

PREVENTION OF ACCIDENTS (SEAFARERS) CONVENTION, 1970 (No. 134)

(Article 1 and Article 2, paragraph 4)

MEMORANDUM BY THE INTERNATIONAL LABOUR OFFICE

(Translation)

1. The Government of Poland has asked the Office for clarification of certain provisions of the Prevention of Accidents (Seafarers) Convention, 1970 (No. 134). The questions raised relate, on the one hand, to the scope of the Convention (Article 1, paragraphs 1 and 2) and, on the other, to the definition of "occupational accidents" (Article 1, paragraph 3 and Article 2, paragraph 4). These questions will be dealt with successively below.

Scope of the Convention

2. The question raised by the Government is whether the expression "seafarers", as used in paragraph 1 of Article 1 of the Convention, includes persons employed on board fishing vessels.

3. The pertinent provisions of the Convention are worded as follows:

Article 1

1. For the purposes of this Convention, the term "seafarer" covers all persons who are employed in any capacity on board a ship, other than a ship of war, registered in a territory for which the Convention is in force and ordinarily engaged in maritime navigation.

2. In the event of any doubt whether any categories of persons are to be regarded as seafarers for the purpose of this Convention, the question shall be determined by the competent authority in each country after consultation with the shipowners' and seafarers' organisations concerned.

4. In order to answer the question put by the Government, it is necessary to determine:
(i) whether the expression "seafarers" in Article 1 of the Convention covers persons

¹ ILO: *Record of proceedings*, International Labour Conference, 47th Session, Geneva, 1963, p. 617 para. 42.

employed on board fishing vessels; and (ii), if so, whether it is none the less possible to have recourse to the provisions of Article 1, paragraph 2, of the Convention, to determine whether the latter should or should not be considered applicable to fishermen.

5. Article 1, paragraph 1, of the Convention defines "seafarers" as "all persons who are employed in any capacity on board a ship, other than a ship of war, . . . ordinarily engaged in maritime navigation". Apart from the exclusion of war ships, this wording does not make any distinction between various types of ships and, consequently, appears to include fishing vessels. It should be noted that the provisions of Article 1, paragraph 2, of the Convention, do not give national authorities a general discretionary power to exclude particular classes of ships or seafarers, but only the power to decide *in the event of any doubt*. For the purpose of determining the exact scope of these provisions it will be useful to consider the general background to Convention No. 134 and the precedents drawn upon in its provisions.

6. Convention No. 134 refers in its preamble to earlier ILO instruments dealing with accident prevention, including the Labour Inspection (Seamen) Recommendation, 1926 (No. 28), the text of which had been reproduced in full in the initial report on the prevention of accidents to seafarers, presented at the Preparatory Technical Maritime Conference in 1969.¹ The preparatory reports respecting Recommendation No. 28 specifically referred to inspection arrangements of particular importance to fishing vessels², and proposed that reports of inspection authorities should include statistics, inter alia, on the number of vessels subject to inspection by category ("e.g. ocean going or coasting vessels, passenger or cargo vessels, deep-sea or coastal-fishing vessels").³ These details were deleted by the competent Conference committee, which indicated that "this deletion was in no way intended to imply a reduction of the list of types of ships given in the draft of the International Labour Office, but on the contrary to make it easier if necessary to include other types of ship".⁴ It is thus clear that the first ILO instrument dealing directly with questions relevant to seafarers' safety was intended to cover also fishing vessels.

7. The preparatory reports preceding the adoption of the Prevention of Accidents (Seafarers) Convention and Recommendation, 1970 (Nos. 134 and 142), also referred in various places to fishing vessels.

8. Thus the initial report submitted to the Preparatory Technical Maritime Conference referred to the Code of Safety and Health Practice for Skippers and Crews of Fishing Vessels, issued jointly by FAO, the ILO and IMCO, and indicated that many of its provisions were also applicable to merchant seafarers.⁵ The report also referred to a statement by the Government of Morocco concerning the frequency of accidents on fishing vessels⁶, and to the manual of safe working practices on board ship for fishermen of New England fishing vessels published by the United States Department of Labor.⁷ The report also indicated that accident statistics provided by the French Government did not cover the fishing industry and that in the Federal Republic of Germany such statistics, including fishing vessels, were published annually.⁸ The wide variation of available statistics was given as one reason for adopting a new uniform system.⁹

9. In its observations concerning the draft Convention, the Government of the United States made the following statement with respect to Article 1:

In the Government's view, the definition of the term "seafarer" is very broad and could easily be interpreted to include categories of persons other than those engaged in marine transportation,

¹ ILO: *Accident prevention on board ship at sea and in port*, Report IV, Preparatory Technical Maritime Conference, Genoa, 1969, pp. 9 and 71.

