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Leiden
The Netherlands

Labour regulation of international aviation: A crawl-walk-run approach in international law

Shi, Y.

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3 | International labour standards

3.1 INTRODUCTION

Chapter 2 of this study presented a range of labour practices among the EU and the US as examples of inadequate labour protection in the airline industries. The subsequent chapters of this study will investigate international mechanisms that are potentially suitable for promoting labour regulation in international aviation. Discussions will start with international labour standards in chapter 3, as these standards contribute to the general framework of labour regulation and solutions proposed within international air law require reference to labour rules. Chapters 4 and 5 will then focus on the existing and prospective international air law which may deal with labour and social issues. Chapter 6 will summarise the findings in Chapters 3, 4, and 5, and propose a multi-step regulatory solution based on possible contributions from the ILO and ICAO.

The present chapter focuses on the question of whether international labour standards can effectively promote labour standards in international aviation.

Since 1919, the ILO has established and promoted a set of international labour standards designed to enhance the chances for workers to secure satisfactory and efficient employment in a climate of security, equality, dignity, and freedom.¹ International labour standards, crafted by the ILO's constituents, namely governments, employers, and workers, establish fundamental principles and rights in the workplace, outlined in either ILO conventions, which are binding on contracting States, or ILO recommendations, which are not legally binding.² In the contemporary globalised airline economy and international air services, international labour standards are essential by creating the international regulatory framework for labour protection to ensure that the expansion of international aviation yields benefits for all individuals and fosters sustainable development.

The present chapter not only outlines the *status quo* of international labour standards related to aviation labour but also explores the prospect of a new

1 Nicolas Valticos, 'International Labour Standards and Human Rights: Approaching the Year 2000' (1998) 137 *International Labour Review* 135.

2 Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 *International Labour Review* 565; see also the ILO, *Rules of the Game: An Introduction to the Standards-Related Work of the International Labour Organization* (2019).

and specialised ILO convention on aviation labour, examining whether and to what extent it could foster elevated levels of labour regulation of international aviation. The discussion centres on ILO law and derives normative insights from the Maritime Labour Convention (2006).³ Positioned as a next-generation ILO instrument, the Maritime Labour Convention (2006) can serve as inspiration for promoting decent work in the civil aviation industry, given the shared similarities between aviation labour and maritime labour.

The section below will firstly explain the necessity of reviewing international labour standards in section 3.2. Following a brief overview of the ILO and international labour standards, section 3.2 scrutinises how inadequate labour protection in international aviation poses challenges to the 'level playing field' and human rights, which international labour standards aim to promote. Section 3.3 unveils ongoing policy discussions about aviation labour under the auspices of the ILO. Section 3.4 then delves into the current state of labour regulation of civil aviation under international labour standards. Furthermore, sections 3.5, 3.6, and 3.7 explore the potential for concluding a specialised ILO convention on aviation labour. Section 3.5 undertakes a comparative analysis of aviation and maritime labour to identify similarities and differences, justifying the application of lessons learned from maritime labour to aviation labour. Section 3.6 introduces international maritime labour law, with an emphasis on the Maritime Labour Convention (2006). Section 3.7 discusses the labour regulation of international aviation through a new ILO convention. In addition to delineating the pros and cons of this approach, this section especially includes legal considerations grounded in lessons learned from the Maritime Labour Convention (2006), which might help in evaluating the potential establishment and enforcement of a new ILO convention on aviation labour.

3.2 THE NECESSITY OF LOOKING AT INTERNATIONAL LABOUR STANDARDS

The ILO has undertaken comprehensive and fundamental initiatives aimed at promoting international labour standards, improving social protection, and ensuring equality of opportunities for workers.⁴ Understanding the relevance and significance of this branch of international law is crucial before delving into the potential for developing regulatory frameworks within ILO law. Following recapping international labour standards, section 3.2 elucidates how inadequate protection in international aviation undermines the 'level playing field' in the international marketplace and human rights, highlighting the need for increased international cooperation facilitated by the ILO.

3 Maritime Labour Convention, signed on 23 February 2006.

4 Andrea Trimarchi, *International Aviation Labour Law* (Routledge 2022) 4.

3.2.1 International labour standards

The establishment of the ILO in 1919 marked a crucial milestone in the quest for global social justice.⁵ Through its tripartite structure, the ILO develops international labour standards designed to uphold basic rights in the workplace worldwide. These standards, delineated in conventions and recommendations, encompass a range of fundamental rights for workers, spanning from freedom of association to the eradication of child labour and equal remuneration.

3.2.1.1 *The International Labour Organization*

In 1919, representatives from more than thirty allied and associated States gathered near Paris to negotiate and establish the conditions of the peace treaty following World War I. These representatives signed the Treaty of Versailles (1919) to address political and social crises after the First World War.⁶ In this Treaty, a pioneering generation of scholars, social policy experts, and politicians specifically crafted an unprecedented international organisational framework for labour politics.⁷ Part VIII of the Treaty of Versailles (1919) was especially devoted to labour, emphasising the establishment of a permanent labour organisation, *to wit* the ILO.⁸ Part VIII also laid the foundation for the ILO Constitution and the tripartite character of the ILO, highlighting the 'participation in its governing bodies, in particular the annual Conference and the Governing Body, of employers' and workers' representatives alongside government delegates'.⁹

In 1944, the International Labour Conference adopted the Declaration of Philadelphia (1944), providing a powerful and ensuring impetus to the social mandate of the ILO.¹⁰ The Declaration of Philadelphia (1944) has been incorporated into and has become a crucial component of the ILO Constitution. Within the ILO framework, emphasis must be placed on the independent behaviours of employers' and workers' representatives, particularly regarding their independence from their governments, echoing the values of freedom

5 Guy Ryder, 'The International Labour Organization: The Next 100 Years' (2015) *Journal of Industrial Relations* 57(5): 748.

6 Steve Hughes, 'The International Labour Organisation' (2005) 10(3) *New Political Economy* 413.

7 Jasmien Van Daele, 'Engineering Social Peace: Networks, Ideas, and the Founding of the International Labour Organization' (2005) 50(3) *International Review of Social History* 438.

8 Part VIII of the Treaty of Versailles (1919).

9 Jean-Michel Servais, *International Labour Law (Sixth Edition)* (Kluwer Law International BV 2020) 22.

10 The ILO, 'The Declaration of Philadelphia – 75 Years' (Press Release, 10 May 2019) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_698989/lang-en/index.htm> accessed 26 March 2024.

of association and social dialogue.¹¹ Article 3 of the ILO Constitution explicitly states that:

‘The meetings of the General Conference of representatives of the Members shall be held from time to time as occasion may require, and at least once in every year. It shall be composed of four representatives of each of the Members, of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the workpeople of each of the Members [...]

The Members undertake to nominate non-Government delegates and advisers chosen in agreement with the industrial organizations, if such organizations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries [...]¹²

If an ILO Member State sends an incomplete delegation comprising only employers’ representatives or only workers’ representatives alongside the government delegate, the social partners’ delegate attending the General Conference would lose the right to vote.¹³ The tripartite design of the ILO authentically mirrors the interests of both workers and employers. This design contributes to the distinctive legitimacy of the ILO, which fulfils its authoritative and regulatory functions concerning the aspirations of the international community for a just world.¹⁴ Social justice allows all workers to rightfully collect their corresponding portion of the wealth they have contributed to generating, based on equal chances.¹⁵

The ILO is dedicated to promoting equitable society and globally recognised labour rights and principles, following the principle that ‘social justice is essential to universal and lasting peace’.¹⁶ To support its goals, the ILO provides unparalleled expertise and knowledge about various aspects of the workplace, acquired through over a century of responding to the needs of people everywhere for decent work, livelihoods, and dignity.¹⁷

3.2.1.2 *The ILO conventions and recommendations*

The ILO constituents, comprising representatives of governments, companies, and workers, formulate international labour standards to delineate fundamental

11 Alfred Wisskirchen, ‘The Standard-Setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience’ (2005) 144(3) *International Labour Review* 253.

12 Article 3 of the ILO Constitution.

13 Article 4 of the ILO Constitution.

14 Francis Maupain, ‘A Second Century for What? The ILO at a Regulatory Crossroad’ (2020) 17 *International Organizations Law Review* 297.

15 The ILO (n 2) 8.

16 The ILO, ‘Mission and Impact of the ILO’ <<https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm>> accessed 26 March 2024.

17 *ibid.*

principles and rights at work.¹⁸ The conventions become binding on the States upon ratification, constituting a voluntary act through which the States commit to applying them.¹⁹ The recommendations are not mandatory; they contain reference standards that the ILO encourages States to consider in their domestic laws and practices. A convention sets out fundamental principles for implementation by the contracting States. A related recommendation then offers more comprehensive information on how to apply the convention.²⁰ However, recommendations might be independent and not associated with any ILO convention.²¹ Article 19 of the ILO Constitution establishes the process of adopting labour conventions and recommendations, as well as the obligations of the ILO Member States regarding these instruments.²² The International Labour Conference, which convenes annually and includes delegates from governments, workers, and employers of the ILO member States, can decide to accept a proposal in the form of a recommendation to 'meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a Convention.'²³

The tripartite approach ensures that international labour standards have broad support from all ILO constituents.²⁴ As per the ILO,

'ILO standards on tripartite consultation set forth the framework for effective national tripartite consultations. Such consultations can ensure greater cooperation among the social partners and stronger awareness and participation in matters relating to international labour standards, and can lead to better governance and a greater culture of social dialogue on wider social and economic issues.'²⁵

International labour standards encompass various fields related to labour, employment, and social security.²⁶ The ILO Governing Body has recognised eleven fundamental conventions, encapsulating the acknowledged core values of the ILO, which include

- 'a. freedom of association and the effective recognition of the right to collective bargaining;
- b. elimination of all forms of forced or compulsory labour;
- c. effective abolition of child labour;

18 The ILO, *Handbook of Procedures Relating to International Labour Conventions and Recommendations (Centenary Edition 2019)* (2019).

19 Servais (n 9) 44.

20 See the ILO (n 2)

21 The ILO, *Application of International Labour Standards 2023 (Report of the Committee of Experts on the Application of Conventions and Recommendations)* (2023).

22 Article 19 of the ILO Constitution.

23 *ibid.*

24 The ILO (n 2) 39.

25 *ibid.*

26 Servais (n 9) 44.

- d. elimination of discrimination in respect of employment and occupation; and
- e. a safe and healthy working environment.¹²⁷

The ILO Declaration on Fundamental Principles and Rights at Work (1988) (1988 ILO Declaration) also recognises these principles.²⁸ As Jean-Michel Servais noted,

‘briefly, the aim [of the 1988 ILO Declaration] is to maintain the link between economic growth and social progress in a situation of growing economic interdependency. In this context, the guarantee of fundamental principles and rights at work is particularly important and significant in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth they helped create and to achieve fully their human potential.’²⁹

The 1988 ILO Declaration reminds States of obligations inherent in their membership in the ILO, regardless of whether they have ratified ILO conventions.³⁰ It also calls for a strong political commitment to guarantee acceptance of those rights and their promotion in economic and social practice.³¹ In 2022, delegates attending the International Labour Conference adopted a resolution to add the principle of Occupation Safety and Health (OSH) to the Declaration, which becomes the fifth category of Fundamental Principles and Rights at Work.³² Annex to the 1988 ILO Declaration also outlines international obligations incumbent on the ILO Member States concerning non-ratified fundamental conventions.³³ The Annex refers to Article 19 of the ILO Constitution and mandates that States not having ratified those fundamental conventions submit annual reports on ‘the position of its law and practice regarding the

27 The ILO, ‘ILO Declaration on Fundamental Principles and Rights at Work’ <<https://www.ilo.org/declaration/lang-en/index.htm#:~:text=The%20ILO%20Declaration%20on%20Fundamental,our%20social%20and%20economic%20lives>> accessed 26 March 2024; see also the ILO, *Resolution on the Inclusion of a Safe and Healthy Working Environment in the ILO’s Framework of Fundamental Principles and Rights at Work* (ILC.110/Resolution I, 2022).

28 The ILO, ‘ILO Declaration on Fundamental Principles and Rights at Work’ (n 27).

29 Servais (n 9) 85.

30 In the context of the airline industry, not all ILO conventions are relevant in improving employment conditions of workers. For example, while Freedom of Association and Protection of the Right to Organise Convention (No. 87) and Right to Organise and Collective Bargaining Convention (No. 98) aim to provide robust trade union protection and are related to labour standards in civil aviation, Forced Labour Convention (No. 29) and Abolition of Forced Labour Convention (No. 105) are less relevant.

31 Servais (n 9) 85.

32 The other four categories of Fundamental Principles and Rights at Work include: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. See ILO (n 27).

33 See the ILO, *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up* (2022).

matters dealt with in the Convention³⁴ and ‘the difficulties which prevent or delay the ratification of such Convention’.³⁵

The ILO is making efforts to promote the harmonisation of domestic labour laws. Harmonisation of legislation does not entail making laws identical but rather aims to establish more or less similar laws among different States, accompanied by similar legal effects.³⁶ Harmonised laws can bring benefits such as improved legal certainty and reduced legal risks and conflict across States; facilitated cooperation and cross-border activities; increased efficiency, transparency, and cost reduction for intra-regional and international transactions; a ‘level playing field’ among concerned parties; and ultimately, economic growth.³⁷ The ILO seeks the harmonisation of legislation through various means. In addition to introducing international conventions as binding instruments and recommendations as guidelines with details such as the definition of terms, the ILO also assists States in developing model laws, such as the Caribbean Community (CARICOM) Model Labour Laws.³⁸ Despite these efforts, however, domestic labour laws and policies are not extensively harmonised.³⁹ One significant reason is the ILO’s deficient enforcement mechanism to ensure compliance.⁴⁰

3.2.2 Challenges arising out of inadequate labour protection in international aviation

Inadequate labour protection in international sectors has adverse effects on the ‘level playing field’ in the global economy, which relies on the adherence to minimum labour standards across borders, and the safeguarding of human rights as universal concerns. These problems highlight the imperative for a coordinated endeavour to uphold international labour standards in the global civil aviation market.

