

INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW

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Chapter 1

International Sources and Institutional Aspects

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Chapter 1

INTERNATIONAL SOURCES AND INSTITUTIONAL ASPECTS

Nicolas Valticos

I. INTRODUCTION

1. From the very beginnings of labour law, in the nineteenth century, it was widely held that such legislation could be solidly based and soundly developed in individual countries only if it was supported by parallel measures of international legislation adopted in the same field. Thus, international labour standards were regarded not merely as a source of inspiration and a factor in the harmonisation of national labour legislations, but as an essential condition for the latter's very existence, its maintenance and its development. This is one of the reasons why the international sources of labour law date back so far and are so abundant. It will therefore be necessary in the first place to consider the purpose of international

labour law¹ (*infra* II). Secondly, the various international sources of labour law, the most important of which stem from the International Labour Organisation (ILO), will be examined (*infra* III). The next sub-chapter will deal with the formulation of international conventions and recommendations from the standpoint of the procedure followed and also of the main problems encountered (*infra* IV). The implementation of international labour standards will then be discussed (*infra* V). Lastly, consideration will be given to the conflicts which may arise either between the different international rules or between international and national rules of labour law (*infra* VI).

II. PURPOSE OF INTERNATIONAL LABOUR STANDARDS²

2. *Social justice and consolidation of peace.* – In the current of ideas which led to the establishment of international labour standards, and later in the course of their development, a number of arguments were adduced in support of international labour legislation, the relative importance of which has varied from one period to another.³

The driving force behind the idea of international labour legislation was the notion of social justice, both for its own sake and as a factor in the consolidation of international peace. Thus, the Preamble to the ILO Constitution begins as follows:

“Whereas universal and lasting peace can be established only if it is based on social justice;

And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required: as, for example, . . .

The High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire

to secure the permanent peace of the world, and with a view to attaining the objectives set forth in this Preamble, agree . . .”⁴

The question has sometimes been raised as to whether the relation claimed between social justice and universal peace – sometimes expressed in the Latin formula *si vis pacem cole justitiam* – was really valid or was a mere figure of speech specifically designed to justify the creation of the ILO under the 1919 Peace Treaties. As *Albert Thomas*, the first Director of the ILO, himself admitted⁵, it would be historically incorrect to accept the formula literally; it should in fact be interpreted in a broad and indirect sense.

Thus, it has been pointed out that measures of social justice which provide, among other things, for trade union rights are bound to strengthen democratic regimes, and that these are more likely to be peace-loving than are authoritarian regimes. Social peace within countries may also sometimes be related to international peace inasmuch as internal tensions may have reactions

¹ The term “international labour law” is here used to indicate that part of labour law of which the source is international, and not problems of conflict of law in the labour field (such as the law applicable, etc.).

² For further details on this question, as on the other points dealt with in the present sub-chapter, see *Valticos*, *Droit* (with Supplement).

³ For the older arguments, see *Mahaim*, *The Histori-*

cal and Social Importance of International Labour Legislation: *Shotwell* I 3-18.

⁴ ILO Const. (text ed.) 5.

⁵ See *Thomas*, *Justice sociale et paix universelle*: *La Revue de Paris* 31 (1924) no. 6, 241-261. See also the comments on the same subject of one of his successors, *Phelan*, *The Contribution of the I.L.O. to Peace*: 39 *Int.Lab.Rev.* 607-632 (1949).

abroad. Stress has been laid on a positive and dynamic concept of peace, involving the establishment of stable, just and harmonious conditions both within individual countries and between different countries, by eliminating, *inter alia*, rivalry on world markets arising out of too great a disparity between labour conditions. It has also been claimed that the establishment of international labour standards aiming at improving the condition of mankind develops a common sense of social solidarity internationally and fosters a climate of mutual collaboration and understanding transcending racial and national differences. The fact that in 1969 the Nobel Peace Prize was awarded to the ILO clearly shows that the link between social justice and the consolidation of world peace is still recognised by a strong current of public opinion.

Social justice, however, is also in its own right an objective of international labour legislation. Originally inspired by humanitarian concern in the face of the conditions of great hardship imposed on the workers by developing industrialisation, it was the mainspring of the movement whose first achievement was the adoption on both the national and international levels of measures to protect children from conditions of work which had shocked the public conscience. The notion of social justice, consecrated in 1919 by the ILO Constitution, has certainly been since then the most powerful driving force in the development of international labour legislation. It is true that since 1919 there have been marked improvements in conditions of work and standards of living in the developed countries, in spite of the persistence of isolated imbalances and pockets of poverty. In the greater part of the world, however, social conditions still involve hardship, and in some cases are critical. The poorer countries are facing serious problems, such as poverty, unemployment, lack of adequate administrative infrastructure and of essential facilities in the field of health and education, leading often to less importance being attached to the rights of the individual and of groups. The urgency of finding solutions to these problems made it even more important to define clear goals for national development and the welfare of the population, a process in which international standards, used with a proper sense of priorities, could prove of considerable help. One can refer in this connection to the emphasis placed on social development in the Strategy for the Second

Development Decade (*infra* s. 5). Apart from the problems arising from underdevelopment, certain essential freedoms affecting trade union rights are sometimes more or less severely restricted or even denied, in all parts of the world. Moreover, the notion of social justice is constantly evolving to keep pace with rapid technical and social change.

A growing need for security and well-being is accompanied by a desire for more freedom, more equality and a greater measure of participation in the management of society, as well as for better "quality of life" and a substantial improvement in working conditions. The notion of social justice now goes far beyond the elimination of the most crying injustices and the traditional idea of protecting the weak. It embraces the general welfare of mankind in the broadest sense, as defined by the Declaration of Philadelphia – which is part of the ILO Constitution – and which proclaims that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity".⁶

3. *International competition.* – A third argument in favour of international labour legislation is based on international competition. In the Preamble to the ILO Constitution it is formulated as follows: "... the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries".⁷ This was in fact one of the first reasons advanced for the adoption of international labour conventions. It was an answer to the opponents of national measures for the protection of labour who were afraid that the countries concerned would thereby be put at a disadvantage on international markets because of the resultant higher cost of their products. This argument was used throughout the nineteenth century and during the early years of the twentieth.⁸ It has been given less prominence recently, with the growing realisation that costs and the competitive value of products depend on many factors other than labour costs. Nonetheless it remains valid to some extent, particularly as between countries where conditions are similar and which are not separated by tariff barriers.

