Centre for Aerospace & Defence Laws (CADL)

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NALSAR University of Law, Hyderabad

<u>Course Material</u>

M.A (MARITIME LAWS)

1.1.2. INTERNATIONAL MARITIME LAWS

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MODULE-I

INTRODUCTION TO INTERNATIONAL LAW

DEFINITION, NATURE, SCOPE AND DEVELOPMENT OF INTERNATIONAL LAW

Why Module on International Law? In this modern age the world has greatly shrunk as a result of scientific and technological developments drastically. As a consequence events in one part of the world have an immediate impact on the rest of the world. Similarly there are other issues such as maintenance of peace, security and sovereignty of states, Environment degradation, Terrorism, Piracy, Air and Space law, Law of seas, Airplane Hijacking, International trade and commerce and disputes related thereto, Economic-Social and Cultural developments of states, promotion, protection of Human Rights and International trade and business etc. These issues are global in nature and cannot be confined to and solved within territorial or political boundaries. Therefore, States maintain regular relations with other states because a modern State cannot lead an isolated life in the present context of world affairs. The more a State is civilized and perfect in its organization, the greater and more familiar shall be its intercourse with other States. This leads to that a Government of a State must not only conduct its internal affairs but also regulate its conduct towards the Governments and citizens of other States.

Just as men could not live together in a society without laws and customs to regulate their actions, so States could not have mutual intercourse without usages and conventions to regulate their conduct. International Law impinges on state sovereignty by creating new structures for regulating relations across international boundaries. International Law and International Norms limits the state sovereignty in another way. They create principles for governing international relations that compete with the core realist principles of sovereignty and anarchy. International Law derives not from actions of any legislative branch or other central authority, but from traditions and agreements signed by states. It also differs in the difficulty of enforcement, which depends not on the power and authority of central government but on reciprocity, collective action and international norms. Without International laws and customs, it is impossible for states to maintain relations on the basis of peace, harmony and mutual co-operation. Rather, then the rule 'might is right' will prevail that would be destructive for the global peace and humanity.

International law has emerged & grown to fulfill the essential needs of men organized in separate communities & national entities bound together by common bonds of geography & civilization. The political order of the world is divided into three kinds of nations/ states according to their political, social, economic & cultural backgrounds as to: The western or the capitalist countries are known as First World Countries; The Communist or Socialist countries of East Europe, Latin America & China are known as Second World Countries; The developing or under-developed countries of Asia & Africa are coined as Third World countries. International Law is to be found in the history of ancient & medieval as well as modern times of each kind of political communities.

International law governs relations between states. It provides the basis for peace and stability and aims to protect and ensure the well-being of humankind. Globalisation has not only increased the importance of international law but also the complexity of international legal issues. Transportation is one of the important fields of international law. International treaties are essential for ensuring the safety of international air and rail travel. International Air Law being a part of Contemporary International Law has many branches including the relevant principles and rules of international law, the International Human Rights Law, International Humanitarian and Refugee Law, International Trade Law, International Intellectual Property Law, International Environmental Law, International Space Law, etc. that affect the use of air space and aeronautics.

What is International Law (IL)?

International Law also called other names likes Law of Nations, Public International Law Inter-State Law and Trans-national Law, etc. It is generally viewed that International Law regulates the relations between or among states or International Law is Body of legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognized as international actors. International also called Law of nations because it regulates the behavior of nation-states. The expression 'International Law' and 'Law of Nations' is synonymous and is equivalent terms. Jermy Bentham introduced the former in 1789. Prior to that International Law was known by the name 'Law of Nations'. International law also called Public International Law because there is a private international law or Conflict of Laws. Public International law is commonly divided into the law of war and the law of peace. Hugo Grotius, "considered to be father of international law" called his great work as *De Jure Bella ac pacid* or the Law of War and Peace. Oppenheim divides his treatise into one volume on peace and the other on war.

The conventional view is that public international law is made up of two separate and distinct branches, with the law of war being necessary to regulate the rights and obligations of belligerents and neutrals when the law of peace is no longer applicable. Private International law or Conflict of laws is different which regulate the behaviors of two or more individuals of different countries. International law also called as Inter-state law, which provides a system of rules governing the conduct of inter-state relations. Judge Philip Jessup called international law as Trans-national law because it regulates the actions or events that transcend national frontiers. International law also equated other terminology like Common Law of Mankind, World Order and World Law.

DEFINITIONS

Traditional Definitions of International Law

Oppenheim: International Law is "the name for the body of customary and treaty rules which are considered legally binding by civilized states in their inter course with each other." There are three main elements present in this definition: Body of rules governing the relation between the states, States regard them binding in their relation with each other and Rules are derived from customs and Treaties. *J.L.Brierly:* International Law may be defined as "the body of rules and the principles of actions, which are binding upon civilized states in their relation with the one another. Hackworth: "International Law consists body of rules governing the relation between states." According to Bentham, international law is a collection of rules governing relations between states. *Queen Vs. Keyn: Lord Coleridge C.J.* defined "the law of Nations is that collection of usages which civilized states have agreed to observe in their dealings with one another"

Modern definitions of International Law

Charles G. Fenwick: International Law may be defined as "the body of general principles and scientific rules which are binding upon members of the International Community in their mutual relations." Whiteman: International law is "the standard of conduct at as given time for states and other entities subject there to." *J.G.Starke:* International Law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other, and which includes also: The rules of law relating to the functioning of international institutions or organizations, their relations with each other, and their relations with states and individuals; and Certain rules of relating to individuals and non-states entities so far as the rights or duties of such individuals and non-state entities are the concern of the international community. *Schwarzenberger* "International Law as the body of legal rules which apply between sovereign states and such other entities as have been granted international personality." Whiteman defined International Law as**--** The standard of conduct at a given time, for states and other entities subject thereto.

On the basis of above definition we may conclude that international law is a body of rules and principles which regulate the conduct and relations of the members of international community. The contention that states alone are the subject matter of international law is not only inconsistent with the changing nature of international law but has become completely obsolete and inadequate. Individualistic character of international law is being replaced by the law of social inter-dependence. International law has been remarked as a "living and expanding code". In view of some changing character and expanding scope of international law today, international institutions, some non-state entities and individuals have also become the legitimate subjects of international law. Thus, international law is constantly evolving body of norms that are commonly observed by the members of international community in their relation with one another. These norms confer rights and impose obligations upon state and to a lesser extent, upon international organizations and individuals. Moreover, International law has effects on, and effected by the international relations, political thought and communications, as well as by the awareness of women and men in every state that they are part of those addressed by the United Nations as being " we the people of the United Nations".

NATURE OF INTERNATIONAL LAW

The status of international law is the most controversial and debated topic among the jurist all over the world. The important to be debated is whether international law is really a law or not? Or is it just a code of rules of conduct of moral force only?In order to understand the real nature of international law it is important to take into consideration how the various theorists have defined the tern *"law"*.

International Law is not true Law. The initial reaction of law students and laymen alike, when they are first told about international law, is usually highly skeptical. They believe that states have little respect for international law, and have no incentive to obey it in the absence of a supranational system of sanctions capable of being enforced against the law-breaker. In short, the popular belief is that international law is not really law. In fact, however, states do accept that international law is law and what is more, they usually obey it. It is true that international law is sometimes broken with impunity, but the same could be said of any legal system. The supporter of the positivists school like *Hobbes, Bentham* and *Pufendrof* are of the view that international law is not a true law as it is not binding on the states. Many other prominent jurists took the similar view.

The most prominent amongst them is the British jurist Austin who believed that law is the command of the sovereign attended by sanction in case of violation of the command. In other words law should be limited to the rules of conduct enacted by a determinate legislative authority and enforced by physical sanction. The definition of law as given by Austin basically has two parts: Any rule which is not enacted by sovereign or superior cannot be regarded as law; and Command must be enforced by the sovereign authority. According to him existence of both is necessary for any law to be called as "Proper Law" and other senses of law are "improper law". International law is law improperly so called because it has neither sovereign authority to enact laws nor there is adequate sanction behind it. Since the international law governs the relation of the states inter se and there is sovereign political authority of the state inter se, there is no supreme executive government to execute these laws nor there is any judicial organization with compulsory jurisdiction, it cannot be said to be law.

Criticism: *Austin's* view has been vehemently criticized by mane jurist. According to *Sir Henry Maine* and *Savigny* Austin has not taken into consideration certain important facts which are necessary as to: 1) He completely ignores the customary or unwritten laws and only treats laws enacted by the sovereign legislative authority as law. 2) Laws are not only obeyed because of the fear of sanction behind them, they are also observed because of habit of mind and practice of communities. *Oppenheim:* Another famous jurist Oppenheim defines law as a body of rules for human conduct within a community which by a common consent of the community shall be enforced by external power. Thus this definition of Oppenheim has three main parts: There must be a community; there shall be a body of rules to govern the community; and there shall be a common consent of the community that the rules be enforced by external power.

Comparison with the contemporary international law: When we look at the definition of Law as given Oppenheim and compare it with the present concept of international law, the international law satisfies all the requirement of law. There is an international community present at the international level which is the community of nation. Customs and the treaties have in them set rules which govern the conduct of the members of the international community. The international communities do accept that these set rules are binding on them and are governed by them. There have been many treaties concluded between and among the states and though there are few breaches too but it cannot refute the existence of the international law.

International law as weak law: International law is a law in the true sense of the term which is in turn affirmed by the state practice as well as the practices of the international judicial institutions. International law is observed by all the state and the international level because it is crucial for the peaceful relations and cooperation. Never the less it has to be conceded as a weak law. There are many reasons behind saying so which can be summarized as: 1) International law is not as efficient and as effective as the state legislative machinery as wide options are given to the state parties through customs and treaties. 2) Courts at the international level act with the consent of the state and don't have jurisdiction to decide the disputes of al the states. 3) Under International law the enforcement measures are not effective as courts do have real power to enforce its decisions. 4) Rules as laid down at the international level are frequently violated by the states.

International law is a weak law on the institutional side as there is no legislature, the court though present is not strong enough and has no real powers to enforce its decisions. There is an urgent need to develop formal institutions which will be responsible for law creation and enforcement. There shall be a strong enforcement mechanism and for which the state cooperation is the need of the hour. According to *Austin*, International Law is not true law but positive International morality only. *Holland* remarked that International Law is the vanishing point of jurisprudence. According to him, rules of International law cannot be kept into the category of law because they lack sanction, which is an essential element of municipal law. He further said there is no judge or arbiter to decide international disputes and that the rules of international law are followed by states by courtesy.

- Austin Definition of Law: Law is the command of sovereign political authority given by political superior to inferiors.
- In International Law, no political superior, no physical force and no enforcing authority. So international law is not a law. Rules of international law.
- The rules of international law are positive morality: Holland Bentham, Brown etc., is denied the legal character of international law.

International law is not law because: No agency for international legislation. International Law is a limitation imposed by sovereign state upon itself. Auto limitation is no limitation; therefore international law is not a law, No organised force, No a determinate impartial arbitrato, Though we have the International Court of Justice, but has no compulsory jurisdiction. Some writers called international law as a quasi-law. Starke: International law is a weak law *In Queen vs. Keyn* case the court said International law is not an exactly law.

International Law is a Law: *Oppenhiem, Brierly, Starke, H.L.A.Hart, Pollock, etc.* States obey International law far more often than most people suppose. Fear of sanctions has very little to do with this obedience. There are other factors inherent in the very nature of international law and of international society which induce states to obey international law. These factors more than compensate for the weakness of sanctions, but few people are aware of them, because they have no counterpart in international system of law.

In international law the absence of a legislature means that states very largely create law for themselves, and it is unlikely that they will create law which is not in their interests or which they will be tempted to break. Interdependence is the order of the day. In today's world states are interdependent in many ways, and international law facilitates international cooperation. For example states have a common interest in preventing pollution of the sea, but prevention of pollution requires detailed rules about such things as the discharge of oil from ships, and a treaty or some other legal instrument is the obvious way of laying down the necessary rules. Similarly, when a particular problem is constantly arising (for example, do aircraft from one state have a right to fly through the air space above another state?), it is everyone's interests to have an agreed rule to deal with all such cases, instead of leaving every individual case to be decided by a trial of strength between the particular states concerned. Even when the relevant rule of international law is imprecise, it still performs a useful function; it may not eliminate the area of disagreement between states, but at least it reduces that area, and thus makes it easier for disputes to be settled without frictions.

Sanctions of observance of International Law: A controversial question is the extent to which sanctions, including sanctions by way of external force, are available under international law, to secure observance of its rules. At one extreme there is the view that international law is a system without sanctions. However, it is not quite true that there are no forcible means of compelling a state to comply with international law. The United Nations Security Council may, pursuant to Chapter VII of the United Nations Charter of 26 June 1945, in the event of a threat to the peace, breach of the peace, or act of aggression, institute enforcement action against a particular state to maintain or restore international peace and security, and to the extent that the state concerned is in breach of international law. For example, economic sanctions proclaimed in 1966 against Rhodesia or military in the Korean War 1950 or both in 1990 against Iraq. Also, under article 94, paragraph 2 of the Charter, if any state, party to a case before the International Court of Justice, fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the Security Council may upon application by the other state, party to the same case, make recommendations or decide upon measures to be taken to give effect to the judgment.

Public opinion can also be an effective sanction. The role of reciprocity in international law observance should not be minimized. The international legal system is intrinsically different from municipal law. The principal participants of the international legal system states are all treated as equally sovereign. The international community is composed not of a homogeneous grouping of states, but rather a heterogeneous group of some nearly 200 states, which differ politically, economically, culturally and ideologically. States need to co-exist. International law was conceived and born out of such a need, and thus is designed to promote international peace and harmonization. The international legal system is a young, immature system, which is constantly evolving and developing. It is not simply lawyer's law. Politics play an influential role. (See Rebecca, p.4) International law is primarily formulated by international agreements, which create rules binding upon the signatories, and customary rules ,which are basically state practices recognized by the community at large as laying down patterns of conduct that have to be complied with.

Contrary to popular belief states do observe international law, and violations are comparatively rare. However, such violations are well publicized and strike at the hear of the system, the creation and preservation of international peace and justice. But just as incidents of murder robbery and rape do occur within national legal orders without bringing down the whole edifice or stimulating citizens to deny that law exists, so analogously assaults upon international legal rules point up the weaknesses of the system without denigrating their validity or their necessity. In support of the above argument *Professor Louis Henkin*, observed, "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"

SCOPE OF INTERNATIONAL LAW

The scope of international law has expanded due to the inclusion of new subjects; establishment of International Organizations; the emergence of new states; and the emergence of new problems like nuclear weapons, expansion of international trade and trade related problems, development of transport and communications, etc.,

International law has expanded both in terms of its subjects and its content. Major problems of international law concern have been tackled collectively by states. This has proved, for example, more resource effective than attempting individual state action. The consequence has been a proliferation in the number of international organizations in the years since 1945. Modern technology has brought states and their populations into close and more frequent contact with each other, and rules have evolved to regulate such contact.

The subject matter of international law has correspondingly expanded. For example boundaries of nations on land or at sea, international servitudes, succession of states and governments, ports and inland waters, international rivers and lakes, territorial waters, contiguous zones, continental shelf, exclusive economic zones, international canals and straits, rights and duties of states on the high seas, fisheries, whaling and sealing, air navigation, polar regions, outer space, nationality and statelessness, rights of aliens, asylum, extradition, international communications, protection of minorities, human rights ,governmental and state immunities, status and immunities of international organizations and their personnel, status of armed forces on foreign territory, limits of criminal jurisdiction ,limits of anti-trust jurisdiction, enforcement of foreign judgments and commercial arbitral awards, validity of international treaties and agreements, interpretation and application and termination of treaties and agreements, validity and interpretation of international arbitral awards, pacific blockade, reprisals, indirect aggression and subversion, rights of neutrals, relations between belligerents and neutrals, violations of the laws of war, terrorism and hijacking and overlying all of these , the limits of countermeasures and retaliatory measures designed to protect existing primary rules of international law and so on…

International law is a dynamic law. It has been changing since its inception. However, in the four decades changes have been so radical and tremendous that was not witnessed in the last four centuries. The process of change has resulted in reconstruction and development of international law and at the same time has created many faceted problems because of the demand of further changes. The most significant change that has taken place is the emergence of a number of new states, which hitherto were colonies, into independent states. However, international law still favors their power rather than the number.

International Law has been expanding its frontiers not only in terms of its subject matter but also in terms of its content and orientation. In addition to such new areas as international constitutional law, law of international institutions, international economic law, international communications and air law, law of outer space, human rights law and international humanitarian law, there have also emerged new sources of the law and of the ways by which new laws are made by means of declarations, resolutions and the use of consensus at the UN Security Council and the General Assembly. Either because or in spite of this expansion of its frontiers, traditional notions and attitudes are beginning to show a certain resilience and adaptability: the rigid assertion that only sovereign states are the subjects of international law is giving place to the idea that other entities, notably certain international organizations like the United Nations itself, as well as individuals are now also subjects of international law for most practical purposes.

One such entity has successfully litigated a case before the International Court of Justice in Certain Expenses case (1949) stated that the U.N was a subject of international law and could enforce its rights by bringing international claims. While in the Fasla Case, certain rights of the individual were recognized, albeit by way of appeal from the UN Administrative Tribunal. Indeed, the European Commission and the European Court of Human Rights have both been entertaining cases brought before them by individual citizens of the States of the Council of Europe. There also exists established machinery, although limited, for the implementation of the fundamental rights of the individual through state action. All these are recent developments in contemporary international law, which could not have taken place before 1945. The Euro centric character of international law has been greatly weakened in the last six decades and opinions; hopes and needs of other cultures and civilizations are beginning to play an increasing role in the evolution of world juridical system. Third World's concern for the recognition of sovereignty of states is complemented by their support of the U.N and its charter and supplement of their desire for economic self-determination or Right of permanent sovereignty over natural resources.

This expansion of international law into the field of economics is a major development of the 20th century and is evident by the creation of GATT, UNCATD and establishment of IMF and World Bank. The scope of international law today is immense. From the regulation of space explorations to the question of the division of ocean floor, and from the protection of human rights to the management of the international financial system, its involvement has spread out from the primacy concern with the preservation of peace to embrace all the interests of contemporary international life. The scope of international law today is immense from the regulation of space expeditions to the question of division of the ocean floor, and from the protection of human rights to the management of the international financial system, its involvement has spread out from the primary concern with the preservation of peace to all the interests of contemporary international life. The determining factor of international law lies in its composition consisting of needs and characteristics of the international political system.

International organizations have now been accepted as possessing rights and duties of their own and are distinctive legal personalities. The international court of justice in 1949 delivered an advisory opinion that United Nations was a subject of international law and could enforce its rights by bringing international claims. Such a ruling can be applied to other international institutions like the ILO and the FAO which have a judicial character of their own. They have been joined by other non state entities whose importance is likely to grow in the near future. The growth of regional organizations should also be noted at the same time in this stage. Many of those were created for reasons of military security, for example, NATO and the opposing Warsaw Pact Organizations, others as an expression of regional and cultural identity, such as the OAU and OAS.

DEVELOPMENT OF INTERNATIONAL LAW

There are two views on the development of international law. One view says that International Law is essentially a product of Christian civilization – middle Ages – Oppenheim. Another view opinioned that International Law is a product of ancient times: Ramayana & Mahabharata – S.S.Dhawan Development of International Law in ancient period (from ancient times to 10^{th} century) Jews practiced international law in their relations with other nations. Inviolability of diplomatic agents was recognized and maintained. They recognised humanitarian rules of warfare. They entered treaties with other countries and sanctity was attached to treaties. Hindus: In ancient India international law was practiced. It operated in the Vedic age from 4000 B.C. to 100 B.C. between tribal heads known as Rajahs. The basis of international law in ancient India was religious teachings like Manu's Dharam Shatras and Kautiliys's Arthsgastra. International law then had more sanctity because it was based on the concept of Dharma, which was sacrosanct for all Indian states. Then India was divided into many kingdoms having the same religion. They conducted their foreign relations through rajdoots who are known today as ambassadors.

Manusmriti prescribes qualifications of a good envoy and his functions. It also provided that an ambassador must be well versed in all branches of knowledge. He should be of noble lineage, of pure character, efficient and able to read minds through gestures and postures. Kautiliya expected the envoy to be endowed with power of persuasion, well trained in arts and with foresight, memory and enthusiasm and industry in addition to being in the enjoyment of good physique. According to Manu, inheritance, recovery form usurper and conquest as a result of enforcing of some right or settlement of dispute or could acquire territory by occupation of territory which was unoccupied. Cession of territory by dana (gift) to avoid war or as a token of matrimonial settlement was also prevalent. Foreigners were allowed entry by royal warrant—which we term as visa today—and they had to report at points of entry. There was practice of grant of asylum to political refugees who sought protection. The practice of *Pacta Sunt Servanda* was not to Hindu international law. Kautiliya required faith and honesty in carrying out international obligations. War was resorted to as the last step when everything else failed. Wars were divided into two categories: just war which was termed as *Dharma Yudha*, and unjust war – *Adharna Yudha*. Ancient Greeks also practiced international law. It was during Greek period that the rule of international law requiring prior declaration of war was developed. The dead were given a decent burial even during the fury of war and prisoners of war could be exchanged. International law was followed on the basis of religion. City state relations were common at that time. Greeks were considered as superior race and non-Greeks were treated as barbarians. It is said that Aristotle studied 158 city state constitutions at that time. Romans have contributed a fair amount to the rules of the international law as they exist today. *Jus Gentium*—International law—was the Roman device to deal with foreigners. This law consisted of commonly accepted rules among states based on law of nature. The rule of acquiring territory through means of occupation has been borrowed form Roman law. Romans has drafted elaborate rules of warfare and the doctrine of postilminium as we know toddy is based on *Jus Postliminii.*

Development of I.L in middle Ages (from 11th century to 16th century) The supremacy of church and the universality of its laws; Feudalism; Sea Trade and the growth of Maritime Law; Renaissance and Reformation etc. have helped the growth of international law at that time.

Development of Modern I.L (from 17th century to 20th centuries) the age Discovery in the sixteenth and seventeenth centuries necessitated the evolution of rules governing the acquisition of territory. At the same time, the principle of freedom of the seas was articulated. International law grew out of necessity in response to the need of states to co-exist. During this period international law was developed by various jurists, international treaties and conferences and judicial and arbitral tribunals also helped.

1648 Westphalia peace treaty; Members of Holy Roman Empire attained sovereignty; International peace treaties started; French was common language; Alabama claims Award 1872; Maritime law convention of 1856 – Sea welfare rules were framed; the Hague conference of 1899 and 1907 – established the permanent court of arbitration; Development of International Law in 20th century was Before the World War I; Between World War I & II; After World War II and the establishment of the United Nations. Otherwise development of International law before the league of Nation, under the league of nation and under the United Nations and its specialized agencies.

Basis of International Law or Theories of International Law

Natural Law Theory: According to this school, the Law of Nations is only part of the law of Nature. Previously, it is related to religion, Divine Law. From Greeks, Romans to 18th century this school dominated. States relations are regulated by higher law "the law of Nature". Pufendrof and Vattel are the chief exponents of this school. Traces of the natural law theories survive today, albeit in a much less dogmatic form. Kelsen has said: The theory of natural law, which was dominant throughout the 17th and 18th centuries, after relapsing during the 19th has again in the 20th re-entered the foreground of social and legal philosophy, in company with religious and metaphysical speculation.

Positivist theory: Positivism begins from certain premises, that the state is a metaphysical reality with a value and significance of its own, and that endowed with such reality the state may also be regarded as having a will. This psychological notion of a state-will is derived from the great German philosopher, Hegel. To the state-will, the positivists attribute complete sovereignty and authority. The positivists base their views on the actual practices of states. Growth of International law to treaties and customs rather than human nature: Law is will of states. Chief Exponents of this school are Bynkershoek and Anzilotti.

Grotiu's Theory: This theory propounded by Grotius – He is the father of International law. His principal work, *De Jure Belli ac Pacis*, was continually relied upon as a work of reference and authority in the decisions of courts, and in the textbooks of later writers of standing. His contribution to development of International law.

a. According to Wheaton that "Grotius seems to have been the first to lay down rules of Justice would be binding on men living in a social state.
b. Grotius tried to establish that law governed the totality of relations between states.
c. He secularized the concept of law of Nature
d. Grotius further recognized that the individuals and the state composed of the individual were essential identical.

e. Grotius maintained a fine distinction between Just and Unjust Wars.
f. Grotius developed the qualified Neutrality.
g. Grotius emphasized the binding force of promises and agreements in international sphere.
h. He supported peaceful settlements between states.
i. Grotius recognized Fundamental Rights Freedom of the individuals.
j. Grotius rejection of the reason of state.

Theory of consent: Supporters of this theory says consents of states in the basis for International Law. States observe International Law because they have given their consent for it. Chief exponent of this school – Anzilotti, Tripele, Oppenheim. This theory supported to the positivism. *Auto Limitation Theory:* According to this theory, international law is binding upon states because they have restricted their power through the process of auto – limitations. Each state has a will, which is completely independent and free from external influence. But process of limitation they can restrict their powers and follow the international law. Jellinck is the chief exponent of this theory. *Pacta Sunt Servanda:* According to Anzilotti the binding force of international law is based on the supreme fundamental norm or principle. Is known as Pacta Sunt Servanda. This means that the agreements entered into by states will be respect and followed by them in good faith. *Theory of fundamental rights*: this theory is based on Naturalist. According to this, prior to the existence of state, man lived in natural state; in that state he possessed some fundamental rights such as independence, equality, right of self-preservation. Like man state has possessed their rights because there was no world institution above the state.

Perspectives on International Law or Contribution of First, Second and Third World Countries to IL

Contribution of the first world countries: The foundation of International Law as it is understood today lie firmly in the development of western countries & political organizations. Ancient Greece & Rome were divided into small city-states & the mutual relation or these states are governed by some definite rules & principles. They deserved the credit of developing the laws of- War & peace; Resolving the dispute through Arbitration; Prior declaration before the commencement of the war. The modern International Law is ordinarily regarded as dating from sixteenth & seventeenth centuries, the medieval period, for its special character has been determined by that of the modern European National States system. Meanwhile, there were certain counter-factors leading to inmate & constant relations of the states with another as states could never be accepted as the final & perfect form or human association, so it would be necessary to recognize the existence of a wider unity - the rise of International Law was the recognition of this truth. The seventeenth & eighteenth (modern period) centuries are given birth to three different schools if International Law, namely –

The naturalists; The Positivists; & the Grotians: There were factors led to the development of International Law in the nineteenth & twentieth centuries. The twentieth century witnessed two World Wars & the aftermath was the transformation of European International Law into Law of Nations or Universal International Law. As a result of this, the states & their mutual contracts had greatly increased during this periods, for e.g.-

a) Hague Conferences of 1899 & 1907: It was the establishment of Permanent Court of Arbitration. It also emphasized the settlement of International disputes through peaceful means, formation of many rules of International Law relating to land & naval welfare.
b) Treaty of Versailles 1919: The League of Nations was established under this.
c) Geneva Convention 1929: It laid down rules relating reprisal of prisoners of wars.
d) United Nations: The U.Ns was established in 1945 to ensure the maintenance of international peace & security.

Contribution of the second world countries: Classical Marxist theory described Law & politics as the means by which the ruling class maintained their domination of society. International Law as a method of exploitation would also be criticized by socialist states. Soviets theorists expressed the view that International Law was an inter-class law within two antagonistic class systems (Capitalism & Socialism) would also seek accommodation until the victory of socialist system. International Law was not a form of temporary compromise between capitalist states & U.S.S.R but rather a means of conducting the class war. The new approach in late 1930s was reflected in Russia's successful attempt to join League of Nations. But U.S.S.R was bound only by those rules of which accorded with its purposes. The years that followed the Second World War saw a tightening up the Soviet doctrine as the Cold War gathered pace and the law of transition and state was replaced by International Law of peaceful co-existence. Peaceful co-existence itself rested upon the certain basic concepts, e.g.- Non-intervention in the internal affairs of the others states; The sovereignty of states; Good neighborhood; International co-operation; The observance in good faith of international obligation. The concept was an attempt to reiterate the basic concepts of International Law in a way that was taken to reflect an ideological trend. But it must be emphasized that the principles themselves have long accepted by the international community.

With the decline of the Cold War & the dissolution of the Soviet Union a process of re-evolution in the field of international legal theory took place. Global inter-dependence & the necessity for international co-operation were emphasized. The essence of new Soviet thinking was started to lie in the priority of universal human values & the solution of global problems, which is directly linked to the growing importance of International Law in the world community.

Contribution of the third world countries: The old civilization like in Egypt & India had significant contribution in the history of International Law. The duties of the states in administrative & external matters; The privileges & immunities enjoyed by the diplomatic agents during war – are their contribution in the field of International Law. In the evolution of international affairs since Second World War one of the most decisive had been the disintegration of colonial empires & the birth of new states, in the so-called Third World. The new nations have eagerly embraced the ideas of sovereignty & equality of the states & the principles of non-aggression & non-intervention.

The Soviet emphasized on the territorial integrity & sovereignty proved a great attraction to the developing nations of the Third World anxious to established their own national identities & counteract western financial & cultural influences. The new internationalization of International Law that has destroyed the European based homogeneity & emphasized in universalistic scope, e.g., the Declaration on the Granting of Inter-dependence to colonial countries & Peoples of 1960 enshrined the rights of colonies to obtain their sovereignty with least possible delay for recognition of the principles of self-determination. Their concern for the recognition of the sovereignty of the states complemented by the support of the U.N & its character & supplemented by their desire for economic self-determination. The interests the new states of Third World are often in conflict with these of industrialized nations, but contrary to many fears expressed in the early years of Decolonization saga, International Law has not been discarded & altered beyond recognition. The end of Cold War & rapid development of Russian-American co-operation lead to the development of Globalization in the sense of inter-dependence of High order of individuals, groups & corporation. Both public & private, across national boundaries & might be seen the triumph of one special particularism which had sometimes been used as a justification for Human Rights abuses free from international supervision or criticism

Differences between Public & Private International Law: Public International Law deals with states: private International Law deals with individuals. Private International Law is a part of Municipal Law. But Public International Law is not. Public International Law has Uniformity of rules: But private International Law is different. Private International Law determines as to which law will apply in a case having foreign element. No such provision in public International Law. Private International Law also determines the count which will have jurisdiction to decide the issue. It is not in Public International law. Breach of public International Law is possible. But not in Private International Law

Basic Principles of Modern International Law: In Municipal Legal systems we have well-established rules, organizations to regulate and control human behaviors, whereas in international law not so well developed rules, institutions to regulate or control the behavior of states. In the absence of the above system the international community had experienced tow world wars and their effects. The United Nations was established in 1945 to prevent third world war and maintain peace and security in the world. In spite of the Charter Principles, international community suffered from two shortcoming, firstly, the principles won't apply states who are outside the UN system and secondly, emergence of new states. So to get reaffirmation from the international community the socialist and developing countries initiated process of revision of the UN Charter—the process was stated in 1950s but it reached its climax in 1962, special committee was set up. Its work lasted several years and in 1970 a Declaration on Friendly Relations was adopted unaninasmusly. Sovereign Equality of States; Good faith Principle; Peaceful Settlement of Disputes; Prohibition of force; International Cooperation; Non-intervention; Equal Rights and Self-determination.

New trends regarding basis of obligation in international law: Since the beginning of modern international law, consent has been the basis of obligation under international law. Consent played a predominance role that it was even extended to explain the basis of customary rules of international law. The positivists tried to establish that international customs were based on "tacit-agreements" between states. The unanimity rule was the prevailing rule for every conference and treaty was bound by it. The United Nation charter introduced majority rules in all of its organs and which is having a binding force.(like

General assembly. Security Council etc.). A unique feature of new international law is that it is found not only in law making conferences but also in law creating conferences such as UNCTAZ, GATT, IBRD, IMD, OECD, OPEC etc.
One of the most important change is that has taken place is that many a decisions at international conferences and General assembly of the UN are being adopted by 'consensus'. Though the unanimity rule has not been completely defeated, the basis of obligation in international law is changing from sovereignty oriented consent to community oriented consensus. The international court of justice has also lent its support to the above mentioned change i.e. from sovereignty oriented consent to community oriented consensus. This undoubtedly is a clear triumph of community oriented consensus over sovereignty oriented consent. But the battle has not been finally won and the struggle is likely to a prolonged one. As a matter of fact, consent will continue to be a basis of obligation and there should be no objection to it, but in view of even widening scope of international law it has become necessary to recognize the importance and utility of 'consensus' as a basis of obligation in international law. It is therefore, necessary to enunciate a dynamic and comprehensive theory of basis of obligation so that it may take into account the interest and inspirations of international community as a whole.

SOURCES OF INTERNATIONAL LAW

The words 'Sources of Law' (*i.e.'source de droit'*) has a variety of interpretations. In technological sense, the term 'sources' relates to the law making process. The most important source of International law for centuries was Customary Law, evolving from the practice of states. The recent attempt to codify international law and the conclusion of multinational treaties in many important areas, such as diplomatic and consular relations, the law of war or the law of the sea, have sought to clarify the law and to establish universally accepted norms. It has to be noted that, the changes in international society since 1945 have led to basic disputes on the sources of International law and it must be noted at the outset that they have become an area of considerable theoretical controversy. In particular, the two main traditional elements, customs and treaties, are now often difficult to distinguish clearly.
The question of how these sources are derived brings us to **Article 38 of the Statute of the International Court of Justice**. It provides that:
(1) The Court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
(a) International Conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) International Custom, as evidence of a general practice accepted as law;
(c) The General Principles of Law recognized by Civilized Nations;
(d) Subject to the provisions of Article 59, **judicial decisions** and **the teachings of the most highly qualified publicists** of the various nations, as a subsidiary means for determination of rules of law.
(2) This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree.

Types of Sources: Now we come to the various types of sources. Sources are divided into: **Formal Sources ('law creating')** and **Material Sources ('law identifying')** also known as **Primary Sources** and **Secondary Sources.** A Formal or Primary Source of law, is a process by which a legal rule comes into existence i.e. it is law creating. Hence in International Law, Conventions, Customs and the General Principles of Law are considered formal sources (as they are law creating processes). Material Sources are those sources of law concerned with the substance and content of legal obligations i.e., they are law identifying. In this sense, state practice, judicial decisions, the writings of jurists and now even General Assembly resolutions are all considered as material sources. A few mentioned here, though are not in Article 38 are considered as material or secondary sources.

1. International Conventions (Treaties)[1]: International Conventions or Treaties are considered the most important source of law, primarily because, it reflects the understanding of states, i.e. they are the only way states can consciously create law. Treaties are known by a variety of differing names such as Conventions, International Agreements, Pacts, General Acts, Charters, through to Statutes, Declarations and Covenants. According to Article 2 of Vienna Convention on Law of Treaties, 1969, " A treaty is an agreement whereby two or more states establish or seek to establish relationship between them governed by international law."

Prof. Schwarzenberger defines it as follows: "Treaties are agreements between subjects of international law creating a binding obligation in international law." Prof. Oppenheim states that, "International treaties are agreements of a contractual character entered into between states or organization of states creating legal right and obligation."All the above definitions show how the rights and duties of parties to a treaty are in the first instance, determined by an agreement between them. McNair gives the most appropriate definition[2]. He says, "Treaty means a written agreement by which two or more states or international organizations create or intending to create relationship between them, operating within the sphere of international law."

We can divide International Treaties into 2 types: (A) Law- making Treaties (B) Treaty Contracts.

(A) <u>Law-making Treaties:</u> Law making treaties are those treaties, entered into by a large number of States; they are the multilateral treaties that lay down rules of universal or general application. Hence, the provisions of a 'law-making' treaty are a direct source of international law. Law-making treaties can be divided into two: (a) <u>Treaties enunciating rules of universal international law</u>- The best example for such a treaty is the United Nations Charter, to which 192 States are members. (b) <u>International treaties that lay down general principles</u>- These are multilateral treaties entered into by a large number of countries. E.g.: Vienna Convention on the Law of Treaties, 1969, Vienna Convention on Diplomatic Relations, 1961. In order to understand treaty as a source of law, we need to look into the Principles Governing a Treaty: (i) <u>Treaties are voluntary</u> i.e., a treaty can bind no state, without the state having given its consent to be bound by one of the methods recognized as effective in international law for this purpose (i.e. signature, ratification,

[1] Article 38(1) (a)
[2] McNair on Law of Treaties

accession etc.). There is an exception to this general rule, as there are certain treaties, which contain rules available against the whole world known as *erga omnes.* This concept is being dealt with towards the end. (ii) Treaties require consent, once a state has signified its consent to a treaty, and then it is bound by the terms of the treaty. Here, I would like to explain the two types of consent:Express Consent – those states that are parties, are bound by the treaty, as the treaty has been formed as a result of their express agreement,

Tacit Consent – sometimes, if state practice develops along the lines of the treaty code, the result could be that new rules of custom, similar to those found in the treaty, come into being. When such a thing happens, the new customary law will bind non-parties- here the non- parties give their tacit consent to the treaty. E.g. the 1982, United Nations Convention on Law Of the Sea, crystallized the concept of Exclusive Economic Zone (EEZ). According to the ICJ in the *North Sea Continental Shelf Cases*[3], for a treaty provision to give rise to a general customary law principle, it 'should be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law'.

(B) Treaty Contracts: 'these are 'particular' treaties entered into between two or more sovereign states'. They are like contracts in national law, and hence are not directly a 'source' of international law, as they are not binding on states that are not parties to it. But treaty contracts may help in the development of a new customary rule as it indicates state practice. E.g. are Bilateral Treaties between states.

2. International Customs[4]: The essence of custom according to Article 38 is that, it should constitute 'evidence of a general practice accepted as law'. Before looking into what constitutes a custom, we need to have a general understanding of what a custom is. International Custom is the oldest and the original source of international law. Though it is said that, the role of international custom as a source of international law has diminished, it is undeniable that it still has, a significant role to play, as a dynamic source, in the development of new rules of international law.

Now, the terms 'custom' and 'usage' are often used interchangeably; but there is a clear distinction between the two. 'Usage' represents the initial stage of custom. It is an international habit of action that has not yet received, full legal attestation[5]. Hence, when the states in their international relations start behaving in a particular way, in certain circumstances, that behaviour is called usage. When this usage receives the general acceptance or recognition of the states, in their relations, the usage becomes a custom. A Custom is a usage that has obtained the full force of law. When a usage crystallizes (i.e. becomes clear and definite) it becomes a custom. Hence, custom begins where usage becomes general[6]. But an international customary rule emerges only when there is satisfactory evidence that the rule has been accepted generally by states. Hence, it is possible to detect 2 basic elements in the making of a Custom: (A) The Material Fact, i.e. the actual behaviour of States or State Practice and (B) The Psychological or Subjective belief that such behaviour is law, i.e., *opinio juris*. This has been pointed out in *Libya/Malta*

[3] 1969
[4] Article 38(1) (b)
[5] I.A. Shearer, Starke's INTERNATIONAL LAW, 11th ed. (2007), p. 31
[6] *Supra* at n.6

case[7], where it was held that the substance of customary law must be 'looked for primarily in the actual practice and opinio juris of states'.

(1) The Material Fact/ State Practice- Customary rules crystallize from usages or practices of States that evolve usually from three sets of circumstances: a) Diplomatic Relations Between States- Evidence of usages followed by states is found in acts or declarations by representatives of states, opinions of legal advisors to State Governments, bilateral treaties and press releases or official statements by governments. b) Practice Of International Organs- The practice of international organs, by conduct or declarations, may lead to the development of customary rules of international law concerning their status, or their powers and responsibilities. c) State Laws, Decisions Of State Courts, And State's Parliamentary Or Administrative Practices- This can be found by looking into statutes i.e. State's municipal laws, official books and documents or the internal regulations of a state's diplomatic and consular services.

There are certain points that ought to be considered in order to ascertain State Practice: (1) Duration of Practice – In municipal systems, there is a recognized time-scale for acceptance of a practice as customary law. For e.g. in British legal system it is time- immemorial, while in some continental countries it is thirty to forty years. But in international law, there is no such rigid time element. The ICJ also does not give any clear guideline as to what will the time required be for the formation of customary law. This is because it depends from case to case, as to how a custom evolves. In certain cases the progress is slow, but in certain fields, the need for rules to develop quickly becomes necessary. In such cases, 'instant' customary law is possible. This is often known as 'Custom on Demand'. For e.g. the principle of state sovereignty in Air Law and the principle of non-sovereignty in Space Law are examples of Instant Custom. Hence, the duration is not very important in constituting state practice.

(2) Uniformity and Consistency of Practice- This is one of the most important factors in determining State Practice. The basic rule regarding this was laid down in the *Asylum Case* [8] where the Court held that a customary rule must be '*in accordance with a constant and uniform usage practiced by the States in question.*' The facts of the case are as follows:

Haya de la Torre, a Peruvian was sought after by his government after an unsuccessful revolt. He was granted asylum by Columbia's embassy in Lima, but Peru refused to grant safe passage for Haya de la Torre to leave the country. Columbia brought the matter before ICJ and stated that it wanted the right to try Torre in its country. The Columbian government stated that the practice of granting asylum existed in the Latin-American countries and that it was a regional custom. But the ICJ held that, what needs to be proved is an existing 'constant and uniform usage' or practice, by the states in question. Hence, Columbia's plea was rejected due to lack of 'uniformity and consistency'. Thus we can see that ICJ emphasizes on a certain degree of uniformity amongst state practices as essential before a custom could come into existence.[9]

(3) Generality of Practice – Though universality of practice is not required, ICJ requires that the practice should have been generally observed or repeated by numerous states, i.e.

[7] ICJ (1985)

[8] *Columbia* v. *Peru*, (1950) ICJ

[9] *Anglo- Norwegian Fisheries Case* (1951) ICJ

there should be a certain degree of continuity and also the practice must be common to a significant number of states. As an exception to generality of practice is the *Lotus Case*[10] the facts says there was a collision on the high seas between The Lotus, French ship and The Boz – Kourt, Turkish ship. 8 crew- members of the Turkish ship died. Turkey alleged negligence and arrested the captain of the French ship, De Mones, when he arrived on the Turkish territory. The French government challenged the Turkish government stating that the jurisdiction to try the accused lies with the French government and hence, they should not be barred from trying him. The French State argued that there existed a custom of abstaining criminal proceedings by which states in similar situations and hence that practice ought to be given regard. The PCIJ rejected this argument and held that, abstention will form international customary rule 'only if such abstention were based on the states being conscious of a duty to abstain. Hence, this case shows how protests and acquiescence, as such will not form customary law. But, if there is a conscious abstention by states in general, then a particular rule may become customary law.

(B) The Psychological Element/ Opinio Juris- '*opinio juris sive necessitates*' is the factor that differentiates legal custom from mere social usage. It is the belief by a state, which behaved in a certain way that it was under a legal obligation to act that way. *The North Sea Continental Shelf Cases*[11] can explain the concept of opinio juris. The case is concerning the dispute between delimitation of continental shelf between Germany, Denmark and Netherlands. In this case, the ICJ laid down the two conditions for the existence of opinio juris. Not only should: 1) The act amount to a settled practice 2) The act must also be carried out in such a way, as to give evidence of a belief that a practice is obligatory by the existence of a rule of law. Hence, state practice along with opinio juris leads to the emergence of a customary rule of international law.

3. General Principles of Law[12]**:** According to clause 1 (c) of Article 38, the Court recognizes general principles of law, recognized by civilized nations, as a third source of international law. There are many opinions as to what constitutes 'general principles of law'. Generally, when the court finds that a principle has received general recognition, the court may apply it as a principle of international law.
Some jurists believe that Article 38 (1) (c) incorporates natural law doctrines, and that they have a pre-existing legal validity, irrespective of whether they are contained in a treaty or custom. Then there are those principles and rules, common to all municipal legal systems. Given are important case- laws that have recognized the following rules as general principles:

(i) *Chorzow Factory Case*[13] where the PCIJ applied the principle of *res judicata* and also held that one who violates a rule is liable to make reparation. (ii) *Mavrommatis Palestine Concessions Case*[14] in this case the court applied the general principle of Subrogation. (iii) *Case Concerning the Temple of Preach Vihar*[15] ICJ in this case recognized and applied the

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[10] *France* v. *Turkey*, (1927) PCIJ
[11] *Germany* v. *Denmark*, (1969) ICJ
[12] Article 38(1) (c)
[13] (1928) PCIJ
[14] (1925) PCIJ
[15] (1962) ICJ

principle of estoppel. (iv) *Barcelona Traction Case*[16] here also the principle of estoppel was applied by the ICJ

Other than these general principles that have gained their importance through application in the municipal sphere, there are other principles, which have gained international significance also. They are: Principle of *pacta sunt servanda*: The whole idea of binding international agreements rests upon this. This doctrine is also the basis of law of treaties[17]. Also mentioned in Article 2(2) of UN Charter are obligations resulting from international law, including treaties. Principle of Equity: 'Principles of equity have long been considered to constitute a part of international law and as such have often been applied by international tribunals.'[18] Here, what needs to be understood is that usage of equitable principles in deciding cases is different from deciding a case under Article 38(2), i.e. deciding *ex aequo et bono* (according to fairness and good faith). Hence, while applying the Principle of Equity in the *Case of Rann of Kutch Arbitration*[19], the Court emphasized that equity is not an abstract concept, but denotes the application of substantive rules of international law. Hence, it can be said that general principles help in validating certain important rules through them being applied in the process of deciding cases by various international courts and tribunals.

4. Judicial Decisions: Though described as a 'subsidiary' means[20]for the determination of law, judicial decisions can be of immense importance. This is because, in spite of Article 59, which states that ' the decision of the Court has no binding force, except between the parties and in respect of that particular case', the ICJ is more involved with the process of law creation. The best example is the *Anglo- Norwegian Fisheries* case, where the baselines from which to measure territorial waters were laid down. This was later incorporated in the Geneva Convention on Territorial Sea and Continguous Zone, 1958. Hence, what is to be noted is that, while deciding cases these international courts may actually form a new treaty rule or provide evidence for the existence of a customary rule. In addition to the decisions and opinions given by the Permanent Court of International Justice and the International Court of Justice, 'judicial decisions' include International Arbitral awards and the rulings of national courts also. International Arbitral Tribunals, like the Permanent Court of Arbitration and Claims Tribunals like The Iran-US Claims Tribunal, are all significant in the development of international law.

5. Writers: Article 38 includes as a subsidiary means for the determination of rules of law, 'the teachings of the most highly qualified publicists of the various nations'.[21] Historically, the influence of academic writers on the development of international law was immense. Classic writers like Hugo Grotius and Gentili have contributed to help in determining the scope, form and content of international law. Similarly, writers like McNair on Law of Treaties and Jenks on Space Law, have all helped in the process of evolution of rules of law. But it is to be noted that 'juristic works cannot be treated as an independent source of

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[16] *Belgium* v. *Spain*, (1970) ICJ
[17] Vienna Convention on Law of Treaties, 1969.
[18] *The River Meuse Case*, *Netherlands* v. *Belgium*, (1937) PCIJ
[19] *India* v. *Pakistan*, (1968) ICJ
[20] Article 38(1) (d)
[21] *Ibid.*

law'. They can only assist in the development of law in emerging areas. For example, jurists played a very significant role in the development of Air Law and also Law relating to Outer Space since its evolution. Other than the sources explicitly mentioned in Article 38 of the Statute of ICJ, there are a few other sources the existence and importance of which cannot be denied in the development of international law.

Decisions or Determinations of the Organs of International Institutions: In this come the resolutions and declarations of the General Assembly of the United Nations. The General Assembly has produced a large number of highly important resolutions and declarations, and hence, it is inevitable that they should have some impact on the development of modern international law. The biggest drawback is that General Assembly Resolutions are not binding, even if they are adopted unanimously, by voting of all states. But the importance of General Assembly Resolutions lies in the fact that, these resolutions may give evidence of state practice, which in turn may lead to the creation of a new customary rule in international law. An example for such a declaration is the Declaration on the Legal Principles Governing Activities of States in the Exploration and Use of Outer space (1963), where unanimous votes led to evidence of state practice and that in turn led to the formation a binding rule of customary law[22]. Similarly, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States also led to emergence of requisite opinio juris. Hence, General Assembly Resolutions, though not binding, may have normative value, and provide evidence important for establishing opinio juris. It is because of its non- binding nature that they are termed as 'Soft Law'.

Soft Law is per se, not law. But it has a great influence in the development of treaties or laws in certain areas. The Helsinki Final Act, 1975 is an example of this. Though it is not a binding agreement, it is from this that the concept of International Human Rights Law has evolved. Similarly, in the area of International Economic Law and International Environmental Law, there are many such guidelines and recommendations which are though non-binding instruments play an important role in the development of legally binding rules. Also bodies like the International Law Commission (ILC), The United Nations Commission on International Trade Law (UNCITRAL), The United Nations Conference on Trade and Development (UNCTAD), The International Labour Organisation (ILO), United Nations Educational, Scientific and Cultural Organisation (UNESCO) etc. are all specialized bodies playing a significant role in the development of international law by working from within their respective spheres.

Hence, though the rules made by these bodies are termed 'Soft Law', it is undeniable that there these organizations are instrumental and influential in creating legal norms.

Newly Emerging Concepts: Lastly, there are two more emerging concepts that give way to creating sources, which are slowly gaining significance. They are:

Jus Cogens and *Erga Omnes* Obligations: The concepts of *jus cogens* and *erga omnes* obligations, which are now at the heart of the concern for "serious beaches of obligations arising from a peremptory norm under general international law", are important new elements in the structure of international law. They are an attempt to signify that international law is, going beyond the bilateral and State centric interaction, becoming more

[22] This later crystallized into The Outer Space Treaty, 1967

and more responsive to the needs of more globalize international relations and the demands of increasingly integrated international community interests.[23]

The concept of *Jus Cogens* was introduced in Article 53 of the Vienna Convention of Law of Treaties, 1969 which states that *jus cogens* is a peremptory norm of general international law, i.e. it is a norm accepted and recognized by the international community of States as a whole[24]. Hence, a treaty is void, if at the time of its conclusion, it conflicts with a norm of such a nature. *Jus Cogens* is a norm from which no derogation is possible. Also, it can be modified only by a subsequent norm of general international law having the same nature. Examples of *jus cogens* norms are fundamental rules of humanitarian nature (like prohibition of genocide, slavery and racial discrimination), rules of sovereignty of States, the concept of Common Heritage of Mankind (in High Seas, Outer Space).

Next, is the concept of *Erga Omnes*. The ICJ laid down the concept of *erga omnes* obligation, in the *Barcelona Traction* case[25]. It explained that, *erga omnes* is an obligation a State owes to the international community as a whole. This obligation, gives locus standi for any State to invoke the responsibility of a State, even if it is not directly injured by the wrongful conduct. Examples are obligations to outlaw genocide, protection from slavery etc. are issues that can be raised by any State, on behalf of the international community. Violation of these obligations is considered as a 'serious breach' of peremptory norms in international law[26].

SUBJECTS OF INTERNATIONAL LAW

Theories relating to subjects of International Law: "A subject of rules is a being upon which the rules confer rights and capacity and imposes duties and responsibility; whereas an object enjoys and is burdened by no such competence. The law commands its subjects but it merely regulates the use and disposition of the objects." Subjects of law are those upon whom law bestows a capacity to act. Capacity implies personality. Legal personality indicates that the entity may be capable of possessing international rights and duties. During the classical era of international law, the positivists were of the view that the only legitimate legal person on the international plane is the "state". While states remained the most important subject of international law, one feature of development since 1945 has been recognition of other legal persons. In principle it is for international law to determine firstly whether an entity has legal personality and secondly the scope of that personality. The other subjects of international law are International Organizations and certain non-state entities like NGOs, MNCs etc. and now even the individuals are also included in the realm of international law.

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[23] Pemmarajulu Sreenivasa Rao, "The Indian Position on Some General Principles of International Law", Bimal N. Patel (ed.), INDIA AND INTERNATIONAL LAW, 2n ed. 2001, p. 33

[24] Article 53 of Vienna Convention on Law of Treaties, 1969: " A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only a subsequent norm of general international law having the same character."

[25] *Belgium* v. *Spain* (1970) ICJ

[26] ILC Draft Articles on State Responsibility, 2001

Following are the three main theories prevalent in regard to the subjects of international law:

- States alone are the subject of international law.
- Individuals alone are the subject of international law.
- States are the main subject of international law, but to a lesser extent individuals and certain non-state entities have certain rights and duties under international law.

State as a Subject of International Law

As we all know International Law is also called as ‘Law of the Nations’. The term itself suggests that it is the law which operates amongst various states. States are traditional subject of international community; in the sense that they have been ‘dramatis personae’ (character of the play) on the international scene since its inception. The position could not have been expressed more clearly than by Oppenheim who observed in 1912: ‘since the law of the nations is based on the common consent of the individual human beings, states solely and exclusively are the subjects of the international law’. Therefore with this background the paper will cover following points which are provided in the form of questions: What kind of states are the subjects of international law? Definition of state, traditional and modern concept of international law. Why are the states important in the international law? Role played by the states in the scenario of international law. How is the international law operating between states? Fundamental rights and duties of the states as a subject of international law. Admission case.

Definition of State: Many jurists have attempted the definition of STATE but no definition can be called as a complete one. Still some of them are optimized to cover characteristics of ‘state’. According to Salmond ‘State is a society of men established for the maintenance of order and justice within a given territory by way of force’. According to Oppenheim: ‘the existence of state is possible only when people of the state have settled under highest government authority and habitually follow its order’. According to Kantarowicz ‘a state as a jurist person endowed with the right to impose its will on the inhabitant of a given territory, of which right it cannot by law be deprived without its own consent ’.

From above definitions we can define state – A group of society within defined geographical area united to ensure their mutual welfare and security. Today it is generally accepted that the legal criteria for statehood are those set in Art.1 of the Montevideo Convention on the Rights and Duties of the States (1933) which reads: The state as a person of the international law should possess the following qualifications –(a) a permanent population (b) defined territory (c) a government and (d) Capacity to enter into relations with other states. All the above criteria set out are flexible. Statehood is recognized in the international law though they do not fulfill some of the criteria. These states may be condominium, federal states, protected states etc. From the outset the states has been at the centre of the international society. States are so important because State can only seek membership of the United Nations; State can only participate in litigation before the International Court; Only state commands the permanently organized armed forces; It is normally only state that can mobilize the large resources needed to relieve suffering and afford humanitarian relief.

As the subject of international law state are imposed with certain rights, duties and powers. In broad terms they may be expressed as: the doctrine of the equality of states; the principle of non-interference; the principle of independence of state; and The principle of self-preservation or self-defense. To some extent, these principles overlap and are but consequence of each other however in the interests of clarity it is sensible to segregate them.

These may be discussing in brief: The United Nation Charter (1945) Art.2 (1) expressly asserts that: 'The organization is based on the principles of sovereign equality of all its members'. In particular, sovereign equality includes the following elements: States are juridically equal; Each state enjoys the rights inherent in full sovereignty; Each state has duty to respect the personality of the other states; Each state has a right freely to choose and develop its political, social, economic and cultural systems; The territorial integrity and political independence of the other state; Each state has the duty to comply fully and in good faith with its international obligations and to live in peace with other states. It would be seem that the concept of equality indicates that the each state will be answerable in international law for its conduct. Independence is nothing but consequences of sovereignty. To an extent it is clear that sovereignty implies independence and independence implies jurisdiction.

Peaceful Co-Existence: The doctrine has been reworked to meet anxieties of cold war and nuclear age. It obtained legal recognition in Art.13 of the Charter of the Organization of the American States, Charter of the Organization of The African Unity (1963), and Declaration of the Principles of International Law (1970). The preamble in effect states seven principles which may be summarized as: State shall refrain in international relations from the threat or use of force. States shall settle their international disputes by peacefully means. States recognize a duty not to intervene matters within the jurisdiction of another state. State recognizes a duty to cooperate with one another in accordance with the United Nations Charter. States recognize the principle of equal rights and self determination of peoples. States recognize the principle of sovereign equality. States agree to fulfill in good faith the obligations assumed under the charter.

Admission Case [(1948) Icj 61]: In the early years after 1945 cold war rivalry caused the Security Council to be reluctant to admit new States. In consequence, the General Assembly sought an Advisory Opinion from the ICJ on the criteria for admission; and the criteria that a State should have in mind when casting a vote for admission. In the Advisory Opinion on conditions of membership in United Nations the ICJ held by a majority that there were 5 conditions mainly that the applicant had to be A State; Peace loving**;** Accept the obligations of the charter**;** Be able to carry our these obligations; Be willing to do so. Secondly, the Court ruled that when casting a vote for admission a State should have these criteria in mind and no others. Nevertheless, the situation became less tense on admission after December1955, when a 'Package Deal' was negotiated to enable 16 new States to become members.

In the International Law, States remain the principle subject. It is the only permanent entity which is broadly accepted as having legal rights and duties in the International scenario.

International Organisations as Subjects of International Law

One of the most important developments of the 20th century has been the establishment of numerous international Organisations for inter state relations. International organisations are also generally counted among the subjects of International law together with states, individuals, and perhaps, some other entities like International corporations, national corporations, and national liberation movements as well. In accordance with the standard definition of 'subjects', they are deemed capable of independently bearing rights and obligations under International law. The question as to whether International Organisations could be regarded as subjects of International Law reverberated well into the second half of twentieth century. It is pertinent to note that even before the establishment of League of Nations, the problem of assuming international legal personality was in vogue. There is a long history of non- sovereign organisations performing acts in international law.

Classifications of International Organisations: The international organisations may be classified on various grounds such as the on the basis of functions they perform, the membership and their scope of jurisdiction. But they are mainly divided into two main categories: *Inter governmental Organisations* and *Non-governmental organisations*. Inter governmental Organisations have national governments as their members. Hundreds of IGO's operate in all parts of the world. The United Nations and its agencies are IGO's. They are again classified on the basis of the area of their operation. They are divided into **international** and **regional**. SAARC, OPEC, G8, Arab League and the African Union are the best examples of IGOs operating at regional level.

Importance of International Organisations: The main objective of all the international organizations has been welfare improvement of member countries. International organizations, such as International Trade Centre and World Trade Organization, assist member countries in promoting fair trade with each other. The World Bank and Institute of International Finance are international organizations that provide monetary help to member countries and to enhance sustainable economic development in the world. And they are facing the challenges of enhancement of international reforms and integrating developing countries on various measures.

International organisations play as necessary instruments for organising the growing relation of states ***per se***. They are the institutions which represent that process and play significant roles in the contemporary world. International organisations have become indispensable instruments to deal with international problems confronted by international society.

International Organisations as a Subject: It was in the case of Reparations for injuries suffered in the services of United Nations **(**I.C.J Reports, 1949p.174), the international court of Justice held that the United Nations is a subject of international law and capable of possessing international rights and duties, and it has capacity to maintain its rights by bringing international claims. Hence the subjectivity of international organisations is cleared with the help of three indicators. They are, Whether the organisation possesses the right to enter into international agreements? Whether they have the right to send and receive legations? Whether they can bring and receive international claims? These are not strict requirements as such. At best they can be viewed as indicators; to the extent that proposed subjects of International Law on any of these indicators, they can be deemed to be subjects of international law. And it was also held that the organisation was intended to exercise and enjoy the functions and rights which can only be explained on the basis of the possession a large measure of international personality and the capacity to operate upon the international plane. Therefore, we can say that the idea of considering International organisations as subjects of international law emerged from the decision of the ICJ in this case where it pronounced that UN was not the same as a state, let alone a super state.

Position of International Organisations in Municipal Law: It is usually explicitly provided for in the constituent treaty of the organisation. Article 104 of the United Nations charter provides in this context that 'The organisation shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and fulfilment of its purposes.' And the ICJ has also stated that the organisation should be regarded as possessing the powers which even if they are not expressly stated in the charter are conferred upon the organisation as being essential to the discharge of its functions.

Contribution of United Nations in International Law: The United Nations is an international organization founded in 1945 after the Second World War by 51 countries committed to maintaining international peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights. Due to its unique international character, and the powers vested in its founding Charter, the Organization can take action on a wide range of issues, and provide a forum for its 192 Member States to express their views, through the General Assembly, the Security Council, the Economic and Social Council and other bodies and committees. The work of the United Nations reaches every corner of the globe. Although best known for peacekeeping, peace building, conflict prevention and humanitarian assistance, there are many other ways the United Nations and its System (specialized agencies, funds and programmes) affect our lives and make the world a better place. The Organization works on a broad range of fundamental issues, from sustainable development, environment and refugees protection, disaster relief, counter terrorism, disarmament and non-proliferation, to promoting democracy, human rights, governance, economic and social development and international health, clearing landmines, expanding food production, and more, in order to achieve its goals and coordinate efforts for a safer world for this and future generations.

The Changes Happening in the International Scenario: It may however, be noted that the Brettonwoods conference held in 1944, was the beginning point in the direction of a new International Economic Order. The establishment of WTO has marked the emergence of a new era of economic order of the world. As a result of Uruguay round of GATT negotiations for about 7 years, as many as 125 states including India formed by consensus, the world trade organisation which came into force on January 1, 1995. The WTO is playing an active role in setting up the trade policy agenda, working on consensus and basing itself on the fundamental principles of non- discrimination. WTO has become the world body to oversee a comprehensive set of rules and disciplines covering every aspect of world commerce including trade in services and intellectual property protection. Thus World trade organisation is the main organ for implementation of Multi lateral trade Agreements. It has become the negotiating forum for the member states. It is been regarded as the third economic pillar of world trade and commerce dimensions along with the

International Monetary Fund and the International Bank for reconstruction and Development or World bank.

The paradigm of subjectivity of International law differs from subject to subject and even between various subjects of same category. It is because the scope of International law keeps on widening, thus making the corporations, individuals, and movements come into the ambit of subject of international law. There is a radical transformation from UNO to WTO in controlling the international trade and administration of Multi-lateral Trade Agreements and also of the plurilateral Trade agreements.

Individual as Subjects of International Law

Subject of any law means an entity capable of possessing rights and duties. Similarly a subject is said to possess international personality if the entity is capable of possessing international rights and duties .Thus subject of international law owes responsibility to international community and enjoys rights that may be claimed and if denied may be enforced via legal procedure: that means the particular entity will have *procedural capacity*. To be recognized as a subject of international law is not a choice that an individual in his capacity as an individual has an option of subscribing to, unlike in the municipal legal arena where it is forcibly thrust upon an individual that he has to be the subject weather to his liking or not. Thus one may find in this particular field not lot of changes have taken place, at least in the theoretical concepts of traditional international law. The states themselves afford the status of subjects of international law to individuals, as every thing in international law is dependent on consent even if this does not concern the state but only individuals are affected by them. Even today though lot of inroads are made in traditional view point put forward by older jurists there still remains some hope and scope of improvement in different arenas where international law operates.

Scope on International Law and Changing Concepts of Subjects: In order to understand individual as a subject of international law one must understand the changing structure of scope of international law. The scope of international law have developed and expanded, so new entities have been admitted as subjects, but *the personality enjoyed by such subjects varies considerably.* In order to understand the evolution of the scope of international law one must look into the definition of international law given by various jurists. There were two schools of thought regarding the scope of international law one was the *traditionalistic* school of thought and the other was the *modernistic* school of thought.

The traditionalistic scholars believed *state as the exclusive subjects of international law*.

Oppenheim was the most prominent exponent and as pointed by him "Since law of nations is based on the common consent of the individual states and not of the individual human being states solely and exclusively are the subjects of international law." *Starke* was the most important exponent of modernistic theory and according to him, "international law may be defined as that body of law which is composed for its greater part of the principles and rules that state feel themselves bound to observe and therefore do commonly observe in their relation with each other and which include also the rules of law relating to the functioning of international institutions, their relations with each other and their relation with state and individual and certain rules relating to individuals and non-state entities are the common concern of international community. Today states are the primary subjects of international but hey are no longer the only subjects, international organizations, non-state entities and individuals are also considered as subjects of international law."The scope of international law has widened as a result of greater international awareness of human rights, proliferation of international organization. "State possess international personality as inherent attribute of their statehood, all others do so only to the extent that their states allow i.e. their personality is derived from states. Thus, *personality of states may be characterized as original and that of the other entities as derivative.*

Individual as Subjects: Individual in general have very limited personality but contemporary international law recognizes that individual may possess international rights and duties. *Why is this so?* One of the reasons may be the greater awareness of human rights for individual through both international and regional regulation. As a consequence of this it is being recognized that individuals may be responsible for certain conduct – earlier it was believed that states are exclusively the perpetrators of breach of international law but now this belief if not shattered but definitely dented, some of the examples are piracy-has been recognized under customary international law as international crime. Pirates are considered as hostis humani generis i.e. common enemies of mankind any state that apprehends then can punish them under international law. War crimes and crimes against humanity are recognized as international crimes and individuals may be held liable under the ICC. Nuremburg trail- Judge Jackson made an opening statement "Crimes against international law are committed by men and not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international be established."

Convention on the prevention and punishment of the crime of genocide – article 4 – "*Genocide is punishable as crime irrespective of whether they are committed by A) Constitutionally responsible rulers B) Public officials and C) Private individuals.* As a natural corollary of this individuals are under obligation to refrain from such conduct. Individuals thus have limited right and duties in international scene. There are also other acts that an individual may be personally be held responsible these are hijacking, sabotage, terrorism, drug trafficking and acts upon diplomats.

One point to be noted here is that individual responsibility derives from international law and is independent of law of the state for they may be responsible in municipal law also but the exception is that the responsibility is founded in international law.

Drawback: The most important drawback is that for individual exercising international personality is the lack of procedural capacity which is denied to them because of reluctance of states to grant them such capacity. Some instances though where international law affords procedural capacity are 1) Permanent court in Danzing railway official's case recognized- "*Those exceptional treaties could create rights for individuals and in certain cases these rights could be enforced in municipal courts*.

Vangenden Hoos V. Nederlandse Tarief Commissioner (1963) **-** where article 12 or the European community treaty was interpreted to read- "*The very object of international agreement, according to the intention of the contracting parties may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by international courts"* Central American Court Of Justice – where for the recourse was made available to an individual for violation of international law (human rights)-1908- it was novel in the aspect that court had jurisdiction to deal with dispute between individual and states and individual "court had jurisdiction to hear dispute between private individual of any of the five contracting parties and any of the other contracting parties. Treaty Of Versailles –provided for claims by individuals against government and nationals of defeated state. Tribunal Established under Upper Silesian Convention-it was competent to hear cases brought by nationals of state against their own.

In modern international law individual definitely can be considered as a subject of international law there can be no arguments against this fact simply because it is a fact and not a myth. Any student of international law should know better than argue that individual is not a subject of international law, but to what extent is deficiently a arguable issue not just for students of international law but also for any human being. The status of individual as a subject of international law is pointed towards an upward incline which is a relief for all human beings as evident from the case of Astronauts – they are considered as friends of mankind in general in respect of the. Asylum- every individual has a right to claim asylum in any other country and other states may or may not consider them but if they do there is no practice of questing that particular states decision. Extradition- there is also a duty upon every state subject to the bilateral treaty between them to extradite criminals found in their territory wanted in other states. Slavery And Slave Trade- work they do for the development of humans hence there is a duty upon every state to actually render help and return any astronaut to their respective states upon entry into the earth from any mission. There is also a duty upon every individual and state to desist from slave trade and practicing slavery and every person has a right against slavery. Diplomats –diplomats as individuals have the variety of rights enumerated in Vienna convention on diplomatic agents (1961) and a person may be held liable for the crimes committed against them.

Non-State Entities as Subjects

All the legal persons in the international law apart from State are termed as non-state entities. In the 19th Century States were the only legal persons in International Law. But the position has changed in the last century, and international organisations, individuals and companies also acquired some degree of international legal personality. The problem of including new actors in the international legal system is reflected in very concept of legal personality, the central issue of which has been:- Capacity to bring claims arising from the violation of International law. To conclude valid international agreements. To enjoy privileges and immunities from national jurisdiction.Thus, International Court of Justice has noted that, 'the subject of law in any legal system is not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. The non-state entities can be categorised under following heads namely:- International Organisations, Non-governmental Organisations, Multi-national Organisations, Insurgents and National Liberation Movements, Ethnic minorities, Indigenous people under International Law.

Non-Governmental Organisations: Non-governmental Organisations are those organisations which are not established by a government or by an agreement between states but, its members are private citizens or body corporate. International NGOs have proliferated considerably in past decades and are engaged in a broad variety of different areas, ranging from politics, the legal and judicial field, the social and economic domain, human rights and humanitarian relief, education, women, to the environment and sports. The role of NGOs in International Law is primarily of informal character. They have some effect on International law-making in certain areas by adding additional expertise and making procedures more transparent. They are essentially providers of information, lobbyists or pressure groups, and as such may properly be regarded as so-called non-state actors. From formal point of view, on global level there are no international legal standards governing the establishment and status of NGOs. The relevant law is that of the State where an NGO is based. This may cause problems in the case of international activities because national laws are different. Inter-governmental organisations may agree to grant NGOs a certain consultative or observer status (such as the exceptional case of the observer status granted by the UN General Assembly to the International Committee of Red Cross in1991) and thereby a limited international status, but this does not make them a subject of international law. Since the beginning of this century, efforts have been made by the bodies such as the Institute of International Law (itself being an NGO) to improve the international legal standing of NGOs, but such efforts have remained fruitless in view of the doctrine of sovereignty. On the regional level, however, within the framework of the Council of Europe a common status for NGOs has been recently laid down in the European Convention on the Recognition of Legal Personality of International Governmental Organisations. The State which has ratified it attributes legal personality in any one of the state parties.

The problem as regards NGOs is that they are based in industrial part of the world. Therefore it is concentrated in few home countries like U.K., France, Belgium, Switzerland and U.S. As a resultant, it creates geographical imbalance. Although these countries are democracies, guaranteeing freedom of association, NGOs are sometimes misused by governments in their international dealings. Now the question which raised is- Is it really advisable that these non-territorial entities should seek to obtain a formal international status on the universal level? Owing to its work in the field of human rights, they are now generally acknowledged. But in regard to international law-making in general, it is unlikely that NGOs will be included in formal process in near future. As is said by one recent author, " As NGOs are not democratically authorised to realise common good, they often neglect the common good in pursuance of their specific interests."

Multi-National Corporations: MNCs are those corporations and associations that operate transnationally in the finance, transportation, communication and other areas of economic life. Because they operate across many state boundaries, they serve as a global vehicle to transfer and esseminate capital, skill and technology. They are profit oriented and hence are commonly treated as distinct from NGOs. The larger transnational corporations negotiate directly with nation-state representatives in a new form of democracy. Agreements with these corporate giants may surpass treaties between states in terms of values affected and the prescribing effect engendered. They have contributed greatly to the internationalization of production, finance, and ownership and to the growing integration of national economies into world economy. Though they are labelled multi-national, trans-national, or international, MNCs owe their creation to national laws. Their success in operation however, depends greatly on trans-national recognition of such national laws. MNCs are incorporated under domestic law of State of incorporation. But conflicting national laws are inadequate to deal with manifold problems of MNCs. Profit-oriented by nature, multinational corporations have come to be perceived variously as exploiters of the labour and physical resources of the developing countries, environmental polluters, manipulators of currencies and commodities, tax dodgers, practitioners of corrupt business practices, supporters of reactionary regimes, and instruments of their national governments. They have recently gained particular notoriety due to the exposure of the widespread business practice of bribery- corruption and conspiring with power elites to the detriment of democratic values and the masses of the population. As their operations expand in geographical reach and in magnitude of impact and grow in complexity, it has become increasingly apparent that conflicting national laws are inadequate to deal with manifold problems having to do with multinational corporations. So in 1972 Economic and Social Council called together a group of eminent experts to study the role and impact of MNCs and to recommend measures towards international accountability. In 1974 they established two permanent bodies to deal with problems of MNCs - Inter-governmental Commission on Transnational Corporation, consisting of 48 members. U.N. Centre on Transnational Corporations. The commission made it a top priority to develop code of conduct for activities of transnational corporations. This are because MNCs basically are also seen as a threat to nation-states because they possess more resources than most of these nation states. Hence the nation-states fear that there power would be undermined over their own nationals.