² ILO: *General principles for the inspection of the conditions of work of seamen*, Questionnaire II, International Labour Conference, Ninth Session, Geneva, 1926, pp. 36 and 43.

³ *Ibid.*, p. 41.

⁴ ILO: *Record of proceedings*, International Labour Conference, Ninth Session, Geneva, 1926, p. 588.

⁵ Report IV, Preparatory Technical Maritime Conference, 1969, *op. cit.*, p. 9.

⁶ *Ibid.*, p. 37.

⁷ *Ibid.*, p. 45.

⁸ *Ibid.*, pp. 25-26.

⁹ *Ibid.*, p. 10.

for instance fishermen. It is the Government's opinion that the proposed Convention and Recommendation are intended to cover those categories of persons who use the sea for transport rather than those who make use of the sea (oil drilling-rig personnel, mineral exploration or extraction personnel, fishermen, etc.). Without commenting upon the merits of a similar instrument for the latter category of persons, it seems essential that the extent of coverage be further clarified. The Government would welcome an approach based on category of vessel such as that employed in Convention No. 109. It would appear that such an approach, or a revised clear-cut definition of the term "seafarer", excluding, in this event, the optional provision of paragraph 2 of Article 1, is necessary at the beginning of the discussion in view of the provisions concerning international co-operation in the proposed instrument.

The Office made the following comments on this question:

The proposed definition is identical with that used in a number of other maritime international instruments such as Convention No. 108 or, in slightly different wording, in Conventions Nos. 8, 9, 56, 70 and 71. Since only one government has raised any question on this subject, Article 1 has been retained unchanged, including paragraph 2, which is designed to provide machinery for settling any doubts in determining the applicability of the proposed Convention to a given category of persons.¹

10. In the light of these comments, it appears appropriate to examine the position taken by the Conference regarding the application to fishermen of previous Conventions dealing with the employment of seafarers. In the case of certain earlier Conventions which are applicable to vessels engaged in maritime navigation, the Conference decided, but without including any express provision on the subject, that they should not cover fishing vessels.² A series of other Conventions which apply either to sea-going vessels or to sea-going vessels engaged in the transport of cargo or passengers for the purpose of trade expressly exclude vessels engaged in fishing³ or permit the exclusion of fishermen or certain categories of fishermen.⁴ One Convention provides for its application to vessels engaged in maritime navigation or sea-fishing.⁵ In the case of the Officers' Competency Certificates Convention, 1936 (No. 53), which applies to vessels engaged in maritime navigation, it was decided during the discussion of this text by the competent Conference committee that fishing vessels generally should be included within its scope. This decision was "primarily based upon the consideration of the risks which all vessels ran from the fact that fishing vessels are not always manned by persons of a sufficient professional capacity, and upon the necessity of taking the necessary measures for avoiding these risks".⁶ The applicability of Convention No. 53 to fishing vessels was recalled on the occasion of the adoption of the Fishermen's Competency Certificates Convention, 1966 (No. 125).⁷ In view of the above, it would seem proper to conclude that, in the absence of express provisions or decisions providing for or allowing the exclusion of fishing vessels, Conventions whose scope is defined as covering vessels engaged in maritime navigation must be considered applicable to fishing vessels, particularly when the problems dealt with are equally relevant to this sector of maritime employment.

¹ ILO: *Accident prevention on board ship at sea and in port*, Report V (2), International Labour Conference, 55th (Maritime) Session, Geneva, 1970, pp. 6-7.

² This is the case for the Minimum Age (Sea) Convention, 1920 (No. 7), Unemployment Indemnity (Seawreck) Convention, 1920 (No. 8), Placing of Seamen Convention, 1920 (No. 9), Minimum Age (Trimmers and Stokers) Convention, 1921 (No. 15), Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16)—see ILO: *Record of proceedings*, International Labour Conference, Second Session, Genoa, 1920, pp. 40-41; *idem*, Third Session, Geneva, 1921, p. 868.