For example, it was for reasons connected with the equalisation of costs and competition that the Treaty of Rome of 1957⁹ which set up the EUROPEAN ECONOMIC COMMUNITY dealt with the question of equal remuneration for equal work for

⁶ ILO Const. (text ed.) 24.

⁷ *Ibidem* 5.

⁸ See *Valticos*, Droit no. 1, 5, 7, 10, 16 and 135-136.

⁹ 294 UNTS 19.

men and woman workers (art. 119). Conversely, as between countries in which conditions differ widely, the objective is to secure equivalence rather than uniformity of legislation and costs. Even as between the latter countries, however, the factor of competition is sometimes taken into account; in considering the granting of tariff and commercial advantages to underdeveloped countries, for instance, it has been suggested that the acceptance by such countries of fair labour standards would reduce the risk of unfair competition.

Generally speaking, the factor of international competition, which in its historical context was a relatively valid argument, is today no longer a primary justification for international labour conventions except in certain special circumstances. However, it remains true that the harmonisation of social policy may help to reduce the opportunities for unfair competition, and thereby to safeguard world markets and to facilitate economic integration and the movement of capital, goods and manpower.

4. *International movement of workers and goods.* – Another purpose of international labour standards is, of course, to regulate matters involving international aspects, principally in connection with the migration of workers which raises a number of problems related to working and living conditions of the immigrant worker in the countries of immigration, including social security problems which are often of a complex nature. International standards may also be appropriate in respect of the transportation of goods liable to endanger the safety of the workers and of users generally.

5. *Social and human objectives of economic development.* – A more general function of international labour legislation is to emphasise the social and human objectives of economic development. It is generally accepted today that economic growth does not automatically ensure social progress. In October 1970 the United Nations General Assembly adopted the International Strategy for the Second United Nations Development Decade which lays equal emphasis on social as well as on economic objectives and which has even squarely placed economics in its social context.¹⁰ Nevertheless there is still a widespread tendency to give economic development precedence over social considerations, and it is the function of international labour standards to promote balanced

economic and social progress and to contribute the necessary element of precision to international action for social development.

6. *Consolidation of national labour legislation.* – Another function has sometimes been claimed for international labour conventions which may seem rather academic, namely the consolidation of national labour legislation by acting as a sort of safety-catch to prevent backsliding. In practice, governments do not often go back on progress made in the social field. There have, however, been a number of cases in which the existence of international commitments based on ratified conventions has prevented governments from adopting retrograde measures they had contemplated, particularly in times of crisis, while in other cases where such measures have actually been taken, the supervisory machinery of the ILO has intervened to persuade the government concerned to restore the previous position.¹¹

7. *Source of inspiration.* – Over and above the international obligations which they may entail, international labour standards have an additional function – that of serving as a general guide and permanent source of inspiration to governments by virtue of the authority attaching to texts adopted by an assembly composed of representatives of governments, employers and workers of nearly all the countries in the world. For the same reason they may guide the policy of employers and provide a basis for the claims of the workers. They have thus developed into a kind of international common law, playing a part similar to that played at different historical periods in the field of civil law, first by ROMAN law and later, by certain EUROPEAN codifications.¹²

This function has often been highlighted by those in charge of social policy in the various countries.¹³ It is particularly important at a time when many new countries are engaged in working out a body of labour legislation and when some of the older countries are feeling the need to modernise statutes and structures that are becoming out-of-date. In such cases international standards may contribute just as well to the formulation of general social policies (employment policies, social policies, etc.) as to the adoption of specific measures in special technical fields (industrial safety and health, etc.).

8. *International labour standards and technical co-operation.* – The legal standards evolved to fulfil

¹⁰ See *Director-General of the International Labour Office, Freedom by Dialogue – Economic Development by Social Progress – The ILO Contribution. Report to the International Labour Conference (Geneva 1971) 5-9.*

¹¹ See *Valticos*, Droit no. 146, and, more recently, *Rep.Com.Exp.* 1974, 153 and 154.

¹² See *Jenks*, *Corpus Juris* 105.

¹³ See *Landy*, *Influence*.

these various functions hold an important place in the overall effort of the international community to improve the welfare of mankind. They stand parallel to technical co-operation, which has been greatly developed during the past quarter of a century. These two methods of action have sometimes been compared, and even contrasted.

Standards and technical co-operation are in fact interdependent and complementary methods. Technical co-operation can be greatly facilitated

if it is based on well-defined and unchallengeable standards. And inversely, technical co-operation can provide a particularly effective means of promoting the application of standards. For this reason, and because legislation is becoming an increasingly necessary instrument of social policy in all countries, international labour standards, constantly up-dated, remain a necessary source of guidance for government action.

III. THE DIFFERENT INTERNATIONAL SOURCES

9. The international sources of labour law are very varied and differ from each other in several respects. They differ, first, as regards the legal character of the instruments in which they are contained (declarations of principle which are not mandatory but which are far from negligible in their effect; constitutional texts of international organisations; conventions designed to acquire mandatory effect on ratification; supra-national regulations; recommendations without mandatory force; bilateral agreements). They also differ as regards the international organisations from which they emanate (universal organisations, such as the ILO or the United Nations; regional organisations), and consequently as regards the countries to which they may apply. They differ again in respect of the degree of generality or precision of their terms.