Insurgents and Non-Liberation Movements: Insurgents in civil war have long been recognised in international law as subjects having certain rights and duties because they control some territory and might become the effective new government of the state. This is also reflected in Articles 14 and 15 of the United Nations international Law commissions draft articles on state responsibility, according to which the whole old government is still in power, a wrongful act of an insurrectional movement established in the territory of the state shall not be considered as an act of that state under international law (involving responsibility to other states for it).

New problems emerged in the process of de-colonisation concerning the international legal status of liberation movements of 'peoples under colonial, alien or racist domination' having a representative organisation (such as SWAPO, the ANC or the PLO). With regard to such national liberation movements there have been conflicting positions of states on this issue in the past, which has now lost most of its former relevance.

Ethnic Minorities and Indigenous People: With the rise of ethno-national in many parts of the world, not only in the Balkans and in the former Soviet Union, the status of Ethnic Minorities and other groups in International Law has again become a central issue. This is witnessed in various recent efforts on the global and regional level to improve their legal protection. The question of international legal personality of minorities is more complicated than the issue of international legal personality of individuals or corporations. The problem of minorities has quite different political and legal dimensions. Indigenous people are not subjects of international law in any meaning full sense of the term and have not (yet achieved an international legal status any higher than that of individuals).

RELATION BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

International Law, in the present context, is considered as one of the most significant concepts, which has been gaining momentum at a fast pace in the world community. There has been several occasions, since the evolution of human civilization, where efforts have been put by mankind throughout the world in order to legitimise the concept of International Law in a broader perspective, with the sole objective of maintain universal brotherhood and keeping international war and conflicts at bay. Since the formation of the world community, especially after the Second World War (1939-44), inferences of International Law can be found quite frequently. The presence of International Law has increased by leaps and bounds which is quite evident from the fact that almost all the sovereign nations of the world, irrespective of their political, social, economic, religious or geographical background, have voluntarily accepted the authority of International Law.

With the due passage of time, the role of International Law has also widened accordingly and the concept of International Law is no more restricted only to the maintenance of international tranquility. The ambit of International Law has been growing expansively and hence, it becomes very essential to analyse what could be the possible aspects of international community, where the seeds of International Law can be sown. One can easily chalk out the significance of International Law with the presence of several agencies or sources of International Law, such as, International Organisations, Non-Governmental Organisations (NGOs), International Treaties and Conventions, Multi-National Corporations (MNCs), etc., which have been exhaustively assisting in the growth and development of International Law, with the establishment of the first inter – governmental organization in the year 1864, viz., the "International Telegraphic Union." It is also essential to note that there has been a significant contribution on the part of the internal organs of the sovereign States, such as, the Legislature, the Executive, the Judiciary, etc. who have been making a valiant effort to uphold the principles of International Law in their own territory for achieving the ultimate goal, i.e., 'international peace and security.'

The practice of States regarding the relationship of International Law and Municipal Law is divergent. Application of International Law depends largely upon the Legislature as well as the Judiciary of a State. They are expected to take cognizance and endeavour to honor the international obligations of the State. It has to be realized by them that neither Municipal Law nor International Law is supreme, but they are concordant to each other. They both have been made to solve the problems of human beings in different areas. If they refuse to accept the rules of International Law, relations between the States would obviously become tense and the high ideals of 'maintaining international peace and security' will be at peril.

Theories as to the Relation between International Law and Municipal Law

The proper understanding of the concept of International Law is possible only when its relation with Municipal Law is analysed in a comprehensive manner. Even though International Law regulates the conduct of international subjects, the question arises whether International Law has any impact on domestic legal systems or on subjects within those systems. The framework under which a domestic legal system relates to and applies international law is very important as it is this aspect that gives an effect to the domestic implementation of International Law in the domestic circuit.

There are two major models for this relationship: dualism and monism.[27] In a dualist approach, the domestic and international legal systems are kept separate because they operate in different spheres. Monism, on the other hand, holds that the domestic and international legal systems are simply two connected areas of a single legal dimension. The two principal theories can be elaborately discussed as under:

Monism: Kelsen (1881-1973) is one of the chief protagonists of this theory. Besides Kelsen, the other supporters of monism are Lauterpacht, Fitzmaurice and Starke. According to monism, International Law and State Law are similar aspects of the same system, i.e., law in general. Monism considers that all law as a single unity is composed of binding legal rules, whether those rules are obligatory on States, on individuals or on entities other than States. Monists opine that the science of law is a unified field of knowledge and the decisive question that needs attention is whether or not International Law is true law. Once it is accepted that International Law is a system of rules that are of a true legal nature, it was impossible to deny that the two systems constitute part of that unity corresponding to the unity of legal science. Both Municipal Law and International Law are part of the same universal body of legal rules binding all human beings collectively or individually. It is the individual who lies at the root of the unity of all. Thus, any construction other than monism is bound to amount to a denial of the true legal character of International Law.

Dualism: In the 19th and 20th centuries, there developed a strong view towards the dualist view. The chief exponents of dualism have been the positivist writers Triepel and Anzilotti. For the positivists, with their consensual conception of International Law, it was natural to regard state law as a distinct system. Dualists state that International Law consists of principally of customary and treaty rules whereas, Municipal Law consists of in most part the legislative enactments and judicial legislation. The difference between International Law and Municipal Law is depicted by the dualists as under: Source: Under International Law, customs grown up among States and Law making treaties are the main sources, whereas, under Municipal Law, customs developed within the territory of the State and Statutes enacted by law-giving authority are the main sources. Operation: International Law operates between Relation of States, whereas, Municipal Law operates between the relations of individuals within the sway of the State. Substance: International Law is a weak law as it operates between the States and is not above them, whereas, Municipal Law is the supreme law where the law is the sovereign and operates over individuals. Subjects: States are considered as the subjects of International Law, whereas, Individuals are considered as the subjects of Municipal Law.

The question of primacy, i.e., whether International Law or Municipal Law is superior and in case of a conflict which should be given primacy. On the question of primacy, the monists are divided. Some of them give primacy to International Law. Kelsen has made structural analysis of International Law and Municipal Law. For this, he has applied his 'hierarchical' doctrine or 'grund norm'. On this basis, he asserts that each rule is conditioned by a superior rule for its validity, and thus, in turn, it derives validity from the fundamental rule, i.e., the grund norm. This grund norm is not exclusive in International Law and it may pertain either to International Law or Municipal Law. The primacy of

[27] Supra n. 24.

Municipal Law is perfectly legitimate because the choice between either system could not be decided scientifically. As dualism attaches importance to the sovereignty of 'State Will', they give primacy to Municipal Law over International Law.

Transformation and Specific Adoption Theories: The application of International Law within the municipal sphere would be incomplete without referring to certain theories. On one hand, the positivists have put forward the view that the rules of International Law cannot directly be applied within the municipal sphere by state Courts or otherwise. In order to be so applied, such rules must undergo a process of specific adoption by Municipal Law. As according to positivists, International Law and Municipal Law constitute two distinct and structurally different systems, the former cannot be applied upon state law unless the latter allows its constitutional machinery to be used for that purpose. In the case of treaty rules, it is claimed that there must be a transformation of the treaty into state law, which is not merely a formal but a substantive requirement. The transformation theory is based on an alleged difference between treaties on one hand, and state laws or regulations on the other.

Delegation Theory: According to the exponents of this theory, there is delegated to each state Constitution by constitutional rules of International Law, the right to determine when the provisions of a treaty or convention are to come into force and the manner in which they are to be embodied into state law. The procedure and methods to be adopted for this purpose by the state are a continuation of the process begun with the conclusion of the treaty or convention. There is neither any transformation nor any fresh creation of rules or Municipal Law, but merely a prolongation of a single act of creation. Whatever are the ultimate merits of this theoretical controversy over the alleged necessity for a transformation or specific adoption of International Law by Municipal Law, the actual practice of states concerning the application of International Law within the sphere of Municipal Law must remain of critical importance. It is therefore essential to pass to a consideration of such state practice, and then to derive there from any necessary conclusions with regard to the matter.

Pre Independence Implementation of International Law in British India

Before the adoption of the Constitution, the British 'Doctrine of Incorporation' with certain qualifications as prevailing in Britain was followed in India. It is the part of the public policy that the Courts should in principle give effect to clearly established rules of international law. When a Municipal Court in England has decided as a preliminary issue that a rule of Customary or Treaty law is applicable to a case before it, the rule is applied as though it is a rule of the law of the forum.[28] In the sphere of customary international law, the doctrine of incorporation has become the main British approach.

Conditions for Implementation of Customary International Law in British Practice:[29]

Consistency: Such rules should not be inconsistent with the British statutes, no matter whether the statute is earlier or later in date than the particular customary rule concerned..2

Supremacy of the Court: If the scope of such customary rules has been determined by the

[28] Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 5th ed. 1998, p. 42.

[29] I. A. Shearer, STARKE'S INTERNATIONAL LAW,11th ed. 2007, p.68.

final authority of the British courts, all British courts are thereafter bound by that determination, notwithstanding a divergent customary rule of international law developing later on.

'Doctrine of Incorporation': The British model of interpretation of the 'Doctrine of Incorporation' can be discussed as follows: In **Triquet** v. **Bath**,[30] the 'Doctrine of Incorporation' was quoted as "the Law of Nations, in its full extent was a part of the law of England." This view was in practice for a subsequent period of time. But a departure in this practice of British Courts was noticed in the latter part of the 19th century. The majority of the Court refused to apply the 'Doctrine of Incorporation' and said that English Courts had no jurisdiction over crimes committed by foreigners within the maritime belt extending to three miles from the British coast, although such right existed under customary international law in Franconia case (**R.** v. **Keyn**).[31] The Court held that a rule of customary international law does not apply in England on its own force, but needs preliminary legislation. However, this decision of the Court was reversed by the territorial Waters Jurisdiction Act, 1878 of the British Parliament. In **West Rand Central Gold Mining Co**. v. **R.**,[32] the Court observed that whatever has received the common consent of civilised nations must have received the assent of the country, which may properly be called 'International Law' and as such will be acknowledged and applied by the municipal tribunals of England. This was a partial return to the 'Doctrine of Incorporation'. In **Chung Chi Cheung** v. **R**.,[33] Lord Atkin declared that the Courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by the Statutes or finally declared by their tribunals. It is a recognized prerequisite of the adoption in the Municipal Law of the British, a doctrine of Public International Law that it shall have attained the position of general acceptance by civilized nations as a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decisions. The Privy Council further observed that the Courts acknowledge the existence of that body of rules which are accepted by the nations themselves. Any international rule can be incorporated into the domestic law, so far as it is not inconsistent with rule enacted by Statutes or finally declared by the English tribunals. To conclude, it can be clearly observed that the English Courts did not apply any rule of customary international law if it is in conflict with the existing Parliamentary legislation or any clear judicial precedent. The same practice was also equally exercised in the pre independence implementation of the principles of international law in the Indian context as well.

Post-Independence Implementation of International Law in Independent India

The Constitution of India does not include any clear direction on treaties as found in the United States and French Constitutions. It, however, follows the British approach, namely, that treaties are not the part of internal law unless specifically adopted. But unlike Britain,

[30] (1764) 3 Burr 1478 KB.
[31] (1876) 2 Ex D 63.
[32] (1905) 2 KB 391.
[33] 1939 AC 160.

India has a written Constitution and it contains several provisions which have the bearing on treaty making and treaty implementation in India, but at the same time, there is no provision making treaties as the supreme law of the land. The relevant provisions are Articles 37, 51, 53, 73, 77, 246 read along with Entries 10, 13 and particularly 14 of List I of the Seventh Schedule (The Union List), as well as Article 253, 372(1). In accordance with these provisions, the Union Parliament has the exclusive power to legislate in the realm of treaties, i.e., for the making of treaties and their implementation. But Parliament has not yet legislated; it is instructive, therefore, to refer to the Indian practice, as reflected in the constitutional provisions and the judicial precedents.

Article 37, which provides that the provisions contained in Part IV shall not be enforceable by any Court, also states that the principles laid therein are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Article 51 strengthens the common law principle that International Law is a part of Indian Law which reads as follows: "Promotion of International Peace and Security – The State shall endeavour to – (a) International Peace and Security (b) Maintain just and honourable relations between nations (c) Foster respect for International Law and treaty obligations in the dealings of organised people with one another (d) Encourage settlement of international disputes through arbitration" Article 51 does not give any clear guidance regarding the position of International Law in India as it since it is included in Part IV of the Constitution of India which is unenforceable by the Indian Courts. However, it would be wrong to contend that Article 51 is of no relevance and provides no guidance at all.

Article 73(1) states that "Subject to the provisions of this Constitution, the executive power of the Union shall extend: (a) To the matters with respect to which Parliament has power to make laws and (b) To the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any agreement or treaty".

Article 246 empowers the Parliament to legislate on Entry 14 (of the Union List), which it has not done yet, and until it does so, the President's treaty making power remains unfettered by any internal constitutional restrictions. Hence, the Executive will be very much within its power to bind India internationally under a valid treaty, without referring to the Parliament, or require legislation sanctioning money expenditure, or require a change in existing laws for implementation of the treaty obligations of the Union.

Article 253 of the Constitution of India confers exclusive power upon the Parliament to make law for giving effect to any treaty, agreement or convention with any other country or countries or any decision or any decision made at any international conference. Article 253 of the Constitution provides that "Notwithstanding in the foregoing provisions of Chapter XI of Part XI, the Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at an international conference, association or other body."

Article 372(1) provides that "Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, shall continue in force therein before until altered or repealed or amended by a competent Legislature or any competent authority.” This Article contemplates the fact that before the adoption of the Constitution of India, the British practice was prevalent in India which has been continued even after the adoption of the Constitution by virtue of the provisions of Article 372.

Indian Judiciary and International Law

Before independence, the Common Law Principles of the British, which practised customary rules of International Law as part of the land, applied in India as well. Prior to the Constitution of 1950, Indian Courts were following the British practice of enforcing International Law in the domestic circle. The Constitution of India contains a specific provision in Article 51 (which is stated under Part IV of the Constitution of India, i.e., the Directive Principles of State Policy) a direction to the State, which shows that the intention of the founding fathers towards International Law.

The British practice of the ‘Doctrine of Incorporation’ continues still in India by virtue of Article 372(1) of the Constitution as was held in *T.K. Varred v. State of Travancore-Cochin.*[34]

In the case of *A.M.S.S.V.M. & Co. v. The State of Madras*,[35] the question was whether the State was entitled to abolish private right in the exploitation of chank fish in Palk Bay. The Madras High Court, in its judgment relied on principles of English Common Law and corresponding rules of International Law relating to fisheries, maritime belt, harbours and estuaries, particularly the historic title based on prescription. It held that chank fish cannot be treated as fisheries proper, since they do not move away from the seabed. The rulers of the State adjacent to the sea had acquired the right from the time immemorial to exploit chank fish in the bay. The Court held that particular part of the seabed, though outside the three-mile limit, vested in the Crown and thus, the Government had the right to abolish private right to exploitation of the chank fish in the Bay.

In *Birma v. State of Rajasthan*,[36] the Court held that the Courts that are part of International Law do not form part of the law of the land unless expressly made so by the legislative authority. In *Motilal v. U.P. Government*,[37] it was held that any obligations or arising out of international treaties do not have the force in India and they can be enforced in the territory of India only through proper legislations.In *Keshavananda Bharati v. State of Kerala*,[38] it was opined that in view of Article 51 of the Directive Principles, the Court must interpret language of the Constitution, if not intractable, which is after all a Municipal Law, in the light of the United Nations Charter and the solemn declaration subscribed to by India. In *Shri Krishna Sharma v. State of West Bengal*,[39] the Calcutta High Court held that the Indian Courts would apply rules of internal law which includes The Constitution of India, the Statute enacted by the Parliament of India and the Statutes enacted by the State Legislatures. The Court held: “If the Indian Statutes are in conflict with any principle of International Law, the Indian Courts will have to obey the laws enacted by the legislature of

[34] AIR 1956 SC 142.
[35] MLJ (2-1957) 587.
[36] AIR 1951 Raj. 127.
[37] AIR 1951 All. 257.
[38] (1973) 4 SCC 225: AIR 1973 SC 1461.
[39] AIR 1954 Cal 591.

that country to which they owe their allegiance. In interpreting and applying Municipal Law, the Courts will try to adopt such a construction as will not being into conflict with the rights and obligations deductible from the rules of internal law. If such rule or rights and obligations are inconsistent with the positive regulation of Municipal Law, the Courts override the latter. It is futile in such circumstances to seek to reconcile, by strained construction which are really irreconcilable."

In *Maharaja Vikram Kishore of Tripura v. Province of Assam*,[40] the Court held similarly as the above case and stated that it is a well established rule of construction that a statute will not be construed as overriding International Law unless the words of the statute compel the Court to put such a construction upon it. In *A.D.M. Jabalpur v. Shivakant Shukla*,[41] popularly known as the "Habeas Corpus case", one of the questions for consideration of the Supreme Court was whether the Universal Declaration of Human Rights, 1948 and the two International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, 1966 were part of Indian Municipal Law. By majority, the Supreme Court held that they were not part of Indian Municipal Law. In his dissenting opinion, however, H.R. Khanna, J. held that if there was a conflict between the provisions of a International Treaty and the Municipal Law, it is the latter that will prevail. But if two constructions of the Municipal Law is possible, the Court should give that construction as might bring about harmony between Municipal Law and International Law or Treaty. In his view, the constitutional provision should be construed in such a way as to avoid conflict with the Universal Declaration of Human Rights, 1948, which seems to be more rational and better.

In *Gramophone Co. of India v. Birendra Bahadur Pandey*,[42] the Supreme Court accepted the binding force of international Law with certain limitations. The Court's observation in this regard is relevant: "There can be no question that nations must march with the international community and Municipal Law must respect rules of International Law. The Comity of Nations requires that rules of International Law may be sanction with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of International Law are incorporated into national law and considered to be part of national law, unless they are in conflict with an Act of Parliament. Comity of Nation or no, Municipal Law must prevail in case of conflict. National Courts cannot say 'yes' if Parliament has said 'no' to a principle of International Law. National Courts will endorse International Law but not if it conflicts with Municipal Law. National Courts being organs of the State and not organs of International Law must per force apply national law if International Law conflicts with it."

In *People's Union for Civil Liberties (PUCL) v. Union of India*,[43] the Supreme Court of India held that it is almost an accepted proposition of law that the rules of customary International Law which are not contrary to the Municipal Law shall be deemed to be

[40] (1948) 15 ILR 64.
[41] AIR 1976 SC 1207: (1976) 2 SCC 521.
[42] AIR 1984 SC 667: (1984) 2 SCC 534.
[43] (1997) 1 SCC 301.

incorporated in Municipal Law. In *Daya Singh Lahoria v. Union of India*,[44] the Apex Court has observed that there is no rule of International Law which imposes any duty on a state to surrender a fugitive in the absence of an Extradition Treaty. This question is decided by national courts on the basis of international commitments as well as rules of International Law relating to the subject. In *State of Madras v. G.G. Menon*,[45] the question before the Apex Court was whether any legislative enactment which was prevalent in pre Independence period is applicable to the post-independence era by the reason of the provisions of Article 372 of the Constitution of India, without any alteration or repeal or amendment of the pre Independence legislative enactment by a competent Legislature or any other competent authority. In this case, the Supreme Court held that such a legislative enactment cannot be enforced in the Indian territory notwithstanding Article 372. In *Shiv Kumar Sharma and Others v. The Union of India and Others*,[46] the Delhi High Court held that in India, treaties do not have the force of law and consequently obligations arising there from will not be enforceable in Municipal Courts unless backed by legislation. Settlement of dispute as to boundary arises no such obligation requiring implementation in Municipal Courts. Cases may arise where a domestic law is in express terms extended to a named city and that city as a result of treaty settling a dispute like the present, has to be handed over to another country. In that case, legislation may be necessary.

In *Maghanbhai Ishwarbhai Patel and Others v. Union of India*,[47] the Supreme Court opined that international treaties are enforceable in India by the Municipal Courts only when there is a legislation with that regard as treaties do not have the force of law. In *Civil Rights Vigilance Committee, Bangalore v. Union of India,*[48] the Karnataka High Court observed that if the Parliament does not enact any law for implementing the obligations under a treaty entered in to by the Government of India with foreign countries, Courts cannot compel Parliament to make such law. In the absence of such law, Court cannot also enforce obedience of the Government of India to its treaty obligations with foreign countries. In this case, the question was as to whether Geoff Boycott and Geoff Cook, the two cricket players shall be allowed to visit India and to play cricket matches as members of the English cricket team against India in view of their links with South Africa which was practicing the policy of apartheid. Here, the Petitioner contended that the action of the Government of India in permitting these two cricket players to enter into India and to play cricket in India was in breach of its obligations under the Gleneagles Accord and obligations attached to its membership to the United Nations. The Court held that the Government of India's obligations under the Gleneagles Accord and obligations attached to its membership to the United Nations, cannot be enforced, at the instance of citizens of this country, or associations of such citizens, by Courts in India, unless such obligations are made part of the law of this country by means of appropriate legislation.

44 (2001) 4 SCC 516.
45 AIR 1964 SC 517.
46 AIR (1968) Del. 64.
47 AIR 1969 SC 783.
48 AIR (1983) Kar. 85.

In *Vineet Narain v. Union of India*,[49] the Supreme Court held that it is the duty of the Executive to fill the vacuum by executive orders because its field is conterminous with that of the Legislature and where there is inaction even by the Executive, for whatever reason, the Judiciary must step in, in exercise of its constitutional obligations to provide a solution till such time as the Legislature acts to perform its role by enacting proper legislation to cover the field. In *Jolly George Varghese v. Bank of Cochin*,[50] the question was in case of a conflict between a provision of an International Treaty (such as Article 11 of the International Covenant on Civil and Political Rights) to which India is a party and a provision of a State Statute (such as Section 51 of the Code of Civil Procedure), it is the latter which shall prevail if the International Treaty in the question has neither been specifically adopted in the domestic field nor has gone under transformation.

In *Union of India v. Association for Democratic Reforms*,[51] the Supreme Court held that the foundation of a healthy democracy is to have well informed citizen voters. The reason to have right to information with regard to the antecedents of the candidate is that voter can judge & decide in whose favour he should cast his vote, which is considered as an important aspect of International Law which promotes fair and free elections. In *Sunil Batra v. Delhi Administration*,[52] it was observed by the Court that as a police officer is vested with power to restrain a person by handcuffing him, there is simultaneous restraint by the law on the police officer as to the exercise of the power. The handcuffs should not be used in routine manner. The minimum freedom of movement which even an under trial prisoner is entitled to under Article 19 of the Constitution, cannot be cut down cruelly by application of handcuffs or other hoops. This is in accordance with Universal Declaration on Human Rights, 1948.

In *Prem Shankar Shukla v. Delhi Administration*,[53] the Supreme Court emphasised that handcuffs should be used in the "rarest of the rare cases" and only when the person is 'desperate', 'rowdy' or one who was involved in a non-bailable offence. Krishna Iyer J., speaking for the Court held that 'to manacle man is more than to mortify him. It is to dehumanise him and, therefore, to violate his very personhood; too often using mask of dangerousness and security. The Supreme Court also opined that involvement of the prisoner in a score of criminal cases is no ground for handcuffing. Nor can a person be handcuffed only because he is charged with a grave offence. It cannot be used only for the convenience of the escort party. The rules, regulations and manuals of various states authorising the police to use handcuffs have been struck down as violative of Article 14 of the Constitution of India. This opinion of the Supreme Court is in accordance with the Universal Declaration on Human Rights, 1948.

In *Sheela Barse v. Secretary, Children's Aid Society*,[54] the Supreme Court stressed on the role played by the International Instruments and highlight the fact that these Instruments cast an obligation on the Indian State to gender sensitise its laws and the Courts are under

[49] AIR 1998 SC 889.
[50] AIR 1980 SC 470.
[51] (2002) 5 SCC 294: AIR 2002 SC 2112.
[52] AIR 1978 SC 1675.
[53] AIR 1980 SC 1535.
[54] AIR 1987 SC 656.

an obligation to see that the message of the International Instruments is not allowed to be drowned. This Court and Counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effects to the principles contained in those International Instruments. The Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law. The President can validly exercise his treaty-making power without an authorising legislation of the Parliament. This was clearly stated in *Union of India v. Manmull Jain,*[55] where the validity of the treaty relating to the transfer of the Chandannagore, a former French possession, without the prior parliamentary legislation was questioned. The Court observed that "Making a treaty is an executive act and not a legislative act. Legislation may be and is often required to give effect to the terms of a treaty.

In *Rai Sahib Ram Jawaya Kapur v. State of Punjab,*[56] the Supreme Court laid down that for the exercise of the executive power (of which treaty making is one), under Article 73, the Union legislation is not a pre-requisite. In *Jayanti Lal v. Rana*,[57] the above decision was taken into consideration by the Supreme Court. In *Nirmal Bose v. Union of India*,[58] emphasis was laid on Article 253 of the Constitution of India which talks about the Parliamentary power to implement in the whole or any part of the Indian territory, any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. In *Union of India v. Sukumar Sengupta*,[59] the Government of India leased in perpetuity "Teen Bigha" connecting Bangladesh enclaves of Dahagram and Angerpota, surrounded by Indian Territory, with Panbari Manza of Bangladesh in accordance with 1974 and 1982 agreements between India and Bangladesh, so as to enable Bangladesh to exercise her sovereignty over those enclaves. The Court held that the implementation of these agreements, as far as "Teen Bigha" was concerned, did not amount to cession of the said territory or transfer of sovereignty in respect of the same and did not require any constitutional amendment.

Legislations in connotation to International Law: International Treaties are enforceable in India when they are incorporated into domestic law by Parliamentary legislations, which can be seen in a number of legislations, such as:

- The Diplomatic Relations (Vienna Convention) Act, 1972.
- The SAARC Convention (Suppression of Terrorism) Act, 1993.
- The Territorial Water, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976.
- The Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981.
- The Chemical Weapons Convention Act, 2000.

Domestic Implementation of International Air Law in India: Globally, civil aviation is undergoing technological advances in several areas which have impact on agreements. A major supporting development for the aviation industry in most parts of the world has been

[55] AIR 1954 Cal. 615.
[56] AIR 1955 SC 549.
[57] AIR 1964 SC 648.
[58] AIR (1959) Cal. 606.
[59] AIR 1990 SC 1692.

the globalization and liberalization of economies and an increasingly active role for the private sector in the economic development of the countries. These economic changes brought about structural changes in civil aviation throughout the world and also in the approach towards bilateral agreements and open skies. In 1944, the international aviation community and representatives of various States organised a major international conference in Chicago to consider regulation of international air transport with a view to developing and ensuring safe secure, efficient, and economical international air transport services and to avoid arbitrary action of the States which could hinder such development. This conference culminated in signing of three major agreements, which may be described as follows:

(a) Convention on International Civil Aviation (The Chicago Convention):

The first agreement was the Chicago Convention to which presently 189 States, including India are signatories. This Convention established the International Civil Aviation Organisation (ICAO) and the primary basis for the regulation and development of international airports. The provisions of the Convention are binding on all the Contracting States. The ICAO has a General Assembly which meets at least every three years. It has also a permanent governing Council with 36 members of which India is a member.

(b) International Air Services Transit Agreement: This agreement provided for multilateral exchange of first two rights of freedom, namely, Overflight, i.e., the right to fly across the territory of other contracting States without landing. And Non traffic stop for scheduled air services among its contracting States, i.e., the right to land for non-traffic purposes.

As many as 122 States have ratified this agreement, including India.

(c) International Air Transport Agreement:

This agreement was intended to for grant of the right to five freedoms of air. This agreement was to have a far reaching effect in liberalising international air transport operation and grant of traffic rights. However, only 19 States could ratify this agreement, thus, this agreement is of no proper use in the international air transport regime. India is not a signatory to this agreement. Had this agreement been ratified by the States, the shape of international air transport would have been different from what it is today, as there would been no need of any bilateral or regional agreements. India today has a large civil aviation network. There are 122 airports in the country today, out of which 11 are international airports, which are maintained by the International Airport Authority of India, established in 1986.

There are a number of legislations that have come into practice on the pipeline of international air law norms, such as, the Airship Act, 1911, a pre-independence Act which in itself is a unique feature in the world, the Air Corporations (Transfer of Undertakings and Repeal) Act, 1994 which came into existence after the repeal of the previous Airport Corporation Act, 1953, the Airport Authority Act, 1994, w.e.f. 1995, the Aircraft Rules, 1937, the Airport Infrastructure Policy, 1997, the Aviation Policy, 2000, to name a few. At the normative level, the Aircraft Act, 1934 created the fundamental legislative framework for manufacture, possession, use, operation, sale, import and export of aircraft in India while the Carriage By Air Act, 1972 implemented the Warsaw Convention, 1929 in India. These legislations have been supplemented by host of statutory rules and notifications covering different aspects of aircraft operations and several security related enactments like the Tokyo Convention Act, 1975 and the Anti Hijacking Act, 1982.

After years of talks and negotiation, the “open skies” Air Transport Agreement between the United States of America and India was signed on 14.04.2005 opening a new era in civil aviation partnership. Although there are a number of rules and regulations that have been covering the aviation sector in India, but still there are a number of problems that are prevalent even today which need immediate attention. In spite of all such struggle, the Indian aviation industry is one of the most prosperous one in the world which needs a positive effort from the Indian government to implement various international Conventions.

MODULE-II

INTERNATIONAL MARITIME LAW AND LAW OF THE SEA CONVENTION

The adoption of the LOS Convention on 30 April 1982 marked a milestone in the development of the law of the sea. For the first time, there was a single, all-inclusive treaty governing all uses of the seas and oceans. Moreover, the Convention represented a revolution in the manner in which international law is made.

This chapter seeks to outline the way in which the law of the sea has developed over the past century. It focuses on law-making techniques, rather than substantive rules, tracing the shift from customary international law to the codification and progressive development of international law by international conferences. Finally, it will outline the procedures and processes utilized at UNCLOS III, identifying the significant characteristics of the Conference which distinguish it from more traditional law-making techniques. The trends of law-making in the law of the sea reflect wider changes in the international legal system itself and moves towards an increasing institutionalization of law-making techniques. However, the subject finds its origins in the practice of individual states which contributed to the gradual formation of customary international law through a process of claim and counter-claim.

The Origins of the Law of the Sea

The law of the sea as a discipline is not new, although its distinct and independent existence could be set at the first half of the XXth century, as the result of the different international efforts to codify it and to reach consensus on the basic rules that had emerged throughout the practice of states in the precedent five centuries, and rooted in the very beginning of human civilization. Avoiding the long journey of tracing back the very first expressions of regulatory norms for the conduct of human activities at sea, it is enough to state that the more important that the interaction with the sea became for an empire or human agglomeration, the more common the attempts to regulate the latter became, and those regulations went from simple assignment of competences to officers, to claim large areas of the sea under the exclusive control of that reign. Nevertheless, it is important to highlight some of those events as they contributed in one way or the other to the current status of development of the law of the sea.

From the Romans to the Colonial Empires

Although there are earlier examples of sea-related regulations made by various human groups predating the Roman Empire1 , most of them were more of the maritime law kind, regulating the relations of cargo owners with ship owners, offences committed onboard, compensation, liability, etc. Some others related to judicial decision and precedents that through the usages and customs of merchants rose as a branch of the Lex Mercatoria: the Lex Maritima. Leaving such expressions behind, scholars have discussed the value of the many references in the roman texts about the regime of the Mare Nostrum, however it must be reminded that such a semi-enclosed basin, was under the exclusive control of the Roman Empire, which meant that it was the sole user of the waters and resources, leaving aside any consideration of an international regime.

The real first instances where the regime of the seas came into discussion were the claims made by some realms, like Venice over the Adriatic Sea, or Genoa on the Ligurian Sea. That phenomenon spread around in Medieval Europe, as the situation in the Baltic Sea, Northern Sea, Irish Seas and other spaces which were claimed by the Swedish, Danish, English, etc. These claims usually were sustained in the ruler’s commercial and military power, and demanded from third parties tolls and taxes by the mere transit through those waters. But once the small City-States declined in power and the larger empires arose, claims also grew in extension and complexity. The most famous example of the aforementioned is the Treaty of Tordesillas (1494), concluded between the sovereigns of Spain and Portugal, to modify the Pope's Bull Inter Cætera II (1493), which itself modified a previous treaty concluded by the former under the name of Alcáçovas-Toledo in 1479. By that Treaty and the previous agreements, both kingdoms literally divided the world in two, including the oceans and navigation routes. From that division, monopoly over the commerce and navigation to and from their subsequent colonies sprung, as well as the fierce reply from other nations by means of supporting buccaneers and pirates, or issuing letters of marque, as well as making a wide use of the institution of the privateer and the maritime prize.

Mare Liberum, Mare Clausum and the Territorial Sea

As a result of one incident involving the monopoly over the commerce around Johor exercised by the Portuguese, the vessel Santa Catarina was captured and brought back as prize by the Captain Jakob van Heemskerck to Dutch port. Before it was cleared as prize by court, a young lawyer by the name of Hugo Grotius was asked to deliver his opinion over the morality of the prize. As a product of that request he wrote a whole book under the title De Rebus Indicis, which was not published by him, but by an editor until 1868 by the title De Iure Prædare Commentarius. However, chapter XII of such book was published under the title Mare Libervm Sive De Iure Qvod Batavis Competit Ad Indicana Commercia Dissertatio in 1608. Nowadays that short chapter is regarded as the beginnings of the Law of the Sea. A clear exercise of advocacy, Grotius argued in favor of the liberty of the seas and oceans based on principles and writings of famous authors that stretch from biblical texts to the very founders of international law like Francisco de Vitoria. That freedom covered the whole of the oceans, with a few very narrow exceptions: inlets, gulfs, inner seas, straits and what he defined as "…all the expanse of sea which is visible from the shore". Later on such phrase will be regarded as the predecessor of the Territorial Sea17. Unexpectedly, the most forceful replies came from the British, specifically from two authors: John Selden with his book Mare Clausum Seu De Dominio Maris Libri Duo18, which was published in 1618, and William Welwod in chapter XXVIII of his book An Abridgment of All Sea-Lawes (1613) and later on with the book De dominio maris juribusque ad dominium precipuè spectantibus assertio brevis ac methodica (1615). In any case, replies came from all over Europe, being the best crafted the one of the Portuguese Fray Serafín de Freitas De Justo Imperio Lusitanorum Asiatico, which earned the following description: "L'ouvrage est remarquable; l'auteur défend avec un rare talent une mauvaise cause".

The controversy that captured the mind of scholars centers in the opposing doctrines of Grotius and Selden and it is until now the most celebrated and quoted as giving birth to the adversarial forces that shaped modern Law of the Sea into a balance between the freedom of the seas and the power of coastal states. States (any form thereof) decided over that extension of sea that was under their control that Grotius had recognized as an exception to the freedom of the seas. The original dimension referred by Sassoferrato was two days of navigation, distance that amounts to a hundred miles (1478 meters), opinion that Gentili supported. Grotius, on the other hand, expounded in Mare Liberum, a choice for the reach of the human eye, capacity that according to what the practice evidences, was different from nation to nation, as it was calculated and claimed 21, 14 or 15 miles (England and France, Scotland, and The Netherlands correspondingly). However, the criterion that emerged triumphant was expressed by Grotius, in his most celebrated work De Iure Belli Ac Pacis, where he propounds that the width of that strip of sea should be restricted to the capacity of the coastal state to exercise an effective control over it. As a maxim, Grotius rule needed to be translated into practical terms, and it was finally made by another Dutch writer, Cornelius van Bynkershoek who, in his book De Dominio Maris Dissertatio (1703) states that such control necessarily depends on the effective range of the weapons of the kingdom: "…Terræ potestas finitur ubi finitur armorum vis". Although it is contested, most scholars attribute the determination of the range of the cannon shot in those times to the Italian Ferdinand Galiani, who measured it at three nautical miles or a league (although the Scandinavian Countries used a league of 4 miles or "German league"). States quickly established a practice on their maritime claims based on the "cannon shot rule" or similar. Treaties were concluded between powers paying due regard to it and as such it survived until the XXth Century.

Inevitably, claims were not uniform and sooner rather than later States found different reasons to justify different widths to claim as i.e. protection zones, neutrality zones, customs zones, fishing zones, and the list goes on.

Many authors identify the foundations of the modern law of the sea in seventeenth century Europe. An early milestone for the subject was undoubtedly the publication in 1609 of *Mare Liberum*, the seminal thesis on the law of the sea by the Dutch jurist Hugo Grotius. Grotius famously argued that the seas are not susceptible to appropriation, thereby setting the foundations for the principle of the freedom of the seas. His thesis prompted other scholarly contributions advocating competing theories on the general principles of the law of the sea. Although largely written by academics, these texts often provided support for the position of a particular state. Nevertheless, many of these seventeenth century scholars found much of their inspiration in natural law theories or principles of Roman law. From the beginning of the eighteenth century and the onset of the enlightenment period, natural law began to lose favor amongst European scholars. At this time, positivism became the dominant theory of international law. According to positivist theory, states could only be bound on the basis of their consent. A classic exposition of this theory is found in **The S. S. Lotus**, where the PCIJ held that, "the rules of law binding upon States … emanate from their own free will as expressed in conventions or by usages generally accepted as law."

Customary International Law of the Sea

How do these principles of customary international law apply in the case of the law of the sea? Can the LOS Convention be seen as codifying, crystallizing or creating new customary international law? What evidence of state practice and *opinio juris* would support such a conclusion? It is not intended to consider in detail which parts of the Convention are actually declaratory of customary international law; this issue has been dealt with adequately in other works. The principal issue is how this process has taken place.

One argument is that the Convention cannot influence customary international law because it was adopted as a package deal. Advancing this view, Caminos and Molitor say that "if one assumes that the package deal was solidified at the time that the Convention was formally adopted, then those of its provisions that had not attained customary status by that date may have been precluded from ever doing so." They cite numerous declarations and statements made by participants at UNCLOS III to support their argument. On closer inspection, this approach does not seem to be satisfactory. Firstly, it does not explain how one identifies what the customary law of the sea is. Vasciannie notes that "it would … require States to deny the independent status of custom as a source of obligations in matters falling within the purview of the LOS Convention: as this requirement has no basis in law, it cannot be supported." More importantly, it is not an argument that has been accepted by states or by international courts and tribunals. Indeed, it may be this argument that a chamber of the ICJ had in mind when it said that certain provisions of the LOS Convention, "even if they in some respects bear the mark of compromise surrounding their adoption may nevertheless be regarded as consonant at present with general international law on the question."

Nor can it simply be claimed that the whole LOS Convention has become customary international law because it was adopted as a package deal. This argument ignores the subtleties of the customary law-making process and it comes too close to advocating the Convention as a form of international legislation.

It should not be surprising that an instrument the length and complexity of the LOS Convention is not susceptible to a simple analysis in terms of its impact on customary international law. The preamble of the LOS Convention itself indicates that it is a "progressive development and codification of the law of the sea", although it makes no attempt to distinguish between which provisions are covered by these two processes.

Many states have noted the codifying effect of certain provisions on the Convention. The United Kingdom, for instance, stated at the closing session of UNCLOS III that "many of the Convention's provisions are a restatement or codification of existing conventional or customary international law and state practice." It is true that several parts of the Convention incorporate provisions found in the 1958 Conventions on the Law of the Sea without substantial change. Nevertheless, it is questionable whether the Convention is a codification in the traditional sense of the word. Any provisions that are found in previous instruments were incorporated because they continued to be politically acceptable, rather than because they reflected state practice. As noted by Cameroon in its final speech to UNCLOS III, "this Convention represents for the first time a truly universal law and must be seen as such. Any of its features that bear resemblance in content or form to any custom or agreements or treaties recognized by any region or sub-region or among maritime nations sharing common interests must be viewed as purely coincidental." Moreover, as noted above, the codification of a treaty can only be treated as a presumption which should be confirmed by an analysis of subsequent state practice and *opinio juris*.

Many other provisions in the Convention are without precedent in previous law or practice. Of these new norms, some have undoubtedly inspired subsequent state practice which has contributed to their transition into customary international law. Indeed, state practice began to coalesce around certain rules before the whole regime had been finally agreed.

At the same time, state practice in other areas is in fact quite diverse. An analysis of national legislation does not necessarily point to a consistent trend of state practice. Even those states which are formally bound by the Convention have been criticized for apparent divergences from the text of the treaty.

Several authors have concluded from this state of affairs that parts of the Convention have not made the transition into customary international law. For instance, Orrego Vicna says "while the basic elements of the regime of the territorial sea, including the twelve mile limit, can be considered to have been transformed into customary law, … not every detail of the Convention will have followed the same path." In the context of the EEZ, Churchill and Lowe conclude that "it would seem that what is part of customary international law are the broad rights of coastal and other States enumerated in Articles 56 and 58 of the Convention. It is much more doubtful whether the detailed obligations in the articles relating to the exercise of coastal State jurisdiction over fisheries, pollution and research have passed or are likely quickly to pass into customary international law, partly because of a lack of claims embodying duties in the Convention, partly because there is some divergence between States practice and the Convention, and partly because some of the Conventional rules would not seem to have the 'fundamentally norm-creating character' necessary for the creation of a rule of customary international law." The logical conclusion of these arguments is that there are two distinct and substantively different regimes for the law of the sea, depending on whether a state is a party to the Convention or not.

An alternative view is that the Convention has in large part succeeded in crystallizing the law of the sea through the negotiating process at UNCLOS III. Discussing customary international law of the sea in the wake of the LOS Convention, Moore says "no description of … the customary international law-making process as applied to oceans law would be complete without noting that for the last seventeen years the UNCLOS process and patterns of practices have been a central feature in the customary international law-forming process." Sohn takes a similar view in saying "the interesting thing that happened in the Law of the Sea Conference was that a consensus emerged not only that those rules were necessary but that those rules have been accepted by states … if states generally agree that it has emerged, this is sufficient, for the practice of states is the main of source of international law." This approach implicitly asserts that the international community set out to create a universal regime at UNCLOS III. Is there sufficient evidence of opinio juris to this effect?

The universal application of the rules is supported in part by the text of the Convention itself. Most of the treaty is directed to "States" or "all States". It would have been perfectly possible for participants to indicate their intention to create a treaty regime by drafting the Convention in terms of "States Parties". Indeed, this approach was taken in relation to Parts XI, XV and XVII of the Convention. This differentiation in terminology may be important for the purposes of determining customary international law.

It is also relevant that large parts of the Convention are supported by a consensus of the international community. An analysis of what states say they consider to be the law indicates widespread support for most parts of the Convention as customary international law. The opinion of the United States, as a major maritime state and a nonparty to the Convention, is of particular significance. At the closing session of the Conference, the US asserted that “those parts of the Convention dealing with navigation and overflight and most other provisions of the Convention serve the interests of the international community. These texts reflect prevailing international practice. They also demonstrate that the Conference believed that it was articulating rules in most areas that reflect existing state of affairs – a state of affairs that we wished to preserve by enshrining these beneficial and desirable principles in treaty language.” This statement on the status of the Convention was confirmed by subsequent declarations in 1983. Following his decision not to sign the Convention, President Reagan nevertheless proclaimed that “the United States is prepared to accept and act in accordance with the balance of interests relating to the traditional uses of the oceans – such as navigation and overflight. In this respect, the United States will recognize the rights of other states in waters off their coasts, as reflected in the Convention, so long as rights and freedoms of the United States and others under international law are recognized by such coastal states.” It would be reasonable to conclude from these statements that the US accepts the whole Convention framework on the navigational and related uses of the seas and oceans as a reflection of customary international law on the subject. Nor was the US alone in recognizing the substantial normative impact of the Convention. Records of UNCLOS III reveal concurring opinions of several states.

Further support for the customary status of the Convention is found in the resolutions and declarations of other international institutions and conferences. Although formally non-binding, as noted in the previous section, these instruments may provide important means of identifying further state practice and *opinio juris communis*.

Of particular importance is the General Assembly which, through its annual resolutions on the law of the sea, asserts a substantial and formative influence in this area. It stands out from other international institutions because it was the organ which originally convened UNCLOS III. Furthermore, it is one of the few international institutions to include all states. The General Assembly has adopted a number of resolutions which support the Convention as a source of customary international law. For instance, the preamble of General Assembly Resolution 49/28, adopted in 1994, recognizes “the universal character of the Convention and the establishment through it of a legal order for the seas and oceans.” Since then, the General Assembly has regularly proclaimed that “the Convention sets out the legal framework within which all activities in the oceans and the seas must be carried out.” Year after year, the General Assembly call on states to harmonize their legislation with the provisions of the Convention. These statements are clear support for the idea that the LOS Convention creates universal law.

Also important are the activities of other international institutions working in the field of the law of the sea which have, at least implicitly, been operating within the framework of the LOS Convention since its conclusion. General Assembly Resolution 40/63, adopted on 10 December 1985, recognized that “all related activities within the United Nations system need to be implemented in a manner consistent with it.” True to this statement, many of the UN organs and specialized agencies treat the LOS Convention as the starting point for all law of the sea issues, regardless of the fact that not all states are party to the Convention. For instance, the 2001 Anti-Fouling Convention and the 2004 Ballast Water Convention, both adopted under the auspices of the IMO, refer to the LOS Convention as customary international law.

How have courts and tribunals approached the customary international law of the sea since the conclusion of the LOS Convention? A number of judicial decisions on the law of the sea appear to attribute weight to the consensus underlying the Convention in the formation of customary international law. The most explicit reference to the negotiating techniques employed at UNCLOS III is found in the **Gulf of Maine Case**, where a Chamber of the Court confirmed that the fact that the LOS Convention had not entered into force "in no way detracts from the consensus reached on large portions of the instrument and, above all, cannot invalidate the observation that certain provisions of the Convention, concerning the continental shelf and the exclusive economic zone, which may, in fact, be relevant to the present case, were adopted without any objections." The Court thus considers that consensus is a critical factor in determining the impact of the Convention on customary international law.

At the same time, courts and tribunals have continued to pay lip-service to the practice of states in relation to the LOS Convention. Thus, in the **Continental Shelf Case between Libya Arab Jamahiriya and Malta**, after attributing weight to the adoption of the Convention by "an overwhelming majority of states", the Court held that the institution of the EEZ is also shown, "by the practice of states", to be part of customary international law. As noted above, it is true that many states had in fact proclaimed an EEZ whilst the negotiations at UNCLOS III were ongoing. Yet, as one author has said, "the most striking element in this reasoning is not that provisions of an international agreement are qualified as customary international law but that this was done without embarking upon any empirical research as to whether the respective rules were recognised as law and reflected in State practice."

In many contexts, state practice on the law of the sea is mixed, falling a long way short of being "widespread and virtually uniform". However, it is submitted that any inconsistent state practice must be assessed in light of the general acceptance of the Convention. Following the approach of the ICJ in **Nicaragua**, it is suggested that any contrary state practice is not supported by *opinio juris* in favor of rules which diverge from those found in the Convention. Oxman notes that "there is a fundamental difficulty in attempting to prove the continuing validity of rules of law that are directly at variance with those in the Convention." He continues, "it would be difficult to find sufficient uniform state practice and *opinio juris* today to demonstrate convincingly that there is some other generally accepted positive restraint of customary law substantially more restrictive than, or inconsistent with, the Conventional rule of restraint." That is not to say that customary international law was frozen at the time that the LOS Convention was concluded. The law can continue to evolve through consistent trends of state practice, either unilaterally or equally through institutional processes. However, such practice must also be supported by an indication that states are intending to create new rules of customary international law. At present, most of the Convention continues to be supported by the international community as the material source of the international law of the sea.

It is possible to conclude that the process of negotiating the LOS Convention had a substantial impact on the customary international law of the sea by forging and crystallizing a consensus on the general rules and principles that apply to most uses of the oceans. Although practice is not in rigorous conformity with the substance of the Convention, there is nevertheless clear evidence that states believe the Convention provides a repository of the prevailing rules and principles. The negotiation of the Convention has therefore succeeded in promoting a degree of certainty in the applicable law of the sea, mitigating the confusion and ambiguity that was prevalent at the time of the **Fisheries Jurisdiction Cases**.

It does not follow that all parts of the Convention have become customary international law. From the records of UNCLOS III, it is clear that the provisions on deep seabed mining were not supported by consensus and there was not sufficient *opinio juris* for their translation into customary international law. Applying the words of the ICJ from a different context, these provisions were the subject of "long continued hesitations". The industrialized states consistently raised objections to the regime for deep seabed mining both before and after the conclusion of the Convention. The objections were not to the principle of the deep seabed as the common heritage of mankind. States had managed to reach a consensus over this issue in 1970 and it is arguable that these broad principles have become custom. The same, however, is not true for the details of the institutional regime and the conditions attached to deep seabed mining which led the industrialized states to reject Part XI of the Convention. The verbal protests of the industrialized states presented at the Conference itself were further supplemented by state practice which conflicted with the detail of the treaty text. Several states, including the US, the UK, the Soviet Union, Germany, France and Italy, passed unilateral legislation permitting their nationals to undertake mining. Further to these unilateral acts, Germany, France, the US and the US entered into an Agreement concerning Interim Arrangements relating to Polymetallic Nodules of the Deep Seabed in 1982. The objections and contrary state practice of these important states were fatal for the future of Part XI out-with the treaty framework.

These objections to the deep seabed mining regime were overcome through the negotiation of the Part XI Agreement. Yet, there are other problems for the transition of Part XI into customary international law.

In order to have this effect, a provision must be of a "fundamentally norm creating character." As Jennings explains, "a treaty is not capable of becoming a general rule of custom in a form which belongs essentially to the particular treaty context. This is without prejudice to whether that rule, in abstracto or in another context, would be capable of becoming a rule of general law."

The provisions on deep seabed mining, however, are specifically directed at States Parties to the Convention. In addition, Part XI is largely concerned with creating and maintaining an international institution which can only occur through the conclusion of a treaty. These considerations also apply to the provisions on dispute settlement. Many provisions in Part XV are also addressed to States Parties and they are similarly concerned with the creation of institutional procedures.

These important provisions can therefore only be invoked as treaty provisions. Ultimately, the substantial influence of the LOS Convention on customary international law does not completely mitigate the need for states to consent to be bound by the Convention if it is to be fully effective. This explains why the General Assembly continues to call on all states that have not done so to become a party to the LOS Convention.

Furthermore, the traditional conception of customary international law is based on consistent trends of state practice and it was to such practice that courts, tribunals and other decision-makers had to turn in order to determine the substance of the law. At this time, few international courts and tribunals existed and maritime cases were chiefly dealt with by national admiralty courts. Although they were national institutions, the law applied by these courts was largely of an international character. Sir Charles Hedges, a seventeenth century Judge of the English High Court of Admiralty, made this clear when he said, "the Court of Admiralty is a Court of Justice, and the judge who is sworn to administer it is as much obliged to observe the laws of nations as the Judges of the Courts of Westminster are bound to proceed according to the statutes and the common law." The admiralty courts drew on a variety of sources, including ancient codes of maritime law, as well as the contemporary practices of states in order to determine customary international law.

For instance, in **The Paquete Habana**, the US Supreme Court traced the history of prize jurisdiction from 1403 onwards, examining several international treaties, the work of scholars, and prize court decisions of various countries. The task of courts in determining the content of the customary international law of the sea was by no means straightforward. Judges were faced with a mass of evidence, often contradictory, as to what the prevailing customs were. Needless to say, the reliance on the claims and counter-claims of states left much to be desired in terms of the precise formulation of rules. **The Paquete Habana** again provides a good example. In that case, the US Supreme Court was faced with the question whether there was a rule of international law prohibiting small coastal fishing vessels which were flying the flag of an enemy state from being captured as prize. Although the justices seemingly agreed on the material sources which contribute to the formation of customary international law, they profoundly disagreed on their assessments of the prevailing state practice. The majority of the Court concluded that the available evidence supported the existence of an exemption for small coastal fishing vessels. A minority of the Court, led by Chief Justice Fuller, dissented, arguing that the practice was inconclusive and "in truth, the exemption of fishing craft is essentially an act of grace, and not a matter of right and it is extended or denied as the exigency is believed to demand." A similar division over the conclusions to be drawn from state practice can be seen in **The S.S. Lotus**. In a decision adopted by the casting vote of the President, the majority of the Court denied the existence of a principle of international law prohibiting Turkey from prosecuting the Master of a French vessel which had collided with a Turkish ship on the high seas. The majority reasoned that the applicable rules of customary international law "must be ascertained by examining precedents offering a close analogy to the case under consideration; for it is only from precedents of this nature that the existence of a general principle applicable to the particular case may appear." Yet, the evidence of state practice was itself ambiguous and there were precedents pointing in both directions. In the words of Judge Weiss, the record of the case demonstrates "controversial doctrine and contradictory judicial decisions…invoked by both parties." The actual result of the case largely turns on the assumption made by the majority that states may exercise jurisdiction unless there is a positive rule which prohibits such action. As France was not able to adduce sufficient evidence of such a rule, its arguments failed. The traditional techniques of deducing customary international law also accorded a significant role to powerful maritime states.

In **The Scotia**, decided by the US Supreme Court in 1871, it was said that "many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of a single state, which were first of limited effect, but which, when generally accepted, became universal obligations." The Court described how the Merchant Shipping Regulations promulgated by the British Government in January 1863 became generally accepted and applied by all the major maritime states of the world and therefore formed part of the international law of the sea.

It can be seen from these few illustrations that traditional conceptions of customary international law, as a means of regulating the activities of a large number of states, suffer from a number of weaknesses. Firstly, divergences in state practice mean that it is often difficult to identify the applicable law at any one time. The more states there are, the more difficult the process. Perhaps one of the greatest weaknesses of custom as a method of law-making is the uncertainty which accompanies the promulgation of new norms. Any evolution in an existing rule requires a breach of that rule. Therefore, until a stable pattern of state practice has emerged, it is impossible to predict the legality of a state's actions.

It has also been suggested that customary international law is unsuitable for the promulgation of detailed rules or regulations in technical fields. Thus, Oxman says that "because it is so difficult to prove a level of state practice and *opinio juris* beyond generalities sometimes barely distinguishable from mere labels, customary international law is a much blunter instrument than written law." However, cases such as **The Scotia** would suggest that this assumption is not always valid. What this case demonstrates is the way in which written texts can inspire and influence the formation of customary international law. This fact has major implications for modern law-making techniques.

It can be expected that a number of matters or concepts will be argued to be customary law by various states.

Among the concepts that are important in connection with custom are:

1. The maximum geographical extent of the territorial sea and the scope of coastal authority within;
2. The principles governing the delimitation of the territorial sea from baselines;
3. The specific principles relevant for delimiting archipelagic baselines;
4. The law governing the creation of historic waters;
5. The principles applicable to archipelagic waters, including those benefiting neighboring states;
6. Resource rights in the EEZ and the scope of authority over foreign activities in the EEZ; and
7. The limits of the continental shelf and the scope of authority over the shelf.

The Continental Shelf

Despite the disclaimers by some delegates against the effect upon them of the 1958 Law of the Sea Conventions entered into before they became independent, there seems to be general acceptance of the provisions contained in at least one of these-the 1958 Convention on the Continental Shelf. As of January 1, 1976 this convention had been ratified by 15 countries that in 1958 were under colonial rule.' Furthermore, the International Court of Justice has by dictum accepted certain basic rules laid down in the Convention as declaratory of existing customary law.

The revised single negotiating text (RSNT) embodies much of the Continental Shelf Convention. It fixes the outer boundary of the Continental Shelf at 200 nautical miles from the baseline used to measure the territorial sea plus an area beyond "to the outer edge of the continental margin." (Part II, Art. 64-74) Views differ as to the method of drawing the line between States facing one another at a distance of less than 200 miles, also as to lateral boundaries between neighbors.

There seems to be general acquiescence in a shelf 200 miles wide but there is opposition, particularly by the landlocked and so-called geographically disadvantaged (e.g. shelf-locked) States, to inclusion of the area beyond that limit. To accommodate the opponents among the lesser developed States, the RSNT calls for distribution amongst them of contributions to be made "in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles" (Part II, Art. 70, par. 1).

One may conclude that there is general recognition that under emerging customary law coastal states now have an exclusive right to control exploitation of the mineral resources of the seabed adjacent to their coasts seaward at least 200 nautical miles from the baseline for measuring their territorial seas and beyond to the 200 meter isopath in cases of exceptionally shallow shelves.

Territorial Sea

The First and Second LOS Conferences held in 1958 and 1960 failed to agree on the width of the territorial sea but did agree on regulations to govern the area. 8 As of January 1, 1976, 44 countries had ratified the Convention on the Territorial Sea and Contiguous Zone. Of these, 13 were under colonial rule in 1958 and 1960.

There is widespread acceptance of the SNT on the width of the territorial sea.

This reads:

Article 2 - Breadth of the territorial sea: Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines in accordance with the present Convention.

Some States have asserted a right to a broader territorial sea but this has not been generally recognized. With the general acceptance of 12 miles as the maximum, the resistance heretofore posed against recognition of a wider territorial sea will doubtless continue and probably stiffen. Those countries that have declared for a wider territorial sea will as a matter of pride probably not back down but they also will probably not enforce restrictions that go beyond those permitted on the high seas beyond the twelve mile boundary.

Contiguous Zone

The 1958 Convention on the Territorial Sea and Contiguous Zone provided for a zone "not to extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured" for enforcement of "customs, fiscal, immigration or sanitary regulations within its territory or territorial sea" (Article 24). This was carried over into the RSNT but widened to 24 miles (Part II, Article 32).

It is unlikely that any State will contest the exercise by a coastal State of control in the widened area for enforcement of its laws.

Free Transit through Straits

It has already been mentioned that the importance the delegations of the United States and other maritime countries attached to the continued right to free transit through straits under the three-mile territorial sea rule has encountered opposition by some countries themselves the beneficiaries of open straits. It was also suggested that this opposition might have been tactical in order to bargain for concessions on other issues.

The leading maritime states will now most likely refuse to recognize any extension of the territorial seas where the effect would be to close international straits now open to free transit by ships and overflight by aircraft. Other countries will probably support this position tacitly if not expressly. Yet, some strait States, Spain and Algeria, for instance, may refuse to back down from the position in opposition taken by these delegations. A confrontation may, however, be avoided by scrupulous observance by ships in transit of rules set out in, or regulations issued in accordance with, RSNT, Part II. While under the text "States bordering straits may not hamper transit passage," they may make laws regarding safety of navigation, the regulation of marine traffic, and the prevention (a) of pollution by enforcing international regulations, (b) of fishing, and (c) of loading or unloading goods or passengers in contravention of their customs and immigration laws (Part II, Arts. 40 and 42).

It seems most unlikely that when reality replaces rhetoric many States would regard their own self-interest as calling for opposition to a position supported by strong arguments of law and policy advanced by the leading maritime States.

Economic Zone

The 1945 Proclamation by President Truman asserting the right of the United States to exploit the mineral resources of the continental shelf beyond the territorial sea led to comparable assertions by other states of a right to exploit not only the mineral seabed resources but the living resources off their shores. A significant number of States have claimed the right to regulate exploitation of living and non-living resources as far seaward as 200 miles.

The United States and other countries have, until recently, resisted such claims. They are now faced with the argument that if the importance to a coastal State of the natural resources of the adjacent seabed mineral resources conferred the right to preclude others from exploiting them, the importance to another coastal State of the living resources in the super-adjacent waters confers a comparable right.

The differences remained irreconcilable so long as the assertion of such a right was confused with an extension of the territorial sea beyond a twelve-mile limit. While some States continue to assert a territorial sea right beyond twelve miles, the differences between most of the coastal States have been reconciled by acceptance of the concept of a 200-mile zone of exclusive economic rights but not exclusive navigational or overflight rights.

There remains an unreconciled doctrinal difference over the so-called residual rights. Put simply, the position of the United States and most maritime and landlocked countries is that the coastal State will have only those economic rights spelled out in the convention; all States will continue to enjoy the high seas rights not expressly limited. The other group contends that the coastal

States shall have all rights not expressly limited by the Convention. Without a Convention the extent of the rights in the economic zone must be left to the traditional process of assertion and response on which customary international law grows. There is, however, already a general consensus as to a 200-mile width of the economic zone and the right of the coastal State to regulate fishing of certain species in that zone. Coastal State regulation of fishing as to certain species remains to be resolved.

The High Seas

The sharpest differences between the delegations were over the high seas character of the area in the Economic Zone just discussed and over the freedom to explore and exploit the non-living as well as the living resources of the high seas.

A group of 77 developing States (calling itself the Group of 77), now grown to over 100 States, many of which were under colonial rule in 1958, have united behind spokesmen who assert that the non-living resources of the high seas seabed (deep seabed) may be exploited only after, and in accordance with, a convention acceptable to that Group.

As late as last September, in the closing debate of the fifth session of the LOS Conference, spokesmen for the Group of 77 declared they were not bound by the 1958 Convention on the High Seas or the customary law then existing and would not accept a convention that recognized the freedom to explore and exploit the mineral resources of the high seas. Spokesmen for leading nations not members of the Group of 77 made clear that they would not accept a convention that took away that freedom. For the foreseeable future this means that exploration and exploitation must be conducted under the principles of customary law and, for the parties to the High Seas Convention, the rules of conventional law it contains.

Whatever rights States and their nationals have to exploit the resources of the high seas and deep seabed, it is clear that each in the exercise of its rights must respect the equal rights of others. It is also clear, though not universally conceded, that under customary law as understood in 1958 the right to explore and exploit the mineral resources of the deep seabed was one of the so-called freedoms of the seas. The Reports of the International Law Commission state this unequivocally.

What was not clear in 1958 and remains debatable today is whether the right to exploit along with others having the same right would be followed up with a right by reason of occupation or long usage to exclude others. There had in 1958 been insufficient activity in exploiting the resources of the seabed to give rise to regulations covering the exercise of that right. This explains why the 1956 Report of the International Law Commission declares that the right to explore and exploit the resources was not listed in what became Article 2 of the High Seas Convention. It was, however, clearly taken into account in the phrase “inter alia” which precedes the listing in Article 2 of the Convention expression that the four freedoms comprised in the Freedom of the seas.

Among those members of the Group of 77 that were under colonial rule in 1958 and have not since adhered to the 1958 Convention on the Law of the Sea, some have contended that customary international law which developed before they became independent is not binding upon them. Whatever merit this has as to their rights and duties it has little bearing on the rights and duties of others as between themselves.

Exploration and exploitation of the seabed beyond coastal-state jurisdiction has, of course, been practiced for centuries. Currently, the deep seabed is being explored and nodules are being reduced to possession by nationals of many countries.

Right of innocent and transit passage

In general, no one disputes that innocent passage is provided for by customary international law in the territorial sea. This has been the concept that bridges the gap between coastal

state sovereignty within the territorial sea and the notion that freedom of navigation pertains to the ocean beyond. The right to use the territorial sea for passage is accepted so long as it is innocent. A coastal state may protect its overall interests by preventing non-innocent passage and regulating innocent passage.
The difficulty with this orderly picture of accepted custom is in determining how to regulate innocent passage without hampering or impeding it. The recently adopted strong emphasis and concern over the protection of the marine environment especially raises a question about how coastal states can achieve realistic protection by regulation of passage in its territorial sea.
The increased traffic in movement of hazardous materials is perceived by some states to justify special measures to avoid potential harm. Can the coastal state, in addition to requiring the use of special sea lanes, also require notice and posting of bond by such vessels? This problem has not yet been played out but it seems clear that further clarification of coastal and navigation interests is definitely required.

Attempts at Codification of the Law of the Sea

From the beginning of the twentieth century, there was an increasing interest in the idea of codifying international law. It was widely believed at the time that the codification of international law on major topics would contribute to the maintenance of international peace and security. It was thought that the reduction of rules to writing would promote clarity and certainty in the applicable law. The Second Hague Peace Conference had adopted a resolution which called for the codification of topics which were “ripe for embodiment in international regulation”, but the outbreak of the First World War had prevented this initiative from being further pursued. Nevertheless, Rosenne suggests “that recommendation is the seed which was ultimately to burgeon forth, first as the Committee of Experts for the Progressive Codification of International Law, and later as the International Law Commission of the United Nations.”
Amongst the first topics considered suitable and necessary to codify was the law of the sea. Specific aspects of the law of the sea had already been the subject of treaty negotiations. The 1856 Declaration of Paris sought to establish international rules on naval warfare, neutrality, blockades and privateering. This aspect of the law of the sea was further developed by several treaties adopted at the two Hague Peace Conferences in 1899 and 1907 and subsequently at the International Naval Conference held in London in 1909. Non-military aspects of the law of the sea, however, were neglected until after the First World War. The 1920s saw several codes on the law of the sea produced by private institutions and individuals, including the International Law Association, the Institut de Droit International, the American Institute of International Law, the German Society for International Law, the Japanese Society for International Law, and Harvard Law School. These private initiatives were swiftly followed by governmental attempts at codification. In 1924 the Council of the League of Nations initiated a process for the codification of international law. To reflect the international character of the project, it was to be carried out by “a body representing the main forms of civilization and the principal legal systems of the world.” The Council duly established a Committee of Experts for the Progressive Codification of International Law. Participation in the Committee was not restricted to

individuals from member states of the League of Nations. This Committee was charged with investigating which topics or fields of law were suitable for codification. The initial list of topics for potential codification considered by the Committee included the status of territorial waters, the status of government ships engaged in commerce, the suppression of piracy, and the exploitation of the products of the sea. Following a series of debates, the Committee of Experts narrowed down the list to those topics of international law which it considered were "sufficiently ripe" for codification by a general international conference. Of the above topics, only the subject of territorial waters was considered to meet this criterion.

In response to this recommendation, the League convened the 1930 Hague Codification Conference, which was attended by delegates from forty-seven governments, including states which were not members of the League. The issue of territorial waters was considered by the Second Committee of the Conference. Despite prolonged discussions, delegates failed to agree a treaty on territorial waters, although they did produce a set of draft articles that were subsequently circulated to governments. This text itself did not create legal obligations. Nevertheless, one commentary explains that it "later exerted influence to the extent that Governments accepted them as a statement of existing international law." The draft articles once again demonstrate the influence that a written text can have on the formation of customary international law. The 1930 Codification Conference was to be the only major multilateral attempt to codify international law during the lifetime of the League whose attention was consumed with more fundamental political crises during the 1930s. Although the Conference had failed to produce substantial results, many lessons were learned which would subsequently influence future attempts at codification.

The United Nations: A New Era of Codification

The codification of international law was to become a much more prominent and permanent feature of the international system following the Second World War. The International Law Commission was established by the UN General Assembly in 1947 for the purposes of advancing the codification and progressive development of international law. The ILC is composed of thirty-four independent experts on international law appointed by the General Assembly. At its first meeting in 1949, the Commission identified a provisional list of fourteen topics as suitable for codification. This list included the regime of high seas and the regime of territorial seas. It decided to prioritize the codification of the regime of the high seas and J.P.A. François was appointed as special rapporteur on the subject. Following a recommendation from the General Assembly, the Commission started work on the regime of the territorial sea at the third session of the Commission in 1951 and François was appointed as special rapporteur on this topic as well. The Commission proceeded with these two topics simultaneously, albeit continuing to treat them as separate subjects on its work programme. In furtherance of its work on the high seas, the Commission submitted draft articles on the continental shelf and fisheries to the General Assembly in 1953. The Commission recommended that the General Assembly adopt the articles on the continental shelf in the form of a resolution. In addition, the Commission proposed that the articles on fisheries should be forwarded to the FAO for adoption. The General Assembly, however, refused. Citing "the physical, as well as the juridical, linking of the problems related to the high seas, territorial waters, contiguous zones, the continental shelf and the superjacent waters", the General Assembly resolved that "it would not deal with any aspect of the regime of the high seas or of the regime of territorial waters until all problems involved has been studied by the Commission and reported by it to the General Assembly." In this way, the General Assembly made it clear that it preferred a comprehensive and coherent approach to codifying the law of the sea. Following this recommendation, the ILC duly submitted a single set of draft articles on the law of the sea to the General Assembly in 1956 along with a detailed set of commentaries.

The draft articles formed the basis for discussions at UNCLOS I which was convened by the General Assembly in order to "examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments that the conference may deem appropriate." The mandate of the conference is important in a number of respects. Firstly, the General Assembly recognized that the law of the sea raised issues of a political or technical nature, as well as pure questions of law. Secondly, the General Assembly, in a significant u-turn, also abandoned its determination to treat the law of the sea as a coherent whole. The mandate foresaw the adoption of more than one international convention on the subject. Indeed, the General Assembly left open the question of whether the outcome of the Conference would be legally binding at all by indicating that the Conference could adopt other such instruments that it deemed appropriate. UNCLOS I took place in Geneva in 1958. In accordance with Resolution 1105 (XI), an invitation was sent to all Members of the United Nations. The final list of participants included eighty-six states as well as observers from seven specialized agencies. Like the previous attempt at codification through the League of Nations, it was recognized that the rules of the law of the sea should be developed with the involvement of as many states as possible. Four principal treaties were negotiated, dealing with the territorial sea and the contiguous zone, the continental shelf, the high seas and fishing. The Conference also adopted an optional protocol on dispute settlement. All substantive decisions of the Conference were subject to a vote of a two-thirds majority. Although the draft articles had been prepared by the ILC as a single and coherent text, the four substantive treaties were not linked in any way, so that a state could choose which instruments it would accept. Thus, the balance of rights and obligations crafted by the Commission was weakened at UNCLOS I. As O'Connell notes "that opened up the possibility for States to adhere to parts only of what was intended to be an over-all scheme, and so distortions and exaggerations became inevitable." Only those states bound by all four Conventions are subject to the package as it was intended to apply. Even then, states could make reservations to many of the articles upon ratification. Nevertheless, UNCLOS I had taken a significant step forward. Where there had been previously only customary rules, there were now four substantive treaties on the law of the sea. The success of UNCLOS I was marred by the failure to solve some small, yet highly significant issues, in particular the width of the territorial sea and the important question of fishing rights. A resolution was adopted requesting the General Assembly to study the advisability of convening a second international conference, which it did in 1960. The mandate of UNCLOS II was to fill in the gaps in the legal framework left by the first conference. It was not intended to consider new issues or reconsider issues that had been concluded at UNCLOS I. However, the eighty-eight states which attended UNCLOS II were not able to agree on an acceptable formula. The Conference was only able to conclude that “the development of international law affecting fishing may lead to changes in practices and requirements of many states.” Thus the issues were left to the vagaries and uncertainties of customary international law.

The Conferences of the XXth Century

The Hague Conference of 1930

By the 1920’s the League of Nations identified that the lack of uniformity and the growing claims related to maritime territories presented huge risks to peace and stability. Following the premise that codification of International Law would help avoid conflict, preparatory works commenced around 1924 and called for a conference for the progressive codification of international law in 1930, in The Hague. Together with subjects like problems of nationality and State responsibility, the issue of territorial waters was taken into account and finally dealt by the second commission of the conference. Due to the strong fragmentation of the 48 participating States’ position, no agreement was reached with regards to the width of the territorial sea. Nevertheless, the above evidenced that the so-called “three mile rule” was not a uniform rule at all. It is under these conditions that the world entered the II World War.