34 *ibid.*

35 Article 19 of the ILO Constitution; the ILO (n 32) 12.

36 Jagdish Bhagwati, ‘Trade Liberalisation and “Fair Trade” Demands: Addressing the Environmental and Labour Standards Issues’ (1995) 18(6) *The World Economy* 745.

37 The ILO, *Strategy for Harmonization of Labour Laws: A Discussion on Options* (ILO background paper No. 2, 2017) 3.

38 *ibid.*

39 Brian A. Langille, ‘Eight Ways to Think about International Labour Standards’ (1997) 31 *Journal of World Trade* 27.

40 Brian A. Langille, ‘What is International Labor Law For?’ (2009) 3(1) *Law & Ethics of Human Rights* 47.

3.2.2.1 The 'level playing field'

As noted by the ILO, 'an international legal framework on social standards ensures a level playing field in the global economy'.⁴¹ This framework assists States and companies in resisting the inclination to weaken labour protection to achieve a greater competitive advantage in international markets. As noted in the ILO Constitution and the Declaration of Philadelphia (1944), 'the failure of any country to adopt humane conditions of labor is an obstacle in the way of other nations which desire to improve the conditions in their countries'.⁴² This is mainly because States believe that cheap labour could contribute to competitive advantages. In the long term, lowering labour standards does not benefit market development or workers, as it:

'can encourage the spread of low-wage, low-skill and high-turnover industries and prevent a country from developing more stable high-skilled employment, while at the same time slowing the economic growth of trade partners. Because international labour standards are minimum standards adopted by governments and the social partners, it is in everyone's interest to see these rules applied across the board, so that those who do not put them into practice do not undermine the efforts of those who do.'⁴³

The ILO identifies two specific elements that may undermine a 'level playing field', *to wit* 'lowering labour standards' and not adhering to international 'minimum standards'. Within the context of civil aviation, inadequate labour protection for workers poses a risk of tilting the international 'level playing field' for airlines. If States derogate from their domestic labour standards or violate obligations related to both international labour standards and international air law, inadequate labour protection can have a detrimental impact on fair competition and the international 'playing field'. Given the conventional perception of labour law as a cost, a prisoner's dilemma underscores the necessity for international minimum labour standards applicable in international aviation.

The ILO has worked to establish a 'level playing field' by institutionalising minimum conditions in the workplace and basic labour rights among different States. For example, the ILO encourages its Member States to ratify ILO conventions and oversees their implementation, as both ratification and enforcement enhance the 'level playing field', preventing any State from lowering its national labour standards in order to obtain a competitive advantage.⁴⁴

41 See the ILO (n 2).

42 The Preamble of the ILO Constitution; see also the ILO Declaration of Philadelphia: Declaration Concerning the Aims and Purposes of the International Labour Organization (1944).

43 The ILO (n 2) 14.

44 See the ILO, *ILO Centenary Ratification Campaign* (2019).

3.2.2.2 Human rights concerns

The ILO laid the groundwork for human rights through standard-setting prior to the establishment of the United Nations (UN) and the articulation of international human rights.⁴⁵ Since the ILO's establishment in 1919, international labour standards have aimed to articulate the aspirations, values, and rights later echoed in the United Nations Charter (1945) and proclaimed in the Universal Declaration of Human Rights (1948). There is near-universal consensus on recognising the core labour standards as human rights, including the right to work, freedom of assembly, the right to fair remuneration, and freedom of association.

While passengers' human rights are usually the main focus for airlines, airline workers deserve special attention.⁴⁶ Given the perceived drive and competency of aviation stakeholders, essential attention should be directed towards human rights protection for airline workers, either addressing the impacts of human rights violations on aviation safety or fair competition between airlines.⁴⁷ Ryanair explicitly acknowledges the significance of a non-discrimination policy in 'all aspects of employment, including recruitment, promotions, compensation and benefits, training and discipline', referring to Article 1 of the Universal Declaration of Human Rights (1948).⁴⁸ Lufthansa Group also emphasises human rights, working conditions, and social entitlements in its *Code of Conduct*, addressing issues such as non-discrimination; freedom of association, free assembly, and collective bargaining; equal pay, rest, and regular paid vacations; free choice of occupation; as well as the safety and well-being of employees.⁴⁹ With that said, the application of these policies in practice is not always obvious.⁵⁰

The connection between labour standards and public morals is widely acknowledged in international trade law,⁵¹ and it may increasingly prompt

45 The ILO, 'International Labour Standards and Human Rights' <https://www.ilo.org/global/standards/WCMS_839267/lang-en/index.htm> accessed 26 March 2024.

46 The ILO, *Promoting the Employment of Women in the Transport Sector – Obstacles and Policy Options* (Working Paper No. 298, 2013); see also Lalin Kovudhikulrungsri, *The Right to Travel by Air of Persons with Disabilities* (Leiden University Dissertation 2017).

47 See the ILO (n 46).

48 Ryanair, 'Non-Discrimination Policy' (November 2021) <https://investor.ryanair.com/wp-content/uploads/2021/12/Ryanair_Non-Discrimination-Policy.pdf> accessed 26 March 2024.

49 Lufthansa Group, 'Code of Conduct' <https://investor-relations.lufthansagroup.com/fileadmin/downloads/de/corporate-governance/CoC/Code-of-conduct_201805_EN.pdf> accessed 26 March 2024.

50 Yves Jorens, Dirk Gillis, Lien Valcke and Joyce De Coninck, *Atypical Forms of Employment in the Aviation Sector* (European Commission 2015).

51 See Lorand Bartels, *Social Issues in Regional Trade Agreements: Labour, Environment and Human Rights* (University of Cambridge Faculty of Law Research Paper No. 57/2014, 2014); see also European Commission, *Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation* (COM(2001) 416 final).

academic and policy discussions from an air law perspective. On the one hand, the indivisibility and universality of human rights, coupled with the strong connection between human rights protection and healthy democracy, underscore the importance of safeguarding humans.⁵² Human rights abuses are, therefore, shared concerns for humankind. On the other hand, the public has access to air services provided by foreign airlines, and the airline industry itself is becoming more transnational through arrangements such as wet leases, franchising, codeshare agreements, alliances, and mergers with other airlines.⁵³ Insufficient labour protection in one jurisdiction can give rise to human rights concerns among its global air service partners.

3.3 POLICY DISCUSSIONS ABOUT AVIATION LABOUR

Since the 1920s, specific national services and several employers' and workers' organisations have urged the International Labour Office to investigate issues affecting labour and employment in the air transport industry.⁵⁴ In 1929, the International Labour Conference invited the Governing Body of the International Labour Office to assess if it was possible for the Office to research working conditions in transport, appointing a committee of experts for this purpose.⁵⁵ This occurred just ten years after the commencement of the first regular international passenger air service in August 1919, with a flight from London to Paris.⁵⁶ In a report to subsequent sessions of the conference, the then Director of the Office mentioned safety, social insurance, welfare, rules for engagement and discharge, wages, repatriation, and hours of work, which could be pertinent in civil aviation.⁵⁷ However, in a report submitted in 1938, the International Labour Office highlighted that the reduction of working hours in air transport was not yet ripe for international settlement.⁵⁸ Due to the prevailing political conditions, consideration of this matter was subsequently postponed.⁵⁹ In 1948, following World War II and ICAO's establishment, a resolution from the International Labour Conference recognised that working conditions concerning those employed in air transport deserved special atten-

52 See Emilie M. Hafner-Burton, *Forced to Be Good: Why Trade Agreements Boost Human Rights* (Cornell University Press 2009); see also Lelia Mooney, 'Promoting the Rule of Law in the Intersection of Business, Human Rights, and Sustainability' (2015) 46(4) *Georgetown Journal of International Law* 1135.

53 Steven Truxal, *Competition and Regulation in the Airline Industry: Puppets in Chaos* (Routledge 2012) 7.

54 The ILO, *The ILO's Work in the Civil Aviation Sector: Draft Compendium (1947-2022)* (2023).

55 *ibid.* 5.

56 ICAO, 'Milestones in International Civil Aviation' <<https://www.icao.int/about-icao/History/Pages/Milestones-in-International-Civil-Aviation.aspx>> accessed 26 March 2024.

57 See the ILO (n 54).

58 *ibid.*

59 *ibid.*

tion and study.⁶⁰ Consequently, the resolution authorised the ILO Governing Body to direct the Office to conduct studies on labour and employment in consultation with ICAO.

In subsequent years, the ILO's efforts in civil aviation labour have focused on various issues, encompassing gender discrimination,⁶¹ freedom of association,⁶² working time,⁶³ conditions of employment,⁶⁴ night work of young persons,⁶⁵ personnel posted abroad and repatriation,⁶⁶ crew health and comfort on board aircraft,⁶⁷ industrial relations,⁶⁸ transport and handling of dangerous goods,⁶⁹ and the effects of technological change in the civil aviation industry.⁷⁰ These efforts comprise conclusions and resolutions adopted by the Inland Transport Committee, as well as outcomes from technical meetings,

60 *ibid* 5.

61 In response to changes of aviation labour standards and to mark 100 years since the establishment of the ILO, the ILO Sectoral Policies Department presented the working paper *Women and Aviation: Quality Jobs, Attraction and Retention* in 2019. Progress for women in the world of work has been slow in civil aviation where there are clear gender gaps in a range of occupations. The International Air transport Association (IATA), ICAO, the International Federation of Air Line Pilots' Association (IFALPA) and the ITF actively participated in the preparation of this paper, which underlined the importance to increase the participation of women in civil aviation and eliminate all forms of discrimination in the air transport industry. See the ILO, *Women and Aviation: Quality Jobs, Attraction and Retention* (Working Paper No. 331, 2019).

62 See the ILO Tripartite Technical Meeting for Civil Aviation (1977): Resolution (No. 4) concerning trade union rights in civil aviation; see also the Inland Transport Committee of the ILO Resolution (No. 118) concerning the right of workers in transport undertakings to organise and bargain collectively (1985).

63 See the Inland Transport Committee of the ILO Resolution (No. 108) concerning working time in the transport industry (1980); see also the ILO Ad hoc meeting on civil aviation (1960): Conclusions (No. 1) concerning hours of duty and rest periods of crew members in civil aviation.

64 See the Inland Transport Committee of the ILO Resolution (No. 21) concerning conditions of employment in civil aviation (1947); see also the ILO Ad hoc meeting on civil aviation (1960): Resolution (No. 6) concerning conditions of employment in air navigation services.

65 See the Inland Transport Committee of the ILO Resolution (No. 34) concerning night work of young persons employed in transport by air (1949).

66 See the ILO Ad hoc meeting on civil aviation (1960): Resolution (No. 5) concerning personnel posted abroad and repatriation in civil aviation.

67 See the Inland Transport Committee of the ILO Resolution (No. 102) concerning the improvement of the working environment and the protection of workers' health in the various sectors of transport (1972); see also the Inland Transport Committee of the ILO Tripartite Technical Meeting for Civil Aviation (1977): Conclusions (No. 1) concerning occupational health and safety in civil aviation; see also the ILO Ad hoc meeting on civil aviation (1960): Resolution (No. 8) concerning crew health and comfort on-board aircraft.

68 See the Inland Transport Committee of the ILO Resolution (No. 9) on industrial relations in inland transport (1947).

69 See the Inland Transport Committee of the ILO Resolution (No. 44) concerning the transport and handling of dangerous goods (1951).

70 See the ILO Ad hoc meeting on civil aviation (1960): Resolution (No. 9) concerning effects of technological change in the civil aviation industry.

ad hoc meetings, and meetings of experts.⁷¹ In the Global Dialogue Forum on the Effects of the Global Economic Crisis on the Civil Aviation Industry (2013), the ILO proposed future actions, including:

‘The ILO, in consultation with its tripartite constituents, will explore means to address the needs of the industry for agility and decent and productive work, in order to respond to a continuously changing environment and to further strengthen social dialogue and workplace cooperation.’⁷²

During the Global Dialogue Forum in 2013, the ILO also released the research paper *Civil Aviation and Its Changing World of Work* (2013), discussing recent trends and prospects in civil aviation.⁷³ The paper scrutinised regulatory changes in the aviation market and industrial relations, exploring potential impacts. It identified several distinct features of civil aviation that are relevant to labour and employment. Firstly, despite its cross-border nature, civil aviation remains firmly rooted in domestic policies and national prestige.⁷⁴ Secondly, it is highly regulated both internationally and nationally, addressing safety and security on the one hand, and economic and political reasons on the other. Thirdly, the worldwide liberalisation and deregulation of aviation markets have resulted in differentiation among various categories of airlines, particularly low-cost and legacy carriers. Fourthly, the job market in civil aviation is highly segmented, featuring various types of job profiles.⁷⁵

3.4 CIVIL AVIATION UNDER INTERNATIONAL LABOUR STANDARDS

Despite the various policy discussions and recommendations outlined above, the ILO has made minimal, if any, legislative progress in establishing international labour standards specifically applicable to civil aviation. The ILO conventions and recommendations do not offer specific rules governing labour and employment in international aviation. However, this does not imply that the ILO law has no role in regulating aviation labour.