³ Seamen's Articles of Agreement Convention, 1926 (No. 22); Repatriation of Seamen Convention, 1926 (No. 23); Holidays with Pay (Sea) Convention, 1936 (No. 54); Hours of Work and Manning (Sea) Convention, 1936 (No. 57); Paid Vacations (Seafarers) Convention, 1946 (No. 72); Medical Examination (Seafarers) Convention, 1946 (No. 73); Accommodation of Crews Convention, 1946 (No. 75); Wages, Hours of Work and Manning (Sea) Convention, 1946 (No. 76); Paid Vacations (Seafarers) Convention (Revised), 1949 (No. 91); Accommodation of Crews Convention (Revised), 1949 (No. 92); Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (No. 93); Wages, Hours of Work and Manning (Sea) Convention (Revised), 1958 (No. 109); Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133).

⁴ Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55); Social Security (Seafarers) Convention, 1946 (No. 70); Seafarers' Pensions Convention, 1946 (No. 71).

⁵ Sickness Insurance (Sea) Convention, 1936 (No. 56).

⁶ ILO: *Record of proceedings*, International Labour Conference, 13th Session, Geneva, 1929, p. 423; see also pp. 114-124.

⁷ *Idem.*, 50th Session, Geneva, 1966, p. 662.

11. As indicated above, during the preparatory work regarding the question of accident prevention for seafarers, reference was made several times to the position of persons employed on fishing vessels, which would tend to indicate that this aspect was not excluded from the question as examined by the Conference. The arguments invoked with respect to Convention No. 53 to conclude that the reference to vessels engaged in maritime navigation covered fishing vessels—namely, considerations of safety—are equally valid with respect to Convention No. 134. Further, it is significant that the other Convention adopted at the 55th Session of the Conference—the Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133)—expressly excludes fishing vessels. If the Conference had wished to envisage the possibility of excluding fishing vessels from the scope of Convention No. 134, one might have expected the latter instrument also to contain an express provision to this effect.

12. Nevertheless, there remains the question whether, under Article 1, paragraph 2, of the Convention, fishermen constitute a category of persons in respect of whom there can be a doubt whether they are “seafarers”. At first sight, there would seem to be no reason to question whether they are seafarers. It is appropriate, however, to consider the preparatory work which led to the adoption of this provision of the Convention.

13. The provisions of Article 1, paragraph 2, of Convention No. 134 were taken over from Convention No. 108.¹ The draft of the latter Convention originally provided for the possibility of excluding certain categories of persons, including those employed on board fishing boats.² During the discussion by the Preparatory Technical Maritime Conference, on the proposal of the seafarers’ representatives, the provisions in question were replaced by others “leaving it to the competent authority in each country, after consultation with the shipowners’ and seafarers’ organisations concerned, to determine the categories of persons entitled as bona fide seafarers to be issued with a seafarer’s identity document”.³ The purpose of this provision was to enable the competent authorities in each country to determine, after consultation with the shipowners’ and seafarers’ organisations concerned, the categories of persons to be considered seafarers for the purposes of the Convention. In its commentary on this text, the Office noted that there was an apparent contradiction between the two paragraphs of Article 1, since “the first appeared to give complete coverage while the second appeared to leave the scope of the Convention completely at the discretion of the competent authorities”. In order to reconcile these provisions in a form conforming to the intentions of the Preparatory Technical Maritime Conference, the Office proposed a new version of paragraph 2, which restricted its application to those cases in which a doubt existed whether certain categories of persons should be considered seafarers for the purpose of the Convention.⁴ This was the formula retained in the final text of Convention No. 108 and afterwards incorporated also in Convention No. 134.

14. The question of the application of Convention No. 108 to fishermen was raised by the Government of the United Kingdom. In a memorandum communicated to that Government in 1962, the Office expressed the following opinion concerning Article 1, paragraph 2, of that Convention:

It would appear from the language of paragraph 2 of that Article that it is for the competent authority, in consultation with the shipowners’ and seafarers’ organisations concerned, to delimit the meaning which may be given in good faith to the term “seafarer” for the purpose of the Convention.