Subject to the above, the normal international source of labour law is the body of standards adopted by the ILO, as a rule in the form of conventions and recommendations (but also sometimes in special texts). These will therefore be dealt with in the first place, reserving for later consideration the labour standards laid down by the UNITED NATIONS – in connection with the protection of human rights –, by various regional organisations, mostly EUROPEAN, and by bilateral agreements.

A. THE STANDARDS OF THE INTERNATIONAL LABOUR ORGANISATION

i. *The Constitution of the ILO*

10. Among the standards laid down by the ILO mention must first be made of a number of general principles which appear in the ILO Constitution and are in certain respects a direct source of law. These are contained specifically in the Preamble to the Constitution of the ILO and in the Declaration Concerning the Aims and Purposes of the Organisation adopted at Philadelphia

in 1944 and incorporated in the ILO Constitution. Direct legal consequences have been drawn from them, particularly in the field of freedom of association, state members of the ILO having been regarded as bound to some extent by these constitutional principles (*infra* s. 66).

ii. *Conventions and Recommendations*

11. *Scope and subject-matter.* – The ILO conventions and recommendations are, however, the main source of international labour law, by reason of their number, their detailed character and the breadth of their coverage. From 1919 to 1977, 149 conventions and 157 recommendations were adopted. These two types of instruments are of a different legal character: international labour conventions are instruments designed to create international obligations for the states that ratify them, whereas recommendations are designed not to create obligations but to provide guidelines for government action.

The subject-matter of these instruments has broadened significantly in the course of time (also *infra* s. 33). Without giving a detailed account of the contents of the various conventions and recommendations, which are dealt with in the following chapters of this volume, it will be sufficient here, following the order of the chapters, to give a very general survey of the main fields covered by international labour standards. Details of the substance of these standards and their full text can be found in various publications.¹⁴

As regards, first, the scope of international labour standards, this is extremely broad. While some conventions, by virtue of their purpose or their definition, apply solely to wage earners, and sometimes to those in a specific branch of economic activity, the jurisdiction of the ILO has been recognised in four advisory opinions by the Permanent Court of International Justice as being very wide. Thus it covers the conditions of work of persons employed in agriculture and, subsidiarily, the work of the employer or the work of

¹⁴ For the subject-matter of international labour standards, see also *Valticos*, Droit no. 246-578, with Supplement no. 250-588, and for a brief survey of the main lines of development *Valticos*, Fifty Years 210-215. For the full text of the standards, see *International Labour Organisation*, Conventions and Recommendations 1919-1966 (Geneva 1966); the texts adopted in subsequent years are published in the Official Bulletin

of the International Labour Office of the year of their adoption and are available as off-prints. In addition, *The International Labour Code 1951* (2 vol.) (Geneva 1952) contains a systematic presentation of the standards adopted up to that date. See also *International Labour Office*, List of International Instruments on Social Security Adopted Since 1946 (Geneva 1974).

supervision and management as well as manual work.¹⁵ By virtue of the principle of „unity of work”, it was recognised that the ILO was competent to deal with independent workers as well as with wage earners (and in fact, several conventions dealing with such matters as freedom of association, conditions of work in agriculture, or protection against discrimination in employment cover independent workers as well as others). Similarly, ILO standards sometimes cover employees in the public sector, particularly civil servants, as well as those in the private sector. Some Conventions are quite general in scope and specify that they apply to workers “without any distinction whatsoever”.¹⁶

As regards the actual subject-matter of international labour standards, employment relationships are covered, from the standpoint of the contract of employment, only by conventions concerning special categories of workers (e.g. seamen, fishermen, indigenous workers). On the other hand there is an important Recommendation of 1963 (no. 119) concerning Termination of Employment at the Initiative of the Employer. Within a broader framework, but still impinging on the field of employment relationships, the important Discrimination (Employment and Occupation) Convention and Recommendation of 1958 (no. 111) must also be mentioned here.

In the field of wages, dealt with in chapter 5 below, there are a number of conventions and recommendations covering minimum wages, protection of wages and equal remuneration, also referred to below, as well as holidays with pay, the most recent instrument on the latter subject dating from 1970.

As for other general conditions of employment (*infra* ch. 6), there are a number of instruments dealing with hours of work and the weekly rest. Apart from texts applicable to all workers or to all workers in some main branches of activity (industry, agriculture, commerce and offices), several conventions have dealt with the employment of young persons (minimum age of employment, prohibition of night work, medical examination and conditions of work). Others concern women's work, whether for the purpose of providing special protection (maternity protection, or protection against particularly trying

conditions of work such as night work, work in mines, etc.), or to ensure equal remuneration and freedom from discrimination on the ground of sex in respect of the other conditions of employment. A great many conventions deal with special categories of workers, for instance seamen and fishermen, indigenous workers, foreign workers and migrants. In this latter field, supplementary provisions were adopted in 1975. In addition, general social policy has been dealt with in conventions of general scope.

There are more than 50 conventions and as many recommendations dealing with industrial safety and health (*infra* ch. 6), from the standpoint either of specific types of risk or of special branches of activity. Certain instruments cover methods and institutions for the prevention of industrial accidents and the protection of workers' health. Social services, housing and workers' leisure are also the subject of recommendations.

As regards compensation for industrial accidents and occupational diseases (*infra* ch. 7), and social security itself, a number of texts have been adopted applying to special branches or laying down general standards of social security.

In the field of employment (*infra* ch. 10) a series of conventions and recommendations has dealt successively with unemployment, fee-charging employment agencies, vocational training and apprenticeship, employment service and, in 1964, employment policy designed to promote full, productive and freely chosen employment. More generally, the important Conventions of 1930 (no. 29) and 1957 (no. 105) prohibiting forced or compulsory labour must also be mentioned here.