A fundamental yet prominent function of international labour standards is to provide general umbrella principles and rights for labour and employment. Unless explicitly limited in scope, international labour standards apply to workers in all industries. Each ILO Member State, for which an ILO conven-

71 See the ILO (n 54).

72 The ILO, *Final Report of the Discussion: Global Dialogue Forum on the Effects of the Global Economic Crisis on the Civil Aviation Industry (Geneva, 20-22 February 2013)* (GDFCAI/2013/11, 2013).

73 See the ILO, *Civil Aviation and Its Changing World of Work* (2013).

74 *ibid.*

75 *ibid* 3.

tion is in force, commits to implementing its provisions in the regulation of employment relations and working conditions in international aviation too.⁷⁶

The ILO also serves as a prominent global forum for industrial stakeholders and governments to discuss the prospects of enhancing levels of labour standards in the aviation sector. Ratifications by the ILO Member States, coupled with measures adopted by the ILO to promote them, play a crucial role in enhancing the importance of international labour standards, whose value surpasses the intrinsic legal force.⁷⁷ Article 10 of the ILO Constitution empowers the ILO Council to collect and disseminate information on all these matters.⁷⁸ The civil aviation industry should acknowledge that the ILO law can offer expertise and capabilities to promote high levels of labour standards in international aviation. The role assigned to the ILO to study all matters affecting global adaptation of working conditions and employment relations elucidates its proactive involvement in labour regulation of civil aviation.

3.5 THE WAY FORWARD: LESSONS FROM MARITIME LABOUR?

On 26 May 2020, ICAO, along with the ILO and the International Maritime Organization (IMO), issued a new joint statement.⁷⁹ The statement emphasised the need to secure designations for the millions of skilled personnel who maintained essential global air and sea trade capacities during the COVID-19 pandemic.⁸⁰ This was a compromised policy due to COVID-19 restrictions and guidelines, which curtailed travel and restricted border movements.⁸¹ Designating aviation and maritime personnel as key workers would exempt them from travel restrictions, ensure their access to emergency medical treatment, and, if necessary, facilitate emergency repatriation.⁸²

The fact that maritime labour shares several similarities with aviation labour justifies applying lessons learned from the Maritime Labour Convention (2006)

76 See the ILO (n 2).

77 Servais (n 9) 17.

78 Article 10 of the ILO Constitution.

79 ICAO, 'ILO, and IMO Issue Joint Call to World Governments on Need for "Key Worker" Designations for Essential Air and Sea Personnel' (26 May 2020) <<https://www.icao.int/Newsroom/Pages/ICAO-ILO-and-IMO-issue-joint-call-to-world-governments-on-need-for-key-worker-designations-for-essential-air-and-sea.aspx>> accessed 26 March 2024.

80 *ibid.*

81 The ILO, *Statement of the Officers of the Special Tripartite Committee of the Maritime Labour Convention, 2006 on COVID-19* (2020).

82 Elizabeth A. Mack, Shubham Agrawal, and Sicheng Wang, 'The Impacts of the COVID-19 Pandemic on Transportation Employment: A Comparative Analysis' (2021) *Transportation Research Interdisciplinary Perspectives* 1; see also the ILO, 'Recommendations Adopted by Heads of UN Agencies and Sectoral Organizations to Protect Transport Workers in Future Health Emergencies' (25 January 2023) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_866326/lang--en/index.htm> accessed 26 March 2024.

to help examine whether an ILO convention on civil aviation could handle labour-related regulatory concerns concerning airline workers.

Globalised business presents considerable challenges to labour standards when private international law does not provide effective rules to stop a possible race to the bottom.⁸³ Maritime labour provides an exemplary illustration of this. States maintained tight control over their vessels until the 20th century, when freedom in ship registration transformed maritime labour into a genuinely international activity.⁸⁴ Precarious working conditions negatively impact human rights protection for seafarers.

The Maritime Labour Convention (2006) aims to enhance seafarers' working conditions globally by establishing standards and guidelines. Over a decade after the adoption of the Convention, lawyers and policymakers must assess whether this Convention has delivered on its commitment to provide workers in the maritime sector with enhanced labour protection that they have been striving for. Lessons can assist competent authorities and industrial stakeholders in civil aviation in contemplating the possibility of establishing a specialised ILO convention on aviation labour and reflecting on its effectiveness.

However, as differences exist in how shipowners and airlines organise their labour, representatives of governments, airlines, and airline workers must exercise careful consideration when using the Maritime Labour Convention (2006) as the model for developing aviation labour standards.

3.5.1 A close relationship between air law and maritime law

A thorough examination of international air law instruments highlights familiar elements originating from international maritime law. For instance, Annexes to the Chicago Convention (1944) outline the specific responsibilities and authorities of pilots-in-command. In reality, a pilot-in-command is entitled to a similar status that centuries of international maritime custom have bestowed upon the commander of a ship.⁸⁵ In maritime transport, a ship commander holds a distinct status with various jurisdictional attributes, acting as a magistrate and, to some degree, an enforcer of law and order on board.⁸⁶

Several other concepts defined in air law also stem from practices in the maritime sector. Article 34 of the Chicago Convention (1944) requires every

83 See Bob Hepple, *Labour Laws and Global Trade* (Hart Publishing 2005).

84 Laura Carballo Piñeiro, *International Maritime Labour Law* (Springer 2015) 2.

85 Michael Milde, *International Air Law and ICAO (Third Edition)* (Eleven International Publishing 2016) 227.

86 See Michael L. Smidt, 'Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations' (2000) 164 *Military Law Review* 155; see also Goran Vojković and Melita Milenković, 'Autonomous Ships and Legal Authorities of the Ship Master' (2020) 8(2) *Case Studies on Transport Policy* 333.

aircraft involved in international navigation to maintain a detailed journal log book containing information about aircraft, crew members, and each flight.⁸⁷ The concept of a journey log book has a longstanding tradition in maritime navigation, maintaining a continuous and detailed record of each journey.⁸⁸

Pablo Mendes de Leon has discussed how air law originated from maritime law:

‘Following the First World War, on 8 February 1919, the first scheduled air service between Paris and London came into operation. It was considered necessary for existing regulations to be incorporated into a Convention. A choice had to be made between a free airspace analogous to the principle of maritime law, and an airspace governed by the sovereignty of the underlying states. Due to the aftermath of the War, there were strong tendencies in favour of defending the national interest so that the latter principle prevailed.’⁸⁹

In addition to the fact that many concepts and principles of air law come from maritime law, another element substantiating their close relationship is the reference to maritime concepts in air law. The sea covers about 70 per cent of the Earth’s surface, and a significant portion of today’s air navigation occurs in the airspace above the sea.⁹⁰ Furthermore, the airspace suprajacent to the vast areas of the sea extends over different areas and zones of the sea. It is therefore necessary to study sources of international maritime law to comprehend the regulatory framework of the sky.⁹¹ Indeed, Article 2 of the United Nations Convention on the Law of the Sea (1982) explicitly delineates the statutory standing of the territorial sea, as well as the airspace over it and the seabed and subsoil beneath it.⁹²

87 Article 34 of the Chicago Convention (1944).

88 Milde (n 85) 104.

89 Pablo Mendes de Leon, *Introduction to Air Law (Eleventh Edition)* (Kluwer Law International BV 2022) 3.

90 Milde (n 85) 39.

91 Ruwantissa Abeyratne, ‘In Search of Theoretical Justification for Air Defence Identification Zones’ (2012) 5 *Journal of Transportation Security* 87; Christopher K. LAMONT, ‘Conflict in the Skies: The Law of Air Defence Identification Zones’ (2014) 39(3) *Air & Space Law* 187.

92 United Nations Convention on the Law of the Sea, signed on 10 December 1982. Article 2 of the UNCLOS [Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil]: 1. The sovereignty of a coastal State extends, beyond its land 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. 2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil. 3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

3.5.2 Similarities between aviation and maritime labour

Undoubtedly, aviation and maritime labour share inherent similarities. In today's globalised landscape, labour and employment in both sectors are characterised by extensive transnational activities and intricately linked to the cost structures of the airline business. Furthermore, maintaining robust labour protection in these industries is paramount for ensuring the safe and successful completion of operations.

3.5.2.1 International traffic operations

Aviation and maritime transport are profoundly international sectors. In the context of a globalised economy, both aircraft and ships enable the cross-border mobility of passengers and goods. Moreover, the global market environment in these industries demands the transnational movement of workers. These factors may lead to various regulatory challenges.

Fragmentation of labour standards may adversely affect working conditions in international aviation and maritime. A notable example is linked to union protection, where airline workers face challenges in exercising their rights of association and collective bargaining. Enforceable collective labour agreements are those made by unions established in accordance with national laws.⁹³ Generally, these agreements are not valid outside the State where they are concluded.⁹⁴ Regarding maritime labour, the International Transport Workers' Federation (ITF) and the International Maritime Employers' Committee (IMEC) engage in extensive discussions about labour standards for seafarers, including pay scales for workers on the flag of convenience ships.⁹⁵ Despite the frequently observed phenomenon of the globalisation of production networks and product markets, the bargaining strategies of organised labour have mostly remained national in scope.⁹⁶ The nature of shipping involves mobile and distant workplaces, the organisation of workers as multinational crews, and

93 See the ECA, *TNA Handbook* (2018).

94 Carlotta Benvegnú, Bettina Haidinger, and Devi Sacchetto, 'Restructuring Labour Relations and Employment in the European Logistics Sector: Unions' Responses to a Segmented Workforce' in Virginia Doellgast, Nathan Lillie, and Valeria Pulignano (eds), *Reconstructing Solidarity: Labour Unions, Precarious Work, and the Politics of Institutional Change in Europe* 83.

95 Rohini Hensman, 'World Trade and Workers' Rights: In Search of An International Position' 33(3) *Antipode* 427; see also International Labour Organization – Joint Maritime Commission (ILO-JMC), *The Impact on Seafarers' Living and Working Conditions of Changes in the Structure of the Shipping Industry* (Geneva, 2001).

96 Sigrid Koch-Baumgarten, 'Trade Union Regime Formation Under the Conditions of Globalization in the Transport Sector: Attempts at Transnational Trade Union Regulation of Flag-of-Convenience Shipping' (1998) 43(3) *International Review of Social History* 369; see also Paul Marginson and Keith Sisson, 'European Dimensions to Collective Bargaining: New Symmetries within An Asymmetric Process?' (2002) 33(4) *Industrial Relations Journal* 332.

the hierarchical life on board. These factors unavoidably hinder the capacity of trade unions to mobilise collective responses at the shipboard level.⁹⁷

3.5.2.2 Labour costs

Employment relations and working conditions are closely linked to the labour costs borne by operators, influencing competitive advantages and fair competition for both airlines and shipowners. In both the aviation and maritime sectors, fierce competition among airlines inadvertently results in deplorable working conditions, sparking concerns about a possible race to the bottom in levels of labour protection.⁹⁸ Operators benefit from a cost-effective workforce, but excessively intense competition weakens the incentives of individual States supplying labour to uphold and improve minimum employment conditions for workers.⁹⁹

3.5.2.3 Operational safety

Unreasonable working conditions have a detrimental impact on the safety of air operations.¹⁰⁰ Airline crew members endure erratic sleep and work patterns, extended flying hours, as well as demanding night shifts.¹⁰¹ In particular, safety concerns have emerged due to the problematic implementation of the FTLs and the reluctance of flight crew members to report fatigue and subsequent unfitness for work.¹⁰²

Simultaneously, the right of every seafarer to a safe and secure workplace is not only related to occupational safety concerning the physical health of seafarers but also the safe operation of a ship.¹⁰³ Seafarers have specific responsibilities for the efficiency and safety of ship operations.¹⁰⁴ Under the IMO conventions, ensuring safe operations by addressing technical aspects of labour regulation has been a primary focus during a port State inspec-

97 Carolyn AE Graham and David Walters, 'Representation of Seafarers' Occupational Safety and Health: Limits of the Maritime Labour Convention' (2021) 32(2) *The Economic and Labour Relations Review* 278.

98 Pengfei Zhang, *Seafarers' Rights in China: Restructuring in Legislation and Practice Under the Maritime Labour Convention 2006* (Springer 2016) 120.

99 Roger Blanpain and Desislava Nikolaeva Dimitrova, *Seafarers' Rights in the Globalised Maritime Industry* (Kluwer Law International 2010).

100 The ECA, *Flight Plan to Safety: European Pilots' Perspective: Threats and Challenges to Commercial Air Transport* (2013).

101 *ibid.*

102 Jorens et al (n 50) 84.

103 Article IV(1) of the Maritime Labour Convention (2006).

104 Ahmed Abd El Naiem Hafez, *Seafarers' Social Life and Its Effect on Maritime Safety with Respect to Egyptian Seafarers* (World Maritime University Dissertations 1999) 29.

tion.¹⁰⁵ The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) specifically lays down minimum standards regarding training, certification, and oversight duties for seafarers, which must be met by the contracting States.¹⁰⁶ Assuring that seafarers are entitled to decent labour standards is one of the goals of maritime labour law to improve the safety of maritime operations.

The severe impacts of unfavourable working conditions on the safety of operations lead to comparable concerns within the aviation and maritime sectors. There is also a shared expectation that specialised labour regulations in each sector can address the dangers of fatigue accumulation and ensure operational safety and regularity.¹⁰⁷ Moreover, both aviation and maritime operations necessitate that their workers be adequately trained and certified. This is linked to the significance of personnel in ensuring the safe and reliable completion of transportation. For crew members in aviation, Annex 1 to the Chicago Convention (1944) sets out rules pertaining to personnel licencing and training.¹⁰⁸ For seafarers, the IMO has the STCW, which incorporates a variety of technical requirements for personnel training and certification, including instructions on new technologies like digital maps and data platforms.¹⁰⁹

3.5.3 Differences between aviation and maritime labour

Despite significant similarities between aviation and maritime labour, the specifications of these two sectors give rise to differences in employment relations and working conditions in these two sectors.