The Office stressed that there was no indication that it had been the intention of the authors of the amendment mentioned in the previous paragraph to have less flexibility as regards the scope of the Convention than under the initial draft, which had provided for the possibility of excluding certain categories, including persons employed on board fishing vessels; the main purpose of this amendment appeared to have been to give shipowners’ and

¹ ILO: *Accident prevention on board ship at sea and in port*, Report V (1), International Labour Conference, 55th Session, Geneva, 1970, p. 17.

² ILO: *Reciprocal or international recognition of seafarers’ national identity cards*, Report VII, International Labour Conference, 41st Session, Geneva, 1958, pp. 3 and 6.

³ *Ibid.*, p. 8.

⁴ *Ibid.*, p. 18.

seafarers' organisations a voice in the matter. In these circumstances, the Office was of the view that:

The competent authority, being entitled, after consultation with the shipowners' and seafarers' organisations concerned, to determine whether any categories of persons are to be regarded as seafarers for the purpose of the Convention, may, after such consultation, exercise its discretion in the matter by determining that fishermen are not, in view of the special characteristics of their employment, to be regarded as seafarers for the purposes of the Seafarers' Identity Documents Convention, 1958.¹

15. Two points regarding the Office opinion mentioned above deserve notice. Firstly, it stresses that decisions aimed at delimiting the scope of the Convention must be made *in good faith*.² Secondly, it states that it is *because of the special characteristics of their employment* that fishermen may be considered not to be seafarers *for the purposes of Convention No. 108*. Although Article 1, paragraph 2, of Convention No. 108 and the corresponding provision of Convention No. 134 leave a certain discretion to the national authorities, the decisions which may be taken under these provisions will not necessarily be the same for every Convention containing them. Rather, it is necessary to consider whether, having regard to the subject matter and purposes of each Convention, the protection for which it provides can be considered sufficiently marginal for a given occupational group, because of the special characteristics of its employment, to raise a bona fide doubt whether the persons concerned should or should not be covered by the Convention.

16. In the case of Convention No. 108, which deals with reciprocal or international recognition of seafarers' identity documents with a view to granting rights of entry (Article 6 of the Convention), it may be, having regard to the manner in which fishing is organised in a given country, that the need for fishermen to enjoy rights of entry into the territory of other countries either does not exist or arises so rarely that there may be a real doubt concerning the necessity of issuing fishermen with identity documents. This seems to be the reason for which it was originally contemplated that fishermen might be excluded from the scope of Convention No. 108 when this was deemed necessary. Such a situation could similarly justify a decision of the national authority, pursuant to the present Article 1, paragraph 2, of Convention No. 108, not to extend the scope of the Convention to fishermen.

17. In the case of Convention No. 134, the situation appears to be very different. The substantive provisions of the Convention deal with the following matters: reporting of accidents, investigation into causes, statistics (Article 2); research into general trends in accidents and into hazards (Article 3); provisions to be made for accident prevention (Article 4); definition of responsibilities for compliance with these provisions (Article 5); inspection and enforcement of accident prevention provisions (Article 6); appointment of crew representatives responsible for accident prevention (Article 7); tripartite collaboration in accident prevention programmes (Article 8); instruction and training (Article 9); measures aimed at international uniformity of the pertinent provisions (Article 10). All these measures are as valid for fishing vessels as for any other type of ship. Indeed, having regard to the size of vessels, the operations carried out at sea and the conditions under which these operations have to be performed, accident hazards are particularly serious in maritime fishing, and the measures provided for in Convention No. 134 are of corresponding importance for this sector. The same holds true for the supplementary provisions contained in the Prevention of Accidents (Seafarers) Recommendation, 1970 (No. 142).

18. Consequently, although it is possible to conceive of certain marginal cases concerning particular types of fishing vessels—for instance, boats normally engaged in fishing for sport or recreation, which are excluded from the scope of the Fishermen's Competency Certificates Convention, 1966 (No. 125), (Article 1 (c)) and of the Accommodation of Crews (Fishermen) Convention, 1966 (No. 126), (Article 1, paragraph 5 (a))—it would seem difficult, having regard to the preceding considerations, to consider in good faith

¹ ILO: *Official Bulletin*, July 1963, p. 467.