In the field of trade union rights and industrial relations (*infra* ch. 11-15), the basic texts are the Conventions of 1948 (no. 87) and 1949 (no. 98) on Freedom of Association and the Right to Organise and Collective Bargaining, which were supplemented by a series of recommendations concerning various aspects of industrial relations (collective agreements, voluntary conciliation and arbitration, co-operation at the level of the undertaking, consultation at the industrial and national levels, etc.), and more recently, in 1971, by a Convention (no. 135) and Recommendation (no. 143) on Protection and Facilities to be Afforded to

¹⁵ See Permanent Court of International Justice (P.C.I.J.) 1922 ser. B no. 2 and 3, 5-43; 1926 ser. B no. 13, and 1932 ser. A/B no. 50, 365-389. See also *Jenks, La compétence de l'Organisation internationale du Travail - Examen de quatre avis consultatifs rendus par la Cour permanente de Justice internationale*: Rev.dr.

int.lég.comp. 1937, 156-183 and 586-623; and *idem*, *The Prospects of International Adjudication* (London and New York 1964) 461-480.

¹⁶ As provided in the Freedom of Association and Protection of the Right to Organise Convention, 1948 (no. 87) art. 2.

Workers' Representatives in the Undertaking and, in 1975, by Convention (no. 141) and Recommendation (no. 149) on Rural Workers' Organisations. The standards concerning freedom of association, together with those concerning the prohibition of discrimination and of forced labour, are regarded as those most closely related to fundamental human rights.¹⁷

Lastly, in connection with the organisation and functioning of labour administration (*infra* ch. 17), mention must be made of the Conventions (no. 81 and 129) and Recommendations (no. 81, 82 and 133) on Labour Inspection, Convention and Recommendation (no. 122) on Employment Policy (already mentioned above) and Convention (no. 63) on Labour Statistics. The final adoption of texts on labour administration will be discussed by the International Labour Conference in 1978. Convention (no. 144) and Recommendation (no. 152) on Tripartite Consultation to Promote the Implementation of International Labour Standards were adopted in 1976.

As the various ILO standards have been adopted in the course of a period of over 50 years, the Governing Body decided, in 1976, to undertake an overall review of existing standards with a view to determining which of them may be considered as up-to-date instruments and what may be future needs in standard-setting. This review started in November 1976.

12. *Special features.* – International labour conventions have a number of special features.¹⁸ Some of these arise out of the fact that they are adopted within the framework of an international organisation. Their institutional character is evidenced by the procedure for their adoption (*infra* s. 29), by the rules concerning the formalities for the signature and ratification of conventions,¹⁹ their interpretation (*infra* s. 15), their revision (*infra* s. 38), and the effect of war on the obligations arising out of ratification (*infra* s. 54).

A second series of special features results from the composition of the International Labour Conference, by which the conventions are adopted, and which comprises representatives not only of governments but also of national organisations of employers and workers.²⁰ One of the consequences of this is that ratification of a convention cannot be made subject to reservations (*infra* s. 46).

A third series of characteristics results from the desire to make the conventions particularly effective. This had led to the requirement that states should submit conventions and recommendations to their competent authorities (*infra* s. 43), and should make reports on non-ratified conventions and recommendations, to the rule that the withdrawal of a state from the ILO does not affect the validity of the obligations resulting from a ratified convention, and to the setting up of a sophisticated system of supervision (*infra* s. 56 ss.).

On the other hand, international labour conventions have also preserved certain features of traditional treaties: thus, a convention is binding on a state only if it has been ratified by that state (despite more radical proposals submitted in 1919 by France and Italy to the Peace Conference which set up the ILO under the Treaty of Versailles and established the system of international labour conventions); the entry into force of a convention requires a minimum number of ratifications, though usually not more than two (*infra* s. 49); and lastly, when a convention is revised the former text continues to be binding on the states which ratified it in its original form until they have ratified it in its revised form (*infra* s. 38).

The special features of international labour conventions pointed out above gave rise to a well-known theoretical discussion, particularly in the early years, on the nature of international labour conventions. Thus, *Scelle*²¹ maintained that the conventions were in no sense of a contractual nature, but were simply "international laws" adopted by an "international legislative body" (the International Labour Conference), requiring only a *conditional act*, namely ratification, which in reality would be merely an accession to a pre-existent act, to acquire the force of an internal law. The truth of the matter is that international labour conventions represent a compromise between the notions of contract-making treaties and law-making treaties.²²

13. "*International Labour Code*". – The international labour conventions and recommendations adopted over the years, although separate legal instruments, constitute a comprehensive whole which is often described as the International Labour Code.²³ This term should not be taken

¹⁷ See *Jenks*, Human Rights; *Valticos*, Normes universelles 691-769.

¹⁸ See in particular *Morellet* 1 ss.; *Jenks*, Some Characteristics of International Labour Conventions: 13 Can.Bar Rev. 448-462 (1935) and *idem*, International 574-578.

¹⁹ See *infra* s. 27 and 44.

²⁰ See *Jenks*, Significance; see also *infra* s. 27.

²¹ *Scelle* 182-185.

²² *Thomas*, Preface to *Scelle* p. XIV-XV.

²³ On this subject, see *Jenks*, Corpus Juris 102-113; see also *Wolf*, Interdépendance 117-219.

literally, since the various conventions of which the "Code" is composed may be accepted by means of separate undertakings and its content is in constant development. Nevertheless it is justified by the fact that the instruments constituting the "Code" form a coherent whole and are, as it were, all cast in the same mould.

The term International Labour Code also refers to a methodical and systematic presentation of international labour standards compiled by the International Labour Office, to which reference has already been made (*supra* n. 14).

iii. Less Formal Instruments

14. The ILO has also laid down standards by means of certain instruments of a less formal type than conventions and recommendations, principally in *resolutions* adopted by the International Labour Conference. Some of these resolutions have become current texts of reference for the bodies responsible for encouraging and supervising the implementation of conventions; this applies in particular to the 1952 Resolution concerning the independence of the trade union movement²⁴ and to the 1970 Resolution concerning trade union rights and their relation to civil liberties.²⁵

Mention must also be made of the standards embodied in the resolutions and conclusions of technical committees of experts and of meetings or bodies set up to deal with particular sectors (industrial committees, *etc.*) or particular subjects, such as social security and occupational health and safety, and statistics, or of technical regional conferences and meetings.