Truman’s Effect The 28th of September 1945, President Truman published Presidential Proclaims 2667 & 2668, the first one dealing with the Continental Shelf and the second one with offshore fishing resources. The effect of the combined interpretation of both proclaims by other states possibly was the main thrust for the change that the Law of the Sea experienced in the next decade. Through the first one of the proclaims, President Truman made a claim over the offshore subsoil mineral resources beyond the three nautical miles that the United States of America traditionally claimed as Territorial Sea. This was seen as a sovereignty claim over the whole of the continental shelf itself (and not the resources) by, especially, the Latin American countries and led to a wave of claims which were inaugurated by Mexico (1945) and followed by Argentina & Panama (1946) Costa Rica (1948), Honduras & Brazil (1950), Nicaragua (1961) and Uruguay (1969), all based on the US assertion. It is also worth highlighting the claims made by the South Pacific countries in 1947, namely the Chilean and Peruvian claims, which reached the 200 nautical miles expressly and by 1952 gave way to the first treaty around that number, the South Pacific Permanent Commission (or CPPS), being the main precedent to the Exclusive Economic Zone figure that arose in the United Nations Convention on the Law of the Sea (UNCLOS) in 1982. Several other national claims were subsequently made, again, concentrating in Latin America. A number of important regional conferences dealt with the issues of the different maritime claims regarding the Territorial Sea and the Continental Shelf, as well as the emerging “Epicontinental Sea” or “patrimonial sea.”

The 1958 United Nations Conference After the failed attempt of the Hague Conference of 1930 to regulate the “territorial waters” question, and the failure of the League of Nations itself, it was to the United Nations to pick up the unfinished business of its predecessor, particularly in the view of the massive number of uneven claims that arose after 1945. In compliance with Article 13 of the United Nations Charter, the International Law

Commission (ILC) was set up in 1947 and by 1949 a list of issues to be dealt with was in place. Without delay, the issues of the Territorial Sea and the High Seas were identified to be priorities and as such work was done; this concluded in 1956, when a draft containing 73 articles with corresponding comments was released. A diplomatic conference was convened and gathered from the 24th of February to the 27th of April 1958 in Geneva, to discuss the draft articles prepared by the ILC. The result of that meeting were four conventions on: a) the Territorial Sea and Contiguous Zone, b) the Continental Shelf, c) the High Seas, d) fishing and conservation of the living resources of the High Seas, and the Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes. Most of the contents of the four conventions were a mere codification of the current evolution of the Law of the Sea so far. Despite the success in bringing uniformity in many aspects of the law (which has outlasted the conventions themselves) no agreement was reached in the important issue of the breadth of the Territorial Sea. Another major failure that has been attributed to the Conference was its fractioned approach by concluding separate conventions instead of a single holistic instrument as envisaged by the ILC. That situation allowed states to benefit of acceding only to one or more of the Geneva Conventions and exclude those that were against their interest, the settlement of disputes being the most compromised section. However, the Optional Protocol did enter into force in 1962 and has 38 parties. It provides compulsory jurisdiction to the International Court of Justice with regards to any of the four Geneva Conventions (with exception to Articles 4-8 of the Convention on Fishing and Conservation of the Living Resources of the High Seas, to which Articles 9-12 are applicable). The protocol also provides for the option of resorting to Arbitration (Article III) or Conciliation (IV) within the period of two months after the notification of the existence of a dispute to the other party.

Success or Failure? The Impact of the 1958 Conventions

The overall reception of the 1958 Conventions was underwhelming. The High Seas Convention, with 62 ratifications, was the most widely accepted of the four treaties. The Fisheries Convention, on the other hand, only managed to attract 37 contracting parties.

However, it is certainly not true that they had no normative impact. Many of the rules in the 1958 Conventions would be reproduced in some form in the 1982 LOS Convention. Moreover, some of the proposals on which states could not come to an agreement would have an impact on the formation of customary international law. At the same time, some of the more controversial provisions of the 1958 Conventions would be the catalyst for a more wide-ranging reformulation of the law of the sea in the following decades. During the 1960s, the process of decolonization saw the creation of several new states, many at lower levels of development. Some of these newly independent states were demanding changes in the law to take into account their special interests. As O'Connell notes, some states, "inspired more by emotion than legal analysis, purported to find their hands tied by the Convention in the interests of the great powers, and were disposed to overthrow the whole Geneva system as having been contrived without their consent and against their interests." In this way, the law of the sea became caught up with more general demands for a New International Economic Order which was being promoted by developing countries within the United Nations at that time. Although the 1958 Conventions did contain amendment clauses, no attempts were made to invoke these procedures in order to make changes to the legal regime. The relatively low number of contracting parties to these instruments may have contributed to the failure to pursue this option. Moreover, many states had in mind a more revolutionary change to the legal regime, rather than tinkering with what was already there. In the meantime, the widely perceived weaknesses of the 1958 regime led to a return to unilateralism as a means of asserting legal claims. State practice continued to develop to the degree that the ICJ held in the **Fisheries Jurisdiction Cases** that coastal states could claim a twelve mile exclusive fisheries zone, a "*tertium genus* between the territorial sea and the high seas", as well as preferential fishing rights on the high seas, despite the principle of freedom of fishing as found in the 1958 High Seas Convention. By the time the judgment was rendered in the Fisheries Jurisdiction Cases, negotiations at UNCLOS III were already underway. Indeed, the Court took note of these multilateral law-making activities. The Court recognized that it could not render judgment sub specie *legis ferendae* and it clearly acknowledged the advantages of negotiated outcomes at the international level.

The 1960 United Nations Conference

United Nations convened a new diplomatic conference on the Law of the Sea, again in Geneva, from 17th of March to the 26 of April 1960, which worked with no preparatory background and in a single committee. Being its main goal to find consensus with regards to the breadth of the Territorial Sea and now the Fisheries claims, the Conference was again a failure, although the proposal of adopting a 6 mile Territorial Sea plus a 6 mile Fishing Zone ended up just one vote away of being approved.

The Third United Nations Conference on the Law of the Sea

The Conference was convened for a first session in 1973 in New York. The work begun on the basis of a preliminary list of subjects prepared by the preparatory commission, rendering the exercise a creative one, and not one of discussion and approval of a previously arranged draft, as was the case of the 1958 Conference. The Conference worked on four commissions that dealt separately with all issues now included in the UNCLOS. The fourth of those commissions was the one dealing with the settlement of disputes provisions. The mechanism to take decisions was agreed on a three tier process: firstly, consensus, secondly, a period of reflection, and thirdly, a qualified majority vote. Only once there was a need to recur to vote and it was on the final approval of the Convention itself. The Conference met from 1973 until 1982 and most of the years it met twice, making the conference the longest diplomatic effort to conclude an international instrument. Finally, the Conference adopted a text composed by 320 articles divided in 17 Parts, complemented by 9 Annexes (88 Articles) and 4 Resolutions all which form an integral part of the Convention, without the general possibility to make reservations, as the text was devised as a "package deal" due to the serious exercise of balance of compromises made by the different negotiating states.

<u>United Nations Convention on Law of the Seas, III</u>

In 1967, the Maltese ambassador Arvid Pardo addressed the First Committee of the General Assembly, demanding urgent action to ensure the peaceful development of the law of the sea and in particular the legal regime relating to the deep seabed. In response to this speech, the General Assembly created the Committee on the Peaceful Uses of the Seabed whose initial mandate was to prepare a survey of state practice on the deep sea-bed and the ocean floor, an account of the scientific, technical, economic, legal and other aspects of the issue, and an indication of practical means of promoting international co-operation in the exploration, conservation and exploitation of the ocean floor. The work of the Committee led to the adoption by the General Assembly of the 1970 Declaration of Deep Seabed Principles. In the words of one author, these principles “obviously filled a void created by the rampant technological revolution in this rampant area.” The promulgation of the Declaration differed drastically from the process of codification because the Committee was faced with completely new issues where there was no settled state practice. Formally, the Declaration was nonbinding, although the principles therein were to have a significant influence on the future LOS Convention and international law generally. Indeed, the Declaration was not an end in itself and it foresaw the establishment of an international regime to implement the principles in a more concrete form.

In 1970, the General Assembly also decided to convene another conference on the law of the sea. The mandate of the Conference was not limited to the deep seabed. UNCLOS III was instructed to “adopt a convention dealing with all matters relating to the law of the sea.” Thereby, the General Assembly sanctioned the reform of the whole law of the sea in order to address the concerns of states over the 1958 Conventions. According to one author, “nothing was now to be taken for granted; everything was to be looked at again in the light of new political, economic and technological realities.” UNCLOS III was described by one of its participants as “the most comprehensive political and legislative work undertaken by the United Nations in its 38 years of existence.” Clearly there was a lot at stake for all states concerned and UNCLOS III was “as much a daring venture of international politics and international relations as an exercise in international law.” The politically charged atmosphere also affected the methods of law-making to be adopted by UNCLOS III. From the start, it was a drastically different process from previous attempts at codifying the law of the sea. The politicization of the law of the sea is partially reflected in the preparatory process of UNCLOS III. In contrast to UNCLOS I, the task of preparing for the conference was not delegated to the International Law Commission. It was thought the balancing of competing state interests could not be undertaken by a body of independent legal experts. As one commentator says, “states were simply unwilling to leave the promotion of their vital interests to the International Law Commission because they reasoned that only governmental representatives could effectively formulate solutions.” In particular, developing countries doubted the representativeness of the Commission and they had serious reservations about its conservative approach to codification. Instead, the preparatory work for the Conference was entrusted to the Seabed Committee, whose membership was increased in size to ninety-one members for this purpose. General Assembly Resolution 2750 (XXV) mandated the Committee to prepare draft treaty articles embodying the international regime for the deep seabed area and resources of the seabed beyond the limits of national jurisdiction as well as a comprehensive list of subjects and issues relating to the law of the sea to be dealt with by the Conference, including draft articles on such subjects and issues. The Seabed Committee met for six sessions between 1971 and 1973. Its final report consisted of six volumes of proposals and counter-proposals submitted by states, as well as a number of studies prepared by the UN Secretariat at the behest of the Committee.

Crucially, it failed to produce a draft treaty text. A further reflection of the political character of UNCLOS III was the fact that oversight of the Conference was undertaken by the First (Political) Committee of the UN General Assembly, rather than the Sixth (Legal) Committee. Many commentators have stressed the enormity of the task with which UNCLOS III was charged. It is true that the scope of the issues had grown since the first serious attempt at codification through the International Law Commission. Deep seabed mining, the marine environment and the transfer of marine technology were now key issues in the discussions. More significantly, perhaps, the number of states involved in the negotiations had dramatically increased. Whereas 86 states had attended the 1958 Conference, over 160 states participated at various stages of UNCLOS III. Resolution 3067 (XXVIII) explicitly called for universality of participation at the Conference and it mandated the UN Secretary General to invite all Members States of the United Nations or its specialized agencies, members of the International Atomic Energy Agency, contracting parties to the ICJ Statute, as well as Guinea-Bissau and North Viet-Nam, who at the time were not yet members of the United Nations. In addition, invitations were sent to certain inter-governmental and non-governmental organizations and the UN Council for Namibia. In other words, this was intended to be an attempt at law-making by the international community as a whole. The negotiations at UNCLOS III were politically charged. Traditional groupings, such as the G77 or the geographical groups inherited from the UN system, did play a role in the negotiations. More importantly, several interest groups spontaneously emerged from the negotiating process such as the coastal states, the strait states, the archipelagic states, and the landlocked and geographically disadvantaged states. The conflict between the developing countries and industrialized states was one of the most striking dynamics at the Conference. The chief area of controversy between these two factions was the somewhat unusual topic of deep seabed mining, an issue that would ultimately cause the failure of the Conference to agree a text by consensus. However, political alliances and divisions often varied depending on the issues under discussion. Whilst the industrialized states were largely unified on the issue of deep seabed mining, divisions arose over questions of maritime pollution depending on whether a state identified itself as a coastal state or a maritime state. The challenge for the Conference was to balance all of these diverse interests.

The Limits of the LOS Convention as a Treaty Instrument

From the outset, the object of UNCLOS III was to conclude a treaty covering all aspects of the law of the sea. At its final session in 1982, the Conference fulfilled this aim by adopting the LOS Convention which was subsequently opened for signature on 10 December 1982.

The LOS Convention aspires to universal participation. It is open to formal acceptance by all states, as well as a range of non-state actors which had attended the Conference. The target of universal participation has been endorsed by the General Assembly which regularly urges states that have not done so to become parties to the Convention.

States can consent to be bound by the Convention through ratification or accession. The LOS Convention required sixty ratifications or accessions in order to come into force. It finally did so on 16 November 1994. States accepting the Convention following its entry into force will become bound thirty days after indicating their acceptance. As of May 2007, the number of States Parties was 155. Whilst this includes a significant proportion of the international community, it still falls short of the 192 states who are currently members of the United Nations.

According to the fundamental doctrine of pacta tertiis nec nocent prosunt, a treaty only creates legal obligations for states which have consented to be bound. The International Law Commission describes this doctrine as "one of the bulwarks of the independence and equality of States", whilst McNair says that "both legal principle and common sense are in favor of the rule … because as regards States which are not parties … a treaty is res inter alios acta."

The limitations of treaties as instruments for the creation of universal law are thus plain. From the strict perspective of the law of treaties, it is necessary for all states to become party to the Convention in order for it to successfully create a universal framework for the law of the sea.

Given these inherent limitations, it may seem strange that states continue to use treaties as a way of developing international law. The answer may be a lack of any viable alternative. As McNair noted as long ago as 1930, the treaty is "the only and sadly overworked instrument with which international society is equipped for the purpose of carrying out multifarious transactions." Little has changed since that time. More than sixty years later, another author similarly concludes, "law-making by treaty is the only organized procedure for the conscious, rational positing of legal rules, at least at the universal level."

International legislation has occasionally been mooted, but the idea of an instrument capable of binding all states ipso facto without their consent is not yet generally accepted. Danilenko, for one, says "there is no evidence that by entering into negotiations leading to treaty norms expressing general interests, members of the international community endorse legislative techniques based on majority lawmaking."

One possible exception is the power of the UN Security Council to impose obligations on Members of the United Nations. Whilst most Security Council resolutions deal with specific threats to international peace and security involving a small number of states, some are drafted in general terms. These resolutions come close to legislation. Nor is the Security Council alone in possessing the ability to bind states by its decisions. Some other institutions have powers to create and amend standards which are binding on states without the need for their further consent. However, it should be remembered that all of these law-making powers are conferred by treaty in the first place. Moreover, they can only be exercised within strict limits. Such powers are better understood as delegated law-making than legislation per se.

It is inappropriate to describe the LOS Convention as a legislative act. Yet, there may be other ways to account for the transition of the Convention from treaty instrument to universal law. The first stage of the analysis is to look to the law of treaties for any exceptions to the *pacta tertiis* principle which would allow the application of the LOS Convention to third states without them being a party. Secondly, it is necessary to inquire whether the conclusion of a treaty such as the LOS Convention can influence the creation of customary international law.

Treaty Rights and Obligations for Third States

The first question is to what extent states can have rights or obligations under a treaty without being a party. The general principle is that treaties are only binding on states that have consented to be bound.

One exception to this principle is that a treaty can confer rights on third states, sometimes referred to as "stipulation pour autrui". In the **Free Zones Case**, the PCIJ confirmed that third states could enjoy rights under a treaty without becoming a party to the treaty itself. The Court emphasized the importance of the intention of the contracting parties to this effect, as well as the consent of the third state. On the evidence, the Court held that the parties to the 1815 Treaty of Paris and associated instruments had intended to extend to Switzerland a right to the withdrawal of the French customs barrier behind the political frontier and that Switzerland could rely on that right in the proceedings against France.

The rules relating to the rights of third states under treaties are now found in the 1969 Vienna Convention on the Law of Treaties. Article 36 provides in part, "a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto." According to this provision, there are two conditions which must be satisfied before a right is conferred on a third state. Firstly, the parties to the treaty must have intended to confer a right on a third state. Secondly, the third state itself must consent to the conferral of the right. The consent of third parties to accept a right under a treaty to which it is not a party shall however be "presumed so long as the contrary is not indicated."

As well as conferring rights, a treaty can also create obligations for third states without those states actually becoming party to the whole treaty. This situation is covered by Article 35 of the Vienna Convention on the Law of Treaties. Article 35 again stresses the importance of the intention of the parties to the treaty to create an obligation for a third State and the consent of the third state to that obligation. The principal difference between the treatment of rights and obligations in this context is the form of consent. According to Article 35, a third party must accept an obligation under a treaty in writing. The ILC commentary confirms that such obligations are not strictly speaking based upon the treaty itself but on a second collateral agreement between the parties to the treaty and the third state.

The intention of the contracting parties to confer a right or obligation is central to these provisions. In these circumstances, the parties to the treaty may be characterized as offering a right to a third state or inviting a third state to undertake an obligation.

How one identifies the intentions of the parties is an important issue. The standard of proof is a high one – in the words of the PCIJ, "it cannot be lightly presumed that stipulations favorable to a third State have been adopted with the object of creating an actual right in its favor."

The principal means of identifying intention should be the text of the treaty itself and the normal rules of treaty interpretation apply. A third state which is afforded rights or obligations under a treaty need not be specifically named; a treaty may direct itself to all states or to a specific class of states belonging to an identifiable category. Further evidence of intention may also be found in *travaux préparatoires*. Such evidence, however, should not be used to infer an intention that cannot be supported by the text of the treaty.

In the case of the UNCLOS, there are no express stipulations which clearly and unambiguously confer rights or obligations on third states. It is true that many provisions in the Convention refer to "States" or to "all States" as opposed specifically to "States Parties". For example, Article 2(1) says that "the sovereignty of a coastal State extends, beyond its land and territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea." This provision seemingly refers to coastal States in general rather than coastal States Parties. Similar phrasing is found throughout the Convention with the exception of Parts XI, XV, and XVII which are largely addressed to States Parties alone.

Does this generic terminology demonstrate the intention of the drafters to grant rights to third states? St Skourtos asserts that "with regard to the comprehensive objective, the universal aim and the system applied by the Convention concerning the conferment of rights and the imposition of obligations … it cannot be lightly presumed that this differentiation of terms is to be regarded as meaningless." However, it is not obvious that this conclusion is supported by other evidence. Lee argues that "the intent may most appropriately be ascertained from official statements made by representatives of states participating in [UNCLOS III]." A survey of the *travaux préparatoires* of the LOS Convention reveals strong disagreement amongst states over the precise impact of the Convention on third states with many delegates arguing that the Convention is a package deal which cannot be selectively applied by states. The issue of interconnecting rights and obligations was stressed, for instance, by Deputy Foreign Minister Gouzhenko of the Soviet Union, who said at the closing session of the Conference that "the Convention is not a basket of fruit from which one can pick only those one fancies. As is well known, the new comprehensive Convention has been elaborated as a single and indivisible instrument, as a package of closely interrelated compromise decisions."

It is the interconnection of the LOS Convention that causes problems for the application of Articles 35 and 36 of the Vienna Convention. These provisions allow third states to selectively choose individual rights and obligations under a treaty. Yet, this possibility would appear to have been against the wishes of many states at UNCLOS III. Further support for this view can be found if one considers the wider context of the Convention. Article 309 of the Convention prohibits reservations which are not expressly permitted. Allowing third states to selectively claim rights and obligations under the LOS Convention would undermine this provision.

Indeed, the differential treatment of rights and obligations could be problematic for many multilateral treaties. In his analysis, Sinclair notes that most treaties confer rights and obligations simultaneously and the two can often be intertwined. Moreover, although Article 36(2) allows conditions to be attached to rights conferred on third states, Chinkin notes that "onerous conditions could, in the opinion of a third party, transform such a right into an obligation." These issues are not satisfactorily resolved by the Vienna Convention.

There is a further question of whether the provisions on third states are applicable to general multilateral treaties such as the LOS Convention. Third state is defined by the Vienna Convention as "a State not party to a treaty". This is a very broad definition and it makes no distinction between those states which can become a party and those states which cannot. Nevertheless, the underlying policy of these provisions suggests that they should have a limited application. It is submitted that the concept of stipulation pour autrui, literally “for other persons”, only applies where a state is not able to become a party to the treaty by signature, ratification or accession.

This argument finds some support in the fifth report on the law of treaties by Fitzmaurice where he suggests that the presumption that a treaty has no effects for third states is “enhanced, and may become absolute, in the case of these treaties which contain specific provision for the participation of third states, either by leaving the treaty open for signature or subsequent ratification by states other than the original signatories, or by the inclusion of an accession clause or its equivalent.” Fitzmaurice admits there is no authority for this position, but he asserts that it is correct as a matter of principle. He explains, “it seems clear that when a treaty itself makes provision for the admission of third states, then the correct method of procedure, if those third States wish to benefit from, or to enjoy the rights provided by the treaty or if they are prepared to assume obligations, is for them to avail themselves of the faculty of becoming parties.”

These comments raise questions over when the provisions on third states apply? The concept of stipulation pour autrui is aimed at the situation where a group of states concludes a treaty which has ramifications for other states who are not able to become a party to the treaty. Examples are the 1815 Treaty of Paris and the 1919 Treaty of Versailles, which were considered by the PCIJ in the **Free Zones Case**. These instruments were both peace treaties concluded by a small number of powerful states following the cessation of international conflicts. Despite the limited number of parties to the negotiations, the outcome nevertheless had the character of an international settlement that affected numerous third states who had not been involved in the negotiations and who could not become a full party to the treaty. It was therefore necessary to invoke the rules on third states in order to give full effect to the treaty.

Many modern multilateral treaties, on the other hand, are negotiated in very different circumstances. As Tunkin pointed out during the ILC discussions on this issue, “if a state had a legitimate interest in the subject-matter of a treaty, it should be invited to the Conference formulating the treaty or at least consulted during its formulation.” All states and many other interested actors were involved in the drafting of the LOS Convention. Moreover, any state, whether or not it attended UNCLOS III, is free to become a party to the Convention. It is submitted that the participation of all states in the drafting of most modern multilateral treaties negates the need for invoking the principles on third party rights and obligations. Similar observations were made by several members of the ILC in their discussion on Articles 35 and 36. The special rapporteur himself noted that “it was unlikely that the parties to a general multilateral treaty would resort to devices of the kind envisaged…” Thus, on the basis of these arguments, the application of the provisions on third states to general multilateral treaties such as the LOS Convention is not appropriate.

The UNCLOS as an Objective Regime.

Another doctrine supporting the application of a treaty to non-parties is that of objective regimes. Support for the doctrine is found in the judgment of the PCIJ in the **Case of the S.S. Wimbledon** where the Court considered the implementation of Part XII, Section VI of the 1919 Treaty of Versailles which sets up a treaty regime for the Kiel Canal. The S.S. Wimbledon was a ship flying the flag of the United Kingdom. It had been chartered by a French company to carry munitions to the port of Danzig at the time when Poland was at war with Russia. The ship was stopped from passing through the Kiel Canal by the German authorities because Germany claimed that it was bound by its status as a neutral state not to allow the transit of weapons to a warring party. The UK, France, Italy and Japan brought a claim before the PCIJ claiming that Germany was under a duty to guarantee free access through the Kiel Canal under the terms of the Treaty of Versailles. The Court held that the terms of Article 380 created an international waterway “intended to provide easier access to the Baltic for the benefit of all nations of the world.” It is clear from this decision that Part XII, Section VI of the Treaty of Versailles creates a set of rights that are invocable by all states, whether or not they are party to the treaty. Nor was it a matter of a single right being conferred on these states; the Court treated Part XII, Section VI of the Treaty as an inseparable whole.

The doctrine of objective regimes was considered by the International Law Commission in its codification of the law of treaties, although ultimately the Commission decided not to include it in the draft articles because it was deemed unlikely to meet with the general acceptance of states. Nevertheless, Sinclair insists that “it must not be assumed that the deliberate decision of the Commission and the Conference not to make special provision for treaties creating ‘objective regimes’ in the series of articles on treaties and third states in the Vienna Convention on the Law of Treaties constitutes a denial of the existence of this category of treaty.” Indeed, the doctrine can still find support in the writings of many commentators. Aust writes that certain treaties have been held to create a status or regime valid erga omnes, including demilitarisation treaties, waterway regimes or a regime for a special area, for example Antarctica.

Although the draft articles on objective regimes prepared by the special rapporteur were not ultimately submitted to the Vienna Conference on the Law of Treaties, this work nevertheless provides a useful account of the scope of the doctrine. Waldock, as special rapporteur on the law of treaties, describes a treaty as creating an objective regime “when it appears from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the general interest general obligations and rights relating to a particular region, State, territory, locality, river, waterway, or to a particular area of sea, sea-bed, or air-space; provided that the parties include among their number any State having territorial competence with reference to the subject matter of the treaty, or that any such State has consented to the provision in question.” Waldock’s draft article on objective regimes required states to expressly or impliedly accept the objective regime. Failure to oppose the treaty within a certain time limit amounts to tacit acceptance.

It can be seen from this short analysis that the concept of objective regimes shares many similarities with third state rights and obligations under Articles 35 and 36 of the Vienna Convention on the Law of Treaties. The creation of an objective regime must be clear from the intention of the parties to the treaty. Consent also plays a central role in Waldock’s conception of objective regimes. Yet, there are several aspects of the doctrine of objective regimes which differentiate it from Articles 35 and 36 of the Vienna Convention. Firstly, as noted above, it applies to a whole regime as opposed to individual treaty articles.

Furthermore, the doctrine of objective regimes as proposed by Waldock would only appear to be applicable to certain types of territorial regimes.
Can this doctrine be invoked to support the universal application of the LOS Convention? Unlike Article 35 and 36, it cannot be argued that the doctrine of objective regimes undermines the package deal achieved at UNCLOS III. Indeed, this doctrine emphasizes the interconnection of certain treaty articles.
Notwithstanding the controversial question of the intention of states attending UNCLOS III, it is not clear that Waldock considered the doctrine was applicable to treaties such as the LOS Convention. In his commentary, he makes clear that his conception of objective regimes would not apply to general law-making treaties, a category into which the LOS Convention arguably falls. Waldock explains, "it excludes from the article cases where the parties have a general treaty-making competence with respect to the subject-matter of the treaty but no greater competence than any other state; in other words, it excludes law-making treaties concerned with general international law or with areas not subject to the exclusive jurisdiction of any state." Therefore, this doctrine, like the provisions on third states generally, are not intended to be applied to general multilateral treaties to which any state can become a party through ratification or accession.
It follows that the law of treaties cannot account for the application of a general multilateral treaty such as the LOS Convention to non-parties. Therefore, it is necessary to look beyond the law of treaties in order to account for any law-making impact that they might have.

Beyond the Law of the Sea Convention

UNCLOS III successfully managed to settle many of the outstanding controversies that had precipitated the collapse of previous attempts to codify the law of the sea. As a consequence, the LOS Convention is hailed as a milestone in the international legal order. It has been described by one author as "a shining example of international cooperation, diplomacy and the role of international law in the regulation of international affairs and is considered to be one of the most complex and ultimately successful international diplomatic negotiations that took place in the twentieth century."
Whilst the LOS Convention has had huge success in stabilizing state claims to jurisdiction over the oceans, it is also true that "the law needs to be flexible and able to change to reflect new circumstances whether it be increased national sovereignty, greater environmental protection, or enhanced global security."The LOS Convention cannot be seen as a fait accompli. The law of the sea, like all international law, must be able to balance the need for stability with the desire for change.
How the LOS Convention evolves in light of the ever-changing challenges facing the international community will be considered in the following chapters. In doing so, it will be necessary to take into account the interplay of written instruments and custom, as well as the role of international institutions in the law-making process.
The fact that the Convention reflects a consensus of the international community may pose challenges to the future development of the law of the sea. As Treves notes, "the impact of the Convention on customary international law, on whose crystallization and development it exercises a powerful influence, makes the Convention, as well as the main substantive questions it addresses, a matter of interest for all states even beyond the circle of States

Parties." It is in this context that questions of participation, decision-making procedures and other aspects of legitimacy are relevant.

What is clear from this chapter is that international institutions are a vital aspect of modern law-making techniques and they will form a central part of the analysis of the ways in which the law of the sea evolves. There are many institutions which have an interest in maritime affairs. Their characteristics vary from general political organizations such as the UN General Assembly to technical organizations such as the International Maritime Organization. Moreover, some institutions are created by the LOS Convention itself. The role that these types of institutions play will be considered over the following chapters. Many of the issues that have been addressed in this chapter will be further considered in the context of these other institutions. What role does consensus play in law-making by international institutions? How do written instruments influence the development of universal international law? The analysis will also demonstrate to what extent the law-making techniques utilized at UNCLOS III have survived or been further developed by other institutions in order to maintain the balance of interests in the law of the sea.

MODULE-III

UN, IMO AND INTERNATIONAL MARITIME LAW

UNITED NATIONS AND INTERNATIONAL MARITIME LAW

Life itself arose from the oceans. The ocean is vast, covering 140 million square miles, some 72 per cent of the earth's surface. Not only has the oceans always been a prime source of nourishment for the life it helped generate, but from earliest recorded history it has served for trade and commerce, adventure and discovery. It has kept people apart and brought them together.

Even now, when the continents have been mapped and their interiors made accessible by road, river and air, most of the world's people live no more than 200 miles from the sea and relate closely to it.

Freedom of the Seas

The oceans had long been subject to the freedom of-the-seas doctrine - a principle put forth in the 17th century, essentially limiting national rights and jurisdiction over the oceans to a narrow belt of sea surrounding a nation's coastline. The remainder of the seas was proclaimed to be free to all and belonging to none. While this situation prevailed into the twentieth century, by mid-century there was an impetus to extend national claims over offshore resources.

There was growing concern over the toll taken on coastal fish stocks by long-distance fishing fleets and over the threat of pollution and wastes from transport ships and oil tankers carrying noxious cargoes that plied sea routes across the globe. The hazard of pollution was ever present, threatening coastal resorts and all forms of ocean life. The navies of the maritime powers were competing to maintain a presence across the globe on the surface waters and even under the sea.

United Nations Law of the Sea Convention (UNCLOS)

The United Nations has long been at the forefront of efforts to ensure the peaceful, cooperative, legally defined uses of the seas and oceans for the individual and common benefit of humankind. Urgent calls for an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction set in motion a process that spanned 15 years and saw the creation of the United Nations Seabed Committee, the signing of a treaty banning nuclear weapons on the seabed, the adoption of the declaration by the General Assembly that all resources of the seabed beyond the limits of national jurisdiction are the common heritage of mankind and the convening of the Stockholm Conference on the Human Environment.

The UN's groundbreaking work in adopting the 1982 Law of the Sea Convention stands as a defining moment in the extension of international law to the vast, shared water resources of our planet. The convention has resolved a number of important issues related to ocean usage and sovereignity, such as:

- Established freedom-of-navigation rights
- Set territorial sea boundaries 12 miles offshore
- Set exclusive economic zones up to 200 miles offshore
- Set rules for extending continental shelf rights up to 350 miles offshore
- Created the International Seabed Authority
- Created other conflict-resolution mechanisms (e.g., the UN Commission on the Limits of the Continental Shelf)

Protection of marine environment and biodiversity

The United Nations Environment Programme (UN Environment), particularly through its Regional Seas Programme, acts to protect oceans and seas and promote the environmentally sound use of marine resources. The Regional Seas Conventions and Action Plans is the world's only legal framework for protecting the oceans and seas at the regional level. UNEP also created The Global Programme of Action for the Protection of the Marine Environment from Land-based Activities. It is the only global intergovernmental mechanism directly addressing the connectivity between terrestrial, freshwater, coastal and marine ecosystems.

The United Nations Educational, Scientific and Cultural Organization (UNESCO), through its Intergovernmental Oceanographic Commission, coordinates programmes in marine research, observation systems, hazard mitigation and better managing ocean and coastal areas.

The International Maritime Organization (IMO) is the key United Nations institution for the development of international maritime law. Its main role is to create a regulatory framework for the shipping industry that is fair and effective, universally adopted and universally implemented.

Marine shipping and pollution

To ensure that shipping is cleaner and greener, IMO has adopted regulations to address the emission of air pollutants from ships and has adopted mandatory energy-efficiency measures to reduce emissions of greenhouse gases from international shipping. These include the landmark International Convention for the Prevention of Pollution from Ships of 1973, as modified by a 1978 Protocol (MARPOL), and the 1954 International Convention for the Prevention of Pollution of the Sea by Oil.

Polar Code

In 2014, important regulatory developments in the field of transport and trade facilitation included the adoption of the International Code for Ships Operating in Polar Waters (Polar Code), as well as a range of regulatory developments relating to maritime and supply chain security and environmental issues.

Piracy

In recent years there has been asurge in the piracy off the coast of Somalia and in the Gulf of Guinea. Acts of piracy threaten maritime security by endangering, in particular, the welfare of seafarers and the security of navigation and commerce. These criminal acts may result in the loss of life, physical harm or hostage-taking of seafarers, significant disruptions to commerce and navigation, financial losses to shipowners, increased insurance premiums and security costs, increased costs to consumers and producers, and damage to the marine environment.

Pirate attacks can have widespread ramifications, including preventing humanitarian assistance and increasing the costs of future shipments to the affected areas. The IMO and UN have adopted additional resolutions to complement the rules in the Law of the Sea Convention for dealing with piracy.

SPECIALIZED BODIES ESTABLISHED BY UNCLOS

1. International Seabed Authority

The International Seabed Authority is an autonomous international organization established under the 1982 United Nations Convention on the Law of the Sea and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.

The International Seabed Authority (ISA) is an intergovernmental body based in Kingston, Jamaica, that was established to organize, regulate and control all mineral-related activities in the international seabed area beyond the limits of national jurisdiction, an area underlying most of the world's oceans. It is an organization established by the United Nations Convention on the Law of the Sea.

The Mandate of the International Seabed Authority

Under the 1982 United Nations Convention on the Law of the Sea (the Convention), the International Seabed Authority (ISA) is the organization through which States Parties to the Convention shall, in accordance with Part XI of the Convention, organize and control activities in the "Area", that is, the area of the seabed beyond national jurisdiction. -his is to be done in accordance with the regime established by Part XI of the Convention and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (the 1994 Implementation Agreement), which was adopted on 28 July 1994 by the United Nations General Assembly. The magnitude of the task is not to be underestimated. The ocean floor beyond national jurisdiction covers some 50 per cent of the world's surface. The phrase "activities in the Area" is a term of art, defined in the Convention, and refers chiefly to the exploration for and subsequent mining of deposits of minerals. These mineral deposits, which include polymetallic nodule deposits or sulphides on the ocean floor or minerals embedded in cobalt rich crusts on the tops and flanks of seamounts, are of potential economic interest because they are rich in cobalt, copper, nickel and manganese, as well as containing traces of gold, silver and other rare metals. There are formidable economic and technical barriers to commercial mining of the deep seabed. Nevertheless, when it does take place, it can be expected that mining would occur in depths of up to 6,000 metres on the abyssal plain, but also in biologically rich ocean areas, such as seamounts and mid-ocean ridges where hydrothermal vents are found. For this reason, the legal mandate of the ISA is drawn sufficiently broadly to, and indeed requires, the ISA to take steps to monitor, control and prevent serious harm to the marine environment as a result of mining activities. Thus, whilst the ISA aims to encourage the development of seabed mineral resources, it also works to ensure that biodiversity within the marine environment is sustained. A key factor for the ISA is that, although a significant amount of basic and applied research has been done in the past or is still in progress, it is broadly accepted that the current level of knowledge and understanding of deep sea ecology is not yet sufficient to allow conclusive risk assessment of the effects of large-scale commercial seabed mining. Effective administration of the Area requires knowledge of the Area. In order to be able in future to manage the impacts from mineral development in the Area in such a way as to prevent serious harm to the marine environment, it will be essential for the ISA to have better knowledge of the state and vulnerability of the marine environment in mineral-bearing provinces. This includes, inter alia, knowledge of baseline conditions in these areas, the natural variability of these baseline conditions and the relationship with impacts related to exploration and mining. For this reason, all exploration contracts issued by the ISA require contractors to organize and provide training programmes for personnel from developing countries. However, the ISA's responsibilities go wider still. Under Articles 143 and 145 of the Convention, in addition to its core function of encouraging the development of seabed mineral resources, the ISA also has a general responsibility to promote and encourage the conduct of marine scientific research in the Area for the benefit of mankind as a whole and to disseminate the results of such research. This implies that research and scientific knowledge should be shared widely amongst the international science community so scientists around the world can benefit from the findings. Furthermore, scientific study in the international seabed area should include scientists and researchers from both developing and developed countries. Unfortunately, the financial costs of conducting research in the deep seabed often prohibit the involvement of developing nations' scientists and other personnel. Lack of technology and expertise in a field that remains on the cutting edge of science may also contribute to fewer researchers from developing countries being involved in deep sea research initiatives. In reality, therefore, pending the start of commercial mining of the seabed, the most immediate and practical way in which the ISA can carry out its responsibilities under the Convention is to try to make the benefits of scientific research more widely accessible to developing States which would otherwise be unable to participate in such efforts.

2. Commission on the Limits of the Continental Shelf

The Commission on the Limits of the Continental Shelf was established to facilitate the implementation of UNCLOS in respect of the establishment of the outer limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The responsibilities of the Commission are set forth in Annex II of UNCLOS.

The Establishment of the Commission on the Limits of the Continental Shelf and Its Functions

The entry into force of the United Nations Convention on the Law of the Sea (UNCLOS) is a milestone in the development of the law of the sea. For the first time in history, the UNCLOS lays down the rights and obligations that every State has in territorial sea, contiguous zone, exclusive economic zone, high seas, continental shelf, international seabed area and other regions, and becomes a comprehensive code governing the relationship of rights and obligations that each State has in ocean space. More importantly, the UNCLOS specifies the legal status of each part of the seas and seabed and plays a role in settling disputes between States over ocean sovereignty. Entitlements to all water areas shall be claimed according to the rules of the UNCLOS, including territorial sea which a State has sovereignty over, exclusive economic zone that a State has sovereign rights in, or the international seabed area that is common heritage of mankind. The UNCLOS also stretches out the last shred of hope for ocean enclosure movement to the coastal States. In line with Article 76 of the UNCLOS, the coastal State may establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, and also extend its entitlement up to 350 nautical miles from the baselines on some conditions. Quite different from the coastal State that has inherent entitlement to the continental shelf within 200 nautical miles, the State with a broad continental shelf should submit its application in accordance with the provisions of the UNCLOS and obtain the entitlement with approval. Hence, Article 76 of the UNCLOS and Annex II provide the establishment of the Commission on the Limits of the Continental Shelf (hereinafter "the Commission"), and confer upon the Commission the power over affairs concerning the extended continental shelf. During June 16-20, 1997, the 21 elected members of the Commission held the first session of the Commission, and elected Mr. Yuri Borisovitch Kazmin (Russian Federation) by acclamation as its Chairman. Since then, the Commission officially came into operation and performed its important duties conferred by the UNCLOS. According to Article 3, Annex II of the UNCLOS, the Commission has two functions: first, to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea; second, to provide scientific and technical advice, if requested by the coastal State concerned during the preparation of the data said above. These two functions work as an organic whole and neither of them can be underestimated. The first function represents the substantive work of the Commission as it directly concerns whether the entitlement claimed by the coastal State to the outer continental shelf can be realized and, on the other hand, also decides whether benefits enjoyed by the international community can be effectively guaranteed. The second function, to a certain extent, can be regarded as the obligations borne by the Commission to the State Parties. The scientific and technical advice not only is assistance to relevant coastal States, but also reflects the legal status of the Commission from a side view.

Considering the importance of its status and functions, the birth of the Commission attracted great attention and expectation in the international community. At the same time, the legal regime on which it was established is brand-new and the scientific and technical difficulties that it is confronted with are very complicated. Both the Commission itself and the work on outer continental shelf that it deals with will continuously develop and reform in practices.

Status of the Commission in International Law

1. The Commission Is Not an International Organization

After World War II, international organizations became an important player in international communities and produced profound influence on the development of international law and the construction of international order. The status of international organizations has become a more complicated issue along with changes in international situation and diversification of multilateral cooperation among countries. Scholars and international institutions, however, both particularly emphasize that independent legal personality is the fundamental attribute of an international organization. Professor Schermers believes that, “international organizations are defined as forms of cooperation founded on an international agreement, having at least one organ with a will of its own and established under international law.” During the ongoing preparation of the Draft Articles on the Responsibility of International Organizations, the International Law Commission also points out that “international organization' means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality." In this view, the Commission, though established by a treaty and governed under international laws, cannot be regarded as an international organization due to the lack of independent legal personality. This is not only to pinpoint the definition, but also to place emphasis on how to regard the power and authority the Commission may have. An international organization may have the implicit power necessary to perform functions specified in its charter, and interpret the charter serving as its cornerstone more purposefully. Therefore, the Commission, because it is not an international organization, lacks freedom and flexibility since it must conduct its work strictly in accordance with the clear authorization of the UNCLOS.

2. The Commission Is a Treaty Body Established by the UNCLOS

The Commission is established pursuant to Article 76 of the UNCLOS and has the function to supervise the implementation of Article 76(8). While the Commission has no independent legal personality, it has a will of its own. It urges State Parties to implement relevant provisions of the UNCLOS through recommendations as its own working methods. Similar to other treaty bodies, the Commission does not have its own secretariat and separate financial source, and largely relies on the UN's Secretariat and financial allotments. Generally speaking, either the charter of some international organization or the organ under an international organization establishes a treaty body. The Commission is obviously an exception. The Commission was established by the General Assembly of the State Parties of the UNCLOS and an organ with the assistance from UN Secretariat and particularly the Division of Ocean Affairs and the Law of the Sea. Different from the other two organs (International Tribunal for the Law of the Sea and the International Seabed Authority) established by the UNCLOS at the same time, the Commission is more like a steadfast guardian of the UNCLOS instead of a positive practitioner. This is partly because the other two organs are international organizations with independent legal personality having more sufficient resources and higher initiative in their work, and partly because provisions of the UNCLOS in the charge of the Commission are voluntarily introduced by interested State Parties and the Commission merely plays a role of judgment and supervision from the perspective of the UNCLOS. Again, this proves that the Commission need not and should not voluntarily involve itself in the process of implementation of the UNCLOS by State Parties. Instead, it should comment and supervise in strict accordance with the authorization of the UNCLOS.

3. The Commission Is an Expert Organization Established by the UNCLOS

There are generally two types of treaty bodies: the first type includes those consisting of governmental officials of State Parties, represented by the general assembly of multilateral environmental agreements, for example, the United Nations Framework Convention on Climate Change; the second type includes those consisting of experts from fields concerned, represented by the treaty body of international human rights, for example, the Committee on the Elimination of Racial Discrimination. Comparatively speaking, the Commission is the second type because its members are experts with independent identities and do not speak for any governments. The first type of treaty bodies reflects to a greater extent intergovernmental wills as its members are from governments of State Parties. It is a form of intergovernmental, international, and multilateral cooperation in a broad sense. Their task is usually to elaborate on the basic framework established by a multilateral treaty and carry out the principled consensus previously reached by State Parties via regular meetings. As a result, this type of organization can more easily and directly reflect the wills of State Parties in view of its staff composition, thus facilitating the formation of new consensus. On the other hand, their tasks also require them to continue efforts to achieve goals provided in the treaty. As an expert organization, the Commission has more independence. While broad representativeness is considered to the greatest extent during the selection of the Commission's members, all members of the Commission hold their positions individually. They neither represent any government nor receive instructions from any government. They express their opinions with their expertise and review whether the act of a State Party claiming outer continental shelf is consistent with the Convention.

Actual Force of the Commission's Recommendations

After the analysis from theoretical perspective, we should now examine the actual force of the Commission's recommendations with reference to specific provisions of the UNCLOS and the practices of the Commission. First, the Convention does not directly define the force of the Commission's recommendations. Instead, it states that “the limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.” This provision does not explain the force of the recommendations, but says the limits of shelf established with the adoption of these recommendations by a coastal State shall be binding. Presumably, the targets "bound" hereby include not only coastal States but also other State Parties. In other words, a delimitation decision made according to the Commission's recommendations should be recognized and respected by other State Parties. This shows that the Commission's recommendations are critical as to whether the international community can recognize the delimitation of a coastal State. We should also note that the UNCLOS does not require coastal States to delimitate completely in accordance with the Commission's recommendations, and merely requires coastal States to delimitate on the basis of these recommendations. Herein lies the problem about how to understand the phrase "on the basis of these recommendations." In the Beef Hormone Dispute (the United States and Canada v. European Communities) lodged to the WTO dispute settlement system, the appellate body disagreed with the Panel's interpretation that "based on" meant the same thing as "conform to," explaining that the animal and plant inspection and quarantine measures which are based on a given international standards do not require the achievement of the same level of sanitary protection for two parties. Similarly, the UNCLOS does not require coastal States to use the Commission's recommendations as their delimitation standards and allows coastal States to exercise discretion. Additionally, no other people other than State applicants and the Secretary-General of the United Nations know about the specific content of the Commission's recommendations. They don't know if the recommendations contain clear-cut delimitation methods or propose improvements in principles. If the Commission's recommendations provide some factors that a coastal State should consider in revising its submissions, as the Secretary-General said in the report of Oceans and the Law of the Sea, these recommendations accordingly cannot be the delimitation submission. On the basis of the preceding analysis, we believe that the UNCLOS confers quite high authority upon the

Commission's recommendations, making them the basis that coastal States use to establish binding outer limits of the continental shelf beyond 200 nautical miles. Meanwhile, the UNCLOS doesn't completely deprive the coastal States of their right to make final decisions based on the Commission's recommendations. Second, judging by the rules of procedure of submission to the Commission, the Rules of Procedure of the Commission, the Commission always has effective supervision over whether or not a coastal State has adopted its recommendations, making these recommendations too important to be ignored. When a coastal State makes a submission, the Commission would usually give recommendations for revision to the coastal State unless the Commission totally agrees with the submission. The coastal State, whether or not it expresses its intention to adopt the recommendations, must make a revised or new submission to the Commission and then go through the consideration of the Commission again. In the case that the Commission approves the revised or new submission, the coastal State may establish outer limits thereunder. The Commission will make further recommendations for revision if it thinks the revised or new submission does not completely adopt previous recommendations. For this sake, the Commission actually has the final power to judge if a coastal State has accepted its recommendations. We can say that the Commission uses its power of giving recommendations to continuously increase the de facto binding force of its recommendations. Third, judging by the considerations of the Commission on the submission of the Russian Federation, the Commission's recommendations have an actual impact on the success of a coastal State's delimitation. At present, the Commission completed only the first consideration of the first submission it received and gave recommendations. According to the summary of recommendations disclosed by the UN Secretary-General in his report, we can see that the Commission required the Russian Federation to submit additional information on certain elements of its submission and consider the examination results mentioned in the Commission's recommendations. Put simply, the first submission of the Russian Federation did not obtain the final approval of the Commission and needed to be further improved and revised. In fact, Russia seriously took the Commission's recommendations after receiving them and submitted to the Commission its comments and requested advice through governmental channels. The Commission's preliminary practices show that the coastal States give due respect and attention to the Commission's recommendations and make amendments to their submissions with reference to these recommendations. We must wait until Russia makes a new submission or the Commission makes further recommendations to see to what extent Russia has accepted the Commission's recommendations.

In conclusion, the Commission's recommendations are the indispensable reference to determine whether the submission of a coastal State is final and binding, though they are not the final judgment on whether the submission is appropriate.

HISTORY OF IMO

The importance of international co-operation in shipping has been recognized for centuries, and has long been manifested in maritime traditions such as ships taking refuge in foreign ports in the event of bad weather and going to the aid of others in distress, irrespective of their nationality.

In 1889 an international maritime conference in Washington, DC, United States discussed a proposal to set up a permanent international body to cater for the needs of shipping. This followed the establishment of a number of other international organization, such as the International Telegraph (now Telecommunications) Union (established 1865); the International (now World) Meteorological Organization (1873); and the Universal Postal Union (1874).

But the plan for a shipping body was rejected. The Conference announced: "for the present the establishment of a permanent international maritime commission is not considered expedient". The reason - although not stated explicitly - was that the shipping industry was suspicious of any attempt to control its activities and restrict its commercial freedom.

In 1945, the United Nations was established and, in the same decade, a number of international organizations were formed, each dealing with a different subject. The International Civil Aviation Organization (ICAO) was founded in 1944, the Food and Agriculture Organization (FAO) was created in 1945, the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1945 and the World Heath Organization (WHO) in 1947. All were members of the United Nations system.

In 1948, a Conference was held to establish a similar body for shipping.

The Geneva conference 1948

The Geneva conference opened in February 1948 and on 6 March 1948 the Convention establishing the Inter-Governmental Maritime Consultative Organization (IMCO) was adopted. (The name was changed in 1982 to International Maritime Organization (IMO).)

In the 1948 convention text, there was no reference to marine pollution or the environment, now among IMO's greatest concerns. Maritime safety was only referred to briefly, at the end of paragraph (a). The emphasis was on economic action to promote "freedom" and end "discrimination". Paragraphs (b) and (c) were of concern to a number of Governments who regarded promises to create "a world without discrimination" and to take action against "unfair restrictive practices", as dangerous interference in the practice of free enterprise.

In Part II of the Convention, dealing with the Organization's functions, Article 2 stated: "The functions of the Organization shall be consultative and advisory."

Article 3 (b) said that, in order to achieve the purposes set out in Article 1, IMO should "provide for the drafting of conventions, agreements, or other suitable instruments, and to recommend these to Governments and to intergovernmental organizations, and to convene such conferences as may be necessary". IMO was not given the authority itself to adopt treaties. Article 3 (c) said that IMO should "provide machinery for consultation among Members and the exchange of information among Governments".

It was expected in 1948 that Article 1 (b) in particular would prove controversial, because Article 4 stated: "When, in the opinion of the Organization, any matter concerning unfair restrictive practices by shipping concerns is incapable of settlement through the normal processes of international shipping business, or has in fact so proved, and provided it shall first have been the subject of direct negotiations between the Members concerned, the Organization shall, at the request of those Members, consider the matter."

The Convention provided for three main organs: the Assembly, the Council and the Maritime Safety Committee (MSC).

The Assembly was to consist of all Member States and to meet once every two years, with provision for extraordinary sessions if necessary. Its main tasks were to vote on the budget and decide financial arrangements, to determine the general policy of the Organization to achieve the purposes of Article 1 and to adopt resolutions submitted to it by the Council and the MSC.

The Council originally consisted of 16 Member States (now 40 – see below) elected by the Assembly, of which, according to Article 17:

(a) six shall be governments of the nations with the largest interest in providing international shipping services;
(b) six shall be governments of other nations with the largest interest in international seaborne trade;
(c) two shall be elected by the Assembly from among the Governments of nations having a substantial interest in providing international shipping services, and
(d) two shall be elected by the Assembly from among the governments of nations having substantial interest in international seaborne trade.

The main functions of the Council were to receive recommendations and reports of the MSC and transmit them to the Assembly; to appoint the Secretary-General, with the approval of Assembly; to submit budget estimates and, between sessions of the Assembly, to perform other functions of the Organization.

The MSC was also an elected body consisting of 14 Members elected by the Assembly (later expanded to include all Members – see below). Eight were to be the largest shipowning nations and the remainder were to be elected "so as to ensure adequate representation of other Members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas". Members were to be elected every four years and were to be eligible for re-election.

The duties of the MSC (Article 29) were to consider "aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for the prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements, hydrographic information, log-books and navigational records, marine casualty investigation, salvage and rescue and any other matters directly affecting maritime safety".

The Convention then went on to deal with the Secretariat, finances, voting (each Member was to have one vote), the headquarters (it was to be in London) and various other matters.

Article 59 stated that the Convention "would enter into force on the date when 21 States, of which seven shall each have a total tonnage of not less than 1,000,000 gross tons of shipping, have become parties to the Convention..."

The question of funding was left to the IMO Assembly to decide. Article 41 of the Convention stated that the Assembly "should apportion the expenses among the Members in accordance with a scale to be fixed by it after consideration of the proposals of the Council thereon".

Long process to entry into force

It was hoped that the Convention would enter into force relatively quickly. The Geneva conference established a preparatory committee to deal with such matters as rules of procedure, draft financial regulations and a provisional agenda. It also resolved that a conference to revise the International Convention for the Safety of Life at Sea (SOLAS), due to be held in London later in 1948, should draft provisions taking into account the duties and functions which had been accorded to IMO, the intention being to delegate future responsibilities for the Convention to IMO.

However, to some countries, much of Article 1 was unacceptable. Some were afraid that the treaty would lead to interference with their own national shipping industries and laws. Others felt that the IMO Convention was written by and for the benefit of the handful of countries which dominated shipping at that time.

By the mid-1950s the delay in ratifying the IMO convention was causing concern. The 1948 SOLAS Convention was already in need of revision. New maritime problems were also beginning to emerge, among them oil pollution. In 1954 a conference in London adopted the International Convention for Prevention of Pollution by Oil and agreed that it would become the responsibility of IMO once the new organization was established.

Gradually the number of Parties to the Convention increased. But many of them registered declarations or reservations which had the effect of greatly restricting the Organization's area of activities. Several used identical wording stating "it is in the field of technical and nautical matters that the Organization can make its contribution towards the development of shipping and seaborne trade throughout the world. If the Organization were to extend its activities to matters of a purely commercial or economic nature, a situation might arise where the Government (of the country concerned) would have to consider resorting to the provisions regarding withdrawal".

Entry into force 1958

The convention provided for entry into force "on the date when 21 States, of which seven shall each have a total tonnage of not less than 1,000,000 gross tons of shipping, have become Parties to the Convention".

On 17 March, 1958, the acceptance of the IMO Convention by Egypt and Japan brought the number of Parties to 21, and the Convention finally entered into force. But by the time the new Organization met for the first time in January 1959, so many reservations had been submitted that it was clear that it would not be able to engage in any activities that might be regarded as economic or commercial. It would have to confine itself to mainly technical issues, especially those involving safety as defined in Article 29.

The first Assembly met in January 1959 and much of its work concerned administrative arrangements, one of the most important being the apportionment of expenses among Member States. Resolution A.20(I) agreed that each Member should pay a basic assessment to be determined by the percentage of its contribution to the United Nations. Countries paying less than 2% would have to pay $US 2,000, while those paying 10% or more would have to pay $US10,000.

Each Member would additionally pay an additional assessment determined by the gross registered tonnage of its merchant marine, as shown in the latest edition of Lloyd's Register of Shipping, on the basis of one share for every 1,000 tons. In practice, therefore, contributions to the IMO budget are based primarily on shipping tonnage rather than national wealth. This system is unique in the United Nations system.

The 1964 amendments – entry into force 1967

The 1960s saw the emergence of new nations, many of which had an interest in maritime affairs. Membership of IMO was growing and in September 1964, at the 2nd Extraordinary Session of the Assembly, IMO adopted an amendment to the IMO Convention that increased the size of the Council to 18.

The main shipowning and trading nations continued to have six seats each, but a third group (c) was added consisting of six Member States "which have special interests in maritime transport or navigation and whose election to the Council will ensure the representation of all major geographic areas of the world".

The 1965 amendments – entry into force 1968

The 4th regular session of the Assembly in 1965 adopted an amendment to Article 28 increasing membership of the Maritime Safety Committee to 16. Of these, eight were to be elected from among the ten largest shipowning States and four to be elected in such a way as to ensure that Africa, the Americas, Asia and Oceania and Europe were all represented. The other four seats "shall be elected from among States not otherwise represented on the Committee".

The 1964 and 1965 amendments were important because they acknowledged the fact that the membership of IMO was not only growing but was changing. The dominance of the traditional maritime countries was coming to an end as more and more developing nations joined the Organization.

The 1974 amendments – entry into force 1978

At the 5th Extraordinary Session in October 1974, Council membership was increased to 24 Member States. This was done by enlarging Group (c) to 12 Member States.

More significantly, Article 28 was amended. The existing text was replaced by one line stating: "The Maritime Safety Committee shall consist of all Members".

These amendments did much to counter the criticism that IMO was still dominated by traditional shipowning nations. The change in membership was underlined by the adoption of resolution A.316 (ES.V) which noted that "a high number of the members of the Organization is constituted by developing countries and that such fact has not so far been reflected in the composition of the governing bodies of the Organization".

The resolution stated that the amendments were adopted "as a recognition of the need of wider and more equitable representation in the Council and all sectors interested in the work of the Organization, having regard to the increased membership of the Organization and the need to improve the representation of developing countries in the Council".

The 1975 amendments – entry into force 1982

In 1967, the **Torrey Canyon** oil spill illustrated the immense environmental damage that could result from an accident involving a large oil tanker. The protection of the marine environment became a major issue, but the Torrey Canyon spill also revealed a number of deficiencies in the international system for assessing liability and compensation for oil spill damage. IMO established a Legal Committee to deal with the latter and a new sub-committee of the MSC to handle environmental issues.

By the mid-1970s both subjects were recognized as being important enough to become a permanent part of the IMO work programme. In 1975, the 9th Assembly adopted resolution

A.358(IX) which formed a new Marine Environment Protection Committee (MEPC) and raised it and the Legal Committee to the same status as the MSC.

Article 1 of the Convention was changed by adding to the list of purposes "the prevention and control of marine pollution from ships; and to deal with legal matters related to the purposes set out in this Article."

Also, the name of the Organization was changed to the International Maritime Organization. It was felt that the original name was confusing, especially the inclusion of the word "Consultative", which gave the impression that IMO could only talk, rather than take decisions and act.

The 1977 amendments – entry into force 1984

IMO's 10th assembly adopted amendments to Article I parts (a) and (d) to accommodate the Organization's growing involvement in environmental, administrative and legal issues. Article 2, which then limited IMO's role to being consultative and advisory, was deleted and subsequent articles renumbered.

The Technical Co-operation Committee (which had been established in 1969) was raised to the same status as the MSC, Legal Committee and MEPC.

The 1979 amendments – entry into force 1984

The Council was increased in size to 32, with 16 places for Group (c).

The 1991 amendments – entry into force 2008

The amendments raise the Facilitation Committee to the same status as the other Committees. The Committee seeks to standardize the documentary procedures involved in international maritime trade and to remove unnecessary "red tape".

The 1993 amendments – entry into force 2002

The amendments increased the size of the Council to 40, with Groups (a) and (b) increased to ten and Group (c) to 20 Member States. The adoption of the amendments followed concern over elections to the Council held during the 17th session of the Assembly, when several time-consuming votes had to be held to decide membership of Group (a) because so many Members were seeking election.

IMO's mission statement:

"The mission of the International Maritime Organization (IMO) as a United Nations specialized agency is to promote safe, secure, environmentally sound, efficient and sustainable shipping through cooperation. This will be accomplished by adopting the highest practicable standards of maritime safety and security, efficiency of navigation and prevention and control of pollution from ships, as well as through consideration of the related legal matters and effective implementation of IMO's instruments with a view to their universal and uniform application."

Convention on the International Maritime Organization Articles of the Convention – Summary

Part 1 – Purposes of the Organization

Part II – Functions

Part III – Membership

Articles 4-10 – give procedures for becoming a Member (or Associate Member) of IMO, by becoming Party to the IMO Convention.

Part IV – Organs
Article 11 – states the Organization consists of an Assembly, Council, Maritime Safety Committee, Legal Committee, Marine Environment Protection Committee (MEPC), Technical Co-operation Committee Facilitation Committee and "such subsidiary organs as the Organization may at any time consider necessary"; and a Secretariat.
Part V- The Assembly
Articles 12-15 – give constitution (all Members) and functions of the Assembly.
Part VI – The Council
Articles 16-26 – relate to composition, election procedures and functions of the Council.
Part VII – Maritime Safety Committee
Articles 27-31 – give constitution (all Members) and functions/work of the Committee.
Part VIII – Legal Committee
Articles 32-36 – give constitution (all Members) and functions/work of the Committee.
Part IX – Marine Environment Protection Committee
Articles 37-41 – give constitution (all Members) and functions/work of the Committee.
Part X – Technical Co-operation Committee
Articles 42-46 – give constitution (all Members) and functions/work of the Committee.
Part XI – Facilitation Committee
Articles 47-51 – give constitution (all Members) and functions/work of the Committee.
Part XII - The Secretariat
Articles 52-57 - give functions and duties of the Secretariat.
Part XII I– Finances
Articles 58-61 – give financial obligations of the Member States
Part XIV – Voting
Article 62 – Each Member has one vote, decisions shall be by a majority vote.
Part XV – Headquarters of the Organization
Article 63 – The headquarters is established in London; the Assembly may by two-thirds majority vote change the site if necessary; sessions may be held in any place other than Headquarters if Council deems it necessary.
Part XVI – Relationship with the United Nations and other organizations
Article 64 – relate to relationships and co-operation with the United Nations, intergovernmental organizations and non-governmental organizations.
Part XVII – Legal capacity, privileges and immunities
Articles 69-70 – refers to the General Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations and refers to Appendix II of the IMO Convention which gives provisions on legal capacity, privileges and immunities which should be applied by Members and by the Organization.
Part XVIII – Amendments
Articles 71-73– Amendments to the IMO Convention must be adopted by two-third majority vote of the Assembly and enter into force 12 months after acceptance by two-thirds of Member States.

Part XIX – Interpretation
Articles 74-75 – questions or disputes over interpretation or application of the Convention shall be referred to the Assembly; if they cannot be settles, they must be referred to the International Court of justice for an advisory opinion.
Part XX – Miscellaneous Provisions
Articles 76-78 – cover signature and acceptance; territories; withdrawal.
Part XXI – Entry into force
Articles 79-82– entry into force provisions for the Convention.

PURPOSE AND FUNCTIONS OF IMO

Purpose of IMO
Article 1 – states the purposes of the organization are:
(a) To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters related to the purposes set out in this Article.
(b) To encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination; assistance and encouragement given by a Government for the development of its national shipping and for purposes of security does not in itself constitute discrimination, provided that such assistance and encouragement is not based on measures designed to restrict the freedom of shipping of all flags to take part in international trade;
(c) To provide for the consideration by the Organization of matters concerning unfair restrictive practices by shipping concerns in accordance with Part II;
(d) To provide for the consideration by the Organization of any matters concerning shipping that may be referred to it by any organ or specialized agency of the United Nations;
(e) To provide for the exchange of information among Governments on matters under consideration by the Organization.
Functions of IMO
Article 2 – states that IMO provides for the drafting of conventions, agreements or other suitable instruments; provides machinery for consultation among Members and exchange of information; facilitates technical co-operation.
Article 3 – states that for matters "capable of settlement through the normal processes of international shipping business", the IMO should recommend their resolution in that manner.
The Role and the Functions Performed by the International Maritime Organization
There are various functions and vital roles that the International Maritime Organisation plays as an organization as well as an International leader in the maritime department. The roles and the functions of the International Maritime Organisation are mentioned below.
<u>Strategic Development and the high-level action plans</u>

This means that the International Maritime Organisation always focusses on the highest possible standards in the maritime department and ensures the safety, security, efficiency and the ability to work in the maritime development. Apart from this it makes sure that the various mishappenings that take place in the sea waters or the international waters such as that of the pirates looting the ships and the ship's sinking in the sea or the oceans due to the natural as well as the non natural factors, does not happen because any loss of life or property is a loss of a country or a continent in trade that the International Maritime Organisation is supervising or has the jurisdiction over.

In the year 2003, in order for the organization to effectively address those strategic objectives, a high-level action plan was also adopted by the International Maritime Organisation Assembly to identify the actions required to achieve its mission objectives and to provide for the linkage between the Organisation's strategy and the work of its committees. The International Maritime Organisational Assembly, at its 25th session held in the year 2007 in November, reviewed the plans that the various countries had for trade through the International waters and adopted the Strategic Plan for the Organisation and a high-level action Plan for the Organisation and priorities for the 2008-2009 Biennium.

Safety of Passenger Ships

Safety of passenger ships means that the International Maritime Organisation has the responsibility and the function of ensuring the safety of the ships in the international waters. The safety of the ship does not only mean protecting from factors such as pirates and other things, it also includes other factors which have been mentioned below:-

- Designing of the ships and the alternative designing and arrangements related to the danger thereto,
- To mention the safe areas and the essential systems to be maintained while the ship proceeds to the port after a casualty, which will require redundancy of the propulsion and other essential things that the ship needs to carry while on the sail.
- Onboard safety centers, from where the safety systems can be controlled, operated and monitored.
- Fixed wire detection and the alarm systems in the ships including requirements for fire detector and manually operated call points to be capable of being remotely and individually identified.
- Fire prevention, including amendments aimed at enhancing the fire safety of atriums, the means of escape in case of fire and the ventilation systems and
- The time for orderly evacuation and abandonment, including requirements for the essential systems that must remain operational in case any one main vertical zone is unserviceable due to fire.

Goal-Based New Ship Construction Standards

This means that the International Maritime Organisations also have to set standards for the new ships before the making based on the loopholes in the previous ships and the renovation of the same. IMO also plans to determine the new hull construction standards for the new ships which are currently largely under the responsibility of the classification societies. The standards, once finalized, are intended to ensure that full standards developed by the classifications societies and other recognized organizations conform to the safety goals and the functional requirements established by the International Maritime

Organisations. Therefore, it is an important role or a function that is performed by the organization.

Formal Safety Assessment

The safety assessment that the IMO does is according to the safety standards laid down by the same. In 2002, the MSC and the Marine environment Protection committee introduced a new methodology called Formal Safety Assessment, for its rulemaking process to incorporate risk assessment techniques that have been successfully used in several other industries such as the nuclear and the offshore industries.

FSA guidelines were approved by the MSC in 2002 and the guidelines have been routinely amended so as to catch up with the latest trends and the knowledge in the international market on the subject. The above committees are utilizing FSA process in the evaluation of the proposed new measures with a view to achieving a balance between the technical and operational issues, including the human element and between costs and benefits. Since 2002, FSA's has been used in several cases by MSC. there were several guidelines which were added to them in the year 2006 but at present the MSC having received several new FSC studies submitted by the IMO member governments, agreed, in principle, to establish a group of experts to review these FSA studies for use in future rule-makings.

Human Element

International Maritime Organization also keeps into account the human element and maintains standards for the same and it does ensure that there is a human element in the working of the organization and the people who are engaged in the working of the ship, be it sailing or other operational issues are not faced with issues risking their lives. The International Maritime Organisation in this way maintains high standards of safety and environmental protection for the purpose of significantly reducing the maritime casualties.

Improving Maritime Technology Standards

There are certain standards which the International Maritime Organization as a part of its function have to perform, and improving the technological standards of the maritime. The technical standards of the SOLAS conventions with a view to keeping them updated with the latest marine technologies in the ship design. As such, the MSC routinely adopts numerous codes and guidelines to support matters related to fire safety, life-saving, marine equipment, stability and the carriage of dangerous goods and hazardous cargoes. Most merchant ships today are covered by the 1966 Load Lines Convention to establish international rules with respect to the limits to which ships may be loaded. In 1988, in order to facilitate the adoption of amendments related to the 1966 Load Lines Convention, IMO adopted the 1988 LL protocol, which harmonized the convention's survey and certification requirement with those contained in SOLAS and MARPOL 73/78. IMO has developed in 1993, the Code on Intact Stability (IS Code) for all types of ships covered by IMO instruments and the MSC is currently revising the IS code to incorporate states of art knowledge, such as dynamic stability and the performance-based criteria. The regulations were made to bring in changes to the new ships and technology in force. The new regulations came into force in January 2009.

Investigation of the Maritime Casualties and Incidents

This means that the International Maritime Organization will have to check and investigate the casualties and the accidents happening in the midwaters or the international waters and also to ensure and facilitate the conduct of the investigations, analysis and reporting the accidents in accordance with the globally recognised best practices, with a view to maintaining an efficient and comprehensive knowledge-based mechanism to support the identification of trends and the International Maritime Organization rulemaking process. With this aim and within the framework of article 94.7 of the United Nations Convention on the Law of the Sea (UNCLOS), and relevant provisions contained in the IMO conventions. They have developed a new code of International Standards and Recommended Practices for a safety investigation into the marine casualty or marine incident (Casualty Investigation Code), which is now under consideration for becoming mandatory under the SOLAS convention.

Piracy and Armed Robbery Against Ships

IMO also prevents attacks of piracy and armed robbery, to combat piracy and armed robbery at sea by adopting measures, including those relating to assistance with capacity-building through training of seafarers, port staff and enforcement personnel in the prevention, reporting and investigation of the incidents; bringing the alleged perpetrators to justice, in accordance with the international law; and by adopting national legislation as well as providing enforcement vessels and the equipment and guarding against fraudulent ship registration.

ADMISSION AND MEMBERSHIP TO IMO

Member States

IMO currently has 174 Member States and three Associate Members.

Non-Governmental Organizations (NGOs)

Non-governmental international organizations that have the capability to make a substantial contribution to the work of IMO may be granted consultative status by the Council with the approval of the Assembly.

Any organization seeking consultative status with IMO has to demonstrate considerable expertise as well as the capacity to contribute, within its field of competence, to the work of IMO. It must also show that it has no means of access to the work of IMO through other organizations already in consultative status and that it is "truly international" in its membership, namely that it has a range of members covering a broad geographical scope and, usually, more than one region.

The application procedure is initiated by sending, by post or e-mail, a formal letter addressed by the Executive Head of the NGO (or the person in charge) to the Secretary-General of IMO, informing him of the wish of the NGO to obtain consultative status with IMO. Applications, together with a completed questionnaire and other relevant documentation, should be sent to the following address:

The IMO Council considers applications for consultative status by non-governmental international organizations once a year, at its first session, which is usually held in the summer. Applications, including the letter, the questionnaire and any additional relevant documentation must have reached the IMO Secretariat by 31 March in order to be submitted to the summer Council session held that year; applications received after that date will be considered the following year.

Intergovernmental organizations (IGOs)

IMO may enter into agreements of cooperation with other intergovernmental organizations on matters of common interest with a view to ensuring maximum coordination in respect of such matters.

INSTRUMENTS OF IMO

One of the main aims of IMO is to ensure co-operation among maritime governments of the world. It also uses a number of instruments to implement and maintain the highest standards in areas of maritime safety, prevention of marine pollution, and shipping navigation and trade.

The 5 important instruments of IMO are:

(a) Conventions
(b) Protocols
(c) Amendments
(d) Recommendations, codes, and guidelines
(e) Resolutions

Conventions

A convention is a written agreement with several parts. Conventions form a major part of maritime affairs governed by the IMO. Some of the major conventions by IMO are Safety of Life at Sea (SOLAS) 1974 convention and International convention for prevention of pollution from Ships (MARPOL).

It is to note that conventions generally have several sub-parts, which would describe in details various aspects of the subject defined by that particular convention. For e.g. MARPOL convention has six parts which are known as annexes. Each of this annexe deals with different aspect of marine pollution.

It is also possible that details given within a convention are put under an associated code, which provides further technical details of that aspect; for e.g. the Life saving appliances (LSA) code gives details for minimum requirements for safety equipment used on board ships.

Each member state must accept the details mentioned in conventions put forth by the IMO and agree to international supervision required under such conventions.

Thus, conventions act as a treaty between the IMO and member states. It is imperative that every member state abides by the rules and regulations put forth by the IMO.

Protocols

Protocol is an important instrument used by the IMO to introduce changes to conventions, which are already adopted but not yet entered into force.

For e.g. SOLAS convention 1973 was amended twice using protocols – by 1978 SOLAS protocol which entered into force in 1st May 1981 and by 1988 SOLAS protocol which entered into force on 3rd Feb 2000. Both the protocols are now known as SOLAS 74/78 and SOLAS 74/88.

Amendments

As mentioned above, amendments are major changes that are brought into action using protocols. Amendments are the reforms that are needed in a convention and are backed by the protocols.

For e.g. Because of several accidents at sea, there was an urgent need to change the MARPOL 1973 convention in 1970s. These changes or amendments were brought into action by the combined convention-protocol instrument called MARPOL 73/78 on 2nd October 1983.