Firstly, the nature of maritime operations requires seafarers to live on board ships for long periods,¹¹⁰ whereas airline workers do not live on aircraft and only work for a very limited duty period. Airline operations are mostly subject

105 Georgios Exarchopoulos et al, 'Seafarers' Welfare: A Critical Review of the Related Legal Issues under the Maritime Labour Convention 2006' (2018) 93 *Marine Policy* 64.

106 The Preamble of the STCW mentions: DESIRING to promote safety of life and property at sea and the protection of the marine environment by establishing in common agreement international standards of training, certification and watchkeeping for seafarers [...]. See International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), adopted on 7 July 1978.

107 Jon Whitlow and Ruwan Subasinghe, 'The Maritime Labour Convention, 2006: A Model for Other Industries?' (2015) 7(1-2) *International Journal of Labour Research* 128; Trimarchi (n 4) 139.

108 See section 4.2.1 of this study.

109 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW).

110 Marina Liselotte Fotteler, Olaf Chresten Jensen, and Despina Andriotti, 'Seafarers' Views on the Impact of the Maritime Labour Convention 2006 on Their Living and Working Conditions: Results from a Pilot Study' (2018) 69(4) *International Maritime Health* 257.

to restrictions on the duration of personnel's duty periods. Except for long-haul services that require an overnight stay, airline crew members usually return to their domicile, base, or home once their shift is completed.¹¹¹ In this regard, provisions of the maritime labour rules addressing shore leave and living conditions available on ships, aimed at improving the mental health of seafarers, offer little reference value for formulating the framework of an ILO convention on aviation labour, if such a convention exists in the future.

Secondly, although maritime labour law recognises the importance of overseeing the mental health of seafarers, it emphasises that social isolation is a primary cause of psychological issues for seafarers, leading to feelings of boredom, exclusion, anger, depression, and desire.¹¹² In civil aviation, discussions about flight crew members' mental health primarily and predominantly fall within the realm of aviation safety and subsequently involve considerations of public morals and human rights protection.

Thirdly, while maritime labour is characterised by a high percentage of undeclared work, effective control and supervisory mechanisms exist for the workforce in civil aviation. As noted by Article 32 of the Chicago Convention (1944), airline crew members on any aircraft must possess certificates of competency and licences 'issued or validated by the State in which the aircraft is registered'.¹¹³ States typically establish domestic regulatory frameworks on licencing and training requirements for aviation personnel. Therefore, the aviation sector has stringent rules for personnel management to ensure that air transport operates based on stable schedule timetables.¹¹⁴ For these reasons, undeclared work is not and will not be a significant issue in the context of aviation labour.

3.6 THE MARITIME LABOUR CONVENTION (2006)

The Maritime Labour Convention (2006) was established in 2006, which can be considered a resounding success, with over one hundred ratifications to date.¹¹⁵ By consolidating several maritime conventions, the Maritime Labour Convention (2006) establishes enforceable international minimum standards, touching upon both social and technical aspects of labour regulation. As a

111 Trimarchi (n 4) 139.

112 Alex Mellbye and Tim Carter, 'Seafarers' Depression and Suicide' (2017) 68(2) *International Maritime Health* 108.

113 Article 32 of the Chicago Convention (1944).

114 Trimarchi (n 4) 139.

115 The ILO, 'Oman: 100th Member State to Ratify the Maritime Labour Convention, 2006, as amended (MLC, 2006)' (31 March 2022) <https://www.ilo.org/global/standards/maritime-labour-convention/news/WCMS_840961/lang-en/index.htm#:~:text=On%2029%20March%2C%20the%20International,commit%20to%20this%20landmark%20instrument> accessed 26 March 2024.

next-generation ILO instrument, it can provide regulatory ideas to promote decent work through innovative, legislative designs.

3.6.1 Establishment of the Maritime Labour Convention (2006)

The British Board of Trade conducted an early study on accidental fatalities of maritime workers in 1894.¹¹⁶ This study unveiled a mortality rate of 113 deaths per thousand per year, which was 9 times that of railway employees and 147 times that of factory and shop operatives.¹¹⁷ Another study in 2001 observed that from 1962 to 1988, approximately 200 seafarers lost their lives due to shipping disasters, personal accidents, suicide, homicide, or diseases at their workplaces.¹¹⁸ These studies indicated that, despite technological development and the implementation of labour standards promoting occupational safety, seafaring remained a hazardous profession.

Owing to these circumstances, along with concerns among States regarding the adverse implications of ‘flags of convenience’ practices adopted by maritime operators, the precarious working conditions of seafarers have garnered significant attention from the ILO.¹¹⁹ In 1920, the ILO introduced the National Seamen’s Codes Recommendation (1920), shortly following its establishment.¹²⁰ This legislation called for an international convention to establish labour rights and principles for the maritime industry.

Between 1920 and 2006, ten special ILO conferences dedicated to labour issues in the maritime industries, known as Maritime Sessions, were held.¹²¹ The Maritime Sessions contributed to 68 ILO conventions and recommendations.¹²² However, this situation proved unsatisfactory because the disparity among the ratification numbers of these various legal instruments resulted in an opaque overview and made implementation complex and difficult.¹²³

116 Tore J. Larsson and Christian Lindquist, ‘Traumatic Fatalities among Swedish Seafarers 1984-1988’ (1992) 15(3) *Safety Science* 173.

117 *ibid.*

118 K. X. Li and J. Wonham, ‘Maritime Legislation: New Areas for Safety of Life at Sea’ (2001) 28(3) *Maritime Policy & Management* 225.

119 Reto Dürler, ‘The Maritime Labour Convention, 2006: A Major Step Forward in Maritime Law’ in Norman A. Martínez Gutiérrez (ed), *Serving the Rule of International Maritime Law: Essays in Honour of Professor David Joseph Attard* (Routledge 2010) 298.

120 International Labour Conference, *Withdrawal of Recommendation 9* (Decided by the Conference at its 111th Session, Geneva, 2023).

121 The ILO, ‘94th (Maritime) Session of the International Labour Conference’ <<https://www.ilo.org/ilc/ILCSessions/previous-sessions/94thSession/lang-en/index.htm>> accessed on 26 March 2024.

122 Dürler (n 119) 298.

123 *ibid.*

In the late 1990s, representatives of maritime operators and workers at the ILO initiated discussions about improving the labour rights of seafarers.¹²⁴ However, at that time, there was neither a common understanding nor a compromise reached between employers and employees in the shipping sector.¹²⁵

The ILO has established a consultative body named the Joint Maritime Commission, which offers guidance to the Governing Body regarding seafaring issues, particularly those related to the development of norms applicable in the maritime sector.¹²⁶ In 2000, the Joint Maritime Commission launched a project called the *Geneva Accord* (2000), which aimed to collect all relevant international maritime labour standards and merge them into one single piece of legislative document.¹²⁷ A fresh strategy centred on efficacy and obtaining universal support was presented by the *Geneva Accord* (2000), which detailed an agreement between worldwide representatives of shipping workers and shipowners about the necessity of an umbrella and institutional labour convention.¹²⁸ This industry agreement essentially constituted the foundation for the Maritime Labour Convention (2006).¹²⁹

The 280th session of the ILO Governing Body in 2001 reviewed all pertinent maritime labour standards within international law and addressed the following:

‘The Commission, under this item discussed the significance and impact of maritime labour standards. It agreed that many of the existing ILO maritime labour instruments were outdated, deficient and not reflective of modern practices; those which were up to date and pertinent were not sufficiently ratified. It concluded that the best way forward in line with the integrated approach approved by the Governing Body at its 279th Session (November 2000) was the adoption of a single “framework” instrument which would consolidate the existing body of ILO maritime Conventions and Recommendations.’¹³⁰

124 See Pengfei Zhang and Edward Phillips, ‘Safety First: Reconstructing the Concept of Seaworthiness under the Maritime Labour Convention 2006’ (2016) 67 *Marine Policy* 54.

125 Moira L. McConnell, Dominick Devlin and Cleopatra Doumbia-Henry, *The Maritime Labour Convention, 2007: A Legal Primer to an Emerging International Regime* (Martinus Nijhoff Publishers 2011) 7.

126 International Labour Office Governing Body-Committee on Sectoral and Technical Meetings and Related Issues, *Effect to Be Given to the Recommendations of Sectoral and Technical Meetings* (GB.295/STM/3/4/1, 2006).

127 The ILO, ‘International Shipping Industry Adopts “Geneva Accord”’ (Press Release, 26 January 2001) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_007832/lang-en/index.htm> accessed on 26 March 2024.

128 *ibid.*

129 Milde (n 85) 129.

130 International Labour Office Governing Body, *Report of the 29th Session of the Joint Maritime Commission* (GB.280/5(Corr.), 2001).

The provisions of the previous 68 ILO instruments about maritime labour were consolidated into the Maritime Labour Convention (2006), which was adopted on 23 February 2006, during the 10th Maritime Session and the 94th session of the International Labour Conference.¹³¹ It guarantees shipping workers' entitlement to satisfactory employment, establishing fair competition terms for shipowners. Oman ratified the Convention in March 2022, marking its status as the 100th ILO Member State to do so.¹³² This means that over 96 per cent of the global gross shipping tonnage is now covered by this internationally agreed-upon labour legislation, which applies to most seafarers around the world.¹³³

3.6.2 Structure and contents

The Maritime Labour Convention (2006) elaborates an extensive set of rules that establish rights and obligations related to basic requirements for occupational and living situations pertaining to a diverse range of seafarers. These standards include minimum age, minimum hours of work and rest, medical fitness, regulated hiring and posting services for seafarers, training requirements, terms of employment relations, remuneration, repatriation, and resignation.¹³⁴ Additionally, the Convention includes provisions addressing standards for accommodation and recreational facilities, medical treatment both on board and on land, as well as food and catering services on board ships.¹³⁵

Within the Maritime Labour Convention (2006), Articles and Regulations delineate the fundamental rights, principles, and essential obligations of the contracting States. These 16 Articles address issues including definitions, the scope of application, entry into force, and amendments. Typical conventional norms, such as depository functions in Articles XI and XII, are present.¹³⁶ Beyond these provisions, the majority of the 16 Articles establish the general and enabling enforceable obligations that contracting States undertake. As an illustration, Article V emphasises the States' duties and principles related to

131 The ILO, 'Frequently Asked Questions about the ILO's Maritime Labour Convention, 2006' <https://www.ilo.org/global/standards/maritime-labour-convention/WCMS_CON_TXT_ILS_MAR_FAQ_EN/lang--en/index.htm> accessed 26 March 2024.

132 See the ILO (n 115).

133 The ILO, 'Maritime Labour Convention Reaches 100th Ratification' (Press Release, 11 April 2022) <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_842068/lang--en/index.htm> accessed 26 March 2024.

134 See the Maritime Labour Convention (2006).

135 Moira L. McConnell, 'The Maritime Labour Convention, 2006 – Reflections on Challenges for Flag State Implementation' (2011) 10 WMU Journal of Maritime Affairs 131.

136 See the Maritime Labour Convention (2006).

implementation and enforcement based on general statements of obligations.¹³⁷ The Articles furnish the comprehensive legal framework for Regulations, encompassing mandatory standards in Part A and non-mandatory guidelines in Part B, pertaining to each labour issue.¹³⁸ This legislative design offers inclusive definitions and flexibility to address specific situations and circumstances at a national level through consultations.¹³⁹

Title 1 of the Maritime Labour Convention (2006) contains four requirements related to minimum age, health certification, training and licences, as well as hiring and posting.¹⁴⁰ It particularly acknowledges the training requirements outlined in the IMO conventions.¹⁴¹ For example, Regulation 1.3 regarding training and qualifications stipulates that the Certification of Able Seamen Convention (No. 74) remains binding for its contracting States until 'mandatory provisions covering its subject have been adopted by the IMO and entered into force', or five years following the entry into force of the Maritime Labour Convention (2006).¹⁴² However, Regulation 1.3 does not mandate that signatory States of the Convention establish domestic standards equivalent to those established by instruments adopted by the IMO. These standards are thus not necessarily applicable in the contracting States under the Maritime Labour Convention (1994).¹⁴³

Title 2 of the Maritime Labour Convention (2006) deals with conditions of employment, touching upon employment contracts, remuneration, hours at work, crewing levels, and commitments related to domestic initiatives for encouraging job creation.¹⁴⁴ In particular, Standard 2.1 defines the information that should be included in employment agreements.¹⁴⁵ It nevertheless does not mandate an employment contract, permitting employment through intermediary work agencies and self-employment. As per the defined meaning of 'seafarer' contained in Article II, 'seafarer means any person who is employed or engaged or works in any capacity on board a ship'.¹⁴⁶ Furthermore, paragraph 1(a) in Standard A2.1 allows agency work, provided that

137 Article V of the Maritime Labour Convention (2006): [...] 6. Each Member shall prohibit violations of the requirements of this Convention and shall, in accordance with international law, establish sanctions or require the adoption of corrective measures under its laws which are adequate to discourage such violations. 7. Each Member shall implement its responsibilities under this Convention in such a way as to ensure that the ships that fly the flag of any State that has not ratified this Convention do not receive more favourable treatment than the ships that fly the flag of any State that has ratified it.