Texts of this type vary considerably as regards their subject-matter; some deal with basic principles while others are of a very practical technical nature. They differ also in respect of the weight they carry. None have the authority of conventions and recommendations, but a resolution adopted by the Conference carries more weight than the conclusions of a less comprehensive body. The significance and value of such texts, however, lie in the fact that they are adopted by bodies representative of the interests concerned. Resolutions can also be important for the development of the programme of the ILO in certain fields.

This was the case as regards labour-management relations, workers' education, rural development and conditions of work; as an example, one can refer to the 1975 Resolution concerning the future action of the ILO in the field of working conditions and environment.²⁶

iv. Interpretation of the ILO Constitution and Conventions

15. Under art. 37 of the ILO Constitution, any question or dispute relating to the interpretation of the Constitution or of international labour conventions must be submitted to the International Court of Justice (formerly the Permanent Court of International Justice). This provision has been resorted to only on a very few occasions, and during the early years of the Organisation's existence. Thus, on four occasions between 1922 and 1932 the Permanent Court of International Justice was called upon to give advisory opinions, and all these related, directly in the case of the first three and indirectly in the case of the fourth, to the competence of the ILO. The Court noted, in particular, the "comprehensive character" of the terms of the ILO Constitution and the broad scope of its competence.²⁷

As a result of amendments made to the ILO Constitution in 1946, a second paragraph was added to art. 37 designed to ensure greater flexibility in methods of interpretation by providing also for the possibility of appointing a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a convention. So far no recourse has been had to this provision.

The Director-General of the ILO is, however, frequently consulted by governments as to the interpretation of some provision of a convention, and the opinions he gives, accompanied by the proviso that he has no special competence in the matter, which are communicated to the Governing Body of the International Labour Office and published in the Official Bulletin of the ILO and seem to be tacitly accepted, provide authoritative documentation on the subject and have acquired considerable weight.²⁸ Over the years a very large number of such opinions have been

²⁴ 35th Session of the International Labour Conference, 1952, Record of Proceedings 583 (cited as 35 ILC 1952 RP 583).

²⁵ 54 ILC 1970 RP 733.

²⁶ 60 ILC 1975 RP 978.

²⁷ See *supra* s. 11. In addition to the works cited above (n. 15) see also G. Fischer, *Les rapports directs*

entre l'Organisation internationale du Travail et la Cour permanente de Justice internationale (Thesis, Geneva 1945), and *Valticos*, *Droit* no. 204-208.

²⁸ On this subject, see *Jenks*, *The Interpretation of International Labour Conventions by the International Labour Office*; 20 *Brit.YB Int.L.* 132 ss. (1939), and *idem*, *Corpus Juris* 121 ss.

given to governments by the ILO.

Lastly, mention must also be made in this context of the legal opinions contained in memoranda from the Director-General or the Legal Adviser of the ILO concerning questions connected with the constitutional framework of ILO conventions.²⁹

v. Decisions of Supervisory Bodies

16. A body of case law has been evolved over the years by the quasi-judicial organs set up to promote and supervise the implementation of international labour standards (*infra* s. 56 ss.). In assessing the extent to which the conventions are implemented, these organs have often had to reach conclusions as to the precise scope and meaning of the conventions under consideration.

An abundant case law, in the widest sense of the term, has thus been built up by the Committee of Experts on the Application of Conventions and Recommendations, which since 1927 has annually examined the reports of governments on the application of conventions ratified by them. The interpretative function of the Committee is not based on any explicit authority, but arises logically out of its mandate and the nature of its task. It is all the more important inasmuch as, during recent years, several international labour conventions have, in an effort to ensure flexibility, been drafted deliberately in general terms (*infra* s. 37), so that the Committee of Experts has had to interpret and define more closely their meaning and scope. This has happened in the case of the instruments dealing with forced labour, freedom of association and discrimination in employment.³⁰

A considerable case law has also been established by the Freedom of Association Committee (*infra* s. 67), which has dealt with over 900 complaints since it was first set up in 1951. While relying at the outset on the general standards laid

down in the two ILO Conventions concerning Freedom of Association (no. 87 and 98) of 1948 and 1949 respectively, the Committee, faced with a wide variety of situations, was gradually led to frame principles defining more closely, and in some respects supplementing and even extending those expressly embodied in the conventions. Examples are provided by the principles formulated by the Committee concerning the right to strike, collective bargaining, and the more general civil liberties on which the effective exercise of the right to strike depends. The essence of this jurisprudence has been published.³¹

vi. Standards Laid Down by Special Conferences

17. Special governmental conferences have sometimes been convened by the ILO outside its institutional framework to deal with questions affecting only a small number of countries, and therefore unsuitable for regulation by a universal convention. In other cases such special conferences have been convened by the ILO jointly with other international organisations in order to deal as a whole with a subject falling within the jurisdiction of several international organisations.

Agreements concerning Rhine Boatmen were first adopted in this way in 1950 by an intergovernmental conference attended by Belgium, France, the Federal Republic of Germany, the Netherlands, Switzerland, the United Kingdom and the United States. This conference was preceded in 1949 by a special tripartite conference comprising representatives of the countries concerned together with representatives of Rhine shipowners and boatmen. The Central Commission for Rhine Navigation was associated with the various stages of the proceedings. The Governmental Conference adopted two Agreements, one concerning social security³² and the other concerning conditions of employment, including

²⁹ For instance, the memorandum of the Legal Adviser (then *Wilfred Jenks*) on "The Nature of the Competent Authority Contemplated by Article 19 of the Constitution of the International Labour Organisation": O.B. XXVI (1944) 205-221 (on this question, see *infra* s. 43); and the memorandum on "The Practice of Reservations to Multilateral Conventions": O.B. XXXIV (1951) 274-312; the latter memorandum was submitted to the International Court of Justice (I.C.J.) in the genocide case and set forth the reasons why the ratification of international labour conventions cannot be made subject to reservations (see *infra* s. 46).

