Third meeting of the Special Tripartite Committee of the MLC, 2006

Geneva
23–27 April 2018

Instruments relating to the repatriation of seafarers

Summary

The maritime labour instruments under review include **two Conventions and two Recommendations concerned with the repatriation of seafarers:**

– Repatriation of Seamen Convention, 1926 (No. 23);

– Repatriation of Seafarers Convention (Revised), 1987 (No. 166);

– Repatriation (Ship Masters and Apprentices) Recommendation, 1926 (No. 27);

– Repatriation of Seafarers Recommendation, 1987 (No. 174).

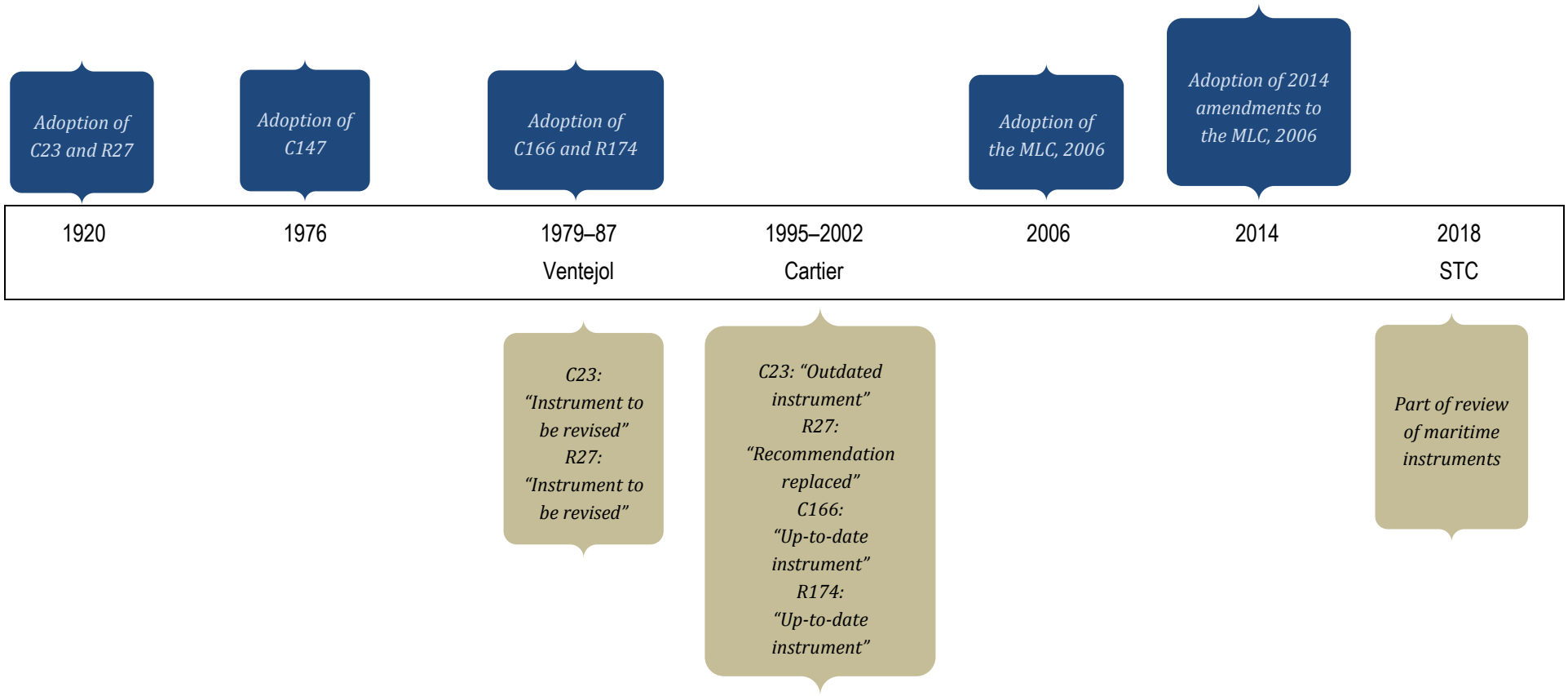
Status of the instrument under review

	Recommendation of the Cartier Working Party	Follow-up since the Cartier Working Party
Convention No. 23	Outdated instrument	Revised by the MLC, 2006
Convention No. 166	Up-to-date instrument	Revised by the MLC, 2006
Recommendation No. 27	Recommendation revised	Revised by the MLC, 2006
Recommendation No. 174	Up-to-date instrument	Revised by the MLC, 2006

Possible action to consider

1. To classify Convention No. 23 as “outdated” and propose its abrogation.
2. To classify Recommendations Nos 27 and 174 as “outdated” and propose their withdrawal.
3. To classify Convention No. 166 as “outdated” and to consider its possible withdrawal or abrogation at a later date.