² The opinions given by the Office have always stressed that national authorities must exercise discretionary powers granted them under ILO Conventions in good faith; see for instance, in addition to the opinion dealing with Convention No. 108, *Official Bulletin*, 1959, No. 7, p. 393, para. 27; 1960, No. 7, p. 578, para. 17; 1966, No. 3, p. 400, paras. 9-10; and 1970, No. 4, pp. 384-385, para. 12.

that the question whether fishermen should be regarded as seafarers for the purposes of the Prevention of Accidents (Seafarers) Convention (No. 134) gave rise to such doubt as to justify their exclusion from the scope of this Convention pursuant to Article 1, paragraph 2.

Definition of Occupational Accidents

19. The question raised by the Government relates to the scope of the phrase "occupational accidents" for the purposes of Article 1, paragraph 3, and Article 2, paragraph 4, of the Convention and asks whether these words include accidents happening to the worker on his way to or from work.

20. The pertinent provisions of the Convention are worded as follows:

Article 1

.....
3. For the purpose of this Convention the term "occupational accidents" covers accidents to seafarers arising out of or in the course of their employment.

Article 2

.....
4. The competent authority shall undertake an investigation into the causes and circumstances of occupational accidents resulting in loss of life or serious personal injury, and such other accidents as may be specified in national laws or regulations.

21. In the first place it should be noted that the preamble of Convention No. 134 states that it is aimed at the prevention of accidents *on board* ships and in ports. The Conference agenda item, as well as the subject matter of the preparatory reports, was defined in the same terms. This approach is reflected in several provisions of the Convention, as follows:

- (a) Article 2, paragraph 3, states that the statistics of seafarers' occupational accidents to be kept shall contain "*a clear indication of the department on board ship—for instance, deck, engine or catering—and of the area—for instance, at sea or in port—where the accident occurred.*"
- (b) Article 4, paragraph 3, enumerates the matters to be covered by accident prevention provisions: (a) general and basic provisions; (b) structural features of the ship; (c) machinery; (d) special safety measures on and below deck; (e) loading and unloading equipment; (f) fire prevention and fire-fighting; (g) anchors, chains and lines; (h) dangerous cargo and ballast; (i) personal protective equipment for seafarers. It will be seen that these matters deal with hazards which arise either on board or in the immediate vicinity of ships.
- (c) Article 5, paragraph 1, refers to the obligation to comply with accident prevention provisions of shipowners, seafarers and others concerned, that is, persons connected with the ownership or running of ships.
- (d) The same can be said of Article 8, which provides for occupational accident prevention programmes in which the competent authority, interested bodies and shipowners' and seafarers' organisations are to play an active part.

22. It should also be noted that, although Article 1, paragraph 3, refers to "accidents to seafarers arising out of or in the course of their employment", the Convention deals not with workmen's compensation (a field in which the problem of commuting accidents arises¹, but with accident prevention measures, research and statistics.² The various authorities, organisations and persons mentioned in the Convention as responsible for, or to be associated in, its implementation—maritime inspection and other supervisory authorities, shipowners and seafarers—do not as such possess means of preventing or dealing with accidents which may happen to a worker on his way to or from work, except accidents which occur in the immediate vicinity of the ship and are connected with the ship or its

¹ See on this matter the Employment Injury Benefits Convention, 1964 (No. 121), Article 7, and Recommendation, 1964 (No. 121), paragraph 5 (c).

² Report V (2), International Labour Conference, 55th Session, op. cit., p. 6.

fittings (for instance, gangways, anchors, chains and cables, etc.). It would therefore be appropriate to conclude that, except to this limited extent, the provisions of the Convention do not cover accidents happening to a worker on his way to or from work.

23. A further point is worth mention with respect to the definition of occupational accidents. Before the inclusion of Article 1, paragraph 3, in the draft Convention, one government observed that it was not entirely clear whether the Convention was intended to cover any accident on board ship or was limited to occupational accidents in the strict sense of the term and that it was therefore necessary to clarify whether the Convention was intended to cover accidents occurring during leisure hours as well as those connected with the performance of work. In its commentary, the Office pointed out that, in a Convention dealing with accident prevention rather than liability for accidents, it was difficult to distinguish, in the framework of employment on board ship, between accidents occurring during work and those happening during leisure hours.¹ The definition contained in the present paragraph 3 of Article 1 was added by the competent Conference committee without any further discussion of this question when the Convention was adopted.

11 June 1973.

¹ Ibid., pp. 4 and 6.