³⁰ See the "general surveys" submitted by the Committee of Experts on the Application of Conven-

tions and Recommendations in 1959 and 1973 (on freedom of association), 1962 and 1968 (on forced labour), and 1963 and 1971 (on discrimination in employment). The surveys of 1959, 1962, 1963 and 1968 constituted Part Three of the Report of the Committee of Experts, submitted as Report III Part IV to the International Labour Conference in the years in question. The surveys of 1971 and 1973 were published as Report III Part 4 B to the Conference in those years.

³¹ Freedom of Association. Digest of Decisions of the Freedom of Association Committee of the Governing Body of the ILO (ed. 2 Geneva 1976).

³² O.B. XXXIII (1950) 98.

hours of work, overtime, rest periods and holidays.³³ The Agreements were to come into force after ratification by all the states bordering the Rhine and by BELGIUM. The Agreement on Social Security accordingly came into force in 1953, was supplemented by an Administrative Arrangement, and was revised in 1961³⁴, the Administrative Arrangement also being revised in 1965. The revised Agreement came into force in 1970. The Agreement on Conditions of Employment was amended in 1954³⁵ and came into force in 1959; an amendment to it was adopted in 1963.³⁶

A European Convention concerning Social Security for Workers Engaged in International Transport³⁷ was adopted in 1956 by an inter-governmental conference convened by the Director-General of the ILO. The Convention is open to signature by governments of European countries which are members of the ILO. It came into force in 1958, and an Arrangement supplementing it in 1960.

An International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations³⁸ was adopted in Rome in 1961 by a Diplomatic Conference convened jointly by the ILO, UNESCO and the Bureau of the International Union for the Protection of Literary and Artistic Works. The Convention came into force in 1964.

A Recommendation concerning the Status of Teachers³⁹ was adopted in October 1966 by a special intergovernmental conference convened by UNESCO and attended by a delegation of the Governing Body of the ILO and representatives of the International Labour Office itself.

Reference is made later to instruments adopted by regional organisations, such as the EUROPEAN Social Charter, the EUROPEAN Social Security Code (*infra* s. 21), and Regulations no. 3 and 4 of the EUROPEAN ECONOMIC COMMUNITY, in the preparation of which the ILO was associated.

B. OTHER INTERNATIONAL STANDARDS

18. Apart from the standards adopted by the ILO, various other international standards affecting labour have, as already stated, been adopted by other organisations, in particular by the UNITED NATIONS and several regional organisations, mostly EUROPEAN.⁴⁰

i. United Nations Standards

19. The UNITED NATIONS does not deal with labour questions as such⁴¹, but some instruments of more general scope have also covered labour matters. An example is the question of *slavery*, in respect of which the 1926 Convention was framed under the auspices of the League of Nations⁴² and the supplementary Convention on the same subject was adopted in 1956⁴³ under the auspices of the United Nations.

More recently, labour questions have been touched on by the UNITED NATIONS mainly in the instruments concerning human rights. Thus, a number of provisions concerning labour matters appear in the Universal Declaration of Human Rights⁴⁴ adopted in 1948, which is not mandatory, and in the two International Covenants on Human Rights (1966)⁴⁵, which entered into force at the beginning of 1976 when they were ratified by 35 states each.

The Covenant on Civil and Political Rights includes provisions concerning non-discrimination, forced labour and freedom of association (particularly trade union freedom). But it is the Covenant on Economic, Social and Cultural Rights that contains the largest number of provisions relating to labour: non-discrimination, the right to work, the right to form trade unions, the right to strike "exercised in conformity with the laws of the particular country" (art. 8 par. 1(d)), the right to social security, protection of and assistance to the family - specifically, mater-

³³ O.B. XXXIII (1950) 113.

³⁴ 717 UNTS 3, O.B. XLIV (1961) 372.

³⁵ 345 UNTS 285, O.B. XXXVII (1954) 22.

³⁶ O.B. XLVI (1963) 462.

³⁷ O.B. XXXIX (1956) 409.

³⁸ 496 UNTS 43.

³⁹ O.B. I (1967) 126.

⁴⁰ Certain other texts, such as the Red Cross Conventions of 12 Aug. 1949 relative to the Treatment of Prisoners of War and to the Protection of Civilian Persons in Time of War (75 UNTS 135 and 287), also include provisions concerning the employment of the classes of persons concerned. See *Wolf*, *Interdépen-*

dance 187-193.

⁴¹ Under the agreement concluded between the two organisations in 1946, the United Nations recognises the ILO as the specialised agency responsible for taking appropriate action for the accomplishment of the purposes set out in its Constitution.

⁴² See Human Rights. A Compilation of International Instruments of the United Nations (New York 1967) (no. E.68.XIV.6) 41.

⁴³ *Ibidem* 44.

⁴⁴ *Ibidem* 1.

⁴⁵ *Ibidem* 3.

nity leave and protection of children and young persons –, the right to an adequate standard of living, and the right to the highest attainable standard of health.

Because of their comprehensive nature the Covenants are drafted in general terms, and the various rights relating to labour which they recognise are the subject of more precise and detailed ILO standards.⁴⁶ As for their subject-matter, the protection provided under ILO instruments often goes beyond the standards laid down in the Covenants, except on certain points of detail. In some fields, however (occupational safety and health, agricultural work), further development of the ILO's standard setting activity could help to promote the practical implementation of the rights proclaimed in the Covenants.

In December 1965, a year before the adoption of the Covenants, the United Nations General Assembly adopted a Convention on the Elimination of All Forms of Racial Discrimination.⁴⁷ This came into force in January 1969.