Instrument relating to the repatriation of seafarers – Chronology



I. Regulatory approach of the ILO with regard to the repatriation of seafarers

A. Protection provided by ILO instruments

1. The Repatriation of Seamen Convention, 1926 (No. 23) applies to seagoing vessels, with the notable exception of ships of war and pleasure yachts, fishing vessels, and certain vessels of less than 100 tons gross registered tonnage or 300 cubic metres engaged in home trade. Captains, pilots, pupils on training vessels and apprentices with a special training contract are excluded from the protection established. It affirms the right of all seafarers, during the term of their engagement or on its expiration, to be repatriated to their own country, be it at the port where they were engaged or the port from which the vessel departed. National legislation is used to determine who will bear the cost of repatriation. Expenses may not be charged to the seafarer if he has been left behind by reason of injury sustained in the service of the vessel; shipwreck; illness not due to his own wilful act or default; or discharge for any cause for which he cannot be held responsible. Repatriation expenses shall include passage, accommodation and food for the seafarer during the journey. They shall also include the maintenance of seafarers up to the time fixed for their departure. The vessel's flag State shall be responsible for the repatriation of all seafarers, regardless of nationality, and where necessary for giving them their expenses in advance.

2. The Repatriation (Ship Masters and Apprentices) Recommendation, 1926 (No. 27), recommends that steps should be taken to provide for the repatriation of captains and duly indentured apprentices, who are not covered by the terms of the aforementioned Convention.

3. The Repatriation of Seafarers Convention (Revised), 1987 (No. 166), applies to all seagoing vessels that are ordinarily engaged in commercial navigation. This Convention may also be extended to commercial maritime fishing vessels. It establishes protection for seafarers, defined as any person employed, in any capacity, on board a seagoing vessel. It defines the circumstances in which a seafarer has the right to repatriation. It specifies that the destination of the repatriation should be determined by national law and should include at least the place at which the seafarer was engaged, the seafarer's country of residence or any other place agreed in a contract or by convention. The shipowner is responsible for arranging the repatriation and bears the cost (passage, accommodation and food, salary until reaching the destination, 30 kilograms of personal luggage, and medical treatment where necessary). The Convention prohibits the seafarer from being required to pay advances or the cost of repatriation. The only exception is in the event of the seafarer being found to be in serious default of his employment obligations, in which case the shipowner may recover the costs of repatriation. The flag State is required to intervene when a shipowner fails to meet his obligations.

4. The Repatriation of Seafarers Recommendation, 1987 (No. 174), provides for a case where the shipowner and the vessel's flag State fail to meet their obligations. It is then the responsibility of the State from which the seafarer is to be repatriated, or of which the seafarer is a national, to arrange the repatriation. In such a case, the State that arranges the repatriation may recover the costs of repatriation from the flag State.

5. The Maritime Labour Convention, 2006, as amended (MLC, 2006), under Regulation 2.5 concerning the repatriation of seafarers, provides that seafarers have the right to be repatriated at no cost to themselves in the circumstances and under the conditions specified in the Code. Standard A2.5.1 outlines the situations in which a seafarer has the right to repatriation. National legislation is used to determine the rights to be accorded by

shipowners. Shipowners may recover the costs of repatriation from seafarers only when they are found to be in serious default of their employment obligations. The Guidelines contain detailed provisions regarding the implementation of the right to repatriation (including for young seafarers). Pursuant to Regulation 2.5, paragraph 2, each Member shall require ships that fly its flag to provide financial security to ensure that seafarers are duly repatriated. The extent of that financial security is clarified in the amendments to the Convention, which were adopted in June 2014 and entered into force on 18 January 2017. It offers a concrete solution to ensure the protection of seafarers in the event of their abandonment and to establish who should cover the costs of repatriation, maintenance and support, as well as, in part, unpaid salaries. Note should also be taken of the broader scope of the MLC, 2006, which provides protection for the seafarer, defined as "any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies", and applies to "all ships, whether publicly or privately owned, ordinarily engaged in commercial activities, other than ships engaged in fishing or in similar pursuits and ships of traditional build such as dhows and junks". [1]

B. Key dates for the instruments under review: Adoption and ratification

6. Convention No. 23 was adopted in 1926, and 47 ratifications were registered. Of the States that previously ratified this Convention, 32 have subsequently ratified the MLC, 2006, which resulted in their "automatic" denunciation of Convention No. 23. [2] Mexico also denounced this Convention in 2002. Fourteen member States remain bound by this Convention. [3] There are eight comments by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) awaiting a reply concerning a problem of application of the Convention. [4]

[1] Article II, paragraph 4. The MLC, 2006 does not apply to ships of war or naval auxiliary vessels.