Recommendations, codes, and guidelines

Recommendations are mainly guidelines which are not legally accepted. They are not formal documents like convention or protocol but are a list of recommended practices that are closely linked to conventions. For e.g. timber deck cargo code

Recommendations can also be guidelines which are waiting to be accepted by the IMO.

However, it is to note that though recommendations are not legally binding, some governments might apply them in whole or in part.

Codes and guidelines can be both mandatory and non mandatory. Codes such as ISM and IBC codes are mandatory and are a part of a parent convention or protocol.

Resolutions

Resolutions are the finalized documents which are accepted by the IMO or any of the main body under IMO. They generally result from an agreement on a recommendation or amendment.

Resolution passed by the assembly is denoted in a peculiar manner.

For e.g. Resolution A. 586 (XIV)

Where, A = assembly; 586 = serial number of resolution; and XIV = Made by the 14th session of the assembly

E.g. 2: MEPC. 54 (32)

Where, MEPC = Marine environment protection committee; 54 = serial number; 32 = 32nd session of the committee

ORGANIZATIONAL STRUCTURE OF IMO

The International Maritime Organization consists of an assembly, a council and five main committees, which are as follows:-

1. The maritime safety committee
2. The Marine Environment Protection Committee
3. The legal committee
4. The technical cooperation committee
5. The facilitation committee

Apart from the main committees, there are certain subcommittees as well to assist the main five committees as mentioned above.

Assembly

This is the highest governing body of the organization. IT consists of all the member states and it meets once every two years in regular sessions, but may also meet in an extraordinary session if necessary. The assembly is responsible for approving the work programme, voting the budget and determining the financial arrangements of the organization. The assembly also elects the council.

Council

The council is a prestigious institution to be a part of. It is elected by the assembly for the two-year terms beginning after each regular session of the assembly. The council is executive organ of the International Maritime Organisation and is responsible, under the assembly for supervising the work of the organization. Between sessions of the assembly, the council performs all the functions of the assembly, except the function of making the recommendations to the governments on the maritime safety and pollution prevention which is reserved for the assembly by Article 15(j) of the convention.

Maritime Safety Committee (MSC)

The Maritime Safety Committee is the highest technical body of the organization. It consists of all the member states. The functions of the Maritime Safety Committee are to consider any matter within the scope of the organization concerned with the aids to navigation, construction and equipment of vessels, manning form a safety standpoint the rules for the prevention of the collisions, handling of the dangerous cargoes, maritime safety procedures and requirements that directly affect the maritime security.

The Marine Environment Protection Committee (MEPC)

The Marine Environment Protection committee consists of all the member states of the international maritime organization, is empowered to take any decision with respect to the scope of the organization concerned with prevention and control of pollution from ships.In particular, it is concerned with the adoption and amendment of conventions and other regulations and measures to ensure their enforcement.The Marine Environment Protection Committee was established as a subsidiary body of the assembly but later on, in 1985 it was raised to the full constitutional status.

Sub-Committees

There are certain subcommittees that are made in the process. These subcommittees are also open to all the member states. These committees are as follows:-

- Sub-Committee on Human Element, Training, and Watchkeeping (HTW);
- Sub-Committee on Implementation of IMO Instruments (III);
- Sub-Committee on Navigation, Communications and Search and Rescue (NCSR);
- Sub-Committee on Pollution Prevention and Response (PPR);
- Sub-Committee on Ship Design and Construction (SDC);
- Sub-Committee on Ship Systems and Equipment (SSE); and
- Sub-Committee on Carriage of Cargoes and Containers (CCC).

Legal Committee

The legal committee is always important as far as the efficient working of the organization is concerned. The legal committee is empowered to deal with the legal matters of the organization and helps in deciding the right way even out of the wrong way. The Committee consists of all Member States of IMO. The committee works together for the administration as well as the organization of the International Maritime Organization. The Legal Committee is also empowered to perform any duties within its scope which may be assigned by or under any other international instrument and accepted by the Organization.

Technical Cooperation Committee

The technical cooperation committee is required to consider any matter within the scope of the organization concerned with the implementation of the technical cooperation projects for which the organization acts as the executing or cooperating agency and any other matters related to the organization’s activities in the technical cooperation field. It also consists of all the member states of the international maritime cooperation, and was established in 1969 as a subsidiary body of the council and was institutionalized by means of an amendment to the International Marie Organisation Convention which entered into force in 1984.

Facilitation Committee

The facilitation committee was established as a subsidiary body of the Council in May 1972 and became fully institutionalized in December 2008 as the result of an amendment of the International Maritime organization at their own convention. It consists of all the member states of the organization and deals with International Maritime Organization's work in eliminating unnecessary formalities and the red tape in international shipping by implementing all the aspects of the convention on facilitation of the International Maritime Traffic 1965 and any matter within the scope of the IMO and international maritime traffic. To be specific the work of this committee has been to ensure the right balance between the maritime security and the facilitation of the international maritime trade.

Secretariat

Who does not want to be a part of the Secretariat of the International Maritime Organisation, and especially when there are career opportunities open in this institution, why cannot we target it. For now, let us know the current number of members of the secretariat. The Secretariat IMO consists of the Secretary-General and some 300 international personnel based at the headquarters of the Organization in London. The Secretary-General of the Organization is Mr. Kitack Lim (Republic of Korea) who was appointed to the position with effect from 1 January 2016, for an initial four-year term.

CHIEF ACTIVITIES OF IMO

In order to achieve its objectives, IMO has, in the last 35 years, promoted the adoption of some 40 conventions and protocols and adopted well over 700 codes and recommendations concerning maritime safety, the prevention of pollution and related matters.

The initial work on a convention is normally done by a committee or sub-committee; a draft instrument is then produced which is submitted to a conference to which delegations from all States within the United Nations system – including States which may not be IMO Members -are invited. The conference adopts a final text, which is submitted to Governments for ratification.

An instrument so adopted comes into force after fulfilling certain requirements, which always include ratification by a specified number of countries. Generally speaking, the more important the convention the more stringent is the requirements for entry into force. Implementation of the requirements of a convention is mandatory on countries, which are parties to it. Codes and recommendations, which are adopted by the IMO Assembly, are not binding on Governments; however, their contents can be just as important, and in most cases, they are implemented by Governments through incorporation into domestic legislation.

Below are the major categories which are implemented by IMO:

1. Safety – SOLAS
2. Preventing pollution – providing compensation

3. MARPOL
4. IMO’s codes & recommendations

In addition to conventions and other formal treaty instruments, IMO has adopted several hundred recommendations dealing with a wide range of subjects.

Some of these constitute codes, guidelines or recommended practices on important matters not considered suitable for regulation by formal treaty instruments. Although recommendations -whether in the form of codes or otherwise – are not usually binding on Governments, they provide guidance in framing national regulations and requirements. Many Governments do in fact apply the provisions of the recommendations by incorporating them, in whole or in part, into national legislation or regulations. In some cases, important codes have been made mandatory by including appropriate references in a convention.

These recommendations are generally intended to supplement or assist the implementation of the relevant provisions of the conventions and, in some cases, the principal codes, guidelines, etc.

In appropriate cases, the recommendations may incorporate further requirements, which have been found to be useful or necessary in the light of experience gained in the application of the previous provisions. In other cases, the recommendations clarify various questions, which arise in connection with specific measures and thereby ensure their uniform interpretation and application in all countries.

Examples of the principal recommendations, codes, etc., adopted over the years are:

- International Maritime Dangerous Goods Code (IMDG Code) (first adopted in 1965);
- Code of Safe Practice for Solid Bulk Cargoes (1965);
- International Code of Signals (IMO took over responsibility for the Code in 1965);
- Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (1971);
- Code of Safe Practice for Ships Carrying Timber Deck Cargoes (1973);
- Code of Safety for Fishermen and Fishing Vessels (1974);
- Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (1975); Code of Safety for Dynamically Supported Craft (1977);
- Code for the Construction and Equipment of Mobile Offshore Drilling Units (1979);
- Code on Noise Levels on Board Ships (1981);
- Code of Safety for Nuclear Merchant Ships (1981);
- Code of Safety for Special Purpose Ships (1983);
- International Gas Carrier Code (1983);
- International Bulk Chemicals Code (1983);
- Code of Safety for Diving Systems (1983);
- International Code for the Safe Carriage of Grain in Bulk (1991);
- International Safety Management Code (1993);
- International Code of Safety for High-Speed Craft (1994).

Other important recommendations have dealt with such matters as traffic separation schemes (which separate ships moving in opposite directions by creating a central prohibited area); the adoption of technical manuals such as the Standard Marine Navigational Vocabulary, the IMO Search and Rescue Manual and the IMO Manual on Oil Pollution; crew training; performance standards for shipborne equipment; and many other matters. There are also guidelines to help the implementation of particular conventions and instruments.

The provisions of recommendations are sometimes incorporated into amendments to the relevant conventions. Recommendations enable provisions or requirements to be suggested relatively quickly to Governments for consideration and action. It is also easier for Governments to act on such matters than in respect of provisions in formal treaty instruments, which involve international legal obligations.

Dumping at sea

In addition to other aspects of marine pollution prevention, IMO also carries out Secretariat functions in connection with the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter. This Convention, now called the London Convention, was adopted in 1972 at a conference held under the auspices of the United Kingdom. It entered into force in 1975.

The Convention controls and regulates on a global level the disposal at sea of wastes and other material of any kind (including ships and platforms). The disposal of certain substances which from the environmental point of view are known to be particularly harmful (such as organ halogen compounds, mercury, cadmium, plastics, mineral oils and radioactive wastes) is prohibited.

The Convention also contains specific regulations concerning the dumping of several other materials, which may present a risk to the marine environment and human health. In addition, it bans the incineration of wastes on board ships.

How does it work?

The International Maritime Organisation works through a number of specialist committees and sub-committees. All these bodies are composed of representatives of Member States who discharge their functions with the assistance and advice of appropriate bodies of the United Nations or the specialised agencies, as well as international governmental and non-governmental organisations with which formal relationships have been established.

Formal arrangements for co-operation have been established with more than 30 intergovernmental organisations, while nearly 50 non-governmental, international organisations have been granted consultative status to participate in the work of various bodies in an observer capacity. These organisations represent a wide spectrum of maritime, legal and environmental interests and they contribute to the work of the various organs and committees through the provision of information, documentation and expert advice. However, none of these organisations has a vote.

How does IMO implement legislation?

The Organization itself has no powers to enforce conventions. Therefore, IMO does not implement any Conventions. The enforcement of IMO convention depends upon the Governments of Member Parties. Contracting Governments enforce the provisions of the IMO conventions as far as their own ships are concerned and also set the penalties for infringements, where these are applicable. They may also have certain limited powers in respect of the ships of other Governments.

In some conventions, certificates are required to be carried onboard ship to show that they have been inspected and have met required standards. These certificates are normally accepted as a proof by authorities from other States. When an offence occurs in international waters, the responsibility for imposing a penalty rests with the flag State. Should an offence occur within the jurisdiction of another State, however, that State can either cause proceedings to be taken in accordance with its own law or give details of the offence to the flag State so that the latter can take appropriate action.

Under the terms of the 1969 Convention Relating to Intervention on the High Seas, Contracting States are empowered to act against ships of other countries that have been involved in an accident or have been damaged on the high seas if there is a grave risk of oil pollution occurring as a result that would reach their waters.

The way in which these powers may be used arc very carefully defined, and in most conventions the flag State is primarily responsible for enforcing conventions as far as its own ships and their personnel are concerned.

Actors in the IMO Law-Making Process

The IMO Convention of 1948 created room for three types of entities to participate in the IMO law-making process. These are member states (including associate members), inter-governmental organisations as observer organisations, and international non-governmental organisations as organisations with consultative status.

<u>Member States</u>

Presently, IMO has 170 Member States and three Associate Members representing all regions of the world. Subject to the relevant provision of the IMO Convention 1948, all States are eligible to become Members of the organisation. United Nations members are allowed to become members of the organisation by joining as a party to the IMO Convention 1948. There is an elaborate mechanism for gaining membership for the countries which are not members of the United Nations. Any Territory or group within a Member State may be an associate member if it is a territory to which the Convention has been made applicable under Article 72, by the Member having responsibility for its international relations or by the United Nations. Member States of the IMO may be divided into different groups depending on their interest in the organisation.

Port, Coastal and Flag States

The first dynamic of IMO members' interests is the conflict between the interest of port or coastal and flag States. However, this type of binary division is practically impossible because a country may be a port state while simultaneously being a coastal or flag state. Nevertheless, a State may consider one of these roles more important than the other due to its economic, geographical and environmental interests. For example, a State with a huge merchant fleet may largely represent the interests of its shipping companies because revenue from this sector is a major source for national income. This is particularly true for 'flag of convenience' (FOC) countries. As of 2011, around 69.7 % of the total global merchant fleet operates under FOCs. FOC has been defined as the "flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering the vessels". Under international law, an owner has full liberty to choose the flag for his or her ship. Consequently, every State has the right to set its own regulation and standards for registration of ships. Both the 1958 Geneva Convention on High Seas and UNCLOS (articles 91 and 94) impose a condition of 'genuine link' between the ship and the flag State, without precisely defining the term. This seems to be an incomplete provision which creates more problems than it solves. Its ambiguity has led scholars to interpret the term in a variety of different ways with divergent results. Most scholars come to the conclusion that a mere administrative act such as registration is sufficient to fulfil the condition of "genuine link".

Moreover, there is strong support for the opinion that lack of a 'genuine link' is not sufficient to refuse nationality of a ship. As observed by the International Tribunal for the Law of Sea (ITLOS) in the *M/V "SAIGA" (No. 2) Case* :

…there is nothing in article 94 to permit a State which discovers evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognize the right of the ship to fly the flag of the flag State. …… The conclusion of the Tribunal is that the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.

All these shortcomings open up the profitable business of FOC at the cost of environmental protection and safety. FOC countries may consider environmental protection is not an important issue for them.

In contrast, a country may consider its role as a coastal state is very vital. Australia is a good example. With its large pristine marine areas, such as the Great Barrier Reef, Australia considers its role as a coastal State as vital. Indeed, Australia has advocated for more robust international regulation for the protection of the marine environment from vessel-source pollution, having submitted a proposal in 1990 urging MEPC to establish the Great Barrier Reef Particularly Sensitive Sea Area (PSSA) for the introduction of a system of pilotage and mandatory ship reporting. The Great Barrier Reef PSSA is the first PSSA approved by IMO.

Developed, Developing and Least Developed States

Like other international organisations IMO Member States are also deeply divided into developed, developing and least developed States; a division which has existed from the very beginning of the organisation. There is an assertion that "the developed-developing state dynamics underlying much of international discourse in the 1970s have largely dissipated. The more relevant tussle at IMO today is one between coastal and port states seeking greater control over foreign ships and maritime states seeking to uphold the freedom navigation". In fact the north–south divide is still a dominating factor in the IMO discourses. The presence of issues like the implementation of the principle of Common but Differentiated Responsibilities (CBDR) is more apparent than ever in current IMO discourses. Dealing with the issue of shipbreaking industry and reduction of emissions of greenhouses gases from international shipping, there is a serious divide and ongoing conflict between developed and developing States. This debate is playing a catalyst in profoundly resurfacing relatively older north–south debates, like the issue of technology transfer and assistance. Recent negotiations in MEPC, particularly in the context of climate change, show developed and developing countries are debating with each other as groups.

That is a clear sign of serious north–south divide, like in other areas of international law-making. However, despite serious interest involved particularly in the areas of climate change and shipbreaking, least developed countries are not playing an active role in the debate as a group. For example, the 48 nations comprising the Least Developed Countries group work together in the intergovernmental negotiations under the UN Framework Convention on Climate Change (UNFCCC). However, they do not work together in the IMO negotiations relating to climate change and international shipping. This may be due to their divergent interests regarding the maritime sector.

Nevertheless, IMO is still mainly dominated by developed countries despite the scope for equal participation in most of the IMO organs. As will be discussed later in this chapter, there is a role of non-governmental actors behind this domination.

<u>United Nations and Other Intergovernmental Organisations</u>

IMO is a specialised agency of the United Nations in the fields of shipping and the effect of shipping on the marine environment. The IMO Convention 1948 provides that IMO shall cooperate with any specialised agency of the United Nations on matters of common concern. The IMO Convention 1948 also provides that IMO may cooperate with other intergovernmental organisations whose interests and activities are related to the purpose of the organisation. In accordance with these provisions IMO has signed agreements of cooperation with 63 intergovernmental organisations. Some of these organisations are specialised organisations from the maritime sector or regional organisations active in maritime sectors. These organisations, particularly some regional organisations, may have and exert serious influence on the Member States' opinions regarding marine environmental issues under IMO 's consideration. For example, the European Commission as the executive body of the European Union is an observer organisation in IMO. The European Union has serious influence on other Members because a regulation adopted by the European Union may be binding for the Member States. Therefore, Member States of the European Union may try to impart the European Union's view on the IMO negotiation process. There is even a discussion on whether the European Union should take full membership of IMO, although this is in fact impossible without amending the IMO Convention 1948.

IMO works cooperatively with other organisations and programs in the United Nations system for matters related to marine environment. One such example is IMO's interaction with United Nations Environment Program.

<u>International Non-governmental Organisations with Consultative Status</u>

International non-governmental organisations (INGOs) play a significant a role in the IMO law-making process despite not having any voting rights in IMO organs. IMO Convention 1948 empowers IMO to make suitable arrangements after consultation and cooperation with non-governmental international organisations on matters within the scope of IMO. In 1961, in accordance with a provision, the IMO Assembly approved the *Rules for Consultative Status of Non-Governmental International Organizations with the International Maritime Organization*. IMO Council developed Guidelines in this regard in 1978. The Rules and Guidelines were amended several times. According to these the IMO Council, with the approval of the IMO Assembly, may grant consultative status to an INGO if that organisation is able to make a substantial contribution to the work of IMO. Seventyseven INGOs have been granted consultative status in IMO. INGOs represent a variety of interests in the IMO marine environmental discourses, including different types of shipping interests (for example ship-owners and operators), cargo interests (for example cargo owners and charters), seafarers and other labour organisations, environmental organisations, research organisations, training organisations, classification societies, organisations representing marine-related industries, protection and indemnity insurance clubs and other marine insurers.

Among these organisations, those representing ship-owners and operators appear to be the most powerful. They even have the capacity to influence the Member States with vested shipping interests. Another very vocal group is cargo owners and charters, particularly big oil companies. Classification societies, protection and indemnity insurance clubs and other marine insurers are also active participants in the IMO marine environmental law-making process. Environmental NGOs also actively participate in the MEPC meetings and make regular submissions.

Non-governmental organisations do not just influence the law-making process merely by their submissions and participation in the meetings of MEPC and other IMO organs. Their main influence comes via IMO Member States who also share similar interests. The presence of FOC countries in the leading position of IMO created a further avenue for shipping companies to exert influence on the IMO law-making process, as they virtually have a client–service–provider relationship with those countries. The participation of non-governmental organisations in IMO is more apparent than many other similar international organisations. These issues will be elaborated further in subsequent chapters with practical examples.

IMO’S CONTRIBUTUION TO INTERNATIONAL MARITIME LAW

Maritime Security and international regulations in maritime transportation of CBRN materials

IMO measures do not explicitly focus on “preventing terrorists from acquiring weapons of mass destruction” but rather on maintaining the security of the ship at all times to prevent use of the ship for a terrorist purpose.

Maritime security is an integral part of IMO's responsibilities. A comprehensive mandatory security regime for international shipping entered into force on 1 July 2004 and included a number of amendments to the 1974 Safety of Life at Sea Convention (SOLAS), the most far-reaching of which enshrined the International Ship and Port Facility Security Code (ISPS Code), which contains detailed security-related requirements for Governments, port authorities and shipping companies in a mandatory section (Part A), together with a series of guidelines about how to meet these requirements in a second, non-mandatory section (Part B).

The purpose of these maritime security measures is to establish an international framework involving co-operation between Contracting Governments, Government agencies, local administrations and the shipping and port industries to detect/assess security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade; to establish the respective roles and responsibilities of all parties concerned, at the national and international level, for ensuring maritime security; to ensure the early and efficient collation and exchange of security-related information; to provide a methodology for security assessments so as to have in place plans and procedures to react to changing security levels; and to ensure confidence that adequate and proportionate maritime security measures are in place. The objectives are to be achieved by the designation of appropriate officers/personnel on each ship, in each port facility and in each shipping company to prepare and to put into effect the security plans.

Under SOLAS Chapter XI-2 and the ISPS Code, ship security plans must address measures designed to prevent weapons, dangerous substances and devices intended for use against persons, ships or ports and the carriage of which is not authorized from being taken on board the ship. Ship security plans should have established procedures at all security levels to establish, maintain and update an inventory of any dangerous goods or hazardous substances carried on board, including their location, and make provision for restricted areas and access, including to spaces containing dangerous goods or hazardous substances.

Port facility security plans must also address measures designed to prevent weapons or any other dangerous substances and devices intended for use against persons, ships or ports, and the carriage of which is not authorized, from being introduced into the port facility or on board a ship. Those responsible for ship and port facility security are expected to have, as a competency, knowledge of recognition and detection of weapons, dangerous substances, dangerous goods and devices, and an awareness of the damage they can cause. Procedures and actions should be in accordance with the principles established by the maritime security measures and the relevant provisions of the International Maritime Dangerous Goods (IMDG) Code.

The IMO maritime security measures also require Governments to determine when a Declaration of Security (DOS)—which is an agreement between a port or port facility and a ship or between a ship and another ship that confirms the security responsibilities of each party during a ship/port interface or a ship-to-ship activity—is required. It is the responsibility of the respective security officers of the ship and port/port facility to assess the risk that the ship/port interface or ship-to-ship activity poses to persons, property or the environment. These circumstances are usually specified by the Designated Authority or Administration for inclusion in port, port facility and ship security plans, which are then implemented in circumstances such as when the port facility/ship interface involves a cruise ship, a ship carrying dangerous goods or the loading or transfer of dangerous goods.

Many maritime countries have taken steps to regulate the carriage of dangerous goods by sea, based on the safety considerations set out in parts A and A-1 of Chapter VII of the 1974 SOLAS Convention, as amended. More recently, as marine pollution has become a serious concern, countries have taken further steps to regulate the carriage of marine pollutants, as described in Annex III of MARPOL.

The IMDG Code, which was first published in 1965, amplifies the requirements of both conventions and has become the standard guide to all aspects of handling dangerous goods and marine pollutants in sea transport. The Code as originally amended was recommended to governments as the basis for national regulations by which the requirements of SOLAS 1974 and MARPOL Annex III were effected, but as amended by Amendments 32, 33, 34 and 35 is now mandatory. The Code lays down basic principles: detailed recommendations for individual substances, materials and articles, and a number of recommendations for good operational practice, including advice on terminology, packing, labelling, stowage, segregation and handling, and emergency response action.

Wider initiative to counter terrorism

The maritime security provisions of SOLAS chapter XI-2 and the ISPS Code are part of a wider initiative to counter terrorism, including action by the Counter Terrorist Committee of the UN Security Council through resolution 1373; co-ordination with other UN agencies and Interpol through the UN Counter-terrorism implementation task force; co-operation with the World Customs Organization (WCO) on container security; and joint initiatives with the International Labour Organization (ILO) on port security and identification documents.

IMO's Maritime Safety Committee and its subsidiary bodies are continuously working on additional elements of and guidance for the mandatory requirements, e.g. Ship Security Alert Systems (SSAS), long-range identification and tracking (LRIT) of ships, control and compliance measures, training and certification of security officers, etc.

2005 Protocol to the SUA Convention

Among the unlawful acts covered by the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (the SUA Convention) in Article 3 are the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it.

The 2005 Protocol to the SUA Convention, which entered into force 28 July 2010, adds a new Article 3bis which states that a person commits an offence within the meaning of the Convention if that person unlawfully and intentionally:

- When the purpose of the act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from any act:
  - uses against or on a ship or discharging from a ship any explosive, radioactive material or BCN (biological, chemical, nuclear) weapon in a manner that causes or is likely to cause death or serious injury or damage;
  - discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage;
  - uses a ship in a manner that causes death or serious injury or damage;
- Transports on board a ship:
  - any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, death or serious injury or damage for the purpose of intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act;
  - any BCN weapon, knowing it to be a BCN weapon;
  - any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; and

- any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.

The transportation of nuclear material is not considered an offence if such item or material is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non Proliferation of Nuclear Weapons (Subject to conditions).

The 2005 Protocol establishes procedures to board ships suspected of transporting WMD and related goods under certain circumstances. A new Article 8bis covers co-operation and procedures to be followed if a State Party desires to board a ship flying the flag of a State Party when the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be involved in, the commission of an offence under the Convention. The authorization and co-operation of the flag State is required before such a boarding. A State Party may notify the IMO Secretary-General that it would allow authorization to board and search a ship flying its flag, its cargo and persons on board if there is no response from the flag State within four hours. A State Party can also notify that it authorizes a requesting Party to board and search the ship, its cargo and persons on board, and to question the persons on board to determine if an offence has been, or is about to be, committed. At time of writing, 20 Contracting States had ratified SUA 2005, representing approximately 30% of world tonnage.

In addition to the development of legal instruments and associated training and guidance material, IMO has focussed on assisting Governments to implement the provisions of SOLAS chapter XI-2 and the ISPS Code and other instruments through its technical cooperation programme. Such activities have included conducting training courses, needs assessment missions, seminars and workshops on a regional and national basis.

Marine Environment

Shipping – which transports about 90% of global trade – is, statistically, the least environmentally damaging mode of transport, when its productive value is taken into consideration. For example, the vast quantity of grain required to make the world's daily bread could not be transported any other way than by ship. Moreover, set against land-based industry, shipping is, overall, a comparatively minor contributor to marine pollution from human activities.

IMO's original mandate was principally concerned with maritime safety. However, as the custodian of the 1954 International Convention for the prevention of pollution of the sea by oil (OILPOL Convention), the Organization, soon after it began functioning in 1959, assumed responsibility for pollution issues and subsequently has, over many years, adopted a wide range of measures to prevent and control pollution caused by ships and to mitigate the effects of any damage that may occur as a result of maritime operations and accidents.

These measures have been shown to be successful in reducing ship-sourced pollution and illustrate the commitment of the Organization and the shipping industry towards protecting the environment. Of the 51 treaty instruments for the regulation of international shipping IMO has adopted so far, 21 are directly environment-related.

The work of the Marine Environment Division is, in the main, directed by the Marine Environment Protection Committee, the MEPC in short, which is IMO's senior technical body on marine pollution related matters. It is aided in its work by a number of IMO's Sub-Committees, in particular the Sub-Committee on Pollution Prevention and Response (PPR). The original focus of its work was the prevention of marine pollution by oil, resulting in the adoption of the first ever comprehensive antipollution convention, the International Convention for the Prevention of Pollution from Ships (MARPOL) in 1973. This has changed over the last few decades to include a much wider range of measures to prevent marine pollution, and the original MARPOL Convention was amended many times to also include requirements addressing pollution from chemicals, other harmful substances, garbage, sewage and, under an Annex VI adopted in 1997, air pollution and emissions from ships.

Other international instruments in the remit of the Division regulate oil pollution preparedness, response and co-operation (OPRC Convention and its 2000 OPRC-HNS Protocol), control of harmful anti-fouling systems on ships (AFS Convention), prevention of the potentially devastating effects of the spread of invasive harmful aquatic organisms carried by ships' ballast water (BWM Convention), safe and environmentally sound recycling of ships (Hong Kong Convention), to name just a few.

IMO also carries out Secretariat functions in connection with the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the London Convention as well as its 1996 Protocol. Its objective is to promote the effective control of all sources of marine pollution and to take all practicable steps to prevent pollution of the sea by dumping of wastes and other matter.

Many developing countries cannot yet give full and complete effect to these instruments, for various reasons. IMO has established an Integrated Technical Co-operation Programme (ITCP), with the sole purpose of assisting countries in building up their human and institutional capacities for uniform and effective compliance with the Organization's regulatory framework. Assisting these countries in working towards sustainable socio-economic development and enhancement of marine environment protection will ultimately result in cleaner waters and coasts, increased tourism, greater access to protein through improved and uncontaminated fish catches and integrated coastal zone management.

Pollution Prevention

In 1973, IMO adopted the International Convention for the Prevention of Pollution from Ships, now known universally as MARPOL, which has been amended by the Protocols of 1978 and 1997 and kept updated with relevant amendments. The MARPOL Convention addresses pollution from ships by oil; by noxious liquid substances carried in bulk; harmful substances carried by sea in packaged form; sewage, garbage; and the prevention of air pollution from ships. MARPOL has greatly contributed to a significant decrease in pollution from international shipping and applies to 99% of the world's merchant tonnage.

Other treaties address anti-fouling systems used on ships, the transfer of alien species by ships' ballast water and the environmentally sound recycling of ships. Reductions of pollution generated by ships have been achieved by addressing technical, operational and human element issues and are all the more noteworthy when compared with the significant growth in the world's shipping industry – both in the size of the world fleet and the distances that it travels. IMO is continuously pursuing a pro-active approach to enhance implementation and enforcement, both by flag and port States, including a pro-active action plan to ensure that shore-based reception facilities for ship generated waste keep up with international regulatory requirements.

Oil Pollution

Oil tankers transport some 2,900 million tonnes of crude oil and oil products every year around the world by sea. Most of the time, oil is transported quietly and safely...

Measures introduced by IMO have helped ensure that the majority of oil tankers are safely built and operated and are constructed to reduce the amount of oil spilled in the event of an accident. Operational pollution, such as from routine tank cleaning operations, has also been cut.

The operational and construction regulations introduced by MARPOL, which entered into force in 1983, have been a success, with statistics from reputable industry and independent bodies showing that these regulations, along with other safety-related regulations such as the introduction of mandatory traffic separation schemes and international standards for seafarer training, have been instrumental in the continuous decline of accidental oil pollution that has taken place over the last 30 years.

The MARPOL convention, in 1983, introduced a number of radical new concepts, such as a requirement for new oil tankers to be fitted with segregated ballast tanks, so as to obviate the need to carry ballast water in cargo tanks. This was superseded by the requirement for oil tankers delivered from 1996 onwards to be fitted with a double hull. The protection of the marine environment was thus greatly enhanced.

As far as operational oil pollution is concerned, the many innovations introduced by MARPOL on allowable discharges of bilge water through the oily water separator (with the well-known 15ppm standard), or oily waters from the cargo tanks, through the oil discharge and monitoring system, have contributed greatly to a noticeable decrease in the pollution of the world's seas, though it is fair to recognise that a greater effort to impose compliance must be carried out.

Chemical Pollution

Regulations governing the carriage of chemicals by ship are contained in the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention for the Prevention of Marine Pollution from Ships, as modified by the Protocol of 1978 relating thereto (MARPOL).

Chemicals carried in bulk

Carriage of chemicals in bulk is covered by regulations in SOLAS Chapter VII - Carriage of dangerous goods and MARPOL Annex II - Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk.

Both Conventions require chemical tankers built after 1 July 1986 to comply with the International Bulk Chemical Code (IBC Code), which sets out the international standards for the safe carriage, in bulk by sea, of dangerous chemicals and noxious liquid substances. The Code prescribes the design and a construction standard of ships involved in the transport of bulk liquid chemicals and identifies the equipment to be carried to minimize the risks to the ship, its crew and to the environment, with regard to the nature of the products carried.

The IBC Code sets out a list chemicals and their hazards, and identifies both the ship type required to carry that product and the environmental hazard rating.

Chemical tankers constructed before 1 July 1986 should comply with the requirements of the Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (BCH Code) – the predecessor of the IBC Code.

MARPOL Annex II - Carriage of noxious liquid substances in bulk

MARPOL Annex II Regulations for the control of pollution by noxious liquid substances in bulk sets out a pollution categorization system for noxious and liquid substances. The four categories are:

- Category X: Noxious Liquid Substances which, if discharged into the sea from tank cleaning or deballasting operations, are deemed to present a major hazard to either marine resources or human health and, therefore, justify the prohibition of the discharge into the marine environment;
- Category Y: Noxious Liquid Substances which, if discharged into the sea from tank cleaning or deballasting operations, are deemed to present a hazard to either marine resources or human health or cause harm to amenities or other legitimate uses of the sea and therefore justify a limitation on the quality and quantity of the discharge into the marine environment;
- Category Z: Noxious Liquid Substances which, if discharged into the sea from tank cleaning or deballasting operations, are deemed to present a minor hazard to either marine resources or human health and therefore justify less stringent restrictions on the quality and quantity of the discharge into the marine environment; and
- Other Substances: substances which have been evaluated and found to fall outside Category X, Y or Z because they are considered to present no harm to marine resources, human health, amenities or other legitimate uses of the sea when discharged into the sea from tank cleaning of deballasting operations. The discharge of bilge or ballast water or other residues or mixtures containing these substances are not subject to any requirements of MARPOL Annex II.

The annex also includes a number of other requirements reflecting modern stripping techniques, which specify discharge levels for products which have been incorporated into Annex II. For ships constructed on or after 1 January 2007 the maximum permitted residue in the tank and its associated piping left after discharge is set at a maximum of 75 litres for products in categories X, Y and Z (compared with previous limits which set a maximum of 100 or 300 litres, depending on the product category).

MARPOL Annex III - Chemicals carried in packaged form

Chemicals which are carried in packaged form, in solid form or in bulk are regulated by Part A of SOLAS Chapter VII - Carriage of dangerous goods, which includes provisions for the classification, packing, marking, labelling and placarding, documentation and stowage of dangerous goods.

MARPOL Annex III also sets out regulations for the prevention of pollution by harmful substances in packaged form and includes general requirements for the issuing of detailed standards on packing, marking, labelling, documentation, stowage, quantity limitations, exceptions and notifications for preventing pollution by harmful substances. For the purpose of Annex III, “harmful substances” are those identified as “marine pollutants” in the IMDG Code.

Both SOLAS and MARPOL refer to the International Maritime Dangerous Goods (IMDG) Code, which was developed by IMO as a uniform international code for the transport of dangerous goods by sea.

Preparedness, Response and Liability and Compensation for Chemical Pollution Incidents

Issues related to the preparedness for and response to incidents of chemical pollution is covered by the OPRC-HNS Protocol 2000. Liability and compensation for incidents involving chemical pollution incidents are covered by the HNS Convention 2010, which has yet to enter into force.

<u>Sewage</u>

Regulations for the prevention of pollution by sewage are contained in MARPOL Annex IV.

Sewage – the problem

The discharge of raw sewage into the sea can create a health hazard. Sewage can also lead to oxygen depletion and can be an obvious visual pollution in coastal areas - a major problem for countries with tourist industries.

The main sources of human-produced sewage are land-based - such as municipal sewers or treatment plants. However, the discharge of sewage into the sea from ships also contributes to marine pollution.

Annex IV of MARPOL

Annex IV contains a set of regulations regarding the discharge of sewage into the sea from ships, including regulations regarding the ships' equipment and systems for the control of sewage discharge, the provision of port reception facilities for sewage, and requirements for survey and certification.

It is generally considered that on the high seas, the oceans are capable of assimilating and dealing with raw sewage through natural bacterial action. Therefore, the regulations in Annex IV of MARPOL prohibit the discharge of sewage into the sea within a specified distance from the nearest land, unless otherwise provided.

Governments are required to ensure the provision of adequate reception facilities at ports and terminals for the reception of sewage, without causing delay to ships.

The Annex entered into force on 27 September 2003. A revised Annex IV was adopted on 1 April 2004 and entered into force on 1 August 2005.

The revised Annex applies to ships, engaged in international voyages, of 400 gross tonnage and above or which are certified to carry more than 15 persons. The Annex requires ships to be equipped with either an approved sewage treatment plant or an approved sewage comminuting and disinfecting system or a sewage holding tank.

The discharge of sewage into the sea is prohibited, except when the ship has in operation an approved sewage treatment plant or when the ship is discharging comminuted and disinfected sewage using an approved system at a distance of more than three nautical miles from the nearest land. Sewage which is not comminuted or disinfected may be discharged at a distance of more than 12 nautical miles from the nearest land when the ship is en route and proceeding at not less than 4 knots, and the rate of discharge of untreated sewage shall be approved by the Administration (see resolution MEPC.157(55))

The MEPC also adopted the *Recommendation on standards for the rate of discharge of untreated sewage from ships* (resolution MEPC.157(55)).

Special Areas

In July 2011, MEPC 62 adopted, by resolution MEPC.200(62), the most recent amendment to MARPOL Annex IV, which entered into force on 1 January 2013. The amendment introduced, inter alia, a definition for Special Area as well as relevant requirements for the discharge of sewage from passenger ships in Special Areas and for port reception facilities.

The discharge of sewage from passenger ships within a Special Area is generally be prohibited under the new regulations, except when the ship has in operation an approved sewage treatment plant which has been certified by the Administration (see resolution MEPC.227(64)). The sewage treatment plant installed on a passenger ship intending to discharge sewage effluent in Special Areas should additionally meet the nitrogen and phosphorus removal standard when tested for its Certificate of Type Approval by the Administration (resolution MEPC.227(64), section 4.2).

Currently, the Baltic Sea area is the only Special Area under Annex IV. In accordance with resolution MEPC.275(69), the discharge requirements for Special Areas in regulation 11.3 of MARPOL Annex IV for the Baltic Sea Special Area shall take effect:

1. on 1 June 2019, for new passenger ships[1];
2. on 1 June 2021, for existing passenger ships[1] other than those specified in .3; and
3. on 1 June 2023, for existing passenger ships en route directly to or from a port located outside the special area and to or from a port located east of longitude 28˚10' E within the special area that do not make any other port calls within the special area.

<u>Garbage</u>

Regulations for the prevention of pollution by garbage from ships are contained in Annex V of MARPOL.

Background of MARPOL Annex V

Garbage from ships can be just as deadly to marine life as oil or chemicals.

The greatest danger comes from plastic, which can float for years. Fish and marine mammals can in some cases mistake plastics for food and they can also become trapped in plastic ropes, nets, bags and other items - even such innocuous items as the plastic rings used to hold cans of beer and drinks together.

It is clear that a good deal of the garbage washed up on beaches comes from people on shore - holiday-makers who leave their rubbish on the beach, fishermen who simply throw unwanted refuse over the side - or from towns and cities that dump rubbish into rivers or the sea. But in some areas most of the rubbish found comes from passing ships which find it convenient to throw rubbish overboard rather than dispose of it in ports.

For a long while, many people believed that the oceans could absorb anything that was thrown into them, but this attitude has changed along with greater awareness of the environment. Many items can be degraded by the seas - but this process can take months or years.

Persuading people not to use the oceans as a rubbish tip is a matter of education - the old idea that the sea can cope with anything still prevails to some extent but it also involves much more vigorous enforcement of regulations such as MARPOL Annex V.

MARPOL Annex V

MARPOL Annex V seeks to eliminate and reduce the amount of garbage being discharged into the sea from ships. Unless expressly provided otherwise, Annex V applies to all ships, which means all ships of any type whatsoever operating in the marine environment, from merchant ships to fixed or floating platforms to non-commercial ships like pleasure crafts and yachts.

Although the Annex is optional[1], it did receive a sufficient number of ratifications to enable entry into force on 31 December 1988. Today, more than 150 Countries have signed up to MARPOL Annex V.

MARPOL Annex V generally prohibits the discharge of all garbage into the sea, except as provided otherwise in regulations 4, 5, and 6 of the Annex, which are related to food waste, cargo residues, cleaning agents and additives and animal carcasses. Exceptions with respect to the safety of a ship and those on board and accidental loss are contained in regulation 7 of Annex V

Under MARPOL Annex V, garbage includes all kinds of food, domestic and operational waste, all plastics, cargo residues, incinerator ashes, cooking oil, fishing gear, and animal carcasses generated during the normal operation of the ship and liable to be disposed of continuously or periodically. Garbage does not include fresh fish and parts thereof generated as a result of fishing activities undertaken during the voyage, or as a result of aquaculture activities.

To assist Governments, ships and port operators in implementing relevant requirements under MAPROL Annex V, MEPC has developed and adopted the Guidelines for the implementation of MARPOL Annex V, known as a living document, the latest of which is resolution MEPC.295(71).

Port reception facilities

The effectiveness of ships to comply with the discharge requirements of MARPOL depends largely upon the availability of adequate port reception facilities, especially within special areas. Hence, MARPOL Annex V also obliges Governments to ensure the provision of adequate reception facilities at ports and terminals for the reception of garbage without causing undue delay to ships, and according to the needs of the ships using them.

As provided in regulation 8.3, Small Island Developing States (SIDS) could satisfy the requirements for providing adequate port reception facilities through regional arrangements when, because of those States' unique circumstances, such arrangements are the only practical means to satisfy these requirements. Parties participating in a regional arrangement must develop a Regional Reception Facility Plan, taking into account the guidelines developed by IMO[2].

Special areas

The special areas established under Annex V are:

- the Mediterranean Sea area
- the Baltic Sea area
- the Black Sea area
- the Red Sea area
- the Gulfs area
- the North Sea area
- the Wider Caribbean Region and

- the Antarctic area.

These are sea areas where for recognized technical reasons relating to their oceanographic and ecological condition and the particular character of traffic, such as heavy maritime traffic, low water exchange, extreme ice states, endangered marine species, etc., the adoption of special mandatory methods for the prevention of marine pollution by garbage is required.

Port State control

Provisions to extend port State control to cover operational requirements as regards prevention of marine pollution were adopted in 1994 and entered into force on 3 March 1996. Like similar amendments to the other MARPOL Annexes, regulation 9 of Annex V makes it clear that port State control officers can inspect a foreign-flagged ship at a port or an offshore terminal of its State "where there are clear grounds for believing that the master or crew are not familiar with essential shipboard procedures relating to the prevention of pollution by garbage".

Placard

Regulation 10.1 also requires every ship of 12 metres in length or over and every fixed or floating platform to display placards notifying passengers and crew of the disposal requirements of the Annex; these placards should be written in the working language of the ship's crew and also in English, French or Spanish for ships travelling to other States' ports or offshore terminals.

Garbage management plan

All ships of 100 gross tonnage and above, every ship certified to carry 15 persons or more, and every fixed or floating platform must carry a garbage management plan on board, which includes written procedures for minimizing, collecting, storing, processing and disposing of garbage, including the use of the equipment on board (regulation 10.2). The garbage management plan must designate the person responsible for the plan and be written in the working language of the crew. Resolution MEPC.220(63) provides the *2012 Guidelines for the development of garbage* management *plans*.

Garbage Record Book

Implementation and enforcement is also the focus of regulation 10.3, which requires all ships of 400 gross tonnage and above and every ship which is certified to carry 15 persons or more engaged in voyages to ports and offshore terminals under the jurisdiction of another Party to the Convention and every fixed or floating platform to provide a Garbage Record Book and to record all disposal and incineration operations.

The date, time, position of the ship, description of the garbage and the estimated amount incinerated or discharged must be logged and signed. The Garbage Record Book must be kept for a period of two years after the date of the last entry. This regulation does not in itself impose stricter requirements - but it makes it easier to check that the regulations on garbage are being adhered to as it means ship personnel must keep track of the garbage and what happens to it. It could also prove an advantage to a ship when local officials are checking the origin of discharged garbage - if ship personnel can adequately account for all their garbage, they are unlikely to be wrongly penalised for discharging garbage when they have not done so. Appendix 2 of MARPOL Annex V provides a standard form for a Garbage Record Book.

Cargo residues

Cargo residues are defined as the remnants of any cargo which are not covered by other Annexes to the present Convention and which remain on deck or in holds following loading or unloading. They include loading and unloading excess or spillage, whether in wet or dry condition or entrained in wash water, but do not include cargo dust remaining on deck after sweeping or dust on the external surfaces of the ship (regulation 1.2 of Annex V). In addition to this definition, MARPOL Annex V also stipulates that only those cargo residues that cannot be recovered using commonly available methods for unloading could be considered for discharge.

A simplified overview of the regulations regarding the discharge of cargo residues under MARPOL Annex V. As a general rule, cargo residues which contain substances classified as harmful to the marine environment (HME) must not be discharged at sea, but have to be taken to port reception facilities. Regarding the discharge of cargo residues which do not contain any HME substances, the Annex establishes different requirements depending on whether they are contained in wash water or not.

Solid bulk cargoes must be classified and declared by the shipper as to whether or not they are harmful to the marine environment, in accordance with the criteria set out in appendix 1 of MARPOL Annex V.

Shipboard incinerator

The Standard Specification for Shipboard Incinerators (resolution MEPC.244(66)) covers the design, manufacture, performance, operation and testing of incinerators designed to incinerate garbage and other shipboard waste.

Verification of compliance

Chapter 2 of MARPOL Annex V provides that Parties must use the provisions of the Code for Implementation in execution of their obligations and responsibilities, and be subject to the IMO Member State Audit Scheme (IMSAS) in accordance with the audit standard to verify compliance with and implementation of the Annex. The mandatory IMSAS commenced from 1 January 2016,

Polar Regions

Chapter 3 of MARPOL Annex V makes use of the environment-related provisions of the Polar Code mandatory, and requires that ships trading the Polar Regions must comply with strict environmental provisions specific to the harsh conditions in Polar waters – the Arctic waters and the Antarctic area.

<u>Air Pollution and GHG Emissions</u>

Air Pollution

In 1997, a new annex was added to the International Convention for the Prevention of Pollution from Ships (MARPOL). The regulations for the Prevention of Air Pollution from Ships (Annex VI) seek to minimize airborne emissions from ships (SOx, NOx, ODS, VOC shipboard incineration) and their contribution to local and global ai r pollution and environmental problems. Annex VI entered into force on 19 May 2005 and a revised Annex VI with significantly tightened emissions limits was adopted in October 2008 which entered into force on 1 July 2010.

Energy Efficiency

In 2011, IMO adopted mandatory technical and operational energy efficiency measures which are expected to significantly reduce the amount of CO_2 emissions from international shipping. These mandatory measures (EEDI/SEEMP) entered into force on 1 January 2013.

IMO has adopted important guidelines aimed at supporting implementation of the mandatory measures to increase energy efficiency and reduce GHG emissions from international shipping, paving the way for the regulations on EEDI and SEEMP to be smoothly implemented by Administrations and industry.

The expected growth of world trade represents a challenge to meeting a future target for emissions required to achieve stabilization in global temperatures and so IMO has begun consideration of further technical and operational measures to enhance the energy efficiency of ships.

Data Collection System

Amendments to MARPOL Annex VI on Data collection system for fuel oil consumption of ships entered into force on 1 March 2018.

Under the amendments, ships of 5,000 gross tonnage and above are required to collect consumption data for each type of fuel oil they use, as well as other, additional, specified data including proxies for transport work. The aggregated data is reported to the flag State after the end of each calendar year and the flag State, having determined that the data has been reported in accordance with the requirements, issues a Statement of Compliance to the ship. Flag States are required to subsequently transfer this data to an IMO Ship Fuel Oil Consumption Database. IMO will be required to produce an annual report to MEPC, summarizing the data collected.

Technical Co-operation

IMO adopted a resolution on Promotion of Technical Co-operation and Transfer of Technology relating to the Improvement of Energy Efficiency of Ships and is focusing its efforts on technical co-operation and capacity building to ensure smooth and effective implementation and enforcement of the new regulations worldwide. To that effect, IMO has been undertaking a series of workshops in all regions of the world on implementation of the measures to address GHG emissions from international shipping.

Reduction of GHG Emissions from Ships

In 2012, international shipping was estimated to have contributed about 2.2% to the global emissions of carbon dioxide (CO_2). Although international shipping is the most energy efficient mode of mass transport and only a modest contributor to overall CO_2 emissions, a global approach to further improve its energy efficiency and effective emission control is needed as sea transport will continue growing apace with world trade.

As already acknowledged by the Kyoto Protocol, CO_2 emissions from international shipping cannot be attributed to any particular national economy due to its global nature and complex operation. Therefore, IMO has been energetically pursuing the limitation and reduction of greenhouse gas (GHG) emissions from international shipping, in recognition of the magnitude of the climate change challenge and the intense focus on this topic.

MODULE-IV

INTERNATIONAL MARITIME LAW AND INTERNATIONAL TREATIES

INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA (SOLAS), 1974

The SOLAS Convention in its successive forms is generally regarded as the most important of all international treaties concerning the safety of merchant ships. The first version was adopted in 1914, in response to the Titanic disaster, the second in 1929, the third in 1948, and the fourth in 1960. The 1974 version includes the tacit acceptance procedure - which provides that an amendment shall enter into force on a specified date unless, before that date, objections to the amendment are received from an agreed number of Parties.

As a result the 1974 Convention has been updated and amended on numerous occasions. The Convention in force today is sometimes referred to as SOLAS, 1974, as amended.

Technical provisions

The main objective of the SOLAS Convention is to specify minimum standards for the construction, equipment and operation of ships, compatible with their safety. Flag States are responsible for ensuring that ships under their flag comply with its requirements, and a number of certificates are prescribed in the Convention as proof that this has been done. Control provisions also allow Contracting Governments to inspect ships of other Contracting States if there are clear grounds for believing that the ship and its equipment do not substantially comply with the requirements of the Convention - this procedure is known as port State control. The current SOLAS Convention includes Articles setting out general obligations, amendment procedure and so on, followed by an Annex divided into 14 Chapters.

Chapter I - General Provisions

Includes regulations concerning the survey of the various types of ships and the issuing of documents signifying that the ship meets the requirements of the Convention. The Chapter also includes provisions for the control of ships in ports of other Contracting Governments.

Chapter II-1 - Construction - Subdivision and stability, machinery and electrical installations

The subdivision of passenger ships into watertight compartments must be such that after assumed damage to the ship's hull the vessel will remain afloat and stable. Requirements for watertight integrity and bilge pumping arrangements for passenger ships are also laid down as well as stability requirements for both passenger and cargo ships.

The degree of subdivision - measured by the maximum permissible distance between two adjacent bulkheads - varies with ship's length and the service in which it is engaged. The highest degree of subdivision applies to passenger ships.

Requirements covering machinery and electrical installations are designed to ensure that services which are essential for the safety of the ship, passengers and crew are maintained under various emergency conditions.

"Goal-based standards" for oil tankers and bulk carriers were adopted in 2010, requiring new ships to be designed and constructed for a specified design life and to be safe and environmentally friendly, in intact and specified damage conditions, throughout their life. Under the regulation, ships should have adequate strength, integrity and stability to minimize the risk of loss of the ship or pollution to the marine environment due to structural failure, including collapse, resulting in flooding or loss of watertight integrity.

Chapter II-2 - Fire protection, fire detection and fire extinction

Includes detailed fire safety provisions for all ships and specific measures for passenger ships, cargo ships and tankers.

They include the following principles: division of the ship into main and vertical zones by thermal and structural boundaries; separation of accommodation spaces from the remainder of the ship by thermal and structural boundaries; restricted use of combustible materials; detection of any fire in the zone of origin; containment and extinction of any fire in the space of origin; protection of the means of escape or of access for fire-fighting purposes; ready availability of fire-extinguishing appliances; minimization of the possibility of ignition of flammable cargo vapour.

Chapter III - Life-saving appliances and arrangements

The Chapter includes requirements for life-saving appliances and arrangements, including requirements for life boats, rescue boats and life jackets according to type of ship. The International Life-Saving Appliance (LSA) Code gives specific technical requirements for LSAs and is mandatory under Regulation 34, which states that all life-saving appliances and arrangements shall comply with the applicable requirements of the LSA Code.

Chapter IV – Radio-communications

The Chapter incorporates the Global Maritime Distress and Safety System (GMDSS). All passenger ships and all cargo ships of 300 gross tonnage and upwards on international voyages are required to carry equipment designed to improve the chances of rescue following an accident, including satellite emergency position indicating radio beacons (EPIRBs) and search and rescue transponders (SARTs) for the location of the ship or survival craft.

Regulations in Chapter IV cover undertakings by contracting governments to provide radiocommunication services as well as ship requirements for carriage of radiocommunications equipment. The Chapter is closely linked to the Radio Regulations of the International Telecommunication Union.

Chapter V - Safety of navigation

Chapter V identifies certain navigation safety services which should be provided by Contracting Governments and sets forth provisions of an operational nature applicable in general to all ships on all voyages. This is in contrast to the Convention as a whole, which only applies to certain classes of ship engaged on international voyages.

The subjects covered include the maintenance of meteorological services for ships; the ice patrol service; routeing of ships; and the maintenance of search and rescue services.

This Chapter also includes a general obligation for masters to proceed to the assistance of those in distresses and for Contracting Governments to ensure that all ships shall be sufficiently and efficiently manned from a safety point of view.

The chapter makes mandatory the carriage of voyage data recorders (VDRs) and automatic ship identification systems (AIS).

Chapter VI - Carriage of Cargoes

The Chapter covers all types of cargo (except liquids and gases in bulk) "which, owing to their particular hazards to ships or persons on board, may require special precautions". The regulations include requirements for stowage and securing of cargo or cargo units (such as containers). The Chapter requires cargo ships carrying grain to comply with the International Grain Code.

Chapter VII - Carriage of dangerous goods

The regulations are contained in three parts:

Part A - Carriage of dangerous goods in packaged form - includes provisions for the classification, packing, marking, labelling and placarding, documentation and stowage of dangerous goods. Contracting Governments are required to issue instructions at the national level and the Chapter makes mandatory the International Maritime Dangerous Goods (IMDG) Code, developed by IMO, which is constantly updated to accommodate new dangerous goods and to supplement or revise existing provisions.

Part A-1 - Carriage of dangerous goods in solid form in bulk - covers the documentation, stowage and segregation requirements for these goods and requires reporting of incidents involving such goods.

Part B covers Construction and equipment of ships carrying dangerous liquid chemicals in bulk and requires chemical tankers to comply with the International Bulk Chemical Code (IBC Code).

Part C covers Construction and equipment of ships carrying liquefied gases in bulk and gas carriers to comply with the requirements of the International Gas Carrier Code (IGC Code).

Part D includes special requirements for the carriage of packaged irradiated nuclear fuel, plutonium and high-level radioactive wastes on board ships and requires ships carrying such products to comply with the International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships (INF Code).

The chapter requires carriage of dangerous goods to be in compliance with the relevant provisions of the International Maritime Dangerous Goods Code (IMDG Code).

Chapter VIII - Nuclear ships

Gives basic requirements for nuclear-powered ships and is particularly concerned with radiation hazards. It refers to detailed and comprehensive Code of Safety for Nuclear Merchant Ships which was adopted by the IMO Assembly in 1981.

Chapter IX - Management for the Safe Operation of Ships

The Chapter makes mandatory the International Safety Management (ISM) Code, which requires a safety management system to be established by the shipowner or any person who has assumed responsibility for the ship (the "Company").

Chapter X - Safety measures for high-speed craft

The Chapter makes mandatory the International Code of Safety for High-Speed Craft (HSC Code).

Chapter XI-1 - Special measures to enhance maritime safety

The Chapter clarifies requirements relating to authorization of recognized organizations (responsible for carrying out surveys and inspections on Administrations' behalves); enhanced surveys; ship identification number scheme; and port State control on operational requirements.

Chapter XI-2 - Special measures to enhance maritime security

Regulation XI-2/3 of the chapter enshrines the International Ship and Port Facilities Security Code (ISPS Code). Part A of the Code is mandatory and part B contains guidance as to how best to comply with the mandatory requirements. Regulation XI-2/8 confirms the role of the Master in exercising his professional judgement over decisions necessary to maintain the security of the ship. It says he shall not be constrained by the Company, the charterer or any other person in this respect.

Regulation XI-2/5 requires all ships to be provided with a ship security alert system. ,Regulation XI-2/6 covers requirements for port facilities, providing among other things for Contracting Governments to ensure that port facility security assessments are carried out and that port facility security plans are developed, implemented and reviewed in accordance with the ISPS Code. Other regulations in this chapter cover the provision of information to IMO, the control of ships in port, (including measures such as the delay, detention, restriction of operations including movement within the port, or expulsion of a ship from port), and the specific responsibility of Companies.

Chapter XII - Additional safety measures for bulk carriers

The Chapter includes structural requirements for bulk carriers over 150 metres in length.

Chapter XIII - Verification of compliance

Makes mandatory from 1 January 2016 the IMO Member State Audit Scheme.

Chapter XIV - Safety measures for ships operating in polar waters

The chapter makes mandatory, from 1 January 2017, the Introduction and part I-A of the International Code for Ships Operating in Polar Waters (the Polar Code).

INTERNATIONAL CONVENTION FOR THE PREVENTION OF POLLUTION FROM SHIPS (MARPOL)

The International Convention for the Prevention of Pollution from Ships (MARPOL) is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes.

The MARPOL Convention was adopted on 2 November 1973 at IMO. The Protocol of 1978 was adopted in response to a spate of tanker accidents in 1976-1977. As the 1973 MARPOL Convention had not yet entered into force, the 1978 MARPOL Protocol absorbed the parent Convention. The combined instrument entered into force on 2 October 1983. In 1997, a Protocol was adopted to amend the Convention and a new Annex VI was added which entered into force on 19 May 2005. MARPOL has been updated by amendments through the years.

The Convention includes regulations aimed at preventing and minimizing pollution from ships - both accidental pollution and that from routine operations - and currently includes six technical Annexes. Special Areas with strict controls on operational discharges are included in most Annexes.

Annex I Regulations for the Prevention of Pollution by Oil (entered into force 2 October 1983)

Covers prevention of pollution by oil from operational measures as well as from accidental discharges; the 1992 amendments to Annex I made it mandatory for new oil tankers to have double hulls and brought in a phase-in schedule for existing tankers to fit double hulls, which was subsequently revised in 2001 and 2003.

Annex II Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk (entered into force 2 October 1983)

Details the discharge criteria and measures for the control of pollution by noxious liquid substances carried in bulk; some 250 substances were evaluated and included in the list appended to the Convention; the discharge of their residues is allowed only to reception facilities until certain concentrations and conditions (which vary with the category of substances) are complied with.

In any case, no discharge of residues containing noxious substances is permitted within 12 miles of the nearest land.

Annex III Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form (entered into force 1 July 1992)

Contains general requirements for the issuing of detailed standards on packing, marking, labelling, documentation, stowage, quantity limitations, exceptions and notifications.

For the purpose of this Annex, "harmful substances" are those substances which are identified as marine pollutants in the International Maritime Dangerous Goods Code (IMDG Code) or which meet the criteria in the Appendix of Annex III.

Annex IV Prevention of Pollution by Sewage from Ships (entered into force 27 September 2003)

Contains requirements to control pollution of the sea by sewage; the discharge of sewage into the sea is prohibited, except when the ship has in operation an approved sewage treatment plant or when the ship is discharging comminuted and disinfected sewage using an approved system at a distance of more than three nautical miles from the nearest land; sewage which is not comminuted or disinfected has to be discharged at a distance of more than 12 nautical miles from the nearest land.

Annex V Prevention of Pollution by Garbage from Ships (entered into force 31 December 1988)

Deals with different types of garbage and specifies the distances from land and the manner in which they may be disposed of; the most important feature of the Annex is the complete ban imposed on the disposal into the sea of all forms of plastics.

Annex VI Prevention of Air Pollution from Ships (entered into force 19 May 2005)

Sets limits on sulphur oxide and nitrogen oxide emissions from ship exhausts and prohibits deliberate emissions of ozone depleting substances; designated emission control areas set more stringent standards for SOx, NOx and particulate matter. A chapter adopted in 2011 covers mandatory technical and operational energy efficiency measures aimed at reducing greenhouse gas emissions from ships.

INTERNATIONAL CONVENTION ON STANDARDS OF TRAINING, CERTIFICATION AND WATCHKEEPING FOR SEAFARERS (STCW)

The 1978 STCW Convention was the first to establish basic requirements on training, certification and watchkeeping for seafarers on an international level. Previously the standards of training, certification and watchkeeping of officers and ratings were established by individual governments, usually without reference to practices in other countries. As a result standards and procedures varied widely, even though shipping is the most international of all industries.

The Convention prescribes minimum standards relating to training, certification and watchkeeping for seafarers which countries are obliged to meet or exceed.

The **1995 amendments**, adopted by a Conference, represented a major revision of the Convention, in response to a recognized need to bring the Convention up to date and to respond to critics who pointed out the many vague phrases, such as "to the satisfaction of the Administration", which resulted in different interpretations being made.

The 1995 amendments entered into force on 1 February 1997. One of the major features of the revision was the division of the technical annex into regulations, divided into Chapters as before, and a new STCW Code, to which many technical regulations were transferred. Part A of the Code is mandatory while Part B is recommended.

Dividing the regulations up in this way makes administration easier and it also makes the task of revising and updating them more simple: for procedural and legal reasons there is no need to call a full conference to make changes to Codes.

Another major change was the requirement for Parties to the Convention are required to provide detailed information to IMO concerning administrative measures taken to ensure compliance with the Convention. This represented the first time that IMO had been called upon to act in relation to compliance and implementation - generally, implementation is down to the flag States, while port State control also acts to ensure compliance. Under Chapter I, regulation I/7 of the revised Convention, Parties are required to provide detailed information to IMO concerning administrative measures taken to ensure compliance with the Convention, education and training courses, certification procedures and other factors relevant to implementation.The information is reviewed by panels of competent persons, nominated by Parties to the STCW Convention, who report on their findings to the IMO Secretary-General, who, in turn, reports to the Maritime Safety Committee (MSC) on the Parties which fully comply. The MSC then produces a list of "confirmed Parties" in compliance with the STCW Convention.

STCW Convention chapters

Chapter I: General provisions

Chapter II: Master and deck department

Chapter III: Engine department

Chapter IV: Radiocommunication and radio personnel

Chapter V: Special training requirements for personnel on certain types of ships

Chapter VI: Emergency, occupational safety, medical care and survival functions

Chapter VII: Alternative certification

Chapter VIII: Watchkeeping

The STCW Code

The regulations contained in the Convention are supported by sections in the STCW Code. Generally speaking, the Convention contains basic requirements which are then enlarged upon and explained in the Code.Part A of the Code is mandatory. The minimum standards of competence required for seagoing personnel are given in detail in a series of tables. Part B of the Code contains recommended guidance which is intended to help Parties implement the Convention. The measures suggested are not mandatory and the examples given are only intended to illustrate how certain Convention requirements may be complied with.

However, the recommendations in general represent an approach that has been harmonized by discussions within IMO and consultation with other international organizations.

The **Manila amendments to the STCW Convention and Code** were adopted on 25 June 2010, marking a major revision of the STCW Convention and Code. The 2010 amendments entered into force on 1 January 2012 under the tacit acceptance procedure and are aimed at bringing the Convention and Code up to date with developments since they were initially adopted and to enable them to address issues that are anticipated to emerge in the foreseeable future.

Amongst the amendments adopted, there are a number of important changes to each chapter of the Convention and Code, including:

- Improved measures to prevent fraudulent practices associated with certificates of competency and strengthen the evaluation process (monitoring of Parties' compliance with the Convention);
- Revised requirements on hours of work and rest and new requirements for the prevention of drug and alcohol abuse, as well as updated standards relating to medical fitness standards for seafarers;
- New certification requirements for able seafarers;
- New requirements relating to training in modern technology such as electronic charts and information systems (ECDIS);
- New requirements for marine environment awareness training and training in leadership and teamwork;
- New training and certification requirements for electro-technical officers;
- Updating of competence requirements for personnel serving on board all types of tankers, including new requirements for personnel serving on liquefied gas tankers;
- New requirements for security training, as well as provisions to ensure that seafarers are properly trained to cope if their ship comes under attack by pirates;
- Introduction of modern training methodology including distance learning and web-based learning;
- New training guidance for personnel serving on board ships operating in polar waters; and
- New training guidance for personnel operating Dynamic Positioning Systems.

CONVENTION ON THE INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA, 1972 (COLREGS)

The 1972 Convention was designed to update and replace the Collision Regulations of 1960 which were adopted at the same time as the 1960 SOLAS Convention.

One of the most important innovations in the 1972 COLREGs was the recognition given to traffic separation schemes - Rule 10 gives guidance in determining safe speed, the risk of collision and the conduct of vessels operating in or near traffic separation schemes.

The first such traffic separation scheme was established in the Dover Strait in 1967. It was operated on a voluntary basis at first but in 1971 the IMO Assembly adopted a resolution stating that that observance of all traffic separation schemes be made mandatory - and the COLREGs make this obligation clear.

Technical provisions

The COLREGs include 41 rules divided into six sections: Part A - General; Part B - Steering and Sailing; Part C - Lights and Shapes; Part D - Sound and Light signals; Part E - Exemptions; and Part F - Verification of compliance with the provisions of the Convention. There are also four Annexes containing technical requirements concerning lights and shapes and their positioning; sound signalling appliances; additional signals for fishing vessels when operating in close proximity, and international distress signals.

Part A - General (Rules 1-3)

Rule 1 states that the rules apply to all vessels upon the high seas and all waters connected to the high seas and navigable by seagoing vessels.

Rule 2 covers the responsibility of the master, owner and crew to comply with the rules.

Rule 3 includes definitions.

Part B- Steering and Sailing (Rules 4-19)

Section 1 - Conduct of vessels in any condition of visibility (Rules 4-10)

Rule 4 says the section applies in any condition of visibility.

Rule 5 requires that "every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

Rule 6 deals with safe speed. It requires that: "Every vessel shall at all times proceed at a safe speed...". The Rule describes the factors which should be taken into account in determining safe speed. Several of these refer specifically to vessels equipped with radar.The importance of using "all available means" is further stressed in

Rule 7 covering risk of collision, which warns that "assumptions shall not be made on the basis of scanty information, especially scanty radar information"

Rule 8 covers action to be taken to avoid collision.

In Rule 9 a vessel proceeding along the course of a narrow channel or fairway is obliged to keep "as near to the outer limit of the channel or fairway which lies on her starboard side as is safe and practicable." The same Rule obliges a vessel of less than 20 metres in length or a sailing vessel not to impede the passage of a vessel "which can safely navigate only within a narrow channel or fairway."

The Rule also forbids ships to cross a narrow channel or fairway "if such crossing impedes the passage of a vessel which can safely navigate only within such channel or fairway." The meaning "not to impede" was classified by an amendment to Rule 8 in 1987. A new paragraph (f) was added, stressing that a vessel which was required not to impede the passage of another vessel should take early action to allow sufficient sea room for the safe passage of the other vessel. Such vessel was obliged to fulfil this obligation also when taking avoiding action in accordance with the steering and sailing rules when risk of collision exists.

Rule 10 of the Collision Regulations deals with the behaviour of vessels in or near traffic separation schemes adopted by the Organization. By regulation 8 of Chapter V (Safety of Navigation) of SOLAS, IMO is recognized as being the only organization competent to deal with international measures concerning the routeing of ships.

The effectiveness of traffic separation schemes can be judged from a study made by the International Association of Institutes of Navigation (IAIN) in 1981. This showed that

between 1956 and 1960 there were 60 collisions in the Strait of Dover; twenty years later, following the introduction of traffic separation schemes, this total was cut to only 16.
In other areas where such schemes did not exist the number of collisions rose sharply. New traffic separation schemes are introduced regularly and existing ones are amended when necessary to respond to changed traffic conditions. To enable this to be done as quickly as possible the MSC has been authorized to adopt and amend traffic separation schemes on behalf of the Organization.
Rule 10 states that ships crossing traffic lanes are required to do so "as nearly as practicable at right angles to the general direction of traffic flow." This reduces confusion to other ships as to the crossing vessel's intentions and course and at the same time enables that vessel to cross the lane as quickly as possible.
Fishing vessels "shall not impede the passage of any vessel following a traffic lane" but are not banned from fishing. This is in line with Rule 9 which states that "a vessel engaged in fishing shall not impede the passage of any other vessel navigating within a narrow channel or fairway."In 1981 the regulations were amended. Two new paragraphs were added to Rule 10 to exempt vessels which are restricted in their ability to manoeuvre "when engaged in an operation for the safety of navigation in a traffic separation scheme" or when engaged in cable laying.
In 1987 the regulations were again amended. It was stressed that Rule 10 applies to traffic separation schemes adopted by the Organization (IMO) and does not relieve any vessel of her obligation under any other rule. It was also to clarify that if a vessel is obliged to cross traffic lanes it should do so as nearly as practicable at right angles to the general direction of the traffic flow. In 1989 Regulation 10 was further amended to clarify the vessels which may use the "inshore traffic zone."

Section II - Conduct of vessels in sight of one another (Rules 11-18)

Rule 11 says the section applies to vessels in sight of one another.

Rule 12 states action to be taken when two sailing vessels are approaching one another.

Rule 13covers overtaking - the overtaking vessel should keep out of the way of the vessel being overtaken.

Rule 14 deals with head-on situations. Crossing situations are covered by Rule 15 and action to be taken by the give-way vessel is laid down in Rule 16.

Rule 17 deals with the action of the stand-on vessel, including the provision that the stand-on vessel may "take action to avoid collision by her manoeuvre alone as soon as it becomes apparent to her that the vessel required to keep out of the way is not taking appropriate action.

Rule 18 deals with responsibilities between vessels and includes requirements for vessels which shall keep out of the way of others.

Section III - conduct of vessels in restricted visibility (Rule 19)

Rule 19 states every vessel should proceed at a safe speed adapted to prevailing circumstances and restricted visibility. A vessel detecting by radar another vessel should determine if there is risk of collision and if so take avoiding action. A vessel hearing fog signal of another vessel should reduce speed to a minimum.

Part C Lights and Shapes (Rules 20-31)

Rule 20 states rules concerning lights apply from sunset to sunrise.Rule 21 gives definitions.

Rule 22 covers visibility of lights - indicating that lights should be visible at minimum ranges (in nautical miles) determined according to the type of vessel.

Rule 23 covers lights to be carried by power-driven vessels underway.

Rule 24 covers lights for vessels towing and pushing.

Rule 25 covers light requirements for sailing vessels underway and vessels under oars.

Rule 26 covers light requirements for fishing vessels.

Rule 27 covers light requirements for vessels not under command or restricted in their ability to manoeuvre.

Rule 28 covers light requirements for vessels constrained by their draught.

Rule 29 covers light requirements for pilot vessels.

Rule 30 covers light requirements for vessels anchored and aground.Rule 31 covers light requirements for seaplanes

Part D - Sound and Light Signals (Rules 32-37)

Rule 32 gives definitions of whistle, short blast, and prolonged blast.

Rule 33 says vessels 12 metres or more in length should carry a whistle and a bell and vessels 100 metres or more in length should carry in addition a gong.

Rule 34 covers manoeuvring and warning signals, using whistle or lights.

Rule 35 covers sound signals to be used in restricted visibility.

Rule 36 covers signals to be used to attract attention.

Rule 37 covers distress signals.

Part E - Exemptions (Rule 38)

Rule 38 says ships which comply with the 1960 Collision Regulations and were built or already under construction when the 1972 Collision Regulations entered into force may be exempted from some requirements for light and sound signals for specified periods.

Part F - Verification of compliance with the provisions of the Convention

The Rules, adopted in 2013, bring in the requirements for compulsory audit of Parties to the Convention.

Rule 39 provides definitions.

Rule 40 says that Contracting Parties shall use the provisions of the Code for Implementation in the execution of their obligations and responsibilities contained in the present Convention.

Rule 41 on Verification of compliance says that every Contracting Party is subject to periodic audits by IMO.

Annexes

The COLREGs include four annexes:

Annex I - Positioning and technical details of lights and shapes

Annex II - Additional signals for fishing vessels fishing in close proximity

Annex III - Technical details of sounds signal appliances

Annex IV - Distress signals, which lists the signals indicating distress and need of assistance.

CONVENTION ON FACILITATION OF INTERNATIONAL MARITIME TRAFFIC (FAL)

The Convention's main objectives are to prevent unnecessary delays in maritime traffic, to aid co-operation between Governments, and to secure the highest practicable degree of uniformity in formalities and other procedures. In particular, the Convention reduces the number of declarations which can be required by public authorities.