138 McConnell et al (n 125) 166.

139 Dürler (n 119) 301.

140 Title 1 of the Maritime Labour Convention (2006).

141 *ibid.*

142 Paragraph 4 of Regulation 1.3 of the Maritime Labour Convention (2006).

143 Paragraphs 1 and 2 of Regulation 1.3 of the Maritime Labour Convention (2006).

144 Title 2 of the Maritime Labour Convention (2006).

145 Standard 2.1 of the Maritime Labour Convention (2006).

146 Article II of the Maritime Labour Convention (2006).

contractual arrangements between shipowners and agency companies ensure seafarers 'with decent working and living conditions on board the ship as required by this Convention'.¹⁴⁷ This provision emphasises the necessity of providing a seafarer with contractual or equivalent agreements when he or she is not an employee directly hired by the shipowner.

Regulation 2.3 on Hours of Work and Hours of Rest, in conjunction with Regulation 2.7 about Manning Levels, incorporates the rules outlined in the Seafarers' Hours of Work and the Manning of Ships Convention (No. 180),¹⁴⁸ 'to ensure that seafarers have regulated hours of work or hours of rest'.¹⁴⁹ Therefore, fatigue management is considered a component of fitness for duty.¹⁵⁰

Title 3 of the Maritime Labour Convention (2006) consists of only two Regulations and their Standards and Guidelines, which are related to housing and entertainment amenities on the one hand, as well as food and catering on the other.¹⁵¹ These two areas are crucial issues for both workers and shipping operators, greatly affecting operational costs and ship designs.¹⁵²

Title 4 of the Convention aims to promote safeguards for health, well-being, medical services, and social security for seafarers.¹⁵³ Specifically, Regulation 4.5 focuses on social security and remains among the most sensitive provisions in the Convention,¹⁵⁴ designating the State in which the worker resides as the main authority as regards social security regulation.¹⁵⁵

Additionally, Regulation 5.3 delineates the responsibilities of labour-supplying States concerning social security. Paragraph 1 of Regulation 5.3 explicitly mentions that each signatory State must ensure implementation of the social security norms outlined in the Convention for maritime workers who 'are its nationals or are resident or are otherwise domiciled in its territory'.¹⁵⁶ Throughout the negotiations of the Maritime Labour Convention (2006), seafarers found this provision difficult to accept. They believed that there should be a responsibility on the flag State.¹⁵⁷ They emphasised the

147 Standard A2.1 of the Maritime Labour Convention (2006).

148 Seafarers' Hours of Work and the Manning of Ships Convention (No. 180).

149 Regulation 2.3 of the Maritime Labour Convention (2006).

150 McConnell et al (n 125) 301.

151 Regulation 3.1 of the Maritime Labour Convention (2006).

152 McConnell et al (n 125) 339.

153 Title 4 of the Maritime Labour Convention (2006).

154 The ILO, *Preparatory Technical Maritime Conference – Record of Proceedings (Geneva, 13-24 September 2004)* (6 Rev. 2004). Paragraph 10 of the Report of Committee No.3 reads: The Government member of Germany stressed the magnitude of the work before the Committee in attempting to regulate social protection at a global level, since harmonization had not even been possible in this area for the European Union. He underlined the importance of reaching a common understanding in this area.

155 Paragraph 3 of Standard A 4.5 of the Maritime Labour Convention (2006).

156 Paragraph 1 of Regulation 5.3 of the Maritime Labour Convention (2006).

157 McConnell et al (n 125) 448.

significance of providing social security protection for maritime workers, regardless of their citizenship or where they live.¹⁵⁸ To ensure effective implementation, given the prevalent flags of convenience practices in maritime, the Convention ultimately acknowledges the shared responsibility of the flag State and the labour-supplying State.¹⁵⁹

Nevertheless, securing social security benefits remains a challenging issue for maritime labour.¹⁶⁰ This practical difficulty largely arises due to the globalised maritime workforce and differences among domestic legislation related to social security.¹⁶¹

Within the Maritime Labour Convention (2006), Title 5 outlines each State's obligations to faithfully carry out and uphold the provisions stipulated in the Convention. In particular, Title 5 delineates the responsibilities of flag States, port States, and labour-supplying States, respectively.¹⁶² Regulation 5.1 reaffirms the flag State's obligation to keep track of employment conditions during maritime operations.¹⁶³ Regulation 5.2 on port State responsibilities aims to enhance inspections in ports and efficiently confirm whether employment conditions are in conformity with the norms laid down in the Convention.¹⁶⁴ The final Regulation in Title 5 provides the responsibilities of labour-supplying States. Standard A5.3 borrows verbatim from Article 5 of the Convention and emphasises that the contracting States must ensure the compliance of seafarer hiring and posting practices within their jurisdictions with the requirements created by the Convention. Furthermore, Standard A5.3 offers legal proceedings for labour-supplying States in instances where there are alleged violations of training, licencing, and other operating standards defined by Standard A1.4.¹⁶⁵

3.6.3 Basic principles

The Maritime Labour Convention (2006) consolidated 37 existing shipping-related labour conventions, updating existing provisions and introducing

158 *ibid*; see also the ILO, *High-level Tripartite Working Group on Maritime Labour Standards (Third Meeting)* (TWGMLS/2003/10, 2003).

159 Sang-Won Ji, 'A Study on the Social Security for Seafarers of Maritime Labour Convention, 2006' (2008) 32(3) *Journal of Navigation and Port Research* 237.

160 Carina Schmitt et al, 'The Global Emergence of Social Protection: Explaining Social Security Legislation 1820–2013' (2015) 43(4) *Politics & Society* 503.

161 Johanna Avato, Johannes Koettl, and Rachel Sabates-Wheeler, 'Social Security Regimes, Global Estimates, and Good Practices: The Status of Social Protection for International Migrants' (2010) 38(4) *World Development* 455.

162 Title 5 of the Maritime Labour Convention (2006).

163 Regulation 5.1 of the Maritime Labour Convention (2006).

164 Regulation 5.2 of the Maritime Labour Convention (2006).

165 Standard A1.4 of the Maritime Labour Convention (2006).

several new and innovative ones.¹⁶⁶ Several legislative principles underpin the Convention, serving as key factors contributing to its success. The principles translate into comprehensive provisions for labour regulation as well as the successful implementation of the Maritime Labour Convention (2006).

3.6.3.1 ILO – IMO cooperation

Despite having to navigate both international maritime law and international labour standards, the Maritime Labour Convention (2006) successfully came to fruition. Indeed, it is the result of inter-organisational cooperation, drawing on the contributions of both the ILO and the IMO.¹⁶⁷ It effectively integrates labour standards with the existing IMO regulatory framework.

Before concluding the Maritime Labour Convention (2006), the ILO had already initiated activities with the IMO to address various issues of great importance to seafarers. A notable example was the establishment of the Joint IMO/ILO Ad Hoc Working Groups. These included the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, the Personal Injury and Abandonment of Seafarers;¹⁶⁸ the Joint IMO/ILO Ad Hoc Expert Working Group on the Fair Treatment of Seafarers in the Event of a Maritime Accident;¹⁶⁹ as well as the Joint ILO/IMO Working Group on Medical Examinations of Seafarers and Ships' Medicine Chests.¹⁷⁰

On the one hand, the IMO has developed a comprehensive set of international regulations, agreements, and guidelines to help all maritime States worldwide meet minimum standards concerning the safety of human life during maritime operations.¹⁷¹ Standards and Guidelines provided by the

166 Article X of the Maritime Labour Convention (2006).

167 The ILO, 'Joint IMO/ILO Activities on Seafarers' <https://www.ilo.org/global/standards/maritime-labour-convention/text/WCMS_162318/lang-en/index.htm> accessed 26 March 2024.

168 The ILO, 'Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers' <https://www.ilo.org/sector/activities/sectoral-meetings/WCMS_161208/lang-en/index.htm#:~:text=The%20Joint%20IMO%20ILO%20Ad,for%20loss%20of%20life%2C%20personal> accessed 26 March 2024.

169 The ILO, 'Joint IMO/ILO Ad Hoc Working Group on the Fair Treatment of Seafarers in the Event of a Maritime Accident' <https://www.ilo.org/sector/activities/sectoral-meetings/WCMS_161477/lang-en/index.htm> accessed 26 March 2024.

170 The ILO, 'Joint ILO/IMO Working Group on Medical Fitness Examinations of Seafarers and Ships' Medicine Chest' <https://www.ilo.org/sector/activities/sectoral-meetings/WCMS_162319/lang-en/index.htm> accessed 26 March 2024.

171 These instruments include the International Convention for the Safety of Life at Sea (SOLAS), the International Convention for the Prevention of Pollution from Ships (MARPOL), and the International Convention on Standards of Training, Certification and Watch-Keeping for Seafarers (STCW). For more background information on the IMO and its Conventions, see the IMO, 'List of IMO Conventions' <<https://www.imo.org/en/About/Conventions/Pages/ListOfConventions.aspx>> accessed on 26 March 2024; see also Francisco

Maritime Labour Convention (2006) exhibit indications of incorporating normative concepts and governance principles from the IMO. For example, Guideline B1.2.1 of the Convention asserts that health and fitness assessments for maritime workers must follow relevant universal norms issued within the regulatory framework of the IMO law.¹⁷² The Maritime Labour Convention (2006) additionally reaffirms the legal implications of mandatory IMO standards pertaining to medical certificates,¹⁷³ training and qualifications,¹⁷⁴ and manning levels.¹⁷⁵

Furthermore, Title 5 of the Maritime Labour Convention (2006) includes obligations to establish a compliance and enforcement system through regular inspections.¹⁷⁶ As per Regulation 5.2, the port State has the authority to control and inspect vessels to assess their adherence to the standards outlined in the Maritime Labour Convention (2006), with a particular focus on seafarers' rights.¹⁷⁷ These regulations generally align with existing IMO practices, wherein port States commit to monitoring foreign ships visiting their ports. If justified, they can deny entry to vessels if operators fail to adhere to the regulations of applicable IMO treaties.¹⁷⁸ This authority is known as port State control, arising from a recognised need among port States for the safety of shipping operations and safeguarding water conditions in their ports.¹⁷⁹

On the other hand, the Maritime Labour Convention (2016) is fundamentally an ILO convention. It reaffirms the enforcement of the ILO law in 'national laws or regulations, through collective bargaining agreements or through other measures or in practice'.¹⁸⁰

Additionally, Article XIII of the Convention explicitly emphasises the tripartism inherent in the ILO law:

'For matters dealt with in accordance with this Convention, the Committee shall consist of two representatives nominated by the Government of each Member which has ratified this Convention, and the representatives of Shipowners and Seafarers appointed by the Governing Body after consultation with the Joint Maritime Commission.'¹⁸¹

Piniella, José María Silos, and Francisca Bernal, 'Who Will Give Effect to the ILO's Maritime Labour Convention, 2006' (2013) 152(1) *International Labour Review* 61.

172 Guideline B1.2.1 of the Maritime Labour Convention (2006).

173 Regulation 1.2 of the Maritime Labour Convention (2006).

174 Regulation 1.3 of the Maritime Labour Convention (2006).

175 Regulation 2.7 of the Maritime Labour Convention (2006).

176 Regulation 5.2 of the Maritime Labour Convention (2006).

177 *ibid.*

178 Piniella (n 171) 64.

179 McConnell (n 135) 131.

180 Article IV of the Maritime Labour Convention (2006).

181 Article XIII(2) of the Maritime Labour Convention (2006).

Emphasising tripartism can assist governments in addressing policy dilemmas arising from the need to enhance labour protection for seafarers while simultaneously maintaining competitiveness in the global marketplace.¹⁸²

Providing social protection is particularly challenging since seafarers frequently work under the laws of a State other than their nationality. In such circumstances, implementing international labour standards addressing unfair, hazardous, and unhealthy working conditions, as well as limited availability of medical supplies and social security protection related to seafarers and their families, can be particularly challenging.¹⁸³ The Maritime Labour Convention (2006) addresses the above-mentioned difficulties by developing labour legislation based on the expertise and knowledge of the ILO and the IMO. This approach maximises the complementarities of the two organisations to ensure policy coherence.

3.6.3.2 Multi-State responsibilities

In the Maritime Labour Convention (2006), Regulation 5.1 reasserts the flag State responsibilities for enforcement and implementation. Subsequently, Regulation 5.2 deals with the responsibilities of port States. Its Preamble specifically points out the legislative purpose of this Regulation, aiming to facilitate global collaboration with respect to application and adherence to the Convention on vessels registered in other States.¹⁸⁴ In 2014, several States entered into the Paris Memorandum of Understanding on Port State Control (2014), which reported that:

‘20 August 2014 marked the first anniversary of the entry into force of the Maritime Labour Convention (MLC, 2006). During the first year 7.4% (3,447) of the total number of 46,798 deficiencies recorded was linked to the MLC, while 160 (4.6%) were marked as a ground for detention resulting in 113 detained ships. Detainable deficiencies were most frequently recorded in the areas “payment of wages” (39.5%), and “manning levels for the ship” (28.6%). Other areas with high deficiency levels are “health and safety and accident prevention” (43.1%), “food and catering” (15.4%) and “accommodation” (10%).’¹⁸⁵

The inspection shall focus solely on examining the maritime labour qualification and declaration, unless stipulated otherwise by the Maritime Labour Convention (2006).¹⁸⁶ The exceptional circumstances encompass falsified docu-

182 McConnell et al (n 125) 565.

183 Oana Adăscălitei, ‘The Maritime Labour Convention 2006 – A Long-awaited Change in the Maritime Sector’ (2014) 149(5) *Procedia – Social and Behavioural Sciences* 8.