Lastly, mention must be made of the 1951 Convention relating to the Status of Refugees,⁴⁸ which came into force in 1954 and which provides that refugees shall receive the same treatment as nationals in the field of employment and – subject to certain reservations – of social security. A similar provision appears in the 1954 Convention on the Status of Stateless Persons,⁴⁹ which came into force in 1960.

ii. Regional Standards

20. *General aspects.* – Since the end of the Second World War, standards concerning human rights and, more specifically, labour have been adopted within the framework of various regional organisations, particularly EUROPEAN. It has, in fact, sometimes been suggested that having regard to the wide divergencies between economic and social conditions in different parts of the world, regulation on a regional basis might provide a solution to the problems arising in connection with the adoption of world-wide standards. Regional standard-setting has certainly led to successful results in EUROPE, although rather in the field of human rights than in that of labour.

The policy of the ILO has been to avoid the creation of any systematic network of regional instruments.⁵⁰ It was feared that the existence of regional standards differing from the general international standards would tend to accentuate rather than reduce existing discrepancies between the different parts of the world, to eliminate the spur of stimulation and harmonisation provided by general standards, to lead to divergencies as between the various sets of standards, and to discredit both the general and the regional conventions, the latter tending moreover to take on an exclusive and restrictive character. It is significant that in 1972, at Addis Abeba, the ILO African Advisory Committee expressed the view that "ILO standards should continue to be adopted on a world-wide basis" and that "any attempt to adopt standards on a regional basis would be a backward step and would produce anomalies and tensions between different regions". It was also recalled then that "sub-standards for sub-humans have no place in the ILO".⁵¹ Moreover, within the various geographical regions, there are also great differences in conditions as between more developed and less developed countries. The ILO has therefore approached the matter as a global one of framing universal standards capable of being adapted to different levels of development.⁵² For these reasons, when, in March 1976, the ILO Governing Body considered the in-depth review of international labour standards, it maintained that "Conventions and Recommendations should remain universal in character, and that the special needs of countries should be taken into account through appropriate provisions in these instruments."⁵³

Nevertheless there are circumstances in which regional standards can play a useful part in completing world-wide standards (*infra* s. 27). In this connection, reference has already been made to certain texts adopted under the auspices of the ILO but applicable to countries of a particular region in respect of matters of particular interest to them, as in the case of Rhine boatmen and international transport in Europe (*supra* s. 17).

21. *Council of Europe standards.* – Among the numerous texts dealing with social questions adopted by the Council of Europe, the EUROPEAN

⁴⁶ See *International Labour Office, Comparative Analysis of the International Covenants on Human Rights and International Labour Conventions and Recommendations: O.B. LII (1969) 181-216.*

⁴⁷ Human Rights Compilation (*supra* n. 42) 23.

⁴⁸ *Ibidem* 63.

⁴⁹ *Ibidem* 57.

⁵⁰ See Rep.Dir.Gen. 1963, 188-189.

⁵¹ Minutes of the 170th Session of the ILO Governing Body, Nov. 1967, 82 par. 156.

⁵² See in this connection *Valticos*, Normes universelles, and *Wolf*, Droit social.

⁵³ ILO Governing Body Document G.B.199/9/22 (Rev.) March 1976, Appendix par. 15.

Social Charter is the basic comprehensive instrument.⁵⁴ Drawn up with the technical help of the ILO and signed in 1961, it has so far been ratified by 11 of the 20 member states of the Council of Europe. Its ratification is subject to acceptance of at least 10 of the 19 articles or 45 of the 72 paragraphs of Part II of the Charter, including a compulsory nucleus of at least five of the seven articles regarded as the most important. The provisions of the EUROPEAN Social Charter are based largely on the relevant ILO standards, but are not drafted with the same degree of detail and precision owing to the comprehensive nature of the instrument. As for the substance of the Charter's provisions, by and large the standards set are equivalent to those contained in ILO conventions and recommendations, although in some cases they are lower and in others they go further, or cover matters for which no ILO standards exist. The most original feature of the Charter is its recognition of the right of workers and employers to collective action in case of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into and to some other restrictions. It also establishes machinery for supervising the implementation of its provisions (*infra* s. 78).

In connection with the Council of Europe, reference must, of course, also be made to the EUROPEAN Convention for the Protection of Human Rights and Fundamental Freedoms,⁵⁵ concluded in Rome in 1950 and since ratified by all the member states of the Council of Europe. While the Convention deals essentially with civil and political rights, it also covers certain rights falling within the field of labour law, such as the right not to be required to perform forced or compulsory labour and the right to form trade

unions, and it specifies that the rights and freedoms laid down in the Convention shall be enjoyed without discrimination on any ground.

In the field of social security and social assistance, the Council of Europe has undertaken, with the technical help of the ILO, a long-term programme which has resulted in the adoption of a number of instruments. In 1953 two EUROPEAN Interim Agreements on Social Security were adopted, supplemented by a EUROPEAN Convention concerning Social and Medical Assistance. In 1964 a EUROPEAN Code of Social Security⁵⁶ was adopted. While based on the ILO Social Security (Minimum Standards) Convention (No. 102) of 1952, it improved the level of protection provided and was supplemented by a Protocol which itself provides for higher standards. The Code and the Protocol both came into force in 1969. Lastly, in 1972 a EUROPEAN Convention on Social Security⁵⁷ provided for equality of treatment in respect of social security as between nationals and aliens, the maintenance of rights acquired abroad and transfer of benefits from one country to another.

22. *European Community standards.* – The main purpose of the European Communities is economic, but they have also set themselves a number of social objectives.⁵⁸ The Treaty of Rome of 1957 (*supra* n. 9) refers to economic and social progress (Preamble) and to “an accelerated raising of the standard of living” (art. 2), and includes provisions, both general and specific, in the social field. The purpose of these provisions, at least at the outset, was to prevent economic integration from tipping the scales of competition against the countries with the most progressive social and labour legislation. Art. 117 of the Treaty proclaims the need “to promote improvement of the living and working conditions of labour so as to permit the equalisation of such conditions in an

⁵⁴ Council of Europe, European Treaty Series no. 35. Among the many studies of the Charter see in particular Kahn-Freund; Wiebringhaus, Charte; Valticos, Charte; Van Asbeck, La Charte sociale européenne – Sa portée juridique, sa mise en œuvre: Mélanges Rolin (Paris 1964) 427-448; the special numbers of Rassegna del Lavoro (Rome) Oct. 1961, 1487-1811, and of the Revue de l'Institut de Sociologie (Belgique) 1966, I 9-141. For a comparison between the standards of the Charter and ILO standards, see International Labour Office, The European Social Charter and International Labour Standards: 84 Int.Lab.Rev. 354-375, 462-477 (1961).