Most human activities are regulated, either by precedent, convention or regulation. Most regulations are essential - but sometimes they come to be regarded not only as unnecessary but also as a significant burden on the activities they are supposed to control. Few activities have been more subject to over-regulation than international maritime transport.

This is partly because of the international nature of shipping: countries developed customs, immigration and other standards independently of each other and a ship visiting several countries during the course of a voyage could expect to be presented with numerous forms to fill in, often asking for exactly the same information but in a slightly different way.

As shipping and trade developed and grew in the early part of the twentieth century, so did the paperwork involved. By the 1950s it was being regarded not simply as an inconvenience but as a threat. The actual number of separate documents required varied from port to port; yet the information on cargoes and persons carried that was sought was often identical. The number of copies required of some of these documents could often become excessive. To the variety of forms and the number of copies required could be added other burdens such as local language translations, consular visa requirements, variations in document size and paper stock used and the necessity for authentication by the shipmaster of the information submitted.

By the early 1960s the maritime nations had decided that the situation could not be allowed to deteriorate further. International action was called for and to achieve it Governments turned to IMO, which had held its first meeting in 1959.

In 1961 the 2nd IMO Assembly adopted resolution A.29 (II) which recommended that IMO take up the matter. An Expert Group was convened which recommended that an international convention be adopted to assist the facilitation of international maritime traffic.

In October 1963 the 3rd IMO Assembly adopted resolution A.63 (III) which approved the report of Expert Group and in particular recommended that a convention be drafted which would be considered for adoption at a conference to be held under IMO auspices in the spring of 1965. The conference duly took place and the Convention on Facilitation of International Maritime Traffic (FAL), 1965 was adopted on 9 April.

Standards and recommended practices

In its Annex, the Convention contains "Standards" and "Recommended Practices" on formalities, documentary requirements and procedures which should be applied on arrival, stay and departure to the ship itself, and to its crew, passengers, baggage and cargo.

The Convention defines standards as internationally-agreed measures which are "necessary and practicable in order to facilitate international maritime traffic" and recommended practices as measures the application of which is "desirable".

The Convention provides that any Contracting Government which finds it impracticable to comply with any international standard, or deems it necessary to adopt differing regulations, must inform the Secretary-General of IMO of the "differences" between its own practices and the standards in question. The same procedure applies to new or amended standards.

In the case of recommended practices, Contracting Governments are urged to adjust their laws accordingly but are only required to notify the Secretary-General when they have brought their own formalities, documentary requirements and procedures into full accord.

This flexible concept of standards and recommended practices, coupled with the other provisions, allows continuing progress to be made towards the formulation and adoption of uniform measures in the facilitation of international maritime traffic.

The IMO Standardized Forms (FAL 1-7)

Standard 2.1 lists the documents which public authorities can demand of a ship and recommends the maximum information and number of copies which should be required. IMO has developed Standardized Forms for seven of these documents. They are the:

- IMO General Declaration
- Cargo Declaration
- Ship's Stores Declaration
- Crew's Effects Declaration
- Crew List· Passenger List
- Dangerous Goods

Two other documents are required under the Universal Postal Convention and the International Health Regulations.

The general declaration, cargo declaration, crew list and passenger list constitute the maximum information necessary. The ship's stores declaration and crew's effects declaration incorporate the agreed essential minimum information requirements.

Important amendments include:

The 2002 amendments

Adoption: 10 January 2002; Entry into force: 1 May 2003

The amendments add new standards and recommended practices for dealing with stowaways. Another amendment relates to the Dangerous Goods Manifest (FAL Form 7), which becomes the basic document providing public authorities with the information regarding dangerous goods on board ships.

The 2005 amendments

Adoption: 7 July 2005; Entry into force: 1 November 2006

The amendments are intended to modernize the Convention in order to enhance the facilitation of international maritime traffic, including a Recommended Practice for public authorities to develop the necessary procedures in order to use pre-arrival and pre-departure information to facilitate the processing of information, and thus expedite release and clearance of cargo and persons; a Recommended Practice that all information should be submitted to a single point to avoid duplication; encouragement of electronic transmission of information; and the addition of references to the International Ship and Port Facility Security (ISPS) Code and SOLAS chapter XI-2 in the Standards and Recommended Practices which mention security measures; and amendments to the IMO Standardized FAL Forms (1 to 7).

A further amendment relates to persons rescued at sea. A standard in Section 2 - Arrival, stay and departure of the ship, in section H Special measures of facilitation for ships calling at ports in order to put ashore sick or injured crew members, passengers, persons rescued at sea or other persons for emergency medical treatment. The amendment requires public authorities to facilitate the arrival and departure of ships engaged in the rescue of persons in distress at sea in order to provide a place of safety for such persons.

The 2009 amendments

Adoption: 16 January 2009; **Entry into force: 15 May 2010**

The amendments are related to sections concerning contents and purpose of documents; arrival and departure requirements and procedures; measures to facilitate clearance of passengers, crew and baggage; and facilitation for ships engaged on cruises and for cruises passengers. The amendments introduced the text of "voyage number", and new IMO FAL Forms were approved.

The 2016 amendments

Adoption: 8 April 2016; **Entry into force: 01 January 2018**

These amendments introduce new definitions for Cargo Transport Unit (CTU), clearance, freight container, the International Ship and Port Facility Security (ISPS) Code, master, ship agent, shipper and single window. Electronic exchange of information will be mandatory from 9 April 2019 with a transition period of no less than 12 months. The text now refers to the use of "Single Window" systems and has been revised in a gender-neutral format. Three additional documents have been introduced for ship's clearance that may be required by the shore authorities, i.e. security-related information as required under SOLAS regulation XI-2/9.2.2, Advance electronic cargo information for customs risk assessment purposes, and Advanced Notification Form for Waste Delivery to Port Reception Facilities. Additional guarantees have been included relating to the shore leave of crew members. All IMO FAL forms, with the exception of Ship's Stores Declaration (IMO FAL Form 3), have been revised.

INTERNATIONAL CONVENTION ON MARITIME SEARCH AND RESCUE (SAR)

The 1979 Convention, adopted at a Conference in Hamburg, was aimed at developing an international SAR plan, so that, no matter where an accident occurs, the rescue of persons in distress at sea will be co-ordinated by a SAR organization and, when necessary, by co-operation between neighbouring SAR organizations.

Although the obligation of ships to go to the assistance of vessels in distress was enshrined both in tradition and in international treaties (such as the International Convention for the Safety of Life at Sea (SOLAS), 1974), there was, until the adoption of the SAR Convention, no international system covering search and rescue operations. In some areas there was a well-established organization able to provide assistance promptly and efficiently, in others there was nothing at all.

The technical requirements of the SAR Convention are contained in an Annex, which was divided into five Chapters. Parties to the Convention are required to ensure that arrangements are made for the provision of adequate SAR services in their coastal waters.Parties are encouraged to enter into SAR agreements with neighbouring States involving the establishment of SAR regions, the pooling of facilities, establishment of common procedures, training and liaison visits. The Convention states that Parties should take measures to expedite entry into its territorial waters of rescue units from other Parties.

The Convention then goes on to establish preparatory measures which should be taken, including the establishment of rescue co-ordination centres and subcentres. It outlines operating procedures to be followed in the event of emergencies or alerts and during SAR operations. This includes the designation of an on-scene commander and his duties.

IMO search and rescue areas

Following the adoption of the 1979 SAR Convention, IMO's Maritime Safety Committee divided the world's oceans into 13 search and rescue areas, in each of which the countries concerned have delimited search and rescue regions for which they are responsible.

Provisional search and rescue plans for all of these areas were completed when plans for the Indian Ocean were finalized at a conference held in Fremantle, Western Australia in September 1998.

Revision of SAR Convention

The 1979 SAR Convention imposed considerable obligations on Parties - such as setting up the shore installations required - and as a result the Convention was not being ratified by as many countries as some other treaties. Equally important, many of the world's coastal States had not accepted the Convention and the obligations it imposed.It was generally agreed that one reason for the small number of acceptances and the slow pace of implementation was due to problems with the SAR Convention itself and that these could best be overcome by amending the Convention.

A revised Annex to the SAR Covnention was adopted in May 1998 and entered ito force in January 2000.

The revised technical Annex of the SAR Convention clarifies the responsibilities of Governments and puts greater emphasis on the regional approach and co-ordination between maritime and aeronautical SAR operations.

The revised Annex includes five Chapters:

Chapter 1 - Terms and Definitions

This Chapter updates the original Chapter 1 of the same name.

Chapter 2 - Organization and Co-ordination

The Chapter makes clear the responsibilities of Governments. It requires Parties, either individually or in co-operation with other States, to establish basic elements of a search and rescue service, to include:

- legal framework;
- assignment of a responsible authority;
- organization of available resources;
- communication facilities;
- co-ordination and operational functions; and
- processes to improve the service including planning, domestic and international co-operative relationships and training.

Parties should establish search and rescue regions within each sea area - with the agreement of the Parties concerned. Parties then accept responsibility for providing search and rescue services for a specified area.

The Chapter also describes how SAR services should be arranged and national capabilities be developed. Parties are required to establish rescue co-ordination centres and to operate them on a 24-hour basis with trained staff who have a working knowledge of English.

Parties are also required to "ensure the closest practicable co-ordination between maritime and aeronautical services".

Chapter 3 - Co-operation between States

Requires Parties to co-ordinate search and rescue organizations, and, where necessary, search and rescue operations with those of neighbouring States. The Chapter states that unless otherwise agreed between the States concerned, a Party should authorize, subject to applicable national laws, rules and regulations, immediate entry into or over its territorial sea or territory for rescue units of other Parties solely for the purpose of search and rescue.

Chapter 4 - Operating Procedures

The Chapter says that each RCC (Rescue Co-ordination Centre) and RSC (Rescue Sub-Centre) should have up-to-date information on search and rescue facilities and communications in the area and should have detailed plans for conduct of search and rescue operations. Parties - individually or in co-operation with others should be capable of receiving distress alerts on a 24-hour basis. The regulations include procedures to be followed during an emergency and state that search and rescue activities should be co-ordinated on scene for the most effective results. The Chapter says that "Search and rescue operations shall continue, when practicable, until all reasonable hope of rescuing survivors has passed".

Chapter 5 - Ship reporting systems

Includes recommendations on establishing ship reporting systems for search and rescue purposes, noting that existing ship reporting systems could provide adequate information for search and rescue purposes in a given area.

IAMSAR Manual

Concurrently with the revision of the SAR Convention, the IMO and the International Civil Aviation Organization (ICAO) jointly develop and publish the International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual, published in three volumes covering Organization and Management; Mission Co-ordination; and Mobile Facilities.

2004 amendments - persons in distress at sea

Adoption: May 2004; Entry into force: 1 July 2006

The amendments to the Annex to the Convention include:

- addition of a new paragraph in chapter 2 (Organization and co-ordination) relating to definition of persons in distress;
- new paragraphs in chapter 3 (Co-operation between States) relating to assistance to the master in delivering persons rescued at sea to a place of safety; and
- a new paragraph in chapter 4 (Operating procedures) relating to rescue co-ordination centres initiating the process of identifying the most appropriate places for disembarking persons found in distress at sea.

CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION, PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF FIXED PLATFORMS LOCATED ON THE CONTINENTAL SHELF

Concern about unlawful acts which threaten the safety of ships and the security of their passengers and crews grew during the 1980s, with reports of crews being kidnapped, ships being hi-jacked, deliberately run aground or blown up by explosives. Passengers were threatened and sometimes killed.

In November 1985 the problem was considered by IMO's 14th Assembly and a proposal by the United States that measures to prevent such unlawful acts should be developed by IMO was supported.

The Assembly adopted resolution A.584(14) *Measures to prevent unlawful acts which threaten the safety of ships and the security of their passengers and crew*, then in 1986 the Maritime Safety Committee (MSC) issued a Circular (MSC/Circ.443) on *Measures to prevent unlawful acts against passengers and crews on board ships.*

In November 1986 the Governments of Austria, Egypt and Italy proposed that IMO prepare a convention on the subject of unlawful acts against the safety of maritime navigation 'to provide for a comprehensive suppression of unlawful acts committed against the safety of maritime navigation which endanger innocent human lives, jeopardize the safety of persons and property, seriously affect the operation of maritime services and thus are of grave concern to the international community as a whole."

In March 1988 a conference in Rome adopted the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.The main purpose of the Convention is to ensure that appropriate action is taken against persons committing unlawful acts against ships. These include the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it.

The Convention obliges Contracting Governments either to extradite or prosecute alleged offenders.

Important amendments to the 1988 Convention and its related Protocol, were adopted by the Diplomatic Conference on the Revision of the SUA Treaties held from 10 to 14 October 2005. The amendments were adopted in the form of Protocols to the SUA treaties (the 2005 Protocols).

2005 Protocol to the SUA Convention

Among the unlawful acts covered by the SUA Convention in Article 3 are the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it.

The 2005 Protocol to the SUA Convention adds a new Article 3bis which states that a person commits an offence within the meaning of the Convention if that person unlawfully and intentionally:

- when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from any act:

    - uses against or on a ship or discharging from a ship any explosive, radioactive material or BCN (biological, chemical, nuclear) weapon in a manner that causes or is likely to cause death or serious injury or damage;
    - discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage;
    - uses a ship in a manner that causes death or serious injury or damage;
- transports on board a ship any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, death or serious injury or damage for the purpose of intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act;
- transports on board a ship any BCN weapon, knowing it to be a BCN weapon;
- any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; and
- transports on board a ship any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.

The transportation of nuclear material is not considered an offence if such item or material is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non Proliferation of Nuclear Weapons (Subject to conditions).

Under the new instrument, a person commits an offence within the meaning of the Convention if that person unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act that constitutes an offence under the SUA Convention or an offence set forth in any treaty listed in the Annex. The Annex lists nine such treaties.

The new instrument also makes it an offence to unlawfully and intentionally injure or kill any person in connection with the commission of any of the offences in the Convention; to attempt to commit an offence; to participate as an accomplice; to organize or direct others to commit an offence; or to contribute to the commissioning of an offence.

A new Article requires Parties to take necessary measures to enable a legal entity (this could be a company or organization, for example) to be made liable and to face sanctions when a person responsible for management of control of that legal entity has, that capacity, committed an offence under the Convention.

Boarding provisions

Article 8 of the SUA Convention covers the responsibilities and roles of the master of the ship, flag State and receiving State in delivering to the authorities of any State Party any person believed to have committed an offence under the Convention, including the furnishing of evidence pertaining to the alleged offence.

A new Article 8bis in the 2005 Protocol covers co-operation and procedures to be followed if a State Party desires to board a ship flying the flag of a State Party when the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be involved in, the commission of an offence under the Convention.

The authorization and co-operation of the flag State is required before such a boarding. A State Party may notify the IMO Secretary-General that it would allow authorization to board and search a ship flying its flag, its cargo and persons on board if there is no response from the flag State within four hours. A State Party can also notify that it authorizes a requesting Party to board and search the ship, its cargo and persons on board, and to question the persons on board to determine if an offence has been, or is about to be, committed.

The use of force is to be avoided except when necessary to ensure the safety of officials and persons on board, or where the officials are obstructed to the execution of authorized actions.

Article 8bis includes important safeguards when a State Party takes measures against a ship, including boarding. The safeguards include: not endangering the safety of life at sea; ensuring that all persons on board are treated in a manner which preserves human dignity and in keeping with human rights law; taking due account of safety and security of the ship and its cargo; ensuring that measures taken are environmentally sound; and taking reasonable efforts to avoid a ship being unduly detained or delayed.

Extradition

Article 11 covers extradition procedures. A new Article 11bis states that none of the offences should be considered for the purposes of extradition as a political offence. New article 11ter states that the obligation to extradite or afford mutual legal assistance need not apply if the request for extradition is believed to have been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Article 12 of the Convention requires States Parties to afford one another assistance in connection with criminal proceedings brought in respect of the offences. A new Article 12bis cover the conditions under which a person who is being detained or is serving a sentence in the territory of one State Party may be transferred to another State Party for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences.

Amendment procedure

Amendments to the Articles in the Convention require acceptance by a requisite number of States. However, the Annex, which lists the treaties under which offences can be considered for the purpose of the SUA Convention, has a special amendment procedure.

The treaties listed are:

- Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971

- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973
- International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979
- Convention on the Physical Protection of Nuclear Material, done at Vienna on 26 October 1979
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988
- International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997
- International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.

2005 Protocol to the 1988 SUA Protocol

The amendments to the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf reflect those in the 2005 Protocol to the SUA Convention.

New article 2bis broadens the range of offences included in the Protocol. A person commits an offence if that person unlawfully and intentionally, when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act, uses against or on a fixed platform or discharges from a fixed platform any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or discharges from a fixed platform, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration, that it causes or is likely to cause death or serious injury or damage; or threatens, with or without a condition, as is provided for under national law, to commit an offence.

New article 2ter includes the offences of unlawfully and intentionally injuring or killing any person in connection with the commission of any of the offences; attempting to commit an offence; participating as an accomplice; organizing or directing others to commit an offence.

INTERNATIONAL CONVENTION FOR SAFE CONTAINERS (CSC)

In the 1960s, there was a rapid increase in the use of freight containers for the consignment of goods by sea and the development of specialized container ships. In 1967, IMO undertook to study the safety of containerization in marine transport. The container itself emerged as the most important aspect to be considered.

IMO, in co-operation with the Economic Commission for Europe, developed a draft convention and in 1972 the finalized Convention was adopted at a conference jointly convened by the United Nations and IMO.

The 1972 Convention for Safe Containers has two goals.
One is to maintain a high level of safety of human life in the transport and handling of containers by providing generally acceptable test procedures and related strength requirements.
The other is to facilitate the international transport of containers by providing uniform international safety regulations, equally applicable to all modes of surface transport. In this way, proliferation of divergent national safety regulations can be avoided.
The requirements of the Convention apply to the great majority of freight containers used internationally, except those designed specially for carriage by air. As it was not intended that all containers or reusable packing boxes should be affected, the scope of the Convention is limited to containers of a prescribed minimum size having corner fittings - devices which permit handling, securing or stacking.

Technical annexes

The Convention includes two Annexes:
Annex I includes Regulations for the testing, inspection, approval and maintenance of containers
Annex II covers structural safety requirements and tests, including details of test procedures.
Annex I sets out procedures whereby containers used in international transport must be safety-approved by an Administration of a Contracting State or by an organization acting on its behalf.
The Administration or its authorized representative will authorize the manufacturer to affix to approved containers a safety approval plate containing the relevant technical data.
The approval, evidenced by the safety approval plate granted by one Contracting State, should be recognized by other Contracting States. This principle of reciprocal acceptance of safety-approved containers is the cornerstone of the Convention; and once approved and plated it is expected that containers will move in international transport with the minimum of safety control formalities.
The subsequent maintenance of a safety-approved container is the responsibility of the owner, who is required to have the container periodically examined.
The Convention specifically requires that the container be subjected to various tests which represent a combination of safety requirements of both the inland and maritime modes of transport.
Flexibility is incorporated in the Convention by the provision of a simplified amendment procedures (tacit amendment procedure) which makes it possible to speedily adapt the test procedures to the requirements of international container traffic.

INTERNATIONAL CONVENTION RELATING TO INTERVENTION ON THE HIGH SEAS IN CASES OF OIL POLLUTION CASUALTIES, 1969

The Convention affirms the right of a coastal State to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate danger to its coastline or related interests from pollution by oil or the threat thereof, following upon a maritime casualty.
The coastal State is, however, empowered to take only such action as is necessary, and after due consultations with appropriate interests including, in particular, the flag State or States

of the ship or ships involved, the owners of the ships or cargoes in question and, where circumstances permit, independent experts appointed for this purpose.

A coastal State which takes measures beyond those permitted under the Convention is liable to pay compensation for any damage caused by such measures. Provision is made for the settlement of disputes arising in connection with the application of the Convention.

The Convention applies to all seagoing vessels except warships or other vessels owned or operated by a State and used on Government non-commercial service.

The 1969 Intervention Convention applied to casualties involving pollution by oil. In view of the increasing quantity of other substances, mainly chemical, carried by ships, some of which would, if released, cause serious hazard to the marine environment, the 1969 Brussels Conference recognized the need to extend the Convention to cover substances other than oil.

The 1973 London Conference on Marine Pollution therefore adopted the Protocol relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil. This extended the regime of the 1969 Intervention Convention to substances which are either listed in the Annex to the Protocol or which have characteristics substantially similar to those substances.

The 1973 Protocol entered into force in 1983 and has been amended subsequently to update the list of substances attached to it.

CONVENTION ON THE PREVENTION OF MARINE POLLUTION BY DUMPING OF WASTES AND OTHER MATTER

The Inter-Governmental Conference on the Convention on the Dumping of Wastes at Sea, which met in London in November 1972 at the invitation of the United Kingdom, adopted this instrument, generally known as the London Convention. The London Convention, one of the first international conventions for the protection of the marine environment from human activities, came into force on 30 August 1975. Since 1977, it has been administered by IMO.

The London Convention contributes to the international control and prevention of marine pollution by prohibiting the dumping of certain hazardous materials. In addition, a special permit is required prior to dumping of a number of other identified materials and a general permit for other wastes or matter.

"Dumping" has been defined as the deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures, as well as the deliberate disposal of these vessels or platforms themselves. Annexes list wastes which cannot be dumped and others for which a special dumping permit is required.

Amendments adopted in 1993 (which entered into force in 1994) banned the dumping into sea of low-level radioactive wastes. In addition, the amendments phased out the dumping of industrial wastes by 31 December 1995 and banned the incineration at sea of industrial wastes.

In 1996, Parties adopted a Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (known as the **London Protocol**) which entered into force in 2006.

The Protocol, which is meant to eventually replace the 1972 Convention, represents a major change of approach to the question of how to regulate the use of the sea as a depository for waste materials. Rather than stating which materials may not be dumped, it prohibits all dumping, except for possibly acceptable wastes on the so-called "reverse list", contained in an annex to the Protocol.

The London Protocol stresses the "precautionary approach", which requires that "appropriate preventative measures are taken when there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects". It also states that "the polluter should, in principle, bear the cost of pollution" and emphasizes that Contracting Parties should ensure that the Protocol should not simply result in pollution being transferred from one part of the environment to another.

The Contracting Parties to the London Convention and Protocol have recently taken steps to mitigate the impacts of increasing concentrations of CO_2 in the atmosphere (and consequently in the marine environment) and to ensure that new technologies that aim to engineer the climate, and have the potential to cause harm to the marine environment, are effectively controlled and regulated. The instruments have, so far, been the most advanced international regulatory instruments addressing carbon capture and sequestration in sub-sea geological formations and marine climate engineering such as ocean fertilization.

The 1996 Protocol restricts **all** dumping except for a permitted list (which still require permits).

Article 4 states that Contracting Parties "shall prohibit the dumping of any wastes or other matter with the exception of those listed in Annex 1."

The permitted substances are:

1. Dredged material
2. Sewage sludge
3. Fish waste, or material resulting from industrial fish processing operations
4. Vessels and platforms or other man-made structures at sea
5. Inert, inorganic geological material
6. Organic material of natural origin
7. Bulky items primarily comprising iron, steel, concrete and similar unharmful materials for which the concern is physical impact and limited to those circumstances, where such wastes are generated at locations, such as small islands with isolated communities, having no practicable access to disposal options other than dumping
8. CO_2 streams from CO_2 capture processes.

INTERNATIONAL CONVENTION ON OIL POLLUTION PREPAREDNESS, RESPONSE AND CO-OPERATION (OPRC)

In July 1989, a conference of leading industrial nations in Paris called upon IMO to develop further measures to prevent pollution from ships. This call was endorsed by the IMO Assembly in November of the same year and work began on a draft convention aimed at providing a global framework for international co-operation in combating major incidents or threats of marine pollution.

Parties to the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) are required to establish measures for dealing with pollution incidents, either nationally or in co-operation with other countries.

Ships are required to carry a shipboard oil pollution emergency plan. Operators of offshore units under the jurisdiction of Parties are also required to have oil pollution emergency plans or similar arrangements which must be co-ordinated with national systems for responding promptly and effectively to oil pollution incidents.

Ships are required to report incidents of pollution to coastal authorities and the convention details the actions that are then to be taken. The Convention calls for the establishment of stockpiles of oil spill combating equipment, the holding of oil spill combating exercises and the development of detailed plans for dealing with pollution incidents.

Parties to the convention are required to provide assistance to others in the event of a pollution emergency and provision is made for the reimbursement of any assistance provided.

The Convention provides for IMO to play an important co-ordinating role. A Protocol to the OPRC relating to hazardous and noxious substances (OPRC-HNS Protocol) was adopted in 2000.

INTERNATIONAL CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE (CLC)

The Civil Liability Convention was adopted to ensure that adequate compensation is available to persons who suffer oil pollution damage resulting from maritime casualties involving oil-carrying ships.

The Convention places the liability for such damage on the owner of the ship from which the polluting oil escaped or was discharged.

Subject to a number of specific exceptions, this liability is strict; it is the duty of the owner to prove in each case that any of the exceptions should in fact operate. However, except where the owner has been guilty of actual fault, they may limit liability in respect of any one incident.

The Convention requires ships covered by it to maintain insurance or other financial security in sums equivalent to the owner's total liability for one incident.

The Convention applies to all seagoing vessels actually carrying oil in bulk as cargo, but only ships carrying more than 2,000 tons of oil are required to maintain insurance in respect of oil pollution damage.

This does not apply to warships or other vessels owned or operated by a State and used for the time being for Government non-commercial service. The Convention, however, applies in respect of the liability and jurisdiction provisions, to ships owned by a State and used for commercial purposes. The only exception as regards such ships is that they are not required to carry insurance. Instead they must carry a certificate issued by the appropriate authority of the State of their registry stating that the ship's liability under the Convention is covered.

The Convention covers pollution damage resulting from spills of persistent oils suffered in the territory (including the territorial sea) of a State Party to the Convention. It is applicable to ships which actually carry oil in bulk as cargo, i.e. generally laden tankers. Spills from tankers in ballast or bunker spills from ships other than other than tankers are not covered, nor is it possible to recover costs when preventive measures are so successful that no actual spill occurs. The shipowner cannot limit liability if the incident occurred as a result of the owner's personal fault.

The Protocol of 1976, which entered into force in 1981, provided for the aplicable unit of account used under the convention to be based on the Special Drawing Rights (SDR) as used by the International Monetary Fund (IMF), replacing the the "Poincaré franc", based on the "official" value of gold, as the applicable unit of account.

The Protocol of 1984 set increased limits of liability but was superseded by the 1992 Protocol.

The Protocol of 1992 changed the entry into force requirements by reducing from six to four the number of large tanker-owning countries that were needed for entry into force.

The compensation limits were set as follows:

- For a ship not exceeding 5,000 gross tonnage, liability is limited to 3 million SDR
- For a ship 5,000 to 140,000 gross tonnage: liability is limited to 3 million SDR plus 420 SDR for each additional unit of tonnage
- For a ship over 140,000 gross tonnage: liability is limited to 59.7 million SDR.

The 1992 protocol also widened the scope of the Convention to cover pollution damage caused in the exclusive economic zone (EEZ) or equivalent area of a State Party. The Protocol covers pollution damage as before but environmental damage compensation is limited to costs incurred for reasonable measures to reinstate the contaminated environment. It also allows expenses incurred for preventive measures to be recovered even when no spill of oil occurs, provided there was grave and imminent threat of pollution damage.

The Protocol also extended the Convention to cover spills from sea-going vessels constructed or adapted to carry oil in bulk as cargo so that it applies apply to both laden and unladen tankers, including spills of bunker oil from such ships.

Under the 1992 Protocol, a shipowner cannot limit liability if it is proved that the pollution damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

From 16 May 1998, Parties to the 1992 Protocol ceased to be Parties to the 1969 CLC due to a mechanism for compulsory denunciation of the "old" regime established in the 1992 Protocol. However, there are a number of States which are Party to the 1969 CLC and have not yet ratified the 1992 regime - which is intended to eventually replace the 1969 CLC.

The 1992 Protocol allows for States Party to the 1992 Protocol to issue certificates to ships registered in States which are not Party to the 1992 Protocol, so that a shipowner can obtain certificates to both the 1969 and 1992 CLC, even when the ship is registered in a country which has not yet ratified the 1992 Protocol. This is important because a ship which has only a 1969 CLC may find it difficult to trade to a country which has ratified the 1992 Protocol, since it establishes higher limits of liability.

The 2000 Amendments

Adoption: 18 October 2000; Entry into force: 1 November 2003

The amendments raised the compensation limits by 50 percent compared to the limits set in the 1992 Protocol, as follows:

- For a ship not exceeding 5,000 gross tonnage, liability is limited to 4.51 million SDR (US$5.78 million)
- For a ship 5,000 to 140,000 gross tonnage: liability is limited to 4.51 million SDR plus 631 SDR for each additional gross tonne over 5,000
- For a ship over 140,000 gross tonnage: liability is limited to 89.77 million SDR

ATHENS CONVENTION RELATING TO THE CARRIAGE OF PASSENGERS AND THEIR LUGGAGE BY SEA (PAL)

The Convention was adopted at a Conference, convened in Athens in 1974 and was designed to consolidate and harmonize two earlier Brussels conventions dealing with passengers and luggage and adopted in 1961 and 1967 respectively.

The Convention establishes a regime of liability for damage suffered by passengers carried on a seagoing vessel. It declares a carrier liable for damage or loss suffered by a passenger if the incident causing the damage occurred in the course of the carriage and was due to the fault or neglect of the carrier.

However, unless the carrier acted with intent to cause such damage, or recklessly and with knowledge that such damage would probably result, he can limit his liability. For the death of, or personal injury to, a passenger, this limit of liability is set at 46,666 Special Drawing Rights (SDR) per carriage. The 2002 Protocol, when it enters into force, will introduce compulsory insurance to cover passengers on ships and substantially raise those limits to 250,000 SDR per passenger on each distinct occasion. .

As far as loss of or damage to luggage is concerned, the carrier's limit of liability varies, depending on whether the loss or damage occurred in respect of cabin luggage, of a vehicle and/or luggage carried in or on it, or in respect of other luggage.

The 1976 Protocol made the unit of account the Special Drawing Right (SDR), replacing the "Poincaré franc", based on the "official" value of gold, as the applicable unit of account.

The 1990 Protocol was intended to raise the limits set out in the convention but it did not enter into force and was superseded by the 2002 Protocol.

The 2002 Protocol

Adoption: 1 November 2002; Entry into force: 12 months after being accepted by 10 States

The Protocol introduces compulsory insurance to cover passengers on ships and raises the limits of liability. It also introduces other mechanisms to assist passengers in obtaining compensation, based on well-accepted principles applied in existing liability and compensation regimes dealing with environmental pollution. These include replacing the fault-based liability system with a strict liability system for shipping related incidents, backed by the requirement that the carrier take out compulsory insurance to cover these potential claims.

The limits contained in the Protocol set a maximum limit, empowering - but not obliging - national courts to compensate for death, injury or damage up to these limits.

The Protocol also includes an "opt-out" clause, enabling State Parties to retain or introduce higher limits of liability (or unlimited liability) in the case of carriers who are subject to the jurisdiction of their courts.

Compulsory insurance

A new Article 4bis of the Convention requires carriers to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover the limits for strict liability under the Convention in respect of the death of and personal injury to passengers.

The limit of the compulsory insurance or other financial security shall not be less than 250,000 Special Drawing Rights (SDR) per passenger on each distinct occasion. Ships are to be issued with a certificate attesting that insurance or other financial security is in force and a model certificate is attached to the Protocol in an Annex.

Limits of liability

The limits of liability have been raised significantly under the Protocol, to reflect present day conditions and the mechanism for raising limits in the future has been made easier.

The liability of the carrier for the death of or personal injury to a passenger is limited to 250,000 SDR per passenger on each distinct occasion.

The carrier is liable, unless the carrier proves that the incident resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or was wholly caused by an act or omission done with the intent to cause the incident by a third party.

If the loss exceeds the limit, the carrier is further liable - up to a limit of 400,000 SDR per passenger on each distinct occasion - unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier.

Death of or personal injury to a passenger

For the loss suffered as a result of the death of or personal injury to a passenger not caused by a shipping incident, the carrier is liable if the incident which caused the loss was due to the fault or neglect of the carrier. The burden of proving fault or neglect lies with the claimant.

The liability of the carrier only includes loss arising from incidents that occurred in the course of the carriage. The burden of proving that the incident which caused the loss occurred in the course of the carriage, and the extent of the loss, lies with the claimant.

"Opt-out" Clause

The Protocol allows a State Party to regulate by specific provisions of national law the limit of liability for personal injury and death, provided that the national limit of liability, if any, is not lower than that prescribed in the Protocol. A State Party, which makes use of this option is obliged to inform the IMO Secretary-General of the limit of liability adopted or of the fact that there is none.

Loss of or damage to luggage and vehicles

- The liability of the carrier for the loss of or damage to cabin luggage is limited to 2,250 SDR per passenger, per carriage.
- liability of the carrier for the loss of or damage to vehicles including all luggage carried in or on the vehicle is limited to12,700 SDR per vehicle, per carriage.

- liability of the carrier for the loss of or damage to other luggage is limited to 3,375 SDR per passenger, per carriage.

The carrier and the passenger may agree that the liability of the carrier shall be subject to a deductible not exceeding 330 SDR in the case of damage to a vehicle and not exceeding 149 SDR per passenger in the case of loss of or damage to other luggage, such sum to be deducted from the loss or damage.

Amendment of limits

The 2002 Protocol introduces a new procedure for amending the limits of liability under the Convention, so that any future raises in limits can be achieved more readily. Under the 1974 Convention, limits can only be raised by adopting amendments to the Convention which require a specified number of States' acceptances to bring the amendments into force. This has meant, for example, that the 1990 Protocol, which was intended to raise the limits, has not yet entered into force and indeed is being superseded by the 2002 Protocol.

The 2002 Protocol therefore introduces a tacit acceptance procedure for raising the limits of liability. A proposal to amend the limits, as requested by at least one-half of the Parties to the Protocol, would be circulated to all IMO Member States and al States Parties and would then be discussed in the IMO Legal Committee. Amendments would be adopted by a two-thirds majority of the States Parties to the Convention as amended by the Protocol present and voting in the Legal Committee, and amendments would enter into force 18 months after its deemed acceptance date. The deemed acceptance date would be 18 months after adoption, unless within that period not less than one fourth of the States that were States Parties at the time of the adoption of the amendment have communicated to the IMO Secretary-General that they do not accept the amendment.

Regional Economic Integration Organizations

For the first time in an IMO Convention, a regional economic integration organization may sign up to the Protocol. An article in the Protocol states that a Regional Economic Integration Organization, which is constituted by sovereign States that have transferred competence over certain matters governed by this Protocol to that Organization, may sign, ratify, accept, approve or accede to the Protocol. A Regional Economic Integration Organization which is a Party to this Protocol shall have the rights and obligations of a State Party, to the extent that the Regional Economic Integration Organization has competence over matters governed by this Protocol.

Title of Convention

The Protocol states that Articles 1 to 22 of the Convention, as revised by the Protocol, together with Articles 17 to 25 of the Protocol and the Annex thereto, shall constitute and be called the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 2002.

States who ratify the 2002 Protocol are required to denounce the 1974 Convention and its 1976 and 1990 Protocols, if they are Party to the 1974 Convention and those Protocols.

2006 "reservation"

The Legal Committee at its 92nd session in October 2006 adopted the text of a reservation, intended for use as a standard reservation, to the 2002 Protocol and adopted *Guidelines for the implementation of the Athens Convention, to allow limitation of liability in respect of claims relating to war or terrorism*.

The aim is to put States in a position to ratify the 2002 Protocol and thereby afford passengers better cover.
The text of the agreed reservation states that the Government concerned reserves the right to and undertakes to limit liability to 250,000 units of account in respect of each passenger on each distinct occasion; or 340 million units of account overall per ship on each distinct occasion. This relates in particular to war insurance which, under the guidelines, shall cover liability, if any, for loss suffered as a result of death or personal injury to a passenger caused by:

- war, civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power;
- capture, seizure, arrest, restraint or detainment, and the consequences thereof or any attempt thereat; derelict mines, torpedoes, bombs or other derelict weapons of war;
- act of any terrorist or any person acting maliciously or from a political motive and any action taken to prevent or counter any such risk;
- confiscation and expropriation.

CONVENTION ON LIMITATION OF LIABILITY FOR MARITIME CLAIMS (LLMC)

The Convention replaced the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships, which was signed in Brussels in 1957, and came into force in 1968.
Under the 1976 Convention, the limit of liability for claims covered is raised considerably, in some cases up to 250-300 per cent. Limits are specified for two types of claims - claims for loss of life or personal injury, and property claims (such as damage to other ships, property or harbour works).
The limits under the 1976 Convention were set at 333,000 SDR for personal claims for ships not exceeding 500 tons plus an additional amount based on tonnage. For other claims, the limit of liability was fixed under the 1976 Convention at 167,000 SDR plus additional amounts based on tonnage on ships exceeding 500 tons.
The Convention provides for a virtually unbreakable system of limiting liability. Shipowners and salvors may limit their liability, except if "it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such a loss, or recklessly and with knowledge that such loss would probably result".

Protocol of 1996

Adoption: 2 May 1996; Entry into force: 13 May 2004

Under the Protocol the amount of compensation payable in the event of an incident being substantially increased and also introduces a "tacit acceptance" procedure for updating these amounts.
The limit of liability for claims for **loss of life or personal injury** on ships not exceeding 2,000 gross tonnage is 2 million SDR.
For larger ships, the following additional amounts are used in calculating the limitation amount:

- For each ton from 2,001 to 30,000 tons, 800 SDR
- For each ton from 30,001 to 70,000 tons, 600 SDR

- For each ton in excess of 70,000, 400 SDR (US$634).

The limit of liability for **property claims** for ships not exceeding 2,000 gross tonnage is 1 million SDR.

For larger ships, the following additional amounts are used in calculating the limitation amount:

- For each ton from 2,001 to 30,000 tons, 400 SDR
- For each ton from 30,001 to 70,000 tons, 300 SDR
- For each ton in excess of 70,000, 200 SDR

Amendments to 1996 Protocol

Adoption: 19 April 2012; Entry into force: 8 June 2015

Under the amendments to the 1996 Protocol, the limits are raised as follows:

The limit of liability for claims for **loss of life or personal injury** on ships not exceeding 2,000 gross tonnage is 3.02 million SDR (up from 2 million SDR).

For larger ships, the following additional amounts are used in calculating the limitation amount:

- For each ton from 2,001 to 30,000 tons, 1,208 SDR (up from 800 SDR)
- For each ton from 30,001 to 70,000 tons, 906 SDR (up from 600 SDR)
- For each ton in excess of 70,000, 604 SDR (up from 400 SDR).

The limit of liability for **property claims** for ships not exceeding 2,000 gross tonnage is 1.51 million SDR (up from 1 million SDR).

For larger ships, the following additional amounts are used in calculating the limitation amount:

- For each ton from 2,001 to 30,000 tons, 604 SDR (up from 400 SDR)
- For each ton from 30,001 to 70,000 tons, 453 SDR (up from 300 SDR)
- For each ton in excess of 70,000 tons, 302 SDR (up from 200 SDR).

INTERNATIONAL CONVENTION ON LIABILITY AND COMPENSATION FOR DAMAGE IN CONNECTION WITH THE CARRIAGE OF HAZARDOUS AND NOXIOUS SUBSTANCES BY SEA (HNS)

The HNS Convention was adopted by an international conference in 1996 and is based on the highly successful model of the Civil Liability and Fund Conventions which cover pollution damage caused by spills of persistent oil from tankers. As with the original oil pollution compensation regime, the HNS Convention will establish a two-tier system for compensation to be paid in the event of accidents at sea, in this case, involving hazardous and noxious substances such as chemicals. However, it goes further in that it covers not only pollution damage but also the risks of fire and explosion, including loss of life or personal injury as well as loss of or damage to property.

Tier one will be covered by compulsory insurance taken out by shipowners, who would be able to limit their liability. In those cases where the insurance does not cover an incident, or is insufficient to satisfy the claim, a second tier of compensation will be paid from a fund, made up of contributions from the receivers of HNS. Contributions will be calculated according to the amount of HNS received in each Party in the preceding calendar year.

HNS are defined by reference to lists of substances included in various IMO Conventions and Codes. These include oils; other liquid substances defined as noxious or dangerous; liquefied gases; liquid substances with a flashpoint not exceeding 60°C; dangerous, hazardous and harmful materials and substances carried in packaged form; and solid bulk materials defined as possessing chemical hazards. The Convention also covers residues left by the previous carriage of HNS, other than those carried in packaged form.

The Convention defines damage as including loss of life or personal injury; loss of or damage to property outside the ship; loss or damage by contamination of the environment; the costs of preventative measures and further loss or damage caused by them.

The Convention introduces strict liability for the shipowner and a system of compulsory insurance and insurance certificates.

By 2009, the 1996 HNS convention had still not entered into force, due to an insufficient number of ratifications. A second international conference, held in April 2010, adopted a Protocol to the HNS convention (2010 HNS Protocol) that was designed to address practical problems that had prevented many States from ratifying the original Convention.

States are being urged to ratify the 2010 Protocol. Together with the IOPC Funds and ITOPF, IMO has produced a six-page brochure that explains to States the purpose and benefit of the HNS Convention and encourages IMO Member States to take the next steps to ratify or accede to the Convention.

Once the 2010 HNS Protocol enters into force, the 1996 Convention, as amended by the 2010 Protocol, will be called “the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010.

Limits of liability under the 2010 Protocol

Under the 2010 Protocol, if damage is caused by bulk HNS, compensation would first be sought from the shipowner, up to a maximum limit of 100 million Special Drawing Rights (SDR).

Where damage is caused by packaged HNS, or by both bulk HNS and packaged HNS, the maximum liability for the shipowner is 115 million SDR.

Once this limit is reached, compensation would be paid from the second tier, the HNS Fund, up to a maximum of 250 million SDR (including compensation paid under the first tier).

The Fund will have an Assembly, consisting of all States Parties to the Convention and Protocol, and a dedicated secretariat. The Assembly will normally meet once a year.

Entry into force criteria for the Protocol

The 2010 Protocol will enter into force eighteen months after the date on which the following conditions are fulfilled:

(a) at least twelve States, including four States each with not less than 2 million units of gross tonnage, have expressed their consent to be bound by it; and

(b) the Secretary-General has received information in accordance with article 20, paragraphs 4 and 6, that those persons in such States who would be liable to contribute pursuant to article 18, paragraphs 1(a) and (c), of the Convention, as amended by this Protocol, have received during the preceding calendar year a total quantity of at least 40 million tonnes of cargo contributing to the general account.

HNS Fund

It has generally been agreed that it would not be possible to provide sufficient cover by the shipowner liability alone for the damage that could be caused in connection with the carriage of HNS cargo. This liability, which creates a first tier of the Convention, is therefore supplemented by the second tier, the HNS Fund, financed by cargo interests. The Fund will become involved:

- because no liability for the damage arises for the shipowner. This could occur, for example, if the shipowner was not informed that a shipment contained HNS or if the accident resulted from an act of war;
- because the owner is financially incapable of meeting the obligations under this Convention in full and any financial security that may be provided does not cover or is insufficient to satisfy the claims for compensation for damage, or
- because the damage exceeds the owner's liability limits established in the Convention.

Contributions to the second tier will be levied on persons in the Contracting Parties who receive a certain minimum quantity of HNS cargo during a calendar year. The tier will consist of one general account and three separate accounts for oil, liquefied natural gas (LNG) and liquefied petroleum gas (LPG). The system with separate accounts has been seen as a way to avoid cross-subsidization between different HNS substances.

The Fund will have an Assembly consisting of all States which are Parties and a Secretariat headed by a Director. The Assembly will normally meet once a year.

HNS and the CLC/Fund Conventions

The HNS Convention excludes pollution damage as defined in the International Convention on Civil Liability for Oil Pollution Damage and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, to avoid an overlap with these Conventions.

However, HNS covers other damage (including death or personal injury) as well as damage caused by fire and/or explosion when oils are carried.

INTERNATIONAL CONVENTION ON TONNAGE MEASUREMENT OF SHIPS

The Convention, adopted by IMO in 1969, was the first successful attempt to introduce a universal tonnage measurement system.

Previously, various systems were used to calculate the tonnage of merchant ships. Although all went back to the method devised by George Moorsom of the British Board of Trade in 1854, there were considerable differences between them and it was recognized that there was a great need for one single international system.

The Convention provides for gross and net tonnages, both of which are calculated independently.

The rules apply to all ships built on or after 18 July 1982 - the date of entry into force - while ships built before that date were allowed to retain their existing tonnage for 12 years after entry into force, or until 18 July 1994.

This phase-in period was intended to ensure that ships were given reasonable economic safeguards, since port and other dues are charged according to ship tonnage. At the same time, and as far as possible, the Convention was drafted to ensure that gross and net tonnages calculated under the new system did not differ too greatly from those calculated under previous methods.

Gross tonnage and net tonnage

The Convention meant a transition from the traditionally used terms gross register tons (grt) and net register tons (nrt) to gross tonnage(GT) and net tonnage (NT).

Gross tonnage forms the basis for manning regulations, safety rules and registration fees. Both gross and net tonnages are used to calculate port dues.

The gross tonnage is a function of the moulded volume of all enclosed spaces of the ship. The net tonnage is produced by a formula which is a function of the moulded volume of all cargo spaces of the ship. The net tonnage shall not be taken as less than 30 per cent of the gross tonnage.

INTERNATIONAL CONVENTION ON SALVAGE

The Convention replaced a convention on the law of salvage adopted in Brussels in 1910 which incorporated the "'no cure, no pay" principle under which a salvor is only rewarded for services if the operation is successful.

Although this basic philosophy worked well in most cases, it did not take pollution into account. A salvor who prevented a major pollution incident (for example, by towing a damaged tanker away from an environmentally sensitive area) but did not manage to save the ship or the cargo got nothing. There was therefore little incentive to a salvor to undertake an operation which has only a slim chance of success.

The 1989 Convention seeks to remedy this deficiency by making provision for an enhanced salvage award taking into account the skill and efforts of the salvors in preventing or minimizing damage to the environment.

Special compensation

The 1989 Convention introduced a "special compensation" to be paid to salvors who have failed to earn a reward in the normal way (i.e. by salving the ship and cargo).

Damage to the environment is defined as "substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents."

The compensation consists of the salvor's expenses, plus up to 30% of these expenses if, thanks to the efforts of the salvor, environmental damage has been minimized or prevented. The salvor's expenses are defined as "out-of-pocket expenses reasonably incurred by the salvor in the salvage operation and a fair rate for equipment and personnel actually and reasonably used".

The tribunal or arbitrator assessing the reward may increase the amount of compensation to a maximum of 100% of the salvor's expenses, "if it deems it fair and just to do so".

If, on the other hand, the salvor is negligent and has consequently failed to prevent or minimize environmental damage, special compensation may be denied or reduced. Payment of the reward is to be made by the vessel and other property interests in proportion to their respective salved values.

MODULE-V

INTERNATIONAL MARITIME LABOUR LAW

INTERNATIONAL MARITIME LABOUR LAW[60]

INTRODUCTION:

Maritime law, including maritime employment, is the testing ground for the globalisation process, which is encouraging the gradual internationalisation of both economies and societies, driven by innovations in technology and communications[61]. This process contrasts with the fact that private international disputes have so far been legally addressed as *rarae aves*, i.e., as exceptions to the domestic situations for which legislative policies are generally conceived. While the latter are characterised by predictable uniformity—although varying to a certain extent in socio-economic terms—the same cannot be said of the former since their contact with different jurisdictions results in different degrees of internationalisation involving different levels of cultural, societal and economic discrepancies.

However, the marginal role played by private international disputes has recently been challenged, with the permeability of borders at the core of the political discussion.[62] The globalisation process involves the opening up of both societies and economies, as well as an inevitable and inexorable blurring of legislative power, which was almost exclusively in the hands of states until recently. It is becoming increasingly difficult for states to control their societies and economies due in part to the relocation of businesses and migratory movements that lead to a loss of power at the point of policy enforcement. This is the undesired result of regulatory competition and stems from initiatives such as those entitling stake- holders to indirectly select the law applicable to the situation in question by taking advantage of market freedoms. In this context, the absence of clear links to any specific jurisdiction gives prominence to private international law as the best set of rules for dealing with private international situations.

Nonetheless, private international rules are not enough to avoid a potential race to the bottom in the sector, and it is therefore necessary to take a step further to reduce globalisation′s impact on our open societies, particularly through international cooperation and the development of minimum international standards. Against this background it should be noted that in the field of maritime law, private international situations have long been the rule and not the exception, for which reason maritime law is also an excellent example of how innovations have transformed the way private situations are approached legally.

Maritime employment provides an outstanding example of the new course that has been charted: freedom in ship registration—an area with a strong national component until the twentieth century as a result of the tight control exercised by flag states over their vessels—has turned maritime employment into a truly international activity. Recent developments in technology and communications have enabled operators to choose the law applicable to

[60] Laura Carballo Piñeiro, International Maritime Labour Law, Hamburg Studies on Maritime Affairs, Springer-Verlag Berlin Heidelberg 2015

[61] Basedow (2013), pp. 82–133

[62] Dealing with the transformation of the concept of state resulting from the increasingly blurred concepts of distance and border, which in turn are the consequence of changes in the concepts of time and space due to innovations in technology; see Hinojosa Martínez (2005), p. 5, and more specifically Michaels (2004), pp. 113–115; de Miguel Asensio (2001), pp. 43–44; Pamboukis (2007), p. 87.

their businesses through choosing a vessel′s flag by registering ships in the country where their interest is based.
Indirect party autonomy allows forum shopping in search of the cheapest law, which is normally the law that reduces both safety on board and labour costs. Healthy competition between legal systems seems unlikely in this context, and the direct result has in fact been that traditional maritime nations have established international and second registries with a view to competing with ′flags of convenience'—meaning countries that open their registries to any ship—to be able to preserve their merchant and fishing fleets in this way. These registries ′main feature is that they allow non-residents in the country where the vessel is registered to be recruited as crew members, meaning that their employment contracts are not necessarily subject to the law of the flag. In addition to freedom in ship registration, this further liberalisation process has led to what is known as ′crews of convenience′.
The inevitable consequence of the internationalisation process of the labour market is the relocation of maritime employment, which is currently dependent on a number of factors, given that the law of the flag state can no longer take all workers aboard under its wing, whether protective or otherwise. Crew members can be recruited anywhere outside the flag state, given that open, second and international registries allow the hiring of staff that are not flag state residents. Shipowners make good use of this freedom of recruitment by using manning agencies based in what are now called ′labour-supplying states′. Needless to say, employers are becoming equally international as well, with the added complication that it is becoming increasingly difficult to locate them under the freedoms of establishment and provision of services.
The end result of these factors is deregulation, which also triggers costs, the most striking of which are derived from gaps in maritime safety, leading to substantial losses as a consequence of catastrophic maritime accidents. There are other costs, however, as the internationalisation processes affecting maritime employment also compromises fair competition in the shipping and fishing sectors.
The first reaction takes the issue of flags of convenience as its starting point. There have been numerous attempts to define flags of convenience, but perhaps the most successful characterises them by their total inhibition of the maritime administration in charge of the vessel in question.[63] The flag state′s lack of control is clearly indicative of the fact that priority is given to the pursuit of economic objectives over other values such as

[63] The difficulties inherent in providing a definition for the concept of flags of convenience are revealed by discussions during the drafting process of Article 5 of the Geneva Convention on the High Seas of 28 April 1958, whose purpose was to establish what is not a flag of convenience, hence the connecting factors that ships must have with the states that grant them nationality. In the end, there was only agreement on one single undetermined factor: the existence of a genuine link between state and ship, which therefore allows states to exercise their jurisdiction over ships. See Meyers (1967), pp. 218–219; Skourtos (1990), pp. 5–11. In addition to the Convention, it is important to mention the report issued in 1970 by the Committee of Inquiry into Shipping, named after its chairman Lord Rochdale, on the following criteria, which may help identify flags of convenience: non-citizens are allowed to own and control vessels, and manpower may be recruited from among non-nationals; access to the registry is easy, and so is transfer from it; taxes on income from shipping are low or non-existent; the country does not have the power to institute national or international regulations over shipowners and does not need the shipping tonnage for its own purposes but is keen to earn the tonnage fees. More recently, see Alderton and Winchester (2002), pp. 35–43.

environmental and worker protection, given their low investment in technical measures and labour standards.

The costs of the accidents that inevitably occur as a result of weaker control measures affect not only flag states but also new players in the international arena in maritime issues, i.e., port states: flags of convenience ignore their responsibilities, which in turn undermines flag state authority and legitimises port state intervention to inspect the conditions of the ships docked at its ports. The situation is roughly the following: environmental protection requires stricter shipbuilding standards, whose implementation should not be avoided by resorting to a flag of convenience. Their enforcement therefore depends on different actors: while there are international agreements on the nature of these standards, whether they are complied with or not falls under the jurisdictions of both the flag state and the port state, meaning that port states have become cooperating parties in the control mechanisms, which primarily remain the responsibility of flag states.

Following the trend set in the area of environmental protection issues, the same rationale can be applied to ensuring the protection of workers at sea. At this point, reference must be made to the invaluable work of the two international institutions whose partnership has contributed to laying the foundations of international labour law: the International Maritime Organization (IMO) and the International Labour Organization (ILO). To outline the minimum standards for maritime employment as established by these bodies, the conventions that they have issued that are specifically related to work at sea need to be referred to.

The most important of those conventions are the ILO Maritime Labour Convention 2006 (hereafter MLC, 2006) and the ILO Working in Fishing Convention 2007 (hereafter WFC 2007). As their names indicate, both deal with living and working conditions on board. However, differences in the kind of economic activity and exploitation of the sea′s resources carried out by shipping and fishing fleets have an important bearing on the applicable convention. Both seek to institute minimum labour standards, and their compliance needs monitoring not only by the flag state but also by the port state. The 2007 Convention is not as thorough as MLC, 2006, but it also contains provisions on port state control and on the role of labour-supplying countries in establishing and preserving suitable living and working conditions for fishermen.

The background provided by the conventions dealing with international labour law is not accepted in all states, nor does it cover all aspects of the employment relationship. It also suffers from serious enforcement problems, making the need to address international jurisdiction and conflict of law issues, the areas to which this book is mainly devoted, even more apparent. The peculiarities of maritime employment have determined the way these issues are approached from a private international law perspective, which is obliged to rely on public international law while tackling situations created and developed at *mare liberum*, namely, in non-sovereignty areas. The 1982 Convention on the Law of the Sea (UNCLOS) was an attempt to reconcile the principle of freedom of the seas with the need for public regulation and private planning involved in every maritime venture by distinguishing among the different maritime areas and submitting whatever happened on the high seas to the flag state′s jurisdiction. Accordingly, the flag state could also have a say in living and working conditions aboard.

Nevertheless, the fact that flags of convenience neglect their responsibilities and crews of convenience are not subject to the law of the flag erodes the central role that this connecting factor has traditionally played in resolving key private international law issues. This flag state connection has undeniably lost part of its weight where identifying the closest jurisdiction to a seafarer′s employment contract is concerned. In fact, the crisis of the flag as the key connecting factor in these matters affects not only individual employment relationships but also their collective dimension. Aspects such as determining which state is responsible for social security matters affecting seafarers and deciding on current employment contracts in the event of the employer′s insolvency are also covered.

The relative loss of the significance of the vessel′s flag as the key connecting factor in maritime employment is less clear when issues of international jurisdiction are addressed. This sector of private international law aims to facilitate access to justice, and in so doing it ought to provide seafarers with several heads of jurisdiction so that they can find a close and thus affordable court. This seems particularly complex because of the high degree of internationalisation in maritime employment, where crew members may have been recruited in different countries, usually through manning agencies, while the shipowner′s headquarters may be located in a different country and the work itself may well be carried out on board a ship that is sailing or fishing under a third country′s flag.

Until the Brussels I[64] *bis* Regulation has been fully applied, the scope of the Brussels I Regulation only included employers domiciled in a member state or those who have a branch, agency or establishment in a member state, and the same goes for the Lugano Convention[65] in force. Where other cases are concerned, the Regulation and the Lugano Convention refer the issue to the respective national law, a reference that is maintained by the Brussels I bis Regulation despite covering cases of employers domiciled in third states.

Contrary to international jurisdiction matters, conflict of laws focuses on the establishment of a single applicable law to employment relationships during which attention is specifically paid to factors revealing a close connection between employment contract and a given jurisdiction. Choice of law is also allowed in these matters, but a number of correcting factors have been introduced on the basis that workers, as the weaker party to the contract, are entitled to some kind of protection measures. In the absence of choice of law, the preferred connection is the habitual place of work, as laid down by Article 8 of Regulation (EC) No. 593/2008 of the European Parliament and of the European Council of 17 June 2008 on the law applicable to contractual obligations (hereafter Rome I), and in other private international law provisions included in national law systems like those in China[66], Japan,[67] Panama,[68] Tunisia,[69] Turkey,[70] South Korea[71] and Switzerland.[72] This

[64] Regulation No. 44/2001, of 22 December 2004 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter Brussels I Regulation), and Regulation (EU) No. 1215/2012 (hereafter Brussels I bis Regulation)

[65] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, held at Lugano on 30 October 2007 (OJ No. 147, 10.6.2009).

[66] Article 43 of the Law of the People’s Republic of China on the Application of Law for Foreign- related Civil Relationships.

connecting factor refers to the flag state of the vessel when the work is carried out at sea,[73] but, as already pointed out, this premise has been challenged by the existence of flags of convenience.

Other approaches that aim to abandon the vessel and, with her, the flag state as the habitual workplace often end up pursuing protectionist measures and do not result in the establishing of a closer law to maritime employment than the one provided by the flag. In line with the traditional unilateralist approach to employment matters, these approaches seek to protect residents living within the court′s jurisdiction and hence either ignore the employment relationship′s collective dimension or resort to a more easily manipulated connecting factor. The flag, for its part, has the advantage that it allows for equal treatment for all those working on board.[74] It is important to note here that public international law has not rejected the flag as the main connecting factor, as evidenced by MLC, 2006, and WFC 2007. This does not mean that the flag state jurisdiction should not be disregarded in the event of lack of contact with the employment contract, and to this end, private international law has already devised a specific legal mechanism: the escape clause.

Against the background of outsourcing, trade union activity is vital for improving living and working conditions on board, and the International Transport Workers Federation (ITF) plays a crucial role in this area.

In contrast with the internationalisation of maritime employment, the legal framework of collective bargaining is strictly local, and each state establishes the conditions under which this may be undertaken. The legal reality is thus at odds with the fact that the purpose of any collective agreement is that it is binding on all those working on the same ship, even if their employment contracts are subject to different laws. This divergence triggers two types of problems; the first concerns the collective agreement itself and establishing the law that decides on its very existence, validity and scope of application, while the second affects the application of the collective agreement, namely, whether or not it actually modifies individual employment relationships, an issue that is governed by the law applicable to the latter, the *lex laboris*. Should the employment contracts aboard be subject to different laws, the collective agreement would have to satisfy each one′s test to be applicable to particular employment relationships, and it is from this perspective that the relevance of the collective

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[67] Article 12 of the Japanese Act on the Application of Laws, enacted by law No. 87, 21 June 2006.

[68] Article 94 of the Panamanian Private International Law Code.

[69] Article 67 of the Tunisian Private International Law Code.

[70] Article 27 of the Turkish Act on Private international and procedural law No. 5718, 27 November 2007 (as translated by Wilske S and Esin I).

[71] Article 28 of the South Korean Act on Private International Law adopted in 2001, enacted by law No. 6465, 7 April 2001.

[72] § 121 *Internationales Privatrechtsgesetz.*

[73] Article 52 of the Ukrainian Law on Private International Law specifically mentions the application of the law of the country of the flag's vessel where the employee works by default of choice of law or a law more closely related. However, Article 54 thereof provides for a number of unilateral rules that almost displace Article 52.

[74] And The application of the law of the flag can respond to protective purposes as well. A good example of this is provided by STSJ Andaluc´ıa, 10.12.1993, with comments by Pe´rez Mart´ın (1996), pp. 386–389, although applying Spanish labour law as *loi de aplication* immediate to the employment relationships between a Spanish shipowner and Moroccan workers providing services on board a Spanish ship in Moroccan waters; contracts had been entered into in Morocco.

dimension in determining the law applicable to the employment contract is best appreciated.

Applying the *lex loci actus* is the best option when it comes to deciding on the right to strike and take industrial action, on the ground that these are fundamental rights. When the workers exercising these rights are the crew of a ship docked at a foreign port, the problem is deciding which law that is. Further conflict of law issues emerge with respect to the consequences of collective action, particularly with respect to tort liability arising from it. As a consequence of Court of Justice of the European Union (hereafter CJEU or CJ) case law, this issue has been the subject of legislative intervention, and Article 9 of Regulation (EC) No. 864/2007 of the European Parliament and of the European Council of 11 July 2007 on the law applicable to non-contractual obligations (hereafter Rome II).

Seafarers are still excluded from the scope of most directives and regulations in this area for fear of encouraging the flight of merchant and fishing fleets to less demanding flags, although this exclusion is currently under review. In any case, it is still necessary to determine which law governs these rights, firstly to improve living and working conditions in the workplace—a ship in these cases—and secondly to contribute to the smooth running of the shipping or fishing company.

The Internationalisation of Maritime Employment: Factors and Remedies

Introduction

The provision of labour at sea is deemed to be ʹspecial ʹin most domestic laws due to the specific features of the environment in which it takes place. Working at sea usually involves prolonged absences from oneʹs own home, turning vessels— normally sailing away from sovereign lands and, therefore, jurisdictions—into places for both work and leisure. Against this background, specific working and living conditions are required on board, while many of the requisite training and professional qualifications are not shared with other professions.

The employment relationship is special from the private international law perspective as well because one of its basic assumptions—its provision in an area of sovereignty—usually fails: a vessel may sail through different areas, some subject to one single jurisdiction, some not. This shortcoming has traditionally been overcome by resorting to public international law, which places the responsibility for all matters relating to labour relations at sea in the hands of the flag state. As explained in the following section, this was normally justified on the ground of the close relationship between the vessel and the state whose flag it was flying since the shipowner and crew were usually nationals of and residents in the flag state, which was usually the country where the vessel was built.

However, global socio-economic trends have seriously weakened the links between any one state and the ships flying its flag. In general, international conventions submit all matters related to a ship to the jurisdiction of the flag state, including living and working conditions on board. The latter did not pose problems in a context where crew members were recruited in the flag state, but the current state of affairs makes this assumption debatable, and the third and four sections of this chapter will address the processes leading to the internationalisation of maritime employment. This is mainly caused by the freedom in ship registration granted by some states, with the consequence that neither shipowners nor crew members have to be nationals of the vessel′s flag state, nor do they need to be domiciled in or operate the ship from there. Such states have been named ′flags of convenience′, as the shipowners benefit from low taxes and labour costs as well as a more relaxed approach to technical inspections.

In an attempt to stop the flight of their shipping and fishing fleets to flags of convenience, traditional maritime nations established second and international registries that also grant tax benefits and allow crew members to be hired in countries other than the flag state. The outcome is thus the internationalisation of crews, and a new issue has arisen, that of crews of convenience. The globalisation process has also been driven by the freedoms of establishment and the provision of services, which facilitate new ways of business cooperation and make it difficult to identify the shipowner and employer of a multinational crew. From the private international law perspective, all these factors reveal the minor role nowadays played by the flag state as the key connection in determining the law applicable to an employment relationship in the shipping and fishing industries. Nevertheless, the same factors make it very difficult to determine a closer law to maritime employment than the flag jurisdiction, for which reason its empowerment is sought at international level.

Flags and crews of convenience are manifestations of aggressive international competition, eager to reduce the costs of maritime ventures and able to operate without legal constraints, given the lack of a single state′s power to level the playing field. The point is that unfair competition threatens maritime safety in general and worsens the living and working conditions of seafarers and fishermen. The drift towards deregulation as encouraged by flags of convenience has therefore been constrained precisely because of its high costs, such as those arising from maritime accidents. Efforts have meanwhile been made to improve labour standards, an area in which the work of the International Maritime Organization (IMO) and the International Labour Organization (ILO) has been particularly salient, as they have become the forum in which a level playing field in terms of competition is being fought for.

The ILO in particular has produced numerous international conventions that have become the core of international labour law. The last section of this chapter is devoted to these institutions ′work, and in particular to an examination of the Maritime Labour Convention 2006 (MLC, 2006) and the Work in Fishing Convention 2007 (WFC 2007). Both are key conventions as they codify the great majority of previous legal instruments in these matters while reinforcing compliance with minimum labour standards, mainly by placing clear-cut responsibilities on flag states and also on port states and labour-supplying countries. It should be noted that their scope of application is not restricted to the ratifying states since ships flying third state flags are also under the obligation to meet the standards established by the conventions: in other words, the role of port state control is reinforced in both conventions, in particular MLC, 2006, and all ships arriving at the port of a contracting state must comply with the conventions ′minimum labour standards, subject to immobilisation.

In fact, the introduction of minimum labour standards has succeeded in levelling the playing field to a certain degree and in stopping the race to the bottom between competing labour laws in terms of worker protection. In this regard, worker protection could now be said to be at a point somewhere between the very high and the very low labour standards found in different countries. For the purposes of this study, the ILO Conventions reveal a change of perspective; international fora no longer seem to require a genuine link between a flag state and a ship flying its flag to ensure that there is a socio-economic link between them to justify the flag state′s legal intervention in the vessels ′affairs but look for ways to make the flag state fulfil its international obligations effectively. With this goal in mind, essential labour standards are being harmonised, and their implementation is entrusted to the flag state, given that this is now the only state with jurisdiction on board according to public international law. However, in cases where flag states do not fulfil their obligations, port states have to take the lead in ensuring that shipowners comply with minimum standards. Indeed, port state monitoring reveals that there is a crisis in terms of the flag being the factor that shows the closest jurisdiction in labour and employment matters. Nevertheless, both MLC, 2006, and WFC 2007 make it clear that the flag state bears the main international responsibility in these matters, and the ground is prepared for rebuilding the flag jurisdiction as the best law to rule on employment matters.

The Principle of Freedom of the Seas, a Ship′s Nationality and the Law Governing Labour and Employment Matters on Board

The principle of freedom of the seas is more than just a metaphor to describe the fact that the seas are theoretically an open space without a set of established rules, which are now under the umbrella of various international conventions. The earliest attempts to tame the seas include state appropriation of vessels registered in or otherwise connected with their own territory, meaning that a vessel had taken on the state′s nationality and the obligation to fly its flag. In fact, the introduction of this international obligation runs parallel to the consolidation of the principle of freedom of the seas and oceans in public international law, as this goes hand in hand with international rules that guarantee free circulation and the maintaining of public order at sea—whether it involves decisions about certain events, such as births, deaths or crimes; regulating matters pertaining to the ship itself; or determining behaviour and responsibilities arising from the very fact of being at sea, particularly vis-a-vis third parties. The flag state, therefore, has certain rights over ′its ′vessels in relation to other states—both on the high seas and in its territorial or inland waters—but it also has certain duties, and it is the combination of these rights and duties that make up the concept of nationality.

According to Article 91(1) of the United Nations Convention on the Law of the Sea (UNCLOS) issued at Montego Bay on 10 December 1982, ′every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship′. Articles 94 and 217 of UNCLOS describe in detail the different duties that fall within the sphere of state control with respect to ships flying its flag. Prior to this Convention, Articles 5 and 16 of the Geneva Convention on the High Seas of 29 April 1958 already conferred jurisdiction over matters on board to the flag state.[75]

The nature of the relationship between a state and a vessel over which it has jurisdiction has been widely discussed since the ship is just a movable asset. The initial approach was that the vessel was subject to national sovereignty because it was part of the territory of the state to which it belonged. This fiction soon became inconsistent in the face of the principle of freedom of the seas, which establishes that it is not necessary to obtain permission to fly over a ship or sail under it, for example, whereas such permission is necessary when dealing with state territory. The subsequent approach to justifying flag jurisdiction mirrored the relationship between a state and its nationals, highlighting the idea that the same bond is applicable to the relationship between a state and a vessel flying its flag. However, citizens and ships have different rights and duties as holders of a nationality, and so this explanation of flag jurisdiction also became useless and further arguments were put forward to support national sovereignty on vessels. The first of these took into account a shipowner′s nationality and looked at its correlation with the nationality of the vessel itself. This correlation is rare nowadays, given that the success of open registries specifically relies on the relaxing of the requirement for shipowners to be nationals of the states their vessel are registered with; therefore, state sovereignty over shipowners cannot be extended to their ships. The second argument departed from the English practice of conferring the status of a legal person on a ship.

However, this treatment was only granted for the purpose of taking legal action against the ship, i.e., placing the vessel in the position of a defendant, or rather deeming it an object that might be subject to attachment, so the fiction was only useful to sustain admiralty jurisdiction in rem.

All in all, the conclusion to be drawn is that a ship′s nationality is a *sui generis* construction. While the inappropriateness of the term nationality to describe the link between flag state and ship has already been remarked on, it is also acknowledged that the term has played the key role of supporting the connection between a ship and a particular state[76]. In any event, this bond between a state and a vessel flying its flag—supported by international conventions as well as international customary law—remains as a counterbalance to the principle of freedom of the seas.

The fact that jurisdiction over a ship is ′allocated ′to a specific state justifies the application of the state′s own national laws to the vessel, as well as the fact that jurisdiction over matters related to it be granted to the master and officers of the vessel as legitimate representatives of the power on board. Prior to the proliferation of open registries, such power could only be exercised by flag state nationals, which is to say that the captain and the officers had to be holders of the nationality in question. In fact, this rule is only

[75] 450 UNTS 11.

[76]‘ Allocation ’appears to be a better term than ‘nationality ’to Meyers (1967), p. 1. Further, see Skourtos (1990), pp. 20–23 and 108–137, who pursues the idea that a ship’s nationality is equal to a citizen’s nationality with a view to building a genuine link between a ship and the flag state; because the two nationalities are radically different, this attempt failed. Kamto (2003), pp. 343– 373, considers a ship’s nationality to be metaphorical and that the only thing it has in common with a citizen’s nationality is that the flag state has exclusive jurisdiction over them both.

meaningful in the framework of the current structure of international labour markets, whereas in a less globalised world crew members typically shared their vessel′s nationality, which in turn was also the shipowner′s nationality as a rule. This situation is only currently maintained in closed registries, which still require strong connections between vessel and flag state, sometimes including the requirement for the ship to be built on the flag state′s own shores.

In contrast, a ship without a flag is a pirate ship and is not subject to any law or jurisdiction. By the same token, any vessel can only fly one flag[77], and the respective state takes responsibility for its actions. Against this background, flag states ′interest in knowing which ships are flying their flags—for which registration is generally mandatory—becomes obvious. For similar reasons, flag states also have an interest in specifying seafarers ′and fishermen′s training and professional qualifications and overseeing crew members ′ employment contracts. In addition to determining working and living conditions on board a ship, the flag state intervenes very early on in sailors ′training activities for military purposes. This practice shows that it is the law of the flag that holds sway on board, including in aspects such as living and working conditions,[78] except for in specific events with implications going beyond the ship itself, occurring in waters subject to the jurisdiction of a coastal state or involving more than one ship.

The fact that a ship is subject to the jurisdiction of the flag state determines not only which law governs on board but also the need to accept international responsibilities regarding the ship, meaning that it has to comply with both international and national laws as passed by the state in question, while the vessel benefits from the state′s protection, including on issues such as repatriation of the crew irrespective of their nationality.