184 Regulation 5.2 of the Maritime Labour Convention (2006).

185 Paris Memorandum of Understanding on Port State Control, adopted in Paris on 1 July 1982.

186 Regulation 5.2.1 of the Maritime Labour Convention (2006).

ments, strong reasons to suspect that the circumstances of employment and residence aboard the vessels fail to meet the standards created by the Convention, and a complaint about the violation of the Convention.¹⁸⁷

Regulation 5.3 then emphasises the obligations of labour-supplying States in overseeing the hiring, employment, and posting of seafarers.¹⁸⁸ Labour-supplying States may also be responsible for providing social security contributions.¹⁸⁹

These provisions establish an effective legal framework that assigns the duties of complying with and enforcing the Maritime Labour Convention (2006) to multiple States. Within the realm of multi-State responsibilities, port State responsibilities contribute to global collaboration based on the shared concerns among maritime States about maintaining consistent and sophisticated norms for vessels visiting their ports and sailing through their seas.¹⁹⁰ Individual States that ratify this Convention can have responsibilities on three fronts: firstly, as a flag State; secondly, as a port State; and thirdly, as the State from which the seafarers come. The legislative design of multi-State responsibilities is expected to ensure a comprehensive and effective framework for maritime labour protection, considering the practical difficulties for flag States in asserting jurisdictional authority and enforcing international labour standards on ships as they voyage internationally.

3.6.3.3 *Technical aspects of labour standards*

In the 21st century, the reduction of crew size significantly affects the employment and living circumstances of seafarers. During the early 1970s, a typical 10,000-gross-tonne bulk carrier had around 40 crew members.¹⁹¹ By the early 2000s, a regular cargo ship was at least three times larger, yet its staff consisted of only 18-25 crew members.¹⁹² Crew reduction in the modern maritime industry is partly driven by technological progress and greater efficiencies of large ships but is also associated with shipowners' desire to save labour costs.¹⁹³ In pursuit of business efficiency, ships typically operate with minimal

187 Standard A 5.2.1 of the Maritime Labour Convention (2006).

188 The ITF, *An ITF Guide for Seafarers to the ILO Maritime Labour Convention, 2006* (2020) 60.

189 The European Commission Directorate-General for Mobility and Transport, *Study on the Implementation of Labour Supplying Responsibilities Pursuant to the Maritime Labour Convention (MLC 2006)* (2016).

190 Sara Ruano Albertos and Arántzazu Vicente Palacio, 'Adapting European Legislation to the Maritime Labour Convention 2006 Regulations in Relation to the State Responsibilities of Both the Flag State and the Control of Ships by Port State Control' (2013) 4(4) *Beijing Law Review* 141.

191 Exarchopoulos et al (105) 66.

192 The ILO, *The Global Seafarer: Living and Working Conditions in A Globalized Industry* (2004).

193 Diego Artuso et al, *Study on the Analysis and Evolution of International and EU Shipping* (2015).

crew levels, leading to seafarers working long hours over extended periods.¹⁹⁴ In reality, as the international maritime industry operates largely as a 24/7 enterprise, seafarers often work long and irregular hours.¹⁹⁵ As a result, minimum crew levels on board ships, combined with extensive amounts and hours of work, lead to significant seafarer fatigue.¹⁹⁶ As early as 2001, the IMO issued the *Guidance on Fatigue Mitigation and Management (2001)*,¹⁹⁷ which delineates the primary factors contributing to fatigue among seafarers, including insufficient sleep, inadequate rest, stress, and excessive workload.¹⁹⁸ This Guidance favoured a holistic approach to addressing seafarer fatigue.¹⁹⁹

Regulation 2.3 of the Maritime Labour Convention (2006) addresses the issue of fatigue by setting limits on working hours and mandating minimum rest periods for all seafarers on board.²⁰⁰ No universal solution exists for addressing the issue of excessive fatigue. Nevertheless, certain aspects of labour standards must be addressed by maritime stakeholders under the Convention to manage this human element issue. The pertinent standards encompass working hours, rest periods, manning of ships, and effective training of seafarers to ensure a comprehensive understanding of the nature of fatigue, its causes, preventive measures, and countermeasures.²⁰¹ For instance, Standard A2.3 specifies that the maximum allowable working time within a 24-hour period is 14 hours, and within a seven-day period, it is 72 hours.²⁰² Moreover, the minimum rest period should be at least ten hours in a 24-hour period and 77 hours within a seven-day period.²⁰³

In addition to fatigue management, the Maritime Labour Convention (2006) addresses other technical issues, including medical certificates,²⁰⁴ as well as training and qualifications.²⁰⁵ However, it does not offer self-standing solutions to these issues but takes a cautious approach by reaffirming the legal effects of mandatory IMO standards. Under the Convention, for example, paragraphs 1 and 2 of Regulation 1.3 stipulate that maritime workers must have undergone training and be certified as competent or qualified before they may work.²⁰⁶ Additionally, Paragraph 3 of Regulation 1.3 emphasises that

194 David Walters and Nick Bailey, *Lives in Peril: Profit or Safety in the Global Maritime Industry?* (Springer 2013).

195 Andrea Galieriková, Andrej Dávid, and Jarmila Sosedová, 'Fatigue in Maritime Transport' (2020) 24(1) *Scientific Journal of Bielsko-Biala School of Finance and Law* 35.

196 Exarchopoulos et al (105) 68.

197 See the IMO, *Guidance on Fatigue Mitigation and Management (MSC/Circ.1014, 2001)*.

198 Exarchopoulos et al (105) 71.

199 See the IMO (n 197).

200 Regulation 2.3 of the Maritime Labour Convention (2006).

201 See the IMO (n 197).

202 Regulation 1.3 of the Maritime Labour Convention (2006).

203 *ibid.*

204 Regulation 1.2 of the Maritime Labour Convention (2006).

205 Regulation 1.3 of the Maritime Labour Convention (2006).

206 *ibid.*

‘training and certification in accordance with the mandatory instruments adopted by the International Maritime Organization shall be considered as meeting the requirements of paragraphs 1 and 2 of this Regulation.’²⁰⁷

3.6.3.4 Flexibility in application

The Maritime Labour Convention (2006) acknowledges the necessity for States to have the ability to apply the Convention in a flexible manner, considering the diverse economic, social, and political circumstances of each State.²⁰⁸ For instance, Regulation 2.2 states that all maritime workers ‘shall be paid for their work regularly and in full in accordance with their employment agreements’.²⁰⁹ Although this provision does not establish any minimum wages, it ensures that all seafarers shall be regularly paid, offering a principle with respect to calculating salaries.²¹⁰ This allows States to set wage rates that are appropriate to their level of economic development. The flexibility of application aligns with the objectives of the ILO constituents to ensure that all States, regardless of their domestic situations, may participate in the international regulatory framework and facilitate the process for States to accept and implement the Maritime Labour Convention (2006).²¹¹

3.6.4 Legal effects

The Maritime Labour Convention (2006) represents a success and a significant positive step in addressing inadequate labour protection within the maritime sector.²¹² It establishes an arsenal of enforceable minimum standards. The Convention’s success is largely due to its focus on encouraging decent work and fair globalisation by establishing international minimum requirements.²¹³ This translates into ensuring appropriate employment conditions for maritime workers and establishing a fair competitive environment for shipping operators.²¹⁴ The Maritime Labour Convention (2006) promotes cooperation between individual States and equalises fundamental labour standards globally

207 *ibid.*

208 The ILO (n 131).

209 Regulation 2.2 of the Maritime Labour Convention (2006).

210 Guidelines B2.2.2 of the Maritime Labour Convention (2006).

211 Lisa Tortell, Rudi Delarue and Jeffrey Kenner, ‘The EU and the ILO Maritime Labour Convention: In Our Common Interest and in the Interest of the World’ in Jan Orbie and Lisa Tortell (eds), *The European Union and the Social Dimension of Globalization: How the EU Influences the World* (Routledge 2009) 113.

212 Olukayode Olalekan Aguda, ‘Maritime Labour Convention 2006: Implications for Seafarers after a Decade’ (2017) 8(2) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 132.

213 Piniella (n 171) 60.

214 Whitlow (n 107) 124.

by establishing binding standards that are uniform in application, enforcement, and outcome while incorporating flexibility through its guidelines.²¹⁵ Labour protection in the maritime industries currently falls 'between the very high and the very low labour standards' available across different States.²¹⁶

However, the Maritime Labour Convention (2006) is not a comprehensive solution for regulatory challenges related to inadequate labour protection for seafarers. Several weaknesses may compromise the legal effectiveness of the Convention.

Firstly, while the Maritime Labour Convention (2006) represents a commendable advance over a combination of international labour standards for seafarers, it offers only a modest benefit.²¹⁷ Several provisions are incomplete, largely discretionary, and potentially unenforceable.²¹⁸ Moreover, multi-State responsibilities do not promote comprehensive supervision and implementation of all provisions outlined in the Convention.²¹⁹ Due to ineffective supervision by the flag State, a considerable number of operators prioritise their financial interests above the sustainable development of the maritime industry and decent work, highlighting limited expenditures on improving technologies and working conditions.²²⁰ Establishing the responsibilities of both flag States, port States, and labour-supplying States does not enhance the enforcement of international minimum labour standards. Seafarers continue to face unfavourable working conditions, which can be attributed to the temporary nature of their jobs and the inherent difficulties of working at sea for an extended period.²²¹

Secondly, the Convention does not address all issues that are essentially related to labour and employment in maritime transport. Specifically, it has not addressed the right to organise a strike, the criminalisation of workers, the abandonment of seafarers, or the availability of visas for shore leaves.²²²

Thirdly, Article II explicitly mentions that 'seafarer means any person who is employed or engaged or works in any capacity on board a ship to which

215 Aimée Asante and Ben Chigara, 'Emergent Maritime Labour Law: Possible Implications for other Transnational Labour Fields' in Adelle Backett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar 2015) 345.

216 Piñeiro (n 84) 13.

217 Exarchopoulos et al (n 105) 64.

218 Paul J. Bauer, 'The Maritime Labour Convention: An Adequate Guarantee of Seafarer Rights, or an Impediment to True Reforms?' (2008) 8(2) *Chicago Journal of International Law* 644.

219 The European Commission Directorate-General for Mobility and Transport (n 186).

220 John AC Cartner, 'The shipmaster and the Maritime Labour Convention 2006' in Jennifer Lavelle (ed), *The Maritime Labour Convention 2006: International Labour Law Redefined* (Routledge 2014) 47.

221 Moira L McConnell, 'Making Labour History and the Maritime Labour Convention, 2006: Implications for International Law-Making (and Responses to the Dynamics of Globalization)' in Aldo E. Chircop, Ted L. McDorman and Susan J. Rolston (eds), *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston* (Brill Nijhoff 2009) 349.

222 Aguda (n 212) 132.

this Convention applies'.²²³ Certain groups of workers may not be covered by the Maritime Labour Convention (2006) because they are not considered seafarers based on domestic interpretations of the definition of 'seafarer' adopted by the Convention.²²⁴ For example, as repair crews move from one ship to another and undertake maintenance,²²⁵ several States have excluded them from being classified as seafarers.²²⁶

Fourthly, in addition to the remaining inadequacies in the contents, another indirect weakness is related to the fact that many provisions of the Maritime Labour Convention (2006) can unavoidably increase costs for shipping business.²²⁷ Within the Convention, for instance, Title 3 introduces Standards and Guidelines on living conditions, food, and entitlement venues.²²⁸ Title 4 provides requirements for well-being, health safeguards, social security, and medical services.²²⁹ These provisions essentially raise labour costs for shipowners. While this outcome is not inherently negative, shipowners who cannot afford additional labour costs may face challenges in delivering shipments to foreign markets, impacting their ability to remain in business.²³⁰ These costly requirements may also hinder new entrants from entering the maritime market, thereby reducing competition and potentially driving shipping prices even higher.²³¹

3.7 A SPECIALISED AND INTEGRATED ILO CONVENTION ON AVIATION LABOUR

The Maritime Labour Convention (2006) establishes a unified, globally applicable, and enforceable foundation for labour standards at sea. If such a legislative approach is possible in the maritime industry, there is no reason why States and industrial stakeholders in other sectors cannot advocate for similar legally binding instruments in their respective sectors, including the civil aviation sector.²³²

223 Article II(f) of the Maritime Labour Convention (2006).

224 Paragraph 1(f) of Article II of the Maritime Labour Convention (2006): seafarer means any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies. See Whitlow (n 107) 126.

225 *ibid.*

226 *ibid.*

227 Bauer (n 218) 657.

228 Title 3 of the Maritime Labour Convention (2006).

229 Title 4 of the Maritime Labour Convention (2006).

230 Food and Agriculture Organization of the United Nations, *Report of the Expert Consultation on Implementation Issues Associated with Listing Commercially-Exploited Aquatic Species on Cites Appendices* (FIR/R741, 2004).

231 Darren S. Calley, *Market Denial and International Fisheries Regulation: The Targeted and Effective Use of Trade Measures Against the Flag of Convenience Fishing Industry* (Brill Nijhoff, 2012).

232 Whitlow (n 107) 131.

3.7.1 Minimum aviation labour standards

To promote labour standards applicable to airline workers, ensure the 'level playing field' for airlines, and facilitate aviation safety, an ILO convention on aviation labour could incorporate enforceable international minimum standards for both social and technical aspects of labour standards in international aviation. The inclusion of comprehensive minimum standards would be essential for the effectiveness of this new convention.