⁵⁵ Council of Europe, European Treaty Series no. 5. See in particular Golsong, Das Rechtsschutz-System der Europäischen Menschenrechtskonvention (Karlsruhe 1958); Robertson, Human Rights in Europe (Manches-

ter and New York 1963); Vasak, La Convention européenne des droits de l'homme (Paris 1964).

⁵⁶ Council of Europe, European Treaty Series no. 48.

⁵⁷ Ibidem no. 78.

⁵⁸ See in particular Ribas; Mégret, Louis, Vignes and Waelbroeck, Politique sociale (Institut d'Etudes Européennes, Université Libre de Bruxelles (ed.), Le droit de la Communauté économique européenne no. 7) (Brussels 1973); Lyon-Caen and Ribettes-Tillhet; Troclet, Eléments; L'Europe sociale 1971: Dr.soc. 1971, 1-178 (no. 11); Ribas, Jonczy and Séché, Droit social européen (Paris 1973). On the legal consequences of the various kinds of instruments emanating from the EUROPEAN COMMUNITIES, see Constantinides and Mégret, Le droit de la Communauté économique européenne et l'ordre juridique des Etats Membres (Paris 1967).

upward direction", and states that "such development will result not only from the functioning of the Common Market which will favour the harmonisation of social systems, but also from the procedures provided for under this Treaty and from the approximation of legislative and administrative provisions". Art. 118 lists the main social fields calling for close co-operation between states and for action by the Commission.

In addition to these general provisions, the Treaty also includes more or less precise rules on certain matters; for instance, in respect of equal remuneration as between men and women workers (art. 119), the maintenance of the existing equivalence of paid holiday schemes (art. 120), the free movement of workers, social security for migrant workers, and the establishment of a EUROPEAN Social Fund.

To attain these objectives and to implement the provisions of the Treaty the Communities have had recourse, to a greater or lesser extent, to the various legislative acts provided for by the Treaty, in some cases to mandatory measures (primarily regulations and directives) and in others to measures of a non-mandatory character (recommendations). Apart from the above measures forming part of the Communities' own legal system, decisions have sometimes been made by means of agreements between representatives of the member states. And lastly, the case law of the Court of Justice of the Communities has played an important role in certain fields, in particular that of social security for migrant workers (*infra* s. 80). Reference is made below to the most significant types of action undertaken by the Communities in the social sector, in connection with their two basic preoccupations: the harmonisation of social costs and employment questions.

Concern for the harmonisation of social costs has mainly taken the form of an effort to harmonise, bring into closer approximation and co-ordinate national legislations, in accordance with art. 3 of the Treaty, which specifies that the Community's activities include "the approximation of . . . municipal law to the extent necessary for the functioning of the Common Market." Art. 100 and 102 refer also to the approximation, by means of directives, of such legislative and administrative provisions "as have a direct incidence

on the establishment or functioning of the Common Market." Determination of the extent to which the harmonisation of social conditions is necessary for the functioning of the Common Market has varied between broad and narrow. Although minimalist conceptions have been abandoned, measures of harmonisation in the field of labour have been on a modest scale as regards both the subjects dealt with and the method employed – that of recommendations which are not binding on the state members. A number of such recommendations have been made concerning occupational health and safety (in July 1962, on industrial medicine in the undertaking,⁵⁹ based on ILO Recommendation no. 112, and on the establishment of a list of occupational diseases,⁶⁰ and in July 1966 on compensation for occupational diseases⁶¹ and on medical examination of workers exposed to special risks⁶²). On the subject of equal remuneration for men and women workers, the Commission adopted a Recommendation in 1960⁶³ and a Resolution was passed by a conference of member states on 30 Dec. 1961, but difficulties persisted nevertheless. More recently Directive no. 75/117 of 10 Feb. 1975⁶⁴ clarified in certain respects the scope of art. 119 relating to equal remuneration and provided for various measures to improve the radical protection of the workers concerned, and Directive no. 76/207 of 9 Feb. 1976⁶⁵ provided for equal treatment between men and women. By a decision of 8 April 1976 (*Defrenne* case),⁶⁶ the Court of Justice of the European Communities ruled that the principle of equal remuneration as between men and women workers which is established by Treaty art. 119 can be invoked before national courts, and that these have the duty to ensure the protection provided for by this provision.

A Recommendation on the Protection of Young Workers was addressed to member states by the Commission on 31 Jan. 1967.⁶⁷ In the case of hours of work in agriculture a different method was used – that of an agreement in June 1968⁶⁸ between employers and workers. More recently, Recommendation no. 75/457 of 22 July 1975⁶⁹ related in a general way to the principle of the 40-hour week and the introduction of four-week annual holidays with pay.

In the field of industrial relations, the Draft

⁵⁹ JO CE 1962, 2181.

⁶⁰ *Ibidem* 2188.

⁶¹ JO CE 1966, 2696.

⁶² *Ibidem* 2753.

⁶³ E.E.C. Bulletin no. 6/7, Aug./Sept. 1960.

⁶⁴ JO CE L 45 p. 19.

⁶⁵ JO CE L 39 p. 40.

⁶⁶ Decision no. 43/75, Recueil 1976, 455, J.T. 1976, 217.

⁶⁷ JO CE 1967, 405.

⁶⁸ See text in *Ribas, Jonczyk and Séché* (*supra* n. 58) 364.

⁶⁹ JO CE L 199 p. 32.