The principle of freedom of the seas is not an absolute but a relative principle: states have specific rights and duties in relation to specific areas. According to Article 2 of UNCLOS, coastal state territory includes territorial waters within what is known as the contiguous zone. State sovereignty here is limited, however, since it can only be exercised in accordance with public international law provisions, which impose the right of innocent passage, for example. In this regard, the coastal state is not allowed to use the fact that a ship is sailing through its territorial waters to exercise civil jurisdiction over the people on board and the ship itself by adopting precautionary or arrest measures, ′save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State′.

[77] It is an international principle that only the state of registry is entitled to discuss the validity of its entries [see Lauritzen v. Larsen, 345 U.S. 571, 585 (1953)], as acknowledged by Article 6 of the Geneva Convention on the High Seas, 29 April 1958.

[78] Clarifications of this principle can be found in Article 10 of the Geneva Convention on the High Seas: '1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. 2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect'. See Drobnig (1990), pp. 40– 44; Wolfrum (1990), p. 129.

Public international law allocates other areas beyond the coastline to coastal states: the exclusive economic zone and the continental shelf. In both areas, sovereignty is much more limited than in the territorial sea. Within the exclusive economic zone, jurisdiction is limited to the construction and use of artificial islands and other facilities and structures, marine scientific research, the protection and preservation of the marine environment and other rights and duties provided for in Article 56 of UNCLOS. State sovereignty over the continental shelf is used only for the purposes of exploring and exploiting natural resources in accordance with Article 77 of UNCLOS. Coastal states ʹjurisdiction specifically covers offshore oil rigs as well as other facilities for the exploiting of mineral resources. The exploiting of fish stocks is more complex due to sustainability issues and is subject to fishing quotas. With regard to the shipʹs internal affairs, however, the flag jurisdiction is applicable in accordance with Article 94 of UNCLOS.

The Internationalisation of Maritime Employment: Developments in Ship Registration Systems

The Fight Against the Flight of Shipping and Fishing Fleets to Flags of Convenience

After the decolonisation period and the Second World War, it became clear that the fragile consensus prevailing on the conditions required to fly a stateʹs flag had been breached.[79] The main requirement was that the vessel and owner had the same nationality, which, as previously mentioned, was typically shared with the crew. Nevertheless, this coincidence disappeared with these historical events, as they encouraged the opening of registries in developing countries. These states viewed ship registration as a business opportunity, and this was the beginning of the boom of flags of convenience. The new system provided shipowners not only with fiscal and social advantages but also with further incentives stemming from the lack of control over registered vessels in terms of compliance with technical and labour standards. It is worth noting that flags of convenience may also threaten transparency with regard to ships ʹoperators; indeed, some open registries ensure shipowner anonymity as a further advantage of registering in their countries[80].

The heyday of the use of flags of convenience encouraged the flight of merchant and fishing fleets from traditional maritime countries to other more tolerant nations. This had immediate consequences on crews, not just because such countries enjoyed far more flexible social and labour standards but also because jobs were moving there as well. Given the adverse effects of forum shopping on living and working conditions on board, trade unions25 and major international organisations began to try to pierce the veil and bring the flags of convenience system to an end26 by demanding a genuine link between a shipʹs flag

[79] In fact, the ‘flag of convenience ’concept can be traced back several centuries and is characterised by the mismatch between a shipowner’s nationality and that of the ship.

[80] Mansell (2009), pp. 109–110, refers to these as ‘pseudo-national ’states because the registry is not located on their territory and its powers have been entrusted to a private entity, including the exercise of its jurisdiction over the vessel, which may be exercised by entities not admitted by the International Association of Classification Societies. These states do not oppose the establishment of shell companies on their territory and do not demand transparency on ownership and property control over the ship. Further, see Coles (2002) studying the Bahamas, Barbados, Bermuda, Cambodia, the Cayman Islands, Cyprus, Gibraltar, Hong Kong, the Isle of Man, Jamaica, Liberia, Luxemburg, Madeira, Malta, the Marshall Islands, Panama, San Vicente and Grenadine, the United Kingdom and Vanuatu.

and its owner′s nationality. This campaign reached a deadlock, however, as public international law allowed every country to determine the conditions required for a ship to acquire the country′s nationality. The only way this freedom could be restricted would be through an international convention, and for this reason discussions on the topic shifted to the diplomatic arena.

The ′genuine link ′concept was first formulated in Article 5 of the 1958 Geneva Convention of the High Seas. This provision, however, only served to strengthen the flag of convenience system since it implied that nations were free to grant their flags to any vessel willing to register in their territory. Subsequent attempts to identify a genuine link between flag states and vessels have not had significant results,[81] a noteworthy example being the United Nations Convention on Conditions for Registration of Ships adopted on 6 February 1986, which has never in fact come into effect. This Convention defined the concept of ′genuine link ′in terms of two fundamental pillars: the presence of a competent and appropriate national maritime administration with authority to monitor the ship′s safety and the implementing of international rules and standards on board, on one hand,[82] and, on the other, the development of economic links with the state, in particular national participation in ownership of the vessel, the composition of crews and management of the companies owning the vessels,[83] as well as ensuring the easy identification of owners and operators of vessels,[84] in order to claim liability if necessary. However, these links were labelled inaccurate, as each state could interpret them differently. In fact, the best way to monitor the veracity of ′genuine links ′would have been to introduce a sanctions regime resembling the one posited during the negotiation of the 1958 Convention. At the time, non-recognition of the nationality granted to a vessel was proposed should close links be lacking; as this proposal was ultimately not included in the Convention, each nation is free to grant its flag to a ship under whichever conditions it deems appropriate.

In addition to this, developments in company law have contributed to problems in reaching an agreement on what a genuine link is. Nowadays, freedom of establishment allows dissociation between company and shareholder nationality; accordingly, a shipping or fishing company can be set up in the country where the ship is registered, but not the beneficial ownership. The proliferation of corporate groups further complicates the situation.

Against this background, the problem of how to establish a genuine link between a state and the ships flying its flag is still being discussed in international fora. Particularly salient are the numerous UN General Assembly resolutions inviting IMO and other relevant UN

[81] Proof of such difficulties is the bad praxis of trade unions in the ITF as described by Northrup and Rowan (1983), pp. 133–135, consisting of boycotting ships for the only reason that they were sailing under flags of convenience, regardless of the fact that working conditions on board, including salaries, may have been good. In contrast, numerous ships with substandard working conditions on board were not detained just because their flags were not classified as flags of convenience (pp. 133–135). In fact, the international discussion on the identifying of a ‘genuine link ’underlined the variety of geo-strategic approaches on the part of a number of the states on the flags of convenience list, claiming that others are playing with economic colonialism to stop their development.

[82] Article 5 of the UN Convention on Conditions for Registration of Ships.

[83] Articles 7 to 9 of the UN Convention on Conditions for Registration of Ships.

[84] Article 6 of the UN Convention on Conditions for Registration of Ships.

agencies to rethink the issue of how to make flag states take up their responsibility with respect to vessels—including fishing vessels— registered in their territory.[85] In fact, the IMO has consistently explored the role of the ′genuine link ′in national practice as well as the consequences that states not meeting their international obligations should bring.[86] In this regard, the focus of international concern has now shifted from finding a conventional definition of what a genuine link is to ensuring that flag states effectively exercise the jurisdiction conventionally vested upon them over ships flying their flag. This change of approach has been confirmed by international efforts aimed at providing real content to flag state jurisdiction by issuing international conventions complementing UNCLOS and establishing specific obligations to be complied with by flag states. In this regard, the ITF classification of flags of convenience seems to have become obsolete, and hence the organisation has announced changes in its strategy.

Finally, it must be mentioned that the above discussion does not question a ship′s flag as the connecting factor when it comes to governing the ship′s affairs, as international practice has not provided for alternatives to flag state jurisdiction. Within the framework of EU law, it is worth commenting on the CJEU′s decision of 24 November 1992 involving a fishing ship owned by a Danish company with a Danish crew but flying a Panamanian flag that was chosen to circumvent restrictive fishing measures adopted by the then European Community. The Court in Luxembourg claimed that there was no reason to refuse to recognise the nationality of a ship granted by a state in the exercise of powers conferred on it by public international law.[87] This argument is consistent with its ruling on British laws that required any shipowner registering a fishing vessel in the United Kingdom to hold British nationality; although the CJ answers in accordance with the Commu- nity prohibition on discrimination on grounds of nationality, it also concedes that ′as Community law stands at present, it is for the Member states to determine, in accordance with the general rules of international law, the conditions which must be fulfilled in order for a vessel to be registered in their registers and granted the right to fly their flag (. . .)′.[88]

Capitulation: International Registries and Second Registries

These hurdles to establishing a genuine link between states and ships flying their flag, along with forum shopping in maritime law, have led to many countries opening second registries and international registries as a way to curb the decline of their merchant and fishing fleets in an environment of steady migration towards flags of convenience. This is the case with

[85] See, for example, the UN Resolution approved by the General Assembly on 11 December 2012, Doc. A/RES/67/79.

[86] See Doc. A/61/160, 17.7.2006, Item 67(a), Letter dated 23 June 2006 from the IMO Secretary- General addressed to the UN Secretary-General regarding the Report of the Ad Hoc Consultative Meeting of senior representatives of international organisations on the ‘genuine link’.

[87] CJ 24.11.1992, Case C-286/90, Anklagemyndigheden v. Peter Michael Poulsen, Diva Navigation Corp., spec. paras. 12–16, on the interpretation of Article 6(1)(b) of Regulation (CEE) No. 3094/86 of the Council, 7 October of 1986, laying down certain technical measures for the conservation of fish stocks (OJ L 207, 29.7.1987).

[88] CJ 25.7.1991, Case C-221/89, The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others, paras. 13–17; 4.10.1991, Case C-246/89, EU Commission v. the United Kingdom of Great Britain and North Ireland. See Vialard (1995), pp. 39–50.

Spain, which has a second registry in the Canary Islands;[89] Portugal, which has a registry in Madeira;[90] and Denmark,[91] Luxembourg,[92] Norway and Germany with their respective international registries,[93] an example that has also been followed by France. Even the European Union itself considered the possibility of including a second Community registry— EUROS—but the proposal has not come to fruition.
Registering ships in these entities provides fiscal benefits, as well as social advantages, since the registries enjoy a special status affecting employees ʹworking conditions, differentiating between workers who are resident or domiciled in the country where the register is held and those whose residence or nationality is elsewhere. This distinction opens the door to the possibility of applying different laws to workers aboard, in particular in terms of salaries, to such an extent that crews working on the same vessel may receive different salaries for the same work. This is not new, and the ITF has defined the practice as ʹcrews of convenienceʹ. Manning agencies, strategically located in countries with low wages, have encouraged the growth in the number of crews of convenience, thus decisively contributing to the internationalisation of maritime employment.
The establishment of these registries and the legal differences between workers aboard that they allow have been constitutionally challenged, although unsuccessfully. Both the German *Bundesverfassungsgericht*[94] and the French *Conseil Constitutionel* concluded that both international registries were compatible with their respective constitutions. The French Constitutional Court was specifically questioned about the breaching of the ʹequal work for equal pay ʹprinciple, as emphasised in French law—just as it is in the laws of many other countries setting up second registries—inasmuch as seafarers not domiciled in France may not be covered by the flag stateʹs labour legislation and thus be submitted to working conditions, including wages, that differ from those applicable to seafarers domiciled in France. The Court justified the distinction introduced by the French law establishing an international registry on the ground that a vessel was not part of the territory of the state

[89] See Additional Provision No. 15 Law 27/1992, 24.11.1992, of Spain's National Port and Merchant Fleet Authority [BOE No. 283, 25.11.1992), modified by Law 62/1997, 26.12.1997 (BOE No. 312, 30.12.1997), and Law 46/2003, 26.11.2003 (BOE No. 284, 27.11.2003)], and comments by Fotinopoulou Basurko (2008), pp. 58–61. The latest amendment to this law was introduced by Legislative Royal Decree 2/2011, 5 September, sanctioning the Merged Text of the Law of State Ports and the Merchant Fleet, further TRLPEMM (*Texto Refundido de la Ley de Puertos del Estado y de la Marina Mercante*) (BOE No. 253, 20.10.2011). This last amendment changed the number of the last disposition from 15 to 16.
[90] Decree Law No. 96/89, 28.3.1989 establishing the International Maritime Registry of Madeira.
[91] Act on the Danish International Register of Shipping Act, No. 408, 1.7.1988.
[92] Act of 9 November of 1990 to establish a Luxembourg Maritime Register, amended by the Act of 14 April 1992 and the Act of 17 June 1994.
[93] Norwegian *Dansk Internationalt Skibsregister* established by Law No. 408, 1.7.1988; and German *Gesetz zur Einfu€hrung eines zusa€tzlichen Registers fu€r Seeschiffe unter der Bundesflagge im internationalen Verkehr (Internationales Seeschiffahrtsregister –ISR)*, 23.3.1989.
[94] See BVerfG 10.1.1995, NZV 1995, p. 272. Previous to this judgement and assessing the constitutionality of the German law, see Ku¨hl (1989), pp. 91–92. The main issue involved freedom of association, which the German Constitutional Court did not consider to be affected by the law, since foreign sailors are allowed to join German trade unions (BVerfG 10.1.1995, NZV 1995, p. 272). That was already the ITF's view in 1961 as explained in Northrup and Rowan (1983), p. 53. See also Basedow (1990), pp. 88–90; Hauschka and Henssler (1988), pp. 597–601; Wimmer (1995), pp. 250–256. However, insisting that this law does not comply with the German Consti- tution because this freedom of association appears to be formal only and not substantive, see Geffken (1989), pp. 88–91.

that lends it nationality. As Recital 33 of the French ruling states, 'qu'il résulte des règles actuelles du droit de la mer qu'un navire battant pavillon français ne peut être regardé comme constituant une portion du territoire français: que, dès lors, les navigants résidant hors de France qui sont employés a bord d'un navire immatriculé au registre international français ne peuvent se prévaloir de toutes les règles liées a l'application territoriale du droit français'.[95] This decision has been understood to weaken the idea of the flag as a crucial factor in determining which law is applicable to individual employment contracts. However, the Court simply emphasises a differential factor affecting workers— the fact that they come from different countries—to justify the exception to the principle of equality at work, at least with regard to salaries. The law that should govern employment matters is a different issue, in which the flag may still play a role, and is determined in any event by Article 8 of Rome I Regulation in the European area of justice.

The German international register was also questioned before to the CJEU, not because of infringing the principle of 'equal work for equal pay 'for EU and non-EU workers but because the tax regime and social security benefits available to ships registered there may well be deemed as some kind of state aid. The ruling was in Germany's favour since, according to the Court, the rule granting these benefits is part of Germany's private international law and not an instance of state aid.

Nevertheless, immediately afterwards the EU adopted the 'Community Guidelines on State aid to maritime transport',[96] amended by Commission Communication C (2004) 43,[97] supporting shipping companies 'exemption from taxation and social security contributions in order to increase their ability to compete internationally.

These guidelines have achieved a relative degree of success in curbing the flight towards flags of convenience by extending flat rate tonnage taxation systems (tonnage tax) and other tax benefits, such as reduced social security contributions and a reduced income tax rate for EU seafarers employed on board ships registered in a member state. These benefits are not limited to member states 'national registries since international, second and open registries can equally enjoy these benefits.[98] It is, however, imperative to prove that there is a link with an EU flag by providing 'details of vessels owned and operated under Community registers, Community nationals employed on ships and in land-based activities and investments in fixed assets',[99] in addition to the prerequisite that companies entitled to this benefit must pay corporate tax in an EU member state. Companies interested in benefitting from this kind of aid have to demonstrate that they comply with international

[95] Already concluded by the Permanent Court of International Justice in the Lothus case, 7 September 1927 [1927] P.C.I.J., Ser. A, No. 10.

[96] OJ No. C-205, 5.7.1997.

[97] OJ No. C 13, 17.1.2004.

[98] The Annex to this Communication includes the definition of member state registries, not including those in territories in which EU law is not applicable, such as the Kerguelen Islands, the Dutch Antilles, the Isle of Man, Bermuda and the Cayman Islands.

[99] See the Commission's Communication C(2004) 43, p. 6. In some cases, the application of the tonnage tax to fleets consisting of vessels flying non-EU flags is also accepted, on an undertaking from the companies benefitting to increase, or at least maintain, under the flag of a member state, the share of tonnage that they will operate under the flag.

and EU safety standards as well as with rules regulating working conditions on board. The benefits are not confined to shipping companies and may include applications from businesses providing different types of services to ship-owners, including crew recruitment and placement services as well as training and management.[100] Despite the fact that seafarers ′wages and social protection on board have become more flexible, this helps maintain minimum labour standards and avoids a race to the bottom in this area.

The Internationalisation of Maritime Employment: Parties to the Maritime Employment Relationship

Introduction

This section deals primarily with the parties to the employment contract but also pays attention to the impact of business cooperation on the employment relationship. As previously noted, the immediate consequence of the internationalisation of maritime employment has been the estrangement of the parties to an employment contract from the flag state, as crew members and the shipowner may well come from different countries and their nationalities may not match the vessel′s flag. Business cooperation plays a major role in the multinational origins of employers and employees in the shipping and fishing sectors, unfortunately leading to situations where it is sometimes difficult to identify the employers and where they are located.

In addition to the concepts of maritime employee and employer, the section also covers the role of manning agencies in providing seafarer recruitment and placement services to maritime employers. A manning agency may also be part of a corporate group and carry out its management tasks on behalf of other companies in the same group. Indeed, corporate groups are very common in the fishing and shipping sectors, where specific kinds of business cooperation have developed. The point is that the close financial links between companies belonging to the same group often make it unclear who the real employer is. Business cooperation in the shipping and fishing sectors is therefore tackled in this section, as well as legal solutions to the problem of identifying the employer. The first involves piercing the corporate veil, while the second is a more proactive approach as it aims to enhance best management practices by promoting corporate social responsibility.

Besides employment matters, other potential respondents vis-a-vis seafarers or fishermen may need to be identified. Significant examples are claims for damage to persons or property arising from collisions between ships or claims arising from damage suffered in ports. In all these cases, it may be necessary to find out who the owner of the other ship is—which is similar to the problems that seafarers may face in identifying their employer, in particular in cases of corporations—or the person among port workers and port authorities who is responsible for the accident. As these claims are not included within the concept of labour and employment relations, the parties to these relationships are not covered in this section.

Maritime Employees

[100] See Communication from the Commission providing guidance on State aid to ship management companies (Text with EEA relevance) 2009/C 132/06 (OJ No. C 132, 11.6.2009).

International labour law does not provide for an autonomous definition of ′seafarer′, as can be seen from Article 1(2) of Convention No. 145 on Continuity of Employment (Seafarers), 1976: ′persons defined as such by national law or practice or by collective agreement who are normally employed as crew members on board a sea-going ship (. . .)′. MLC, 2006, and WFC 2007 have gone a step further and removed references to national law from their respective definitions of maritime employees. Article II(1)(f) of MLC, 2006, defines seafarers as ′any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies′, while Article 1(e) of WFC 2007 identifies fishermen as ′every person employed or engaged in any capacity or carrying out an occupation on board any fishing vessel, including persons working on board who are paid on the basis of a share of the catch but excluding pilots, naval personnel, other persons in the permanent service of a government, shore-based persons carrying out work aboard a fishing vessel and fisheries observers′.

It should be noted that these definitions do not take into account the kinds of tasks performed on board, and by this means interpretive problems in relation to staff on board performing services other than those related to navigation or fishing, such as waiters, cashiers or scientific personnel, are now solved. All workers on board are currently covered by the provisions of these conventions, and the scope of application of MLC, 2006, is particularly broad since it covers both the transport of goods and passengers.

Where ships ′captains are concerned, the fact that their position is one of command casts doubt on whether or not there is indeed a genuine employment relationship between captain and shipowner. Captains exercise disciplinary power on board while simultaneously performing managerial tasks on behalf of shipowners as well as acting as their sales representatives. They are also legally vested with special powers, some of which are administrative in nature—including nautical management of the vessel as well as maintaining safety measures on board and at sea—while others are civilian—such as occasionally carrying out the functions of a civil registry constituting civil status[101], which was why only flag state nationals could hold this post.

Nevertheless, the privilege of nationality has to be understood today in the framework of the EU′s prohibiting discrimination on grounds of nationality.[102] The CJEU has ruled on this matter, indicating that the prohibition is applicable to both the merchant and fishing sectors.[103] Although both captain and first officer are vested with public powers on board,[104] including safety and disciplinary issues and measures in the fight against pollution,[105] these are in fact residual, and it is therefore not possible to justify an exception

[101] See Articles 42, 722 and 729 of the Spanish Civil Code; Article 19 of the Spanish Civil Registry Law; and 178 to 181 of the Law on Shipping. In Germany, the relevant provision is § 45 *del Verordnung zur Ausfu€hrung des Personenstandsgesetzes (PersStdGAV)*, 22.11.2008.

[102] Article 18 TFEU.

[103] CJ 4.4.1974, Cade C 167/73, *Commission v. French Republic*; 7.3.1996, Case 334/94, *Commission v. French Republic*. As regards the fishing sector, see CJ 14.12.1989, Case C-3/87, Agegate Ltd.

[104] CJ 1.12.1993, Case 37/93, Commission v. Belgium; 2.7.1996, Case 290/94, Commission v. Greece.

[105] Additional Disposition 16(6) of the Legislative Royal-Decree 2/2011, 5.9.2011, issuing the TRLPEMM, deals with the manning of ships registered in the second Spanish registry, *Registro Especial de Buques y Empresas Navieras*, located in the Canary Islands. This provision specifies, according to the CJ's doctrine,

to the prohibition of discrimination on grounds of nationality, as also applies to some other public sector jobs.[106] In this context, and as long as they do not hold any other position in the shipping company, such as principal partner or owner of the ship on which they also operate as captain,[107] captains and officers have to be considered to be employees because they take orders from the owner and do not bear any business risk. This conclusion can also be drawn from the complete definitions reported in both MLC, 2006, and WFC 2007, where it is clearly indicated that the position held by workers on board is not relevant; what matters is the fact that they are subordinates.

Maritime Employers

Definition

The ILO Conventions do not provide a definition of who may be deemed a maritime employer, perhaps because these Conventions are directed not at private actors but at nations. ILO Convention No. 145 commented on above does mention employers, but only collaterally in Article 3, when it deals with ′contracts or agreements providing for continuous or regular employment with a shipping undertaking or an association of shipowners′. Accordingly, shaping the concept of maritime employer is left to national law—not an easy task, as this is an especially complex definition due to the profound transformations undergone by shipping and fishing companies. Indeed, one of the key issues regarding worker protection is identifying the employer, i.e., the person accountable to national laws in employment matters.

Employers can be defined as the party to a contract who contracts the provision of employment services under certain conditions, either with a for-profit or a non-profit intent. Shipowners fit this definition,[108] which can be completed by reference to the place where the services are provided: a vessel or a fleet—as employees may be attached to more than one ship if the employer owns more than one vessel—operating under the employer′s organisation and instructions.

that captains and officers must be nationals of an EU member state or of a state in the European Economic Area, except in cases where the Maritime Administration establishes that these posts must be held by Spanish citizens because they involve the effective and ordinary exercise of public powers, which do not represent a very small part of their activities. Theoretically, this exception is consistent with the CJ's doctrine; in practice, however, it is an open door to infringement, for example, understanding that the mere legal conferral of public powers and the exercise of police powers on board are enough to make the exception operate. See de Castro Mejuto (2012), pp. 470–474, interpreting Article 212 of the project of law on shipping, now Article 162 of the Law on Shipping.

[106] See CJ 30.9.2003, Case C 405/01, *Colegio de oficiales de la marina mercante espan~ola* v. S*tate Administration*; Case C 47/02, *Ander, Ras & Snoeck v. Bundesrepublik Deutschland*; 11.9.2008, Case C-447/07, Commission v. Italy. See comments by Enrico (2010), pp. 480–482, on the growing lack of significance of the captain's position in the field of national defence in particular and also while taking care of the civil registration of citizens and maintaining discipline on board; Epiney (2004), p. 1073; Morin (1999), pp. 153–161.

[107] See Conclusions of Advocate General Stix-Hackl in Case C 57/02, Ander and others v. Germany, para. 19, highlighting the captain's subordination to the shipowner, even when he or she is a stakeholder of the shipping or fishing company at the same time. In the case in question, one of the plaintiffs was both the captain and a stakeholder of the company running the fishing vessels under his authority. The issue was that he did not control the company's activities (para. 27).

[108] For example, Article 145(1) of the Spanish Law on Shipping furnishes a concept of a shipowner according to which it is whoever, whether he or she is the owner or not, holds possession of a vessel, directly or through their dependents, and dedicates it to sailing on their behalf and under their responsibility. Previous to this Law, see Mele´ndez Morillo-Velarde (2009), pp. 78–79.

It is therefore important to emphasise that ownership on the one hand and the operating of a ship or fleet on the other are currently seen as separate concepts, and it is the operating of the fleet or vessel that matters when it comes to identifying employers,[109] as acknowledged by MLC, 2006, and WFC 2007. Both conventions take a functional approach when defining the employer, pointing to the identification of the person responsible for the obligations imposed and understanding that the employer is ʹthe owner of the ship [or fishing vessel] or any other organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the vessel from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners [fishing vessel owners] in accordance with the Convention, regard- less of whether any other organization or person fulfils certain of the duties or responsibilities on behalf of the shipowner [fishing vessel owner]ʹ.[110]

These definitions confirm the dissociation between owner and employer, as they specifically refer to different means of operating a ship. To take the most common as an example, leasing a vessel involves the leasers agreeing with the leasees to make a ship available for operating on the latterʹs behalf and at their own risk. The ship may or may not be equipped and ready for sailing, but the leaser passes nautical, technical and commercial management of the vessel to the leasee. The charterer thereby becomes the sole owner of the shipping or fishing business, is in charge of operational developments and becomes, in turn, an employer.

Under one form, bareboat charter registration, in addition to accepting a shipʹs nautical and commercial management, the charterer can also choose its nationality via a temporary change of flag. As long as a ship is under contract, it cannot sail under the ownerʹs flag, and this nationality is held in abeyance. The charterer also of course assumes the right to appoint master and crew throughout the contract.[111]

For its part, time charter is a type of contract via which the shipowner gives the charterer the use of a fully equipped freighter for a fixed period of time in exchange for a lease or freight and for commercial purposes. This per-time contract— different from a per-voyage contract—involves the shipowner remaining in control of the vesselʹs technical and nautical management and brings about a kind of shared control over the captain and crew members: while the shipowner is responsible for nautical matters, the charterer is in charge of the shipʹs commercial exploitation by, for example, giving indications to the master about ports of destination. The duality would only disappear if the contract included a clause for the

[109] As highlighted by Duque Domínguez (1985), p. 166, a ship operator is in principle the centre of the allocation of the responsibilities stemming from sailing. Also Metaxas (1985), p. 11, who distinguishes between maritime ventures and beneficial ownership. See also Carbone et al. (2006), pp. 95–97. Pulido Begines (2010), pp. 64–69, focuses on the definition of shipping companies and ship exploitation, including in the definition persons operating ships for non-commercial reasons and not only on a profit-making basis.

[110] See Articles II(j) MLC, 2006, and 1(d) WFC 2007.

[111] On this contract and its history, see Ademuni-Odeke (1997), pp. 649–653. With a view to maintaining the working conditions of the crew, Article 19 of Italian Law No. 234, 14.6.1989 prompts the charterer to comply with collective agreements in force at the time of taking on the ship as a condition to agreeing on the temporary change of flag.

transfer of the shipʹs ownership, as both sides of ship management—nautical and commercial—would have been transferred.

Business Cooperation and the Issue of Identifying the Employer

<u>*Manning Agencies*</u>

Ship management companies provide shipowners with services relating to vessels ʹtechnical and commercial management. Manning agencies or seafarers and fisher- men recruitment and placement services are types of ship management companies specialising in crew management and thus deal with the selection, recruitment and hiring of crews. The role of manning agents may in fact go beyond these services, and they may continue to manage crews after recruitment, for example, by dealing with visas and journeys, organising crew changeovers, organising and paying salaries and social security contributions, dealing with crew members ʹcomplaints and even negotiating working conditions with the ITF. They are so important for both the merchant and fishing sectors that the ILO has targeted the issue and ruled on seafarers ʹand fishermenʹs recruitment and placement services, which are now defined as ʹany person, company, institution, agency or other organization, in the public or private sector, which is engaged in recruiting seafarers [fishers] on behalf of, or placing seafarers [fishers] with, shipowners [fishing vessel owners]ʹ.[112]

Manning agency operations actually involve three types of contract that have to be clearly distinguished from one another, as each is subject to its own law, despite the fact that they are usually intermingled: the first contract is between manning agency and shipowner and deals with placing the order to hire seafarers or fishermen, the second contract is the collocation or placement agreement between worker and manning agency and the third is the employment contract between shipowner and seafarer or fisherman, resulting from the manning agencyʹs role as intermediary. These intertwined relationships make identifying employers cumber- some and also generate conflicts of interest, since the agencies represent both the seafarers or fishermen seeking employment and the employers for whom they recruit and train crews, which includes checking their qualifications. In this regard, both MLC, 2006, and WFC 2007 make it clear that a ship or fishing vesselʹs operator or owner is ultimately responsible for the employment relationship and therefore ʹseafarers working on ships that fly its flag shall have a seafarers ʹemployment agreement signed by both the seafarer and the shipowner or a representative of the shipowner (or, where they are not employees, evidence of contractual or similar arrangements) providing them with decent working and living conditions on board the ship as required by this Conventionʹ.

Due to the technical problems resulting from the type of relationship established between ship management agencies and shipowners, the 1988 Baltic and International Maritime Conference produced and adopted the Shipman Agreement, which outlines the activities of ship management agencies as agents operating on the ownerʹs behalf in the management of a vessel or fleet. Among their tasks is crew management, which in turn includes crew

[112] Articles II(h) MLC, 2006, and 1(d) WFC 2007. Further, Regulation I(4)(3) MLC, 2006: ‘Each Member shall require, in respect of seafarers who work on ships that fly its flag, that shipowners who use seafarer recruitment and placement services that are based in countries or territories in which this Convention does not apply, ensure that those services conform to the requirements set out in the Code’.

recruitment, training and command. The Shipman Agreement is a policy—available to the contracting parties—whose validity has to pass through the sieve of the relevant national law. It covers all forms of maritime management, including crew, nautical and commercial management. However, since the most common among these was crew management, the BIMCO also drafted a specific ad hoc policy: the Crewman Agreement.

The Crewman Agreement was adopted at the 1994 Baltic International Maritime Conference and focuses on crew recruitment and supply, requiring the ship management agency to ensure that seafarers have had a medical check-up, are duly qualified to perform the tasks commissioned to them and keep their professional qualifications up to date throughout their employment contract. There are currently two types of Crewman Agreement, one of which, Crewman B, deserves a specific mention as it expressly lays down that crew managers act in their own name,[113] which means that they, and not the shipowners, are the actual employers. Crewman A, however, specifies that crew managers act as agents for and on behalf of the owners, as established by the Shipman Agreement.

The use of one of these policies provides valuable information about who the employer is. However, it is not always easy to find out whether the employer is the shipowner or the manning agency on the basis of the contract′s terms and conditions. This may lead to conflicts, for example when the contract does not contain information about who the employer is, sometimes because there is confusion as to the role played by agencies with respect to the workers. The agency may sometimes even specify that it is hiring workers on its own behalf, a fairly typical situation for fishing vessels. Furthermore, these agencies have become so important for both the merchant and fishing sectors[114] that countries like the Philippines have decided that Philippine nationals should be recruited exclusively through manning agencies.

For all these reasons, and also because employers may hire crews through a manning agency and then vanish, national courts take them into consideration in their decisions as to who is responsible for an employer′s duties, sometimes building a case of joint liability. In Spain, ship management companies are recognised by Article 10(4) of the Spanish General Regulation on business registration and affiliation,[115] although they had been considered illegal for some time. This provision poses a problem of interpretation, as shipping agents and manning companies ′activity is not in accordance with Article 43 of the Statute of Workers, which states that agency work is held to be illegal unless undertaken by licensed

[113] See Crewman-B policy, third clause: ‘Subject to the terms and conditions herein provided, during the period of this Agreement the Crew Managers shall be the employers of the Crew and shall carry out the Crew Management Services in respect of the vessel in their own name’. This is the conclusion reached by the Spanish Supreme Court, Employment Division, 27.6.2008, judging an appeal against the Galician High Court of Justice, Employment Division, 10.11.2006.

[114] On the economic relevance of manning agencies, see the Commission Communication providing guidance on state aid to ship management companies (OJ Nr. C 132, 11.6.2009, p. 6), whereby state aid—in particular tonnage tax—to shipowners is extended to manning agencies.

[115] As amended by Royal Decree 1041/2005, 5.9.2005 (BOE No. 222, 16.9.2005). Article 10 (4) reads as follows: ‘. . . are considered employers for the purposes of inclusion in this special scheme shipping agents, manning agencies or such other individuals or legal entities resident in Spain to serve in foreign flag vessels, including Spanish companies participating in fishing joint enterprises created in other countries, all without prejudice to what may result from international conventions or agreements signed by Spain ’(my translation). On this provision, see Arrieta Idiakez (2006), pp. 119–165.

companies and for temporary purposes only, which is not true of manning agencies. In any event, the labour market has changed substantially for seafarers and fishermen as a result of its internationalisation, and the activity of shipping agents and manning agencies has been accepted and qualified as a mandate contract covered by Article 1717(2) of the Spanish Civil Code, which states that by contracting on their behalf, agents are acting on clients ′ affairs, and therefore the employers are the shipowners. In addition, Article 10(4) stipulates that ship management agencies hiring and paying wages to Spanish seafarers and fishermen serving on foreign vessels are the employers too, for social security purposes. This provision brings together previous Spanish jurisprudence and builds a case for joint liability, with the aim of preventing the kind of fraud that occurs when crews are recruited through a manning agency and once the work has been completed the shipowner simply disappears as a company without fulfilling the terms of the employment contract. By the same token, Article 164(2) of the Spanish Law on Shipping establishes joint liability for contract fulfilment of both shipowners and foreign shipowners ′agents recruiting Spanish nationals or residents in Spain to serve on board foreign ships.

The same problems have arisen in the construction sector, leading the EU to considering the possibility of issuing a similar provision whereby the contractors are held liable in the event that the employers-subcontractors fail to fulfil their obligations to posted workers.[116] In view of the impact of manning agencies in the maritime and fishing sectors, the EU should consider promoting the same for such cases.

Corporate Groups and Further Business Cooperation Schemes

Business cooperation among corporate groups may include transferring employees from one company to another or having one company in charge of hiring employees for the other, i.e., acting as a manning agency. From a legal standpoint, there are two likely scenarios: one in which one company acts as employer whereas the other is actually employing the workers[117] and another where there is a chain of contracts whereby workers are transferred from one company to the other, sometimes retaining a dormant contract with the first employer. A good example of this is a case reported—but not published—in Germany concerning an officer domiciled there who served with Reederei Hamburger ER from 1959 to 1979. The contract was then cancelled by the parties, and the worker was employed by E. E. Shipping Company Ltd., the London branch of the German company, which in turn transferred him to different one-ship-companies based in Liberia, Panama and Cyprus, all of which were controlled by the German company.

In practice, many companies are set up with the sole purpose of restricting their assets to a single ship, the only one they operate. A ship owned by a single-ship company is usually

[116] See Article 12 of the Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') (Text with EEA relevance) (OJ No L 159, 28.5.2014).

[117] See Chaumette (1993), pp. 237–254, on Cour d'Apppel Poitiers, 26.2.1992, Pellae c. Société Française de Transports Pétroliers. ADMO (1993) 11:252–254, about replacing injured seafarers within the group of companies. In Cour.Cass. (Ch.soc.), 29.4.2003, No. 01-43416, available at http://www.legifrance.com, divers claimed against the parent company that had engaged them to serve abroad from France through two subsidiaries based in Jersey and Switzerland.

over-mortgaged but is the company′s sole asset, which means that creditors are deprived of the possibility of arresting sister ships, for example. In these cases, the main problem is tracing the beneficial owner, who should be ultimately responsible for employment matters.[118] All in all, corporate cooperation dramatically increases the risk of workers ′ rights being infringed.[119]

Maritime law has developed specific business cooperation schemes, such as liner conferences and liner consortia, where companies are treated on an equal footing. In the case of liner conferences, each company operates individually in the market,[120] whereas liner consortia involve participating companies pooling certain assets, such as crew, a central office and the fleet, to achieve a specific aim. Against this background, the question is who is accountable for any environmental damage or infringement of competition law, for example. The best answer comes from studying the type of legal relationship established between the companies: whether they have opted for being independent but operating as a consortium on the basis of specific contracts, in which case general accountability rules are applicable, or have set up a more sustainable scheme and specific answers to the liability issue are therefore to be sought within the scheme. This issue remains unresolved in cases where seafarers are assigned not to a particular vessel or company but to all participant companies in the consortium. Certain legal systems—including Spanish law—may deem this transfer of workers illegal, but the most feasible solution is for all companies involved in the consortium to be held jointly liable vis-a-vis crew members.

Business cooperation in the fishing sector has been channelled through joint enterprises and temporary joint ventures aimed at exploiting fish stocks under the responsibility of the respective coastal states. According to Article 9(3) of the Council Regulation (EC) No 3699/93, a joint enterprise is ′any company regulated by private law comprising one or more Community shipowners and one or more partners in a third country, constituted in the framework of formal relations between the Community and the third country, with the aim of fishing for and possibly exploiting fishery resources in the waters under the sovereignty and/or jurisdiction of the third country, with a view to the priority supply of the Community

[118] The Prestige case is a good example of lack of transparency. The principal was Monach Tanker Corporation; the shipbuilder, Hitachi Shipbuilding and Engineering Co. Ltd. Maizuruy from Japan; the classification society, American Bureau Shipping/ABS; the flag state, first Liberia and later the Bahamas; the shipowner, Monarca Tanker Corporation from 1976 to 1988 and then Mare Shipping, Liberia; the first operator, Maritime Overseas Corporation from 1976 to 1988; the second, Universe Maritime Ltd. from 1980 to 1988; the third, Laurel Sea Transport from 1996 to 2001; the charterer, first Crown Resources A.G. and later ERC Trading; the operator at the time of her sinking, Universe Maritime Ltd; the shipowner, P&I, The London Steamship Mutual Insurance Association Ltd. In general, on problems identifying the ultimate respondent in the maritime transport sector, which are very similar to those in employment matters, see Ndende′ (2006a), pp. 195–206.

[119] See Couper (1999), passim, studying the case of the Adriatic Tanker Company group of companies, based in Greece, which sets out perfectly the significant problems raised by the new financing methods, with over-indebted shipowners who stop paying wages and eventually abandon ships and crews in any port whatsoever (pp. 62–117).

[120] The significance of liner conferences has led the UN Conference on Trade and Development to promote a code of conduct for them, adopted on 17 April 1974, in force from 6 October 1983.

market′.[121] In these cases, transferring crew involves the new company taking on all the first company′s rights and obligations. This is a very common pattern in Spain,[122] typically involving Spanish fishermen hired by a Spanish employer to work on a vessel flying the Spanish flag. After the transfer, the employees work for a foreign company on a ship flying a foreign flag, but their former employer remains a stakeholder in the joint enterprise.
Joint enterprises are deemed legal by the European Union,[123] although seagoing vessels in general are excluded from the scope of Directive 2001/23/EC of the Council of 12 March 2001 on the approximation of the laws of member states relating to the safeguarding of employees ′rights in the event of transfers of undertakings, businesses or part of undertakings or businesses.[124] The same restric- tion may be adopted by member states on transposing Directive 2002/14/EC of the European Parliament and the Council of 11 March of 2002, which establishes a general framework for informing and consulting employees in the European Community.[125] In its Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on ′Reassessing the regulatory social framework for more and better seafaring jobs in the EU′, the Commission fortunately stated the need to re-examine this exclusion.[126]
Along the same lines, an assessment of the functioning of the two Directives jointly with others that also exclude seafarers and fishermen from their scope of application was initiated in 2010. The fundamental goal of the whole revision process is to make working at sea more attractive and appealing to young people by making it clear that working rights are the same as they are on land. The European Commission issued a Proposal for a Directive of the European Parliament and of the Council on seafarers by amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/CE, 2001/23/EC, including both Directives seeking to grant seafarers and fishermen working on ships registered in a

[121] Council Regulation (EC) No. 3699/93 of 21 December 1993 laying down the criteria and arrangements for Community structural assistance in the fishing and aquaculture sector and the processing and marketing of its products (OJ No. L 346, 31.12.1993).
[122] See Spanish Royal Decree No. 798/1995, 19 May, Por el que se define los criterios y condiciones de las intervenciones con finalidad estructural en el sector de la pesca, de la acuicultura y de la comercialización, la transformación y la promoción de sus productos (BOE No. 154, 29.6.1995), amended by Royal Decree No. 1549/2009, 9 October, sobre ordenación del sector pesquero y adaptación al Fondo Europeo de la Pesca (BOE No. 245, 10.10.2008), amended by Royal Decree No. 1586/2012, 23.11 (BOE No. 283, 24.11.2012).
[123] On joint enterprises in fishing, see Council Regulation (EC) No. 1421/2004, 19.7.2004, amending Council Regulation (EC) No. 2792/1999 of 17 December 1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fishing sector (OJ No. L 260, 6.8.2004), developed in Spain by Royal Decree No. 518/2005, 6.5, amending Royal Decree No. 3448/2000 on basic rules for structural aid in the fishing sector; Royal Decree No. 1048/2003 on the planning of and structural aid in the fishing sector; and Royal Decree No. 1473/2004 on socio-economic measures for the fishing sector and amendments to Royal Decree No. 3448/2000 (BOE No. 121, 21.5.2005).
[124] OJ No. L 82, 22.3.2001. See Article 1(3).
[125] OJ No. L 80, 23.3.2002. See Article 3(3).
[126] Brussels, 10.10.2007 [COM (2007) 591 final]. The same Communication states that ‘it is worth noting considerable number of Member states, including some of the largest shipping countries, have not chosen to exclude seagoing vessels from the scope of national legislation implementing the Directive. It is therefore obvious that this issue requires further attention’. These countries are Austria, the Czech Republic, Denmark, Estonia, Spain, Hungary, Italy, Lithuania, Poland, Portu- gal, Sweden and the United Kingdom.

member state or flying a member state′s flag a degree of protection equivalent to the one provided there.

Solutions Vis-a-Vis the Lack of Business Transparency

Piercing the Corporate Veil

When the relationship between companies is blurred and doubts are cast on whether they really are different entities, it may be necessary to raise the corporate veil in order to establish their joint liability. The doctrine of piercing the veil operates on the basis of different legal grounds and by recourse to different laws whose application to the issue depends on the legal relationship involved.

For example, this doctrine is regularly applied in the shipping and fishing sectors in cases involving the arrest of vessels that are deemed by creditors to be the property of their debtors, even if the vessels are assigned to a different company. In such cases, national courts proceed to lift the veil in accordance with the International Convention relating to the Arrest of Sea-Going Ships and using their own law.[127] Seafarers may well have recourse to the Convention to ensure that their claims against shipowners are paid, thus taking advantage of this doctrine. National jurisprudence proceeds by identifying when ships are to be deemed sister vessels on the ground of a number of indicators, including if (1) the vessels belong to the same owner, (2) the companies owning the vessels share assets that are used indiscriminately by both, (3) both are based in the same place, (4) they have a single insurance policy that is valid for all the ships in the fleet, (5) one of the companies is deprived of its decision-making capacity, and, above all, (6) all the companies—which usually operate as single-ship companies— are managed by the same business.

However, there is no doctrinal consensus as to which law should be applicable when it comes to piercing the corporate veil, whether it is the *lex causae* or the *lex fori*. Bearing in mind what is at stake, i.e. identifying the employer in an employment relationship, the *lex laboris* would appear to be the best choice. However, most legal systems—including Spain′s—do not set out a clear definition of the procedure for piercing the corporate veil, and this has mainly been developed by the courts. As a result, the *lex fori* seems best placed to pierce corporate law on practical grounds: first, because it is the closest and most familiar to the courts that have to make the decisions and, second, because the other option may involve the application of different laws as is the case where there is a chain of employment contracts with different companies in the same group.

As to when the veil should be lifted, the standard of proof required by national courts varies considerably. For some, the apparent confusion between the two companies to the point where third parties believe them to be a single company is enough. For other courts, there is a requirement to establish that there actually is a fiction, i.e., that the company that is the formal owner of a ship is a shell company run by the company that is accountable to

[127] According to Article 3(2) of the 1952 Convention relating to the Arrest of Sea-Going Ships, 'ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons'. This Convention was followed by the 1999 Convention—ratified by Spain—which includes Article 3(2), with a more restricted view than the 1952 version: 'Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose: (a) owner of the ship in respect of which the maritime claim arose; or (b) demise charterer, time charterer or voyage charterer of that ship. This provision does not apply to claims in respect of ownership or possession of a ship'.

creditors. There are examples of this modus operandi in the US,[128] France, Italy, and Spain. In other cases, evidence of fraud or abuse of law is required, meaning that proof of intention to defraud creditors must be provided for corporate veil to be lifted, as shown by judicial opinions from the Netherlands, France, Greece, Italy, the US,[129] the UK[130] and Spain[131].

The matter has also been raised before the CJEU.[132] However, the wording of the questions at stake did not refer to the issue as such, as the case focused on determining which law was applicable to an individual employment contract concluded between a Dutch engineer and a shipowner based in Luxembourg. The contract was expressly subject to Luxembourg law, but the issue in point was whether the applicable law was that of the premises where the employee had to go to get his instructions and to which he returned after each voyage in one of the vessels owned by the shipping company. The establishment in question belonged not to the company but to a different business based in Belgium. Against this background, the CJEU was asked whether the Belgian company might be deemed to own the Luxembourg company for the purposes of designating the law applicable to the employment contract in the absence of choice of law. The plaintiff alleged that he always had to be given his instructions at this establishment, whose director was also the director of the Luxembourg company even though the employerʹs authority had not been transferred to the other company, for which reason the Court made reference to the issue of lifting the corporate veil.[133] In its judgment, the CJEU emphasised that the seized court must ʹtake into consideration all the objective factors making it possible to establish that there exists a real

[128] See case law stemming from the Jones Act and other labour laws by which their scope of application is broadened to cover all situations with minimum contacts with the US despite the ship's flying a foreign flag; minimum contacts are established when activities are controlled by a company located in or operating from the US. See Goldie (1963), pp. 238–254, and District Court of Illinois, 18.4.1984, in the Amoco Cadiz case. DirMar (1985) 87:904.

[129] *Itel Containers International Corp. v. Atlantrafik Export Serv. Ltd.*, [1990] 909 F. 2d. 698-2.

[130] British courts extend registered ownership to the beneficial owner. Thus, the doctrine of piercing the corporate veil is resorted to when the registered company has been established with the sole purpose of avoiding the arrest of the ship. See The Maritime Trader [1981] 2 Lloyd's Rep. 153; Kensington International Limited v. Congo [2005] EWHC 2684.

[131] SSAP Barcelona, 11.2.2001 and 24.5.2002. DirMar (2004) 106:280 and 106:283. STSJ Andaluc´ıa, Sevilla, 16.1.2007, D. *Jose´ c. Expoferrer*, S.A., *Jose´ Marti Peix* S.A., *Pesqueras Marsierra*, S.A. (AS 2007\1376) with a generous approach, according to which groups of companies are equal to joint ownerships as regulated by Article 1(2) of the Workers 'Statute. STSJ Comunidad Valenciana, No. 138/2004, 23.1.2004 (AS 2004\1592), applies the doctrine laid down by the Spanish Supreme Court as regards piercing the veil for the fishing sector: (1) organization of work managed in a unitary fashion within the group of companies; (2) provision of labour services to several companies in the group, at the same time or consecutively; (3) establishment of shell companies with a view to avoiding labour duties; (4) confusion of manning, confusion of assets, external appearance of business unity and management unity. See other sentences quoted there, in particular STS, Sala de lo Social, 26.2.1998 (RJ 1998\1062). Galicia (Sala de lo Social), 1.7.1999 (RJ 1999/1975). TSJ Galicia, 1.7.1999 (*Santiago B.L. v. Pescanova S.A. y Argenova S.A., ship Sarvo*. RJ 1975/1999), does not pierce the veil because there is not enough evidence; for example, the only proof that an offer had been made in Spain was a plane ticket. See further Spanish case law on Palao Moreno (2000), passim, spec. pp. 66–92.

[132] CJ 15.12.2011, Case C-384/10, Jan Voogsgeerd v Navimer SA.

[133] In similar terms, some Spanish and Italian sentences gave due course to the lawsuit against the non-employer parent company that had a base in the forum, applying for joint liability with its subsidiary and formal employer in the employment contract at issue. See Casado Abarquero (2008), pp. 55–56; Palao Moreno (2002), p. 314.

situation different from that which appears from the terms of the contract′,[134] making specific reference to its Eurofood IFSC judgment, according to which the lifting of the corporate veil must proceed when the legal person is a shell company.[135] The CJEU would therefore seem to require a strict standard of proof when it comes to lifting the corporate veil. Nevertheless, this test is still to be developed at EU level, and the issue is presently in the hands of national courts.

Corporate Social Responsibility

The cross-border nature of businesses and the strengths and weaknesses stemming from their interaction with a number of regulatory and jurisdictional schemes are the driving force of a voluntary movement—encouraged by various national and international institutions—towards self-regulation, aimed at harmonising labour standards. Beyond hard law standards such as those contained in MLC, 2006, and WFC 2007, this movement promotes the development of soft law, i.e. codes of conduct for best practices in companies, affecting both internal and external matters.

In this respect, it is worth noting the ILO′s drafting of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, available to all companies interested in joining the movement. In the same vein, the United Nations has instituted the Global Compact to promote corporate social responsibility. Other non-governmental organisations have been working towards the same objective, including the International Organization for Standardization (ISO), which is developing the new ISO 26000 Standard on corporate social responsibility aided by the United Nations, with which it has signed a Memorandum of Understanding in order to meet, inter alia, the ILO standards. All in all, this movement put emphasis on ethics and fair play, which, for example, can be encouraged by banks and other financial institutions by making shipping and fishing businesses eligible for financing, among other reasons, on the grounds of management and treatment of personnel who work on board ships or simply by hiring only companies that show respect for labour standards on board.

The Organization for Economic Cooperation and Development (OECD) laid down the Guidelines for Multinational Enterprises, which addresses both individual and collective labour rights, among other matters. The Guidelines are unusual in that they appear as government recommendations aimed at multinational companies operating in or from their own territory. For this reason, they can be a powerful tool when it comes to interpreting the conduct of companies in a group; that is, the Guidelines should not be used exclusively to assess the activity of a business in the territory of the participating state, but also its mode of operation in foreign countries when operating from a participating state, including through subsidiaries.

This opens the door for considering the parent company accountable for its subsidiaries ′ actions. The Badger case, involving the Belgian subsidiary of a US parent company, is a good example of how to achieve the latter′s liability for the former′s operations by enforcing the principles stated in the OECD Guidelines: the Badger Company, Inc., with headquarters in Cambridge, US, ordered the closure of its subsidiary in Belgium, which had

[134] CJ 15.12.2011, Case C-384/10, Jan Voogsgeerd v Navimer SA, para. 62.

[135] CJ 2.5.2006, Case C-341/04, Eurofood IFSC, para 37.

been declared bankrupt and had left wages unpaid, through other subsidiaries also located in Europe. The employees brought a claim against the US parent company, considering it accountable for the wages before the Belgian courts. As a result of public pressure, the Belgian government petitioned the Guidelines Committee on International Investment and Multinational Enterprises for an interpretation of the OECD Guidelines to decide who they were actually aimed at, whether it was only group members in the territory of the participating state or the entire group as a whole, as all the companies were integrated into a single economic unit, regardless of where the company involved had been established.

Had this position been adopted, there would have been grounds for understanding that the parent company was liable for its subsidiary′s debts. Thanks to the agreement reached by employees and the parent company, the Committee did not need to give an opinion on the matter in the end, but it did issue a statement that did not preclude this liability, although the emphasis was on the unavoidable analysis of the circumstances involving the case, i.e., there must be proof that the parent company has influenced the subsidiary′s decisions on the subject matter. Later on, the Dutch court responsible for the Batco case ruled—on the grounds of the principles contained in the OECD Guidelines—on the British American Tobacco Company′s liability in its closure of a Dutch subsidiary with the aim of transferring its activity to Belgium, without proper consultations with the relevant government agencies and employees.

All in all, the case law is sparse but promising, firstly, for the purpose of forcing companies to sign a code of conduct—such as the one provided by the ILO or OECD—to respect and apply the code even when they make decisions that may affect other companies they control and, secondly, for the purpose of determining parent company liability for a subsidiary′s actions. With this in mind, the OECD has improved mechanisms for interpreting the guidelines by promoting alternative dispute resolution methods, although it highlighted the fact that codes of conduct remain soft law. Further initiatives focused on accountability and transparency, such as the Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.[136] The debate as to whether codes of conduct should be made enforceable thus remains open.

A growing number of companies, especially multinational corporations, are adopting codes of conduct that often incorporate international standards. For example, problems caused by transnational collective bargaining are now being dealt with via the adopting of a code of conduct that is usually imposed by company managers and sometimes negotiated with trade unions. In such cases, it is interesting to address the question as to whether a code of conduct adopted by a parent company located in a developed country with subsidiaries in emerging countries is binding or not; this would be useful for finding out whether claiming against the parent company for issues related to the management of subsidiary workers on the ground of culpa in vigilando would be feasible, i.e., holding the parent company accountable for failing to prevent conducts that might be detrimental to workers ′interests

[136] This Directive has been amended by Directive 2014/95/EU (OJ No. L 330, 15.11.2014).

or for failing to meet its commitments in terms of monitoring the subsidiary′s conduct as established in the respective code of conduct[137].

Apart from international agreements, this approach to codes of conduct offers a tenuous possibility of improving the working conditions applicable in a given country, even on the high seas. But it also involves major constraints—hence the use of the adjective ′tenuous'—as it depends on the respective court judgment as to the binding character of a code of conduct generally classified as soft law. In reaching such decisions, courts usually take into consideration the detail of the provisions contained in the code of conduct agreed by the company, the degree to which the code has been disseminated and therefore how much knowledge explicit and implicit addressees—such as workers—have about the code and the acceptance of what the code means to and for third parties. However, there is some reluctance towards adopting this approach, as it is likely to lead to conflicts with market freedoms, insofar as it could amount to a situation of abuse of a dominant position or to the imposition of trade barriers.

In any case, the possibility of incorporating codes of conduct into an international contract, in which case their binding character may well increase, is worth exploring. In the cases mentioned previously in which different businesses cooperate, employment relationships are established between seafarers and one of the companies involved, whereas the other companies are not parties to such a relationship. Hence, it is simply not possible to file a contractual claim against any company other than the one involved in the contract, unless piercing the corporate veil is feasible. However, party autonomy may pave the way to a contractual claim if and when the code of conduct adopted by the group of companies is deemed to be incorporated in the contract at hand and therefore generates obligations that can be subject to legal action by third parties.

For our purposes, it is useful to explore the question of whether a company can force its counterpart to meet specific labour standards. This is usually done by choosing a counterpart from among firms that truly meet these standards[138] or by forcing it to assume the company′s own code of conduct. The American company Wal-Mart serves as a good example here due to its involvement in a relevant case brought before the US jurisdiction.

The company had been sued on the ground that some of its suppliers in developing countries did not meet the standards set by its code of conduct, in particular the prohibition of forced labour and payment of minimum wages and overtime. In addition to ensuring that its suppliers enforced its code of conduct, Wal-Mart committed itself to monitoring its suppliers ′compliance with its standards. The plaintiffs therefore understood that an implicit contract had been established that was enforceable by third parties. However, the court failed to appreciate that the code of conduct gave rise to any obligations to third parties—workers in this particular case—as it simply set out company policy without providing sufficient detail to be deemed an offer that workers could accept, which would have

[137] In these terms, see Resolution of the *Institut de Droit International*, Lisbon Session 1995, on the obligations of multinational organisations and their member companies, principle 2, available at http://www.idi-iil.org/idiE/resolutionsE/1995_lis_04_en.PDF.

[138] This is common practice in the field of public procurement but not in the area of outsourcing. On the boundaries of this strategy, see Otero García-Castrillón (2008), pp. 349–351.

generated contractual obligations.[139] *Contrario sensu*, these obligations would arise if the company had adopted a code of conduct with an enforcement mechanism that could be invoked by third parties. It would then generate obligations vis-a-vis workers, which could be classified as contractual since they stemmed from the contract between the parent company and a supplier or partner, such as a shipping company. At any event and as commented above, this is a promising but still emerging way of making a parent company accountable for its subsidiaries ʹactions.

International Labour Law

Introduction

The globalisation process undergone by the merchant and fishing labour markets has led to the common understanding that the only factor that can balance the scales of global competition in its race to the bottom is international cooperation. However, the unstoppable growth of international trade has not been accompanied by comparable advances in terms of labour rights. In fact, these rights are carefully being excluded from World Trade Organization (WTO) authority, and their defence is being relegated to specific institutions, in particular the ILO, whose activities form the subject matter of the following pages.

It is also important to note that a number of routes have been explored with the aim of making multinational corporations comply with minimum labour standards; for example, the United Nations Conference on Trade and Development (UNCTAD) has suggested introducing a system of generalised tariff preferences for emerging states, granting them export advantages in exchange for participation in and implementation of international conventions, in particular those laying down minimum labour standards. The European Union also plays the role of ambassador for labour rights.[140] Nevertheless, difficulties in monitoring the proper implementation of minimum labour standards cast doubt on the effectiveness of these routes.

The ILO is a privileged forum when it comes to issuing rules on international labour law, and the fact that maritime employment deserves special attention has been clearly stated not only in numerous ILO Conventions on the matter but also in several Recommendations issued in cases where the consensus required for a convention was not achieved.[141] The ILO has a unique structure and includes a participatory mechanism in which each national

[139] Actually, it was brought before the Los Angeles Superior Court by the International Labour Rights Fund on behalf of workers from China, Bangladesh, Indonesia, Swaziland and Nicaragua on the ground of Wal-Mart's Standards for Suppliers Agreement. See Doe v. Wal-Mart Stores, Inc., No. CV 05-7307 GPS (C.D. Cal. 2005), cited by Kenny (2007), passim.

[140] See Council Regulation (EC) No. 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No. 552/97, (EC) No. 1933/2006 and Commission Regulations (EC) No. 1100/2006 and (EC) No. 964/2007 (OJ No. L 211, 6.8.2008).

[141] See Article 19(1) of the ILO Constitution. The original text of the ILO Constitution was approved in 1919 and amended in 1922, coming into force on 4 June 1934; it was also amended by the 1945 Instrument of Amendment, which entered into force on 26 September 1946; the 1946 Instrument of Amendment, which entered into force on 20 April 1948; the 1953 Instrument of Amendment, which entered into force on 20 May 1954; the 1962 Instrument of Amendment, entering into force on 22 May 1963; and the 1972 Instrument of Amendment, entering into force on 1 November 1974. Two more Instruments of Amendment were adopted in 1986 and 1997 but have not yet entered into force.

representation consists of four members, two representing the relevant government and two representing workers and employers from each member state respectively.[142]

A rough outline of the set of rights and obligations established by ILO Conventions with regard to maritime employment is provided in the coming pages; as our concern here is private international law and not international labour law, it is neither necessary nor desirable to go into detail. However, a brief run-through of the latter is essential since these conventions set up minimum standards and as such also need to be taken into account from the private international law standpoint. For example, the ILO′s efforts to force flag states to comply with their obligations to seafarers and fishermen are especially noteworthy as they amount to reinforcing flag state jurisdiction, regardless of the fact that other states may also be monitoring shipowners ′compliance with international labour standards.

Within its own set of conventions, which are characterised by a variable number of ratifications, the ILO draws a line highlighting the significance of those containing minimum standards deemed as essential, Convention No. 147 on Minimum Standards for Merchant Shipping (Minimum Standards) being a noteworthy example. In the same vein, it is worth mentioning the Declaration on Fundamental Principles and Rights at Work, adopted by the ILO in its 80th session in Geneva on 18 June 1998, by which the organisation sought to emphasise the core character of the freedom of association and the prohibition of forced and child labour and discrimination at work. All these principles need to be implemented by states regardless of the conventions they have signed.

This dividing line between the types of conventions raises many questions, as it involves advocating—to borrow ILO terminology—core labour standards in a context of growing international trade liberalisation,[143] therefore moving away from a more belligerent stance aimed at effectively establishing a more advanced social framework in which the ILO takes a proactive and vigilant role in the implementation of labour rights.

It is for this reason that MLC, 2006, was so welcome: it aimed to establish universally enforceable obligations, i.e., it is binding on all ships irrespective of the fact that they may be flying the flag of a non-member state—MLC, 2006, not only has to be implemented by vessels from the signatory countries but also covers all ships arriving at their ports, irrespective of their nationality. In fact, one of its main strengths is the increase in the number of officers involved in its proper compliance and, therefore, in the proper implementation of the labour rights it establishes. In our globalised world, enforcing rules on minimum working and living conditions is a complex task, and this has been the main cause for criticism of approaches such as that represented by the 1998 Declaration.

Although MLC, 2006, was the result of a consensus that had long been sought by trade unions, its success has been largely due to maritime employers ′contributions. Surprisingly, they were more interested than anyone else in drafting this document, as the Convention was seen as a way of achieving a system of fair competition in the shipping industry, one

[142] See Article 3(1) of ILO Constitution.

[143] This shortcoming is equally applicable to commercial treaties between developed and developing nations, where a clear stance with respect to labour rights and their compliance is lacking. See Gallie (2009), pp. 144–198. For a different opinion, see Payoyo (2009), p. 390, based on the clear stand against intermingling national trade policy and compliance with international labour standards taken by the WTO at its Singapore 1996 Session.

helping to level the playing field in the international arena. Thanks to the guarantees it included, this instrumentʹs implementation does not only depend on the number of states ratifying it but also depends on the tonnage they represent. This helps ensure that its application does not have detrimental effects on signatory nations and that its ratification does not actually lead to the very opposite of the outcome that the Convention intended to achieve, i.e., unfair competition from non-signatory states that may be benefitting from the fact that signatory nations have to apply stricter rules than non-signatory nations.

Most ILO Conventions and Recommendations do not apply to either artisanal or industrial fishing vessels, as agreed in a resolution adopted at the International Labour Conference of 10 November 1921. Building on the momentum generated by MLC, 2006, the ILO has drafted WFC 2007, whose scope goes beyond MLC, 2006, as it takes into consideration the deplorable working and living conditions on many fishing vessels,[144] a factor that makes the Conventionʹs implementation absolutely essential. We can only hope that it will come into force at the earliest possible date.

The ILOʹs intensive work is supported by both international and regional organisations such as the International Maritime Organization and the European Union respectively. In fact, the EU has issued numerous instruments and rules that are relevant to this study, despite the fact that its first steps were somewhat faltering, the result of insufficient legal competences with regard to employment matters, at least in the maritime transport sector; however, there is a common fishing policy. The Union is currently an active member of the ILO and participated in and influenced MLC, 2006, negotiations. In 2009, the EU issued the Third Maritime Safety Package,[145] designed to improve port state control over living and working conditions on board a ship. Council Decision 2007/431/EC and Council Decision 2010/321/UE,[146] by which the EU authorised and encouraged member states to ratify MLC, 2006, and WFC 2007 respectively, are of particular interest. The EU has also reached an agreement on MLC, 2006, with trade unions and business associations with the aim of

[144] Sometimes those conditions amount to crimes on board. See the report entitled ‘Sold to the Sea. Human Trafficking in Thailand’s Fishing Industry ’produced by the NGO Environmental Justice Foundation. The report begins with the following statement: ‘As a result of long hours, low and unpredictable pay, physically demanding work and long periods at sea, the Thai fishing industry is suffering an acute labour shortage, with a shortfall of labour for over 10,000 jobs in 2011. This labour shortage is fuelling human trafficking to supply cheap labour for work on Thai fishing boats’.

[145] The following instruments have been published in OJ No. L 131, 28.5.2009, all of them with EEA relevance: Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port state control; Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations; Directive 2009/17/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system; Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009 establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC of the European Parliament and of the Council; Directive 2009/20/EC of the European Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims; Directive 2009/21/EC of the European Parliament and of the Council of 23 April 2009 on compliance with flag state requirements; Regulation (EC) No 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations.

[146] Council Decision 2010/321/EU of 7 June 2010 authorising member states to ratify, in the interests of the European Union, the International Labour Organisation’s Work in Fishing Convention, 2007 (Convention No 188).

harmonising national legislation in accordance with the standards set out there,[147] and a similar agreement has been reached regarding WFC 2007.

In addition to ILO Conventions, it is worth mentioning that international human rights treaties also apply to seafarers and to fishermen and other employees working on board a ship, including on the high seas. To be more precise, this depends on each international treatyʹs scope of application. In this regard, there is already a clear pronouncement on the scope of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR). In the case of Bankovic and others v. Belgium and 16 other States,[148] the European Court of Human Rights (hereafter ECtHR) underlined the territorial nature of jurisdiction according to public international law and emphasised that exterritorial application is also admitted in some cases, as is the case with ships registered under or flying the flag of the state in question.[149] Accordingly, the ECHR is also applicable on board ships sailing under the flag of a state party to the Convention.

Matters are different when it comes to treaties with a restricted scope of application, as exemplified by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the General Assembly in Resolution 45/158 of 18 December of 1990. Article 2 of this Convention specifies that migrant workers are anyone engaged, whether currently or in the past, in a remunerated activity in a country of which they are not nationals; ergo according to this definition, the Convention would be equally applicable to seafarers or fishermen employed on board a vessel registered in a state of which they are not nationals. However, the Convention does not apply to ʹseafarers and workers on an offshore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employmentʹ.[150] This is a significant exclusion and was adopted in response to pay gaps between countries supplying crew members, given that nowadays workers ʹcountry of origin is taken into consideration when wages are paid.

Minimum Labour Standards in the Shipping Industry

Introduction

A quick glance at the ILO website reveals that there are over 60 conventions and some 40 recommendations on working conditions in the maritime transport sector. However, these have had different receptions and have had uneven numbers of ratifications, despite the fact that they all enabled an international labour code to be developed; indeed, this code was drafted as a way of avoiding unfair competition stemming from forum shopping. The outcome was MLC, 2006—adopted by the ILO at its 94th Maritime Session—which codifies most ILO Conventions on maritime employment matters and was described as ʹa

[147] Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners ʾAssociations (ECSA) and the European Transport Workers ʾFederation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC (OJ No. L 124, 20.5.2009), both influenced by ILO Convention No. 180, 22.10.1996, concerning Seafarers ʾHours of Work and the Manning of Ships. Addressing the contents of this Directive; see Munari and Schiano di Pepe (2012), pp. 50–53.

[148] ECtHR 12.12.2001, Reference No. 52207/99.

[149] ECtHR 12.12.2001, paras. 61, 63, 67.

[150] See Article 3(f) of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

single, coherent instrument embodying as far as possible all up-to-date standards of existing international maritime labour Conventions and Recommendations, as well as the fundamental principles to be found in other international labour Conventions ʹand ʹdesigned to secure the widest possible acceptability among governments, shipowners and seafarers committed to the principles of decent work, that it should be readily updateable and that it should lend itself to effective implementation and enforcementʹ.

MLC, 2006, was included in the 1999 ILO Decent Work Agenda and includes four main objectives: full employment, fundamental principles and rights at work, social protection and social dialogue. The deregulation process now prevailing in the international arena has also taken its toll on the ILO, which ought to measure its objectives in accordance with the general and bitter debate between those in favour of promoting employment creation and those who place the focus on improving social and working conditions, which, in turn, may halt the creation of new jobs.

MLC, 2006, was the result of a compromise that acknowledged both goals ʹrelevance, therefore giving fresh impetus to the debate, which now focuses on the true meaning of the term ʹdecent workʹ, adding a certain flexibility in the application of international labour standards. Paradoxically, the first step taken in this direction was to make the Conventionʹs binding force dependent on ratification by at least 30 ILO members with a total share of not less than 33 % of world gross tonnage of ships.[151] This minimum seeks to ensure that the Convention is complied with, as it imposes obligations that will only be effective when applied by a large number of states. The Convention came into force on 20 August 2013 after being ratified by 30 states representing 60 % of world gross tonnage.[152]

MLC, 2006 contains—amending where appropriate—37 maritime labour conventions,[153] and also includes provisions on welfare and social security protection for seafarers. It comprises three separate but intertwined parts and includes 16 Articles followed by a set of Regulations and a Code, both structured into five Titles dealing with the following issues: minimum requirements for seafarers to work on a ship (Title 1); conditions of employment (Title 2); accommodation, recreational facilities, food and catering (Title 3), and health protection, medical care, welfare and social security protection (Title 4).

Unfortunately, MLC, 2006 does not address workers ʹcollective rights; nevertheless, in accordance with ILO Convention No. 147, ILO Convention No. 87 (1948) on freedom of association and protection of the right to organise and ILO Convention No. 98 (1949) on the right to organise and to bargain collectively are both applicable in this field. Finally, Title 5 deals with compliance with and enforcement of Convention provisions and

[151] See Article VIII MLC, 2006.

[152] Antigua and Barbuda, Argentina, Australia, the Bahamas, Bangladesh, Barbados, Belgium, Belize, Benin, Bosnia–Herzegovina, Bulgaria, Canada, Congo, Cyprus, Croatia, Denmark, the Faroe Islands, Fiji, Finland, France, New Caledonia, Gabon, Germany, Ghana, Greece, Hungary, Iran, Ireland, Italy, Japan, Kenya, Kiribati, Korea, Latvia, Lebanon, Liberia, Lithuania, Luxembourg, Malaysia, Maldives, Malta, the Marshall Islands, Mauritius, Montenegro, Morocco, Nicaragua, Nigeria, Norway, the Netherlands, Palau, Panama, the Philippines, Poland, the UK, Bermuda, Cayman Islands, Gibraltar, the Isle of Man, Russia, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Samoa, Serbia, Seychelles, Singapore, Spain, the Republic of South Africa, Sweden, Switzerland, Togo, Tuvalu, Vietnam. Available at http://www.ilo.org/.

[153] These Conventions are enumerated in Article X MLC, 2006.

constituted in itself a highly important breakthrough, for which reason it will be dealt with in a specific section later. Given the significance of this Title, it has been treated as the third pillar of the consolidated Convention. The Code contains two types of rules; Part A regulations and standards are mandatory, whereas Part B guidelines are not, although states have agreed to pay them due attention.[154]

The Convention is self-executing, but if states are unable to apply the principles and rights as provided for in Part A they may resort to ʹany law, regulation, collective agreement or other implementing measure considered to be substantially equivalentʹ, in accordance with the definition of ʹequivalent ʹas laid down in Article VI(4). By means of this provision, the Convention aims to give material form to the compromise between promoting job creation and improving working conditions at sea: in this way, states are granted flexibility in applying the Convention in accordance with their particular circumstances and degree of development.

Flexibility in applying the Convention is also manifest in the general formulation of numerous provisions of Part A, leaving member states ample room for manoeuvre in its implementation. As stated in the Explanatory Note to the Regulations and Code of MLC, 2006, guidance on implementing the non-mandatory provisions in Part B is provided, but as they are non-binding, states may always resort to other types of measures.