3.7.1.1 *Social aspects of labour standards*

A new and self-standing ILO convention on aviation labour could theoretically represent a viable option for improving social aspects of labour standards in civil aviation. The ILO conventions have been shown to be quite effective in promoting labour rights and principles.²³³ On the one hand, the ILO conventions represent widely accepted concepts as they are the product of a two-thirds majority decision among the ILO constituents.²³⁴ On the other hand, the conventions recognise that States characterise different legal frameworks, historical and cultural origins, and financial growth levels.²³⁵ Representatives of governments, workers, and employers have formulated most international labour standards in a way that allows them to be easily incorporated into domestic labour laws and policies, considering these differences.²³⁶ An ILO convention on civil aviation can thus encourage universal ratification by ensuring flexibility in light of treaty obligations.

Regarding labour regulation of international aviation, States can be tempted to relax labour regulations pertaining to international aviation in an effort to make their air transport industries more competitive.²³⁷ They might stick with the labour laws and policies since they think that an improvement in labour protection would harm the ability to compete.²³⁸ The aforementioned patterns of behaviour are not exclusive to civil aviation. Indeed, the ILO law is designed to overcome the problem of coordinating the interests of lowering labour costs with pressures from different States for fair competition, operational safety, and social protection. In this context, a specialised ILO convention on aviation labour can be placed within the Decent Work Agenda (2015)

233 The ILO, *The International Labour Organization and the Quest for Social Justice, 1919-2009* (2009).

234 The ILO (n 2) 22.

235 The ILO, *Transitioning from the Informal to the Formal Economy-Report V(2)* (International Labour Conference, 103rd Session, Geneva, 2014).

236 The ILO (n 2) 22.

237 Peter Turnbull, Paul Blyton and Geraint Harvey, 'Cleared for Take-off? Management-Labour Partnership in the European Civil Aviation Industry' (2004) 10(3) *European Journal of Industrial Relations* 287.

238 Ruben Zandvliet, *Trade, Investment and Labour: Interactions in International Law* (Brill Nijhoff 2022).

and improve the protection of labour rights.²³⁹ It would provide a bill of rights for airline workers, ensuring a firm but flexible response to precarious working conditions in global civil aviation.²⁴⁰

3.7.1.2 Technical aspects of labour standards

Aviation safety is a worldwide challenge, given that civil aviation is largely international in nature and its optimal benefits can not be realised if confined to national boundaries.²⁴¹ The risks of civil aviation are also shared globally.²⁴² The existing international labour standards do not include specialised provisions for aviation labour and cannot effectively address safety-related concerns. This adds to the apprehension regarding the efficacy of an ILO convention in acting as an international forum for the establishment and enforcement of new aviation labour standards from a technical perspective.

The ILO is conscious of the fact that:

‘Having considered the information given in this chapter, having heard from a representative of the International Civil Aviation Organisation of the work already done by that body, and in hand, in regard to the technical aspects of employment in civil aviation, the Committee considers that this is a field of study outside the scope of the International Labour Organisation and properly within the scope of the International Civil Aviation Organisation. The Committee therefore makes no recommendation on the technical aspects of employment.

The social aspects of conditions of employment in civil aviation are the responsibility of the International Labour Organisation [...].²⁴³

The ILO acknowledges its very limited role in establishing dedicated provisions for the technical aspects of labour standards.²⁴⁴ This has been the case since the very beginning, when the ILO was requested by several employers’ and

239 Jorma Rantanen, Franklin Muchiri and Suvi Lehtinen, ‘Decent Work, ILO’s Response to the Globalization of Working Life: Basic Concepts and Global Implementation with Special Reference to Occupational Health’ (2020) 17(10) *International Journal of Environmental Research and Public Health* 3351.

240 Iliana Christodoulou-Varotsi, ‘Critical Review of the Consolidated Maritime Labour Convention (2006) of the International Labour Organization: Limitations and Perspectives’ (2012) 43(4) *Journal of Maritime Law & Commerce* 467; Patrick Bollé, ‘The ILO’s New Convention on Maritime Labour: An Innovation Instrument’ (2006) 145 *International Labour Review* 135.

241 Jiefang Huang, *Aviation Safety and ICAO* (Leiden University Dissertation 2009) 72.

242 Jiefang Huang, ‘Aviation Safety, ICAO and Obligations *Erga Omnes*’ (2009) 8(1) *Chinese Journal of International Law* 64.

243 The ILO (n 54) 27.

244 The failure of international labour standards to effectively address labour issues in international aviation may spark reflections on the *lex specialis* principle, based on which ICAO appears to be the best suited to create labour-related SARPs for civil aviation.

workers' organisations to study labour-related concerns identified in international aviation as far back as the 1920s.²⁴⁵

Drawing lessons from the Maritime Labour Convention (2006), a new convention on aviation labour can adopt regulations about flight crews' flying hours and rest periods. Such limitations should be based on 'at least a weekly, monthly or quarterly limitation or a combination of these, as may be appropriate to the operational conditions'.²⁴⁶ Additionally, the convention may set out key principles concerning other technical aspects of labour standards, including licencing requirements, pilot fatigue, and operational authorities, contributing to a promising regime while referring to detailed requirements created by international air law. This can encourage coordination between the ILO and ICAO based on their respective mandates and avoid duplication of legislative work. Thus, regarding the question of whether an ILO convention on aviation labour can address technical labour standards, the answer is 'yes' but only to the extent that the technical standards are directly tied to labour matters – for instance, working hours – which are traditionally governed by international labour standards. Additionally, an ILO convention on aviation labour may reaffirm key technical principles and refer to detailed international standards provided by the Chicago Convention (1944) and its Annexes.²⁴⁷

3.7.2 Legal considerations in the design and implementation

As mentioned *supra*, the success of the Maritime Labour Convention (2006) is contingent upon certain basic principles related to legislative design and effective implementation. It is conceivable that the ILO constituents might adopt these principles as a model for labour regulation in the air transport industry via a sectoral labour convention.

3.7.2.1 Multi-State responsibilities

Civil aviation is a global business that involves transnational employment and the cross-border movement of workers. The legislative design that includes multi-State responsibilities for aviation labour, as deployed in the Maritime Labour Convention (2006), may guarantee the overall impacts of a prospective ILO convention on aviation labour.

The States of registry may not always ensure high levels of labour standards in civil aviation. By analogy to port State control, which is a core principle reaffirmed in international maritime labour law, a prospective convention concerning aviation labour may consider the possibility of assigning

245 The ILO (n 54) 5.

246 *ibid* 33.

247 See chapter 4 of this study.

enforcement responsibilities to States where aircraft fly over or manoeuvre within. States exercising territorial jurisdiction are crucial in implementing international norms pertaining to air transport.²⁴⁸ This approach may contribute to eliminating substandard labour practices in a complementary manner.

However, certain aspects of civil aviation complicate the ability of these States – over which flights traverse or manoeuvre – to oversee and enforce international labour standards. Aircraft do not stay at foreign airports for extended periods, and there is no comprehensive regulatory framework for States to oversee labour-related standards on foreign aircraft.

This contrasts with maritime law, where the principle of port State control was already established based on the IMO law before the Maritime Labour Convention (2006) came into force. This principle may have its roots in the American model of the US Coast Guard, which emerged in the 1970s with the enactment of the Federal Water Pollution Control Act (1972),²⁴⁹ and the European model based on the Paris Memorandum of Understanding on Port State Control (1982).²⁵⁰

Regarding labour-supplying State responsibilities, Article 33 of the Chicago Convention (1944) can be pertinent as it underscores reciprocal acknowledgement of personnel certificates and licences. This provision suggests the potential for transnational recruitment and placement of airline workers.²⁵¹ To regulate atypical employment, including self-employment, employment through temporary work agencies, as well as pay-to-fly and zero-hour contractual arrangements, airline workers require the effective implementation of labour standards by the labour-supplying State. In light of these responsibilities, contracting States that supply aviation labour shall prioritise the recruit-

248 Article 12 of the Chicago Convention (1944) confirms the legislative powers of States as regards aviation regulation applicable to their airspace, so long as ‘each contracting State undertakes to keep its regulations in these respects uniform, to the greatest extent, with those established from time to time under this Convention’. Furthermore, Article 33 provides that for flights above its territory, every contracting State retains the option to reject airworthiness certificates, competency certificates, and licences if the requirements according to which these documents were issued or validated fall below the standards established in the ICAO Standards and Recommended Practices (SARPs). See chapter 4 of this study.

249 Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.); see also the United States Environmental Protection Agency, ‘History of the Clean Water Act’ (22 June 2023) <[https://www.epa.gov/laws-regulations/history-clean-water-act#:~:text=The%20Federal%20Water%20Pollution%20Control,Clean%20Water%20Act%20\(CWA\)](https://www.epa.gov/laws-regulations/history-clean-water-act#:~:text=The%20Federal%20Water%20Pollution%20Control,Clean%20Water%20Act%20(CWA)>)> accessed 26 March 2024.

250 Paris Memorandum of Understanding on Port State Control, signed in Paris on 26 January 1982. The 1982 Paris Memorandum is based on the experience gained from the 1978 Memorandum of The Hague, which was signed by eight European countries in order to establish uniform criteria for the inspection of working conditions on board ships in accordance with the provisions of the ILO’s Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147). See Piniella (n 168) 64.

251 Article 33 of the Chicago Convention (1944).

ment and placement of airline workers, along with contributions to social security.²⁵²

3.7.2.2 A 'Special Tripartite Committee' on the global level

Article VII of the Maritime Labour Convention (2006) assigns a crucial role to the Special Tripartite Committee, utilising it to enhance the bargaining power of seafarers.²⁵³ In accordance with this provision, States shall determine derogation, exemption, and other flexible applications of the Convention based on engagement with representatives of workers and operators in the maritime sector. If there is no such union of shipowners or seafarers in a State, the State shall consult the Special Tripartite Committee formed at the international level.²⁵⁴

Similarly, mirroring this provision, the establishment and functioning of such a global committee in the civil aviation sector can also offer a solution to the issue of inadequate trade union protection. This facilitates the promotion of the core ILO values of tripartism and social dialogue.²⁵⁵

Multinational crewing practices, the use of intermediary work agencies, and weak national industrial relations for many airline workers, along with the mobile nature of the work, hinder the development of workplace-level solidarity for the collective representation of their interests.²⁵⁶ The size of the workplace and the continuity of employment relations are well-known factors influencing representative institutions for organised labour.²⁵⁷ Organised labour is more likely to be present in larger workplaces with relatively permanent workforces than in smaller ones, particularly if there is high labour turnover in the latter settings.²⁵⁸ In this regard, the high labour turnover in aviation significantly hampers the participation of workers in trade unions and collective bargaining.²⁵⁹

By establishing the Special Tripartite Committee, in cases where there is no effective labour union protection for workers in a contracting State, the State shall conduct consultations with the global Committee for the imple-

252 See Paragraph 1 of Regulation 5.3 of the Maritime Labour Convention (2006).

253 Article VI of the Maritime Labour Convention (2006).

254 *ibid.*

255 Whitlow (n 107) 125.

256 Eli Moen, 'Weakening Trade Union Power: New Forms of Employment Relations. The Case of Norwegian Air Shuttle' (2017) 23(4) *Transfer: European Review of Labour and Research* 425.

257 Alan Bogg and Tonia Novitz, 'Links between Individual Employment Law and Collective Labour Law: Their Implications for Migrant Workers' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* 361.

258 Clare Gallagher and Elsa Underhill, 'Managing Work Health and Safety: Recent Developments and Future Directions' (2012) 50(2) *Asia Pacific Journal of Human Resources* 227.

259 Richard Hyman, 'What Future for Industrial Relations in Europe?' (2018) 40(4) *Employee Relations* 569; Graham et al (n 95) 270.

mentation of the new ILO convention on aviation labour.²⁶⁰ The Committee can help enhance the bargaining power of airline workers, especially when trade union recognition and representation become challenging due to the highly competitive aviation markets leading to workforce casualisation.²⁶¹

3.7.2.3 Flexibility in application

To facilitate the acceptance and subsequent enforcement of the new ILO convention concerning aviation labour by States, the convention should consider the various domestic national circumstances related to aviation economies and offer flexibility in its application.²⁶² For instance, the new ILO convention on aviation labour can articulate the fundamental rights of workers to decent work in clear terms but grants considerable flexibility to ratifying States regarding how they implement these standards to achieve high levels of labour rights and standards in their domestic laws and policies. States shall, therefore, be permitted to exercise the necessary degree of flexibility in respecting and implementing their international obligations arising from the new ILO convention. This design will take into account diverse domestic conditions related to specific labour issues, such as licencing requirements, specific allowances, social dialogue, and social security coverage.

Flexibility is typically grounded in the principles of tripartism, transparency, and accountability.²⁶³ When States exercise their discretion to apply the new convention, governments shall consult the organisations representing workers and airlines.²⁶⁴ The relevant governments should then communicate any decisions to the ILO.²⁶⁵ Flexible application can be an important approach to ensuring that all States can join the international regulatory framework to incrementally enhance protection for airline workers, a necessity in an ever more globalised sector like civil aviation.

260 Article VI of the Maritime Labour Convention (2006).

261 Geraint Harvey and Peter Turnbull, 'Power in The Skies: Pilot Commitment and Trade Union Power in The Civil Aviation Industry' in David Lewin, Bruce E. Kaufman and Paul J. Gollan (eds), *Advances in Industrial and Labor Relations* (Emerald Group Publishing Limited 2012) 51; Whitlow (n 107) 125.

262 Jean-Michel Servais, 'Flexibility and Rigidity in International Labour Standards' (1986) 125 *International Labour Review* 193.

263 Nicolas Valticos, 'The Future Prospects for International Labour Standards' (1979) 118 *International Labour Review* 679.