Despite the flexibility that nations have in implementing MLC, 2006, the Convention stands out as an efficient instrument aimed at harmonising legislation. This can be seen right from the start in the definitions in Article II, which includes such terms as ʹseafarersʹ, ʹseafarers ʹemployment agreementʹ, ʹseafarer recruitment and placement serviceʹ, ʹship ʹand ʹshipownerʹ, continuing with a reference to its broad scope of action, which includes ʹall ships, whether publicly or privately owned, ordinarily engaged in commercial activitiesʹ.[155]

Unfortunately though, the Convention excludes many categories of ships, such as warships, naval auxiliaries and those sailing exclusively in inland waters or the equivalent, in addition to other categories that are difficult to label. These exclusions will drive states to initiate consultations to clear up their doubts, as the Convention does not give any clues as to the final answer. In order to reduce uncertainty, the ILO has set up a public database and is currently compiling information on complying with MLC, 2006, and national case law interpreting these gaps.

In general terms, the Conventionʹs proper implementation relies on national legislation, from which interpretative divergences will no doubt arise. Furthermore, these are encouraged inasmuch as some standards are of an open texture, and with this wording MLC, 2006, softened some obligations established in previous Conventions with a mandatory nature. The ILO webpage therefore provides guidelines on certain issues and regulatory models with a view to harmonising the transposing of mandatory and particularly non-mandatory standards in Part B of the MLC, 2006, Code into national law. These guidelines will be referred to in dealing with the Conventionʹs contents. The guidelines in fact form a handbook providing assistance on implementing MLC, 2006, the

[154] See Article VI(2) MLC, 2006.
[155] See Article II(4) of MLC, 2006.

most general ones being those that make model national provisions available for states, as a kind of model laws.
In addition to the flexible approach that states are granted in implementing the Convention, the Code′s specific amendment procedure should also be mentioned. This innovative procedure does not require the formalities usually applied to the amending of international conventions, offering in turn a speedy response to global challenges. It aims to give all stakeholders a voice: governments, workers ′representatives and employers. However, as they contain core rights and principles and basic member state obligations, the Articles and the Regulations can only be amended in accordance with the procedure laid down in Article 19 of the ILO Constitution.

Maritime Labour Convention, 2006: Contents

Minimum Requirements for Seafarers to Work on Board a Ship

Title 1 deals with the minimum requirements for seafarers to work on a ship. Among these are provisions on the minimum age of seafarers, set at 16 years when MLC, 2006, came into effect,[156] and higher for night work or work likely to jeopardise workers ′health or safety.[157] Although this is a separate requirement, it could also be included in the provisions to ensure that all seafarers are medically fit to perform their duties at sea,[158] which must be backed up by an appropriate medical certificate.[159]

Seafarers ′training and qualifications also take a prominent place in MLC, 2006,[160] which includes an express reference to member states ′obligations in accordance with ILO Convention No. 74 on the Certification of Able Seamen, 1946. To reinforce this Regulation, the European Union issued Directive 2008/106/EC of the European Parliament and of the Council, of November 19, 2008,[161] on the minimum level of training of seafarers (recast), which in turn draws on the IMO Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention).[162]

Seafarers ′training is key not only in maritime safety but also for protecting jobs, as expressed in the EU Commission Communication to the Council and the EU Parliament on the training and recruitment of seafarers,[163] where the lack of qualified seafarers is

[156] See Regulation 1(1) of MLC, 2006.
[157] See Standard A1(1) of MLC, 2006. The ILO had already addressed this topic in Convention No. 58 (Revised) on Minimum Age (Sea) and later in Conventions No. 138, Minimum Age, and No. 180 concerning Seafarers ’Hours of Work and the Manning of Ships, 1996.
[158] See Regulation 1(2) of the MLC, 2006.
[159] See Standard A1(2) of the MLC, 2006. In accordance with its significance, the ILO and the International Migration Organization issued Guidelines on the medical examinations of seafarers (2013). Previously, ILO Convention No. 73 concerning Medical Examination (Seafarers), 1946, and prior to that ILO Convention No. 16 concerning Medical Examination of Young Persons (Sea), 1921, and Recommendation No. 153 concerning the Protection of Young Seafarers, 1976.
[160] See Regulation 1(3) of the MLC, 2006.
[161] OJ No. L 323, 3.12.2008. Amended by Directive 2012/35/EU of the European Parliament and of the Council of 21 November 2012 (O.J. No. L 343, 14.12.2012).
[162] STCW-Convention of 7 July 1978, 1361 UNTS 2, amended in 1995 and 2010, published by IMO, London, 2011.
[163] Brussels, 6.4.2001 [COM(2001) 188 final]. This Communication begins by highlighting the deficit of qualified seafarers, in particular officers, with figures indicating that their numbers have not increased in recent years. Prior to this, see Commission Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions ‘Towards a new maritime strategy’,

highlighted. This is mainly due to the liberalisation of ship registration and the subsequent hiring of cheap labour in third countries and to sociological factors that are now discouraging young people from starting a career in merchant and fishing fleets. The social isolation resulting from long periods at sea combined with the influence of the current practice of short stays in port, as well as the fact that the multicultural composition of crews may hinder efficient communication on board, are also relevant factors.[164]

The Directive introduces an EU procedure and common criteria for the recognition of certificates issued from third countries, thus ensuring crew qualifications, with the aim of restoring the honourable status it deserves to the maritime profession. Within the EU, Directive 2005/45/EC of the European Parliament and the Council of 7 September 2005 on the mutual recognition of certificates issued by member states to seafarers[165] contributes to the free movement of people and services between member states and therefore increases employment opportunities for seafarers resident in Europe and for manpower available to shipowners operating from member states.

Special consideration is given to conditions for access to employment, i.e. how to manage the recruitment and placement of seafarers,[166] an area for which the corresponding services must be regulated and controlled by the respective states in accordance with Standard A1(4) of MLC, 2006. The fundamental aim of these provisions is to prevent abuses, such as charging seafarers undue fees or blacklisting them if they exercise their rights, in particular by joining a trade union or seeking advice on their working conditions.[167]

On the positive side, seafarer recruitment and placement services have to make sure that seafarers meet the minimum requirements, have the right papers and, in particular, receive a copy of the employment contract and are informed of their rights and duties. A further aim is to prevent seafarers from being abandoned in foreign ports by checking shipowners ′ financial means and obliging them to take out an insurance policy or an equivalent measure to ensure that seafarers receive compensation in the event of owner default.[168]

<u>Employment Conditions</u>

Title 2 of MLC, 2006, deals with employment conditions and begins with seafarers ′ employment agreements: ′the terms and conditions for employment of a seafarer shall be set out or referred to in a clear written legally enforceable agreement′, entitling seafarers to examine the document and seek advice where necessary. The same Regulation 2(1) lays

Brussels, 13.3.1996 [COM(1996) 81 final], approved by Council Resolution of 24 March 1997 on a new strategy to increase the competitiveness of Community shipping (OJ Nr. C 109, 8.4.1997, p. 1).

164 The same concerns were later made explicit in the Green Paper ‘Towards a future Maritime Policy for the Union: a European vision for the oceans and seas’, Brussels, 7.6.2006 [COM(2006) 275 final], para. 2.5. In a previous report issued in October 2005 entitled Commission Staff Working Paper on measures adopted by the Commission in the field of maritime employment [SEC(2005) 1400/2], the EC Commission had presented several proposals aimed at increasing the number of jobs and improving the quality of employment in the maritime sector. The Green Paper also stressed the significance of qualifications, and the STCW-F Convention—in the fishing sector—was criticised for not receiving sufficient ratifications (para. 2.5).

165 JO No. L 255, 30.9.2005. This Directive amends Directive 2001/25/EC.

166 See Regulation 1(4) of MLC, 2006.

167 Prohibited by ILO Convention No. 9 for Establishing Facilities for Finding Employment for Seamen, 1920, recruitment and placement services were finally admitted by ILO Convention No. 179 and Recommendation No. 186, concerning Recruitment and Placement of Seafarers.

168 See Standard A1(5)(c) of MLC, 2006.

down that applicable collective bargaining agreements are deemed to be incorporated within seafarers ′employment agreements. Section 4 of Standard A2(1) gives a non-exhaustive list of questions to be included in an employment agreement,[169] such as wages or, where applicable, the formula used to calculate them; the conditions for terminating the agreement; and repatriation rights. Indeed, both wages and the right to repatriation merit a specific set of Regulations, namely No. 2(2) and 2(5) respectively, but the Convention neither lays down a minimum wage—mentioned in Guideline B2(2)(3)[170]—nor includes the principle of ′equal work for equal pay′.

The provisions were drafted with the aim of preventing serious abuses such as failure to provide a copy of the contract or simply indicating that the contract is in the hands of the employer, with the result that the—often clearly unfair— contractual terms are interpreted entirely in line with employers ′interests. To these ends, governments,[171] trade unions and shipowners ′associations[172] have drawn up standard contract forms.

Regulation 2(5) stipulates that member states are required to demand financial security from their flag vessels to ensure seafarers ′repatriation. Despite this provision, MLC, 2006 does not go deeper into the issue of the abandonment of seafarers, as it does not require financial guarantees to cover any expenses that may occur during the period of abandonment, or compensation due to seafarers. For this reason, and given the extent of the problem, the ILO and IMO agreed to continue their negotiations to find a solution, and the outcome was an amendment to MLC, 2006, pursuing the inclusion of the mandatory requirement that all shipowners have financial security, either in the form of an insurance policy or as an instrument included within the social security system, covering not only repatriation but also other costs in addition to unpaid wages.[173] The Special Tripartite

[169] In accordance with its precedent, ILO Convention No. 22, concerning Seamen’s Articles of Agreement, 1926.

[170] On turning social dialogue in wage matters into a key issue, see Chaumette (2007), pp. 135– 136. As a matter of fact, an ILO Joint Maritime Commission Subcommittee issued a resolution fixing a minimum monthly basic pay or wage figure for able seafarers in February 2014.

[171] See POEA Contract on Standard Terms and Conditions governing the employment of Filipino Seafarers on Board Ocean Going Vessels (drafted in 2000 and available at http://www.poea.gov. ph/docs/sec.pdf), UK Maritime and Coastguard Agency Crew Agreement Form ALC/BSF 1(d), UK Maritime and Coastguard Agency Crew Agreement Form ALC (NFD) 1(d) (both drafted in 2004 and available at http://www.dft.gov.uk/mca/).

[172] See ITF Standard Collective Agreement, ITF Uniform TCC CBA 2008–2009, ITF Offshore Standard Agreement, IBF Framework TCC Agreement (available on the ITF webpage).

[173] Proposal for the text of an amendment to the Maritime Labour Convention, 2006 Standard— Provision of financial security in cases of abandonment of seafarers, drafting Article XV to be included within MLC, 2006. Both working documents and the final proposal can be found in Librando (2010), pp. 695–705. See also Fotinopoulou Basurko (2009), pp. 115–153; Nifontov (2014), pp. 117–136. These texts have led to the construction of a database to report all cases of seafarers ’abandonment. It can be consulted online at http://www.ilo.org/dyn/seafarers/ seafarersbrowse.home?p_lang1⁄4es. Previous to the ILO’s undertakings, the IMO had issued Guidelines A.930(22), 20.11.2001, on Provision of Financial Security in Cases of Abandonment of Seafarers (A 22/Res.930, 17.12.2001). Seafarer abandonment may be classified as a profes- sional risk, as it is in Spain. In this vein, Carril Va ́zquez (2009), pp. 217–229, suggests that repatriation and other costs should be included within the coverage provided by the social security system and therefore payable through shipowners ’contributions (pp. 224–229).

Committee has approved the amendment on April 11, 2014, and it is expected it entering into force in 2017.[174]

It must be emphasised that in the event of shipowners not fulfilling their obligation to repatriate seafarers, the flag states will take on the responsibility; should this not be possible, the obligation shifts either to the state from whose territory the seafarers need repatriating or the state of which the seafarers are nationals. Both may be reimbursed by the flag state.[175]

Working hours are dealt with in Regulation 2(3), which seeks to establish a regular standard of working hours for seafarers, as well as maximum working hours and minimum rest hours. Leave entitlement is addressed in Regulation 2(4), and reference is made to Regulation 2(7), which deals with manning levels and aims to ensure that seafarers work on board ships that have sufficient personnel for the vesselʹs safe, efficient and secure operation.

Manning levels are of course key for the respecting of work and rest periods,[176] and in fact, because of their importance for maritime safety, they are also the subject matter of the International Convention for the Safeguarding of Human Life at Sea, 1960 and 1974,[177] whereas work and rest hours are regulated in the STCW Convention.[178] However, shore leave—i.e., seafarers having the opportu- nity to take time off when their ship is in port, deemed a welfare matter—is not addressed in these instruments. This is a serious omission if we take into consideration the fact that many states only allow seafarers to enter their territory if they have a visa, in addition to the fact that technology, inspections and other

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174 Amendments to the Code implementing Regulations 2(5) and 4(2) and appendices of the Maritime Labour Convention, 2006 (MLC, 2006), adopted by the Special Tripartite Committee on 11 April 2014. It is remarkable that the UK has already established insurance companies'—in particular, P&Is—obligation of registering the employers they insure, thereby making it feasible for seafarers to easily identify the relevant insurance company. See further Hjalmarsson (2014), pp. 96–97.

175 See Standard A2(5)(5) of MLC, 2006. All these issues are ruled by Convention No. 166 and Recommendation No. 174, 1987, concerning Repatriation of Seafarers. In Spain, this is addressed in Article 9 of Royal Decree 869/2007, of 2 July, *por el que se regula la concesion de prestaciones asistenciales en atencion a las situaciones especiales derivadas del trabajo en la mar para trabajadores y beneficiarios del Re ́gimen Especial de la Seguridad Social de los Trabajadores del Mar y se establecen determinados servicios a los trabajadores del mar* (BOE No. 188, 14.7.2007), where abandonment is classified as a professional risk, measures are undertaken to repatriate and assist specific individuals as well as the state's subrogation on paid expenses (Article 10). Complementing this system, see Order TAS/29/2008, 15 January (BOE No. 17, 19.1.2008. Corrigendum BOE No. 42, 18.2.2008). See *Carril Va ́zquez* (2009), pp. 217– 229.

176 See ILO Convention No. 180 concerning Seafarers 'Hours of Work and the Manning of Ships and Recommendation No. 18 and Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners ' Association (ECSA) and the Federation of Transport Workers 'Unions in the European Union (FST)—Annex: European Agreement on the organisation of working time of seafarers (OJ Nr. L 167, 2.7.1999).

177 Further, SOLAS, Chapter V, Regulation 13.

178 STCW Convention, Regulation VIII/1 of the Annex of the Convention. The International Safety Management Code providing an international standard for the safe management and operation of ships and pollution prevention adopted by IMO Resolution A.741/18 in 1993, which was incorporated in Chapter IX of SOLAS, also concerns these issues. The human factor is the cause of most maritime accidents, which is why it is necessary to regulate hours of work and rest. Nevertheless, any regulation that does not take into account the specific circumstances in which work is done on board runs the risk of placing all liability on seafarers, in particular when the beneficial shipowner or the ship operator are lacking. For further information on this view- point, see Charbonneau (2009b), pp. 211–216.

tasks on board limit shore visits to just a few hours, during which seafarers are in fact working.

Regulation 2(6) deals with compensation for seafarers in the event of the ship being lost or wrecked. Finally, Regulation 2(8) is devoted to promoting career and skill development and job opportunities for seafarers.[179]

Accommodation, Recreational Facilities, Food and Catering

Title 3 focuses on seafarers ′welfare on board ships. It begins with the obligation to ensure that seafarers have decent accommodation and recreational facilities on board,[180] bearing in mind the relevance of these factors for the promotion of seafarers ′health and well-being. All ships built after the Convention came into force on August 20, 2013, have to meet the specific technical requirements detailed in Standard A3(1), which are to be specified by member states in laws or regulations; ships built before that date are not required to meet these technical requirements but must comply with the provisions of ILO Conventions No. 92 concerning Accommodation of Crews (1949) and No. 133 (1979), which contains supplementary provisions.

Food and catering are dealt with in Regulation 3(2), which makes specific reference to crew members coming from different cultural and religious backgrounds, highlighting the importance of cooks having the right training and qualifications for the task.[181]

Social Protection and Health Care

Finally—and leaving the provisions on compliance and enforcement of MLC, 2006, for the next section—Title 4 covers healthcare, welfare and social security protection. Regulation 4(1) states the obligation to protect seafarers ′health and the need to guarantee prompt access to medical care on board ships and ashore.[182] Health and safety protection measures and accident prevention are also given attention in Regulation 4(3) in order to ensure that seafarers ′working environment on board ship promotes occupational safety and health.[183]

The process of codification undertaken in MLC, 2006, brought with it the flexibilisation of some obligations, such as that in ILO Convention No 164 concerning the protection of health and medical care (seafarers), 1987, and establishing the obligation to provide free medical care, now made flexible by the addition of ′in principle′.

Regulation 4(2) goes beyond the issues of prevention and emergency care and aims to ensure that seafarers are protected from the financial consequences of sickness, injury or

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[179] The terms are broad, and obligations are directed at member states. Worth noting here are ILO Convention No. 145 and Recommendation No. 154, 1974, concerning Continuity of Employment (Seafarers), aiming for regular employment and complemented by the ideas of career opportunities and retraining schemes, as mentioned by Recommendation No. 139 concerning Employment of Seafarers (Technical Developments), 1970.

[180] See Regulation 3(1) of MLC, 2006.

[181] See ILO Convention No. 68 concerning Food and Catering (Ships ’Crews), 1946. In acknowl- edgement of the significance of these issues, the ILO issued Guidelines on the training of ships ’cooks (MESC/2013/9), available at its website.

[182] See ILO Convention No. 164, concerning Health Protection and Medical Care for Seafarers, 1987.

[183] See ILO Convention No. 134 and Recommendation No. 142, concerning Prevention of Accidents (Seafarers), 1970. MLC, 2006, suggests taking into consideration good practices such as those in the 1996 ILO Document (with several revisions) entitled ‘Accident prevention on board ship at sea and in port’, without detriment to other international standards established by other international organisations such as IMO (Standard A4.3) being taken into account.

death that occurs in connection with their employment by making shipowners have sufficient financial guarantees.[184] Nevertheless, these financial guarantees are in principle not mandatory as a result of the lack of any international agreement on the matter.[185] The gap created by their absence is filled by private insurance, and many policies were signed following the implementation of an ITF standard collective agreement,[186] but they display many enforcement problems. For this reason, the ILO continued working on the issue after the issuance of MLC, 2006, and the first amendment it is to be issued in 2017, i.e., the establishing of a standard making it mandatory for shipowners to agree to sufficient financial guarantees to pay compensation arising out of harm suffered by seafarers as a result of their working activity on board. This amendment joins that concerning Regulation 2(5) dealing with seafarers ′repatriation,[187] both hopefully to be put in motion in 2017. In any event, this should not prevent states from providing seafarers with access to social security protection systems.[188]

Finally, and to promote well-being, Regulation 4(4) is concerned with ensuring seafarers ′ access to shore-based facilities and services to guarantee their health and well-being, indicating the need for states to provide these facilities if they are not already available.

Labour Standards in the Fishing Sector

Introduction

Most ILO Conventions do not cover the fishing sector. This does not mean that the ILO has not dealt with them but rather that its activity in this area has been much more limited. The first relevant text is Recommendation No. 7, 1920, which set a limit on working hours in the fishing industry, and some conventions concerning the shipping industry extended their scope of application to the fishing industry, specifically ILO Convention No. 55 concerning Shipowners ′Liability in cases of illness or injury to seafarers and ILO Convention No. 56 concerning Sickness Insurance for Seamen, both issued in 1936, as well as ILO Conventions No. 70 concerning Social Security and No. 71 concerning Seafarers ′Pensions issued in 1946.

More specifically, ILO Convention No. 112, 1959, set out the minimum age for employment on board fishing vessels. In the same year, ILO Convention No. 113 imposed the requirement for a medical certificate to work on board fishing vessels, and ILO Convention No. 114, which was heavily influenced by the ILO 1926 Convention concerning seafarers, dealt with fishermen′s articles of agreement. ILO Recommendation

[184] See ILO Convention No. 55 concerning Shipowners ’Liability (Sick and Injured Seamen), 1936.
[185] See IMO Resolution A931(22), 29.11.2001.
[186] Worthy of note are Articles 23 and 25 of the International Bargaining Forum (IBF), 13.11.2003. Further, see Fotinopoulou Basurko (2012), pp. 33–53.
[187] Amendments to the Code implementing Regulations 2(5) and 4(2) and appendices of the Maritime Labour Convention, 2006 (MLC, 2006), adopted by the Special Tripartite Committee on 11 April 2014, where the relevant regulation is 4(2).
[188] See Regulation 4(5) of the MLC, 2006, and ILO (2012). Previously, see ILO Convention No. 70 concerning social security (seafarers), 1946; ILO Convention No. 71 concerning Seafarers ’Pensions, 1946, ultimately not codified by MLC, 2006; ILO Recommendation No. 75, concerning Seafarers ’Social Security (Agreements), 1946; ILO Convention No. 165 concerning Social Security (Seafarers), 1987, incorporating ILO Convention No. 102, concerning Social Security (Minimum Standards), 1952 into this sector.

No. 126, 1966, covered fishermen's vocational train- ing in the same year that ILO Convention No. 125 dealt with the qualifications required to perform the duties of master, second officer and mechanic on fishing vessels. This ILO Convention is similar to the IMO Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW-F Convention).[189] However, the latter is more detailed and includes mandatory provisions on safety training for all fishermen. The issue of accommodation was tackled in ILO Convention No. 126 of 1966, also heavily influenced by ILO Convention No. 92 concerning Accommodation of Crews in the shipping industry.

Worthy of mention in the European Union are Council Directives 92/29/EEC of 31 March 1992 on minimum safety and health requirements for improved medical treatment on board vessels, 93/103/EC of 23 November 1993 concerning minimum safety and health requirements for work on board fishing vessels[190] and Directive 2003/88/EC of the European Parliament and the Council of 4 November 2003 concerning certain aspects of the organisation of working hours. However, fishing vessels working offshore are excluded from the provisions dealing with daily rest, breaks, weekly rest, maximum weekly working time and the length of night work periods. In 2013, the Commission formulated a Proposal for a decision to sign the STCW-F Convention,[191] thereby filling the gaps mentioned above.

C188 ILO Convention on Work in Fishing, 2007

The positive mood of consensus stemming from MLC, 2006, led the ILO to negotiate Convention No. 188 concerning Work in Fishing within the ILO programme devoted to promoting decent work. As the Preamble states, 'the objective of this Convention is to ensure that fishers have decent conditions of work on board fishing vessels with regard to minimum requirements for work on board; conditions of service; accommodation and food; occupational safety and health protection; medical care and social security'. WFC 2007 does not have the same structure as MLC, 2006, and takes the form of a regular convention. However, in addition to revising previous ILO Conventions, the document addresses relevant issues that had so far been either insufficiently dealt with or totally ignored by the ILO, such as shore leave, repatriation of fishermen and inspections on board.

Although structured like a regular Convention, WFC 2007 was strongly influenced by MLC, 2006, including flexibility in the application of its provisions, i.e., it depends on member states 'individual circumstances.[192] The Convention contains the following parts: Definitions and Scope (I); General Principles (II); Minimum Requirements for Work on Board Fishing Vessels (III); Conditions of Service (IV); Accommodation and Food (V);

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[189] This Convention entered into force on 29 September 2012, after the required 15 ratifications were reached on 29 September 2011, with ratification by the Republic of Palau. Spain had already ratified it.

[190] Thirteenth individual Directive in accordance with Article 16 (1) of Directive 89/391/EEC E (OJ No. L 307, 13.12.1993), the latter having been amended by Regulation (EC) No. 1882/2003 of the European Parliament and of the Council of 29 September 2003 (O.J. No. L 284, 31.12.2003); by Directive 2007/30/EC of the European Parliament and of the Council of 20 June 2007 (O.J. No. L 165, 27.6.2007); and by Regulation (EC) No. 1137/2008 of the European Parliament and of the Council of 22 October 2008 (O.J. L 311, 21.11.2008).

[191] Proposal of Council Directive authorising member states to sign and/or ratify, in the interest of the European Union, the International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel, 1995, of the International Maritime Organisation (Text with EEA relevance) (COM/2013/595 final).

[192] See Article 4 of MLC, 2006.

Medical Care, Health Protection and Social Security (VI); Compliance and Enforcement (VII); Amendment Issues (VIII); and Final Provisions (IX), closing with several annexes covering detailed provisions on certain issues connected with Part A of the Code contained in MLC, 2006, for example, terms to be included within fishermen′s employment agreements or building fishing vessels to ensure decent accommodation for fishermen. WFC 2007 provisions broadly reflect those of the compulsory part of MLC, 2006, and seek to establish exactly the same international minimum standards in the fishing sector. Recommendation No. 199 concerning Work in Fishing was issued in parallel with WFC 2007.

Compliance and Enforcement of International Labour Law

Flag State Liability

International Grounds for Flag State Liability

As can be seen from the preceding section, numerous international instruments and core conventions cover essential issues of life and work on board vessels, as well as other matters concerning safety on board. Regardless of the numerous ratifications of the conventions and the extent to which they have been implemented, it is important to highlight the fact that they all rest on the same principle embodied in Articles 91 and 94 of UNCLOS: living and working conditions on board ships are allocated to the jurisdiction of the flag state. Nevertheless, as already mentioned, this allocation system does not always run smoothly, given that many flag states do not fulfil their duties to ensure compliance with labour standards. Such negligence is not just a matter of lack of political will or policies designed to attract funding but is sometimes due to a lack of the financial resources and trained staff needed for states to supervise their own merchant and fishing fleets.[193]

Flag states ′lack of control over compliance with technical standards often jeopardises maritime safety. This triggered a backlash, which also affected working and living conditions on board: shipping casualties and environmental damage led to a number of instruments being introduced that seek to improve safety standards in the design, construction, equipping and manning of vessels (CDEM standards). In the same vein, improving labour standards on board is essential to prevent accidents at sea. This led the ILO to draft the international conventions mentioned above with the aim of fixing minimum labour standards, the most significant and representative of which are MLC, 2006, and WFC 2007. However, these measures are not enough to guarantee compliance. In

[193] As reported by the International Commission for Shipping in 2001 in a study entitled ‘Ships, Slaves and Competition’, paras. 2.24–2.26: ‘There were constant demands for nations registering ships to be held more accountable in performing of their responsibilities. A major concern was the inability of a significant number of registers to provide adequate legal and administrative infra- structures to meet their obligations in international law, particularly the United Nations Convention on the Law of the Sea 1982. A growing number of port and coastal States and other interest groups are seeking measures to oblige the ‘rogue flag states ’to accept and implement relevant legislation and administrative controls over the quality of shipping. A general consensus is that there are sufficient regulations to do the job, the problem is their lack of implementation. Major reasons stated for failure to implement the necessary measures were the lack of competent personnel and financial resources, and a lack of political will in many cases. There was a widespread view throughout the Commission’s inquiries that the IMO’s work on flag state implementation has been largely ineffective. Concerns were also expressed concerning the validity of the Convention on Standards of Training, Certification and Watchkeeping 1978 and Revision 1998 (STCW) White List, as well as the effectiveness of the International Safety Management Code (ISM)’. This report is available at http://www.itfglobal.org/seafarers/icons-site/images/ ICONS-fullreport.pdf.

accordance with international law, in particular with Article 94 of UNCLOS, the flag state is responsible for ensuring that ships flying its flag comply with international standards on maritime safety and marine environment protection. An essential part of their obligation is to ensure that all vessels flying their flag are regularly examined by a qualified inspector to ensure these standards are met.

Implementation: Certificates Issued by the Flag State and Inspections

To confirm that the flag state indeed ensures that ships comply with international maritime security standards, they are required to carry a certificate issued by the state, which other states have a duty to accept without further investigation. These certificates provide shipowners with the guarantee that they are not risking being detained by other states for further inspection. This system also involves certain risks, however, in that in principle other states have to accept the certificates even if the flag state lacks an infrastructure capable of carrying out the inspections required for the certificates to be issued or monitoring whether inspections carried out by private companies on the flag state′s behalf are performed adequately,[194] for which reason the certificates ′very usefulness is being challenged.

In fact, the certification system works because of the threat that ships seen as a real danger to shipping may be detained by another state. If a ship is detained, the owner incurs significant losses as the vessel cannot meet its commitments, and so shipowners have a natural interest in avoiding such delays. The blue certificates issued by the International Transport Workers ′Federation (ITF) and given to shipowners after the concluding of collective agreements for their ships or fleet operate on the same basis, guaranteeing that the vessel in question complies with international labour standards; ITF unions around the world thus refrain from boycotting and taking other industrial actions against these ships at their ports of arrival[195].

In this sense, the MLC, 2006, compliance and enforcement mechanism relies on flag states issuing new certificates. As laid down in Regulation 5(1)(1)(2), ′Each Member shall establish an effective system for the inspection and certification of maritime labour conditions′. This results in the issuing of a maritime labour certificate, complemented by a declaration of maritime labour compliance, both constituting ′prima facie evidence that the ship has been duly inspected by the Member whose flag it flies and that the requirements of this Convention relating to working and living conditions of the seafarers have been met to the extent so certified′.[196] The ILO is aware that the success of MLC, 2006, rests on the

[194] There are no international regulations indicating what kind of checks a flag state may undertake before registering a ship. The IMO is aware of this loophole and has issued guidelines for governments to ensure the adequacy of the transfer of class-related matters between recognised organisations (MSC/MEPC 2005, 5/Circ.2) and for the transfer of ships between states (MSC/Circ.1140, MECP/Circ.424). All in all, these are voluntary procedures that are badly in need of international regulation. For a proposal on this point, see Mansell (2009), p. 32.

[195] See Smith (2004), pp. 265–276. Implementation of MLC, 2006, may change ITF modus operandi and, in particular, the effectiveness of blue certificates. On warnings of a potential weakening in trade union action, see Charbonneau (2009b), pp. 168–172.

[196] See Regulation 5(1)(1)(4) of MLC, 2006.

uniform and harmonised implementation of flag state responsibilities, for which it prepared the Guidelines for flag state inspections under the Maritime Labour Convention, 2006.

Annexes to MLC, 2006, contain examples of both the maritime labour certificate and the declaration of maritime labour compliance, aiming thus to ensure uniformity in the list of items that have to be subject to flag state control and recognition of these documents by other states. Regulation 5(1)(3), complemented by Standard A5(1)(3), deals with both documents at some length, specifying that they are only mandatory for vessels with a gross tonnage of 500 tonnes or more, engaged in international voyages or flying the flag of a member state and operating from a port, or between ports, in another country; beyond these cases, compliance with MLC, 2006, standards is dependent on the will of the shipowner, who may at any point submit the ship to inspection and apply the corresponding standards.

Maritime labour certificates guarantee that the working and living conditions on board are in accordance with the requirements laid down by national legislation or with other provisions and measures for the implementation of MLC, 2006. The declaration of maritime labour compliance, in turn, specifies the national provisions in force for the implementing of MLC, 2006, and describes the measures adopted by shipowners to ensure compliance with these provisions on board ships. They are valid for a maximum period of 5 years, during which the vessel should have undergone at least one intermediate inspection. The Convention also provides for the possibility of issuing an interim maritime labour certificate with a 6-month validity from the date of issue, which will be at the time of delivery for new vessels, when there is a flag change for old vessels, or when shipowners accept responsibility for operating a ship that is new to them.

MLC, 2006, requires member states to create a body of inspectors responsible for checking that ships flying their flag do indeed provide decent working and living conditions on board, as laid down by the Convention.[197] Inspections can be carried out ex officio and also when a well-founded complaint has been lodged. To this end, Regulation 5(1)(5) and Standard A5(1)(5) set out an on-board complaint procedure expressly warning against the victimising of seafarers for filing complaints.

When a complaint is lodged, the inspection mechanism is activated but legal proceedings are not, meaning that the Convention does not deal with international jurisdiction issues. Title 5(4) of MLC, 2006, warns that ′the provisions of this Title shall be implemented bearing in mind that seafarers and shipowners, like all other persons, are equal before the law and are entitled to the equal protection of the law and shall not be subject to discrimination in their access to courts, tribunals or other dispute resolution mechanisms. The provisions of this Title do not determine legal jurisdiction or a legal venue′.

The WFC 2007 compliance and enforcement system is not as sophisticated as that of MLC, 2006. Article 40 merely states that ′each Member shall effectively exercise its jurisdiction and control over vessels that fly its flag by establishing a system for ensuring compliance with the requirements of this Convention including, as appropriate, inspections, reporting, monitoring, complaints procedures, appropriate penalties and corrective measures, in accordance with national laws or regulations′. It follows from this and the subsequent

[197] See Regulation 5(1)(4) and Standard A5(1)(4) of the MLC, 2006.

provisions that fishing vessels should also be examined by inspectors and should carry a certificate confirming that they have passed the inspection.

In fact, WFC 2007 does echo the obligation to provide inspectors in charge of monitoring compliance with the Convention′s provisions on board fishing vessels,[198] also insisting that, should there be complaints or evidence of the ship not meeting minimum standards, flag state inspectors must carry out investigations and take appropriate measures to rectify any shortcomings found where necessary.[199] Despite being less thorough than MLC, 2006, there are obvious parallels between the two Conventions, so that it is to be hoped that when WFC 2007 comes into force, good use will be made of the steps already taken to implement MLC, 2006, and the same body of inspectors involved in applying the latter will be put in charge of implementing the former.

Port State Responsibilities

Origins and Articulation

Unfortunately, not all flag states fulfil their duties on compliance and enforcement of international labour standards. In this context, international labour law turned to coastal and port states to further monitor compliance with international standards. This major step forward is contained in ILO Convention No. 147 concerning Minimum Standards on Merchant Ships, 1976. Article 4 of this Convention stipulates that any member state ′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 this Convention, after it has come into force, 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′. This ILO Convention has undoubtedly contributed to the development of port state control, but actual intervention is mainly dependent on a complaint being lodged. MLC, 2006, aims to improve control in this area.[200]

Following the ground broken by ILO Convention No. 147 and the sinking of the Amoco Cadiz on 16 March 1978, a Memorandum of Understanding (MOU) was signed in Paris on 22 January 1982,[201] with the aim of coordinating international maritime inspections carried out by port and coastal states. The Memorandum seeks to harmonise inspection practices and stipulates that at least 25 % of the ships that enter any port must be subject to inspection. Moreover, inspections cannot be discriminatory, which means that the MOU targets both vessels flying the flag of states that are party to international conventions—

[198] See Article 42 of WFC 2007.

[199] See Article 43 of WFC 2007.

[200] Common law countries approach this issue differently, since they assume jurisdiction over foreign ships, only restricted by comity. See Symeonides (2006), pp. 491–519. On the other hand, French tradition denies jurisdiction over internal ship matters. On the grounds for this jurisdiction, see Celle (2007), pp. 712–749.

[201] The Paris MOU entered into force on 1 July 1982. It has served as a model for other MOUs such as the 1992 Vi~na del Mar MOU, coordinating Latin American countries and the Barbados MOU, 1996, operating in the Caribbean region. The Tokyo MOU was introduced in Asia in 1993, and on July 1997 the Malta MOU came into force for operations in the Mediterranean Sea. The Indian Ocean MOU dates from 7 June 1998 and the Black Sea MOU from 7 April 2000, and the latest of these initiatives is the June 2004 Persian Gulf MOU. An African MOU involving 16 States from West and Central Africa was concluded in 1999. On related implementation issues, see, among others, Zinsou (2009), pp. 353–377.

which are monitored by each inspection—and ships flying the flags of non-member states.[202]

Much of this MOU′s success is due to EU involvement, whose purpose is to strike a balance for the benefit of all the stakeholders: ′... living and working conditions should rest primarily with the flag state; (. . .) however, there is a serious failure on the part of an increasing number of flag states to implement and enforce international standards; (...) henceforth the monitoring of compliance with the international standards for safety, pollution prevention and shipboard living and working conditions has also to be ensured by the port State′.[203]

These administrative cooperation agreements have helped speed up the ratification of international instruments relating to maritime safety and environmental protection. In the context of these inspections, coastal and port states may monitor working and living conditions on board, but only when and if a complaint has been lodged. With the ratification of the STCW Convention, port state control was extended to cover crew training and qualifications. Other international instruments aimed to broaden the range of issues covered by port state inspections to include working and living conditions on board, one example being Directive 1999/95/EC of the European Parliament and of the Council of 13 December 1999 concerning the enforcement of provisions in respect of seafarers ′hours of work on board ships calling at Community ports.[204]

Port State Control in MLC, 2006, and WFC 2007

MLC, 2006, also deals with the question of the port states ′responsibilities—which are crucial to international cooperation as their intervention is essential in ensuring the implementation and enforcement of international labour standards on foreign ships.[205] Given its key role, the ILO issued a set of Guidelines for port state control officers carrying out inspections under the Maritime Labour Convention 2006. Following EU adherence to the goals of MLC, 2006, Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port state control was also issued.[206]

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[202] The Paris MOU is also open to signatures from non-European states and was signed by Canada in 1994. Part of its success is due to its incorporation within the EEA by Council Directive 95/21/ EC, 19.6.1995 (OJ No. L 157, 7.7.1995).

[203] See Council Directive 95/21/EC of 19 June 1995 concerning the enforcement of international standards for ship safety, pollution prevention and shipboard living and working conditions (port state control) in respect of shipping using Community ports and sailing in the waters under the jurisdiction of member states (OJ No. L 157, 7.7.1995. Corrigendum in OJ No. L 291, 14.11.1996, OJ No. L 133, 7.5.1998, OJ No. L 184, 27.6.1998, OJ No. L 331, 23.12.1999). See also Noussia (2009), pp. 644–669.

[204] OJ No. L 14, 20.1.2000. Due consideration must be given to Council Directive 94/57/EC of 22 November 1994 on common rules and standards for ship inspection and survey organisation and for the relevant activities of maritime administrations (OJ No. L 319, 12.12.1994) and to Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods (OJ No. L 247, 5.10.1993).

[205] See Regulation 5(2) of MLC 2006

[206] This Directive was amended by Directive 2013/38/EU of the European Parliament and of the Council, 12.8.2013 (OJ No. L 218, 14.8.2013). Transposition in Spain was carried out by Royal Decree 1737/2010, 23.12.2010, approving the Regulation on foreign ships ’inspections in Spanish ports (BOE Nr. 317, 30.12.2010), which granted the authority to carry out inspections to the General Directorate of the Maritime Merchant. This body relies in turn on the Spanish Capitan ́ıas Mar ́ıtimas.

Ships arriving at port must therefore meet the working and living conditions required by MLC, 2006, regardless of the fact that they may be flying a non-member state′s flag. Should they be flying a member state flag, port state inspectors ′duties would be limited to checking that the ship was carrying the appropriate maritime labour certificate and declaration of maritime labour compliance.

However, there must be a full inspection if there are irregularities in the documents or clear grounds for believing that working and living conditions on board do not conform to the MLC, 2006, requirements; if there is reason to believe that the flag has been changed to avoid these requirements; or if a complaint has been filed.[207] Nonetheless, as with complaints lodged before the flag state jurisdiction, filing these complaints does not mean that the state in question has international grounds for jurisdiction to prescribe, as the Convention does not deal with these issues. In all these cases, port state control operations may end up with a ship being detained[208] should the conditions on board represent a clear threat to seafarers ′safety, health or security, or when the failure to comply with Convention requirements represents a serious or repeated breach, including of seafarers ′rights.[209]

Article 43 of WFC 2007 establishes port state control over fishing vessels as well. Specifically, this provision requires port states to investigate working and living conditions on board fishing vessels if there is a complaint or evidence that the vessel does not meet the minimum requirements set out in the Convention and report any such cases to the flag state immediately. Measures will be introduced to rectify shortcomings affecting health and safety on board when necessary. This provision also stipulates that complaints may be filed by all stakeholders, with particular reference to fishermen and their associations and unions. When carrying out inspections, port states cannot distinguish between vessels flying Convention member states ′flags and other vessels.[210]

Developments in port state control measures have had a positive impact on improving the condition of ships registered under flags of convenience. On the negative side, it has been observed that ships that cannot meet international standards have moved to what might be called ′emerging ′flags of convenience as a way to avoid ports where inspections are carried out regularly.

Obligations Related to Seafarers ′Welfare

Finally, since this section deals with states ′port management responsibilities, it is important to recall that port states are also subject to other obligations, in particular providing shelter for seafarers so that they can enjoy recreational facilities when in port. Unfortunately, port security controls and docking tolls have increasingly led ship operators to reduce time in port, which has negative effects on seafarers ′health and safety.

[207] See Regulation A5(2)(1)(1) of the MLC, 2006. On the procedure following a complaint in France, see Marin and Charbonneau (2007b), pp. 173–208, who criticise problems in gaining access to justice due to the fact that the Convention does not provide for international jurisdiction, which they held to be developed on the basis of ECHR (pp. 199–205). Likewise, Charbonneau (2010), pp. 273–275; Ntovas (2014), pp. 151–180 and 179–180.

[208] See Standard A5(2)(1)(7) of MLC, 2006.

[209] See Standard A5(2)(1)(6) of MLC, 2006.

[210] See Article 44 of WFC 2007.

Following the tragic events of 11 September 2001, port security was reinforced by requiring seafarers to carry a new identity card and to undertake new security measures in accordance with the International Ship and Port Facility Security Code (ISPS Code).[211] In this context, ILO Convention No. 185 concerning Seafarers ′Identity Documents (Revised), 2003, aimed to strike a balance between the new security requirements and respect for human rights rules, refugee rights and inter- national humanitarian law, which includes seafarers ′welfare.

It should be pointed out that in the event of an international journey for reasons of transit, transfer or repatriation, no visa is required, nor is one needed for temporary shore leave, although the immigration authorities must be informed before a ship arrives at port.[212] These are the terms of the Spanish Immigration Regulation in force, although it is less generous over port access, which is only granted if seafarers hold a uniform visa or a visa with limited territorial validity that may be requested at external borders[213].

Responsibilities of Labour-Supplying States

The use of seafarer recruitment and placement services is currently a common practice among shipowners, and MLC, 2006, also contains provisions relating to this. The provisions have been introduced not only because of the high financial impact of using these services regularly but also because serious abuses have been detected, among which are (1) charging seafarers and fishermen illegal fees for finding them jobs, (2) cutting their salaries with the excuse that there have been further administrative and social security costs associated with their contracts, (3) forcing seafarers to sign two contracts, (4) sending them to non-existent jobs or promising false working conditions, (5) abandoning them, and (6) prohibiting them from joining trade unions under the threat of dismissal and inclusion on a ′black list′, which would effectively exclude them from the labour market. One way to avoid and detect such abuses is state certification of agencies or even limiting permits to operate with seafarers and fishermen exclusively to state agencies in the country.

With the aim of putting an end to these abuses, MLC, 2006, makes labour-supplying states accountable for recruitment and placement services operating there. In particular, these countries must implement provisions ′regarding the recruitment and placement of seafarers as well as the social security protection of seafarers that are its nationals or are resident or are otherwise domiciled in its territory, to the extent that such responsibility is provided for in this Convention′, without jeopardising the principle of flag state responsibility for the

[211] Complemented within the EU by Regulation (EC) No 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security (Text with EEA relevance) (OJ No. L 129, 29.4.2004). On problems arising out of these measures for seafarers ’well-being, see Christodoulou-Varotsi (2007), pp. 141–156. On its implementation in Spain, see Article 7(2)(e) of the Royal Decree No. 557/2011, 20.4.2011, por el que se aprueba el Reglamento de la Ley Organica 4/2000, sobre derechos y libertades de los extranjeros en Espan~a y su integracion social, tras su reforma por Ley Organica 2/2009, and comments by Fotinopoulou Basurko (2007), pp. 157–171.

[212] See Article 6 of ILO Convention No. 185 concerning Seafarers ’Identity Documents (Revised), 2003.

[213] See Articles 1(3) and 31(2) of Royal Decree 557/2011 respectively. In fact, the Convention does not ban visa requirements, but member states that are unable to meet the requirements it provides for may issue essentially equivalent measures. With these terms, the Convention adopts a flexible approach in its implementation, which is also to be found later on in MLC, 2006. Note that a Recommendation concerning Decent Working Conditions was also adopted in parallel with ILO Convention No. 185.

working and living conditions of seafarers on ships that fly their flag[214]. Labour-supplying countries must also set up a system of inspection and monitoring as well as legal proceedings for cases where a breach of licensing and other operational requirements has been committed, as set out by the Convention.[215]

Likewise, WFC 2007 requires member states to include agencies they manage within public recruitment and placement services and to subject private agencies to a licensing procedure. In this regard, ILO Convention No. 181 on Private Employment Agencies, 1997, remains the main instrument regarding agencies, as WFC 2007 refers to it.[216] The Convention expressly orders member states to prohibit unfair practices such as blacklisting fishermen or charging them for employment- related services. In any event, it holds the fishing vessel′s owner responsible vis-a-vis fishermen should a manning agency fail to meet its obligations.

[214] See Regulation 5(3)(1) of MLC, 2006.
[215] See Standard A5(3) of MLC, 2006.
[216] See Article 22(4) of WFC 2007.

MODULE-VI

IMPACT OF COVID-19 ON MARITIME SECTOR

IMPACT OF COVID-19 ON MARITIME SECTOR

As the pandemic has changed the way of communication, while diplomatic activities have stagnated, more intense public discussion and societal interaction between governments will become the concentrated embodiment of international political confrontation during the pandemic. The maintenance of regime legitimacy and the enhancement of dominance in international politics centered on the pandemic response, which is to provide the reasoning and effects of policy and behavior during the crisis, will become the main battlefield of international discourse power, soft-power rivalry, and even comparison of the political system in future.

In the present chapter we will be discussing the impact on covid-19 on the impact of covid-19 and sea trade and maritime transport and its impact on international relations and global order. We will also be discussing the legal impact of covid-19 on maritime sector, global and domestic impact. We will also discuss the changing face of maritime law and risk – cyber, e-commerce, automation of vessels.

I. Impact of covid-19 on international maritime trade, global order and international relations:

Firstly, the COVID-19 outbreak has hit the world economy hard triggering a global economic recession. Traditional controls like limiting the mobility of economic activity, compression of the consumer market, and cutting off the supply chain of economic services have succeeded in buying time for anti-pandemic measures, but generally have a detrimental impact on economic growth.

Extraordinarily the G20 Leaders' Summit Statement on COVID-19 stated that the G20 is injecting over $5 trillion into the global economy to counteract the social, economic, and financial impacts of the pandemic. But with advanced economies such as Europe, the U.S., and Japan entering an era of negative interest rates, their ultra-loose monetary policies in response to the downturn could lead to competitive devaluations.

Regarding fiscal policy, the global financial crisis in 2008 and the European debt crisis in 2010 erupted one after another, leaving the government debt level of developed countries mostly high. The stimulus fiscal measures taken in coping with the pandemic could further induce the government debt crisis.

In the post-pandemic world, globalization will not reverse, but the pace and paradigm will be adjusted. The scale of global trade and investment will shrink. WTO has predicted that global trade will decline by 13-32% this year, but it will ultimately be subject to the rationality of the market economy and the profit-driven nature of capital.

The pandemic has stimulated populism and racism, undermining the balance of governments' capacity to govern and participate in the international system. In some countries, not only their own governments' ability to cope with the pandemic is being seriously questioned by the public, but also their faith in the political leadership on the international stage has been severely weakened.

States that can deal with the crisis more effectively will have the advantage of voice. But some will also try to diminish the advantage of others by sloughing off their responsibilities and politicizing the pandemic through shifting narrative directions and improving narrative techniques.

The basic dividing line in effective responses to this crisis is not between Eastern autocracy and Western democracy. The key determinant of performance is not regime type but state capability, and especially the public trust in their government. The understanding of the pandemic should go beyond the narrow concept of "East-West" and "autocracy-democracy" in traditional international politics.

The reset of globalization and global governance, the acceleration of great power competition and multi-polarization, and the return of realism in the scope of influence held by great powers will become the keynote of international relations in the coming period.

Despite the world confronting the compound challenges posed by the pandemic, some countries, at the behest of lobbyists and industrial leaders, seem to be preparing for a new round of big power games, or even a new cold war. However, the trauma and lessons experienced as a result of this crisis offer us some important lessons for effectively responding as an international community to the next pandemic, or the even more urgent crises of Climate change and ecosystem and food system collapse. As such, reforming the global governance system should be the primary goal and highest priority for international actors to pursue.

Maritime transport sector and international trade:

Maritime transport underpins global supply chain linkages and economic interdependency with shipping and ports estimated to handle over 80 per cent of global merchandise trade by volume and more than 70 per cent by value. As a result, when disruptive factors such as pandemics occur, the sector works as a transmission channel that sends shockwaves across supply chains and regions. Disrupted transport networks and supply chains can significantly undermine world trade and economic activity.

With developing countries playing a large role in global maritime transport and trade, and with vulnerable economies such as small island developing states (SIDS) depending heavily on maritime transport for their livelihood and access to the global market place, safeguarding the integrity of the maritime transport chain is a sustainable development imperative. SIDS are already burdened by disproportionately high transport costs and low shipping connectivity making their trade uncompetitive and costly.

Maritime transport helps in trade and business between countries, thus building up international relationship. But the pandemic has adversely impacted maritime transport, which also has negatively impacted international relations.

Covid-19 and Maritime Transport: how it impacted international relations

The Coronavirus disease (COVID-19) triggered a global health and economic crisis with wide-ranging implications for maritime transport and trade. Restrictions introduced in response to the pandemic have caused disruptions affecting ports, shipping and supply chains. Various industries faced challenges along their supply chain such as raw material shortages, lead time issues, ocean blank sailings, port closures, reduced working hours at ports, equipment and labor shortages, as well as truck/transport capacity constraints. These obstacles undermine the smooth movement of trade flows and supply chain operations and can significantly erode the transport services trade liberalization and trade facilitation gains achieved over the years.

While the longer-term impact of the COVID-19 outbreak is yet to be fully understood, all indicators are pointing to significant immediate challenges for the sector. These differ depending on the maritime transport segment (e.g. container, bulk, reefer, tanker) and whether the transport operation is domestic or international. They also vary by region, level of development, and the state of prior preparedness to shocks and disruptions. Countries with a high share of forward and backward global value chain participation are more vulnerable to supply chain disruptions. Countries having relatively higher shares of backward value chain participation are likely to be the most vulnerable. Meanwhile any disproportionately negative impact on vulnerable economies such as SIDS and landlocked developing countries (LLDCs) and the least developed countries (LDCs) where logistical and developmental challenges are already significant, can be detrimental for their sustainable development aspirations.

Impact of Covid-19 on various aspects of maritime Transport

To cope with the disruption and continue to link supply chains and enable smooth cargo flows, key stakeholders in the maritime supply chain of which ports and shipping are key players, have adopted a range of response and risk mitigation measures. Responses varied and covered different aspects and included

a. operational adjustments;
b. financial/economic adjustments;
c. sanitary protocols and processes; and
d. adjustments to working practices and organizational aspects. Responses to the crisis and the 'back to work practices' varied in scope and type and the capacity for active and prompt interventions has proved to be crucial. Some responses by ports entailed a substantial reorganization of operations. These include
    - the prioritization of essential services;
    - the reorganization of operations and workindue to sanitary protocols; and
    - the advancement of digitalization and communication strategies.

Existing contingency plans have facilitated quick responses to the crisis in shipping and ports Stakeholders that lacked such plans, had to take ad hoc responses or develop plans in a short period of time during the crisis. Digitalization of interactions and information sharing have been critical to the continuity of maritime transport operations during the pandemic. Digitalization has emerged as a key component of transport and supply chain resilience building efforts.

Working and operational adjustment measures that helped the sector adapt have been transformational for the maritime supply chain stakeholders. Digitalization of processes and the use of technology by much of the workforce have triggered the need to revisit operations and upgrade knowledge and skills. Adjustments of working practices were used to limit personnel shortages Ports were able to diffuse several risks when they allowed for telecommuting, implemented sanitary protocols including social distancing, rearranged working shifts, limited meetings and travelling, took advantage of relevant social policies, and made greater use of technology.

Similar adjustments were adopted by shipping lines. Most ports managed to avoid significant disruptions of cargo handling operations. This was facilitated by the reduced number of ship port calls and the reduced maritime trade flows. For ports, the financial implications of the crisis are manifold and more pronounced in the case of fully privatized ports. These include

- the difficulties of ports themselves to continue their financing,
- the limited financial capacities of several port providers that are constrained by lockdowns and suppressed demand, and
- the challenges imposed on ports users.

The capacity of ports to adopt urgent and compensatory measures, by for example, taking advantage of cash flows for early payment of providers, or delay of payments by some of their users, have contributed to mitigate the negative effects of the crisis.

The revision of capacity management plans and changes in shipping schedules have been a key feature of the adjustment measures introduced by shipping lines in the face of lower demand The consolidation that marked the industry in the recent past has seemingly worked in favor of the carriers on this occasion. Container freight rates have not collapsed. They remained relatively strong as carriers closely managed capacity. Challenges to 'crew changes' highlighted the need for orchestrating an integrated approach by all. Crew changes have been one of the major issues faced by the maritime supply chain. This is largely due to difficulties related to third parties (i.e. airports, and public policies imposing restrictions to travelling, etc.).

Developing guidelines to ensure a safe interface between ship and shore-based personnel has been critical, not least due to the nature of the crisis. This has taken place both at local and at international level and with support from relevant industry associations and international organizations.

II. Legal impact of Covid-19 on Maritime sector: an overview

COVID-19 is particularly and adversely affecting shipping, in a similar way to events in many other industries. We examine what key legal issues need to be addressed by the shipping industry, the legislation approved on this subject in recent weeks, and whether ***force majeure*** and the ***rebus sic stantibus*** doctrine could potentially operate. Carriage of goods by sea is considered an essential activity in the laws of Spain and of most of our neighboring countries, to ensure that transport services themselves operate adequately and to procure necessary supplies of goods and products, especially essential products (health and pharmaceutical supplies, protective equipment, food, energy, and others).

Consequently, cargo transport services have not been legally restricted or temporarily halted, as has happened with non-essential activities. Despite this, it is evident that COVID-19 is creating a terrible worldwide crisis that is inevitably affecting shipping. Obviously, if fewer goods are produced and sold as a result of the economic crisis, they are more difficult to finance, and as a result, fewer goods are being and will be carried, which affects freight generally under law of supply and demand. And all of this is taking place in an international context in which COVID-19 is hugely hindering the normal operations of shipping and other related activities (other modes of transport such as air or land carriage, multi-modal transport, short-sea shipping, logistics, port operations, customs, cargo loading and unloading, passenger boarding and alighting, sales of the goods that are to be carried, payment methods, among others).

Passenger sea carriage (cruises and ferries mainly) has been affected by various legal prohibitions and restrictions on their normal operations, including, for example, the reduction imposed on minimum calls for modes of transport subject to public service obligations, or the requirement not to fill every passenger slot (fewer passengers allowed) on passenger ships to comply with existing social distancing rules for avoiding contagion among passengers and crew. Moreover, for various other reasons, operating cruise lines have almost disappeared in Spain and in a few of our neighboring countries, and the number of passengers on shipping services (ferries, above all) is falling sharply being confined, in practice, to essential travel mainly (health, work, studies, family, among others).

The other reasons mentioned above include:

i. Closures of some ports (quarantine, etc.) and shipping terminals (for cruises and passengers) or restrictions on their normal operations;
ii. Border closures, notably the Morocco border due to being particularly sensitive for Spanish maritime shipping (Annual Strait of Gibraltar Passage Operations, etc.).
iii. Restrictions by certain immigration authorities in relation to allowing the entry of the citizens of a few specific countries; and
iv. Suspension or restriction of a large part of the services habitually used (planes, hotels, etc.) for the connections by passengers and crews, especially for cruises.

All these factors are meaning that in relation to a few specific types of contracts (various types of charterparties, carriage under bills of lading, COAs, consignments, cargo handling, bunkering, provisioning, manning, shipbuilding, and, especially, insurance policies for all types of transport, etc.), some of the main players in the shipping industry (shipping companies, terminal operators, consignment agents, providers of bunkering services, forwarding agents, and others) are seeking to rely, as a possible legal remedy, on the existence of force majeure and on the so-called rebus sic stantibus doctrine, a creature of case law. In fact, when faced with the described circumstances, in a few specific cases parties are seeking to rely on the existence of:

- Force majeure to try to be excused from performing contractual obligations as a result of supervening impossible performance caused by an unforeseeable and unavoidable event; and
- The so-called ***rebus sic stantibus*** case law doctrine to try to change contractual obligations because a completely extraordinary, unforeseeable and supervening alteration of circumstances has occurred since the contract was concluded.

This is having the effect that in some cases the various types of contracts signed by shipping industry players are being studied to try to clarify what has been defined, in each case, as force majeure, how frustration of the contract's purpose has been stipulated, for which risks each contracting party is liable or the potential types of compensation for breach, damages or delay covenanted between the contracting parties.

Moreover, where contracts have early termination clauses that may be applicable, they are similarly being analyzed to assess whether and in what cases parties can rely on them, whether they include any events other than those stipulated and the required procedure in each specific case. Similarly, in some scenarios the implications of events triggering impossibility or difficulty to perform contractual obligations are being assessed and studied.

In relation to all of these cases, a proper distinction needs to be made between force majeure and the ***rebus sic stantibus*** case law theory generally, and in particular, their potential scope, operation and effects for the shipping industry.

Force majeure generally:

One of the key issues in relation to the contracts is a supervening impossibility to perform the parties' obligations due to the existence of an event of force majeure. The first thing needing to be examined is whether the contract contemplates that event. Even if it is not provided for in the contract, the Civil Code (article 1105) refers to this event by stating "outside the cases expressly mentioned in the law, and those in which the obligation so states, nobody shall be liable for events that could not have been foreseen or that, if foreseen, were inevitable".

It will be necessary in every case to analyze the circumstances of each contract, identify the specific obligation or obligations that the party is seeking to be excused from performing due to force majeure, and assess whether force majeure exists in relation to the performance of that specific obligation. Force majeure due to Covid-19 cannot be discussed in abstract terms, instead it has to be viewed in connection with a specific contractual obligation. Moreover, force majeure cannot be attributable to the person owing the obligation and a causal link is required between the force majeure event that is sought to be relied on and the impossibility of performing the obligation.

Note that, even in a force majeure scenario, there is a duty to mitigate the damage because force majeure only operates after the company has used all the means at its disposal (in addition to alternative ones) for performing the stipulated obligations. The typical effect of force majeure is to relieve the party unable to perform its obligation of liability for compensation for the damage/loss caused to the other party. The parties may, however, stipulate the effects of force majeure in the contract in which case the terms of the contract apply, although the person seeking to be excused from performing an obligation due to force majeure cannot be in default with respect to the performance of that obligation.

Similarly, and for the purposes of analyzing the meaning of force majeure and its scope, it is essential to determine the law applicable to each contract, because the legal definition of force majeure and its legal implications may vary depending on the applicable law in each case.

In fact, unlike other Roman law countries (including Spain), where force majeure operates even if it is not mentioned in the applicable contracts because the concept is envisaged in general law (article 1105 of the Civil Code in Spain's case), in the United Kingdom and countries governed by common law, force majeure only operates if contracts specifically refer to it, although, in some cases, general references may be relied on (lockdowns, pandemics, epidemics, etc.), and Covid-19 does not have to be expressly mentioned. The effects of force majeure as an event outside the parties' control are determined on a case by case basis in common law countries. They may be temporary effects, including suspension (the obligation is suspended until the force majeure event ends), or extension (time periods for performing the obligation are extended while the force majeure event lasts), or lastly, termination of the contract is held frustrated. In any event, as we have already discussed, the parties concerned also have the obligation to mitigate the damage in common law countries.

Note that in shipping a broad range of contracts (charters, salvage, towing, insurance, consignment and others) expressly refer to English law and these contracts are largely standard forms which, with a few exceptions, are usually accepted as they are by the various shipping players. Moreover, almost every contract mentioned above has very detailed clauses on force majeure, its effects and other matters.

***Rebus sic stantibus* generally:**

Unlike in Germany, Italy and other countries, this concept is not defined in Spanish statutes and is a creature of case law. The rebus sic stantibus doctrine allows changes to contractual obligations if supervening circumstances affecting the basis of the business transaction in a contract upset the balance of the contract and for one of the parties performance becomes impossible, extremely costly or requires too much effort. The requirements are:

- The existence of a completely extraordinary alteration of circumstances when the contract is to be performed with respect to when the contract was concluded;
- Extremely disproportionate obligations for the contracting parties which upsets the balance between those obligations; and
- This must have occurred due to the appearance of supervening circumstances that are radically unexpected at the time the contract was concluded.

The typical effect of a court upholding the ***rebus sic stantibus*** case law doctrine is a fair rebalancing of the obligations established in the contract concerned, and if this is not possible, termination of the contract. Notwithstanding the aforesaid the parties may reach different agreements in this respect , as they have to negotiate in good faith.

The courts have until now applied this clause very cautiously and restrictively in Spain, although there have been varying trends. The specific characteristics of each case must also be looked at in this COVID-19 scenario to determine whether it is applicable, and if so with what scope.

Ad hoc and extraordinary legal provisions on the impact of COVID-19 on certain shipping and port matters

In view of the situation created by COVID-19, various legal provisions are being approved in Spain which are applicable during the state of emergency. Notably:

- The occupancy fee may be reduced by up to 60% for passenger station and terminal concessions, based on the sharp drop in passenger traffic. For all other concessions, it may be reduced by up to 20%, on a reasoned basis.
- Ship owners and shipping companies that have been hit hard by the COVID-19 crisis, with ships that have been forced to dock or anchor in a port as a result of an order by the competent authority may be exempted from the duty to pay that fee.
- Various reductions apply for ships with extended stays that have been rendered inactive (as in the case of cruise ships), as well as for ships that provide services, which are also affected, and those providing short-sea services. In the particular case of ships that provide regular passenger or roll-on/roll-off cargo services, they may qualify for reductions of 50% provided that they guarantee the continuity of their services.
- These exemptions and reductions in relation to port fees, defined in Royal Decree-Law 15/2020 adopting urgent additional measures to support the economy and employment, apply at public-interest ports *(puertos de interés general).* For other

ports, the provisions adopted by the autonomous communities with powers over these matters will apply.

- There is a 70% reduction in passenger shipping services falling within the central government's powers regardless of whether they are subject to a public contract or public service obligations, which implies, in principle, that they would only have to comply with 30% of the minimum calls. This applies to shipping services between mainland Spain, Ceuta and Melilla, the Balearic Islands and the Canary Islands. For routes between islands falling within the powers of the Canary Island and Balearic Island governments, the provisions established by the respective autonomous community governments apply (for information on this subject, see Royal Decree 463/2020 declaring the state of emergency and its amendments).
- Extension of the periods of validity of the following instruments where they end during the state of emergency (for information on this subject, see Order TMA/258/2020 delivering provisions on administrative instruments and inspection activities of the shipping authorities):
    - Certificates, professional cards and certificates or proficiency or competence under the STCW Convention and Spanish legislation.
    - Certificates and documents required by the international instruments drawn up by the IMO, the ILO and the EU for the provision of ships' services.
- Suspension (with a few exceptions) of the conduct of scheduled inspections and recognition procedures on ships (see Order TMA/258/2020).
- Extension of the validity period of clearances covering a fixed time period for vessels (see Order TMA/258/2020).
- Express recognition of the right to free movement of ships' crew members so that they can be relieved and repatriated in view of the impossibility or difficulty of changing ships' crews for various reasons (port, border and hotel closures, travel restrictions, suspension of flights, etc.). This is how it appears in Order TMA 374/2020, although it had previously been defined for carriers in Royal Decree 463/2020 and Order TMA 277/2020.

In view of the ad hoc rules described above, it is questionable legally whether the parties concerned (ship owners, shipping companies, terminal operators, among others) are allowed to go further by bringing civil action to seek to rely on force majeure and ***rebus sic stantibus*** in Spain, because this issue is unresolved legally.

Lastly, it needs to be mentioned, generally, that other national and international rules already exist, which, for example, allow the shipping company/carrier, in some cases, to be relieved of liability for not delivering the goods or delivering fully or partially damaged cargo or delivering cargo with a delay on the ground of force majeure, which could potentially apply to COVID-19 (see letters (d), (g) and (h) of article 4.2 of the Hague-Visby Rules, and Maritime Shipping Law 14/2014 which expressly refers to those rules).

Potential force majeure and rebus sic stantibus scenarios in shipping:

In principle, parties can rely on force majeure and the rebus sic stantibus case law doctrine in a few specific cases. Among others, depending on the particular circumstances of each case (contracts -the terms expressly stipulated in charter parties are very important-, applicable law, among others), and without limiting any agreements that the parties may reach on the matter, the general scenarios potentially arising in this respect could be:

- Deviation of vessels or places of refuge for them at ports/berths that were not originally scheduled due to being unable anchor/operate at the planned ports/births because they are no longer considered safe.
- Unloading and leaving carried goods at ports or terminals that were not originally scheduled for the reasons mentioned in the preceding paragraph.
- Off-hire.
- Demurrage and delays.
- Breach of the minimum safe manning levels to ensure safe operation due to the inability to relieve any crew member falling ill with COVID-19 (which could also result in the ship's crew having to isolate), together with other potential infringements of maritime safety rules, although the mandatory provisions in public law will also apply.
- Prolonging seafarers' enrolment periods beyond the initially scheduled length (subject to the ILO's Maritime Labour Convention -MLC-, 2006, basically, applicable collective labor agreement and employment agreement) due to being prevented from changing ships' crews for various reasons (port, border, or hotel closures, travel restrictions, suspension of flights, etc.). Any prolongation of enrolment periods will also involve the special compensation (economic and others) to which seafarers are entitled in each particular case (ship owner company, law and applicable collective labor agreement, etc.).
- Delays in carriage of goods by sea caused by an earlier delay in the handing over or delivery of the cargo that the ships are going to carry, as a result of various reasons (stock shortages in production, supply of spare parts, logistics, among others). Suspended, stalled or delayed shipbuilding operations and off-shore projects in progress.
- Revision of the terms and conditions (amounts/prices mainly) in various shipping agreements such as:
  - Hires and charters arranged in the various contracts for hiring, chartering, carriage under bills of lading, COAs, among others;
  - Insurance premiums (hull/machinery and cargo) and the membership fees/contributions payable to P&I Clubs;
  - Bunkering of ships' various fuels; and
  - Cargo handling (loading, unloading, stowage, demurrage, horizontal movements, etc.).

III. COVID-19: contractual legal challenges for shipping industry

Fast spread of COVID-19 worldwide and the actions taken by regulatory bodies have created challenges for the shipping industry in particular given its international character.
Much information is available, but it is fragmented. This chapter set outs several issues of importance and gives basic information to help parties handle the situation at hand in the best possible manner.

Force majeure as general legal principle

The COVID-19 outbreak in Norway and under Norwegian law must be described and recognised as a force majeure situation. The basic requirement under Norwegian law is that a force majeure situation must be something which the party invoking force majeure was not and could not have been aware of when the contract was entered into, and the party must take all reasonable measures to overcome the situation or effects (the hindrance) caused thereby. This is also stated in Article 79 of the United Nations Convention on Contracts for the International Sale of Goods.

However, a force majeure situation in itself is not a valid excuse for not performing obligations under a contract. A force majeure situation must cause hindrance or prevent a party from performing the obligations undertaken. The party invoking force majeure has the burden of proof both that there is a force majeure incident and that this has caused the hindrance or prevented the fulfillment of the party's obligations.

Under English law (common law), as opposed to Norwegian law, force majeure is not a legally accepted concept, and must be particularly agreed in the contract. Whether an event amounts to force majeure must under English law be decided based on the wording of the contract. Further, both under Norwegian and English law, the extent and effect of force majeure, must be decided on the basis of the provisions of the contract, thereby deciding the parties' rights and obligations.

Notice of force majeure

Most contracts require that a party that wishes to invoke force majeure give notice in writing to the other party of the force majeure situation and the effect which this is assumed to have on the fulfillment of the contract. Such notice must be given within a short period (as set out in the contract). The requirements concerning such notice will differ. In international shipbuilding contracts, the period is usually 10 days after the "builder becomes aware or should have become aware of any cause of delay as aforesaid". If notice is not given, the effected party may not subsequently invoke force majeure as a valid hindrance and effect (eg, permissible delay).

Under the Norwegian Total Contract 2005 (NTK), notice must be given "as soon as possible". On the other hand, there is no specific provision in the NTK stating that a party will be prevented or barred from invoking force majeure if they fail to give such notice.

It is a generally accepted principle in international contract law that notice must be given and received by the other party "within reasonable time" after the party that invokes force majeure "knew or ought to have known of the impediment". Failure to give such notice will have two effects:

i. the burden of proof will inevitably be heavier if notice is not given timely; and
ii. The party may also be liable for damages to the other party for failing to give such notice.

Such a notice may be of a general nature, as the effects of the force majeure will still not be fully known.

Companies that are aware or suspect that they will be affected by the COVID-19 pandemic are therefore well advised to send a general force majeure notice to their counterparts to secure their rights. Further notice should be given when the effects are clearer. However, such a general force majeure notice must be worded in accordance with the procedures set out in the relevant contract.

On the other hand, parties that receive force majeure notices must reply to the same as failure to reply may be seen as an acceptance of the force majeure situation and possible permissible delay. If a general notice has been received, parties are well advised not to just accept this when received, but review the wording of the relevant contract and request the other party to send further information or notices when further information concerning the actual delay is known, and in the meantime reserve all rights.

Frustration

In the absence of a Force Majeure Clause, parties may rely on the doctrine of frustration in respect of the Corona Virus outbreak. Proving frustration, however, is much more difficult than Force Majeure. Essentially, a contract is frustrated when due to an event it is physically or commercially impossible to fulfill that contract. The test is complex involving inter alia the terms and factual basis of the contract and the reasonable foreseeability of the event at the time of the conclusion of the contract. If frustration is confirmed the contract comes to an end.

German law recognises a similar concept, the so called “Wegfall der Geschäftsgrundlage”, the change or “collapse of the foundation of the transaction” According to this doctrine an uncontrollable change in the circumstances surrounding the contract that leads to a significant undue hardship, may justify an adaptation or termination of the contract, if upholding the contract would be unreasonable. The difference in the doctrines is basically, that under German law an adaptation is possible.

Material Adverse Change or Effect:

It is possible to contractually allocate risk among the parties if events occur that could reasonably be expected to result in a material adverse change (MAC) or material adverse effect (MAE). The occurrence of such an event may entitle a party to avoid performance or terminate the contract.

Wrong Assertion of Risk Allocation Clauses

Incorrectly claiming to be entitled to invoke a risk allocation clause may constitute a breach of contract and entitle the other party to terminate and claim damages. Risk Allocation Clauses do not excuse your own fault.

Duty to mitigate

It follows both from general legal principles as well as from the wording in most standard contracts that a party invoking force majeure must mitigate the effects thereof versus its counterpart.

When force majeure has occurred, a party may be inclined to use (or rather abuse) this opportunity to gain as much extra time as possible, particularly if already delayed for other reasons. This, of course, is unacceptable behavior and under a shipbuilding contract a party invoking force majeure must do its "utmost to avoid or minimize" the delay caused by the event in question.

Practical situations as effects of COVID-19

Since COVID-19 is no longer an epidemic effecting one country, but pandemic affecting countries worldwide, restrictions imposed by each autonomous authority will have effect. This may for example be suppliers in different countries down in the supply chain, where force majeure is not directly, but indirectly affecting a party and the performance of a contract.

Lack of intermediate products needed in manufacturing final products

In principle, the intermediate products needed may be available, but the production of manufacturers of the actual product needed may be delayed and stopped due to lack of workforce with the suppliers and manufacturers. Further, export restrictions may be imposed in order to secure vital products such as protection equipment for health personnel for each country.

Certificates expire and cannot be renewed

For the operation of rigs and ships, classification and statutory certificates are mandatory. Failure to renew and maintain same will be a breach of the obligations under the relevant contract or charterparty. A ship may in principle be considered unsafe and the vessel subject to port state control and be detained for other reasons. Ports may be unsafe without being declared unsafe in the more traditional sense of the word. Again, the reason may be actual illness or quarantine denying ships to enter or allow passengers and crew ashore.

The International Maritime Organisation (IMO) has issued a circular letter addressing these issues, but all the IMO can do is to encourage cooperation and a pragmatic approach between flag and port states, as the IMO cannot issue a general exemption from the mandatory provisions of the relevant statutory conventions, nor delay implementation of mandatory regulations coming into force – not even in the current uncertain situation. Further, all the major classification societies (also acting as agents for national maritime authorities) have now advised their customers that they generally accept the COVID-19 situation as an exceptional circumstance in terms of granting postponement for surveys where such are impossible to perform based on class rules and statutory conventions, and invite customers to use already established remote survey schemes where possible. However, postponement must not exceed three months from the certificate expiry date.

It is clear that neither of the international conventions from the IMO or the International Labour Organisation have been worded to take into account the current situation. For statutory certificates issued by the national maritime authorities, each owner must find flexible solutions with the relevant flag state. For the Norwegian flag, certificates are automatically prolonged for three months without specific application.

Insurance of rigs and vessels

Under insurances subject to Norwegian law, the certificates from class and national authorities are defined as "safety regulations". All certificates must at all times be valid. If not an expired certificate may qualify as a breach of safety regulations, and if a subsequent insurance event occurs that could have been avoided if the relevant certificate had been in place, the owners' right of cover under the relevant insurance may be in jeopardy. Since the insurer has a right to demand a survey of the vessel, it must however be assumed that a general prolongation of existing certificates by class or flag state will be binding on the insurer and has no negative effect on the owners' rights under the insurance.

Further issues will arise under loss of hire insurance, where the repair of the vessels may be delayed due to the COVID-19 pandemic. If such a delay is caused by COVID-19 (eg, personnel not being available, yards being partly closed or necessary parts are delayed), it may be questioned whether this delay will be covered by loss of hire insurance, since the delay may be said to have been caused by COVID-19, which may arguably be considered a peril not insured against.

Charterparties

In the day-to-day operation of ships, the implications for ship-owners and operators due to such outbreaks are significant. Delays occur and costs arise not only when the ship is in an area where the risk of infection is high, but also at a later date when the ship calls at ports outside the region where restrictions were imposed to reduce the risk of the disease spreading. In this respect, no clause or short summarised advice can solve all of the problems that may arise due to countries more or less worldwide imposing restrictions or penalties on ships.

Most charter parties are today entered into on Baltic and International Maritime Council (BIMCO) recommended forms and often governed by English law. As stated above, COVID-19 is recognised as a pandemic. The BIMCO Infectious Disease Clause (BIDC) may thus be included in the relevant charter party and if so, the application thereof must be considered under the relevant governing law. This is the case for the BIMCO form Supplytime 2017. It should be accepted that the term 'affected area' as defined in the BIDC will include areas worldwide where there is a risk to expose the vessel or its crew to COVID-19.

Many charter parties used in offshore supply contain specific force majeure clauses (eg, Clause 35 of Supply time 2017, which sets out a specified list of incidents being defined as force majeure). The effect of a force majeure situation is that:

> *neither party shall be liable for any loss, damage or delay due to any of the following force majeure events and/or conditions to the extent the party invoking force majeure is prevented or hindered from performing any or all of their obligations under this Charter Part, provided they have made all reasonable efforts to avoid, minimize or prevent the effect of such events and/or conditions.*

There is no requirement that the event could not have been foreseen by either party; on the other hand, there is a clear requirement for causation and a firm duty to mitigate the effects of force majeure.

Safe port

One of the measures that authorities are taking is to protect their ports and deny access to prevent spreading via ships entering. At the same time, it is vital to maintain worldwide trade to combat the virus and ensure that the world can still function. Owners will therefore experience strict restrictions in port, which may lead to congestion and delay. One question that remains open is whether an owner can refuse to call at a port where they are likely to have the ship delayed or detained due to the virus or precautions taken to combat the virus.

In time charters, the risk for loss of time is from the outset with the charterer. The issue for the owner is to protect its vessel and crew from being infected. Employment in Supplytime 2017 is restricted to "voyages between any good and safe port or place and any place or Offshore Units where the Vessel can safely lie always afloat with the area of operation". If a port is deemed unsafe, the owner can refuse to follow the orders of the charterer to sail or call at such a port.

Whether a port is deemed unsafe due to COVID-19 will have to be examined case by case based on the prevailing risk factors in the port, including whether measures have been put in place in the port to reduce or avoid the risk of infection, both to passengers and crew. The proximity of the vessel to the shore and the likelihood of the vessel's crew coming into contact with possible sources of infection are also relevant, as well as whether there would be a risk of quarantine or detention of the vessel if calling at the nominated port. An order to call at a port is from the outset valid and the owner must follow such orders. The owner has the burden of proof to show that there is an unacceptable high risk of infection or detention for a port to be deemed unsafe, both under Norwegian and English law.

Off-hire

If a vessel is unable to perform the work under the charter party and time is lost due to COVID-19-related issues, the question is whether the owner remains entitled to the charter hire or whether the vessel will be deemed off-hire. This must be decided on basis of the wording of the relevant charter party and the governing law.

In general, the starting point in a time charter is that hire must be paid unless there is a specific provision to the contrary. If a charterer wishes to invoke the off-hire provisions they will have the burden of proof. The same applies if the owner alleges that any exceptions apply. The relevant clauses are (as always) there to allocate the risk between the parties. The wording of the actual off-hire clauses is therefore very important and the wording differs within the various charter parties.

The condition for placing a vessel off-hire is that an off-hire event as set out in the charter party has occurred. In the present situation, the most practical event is "deficiency of Crew". If a sufficient number of crew are ill due to COVID-19 and as a consequence the vessel is unable to perform the services required, this should from the outset be considered as "a deficiency of Crew" and the vessel be off-hire. If, on the other hand, the remaining crew is healthy and able to perform the services without any loss of time, the vessel is not off-hire.

The off-hire clause in Supply time 2017 exempts from this main rule if the reason preventing the vessel from working is "quarantine... unless caused by the crew having communication with the shore other vessel at any infected area not in connection with the employment of the Vessel", and other specific reasons including force majeure. This means that if a vessel is quarantined in the next port when coming from an affected area, or because a member of the crew is infected, it will remain on-hire. If a vessel is delayed in connection with a crew change where the incoming crew must remain in quarantine, the vessel will be off-hire, since providing crew is the owner's risk.

IV. Persons at sea, International Law, Covid-19:

As the Covid-19 pandemic continues to affect people around the world, the scholarly debate on how to uphold the rule of law amid the crisis remains relevant. A significant aspect of this debate has focused on the impact of Covid-19 restrictions on human rights. However, it is not only the human rights of people on land that have been affected by the pandemic. One of the measures that states adopted to contain the spread of the virus has been port restrictions which range from delayed port clearance and prevention of crew or passengers from embarking or disembarking to prevention of discharging or loading cargo, taking on fuel, water, food or supplies and imposition of quarantine. These restrictions have caused an unprecedented humanitarian crisis at sea affecting the human rights of almost all persons found at sea during the pandemic be it for employment, leisure, military purposes or migration. This short post puts a spotlight on the impact that port restrictions, as a Covid-19 precaution, have had on the human rights of persons at sea and explain how they have undermined the human rights obligations of states, weakening in this way the protection of human rights at sea.

Human Rights Violations at Sea and Covid-19

Violations of human rights at sea have been increasingly documented over the last years. This has given momentum to the recognition of the application of international human rights law at sea (A/74/350, Papanicolopulu, 2018, Galani, 2020) and to the adoption of initiatives to give it effect in practice. The pandemic, however, has been a sad but much needed reminder of the ongoing violations at sea and of the obligation of states to end them.

Those most affected by port closures have been seafarers and fishers. Port restrictions have prevented crew changes forcing hundreds of seafarers to be abandoned or stuck on board commercial vessels, cruise ships or fishing boats in excess of their employment contracts. Many have been forced to remain on-board without access to medical supplies, medical care, Personal Protective Equipment (PPE), food or water. The lack of prospect of returning home, of seeing relatives who got sick or died of Covid-19 or of receiving medical treatment when they fall ill themselves have caused them severe anxiety and distress leading in some cases to attempted suicides. Sailors were also put at risk when the virus started sweeping through warships.

The lack of hygiene protocols and delayed medical treatment caused a high number of infections and one death on board the *USS Theodor Roosevelt* and *Charles de Gaulle*. In containing the spread, long periods of quarantine and isolation were implemented adversely affecting the mental health of sailors. Passengers on board cruise ships found themselves in a similar position when *Diamond Princess*, became the place to account for more than half of the virus cases outside China in February 2020. States forced passengers to quarantine on board often resulting in the death of passengers who were denied medical treatment. Cruise ships transformed from leisure into virus hubs leaving passengers and crews in limbo.

While the pandemic disrupted the migrant flows in the Mediterranean Sea, it never brought them to an end. People kept trying to reach Europe on boats and as the European States started closing their ports, many of them were left stranded at sea. Reported cases of suicides and unrest on board NGO-run vessels, such as the *Ocean Viking* incident, forced Italy and Malta to allow the transfer of those rescued on board quarantine vessels. Rescued persons have been forced to quarantine, often indefinitely, in poor conditions which fall short of the hygiene standards required to prevent the spread of Covid-19. Desperation and anxiety forced migrants to resort to hunger strikes or attempt suicides.

Port Closures in International Law

In light of the humanitarian crisis caused by port restrictions, an important question is whether states have acted lawfully in closing their ports in response to the pandemic. Ports are in internal waters that form part of a State's territory over which States have sovereign rights under international law. This gives port States a sovereign right to control entry or deny access to their ports (Articles 8 and 25 1982 United Nations Convention on the Law of the Sea (LOSC), ***Nicaragua v United States of America***, paras 212-13). Health and safety as well as the prevention of ships carrying passengers with contagious diseases from reaching a state's shores constitute a lawful ground on which port states can deny entry to their ports (La Fayette, 1996). It therefore seems that port states did nothing more than exercising a sovereign right to protect public health amid an unprecedented crisis.

Human Rights at Sea and International Law

States, however, should not be condoned for their decision to close their ports leaving hundreds of people in danger. States have also assumed the obligation to protect human rights at sea under the international law of the sea, human rights law and labour law; an obligation which has been sidelined during the pandemic.

Despite the lack of direct references to human rights, LOSC imposes on flag and coastal States positive duties to protect the safety of life at sea (Articles 94 and 98 LOSC). The prevention of crew changes which have forced crews to work in unhealthy conditions without breaks way in excess of their employment contracts are incompatible with LOSC. The reason is that tiredness and fatigue have been key causes of on-board accidents putting the life of crews in danger. In addition, the denial of medical treatment to sick seafarers in ports and their forceful return at sea when they are unable to perform tasks essential for the safety of the vessel might cause a situation of distress (Klein, 2020).

A situation of distress might well arise when states refuse to assist sick migrants at sea who might not be at risk of drowning but of dying by Covid-19 as well as when they refuse to take them to a place of safety where their life is no longer threatened and where their basic human needs, such as food, shelter and *medical needs* are met (Chapter 2 1979 International Convention on Maritime Search and Rescue, MSC Res. 167(78) Annex 34, 2004). LOSC, as a living instrument, has been the subject of evolutionary interpretation that has among others reflected the increasing need to protect human rights at sea. The 'consideration of humanity' dictum pronounced in *M/V Saiga* has been expanded to give effect to human rights guarantees at sea leaving little room for questioning the obligation of states to comply with international human rights law at sea, including during the pandemic (Petrig & Bo, 2019).

Besides LOSC, States have an explicit duty to protect human rights at sea when they exercise 'directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law' (CAT/C/41/D/323/2007). The Human Rights Council (General Comment No.6 and No.36) has indicated that the duty to protect life requires States to take appropriate measures, including to facilitate access to health care, in response to epidemics or life-threatening diseases. The European Court of Human Rights has also held that a violation of the right to life might arise when the authorities of a state knowingly put an individual's life at risk by denying access to life-saving emergency treatment.

Accordingly, flag states have a duty to protect the right to life by making medical care readily available on-board and in life-threatening cases, port states have to provide access to medical treatment. States which failed to provide medical care on board or denied access to health care to persons critically ill in ports have violated their positive duty to protect the right to life. Further human rights violations have been committed by states which forced rescued persons to quarantine on board vessels in crammed and squalid conditions or pushed them back. Poor conditions of quarantine which might amount to torture as well as collective expulsions are incompatible with IHRL.

The treatment of seafarers during the pandemic has been incompatible with labour law standards. Cases of abandonment in which seafarers have been often forced to stay on board vessels without food, water, receiving their salaries or any prospect of returning home are incompatible with the duty of States to provide financial security and ensure that they are duly repatriated (Regulation 2.5, Maritime Labour Convention, 2006 (MLC) and article 21, ILO Work in Fishing Convention, 2007 (C188)). The prevention of crew changes and abandonment have also been in defiance of the guidance issued by the International Maritime Organization and the International Labour Organization urging states to designate seafarers as 'key workers' and exempt them from travel restrictions.

The failure of certain states to make medical equipment and PPE available on-board as well as the prevention of medical staff and suppliers from boarding vessels in order to provide medical treatment or supply PPE to crews have put the life and safety of crews at risk in violation of labour law standards. The right to medical care and occupational safety on board vessels are guaranteed under labour law (Regulations 4.1 and 4.3, MLC and articles 29, 30 and 32, C188) and while enforcing these rights amid the pandemic has been vital for seafarers, States continue to overlook their duties and insist on rigid restrictions in their ports.

Persons at Sea and Lessons Learnt from the Pandemic

Persons at sea have been victims of severe human rights violations which often occur out of sight. This does not happen because of the lack of legal protection under international law. As this blog briefly showed, the rights of persons at sea are recognised under different legal regimes, such as the law of the sea, human rights law and labour law. Their violation rather occurs because of the way these regimes interact which often weakens each other's application. Port restrictions are just one example of how states might lawfully exercise a right under the law of the sea while overlooking their human rights obligations. This demands revisiting the rights and duties of states at sea under international law in order to devise an approach that will enable the systematic protection of human rights at sea within and beyond the pandemic context.

V. COVID-19 and maritime shipping & fishing:

The shipping sector carries 90 per cent of global trade and is the main artery of international supply chains. As of mid-April, the volume of global merchandise trade was falling by 13 per cent, and there are estimates of a decline of 32 per cent or more. With 384 sailings cancelled, the first half of 2020 could see a 25 per cent reduction in shipping, with a 10 per cent annual fall in 2020. The impact of COVID-19 on employment in the shipping sector, with its 2 million seafarers, is therefore substantial. The cruise shipping sector, with 250,000 seafarers, has been particularly badly affected, as certain countries have advised against travel by cruise ship, and major cruise companies have suspended operations. The maritime fishing sector, which employs tens of millions of fishers, is a major supplier of food, and particularly animal protein.

Many fishing vessels are unable to leave port and the demand for many seafood products is substantially reduced. The COVID-19 crisis is affecting the personal safety and health of seafarers and fishers, their conditions of work and their ability to join and leave their vessels, with a consequent impact on their capacity to perform their key role in ensuring transport by sea, serving passengers and harvesting seafood.

In addition to potentially reduced employment opportunities, seafarers face:

- considerable problems joining and leaving their ships in port (each month around 100,000 seafarers are involved in crew changes);
- restrictions on travel, and quarantine restrictions for international seafarers, even after medical screening;
- the prohibition, or at least delays, in being allowed to return home;
- restrictions on being able to go ashore for medical treatment;
- restrictions on the delivery to ships of essential medical supplies, fuel, water, spare parts and provisions, including in cases where ships are refused entry into ports;
- lack of access to masks, overalls and other personal protective equipment (PPE), often due to restrictions on deliveries;
- the extension of tours of duty beyond the duration specified in employment agreements or national laws, leading to fatigue;
- problems in undertaking training or refresher courses for certification of competency;
- expiration of competency and medical certificates, which are of limited duration;
- increased stress, isolation and social pressures for seafarers and their families; and
- restrictions on access to port-based welfare services.

These and other issues related to COVID-19 have also affected shipping operations, for example by preventing specialized staff, including surveyors and technicians, from performing their duties, such as inspecting vessel safety and repairing equipment. There is a need for improved harmonization among port States, and even between ports in the same country, on the applicable rules and restrictions. There is also concern over insufficient monitoring of visitors to ships (such as pilots and dockworkers) to ensure they are equipped with the necessary PPE to limit the spread of infection. In addition, there have been delays in resolving cases of abandonment, and concern that such cases may increase if shipowners lose the financial ability to support their fleet operations.

Cruise ships, which may employ hundreds of seafarers, have been quarantined off the coast of port States after passengers have tested positive for the virus and face bans on entry into port in several countries. Seafarers on cruise ships face particular problems. Following the disembarkation of passengers, cruise ships have been ordered to anchorage or remote berths, with seafarers confined on board and denied medical assistance or repatriation. Many of these seafarers remain at sea. Although it has been possible to treat mild cases on board, seafarers with more serious infections have faced restriction on their access to medical care ashore.

Many fishers and fishing vessel owners face similar problems, including the inability to make crew changes, the expiry of medical and competency certificates, the lack of the necessary PPE, restrictions on joining and leaving vessels and on travel, insufficient medical care on board vessels and lack of access to shoreside medical care. The inability to change crews, leading to extended periods on board, is particularly problematic in the case of fishers due to the physical and fatiguing nature of their work.

Responses by constituents and partners:

There has been considerable activity at all levels by ILO constituents and other partners to address the impact of COVID-19 on maritime shipping and fishing, including by the Officers of the Special Tripartite Committee of the Maritime Labour Convention, 2006, as amended (the MLC, 2006), as indicated below.

Responses by shipowners' and seafarers' organizations:

Shipowners and seafarers have been working together through social dialogue to address COVID-19 issues efficiently and effectively.

The International Chamber of Shipping (ICS) and the International Transport Workers' Federation (ITF), in a Joint open letter to United Nations agencies from the global maritime transport industry, have emphasized the vital importance for all governments of keeping maritime trade moving by continuing to allow commercial ships access to ports worldwide and facilitating the movement and rapid changeover of ships' crews. They have made an urgent call for this to be added to the agenda of appropriate high-level meetings, and for national authorities to engage immediately with national shipowners' associations and seafarers' unions.

The ICS and ITF, working together with other stakeholders, as well as United Nations specialized agencies, are seeking to facilitate the transfer and transit of seafarers, for example through documentation identifying their essential role.

With respect to cruise ships, the ICS and ITF have jointly urged the ILO to:

- make all governments aware of the importance of treating cruise ship workers with equality and dignity and respecting their human rights, in accordance with the principles of the MLC, 2006, and other appropriate ILO instruments;
- emphasize the importance of States permitting/facilitating the access of seafarers to consular assistance;
- call on States to ensure the safe repatriation of the thousands of seafarers on cruise ships; and for those seafarers who remain behind, call on member States to keep the ships efficient and safe, including through the provision of all necessary equipment, food and assistance, and unhindered access to onshore medical care.

International shipowners' organizations:

The ICS has produced several publications addressing the crisis, including Coronavirus (COVID-19): Guidance for ship operators for the protection of the health of seafarers, which aims to help shipping companies follow the advice provided by the World Health Organization (WHO), International Maritime Organization (IMO) and ILO, as well as the European Centre for Disease Prevention and Control (ECDC). It has also organized a "Coronavirus strategy group", which includes the participation of seafarers' representative organizations. The group meets online each week to identify key issues, exchange information and make recommendations.

International workers' organizations:

The ITF has issued a general call for action with demands in five key areas:

- protecting workers vital to the COVID-19 response;
- putting health and safety first;
- providing income protection for all workers;

- government-led stimulus measures to keep the economy going;
- maintaining sustainable supply chains.

The ITF has also highlighted the situation faced by seafarers, including those of specific groups, such as seafarers on cruise ships. It has provided information and issued advice on the virus for workers and assisted its members, ships' crews and individual seafarers with questions and problems related to COVID-19. It has established a dedicated webpage on COVID-19, including a map showing the effect of Covid-19 restrictions on countries and ports around the globe.

Responses by shipowners' and seafarers' organizations at the national and regional levels:

National shipowners' and seafarers' organizations have joined together to raise concerns and propose solutions to COVID-19 issues. For example, the National Union of Rail, Maritime and Transport Workers (RMT), Nautilus International and the United Kingdom Chamber of Shipping have made a joint call to the Government and devolved administrations to use all the policy levers at their disposal to protect seafarer jobs and qualifications.

- *Responses by regional fishing vessel owners and fishers' organizations*

  In the fishing sector, the social partners in the European Union have urged the European Commission to adopt special regulatory measures and take action to secure the free circulation of fishers. In their letter, they also draw attention to specific problems related to fishers' health, maximum periods of service and competency certificates.
- *Responses by individual shipping enterprises*

  Individual companies are not only issuing their own guidance to their ships and seafarers, but also helping to share information. For example, the Inchcape Shipping Service has posted "Coronavirus (COVID-19) Port /Country Implications" which, among other issues, tracks the crew change situation in each country.

  Government responses:

  Governments, in their capacity as both flag and port States, have issued circulars and other forms of communication on COVID-19 and the maritime sector, including:
- In China, the Ministries of Transport and of Human Resources and Social Security have addressed the extension of seafarer's employment agreements (SEA) when they expire and the next port of call has adopted prevention and control measures prohibiting crew replacement. They have specified that such extensions should be with the seafarers' written consent, provided that continuous service on board does not exceed 12 months and that the signed supplementary SEAs are registered within one month with the relevant maritime administration.
- The Norwegian Maritime Authority, with the agreement of shipowners' and seafarers' organizations, has prepared guidelines for crew changes and for the transport of goods and medicines, including procedures for crew signing on and off ships, and the necessary documentation for seafarers' and fishers' qualifications, training and medical issues.
- The Maritime and Port Authority of Singapore has issued several Port Marine Circulars related to COVID-19. After initially announcing that crew changes were

suspended, following feedback from the industry and unions, it has established a prescribed process, taking into account whether the seafarer has served the maximum time on board and no further extension of the employment contract is granted by the flag State; compassionate grounds, such as the death of a family member; or when a seafarer is no longer medically fit to work on board ship.

- In the United Kingdom, the Department for Transport, the Maritime and Coastguard Agency and Public Health England have published guidance for shipping and seaports on COVID-19, including sections on background, symptoms, what to do with confirmed COVID-19 cases, action for ships and shipping companies, limiting the spread of COVID-19, cleaning and waste, and disembarkation.

Responses by regional organizations:

The European Commission has issued Coronavirus: Guidance on repatriating cruise ship passengers and protecting ship crews, which includes sanitary advice, recommendations for crew changes, disembarking and repatriation of seafarers and passengers. The guidance refers to other European Union COVID-19 communications, including Communication C(2020) 1897 final on the implementation of Green Lanes. The European Maritime Safety Agency (EMSA) has also facilitated the exchange of information among Member States and the countries of the European Free Trade Association (EFTA).

Regional port State control agreements, which seek to harmonize the inspection of vessels in foreign ports for compliance with IMO and ILO Conventions, including the Paris, Tokyo and Indian Ocean Memoranda of Understanding, have shared information and published guidance on ship inspection during the pandemic. The Paris MOU, as a general principle, calls for a pragmatic approach to such matters as allowing the extension of periods of validity of ship and seafarer certificates, including medical certificates.

Responses by other United Nations specialized agencies:

The IMO is facilitating the exchange of information among Member States on its Coronavirus pandemic (COVID-19) website. IMO Circulars published on the site contain detailed advice for IMO Member States, seafarers and the shipping sector, including: information and guidance based on WHO recommendations; advice on the implementation and enforcement of relevant IMO instruments; guidance on the certification of seafarers and fishing vessel personnel; and guidance on unforeseen delays in the delivery of ships.

In April, the IMO Council:

- urged flag and port States to ensure the smooth operation of maritime traffic and the availability of shipping services for world commerce, for the benefit of humanity;
- further urged flag and port States to ensure the welfare of seafarers, in particular the preservation of their right to wages, shore leave, sick leave, access to medical assistance, food supplies and repatriation;
- endorsed a practical and pragmatic approach to repairs, survey and certification and licensing of seafarers;
- encouraged Member States and international organizations to take into consideration the guidance concerning unforeseen delays in the delivery of ships; and;

- further encouraged governments to share best practices in keeping workers in the maritime transport sector safe from COVID-19, while taking into account national circumstances.

The WHO has issued Operational considerations for managing COVID-19 cases/outbreaks on board ships targeted at National Focal Points (NFPs), port health authorities, local, provincial and national health surveillance and response systems, and port and ship operators.

The ILO, IMO and WHO, in accordance with their mandates and capacity to reach labour ministries, maritime administrations and public health authorities, respectively, are working ever more closely together to address the impact of COVID-19 on the shipping and fishing sectors, in line with the call for a coordinated international approach in the sectors.

The IMO and WHO have issued a Joint statement IMO-WHO on the response to the COVID-19 outbreak. The ILO, IMO and WHO have issued a joint statement on COVID-19 and shipping, with emphasis on medical care for seafarers and the extension of the validity of seafarers' medical certificates and of ship sanitation certificates.

Responses by international nongovernmental organizations:

The International Maritime Health Association (IMHA), on its dedicated website on COVID-19, provides guidance for shipping companies on medical assistance for seafarers in ports and testing for COVID-19. It also refers to an interactive COVID-19 assessment tool developed by the Norwegian Centre for Maritime and Diving Medicine (NCMM) and Radio Medico.

The International Seafarers' Welfare and Assistance Network (ISWAN) has established a webpage with resources for seafarers, shipowners and ship management companies, including a video on Managing your mental health during the COVID-19 pandemic.

ILO Tools and Responses:

The ILO has issued an assessment and a range of policy options to mitigate the impact of the crisis and facilitate a strong and rapid recovery. It has developed several guidance and technical notes on the COVID-19 pandemic based on four pillars.

Figure 1: Four key pillars to combat COVID-19 based on international labour standards

Source: based on ILO (2020). COVID and the world of work: Updated estimates and analysis, op. Cit.

The ILO has also issued :

- New guidelines to help employers support families during COVID-19, ILO and UNICEF, 30 March;
- Social Protection Monitor on COVID-19, updated regularly;
- ILO standards and COVID-19 (coronavirus) – FAQ: Key provisions of international labour standards relevant to the evolving COVID-19 outbreak, 27 March; and
- ILO Monitor, 2nd Edition: COVID-19 and the world of work: Updated estimates and analysis, 7 April; and
- Managing conflicts and disasters: Exploring collaboration between employers' and workers' organizations, 2020.

The ILO website provides links to the ILO's work on COVID-19, including regularly updated articles on the impact of the virus on the world of work.

ILO responses specific to the maritime sector:

Following formal requests for intervention from the ITF, the ILO has reminded member States of their responsibilities under the MLC, 2006, in the context of the virus, including in relation to PPE, medical care on board ship and access to medical care ashore. The Office has responded to questions on the application of the provisions of the MLC, 2006, in the context of the COVID-19 crisis. It has also worked with the Officers of the Special Tripartite Committee (STC) of the MLC, 2006, on the most appropriate responses to the challenges faced by the maritime sector.

In a statement on the coronavirus disease (COVID-19), the Officers of the STC draw attention to the severe circumstances created by the virus for the shipping industry and seafarers. They note that daily life in many countries has been heavily restricted, yet societies still need supplies of food, medicine and everyday goods, and factories require materials and logistics to ship their products. This emphasizes the need for robust international supply chains and the critical importance of maritime trade for the global economy. They also call for seafarers to be officially recognized as key workers, granted exemptions from travel restrictions and accorded special consideration so that they can join and leave their ships and return home without impediment, while complying with good practice in infection control.

In response to requests from constituents, and following consultations with the Officers of the STC, the Office issued an Information note on maritime labour issues and coronavirus (COVID-19), which provides guidance on addressing the complexities of the current crisis in light of the MLC, 2006, particularly in relation to:

- seafarers' safety and health;
- facilitation of transit and transfer of seafarers and repatriation;
- expiry of seafarers' employment agreements;
- maximum period of service on board and safeguards;
- reduction of minimum manning;
- expiry of medical certificates;
- certification in respect of training and qualifications;
- maritime labour certificate and inspections;
- social protection – seafarers' entitlement to paid sick leave in case of infection or quarantine;
- shore leave and welfare facilities during the pandemic; and
- Abandonment of seafarers.

At the launch of the statement by the STC Officers, the ILO Director-General, Guy Ryder, called on governments "to ensure that, in these challenging times, seafarers are adequately protected from the COVID-19 pandemic, have access to medical care, and can travel to and from their ships, as necessary, in order to continue to play their crucial role". The ILO/IMO database on reported incidents of abandonment of seafarers has been updated to request those reporting cases to indicate in the report form whether a case is deemed to be related to COVID-19.

The Office is also examining the pandemic in the context of the application of the Work in Fishing Convention, 2007 (No. 188).

The ILO's response to the pandemic and its impact on the shipping and fishing sectors is work in progress. The Office will continue to shape its response in consultation with the tripartite constituents and in close cooperation with other United Nations specialized agencies.

VI. THE CHANGING FACE OF MARITIME LAW AND RISK – CYBER, E-COMMERCE, AUTOMATION OF VESSELS:

During 2020 and into 2021, the COVID-19 pandemic presented the global community with numerous economic, social, physical, legal and humanitarian challenges. The global crisis put international maritime trade under severe pressure and the maritime sector may be dealing with the knock-on effects and consequences for years to come. However, the United Nations Conference on Trade and Development's (UNCTAD) latest "Review of

Maritime Transport 2020" dated November 2020 indicates that the pandemic also highlighted the importance of maritime transport to ensuring the delivery of critical supplies and facilitating global trade in times of crisis, as well as during the period of recovery and when the situation becomes normalised. Business continuity has been, and remains, paramount.

Technological innovation and digitalisation are acknowledged as having played a critical role in assisting uninterrupted maritime transport operations and trade processes during the pandemic, while reducing the risk of infection. Labour shortages and lockdowns severely disrupted cargo operations and multimodal transport connections. The extent to which human labour is relied on to keep goods moving and supply chains running, and the consequences when this is not available, has highlighted the importance of increased automation to ensure business continuity. In ports, for example, it could speed up port and terminal operation processes and reduce vessel waiting times. One positive legacy of the pandemic has, therefore, been to strengthen the case for increased investment in and commitment to enhanced digitalisation and technological advances going forward. Such developments can only improve the global shipping sector's resilience to potential disruptions in the future. In reality, the progress towards a more digitalised, automated and technologically advanced maritime environment has been underway for some years.

Whilst the process has moved further forward in the developed world as compared to developing countries, this is without doubt an international trend that will spread slowly but surely across the globe. "Smart" ships and smart ship technology are clearly the future. In January 2021, class approval was announced for the world's first "smart" LNG bunkering vessel, FueLNG Bellina. It will supply large ocean-going LNG-fuelled vessels as Singapore's first LNG bunkering vessel. The vessel is equipped with digital tools to improve vessel performance and maintenance, as well as to enable remote monitoring and real-time support of vessel operations. In December 2020, it was reported that Korean shipping line HMM had completed the implementation of smart ship systems on board twelve 24,000TEU ultra-large container ships. The system will also be installed on HMM's fleet of new 16,000TEU ultra-large container ships scheduled for delivery during 2021. In November 2020, AET's newbuild vessel, Eagle Passos, delivered by Samsung Heavy Industries, became the first shuttle tanker to be granted an ABS "Smart Notation", recognising the digital capabilities of the vessel's data communications and network infrastructure. These are only some instances of the way in which the industry is embracing smart technology. Smart contract usage is also on the rise, particularly electronic bills of lading. Blockchain technology and E-commerce have become a predominant theme in international trade.

The UK, as part of its "Maritime 2050: Navigating the Future" initiative – which sets out the UK's long-term strategy for its maritime industry – has considered the role that technology and innovation will play, including in the context of: smart ports; digitalisation; communication; navigation; and exploration. In the Maritime 2050 report, the UK Department of Transport has recognised that new technologies, such as autonomous maritime systems, can make the shipping sector cleaner, safer and more efficient. However, as with all innovation, digitalisation and automation present the maritime industry with a number of challenges, including: cyber risk; impact on the maritime workforce; lack of uniform standards, for example, in blockchain technology; and regulatory issues, including the effective application of existing regulations to new processes and systems.

The Changing Face of the Maritime Industry

It will be interesting to see how the shipping industry develops and progresses in the coming years. What is clear, however, is that automation, artificial intelligence, energy efficiency, connectivity and "green shipping" will all feature prominently in the future of the maritime industry. The challenge is to maximise the benefits of technological progress, while mitigating against the potential pitfalls and any downside. Industry stakeholders are addressing key issues, including in the following ways.

Cybersecurity and cyber risks:

The UNCTAD report referred to above highlights the benefits of enhanced digitalisation in the maritime industry, as well as the downside in terms of potentially greater exposure to cyber risks. The report indicates that both the importance of technological advances in the global shipping sector, as well as the challenges this poses for cybersecurity, have been emphasised by the COVID-19 pandemic. According to the report, the pandemic and its disruptions demonstrated that those who took the lead in terms of technological uptake were better able to weather the storm. The digitalisation of interactions and information-sharing proved critical to the continuity of maritime transport operations during the pandemic. It helped to maintain continuity in transport operations and trade processes while reducing the risk of contagion. Prompt deployment of technological solutions ensured the continuity of business activities and government processes, particularly in cross-border trade and when responding to new consumer expectations in an environment of disrupted supply chains, remote working and increased reliance on E-commerce.

However, these developments brought to the fore heightened cyber concerns. As a result of the pandemic, companies were less able to protect themselves. Travel restrictions, social distancing and economic recession all contributed to enhanced cyber risk. The report notes that cybersecurity risks are likely to continue growing significantly due to greater reliance on electronic trading and an increasing shift to virtual transactions at all levels. This increases vulnerabilities that can potentially result in disastrous consequences for critical supply chains and services. Further, as ships and ports become better connected and further integrated into information technology networks, the strengthening and implementation of cybersecurity measures become essential. Cyber risks are not theoretical, they are very real; this is demonstrated by the number of cyber incidents witnessed by the shipping sector in recent years. Just one recent example is the cyberattack in September 2020 on French shipping company, CMA CGM, which took down its worldwide shipping container booking system after two of its Chinese branches were hit by ransomware.

This followed on from a malware attack on SwissItalian shipping line MSC's data centre in April 2020, a ransomware attack on Chinese shipping company, COSCO, in July 2018 and a geopolitical ransomware attack which indirectly impacted upon the Danish shipping company, APM-Maersk, in 2017. This means that the world's four largest companies have now all suffered very disruptive cyberattacks. In addition, during 2020, a US-based gas pipeline operator was hit by malware, a US-based cargo facility's operating systems were infected by ransomware and the operational technology (OT) systems at an Iranian port were hacked.

These incidents impacted all infrastructure movements, leading to massive backlogs. In July 2020, it was reported that cyberattacks on the maritime industry had increased by 400% in just 12 months with attacks on OT increasing by 900% over three years with the number of recorded incidents set to reach record volumes by the end of 2020. This does not take into account the unreported incidents. UNCTAD believes that adopting technological solutions and keeping abreast of the most recent developments in the field will become a requisite in the global maritime industry rather than an option. Consequently, increased investment in technology and adopting solutions that meet the needs of future supply chains are crucial.

Developing countries must be given the digitalisation and technological support they need in order to narrow the divide with developed countries and ensure their resilience. At the same time, however, cybersecurity should be strengthened at all levels to combat the increased cyber risk that comes hand in hand with greater reliance on technology. The global maritime industry must, therefore, continue to come up with initiatives and solutions that ensure the benefits of advanced technology and increased digitalisation are not outweighed by the potentially catastrophic consequences of cyberattacks.

In fact, a number of sophisticated cybersecurity solutions have already been developed and launched within the global shipping sector. One such offering is InceMaritime, which is the first to provide integrated legal, business and technology services designed to help shipowners and operators in dealing effectively with cyber risks and cyber compliance. InceMaritime was launched in February 2021 and offers fully integrated cybersecurity that protects on-shore and on-vessel OT networks, safeguards operations and ensures compliance and business continuity. Other similar ventures will no doubt follow.

E-Commerce and Blockchain:

Blockchain originated as the technology which underpins cryptocurrencies such as Bitcoin. It uses distributed data storage technology together with high-grade encryption to record transactions, protecting them from malicious revisions or deletion. The high level of trust in the data produced can result in related transactions being triggered, leading to the concept of “smart contracts”. It has been estimated that the global blockchain market may be worth over US$23 billion by 2023. Today blockchain applications (effectively an immutable database almost free of hacking risk due to the in-built verification process) span a whole range of supply chain business solutions. In the context of the shipping sector, it has been estimated that one shipment alone can generate up to 200 documents and that the cost of administering and processing this documentation in shipping transactions makes up approximately 1/5th of the cost of transporting goods.

Blockchain has the potential to improve logistical efficiency in the global shipping industry by reducing, or even potentially eliminating, this paper trail and record-keeping, vastly reducing cost and speeding up the shipping process. Traditionally, many documents – such as bills of lading, charterparties, sales contracts, letters of credit, port documents and so on – must pass through the hands of various parties involved in the carriage of goods before delivery can be completed and payment made. Shipping transactions could become much more efficient both in terms of time and money spent, if the industry was converted into a paperless and predominantly online sector.

Key advantages of blockchain, therefore, include: increased market access and competition; reduced processing and administrative time and costs; increased efficiency and reduced risk of errors; enhanced cybersecurity; reduced risk of loss or theft of or damage to shipping documents; transparent transactions; elimination of unnecessary intermediaries; and a reduction in processing and administrative costs. “Smart” bills of lading are already being used relatively regularly and are demonstrating savings in both time and money. CargoX, launched in 2018, is just one industry offering providing a smart bill of lading known as a Blockchain Documentation Transaction System (BDTS).

Another option is edoxOnline, the first eBL system created (in 2007) implementing blockchain technology. In addition, WAVE was the first of the blockchain eBL providers to be fully decentralised when it completed the world’s first live blockchain trade transaction in 2016. Importantly, all three of these eBL providers have been approved by the International Group of P&I Clubs. The IG has so far recognised six eBL systems or providers. Blockchain-based systems can also play an important role in improved and reliable tracking and tracing of fuel origins and quality by recording on a distributed ledger information and data collected throughout the bunker fuel supply chain. This can assist shipowners and operators in ensuring that they comply with international maritime emissions regulations and standards.

BunkerTrace is an example of a recently established initiative providing marine fuel traceability. It adds synthetic DNA tags to bunkers to track them as they move through the supply chain. Combined with a blockchain ledger, this creates an immutable record of bunker supply making it possible to verify the source and quality of bunkers before they are burned in a ship’s engine. A number of ports around the world have also been adopting blockchain initiatives, including some Indonesian ports, Rotterdam port and the port of Long Beach, USA. The application of blockchain technology at ports is designed to make port traffic management more efficient and assist with container stacking, reduce cost and improve security. It may also reduce bureaucracy in port operations, particularly in developing countries, as well as reducing port turnaround time.

Blockchain can also assist certification authorities, such as flag states and classification societies. This would be through converting ship and seafarer certificates into a blockchain-based authentication process whereby the authenticity of approvals can be validated through the common blockchain network. The DCSA is developing open source standards for electronic bills of lading. A DCSA study found that processing paper bills was three times costlier than eBLs and that the shipping industry could potentially save US$4 billion a year if 50% of the market adopts eBL. The DCSA aims to hit this target by 2030.

The DCSA has indicated that eBLs need to be accepted by governments, banks, insurers and other stakeholders if they are to achieve their full potential, although COVID-19 appears to have gone some way to breaking this barrier. A number of DCSA members have reported a sharp increase in the adoption of electronic bills in an effort to keep trade moving notwithstanding the pandemic.

The DCSA has also highlighted some current blockchain shipping initiatives, such as TradeLens, which has a network of around 150 members and is reported to have processed over 23 million containers worldwide. Also worth mentioning is Global Shipping Business Network (GSBN), a consortium that is using blockchain to digitalise shipping operations. Other stakeholders reportedly testing out distributed ledger technology for bills of lading include the Israel Ports Company, Pacific International and the Singapore government. Ocean Network Express, the world's sixth largest container line, has become the latest shipping line to offer fully electronic bills of lading to their customers. India is to integrate eBLs and digital documentation into its electronic port community system. In its report, UNCTAD noted a significant increase in the use of electronic trade documents during 2020/2021 and notable efforts by governments to keep their ports operational and speed up the use of new technologies and digitalisation.

International organisations and industry bodies have called on governments to remove restrictions on the use and processing of electronic trade documents and the need for hard copy documents. The restrictions on physical movement and travel as a result of worldwide lockdowns highlighted the importance of alternative electronic and digital methods of doing business and accomplishing trade deals. Nonetheless, blockchain technology raises a number of potential challenges for the maritime industry. Among other things, there is a lack of standardisation – blockchain solutions are unregulated and voluntary.

In addition, different stakeholders – banks, freight forwarders, ports etc. – use different systems, which makes data exchange complex and reduces interoperability. This problem is particularly obvious, according to the DCSA, in liner shipping where the nature of liner shipping alliances makes interoperability difficult. Given, however, the benefits that blockchain brings to the global maritime sector, we can expect that key stakeholders will collaborate to address these and other concerns in the coming years in an effort to come up with effective solutions.

Artificial Intelligence and Automated Vessels:

In recent years, the shipping community has recognised that Artificial Intelligence (AI) and automation can benefit the maritime industry in a number of significant ways. Emerging technologies can improve safety and efficiency on board vessels. They can also enhance the sector's environmental performance. Work continues on developing maritime autonomous surface ships (MASS), drones and navigation systems. It has been reported that the market for MASS is worth US$1.1 billion annually and that this will grow by 7% each year to US$1.5 billion by 2025. 96% of almost 3,000 patents relating to autonomous shipping technology worldwide have been registered in China.

Other nations are expected to develop and implement autonomous shipping technology in the coming years, although how COVID-19 will impact these expectations is unclear. In the meantime, IBM's Mayflower autonomous ship project has attracted considerable press attention. This is scheduled to be one of the first transatlantic crossings of a fully autonomous vessel from Plymouth, England, to Plymouth, Massachusetts. The voyage was delayed due to the pandemic, but is expected to commence in Spring 2021 and take approximately three weeks. Global navigation satellite systems are critical for safe ship navigation. Automatic identification systems (AIS), which track vessels round the world via satellite signals, produce reliable data for ship tracking and analytics, including for insurance purposes.

However, there is a risk that these systems can be jammed or hacked, leading possibly to groundings or collisions. AIS tracking can also be disrupted. These satellite systems must, therefore, be strengthened and the European Space Agency is reportedly working on a solution to reduce risks for its services in this area. The shipping industry is also collaborating on the use of drones. In Singapore, Wilhelmsen and Airbus have been piloting the delivery of maritime essentials to vessels at anchorage via unmanned aircraft systems (UAS). Drone deliveries can save time, costs and emissions. They also reduced human interaction during COVID-19 restrictions.

While these UAS could only make small deliveries within a small area, the company is developing a drone that can carry 100kg over 100km that it hopes to launch in the second half of 2021. The Singapore Port and Maritime Authority has also been trialling Airbus drones to improve port surveillance. Furthermore, in June 2020, DNV GL completed the first inspection by an autonomous drone, in this case of an oil tank on a FPSO. Notwithstanding the advantages that they bring, automation and technological developments have the potential to adversely impact the maritime labour market. There have been concerns that many seafarer roles will become redundant with time as a different set of skills becomes necessary and work routines change. However, much will depend on the extent to which countries take up new technology and automation.

The UNCTAD report indicates that developed nations have better capitalised on technological advances and automation – for example, Australia, East Asia, Europe and the US. In comparison, developing countries – for example, African and South American countries – have been adopting technology at a slower rate because of insufficient financial investment and more limited technological resources.

Nonetheless, according to a 2019 report from the International Transport Workers' Federation, the demand for seafarers is expected to keep growing until 2040, although the impact of technology and automation between 2020 and 2040 will vary according to the skills and tasks performed and workers' demographic groups. Low and middle-skilled jobs (e.g. cargo handlers, crane operators, dockers) will be more at risk than high-skilled jobs (e.g. ship captains and officers), which are less prone to automation. The high-skilled workers will rely on automation and technology to improve their performance. Ultimately, however, the maritime labour sector will look very different in the future. There will be less jobs on board ships and more jobs onshore. Retraining, particularly on new technology and automation, will be crucial. Turning to regulation, it remains unclear whether key international conventions apply.

For example, do the UN Law of the Sea Convention 1982 (UNCLOS), the 1974 SOLAS and the International Regulations for Preventing Collisions at Sea 1972 (COLREGS) apply to autonomous vessels?

It is also unclear how the civil liability conventions might apply. Some of the issues arising include whether unmanned and autonomous vessels can be classified as ships under some conventions and also what the position might be in terms of regulations that envisage a human element. The IMO has launched a scoping exercise to assess IMO instruments to see how they might apply to ships with varying degrees of automation. The IMO has a strategic plan (2018 to 2023) to integrate new and advancing technologies in the regulatory framework. In the interim, in June 2019, the IMO approved interim guidelines for MASS trials.

In January 2020, an IMO Subcommittee discussed various issues including the operation of MASS and long-range identification and tracking systems. The Subcommittee's recommendations will be reviewed by the IMO Maritime Safety Committee (MSC) in due course. Regulatory and other issues related to MASS are also due to be considered by the IMO Legal Committee, as well as the IMO Facilitation Committee.

Unfortunately, all the previously scheduled meetings to discuss these issues were postponed due to the pandemic. In 2019, EMSA commissioned a SAFEMASS Study to identify new risks and regulatory gaps. In January 2020, it set up an internal taskforce to act as technical facilitator in relation to autonomous ships. EMSA has also attended the relevant MSC meetings and provided input on MASS and related issues. In November 2020, Maritime UK launched an updated version of its *"Industry Code of Practice for Maritime Autonomous Systems Ships (MASS)"*.

According to Maritime UK, the accelerating pace of change in maritime autonomy required updated guidance for those owning and operating MASS. The new Code of Practice focuses on ship systems, as well as including new chapters on cybersecurity, pilotage, dynamic positioning and Vessel Data Recording. Also in November 2020, BIMCO started to adapt its standard form ship management agreement, SHIPMAN, to make it suitable for autonomous vessels. The AUTOSHIPMAN will be the first standard form agreement specifically produced for the autonomous vessel market and is expected to be published during 2021.

VII. GLOBAL IMPACT

The Covid-19 pandemic still rages unabated in April 2020, affecting lives, businesses, individuals and industries in ways that will change the world forever. The International Labor Organization predicts that as many as 25 million jobs worldwide could be wiped out by a worldwide recession brought about by the pandemic.

In many countries, governments imposed "lockdown" to restrict the movements of its citizens and to control the rapid spread of the pandemic. The lockdown was implemented throughout the countries in Southeast Asia in stages:

a) ***Malaysia***: The Malaysia government announced a national lockdown on March 18 by issuing the Movement of Control Order (Restricted Movement). The period of the lockdown was initially until March 31, but it has been extended to April 14. Specific exceptions have been given to transportation and some other essential service sectors.

b) ***Indonesia***: The Indonesian government on March 15 formed the National Disaster Management Agency (BPNP) and declared National Disaster – Non-Natural situation until May 29. It has requested all citizen to work, study and pray from home.

c) ***Singapore***: On April 3, Singapore announced 'circuit breaking' measures, a euphemism for lockdown. Earlier measures included trade and border control measures: the Maritime and Port Authority of Singapore implemented temperature screenings at all sea checkpoints, including ferry and cruise terminals, PSA terminals and Jurong Port for inbound travelers. It has also taken additional precautionary measures such as prohibiting shore leave for personnel in Chinese ports, mandatory temperature checks, keeping a log of crew movements and restricting staff travel to China, among others.

d) ***Thailand***: Thailand's lockdown operates until April 30.

e) ***Philippines***: President Rodrigo Duterte's lockdown came five weeks after the first case was discovered, and a declaration of a State of Emergency on March 25 gave him extraordinary powers.

Cruise Industry

As the pandemic raged worldwide, the plight of the passengers and crew on board cruise ships and the cruise industry came into stark focus.

Cruise ships - with large numbers of passengers and crew and an emphasis on communal dining and group activities - became incubators of the Covid-19 virus, and infections on ships like the *Diamond Princess* have been described as floating nightmares.

The *Diamond Princess*, operated by Princess Cruise Lines, departed from Yokohama on February 4 for a round trip cruise. On January 20, an 80-year-old passenger from Hong Kong embarked in Yokohama, and he disembarked in Hong Kong on January 25. On February 1, six days after leaving the ship, he visited a Hong Kong hospital, where he tested positive for Covid-19.

The ship was due to depart Yokohama for its next cruise on February 4, but it announced a delay the same day to allow Japanese authorities to screen and test passengers and crew still on board. On February 4, the authorities announced positive test results for SARS-CoV-2 for ten people on board, the cancellation of the cruise, and that the ship was entering quarantine. By late March, about 712 of 3,711 people on the *Diamond Princess* (19 percent) had been infected by Covid-19.

Beginning March 15, Australia banned cruise ships arriving from foreign ports. However, exemptions were granted to allow four ships that were already en route to Australia to dock and disembark their passengers. On March 19, the *Ruby Princess* - one of the four ships given an exemption - docked in Sydney after a cruise to New Zealand. The cruise ship was forced to return to Sydney early after a passenger reported a respiratory problem, but when disembarking, passengers were not told that anyone on board presented any symptoms during the voyage.

Many countries in Southeast Asia banned cruise ships from disembarking their passengers for fear of importing the virus through infected passengers and crew. Cruise ships are often registered under flags of convenience, e.g. Panama, the Bahamas and other countries chosen for their low wages, cheap fees and lenient health and safety regulations - and, more often than not, their non-existent tax regimes.

At the time of writing there are still cruise ships with passengers and crew infected by Covid-19 seeking safe harbor. These ships often have difficulty finding countries and ports willing to receive them and allow them to disembark passengers. Each country can set conditions for entry into its ports and many have denied entry to these ships seeking safe harbor.

These incidents involving cruise ships pose the question whether the cruise industry can survive or recover from the effects of the pandemic.

Port Congestion

Many countries have responded to the pandemic by imposing lockdown or restricting movement. Some retailers and manufacturers fail to pick up their cargo and containers because their warehouses are full or closed. Some ports remain open but have reduced workforce, which exacerbates the cargo congestion. This causes disruption of the supply chain, including movement of essential goods and foodstuffs. The cargo lying uncollected at ports creates congestion and takes up space, reducing capacity for incoming cargo and containers.

Some ports have taken the precaution to declare 'force majeure' to pre-empt claims and legal liability. The closure of ports and port congestion has caused disruptions in the supply chain and import and exports.

Supply Chains

The pandemic has exposed the fragility of the global supply chains and brought into acute focus the shortages of critical medical components needed in the fight against the pandemic.

Wuhan and China in general were important manufacturing bases for manufacturing of key components for companies like Apple. The pandemic lockdown and measures were taken stopped manufacturing of crucial component items and disruption of supply chain. When the manufacturing Countries ravaged by the pandemic find it hard to provide adequate medical care due to shortages of critical medical equipment such as ventilators, protective masks and other gear. In the U.S., the shortage has multiple causes, including problems with the global supply chain. Before the pandemic, for instance, China produced approximately half the world's face masks. As the infection spread across China, their exports came to a halt. Now, as the infection spreads globally and transmission in China slows, China is shipping masks to other countries as part of goodwill packages. The United States has not been a major recipient.

Crew

The Philippines, China, India and Indonesia are among the biggest suppliers of crew members. According to one report, the pandemic has caused some 40,000 Indian crew serving on merchant and cruise ships to be stranded worldwide.

Airline and port restrictions in most of these countries have made it nearly impossible for crew members to get home if the governments do not make special arrangements. Even if a ship reaches an open port, the crew members may still be out of luck because most international air traffic is grounded. The safe repatriation of the crew from the vessels will require the joint efforts of the governmental agencies, the crew manning agency and the owners.

Insurance

Insurance implications arise from the disruption of shipping and logistics due to the pandemic. Cargo owners, importers, risk managers and insurers need to monitor closely: (a) Accumulation of Cargo; (b) Delay; (c) Delay Clause; (d) Demurrage Charges; (e) Deviation; (f) Force Majeure; and (g) Interruptions in Transit.

The insurance implications of the disruption include:

i. Cargo and stock throughput – limited workforce availability will reduce capacity to distribute and handle goods. Cargo is also envisaged to be held for a longer duration at ports and for storage locations to see a volume increase whilst stocks await their next destination.

ii. These areas raise the limitations of cover of the normal marine cover:
- Delay – although many will want to keep their cargo moving, delay during the ordinary course of transit or while the goods are in storage could soon be inevitable. Most cargo and stock throughput policies exclude loss or damage solely caused by delay.
- Additional costs/charges –hold-ups or re-routing goods to an alternative destination due to government prohibition will incur an additional cost. Although these costs are usually sub-limited, the additional forwarding costs clause (or similar) will provide extra financial support should you experience added expenses.
- Vulnerable goods – perishable items such as pharmaceutical products and produce operate on a stringent and well-monitored time schedule. The normal cover for marine insurance does not cater to the characteristics of these cargoes due to exclusions for inherent vice and delay. Both will operate when ports are congested and cargo clearance is delayed in the current outbreak.

Legal Disputes

The disruption caused by the pandemic has legal effects.

The cargo owner who charters vessels to ports to load or to discharge cargo is required to nominate a "safe port" - i.e. a port which the vessel can safely call at, conduct cargo operations and safely leave. When the intended port is closed, the cargo owner / charterer would be obliged to nominate an alternative port. This is often not possible as there will not be any alternative destination the cargo can be discharged at.

If the cargo is non-essential cargo, it cannot be moved to the ports during a national lockdown. This may result in the vessel arriving at the port and finding no cargo to be shipped, causing incurring of costly demurrage.

Before the vessel can take on cargo, it must be cleared by the health authorities of the port, a process known as obtaining "*free pratique*." In the pandemic-affected countries the process of vetting the crew may take time, and this delay will fall on the shipowner rather than on the charterer.

The effects of the pandemic may possibly be covered in the force majeure clauses in some contracts, but these are not uniform and will not be always be available. The disruptive effects of the pandemic will cause losses and the result in the most part will be to determine who will bear or share these losses.

While these legal issues and disputes do not immediately arise, they will certainly surface once countries recover from the immediate effects of the pandemic.

VIII. INDIAN SCENARIO

The coronavirus (COVID-19) pandemic continues to disrupt global trade, due in part to reduction in distribution capacities and delays in evacuation or arrival of goods in transit or at ports. To address this adverse impact on the ability of stakeholders in discharging their contractual obligations, the Indian Ministry of Shipping issued guidelines that the pandemic may be considered as a valid ground for invoking Force Majeure (FM) clause on port activities and port operations.

This supplements the Ministry of Finance's clarification which described COVID-19 as a case of natural calamity and stated that an FM clause may be appropriately invoked in accordance with the Manual for Procurement of Goods 2017 where FM means:

"Extraordinary events or circumstance beyond human control such as an event described as an act of God (like a natural calamity) or events such as a war, strike, riots, crimes (but not including negligence or wrong-doing, predictable/seasonal rain and any other events specifically excluded in the clause)."

Shipping industry during the pandemic

Shipping industry transports 90% of the goods all over the world and has a crucial impact on business and global economy, and due to the pandemic, it has already been affected. The next few years will face foul effects on the economy. As the pandemic manifests itself deadlier day by day, the commercial shipping industry is facing worse repercussions. COVID-19 is likely to result in real global economic distress; the WTO calculates that world trade is expected to fall between 13% and 32% in 2020. The maritime sector, that has played a crucial role in bringing people together by opening up a business and connecting countries, hence providing an economic backbone is facing a setback now. For the next 12-18 months, the rating agency, Moodys has changed its forecast of the outlook for the shipping sector from stable to negative.

The United Nations Conference on Trade and Development (UNCTAD) Maritime Transport estimates 2019 had already suffered a decline in global maritime trade due to rising trends of protectionism, world-politics and sanctions, trade tension, cargo traffic, tariff escalation between China and the United States. The COVID-19 on top of all this is likely to give a massive blow to the industry, and stabilising the industry back will be difficult.

The entire maritime operations from shipyards and ports to carrying of bulk commodities have been affected. Fall in demand and reduction of the workforce has pushed freight rates even down. Additional sanctions by countries at the sea-ports like the ban on the crew is disrupting the change in which the shipping services were carried out. Commodities in the transits are being delayed, rerouted, or discharged because of safety measures. As different countries are operating under different rules and phases of lockdown, the issue of port congestions with cargo and containers lying unattended has surfaced. Offshore drilling has also been affected due to the crisis in many countries. Related industries like fisheries, seafood, marine engineers, etc shall also suffer consequences.

The international organisations urge that amidst the prevailing crisis, it is critical for maritime trade to supply chains and remain functional. Kitack Lim, the Secretary-General of the International Maritime Organisation (IMO) said, "*In these difficult times, the ability for shipping services and seafarers to deliver vital goods, including medical supplies and foodstuffs, will be central to responding to and eventually overcoming this pandemic*," while recognizing the challenge at this hour. He also stated that member states should realize that catering to the ceasing of the spread of the virus is important but global trade must be able to continue. Similarly, UNCTAD also emphasised primarily on the world's ports being open for ship calls and the movement of crews with few obstacles even during the lockdown. International bodies like IMO, UNCTAD and International Maritime Health Association (IMHA) have issued guidelines to ensure the safety of mariners and staff working in port communities of the industry.

The demand for shipping is a derived demand, which is directly influenced by the manufacturing and international trade. At the initial stage of the Covid-19 lock-down, the shipping industry experienced a slowdown. This was a global scenario. There were some preliminary disruptions and delays in the loading and unloading of goods due to the safety protocols and regulations that were put in place, globally.

Presently, the Indian shipping industry is reviving from the impact of the COVID 19 pandemic. One such important step is the Merchant Shipping Bill, 2020 that has been promulgated, with the primary aim of promoting the growth of the Indian shipping industry by incorporating the best practices adopted by other advanced countries like the U.S., Japan, U.K., Singapore, and Australia. The Bill aims to offer increased opportunities for foreign investment and provide a better foundation to domestic investment climate in the maritime industry.

Neptune Declaration:

The Neptune declaration was initiated by Global Maritime Forum for universally categorizing seafarers as "key frontline workers" given the nature of their service to the trade and commerce industry. Unlike many other regularized sectors, the seafarers unfortunately do not have scheduled shifts to ensure their holistic well-being. The Neptune declaration takes into consideration the need for shift timings for the maritime crew in line with their agenda of mental and physical well-being and health of this cohort including vaccination.

The Covid -19 pandemic has disrupted and caused a unique crisis at sea with thousands of seafarers being stranded aboard the ship, even post expiry of their employment contracts. For the Neptune declaration to bear the suggested fruits of change, at a global level, the aviation and the shipping industries will have to work cohesively with governments to ensure that airlift activities are initiated between major crew changing hubs and the seafaring nations. In my view, the Neptune declaration is a welcome step in enabling long term health and safety of the seafarers, who are an integral part of an industry which handles logistics of over 90% of international trade.

Budget 2021 and the Maritime Sector:

Over the last few years, in our endeavour to make the Indian maritime sector *"atmanirbhar",* there have been concerted attempts by our Government to shift gears with respect to development of ports and expansion of shipping connectivity to our hinterlands in achieving the 5 trillion economy mark. The focus has also expanded to compete with the global maritime industry to make Indian shipping industry *an owners' market as against present charterers'* market.

Recent budget has further provides a boost to this aspiration, amongst others, by including development of 7 new port projects through PPP (public-private partnerships). The scheme that has been introduced for flagging the Indian merchant ships and providing subsidies in global tenders. This provision will accentuate the Indian position in the global scenario whilst generating additional employment opportunities for the youth in the shipping sector from a long term perspective.

With India acceding to the HK International Convention on recycling of ships and the enactment of Recycling of Ships Act, 2019, efforts are being made to bring European and Japanese ships for recycling, will further boost the Indian ship recycling industry and the capacity is forecasted to double by 2024. All this will generate a growth outlook and provide a positive momentum to employment opportunities in the coming years.

Laws regulating the Shipping Industry

The Ministry of Shipping (MoS) centrally controls and regulates the shipping sector in India. The MoS has a partially autonomous statutory body, which is known as the Directorate General of Shipping (DG Shipping) whose powers are monitored by the Indian Merchant Shipping Act, 1958 (MSA). It tackles all issues regarding the shipping policy and enactments, execution of various other international conventions of the International Maritime Organization. The MSA is a parent body that regulates acts that deal with merchant shipping. The MSA allows the DG Shipping to promulgate further legislation, for example, circulars and notifications so that it can deal with all problems relating to the shipping sector. The DG Shipping further constitutes the Mercantile Maritime Department, a body that involves the registration of Indian-flagged vessels, surveillance of ships and enactments of international regulations such as the SOLAS and Load Line Conventions.

The MoS also has a chartering wing (Transchart) for the movement of government-owned and government-controlled ships. While giving preference and support to Indian-flagged vessels without any difference in freight rate, trans chart also creates shipping arrangements at competitive freight rates of international level, sometimes at a service charge of 1%. Transchart generally finalises long-term charter parties. It also draws agreements of affreightment for several Indian government-owned entities, such as for the Steel Authority of India, Rashtriya Ispat Nigam Ltd, the Department of Fertilizers, and so on.

Most of the major ports in India have ownership and are regulated by state and union governments. The state governments of Gujarat, Maharashtra and Tamil Nadu have also legislated acts to carve out autonomous maritime boards to not only own and operate ports but also to formulate parameters. It is also observed that in many instances that port authorities have entered into public-private agreements with private entities under the ‘Build, Own Operate and Transfer’ (BOOT) Policy which is solely designed for the participation of private sectors in the building of Indian ports. The Tariff Authority for the Major Ports (TAMP) is a quasi-judicial regulatory body, that deals with the levy of port tariffs or tools such as berthing charges and anchorage charges.

India allows all foreign direct investments under the generic route in the shipping industry, however, there have been only a handful of global players who want to invest and promote their vessels in India. Generally, foreign investors can set up special purpose vehicles that own an Indian flagged vessel. This is to take advantage of the cabotage policy in India.

An Indian shipping company can always opt for the tonnage tax system such as the maintenance and training of Indian seafarers and also making financial clauses for new vessel ownership by abiding certain guidelines laid down by the government. The Indian indirect tax regime has undergone a dynamic overhaul in bringing effect to the goods and services tax regime. The Indian government has also brought in an amendment by its notifications informing that the ocean freight export will be exempted from goods and services tax.

i. Satellite devices and ammunition banned in Indian waters

There have been incidents where crew members from foreign lands were using satellite devices, like Thuraya or Iridium phones, inside the Indian territorial waters. They were subsequently arrested. The use of such satellite devices has been banned from India by the DG Shipping. The Indian authorities always have the right to deny permissions to use such satellite phones even if a foreign-flagged vessel board with all the valid documents permits them to carry those. However, these satellite phones could be used only after a 'no objection certificate' is issued from the Department of Telecommunications. Incidents have been observed where otherwise it invited a full-fledged trial of the offence. In the past, there were vessels that were detained for their failure to provide proper declarations from beforehand. The Madurai Bench of the Madras High Court arrested many foreign crew members on the MV Seaman Guard Ohio, a foreign-flagged floating vessel because they entered in India for entering Indian waters. Carrying of arms and ammunition have posed additional complications for vessels staying in an Indian port after the incident with the MV Seaman Guard Ohio.

ii. Cabotage

India does not have a regulation that stops foreign actors from operating in the Indian markets or ship business unlike some other countries like China. On the other hand, India can rightfully refuse the regime. In many circumstances it is observed that Indian ship owners are given the prior opportunity when making contracts with a foreign shipowner under the Indian charter. The DG Shipping would initially look into the matter with the Indian National Shipowners Association (INSA), which is a private body of Indian shipowners, as to if an Indian ship owner could be assisted with a vessel having similar criteria at the same or at a lower freight rate which was asked by the foreign shipowner. And only when INSA issues a 'no objection certificate', a licence can be obtained by the Indian party to charter a foreign-flagged vessel. As far as coastal trade is concerned, a no-objection certificate needs to be issued by the Indian Coastal Conference (ICC).

In an attempt to bloom the *'Make in India'* policy of the Government of India and also to add a spur growth to the shipbuilding sector in India. The government in the recent past has also issued a circular on 13th February, 2019 along with a consequent circular on 22nd March 2019 wherein, for the first time, an Indian-built foreign-flagged vessel would have a preference over foreign-built Indian-flagged vessels.

Before the release of the Proposed RoFR Regime was drafted, the order of priority among various categories of shipowners was as follows:

1. Vessels which have an Indian flag.
2. Vessels that have a foreign flag, but are owned by India.
3. Vessels that have a foreign flag, and do not belong to India.

Under the Proposed RoFR Regime, the order of priority that must be followed:

1. Vessels that are built in India – irrespective of the flag it has.
2. Vessels that are not built in India, but owned by India, and have an Indian flag.
3. Vessels that are not built in India, and do not have an Indian flag, however, it is Indian chartered.

In the case of *The Great Eastern Shipping Company Limited v. Union of India [AIR 1971 Cal 150]*, the Delhi High Court, had passed an order stating that the operation of the proposed RoFR Regime would be subject to the outcome of the proceedings and, or any further appellate proceedings. There would likely be a dynamic shift in the Indian cabotage regime, which is bound to have a far-fetched effect for all stakeholders that are involved in it.

IX. CONCLUSION AND ANALYSIS:

The situation is today at best uncertain, and the relevant facts are changing rapidly, with new legislation coming into effect on a daily basis. It is clear that this is difficult to handle for any national or international business in the maritime sector.

Covid-19 has not only affected the global order but also negatively impacted the international relations. The Sea Trade has been badly hit by the pandemic hence disrupted the global order completely.

In addition to the first priority for all businesses to fight the virus and try to contain its spread, management must seek to secure their business and bottom line in order to survive and get out of the situation as best as possible. This means that as far as possible it should be business as usual in the very unusual times.

What can and should be done is to consider the COVID-19 pandemic and try to hedge as best is possible for this, both for existing contracts (by analysing contractual rights and obligations and mitigation measures) and new contracts now being entered into. As the COVID-19 pandemic is now well-known worldwide, it cannot be relied upon as a force majeure situation and excuse going forward, as this today is something which the parties can foresee and therefore regulate the risk for in their new contracts. A tailor-made 'corona clause' should therefore be considered for all new contracts.

In India, the implication of FM in the COVID-19 world of shipping is dependent on the scrutiny of elements of the FM clause, Governmental position, applicable law and the nexus with the impediment faced in performing the contractual obligation. Further, it is advisable to determine the insurance coverage for losses resulting from COVID-19.

However, in case of the standard marine insurance policies, alternative means may be required for risk management since they may generally be ineffective due to exclusion of delays from their coverage. For that purpose, relevant governmental policies may be effective, in addition to ascertaining clarity on the duty to mitigate contractual non-performance and protection of acts done in good faith.

The most important thing is to recognise and cater to the solutions of the bottleneck situations due to COVID-19 pandemic and try to ensure and protect both the existing contracts (by analysing contractual rights and obligations and mitigation measures) and make new contracts now as per the new solutions and remedies. As the COVID-19 pandemic is being recognised worldwide, and the abrupt effects are normalising, we cannot rely upon the force majeure clauses and create excuses while going forward. Keeping the extreme situations in mind, a readymade ‘corona clause’ should, therefore, be considered for all new contracts.

The present circumstances in which a global Pandemic is hindering global commerce and generating disruptions across the distribution chain pose several difficult legal questions to traders and carriers alike. This chapter has identified some of the most common issues generated by COVID-19 and has provided some information regarding the legal framework within which affected parties should seek a solution. Carriage of goods is a complex business which can be hit by the pandemic in many different ways, with the most common outcomes being delay and compound delay. When affected by the pandemic or COVID-19 related measures or legislation, cargo owners and carriers should establish an immediate line of communication to seek a solution for every cargo affected, in the immediate aftermath of the event and in cases where problems are likely to arise.

While liability for delay is consistently excluded by express wording in carriage contracts, carriers must operate with utmost dispatch and have a duty to proceed to the agreed destination via the agreed or customary route. Shipowners and managers will not take lightly the decision to deviate from the planned voyage and should contact their counterparties in case they feel unable to perform their part of the bargain.

By the same token shipper and receivers should provide carriers all relevant information to ensure the smooth performance of the contract and proactively propose alternative solutions when the local sanitary situation or legal restrictions prevent in full or in part the ordinary course of loading and discharge operations. In this note reference has been made several times to the need of the parties to communicate and cooperate with one another, making every effort to overcome the difficulties an event such as a global pandemic may cause.

Going forward, all parties concerned should put significant effort in attempting to prevent uncertainty in the future performance of carriage contracts and work with their trade associations, insurance representative, stakeholders, and governments to develop a structured response. While issues like deviation and safety at sea are well covered by carefully drafted clauses in standard form contracts, issues like delays at loading, the unavailability of cargo due to unforeseen events, the unavailability of the bill of lading at discharge, access to cargo and port charges do not seem to be equally well catered for. The current pandemic has highlighted the need to re-balance the interests of carriers and cargo in some instances and further work is needed to find mutually acceptable drafting solutions.

One issue which has clearly come to the market's attention is that of delay in documentation. With the end of the pandemic and its repercussions not yet in sight, it is hoped that commercial parties will collaborate with one another to facilitate and promote the more widespread adoption and use of the secure electronic solutions already available and accepted by the liability insurance market. A global pandemic of this scale is an unprecedented event in the history of modern trade. The number, variety and complexity of today's global transactions means that traders who have a deeper understanding of the market and the short-, medium- and long-term consequences of the pandemic are better equipped to avoid and resolve potential disputes.

Carriers, insurers, and cargo interests should take this opportunity to make a leap forward and make the best use of technology to prevent disruptions, seek to allocate fairly the risks arising out of unforeseen and serious events, and protect the essential flow of goods across all trade routes. Trade associations have an important role to play in devising appropriate standard form terms, for inclusion into future commercial contracts. Governments and policymakers too, should consider, as feasible, where temporary financial support may be required to avoid potentially widespread business failures.

To conclude, we can definitely predict that the pandemic will inflict structural damage on the international economy. Although the precise impact of the COVID crisis is still unfolding, it has created a chain effect on global supply chains and hence there is a possibility of the economies turning inward. The effect, as a result, will obviously fall on the shipping industries. The crisis shall also slow down the reassessment of globalisation's costs and benefits. With consumption and demand rates falling, and GDP contraction all over the world, it can be well estimated that the bulk carriers will continue to suffer in the coming months, if not years.

One of the aftereffects of the pandemic could also be seen in the operational changes in the shipping sector. On the bright side, the COVID crisis may act as a catalyst for digital and technological intervention in the industry. This shall also make the sector more resilient to such abrupt shocks in the future. The actors in the current situation would be willing to consider smart technologies like port digitisation, artificial intelligence, Internet of Things (IoT), or even blockchain technologies. Even though the use of these things has come to vogue, however, it shall become mainstream via the rampant use.

During these unprecedented times, the increased use of technology across the global shipping sector has allowed the global maritime industry to better withstand the numerous challenges it has faced as a result of the pandemic. Industry stakeholders have noted the benefits of new technological advances that can enhance efficiency, productivity and safety while reducing costs and emissions.

We can seize on the aftermath of this painful experience as a catalyst to create a new international rules-based order that more effectively and fairly upholds the highest values agreed upon by the international community and all citizens around the world.