264 M. Antonio García-Muñoz Alhambra, Beryl ter Haar and Attila Kun, 'Soft on the Inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law' (2011) 27(4) *The International Journal of Comparative Labour Law and Industrial Relations* 337.

265 *ibid.*

3.7.3 Perceived concerns about the ILO convention on aviation labour

When contrasted with seafaring, the civil aviation industry is noticeably more complex due to the multitude of job categories involved.²⁶⁶ Additionally, there is no aviation convention dealing with labour and employment. An ILO convention on aviation labour is not a miracle solution and may not – at least in the near future – provide a feasible means of promoting decent work, ensuring aviation safety, and safeguarding the ‘level playing field’ in international aviation.

3.7.3.1 *No international aviation labour standards to be consolidated*

When exploring the potential for States to establish an ILO convention on civil aviation, the Maritime Labour Convention (2006) should not be seen as an autonomous set of regulations.²⁶⁷ Instead, it consolidated various ILO conventions related to the labour standards of seafarers. Article X explicitly lists conventions pertaining to labour protection for seafarers, such as the Minimum Age (Sea) Convention (No. 7), the Unemployment Indemnity (Shipwreck) Convention (No. 8), and the Placing of Seamen Convention (No. 9).²⁶⁸ These conventions, in conjunction with the IMO conventions concerning maritime labour, formed the basis for the Maritime Labour Convention (2006), which created a self-contained regulatory framework. The successful establishment of the Maritime Labour Convention (2006), therefore, did not come from scratch.

As regards international aviation, equivalent rules to be consolidated or amended by the ILO constituents are absent. Although the ILO and ICAO engage in extensive discussions regarding the impact of international aviation market liberalisation on labour and employment, these discussions have not resulted in any legislative action.

States exhibit diverse socio-economic conditions and regulatory frameworks concerning labour laws. Additionally, their civil aviation markets are in varying stages of development. Achieving consensus on an ILO convention for aviation labour necessitates striking a compromise among conflicting interests, such as aviation safety, labour cost reduction, and public morals.²⁶⁹ The extent to which States are willing and able to address insufficient labour protection in international aviation remains uncertain. In the absence of international labour standards for civil aviation, States can only rely on existing ICAO

²⁶⁶ Whitlow (n 107) 128.

²⁶⁷ Asante et al (n 215) 343.

²⁶⁸ Article X of the Maritime Labour Convention (2006)

²⁶⁹ There is thus gross disparity in the number of ratifications of ILO conventions between developed and developing States. See Dursun Peksen and Robert G. Blanton, ‘The Impact of ILO Conventions on Worker Rights: Are Empty Promises Worse than No Promises?’ (2017) 12 *The Review of International Organizations* 75.

SARPs regarding technical requirements for personnel as well as general international labour standards. Consequently, they must develop a new set of labour standards, taking into account the operational specifications of international aviation. Consequently, States are likely to face substantial challenges in finalising an ILO convention on aviation labour to address specific regulatory issues in aviation, including pay-to-fly and zero-hour contractual arrangements, pilot fatigue, as well as transnational union protection.²⁷⁰ The drafting process is anticipated to be prolonged, entailing substantial political, economic, and legal complexities.²⁷¹

3.7.3.2 Atypical employment

The ILO conventions face challenges in adequately safeguarding self-employed workers. In the majority of legal systems worldwide, there is a distinction between self-employment and employment, as self-employed workers may not be entitled to labour protection and social security benefits.²⁷² Since self-employed relations differ from employment relations, airline workers in such positions lack the protection provided by labour law, such as minimum wage rates, social security coverage, and paid sick leave.²⁷³ Particularly in instances of bogus self-employment, workers either voluntarily or involuntarily adopt the self-employed status, when, in reality, they could or should be classified as employees subordinate to their employers.²⁷⁴ Consequently, these workers face the risk of being deprived of the full exercise of fundamental workplace rights, such as social security benefits, the right to collective bargaining, and the freedom of association, given that many jurisdictions limit these rights to employees. This highlights a significant weakness of an ILO convention when confronted with atypical forms of employment.

Indeed, various forms of atypical employment could undermine the effectiveness of the new ILO convention on aviation labour. Within civil aviation, an increasing number of workers are engaged in different atypical forms of employment for airlines.²⁷⁵ In response to fluctuating seasonal flight demands, airlines frequently turn to fixed-term contracts or temporary agency work.²⁷⁶ Airlines particularly adopt employment through intermediary work agencies

270 See chapter 2 of this study.

271 Trimarchi (n 4) 144.

272 The ILO, 'Disguised Employment / Dependent Self-Employment' <https://www.ilo.org/global/topics/non-standard-employment/WCMS_534833/lang--en/index.htm> accessed 26 March 2024.

273 Teemu Kautonen et al, "'Involuntary Self-Employment' as a Public Policy Issue: A Cross-Country European Review' (2010) 16(2) International Journal of Entrepreneurial Behavior & Research 112.

274 See Yves Jorens, *Self-Employment and Bogus Self-Employment in the European Construction Industry: A Comparative Study of 11 Member States* (EFBWW and FIEC 2008).

275 Jorens (n 50) 200.

276 *ibid* 201.

as a strategy to cut down on labour and social security costs. According to a recent EU study, between nine per cent and 19 per cent of cabin crew and approximately eight per cent of pilots are currently employed through some form of intermediary organisation.²⁷⁷ This phenomenon predominantly affects low-cost carriers and young crews.²⁷⁸ The separation of work from traditional employment poses a substantial challenge to ensuring sufficient protection for workers in atypical, non-standard, and contingent work arrangements.²⁷⁹ The ILO, in fact, has the potential to enhance protection for individuals outside the conventional employment relationship.²⁸⁰ UN Sustainable Development Goals (SDGs) 8 specifically address the challenges faced by workers in precarious employment.²⁸¹ However, the reality is that the ILO's role in regulating atypical employment, particularly self-employment, where workers may not be entitled to labour protection and social security benefits, or agency employment, and where airlines shift responsibility for labour protection and social security contributions to intermediary agencies, remains very limited.²⁸² While the ILO conventions apply to fixed-term contracts and employment through work agencies, these atypical arrangements restrict the bargaining power of relevant workers and their ability to receive benefits offered under the ILO conventions.

3.7.3.3 Implications for future legislative actions

The conclusion of an ILO convention on aviation labour may result in a paradox concerning the ongoing enhancement of labour standards for airline workers through international law. On the one hand, a new ILO convention on aviation labour can represent a significant step towards promoting labour protection for airline workers. This perspective supports the notion that aviation labour law constitutes a distinct branch of law, consolidating relevant normative standards. The binding force and widespread social relevance of such a convention can lead to broad compliance with the core labour standards

277 European Commission, *Aviation Strategy for Europe: Maintaining and Promoting High Social Standards* (COM(2019) 120 Final) 9.

278 European Commission, *Study on Employment and Working Conditions of Aircrews in the EU Internal Aviation Market* (2019) 34–39.

279 Susan Hayter and Minawa Ebisui, 'Negotiating Parity for Precarious Workers' (2013) 5(1) *International Journal of Labour Research* 81.

280 Tonia Novitz, 'Past and Future Work at the International Labour Organization: Labour as a Fictitious Commodity, Countermovement and Sustainability' (2020) 17 *International Organizations Law Review* 31.

281 SDGs Target 8.8 [Protect Labour Rights and Promote Safe Working Environments]: [p]rotect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment. See the UN, 'Sustainable Development' <<https://sdgs.un.org/goals>> accessed 26 March 2024.

282 Paul Schoukens and Alberto Barrio, 'The Changing Concept of Work: When Does Typical Work Become Atypical?' (2017) 8(4) *European Labour Law Journal* 306.

and principles it encompasses.²⁸³ On the other hand, this convention is likely to be the final legislative effort by the international community to regulate aviation labour standards in the near future, particularly in the form of concluding a comprehensive and multilateral labour treaty. If it fails to provide an effective regulatory framework governing aviation labour, it will become more difficult for governments, trade unions, and all other concerned stakeholders to create another international treaty in this field.

Paul J. Bauer addressed a similar problem when scrutinising the adverse effects of the Maritime Labour Convention (2006) on subsequent legislative reforms.²⁸⁴ He noted that:

'The ILO has worked for five years to put together the Maritime Labour Convention, and it will likely be several more before it finally enters force. Because of all of the thought, hard work, and compromise that has gone into drafting this Convention, it is unlikely that further reforms of international seafarer rights will be pursued anytime soon. It is thus crucial that the ILO include all necessary reforms in this Convention to ensure that seafarers are provided with the rights and protections they deserve.'²⁸⁵

Typically, when a deliberative body advocates for comprehensive reform, it refrains from revisiting that area of law for an extended period.²⁸⁶ This principle would similarly apply to regulatory actions by ILO constituents aiming to promote elevated levels of labour standards in international aviation. If tripartite representatives throughout the globe reopen the topic for any reason, the challenging compromises initially left out of the Convention will inevitably resurface.²⁸⁷ This will not be a favourable regulatory scenario. Thus, States may need to consider the unintended negative impacts of an ineffective international treaty on further legislative progress related to aviation labour regulation under both the ILO law and ICAO law.

283 Einat Albin and Virginia Mantouvalou, 'The ILO Convention on Domestic Workers: From the Shadows to the Light' (2012) 41(1) *Industrial Law Journal* 67.

284 Bauer (n 218) 658.

285 *ibid.*

286 Huw Thomas and Peter Turnbull, 'From a "Moral Commentator" to a "Determined Actor"? How the International Labour Organization (ILO) Orchestrates the Field of International Industrial Relations' (2021) 59(3) *British Journal of Industrial Relations* 874; see also Jeffrey W. Legro, 'Which Norms Matter? Revisiting the "Failure" of Internationalism' (1997) 51(1) *International Organization* 31.

287 Bernhard Boockmann, 'Decision-Making on ILO Conventions and Recommendations: Legal Framework and Application' (2000) 3 *ZEW-Dokumentation* 1.

3.8 CONCLUDING REMARKS

This chapter has explored whether international labour standards can effectively promote labour standards in international aviation. In summary, current international labour standards do not offer rights or principles tailored to aviation labour. Moreover, the establishment of a standalone ILO convention on civil aviation is not a viable approach in the near future, even though it could create minimum standards for both the social and technical aspects of labour standards.

International labour standards play a significant role in promoting decent work across various globalised economic sectors, including maritime and air transport. These standards have evolved into a comprehensive set of social policies and labour-related measures, strengthened with supervisory structures aimed at addressing various issues in their application at domestic levels. International labour standards offer overarching rights and principles that are unquestionably applicable to labour and employment in civil aviation. Furthermore, the ILO law has contributed to a variety of policy discussions and recommendations regarding aviation labour. There is nevertheless no legislative progress. Neither the ILO conventions nor recommendations offer any regulations specifically applicable to civil aviation.

Given this, chapter 3 then examined whether and to what extent a specialised and integrated ILO convention on aviation labour can guarantee elevated levels of labour standards in international aviation.

Being a next-generation ILO instrument,²⁸⁸ the Maritime Labour Convention (2006) serves as a valuable source and exemplar for inspiring decent work in various industries, particularly civil aviation. The Convention constitutes a single and coherent instrument encapsulating all the latest standards from previous ILO and IMO laws for maritime labour, along with core concepts found in other international labour standards. Consequently, it functions as a comprehensive set of rights and establishes an essential regulatory framework for protecting human rights in maritime transport.

The labour standards outlined in the Maritime Labour Convention (2006) govern various issues that can help shape conditions of employment relevant to airline workers. Although it is undeniable that aviation and maritime labour share some inherent similarities,²⁸⁹ careful consideration is necessary before maritime labour legislation can serve as inspiration for a parallel ILO convention on aviation labour. Especially, there are considerable differences between maritime and aviation labour practices. For instance, maritime workers often live on board ships for long periods. This fact highlights the need for decent living and recreational conditions on ships, which are hardly relevant in the context of the airline industry.

²⁸⁸ Whitlow (n 107) 127.

²⁸⁹ Trimarchi (n 4) 139.

On the one hand, an ILO convention on aviation labour has the potential to establish a multilateral regime by setting minimum standards rooted in both the social and technical aspects of labour standards. Specifically, lessons for the technical aspects of labour rights and principles must be gleaned from the expertise and instruments inherent in the ICAO law. The design and implementation of such a convention can also underscore various normative considerations to enhance its effectiveness. These considerations encompass multi-State responsibilities, the creation of an international 'Special Tripartite Committee', and flexibility in domestic implementation.

On the other hand, an ILO convention may not be a viable approach in the short term for addressing regulatory challenges related to labour regulation of international aviation. Firstly, there are currently no established international labour standards for civil aviation, in contrast to the legislative conditions of maritime labour prior to the Maritime Labour Convention (2006) coming into force. During the process of addressing labour-related challenges in international aviation, States would find it difficult to negotiate and develop a new bill of rights within the ILO law without the support of pre-existing international norms for aviation labour. Secondly, international labour standards may apply to self-employed workers or those employed through intermediary agencies, putting these crew members at risk of being deprived of sufficient labour protection and social security benefits. Thirdly, the finalisation of such an ILO convention could hinder subsequent policy discussions and legislative advancements in labour regulation for international aviation. Industrial stakeholders and governments would be hesitant to re-open this topic, given the substantial efforts and compromises invested in drafting the convention. If the new convention proves ineffective or politically hortatory, the ILO constituents would face challenges in returning aviation labour issues to the negotiation table.

Taking into account the perceived concerns regarding the effectiveness of international labour standards in addressing aviation labour, the next two chapters will delve into the labour regulation of international aviation under international air law.