[2] In applying Article X of the MLC, 2006.

[3] The following remain bound by Convention No. 23: Azerbaijan, Colombia, Cuba, Djibouti, Egypt, the former Yugoslav Republic of Macedonia, Iraq, Kyrgyzstan, Mauritania, Peru, Somalia, Tajikistan, Ukraine and Uruguay. With regard to the former Yugoslav Republic of Macedonia, the Committee of Experts noted the Government's indication that the country does not have a shipping fleet, does not have any vessel registered under its flag, and does not have any legislation relating to matters covered by the ILO maritime Conventions. With regard to Kyrgyzstan, the Committee of Experts noted that, according to a communication of 4 November 2011 from the Vice-Minister of Labour, Employment and Migration, the Government announced its intention to denounce all Conventions concerning maritime navigation and fishing. Furthermore, the Convention was declared applicable to the following non-metropolitan territories: Anguilla (United Kingdom), Aruba (Netherlands), British Virgin Islands (United Kingdom), Caribbean Netherlands (Netherlands), China – Hong Kong Special Administrative Region, China – Macau Special Administrative Region, Falkland Islands (Malvinas) (United Kingdom), French Polynesia (France), French Southern and Antarctic Territories (France) and Sint-Maarten (Netherlands).

[4] The comments concern: Anguilla (United Kingdom) (request for clarification regarding how the repatriation provisions of the United Kingdom's Merchant Shipping Act 1995 apply to vessels registered in Anguilla); Azerbaijan (request to indicate the legislative instruments used to apply Convention No. 23); Colombia (request for response to observations submitted by a workers' organization); British Virgin Islands (United Kingdom) (request for clarification regarding whether the regulations used to apply Convention No. 23, with regard to determining the destination of repatriation and the repatriation costs covered, have already been established); Iraq (request to take steps to align national legislation with Article 5 of Convention No. 23 (repatriation costs)); Mauritania

7. Convention No. 166 was adopted in 1987, and 14 ratifications were registered. The ratification of the MLC, 2006, resulted in nine States denouncing this instrument. [5] Five member States remain bound by this Convention. [6] There are five comments made by the CEACR awaiting a response concerning problems with application. [7]

8. Recommendation No. 27 was adopted in 1926. It was revised by Recommendation No. 174.

II. Evolution of the instruments: From adoption to 2018

A. Status

9. During the review carried out by the **Ventejol Working Party**, it was pointed out that Convention No. 23 and Recommendation No. 27 remained of value. [8] In 1979, it was concluded that these instruments should be classified as "instruments to be promoted on a priority basis". In 1987, they were classified as "instruments to be revised", [9] while the process of adopting Convention No. 166 and Recommendation No. 174 had begun.

10. As part of the review carried out by the **Cartier Working Party**, it was indicated that Convention No. 23 had been revised by Convention No. 166, which was adopted in 1987. While Convention No. 23 had not been closed to ratification following its revision, [10] it seemed that the modern standard concerning repatriation was Convention No. 166. Doubts had been raised regarding the status of Convention No. 23, given that it is mentioned in the Appendix to the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147).

(request for response to observations submitted by a workers' organization and to take steps to give full effect to Article 5(2) of Convention No. 23 (remuneration)); Peru (request for information regarding the steps taken to give effect to Article 6 of Convention No. 23 (obligations of the public authority of the country in which the vessel is registered)); Ukraine (request to take the necessary steps to give effect to Article 3.1 of Convention No. 23 – right to repatriation, and Article 4(d) – payment of repatriation costs by the shipowner)); and Uruguay (request for information regarding the steps taken to give effect to Article 4 of Convention No. 23 (right to repatriation without cost to the seafarer)).

[5] In applying Article X of the MLC, 2006.

[6] The following remain bound by Convention No. 166: Brazil, Egypt, Guyana, Mexico and Turkey.

[7] The comments concern: Brazil (request to align national legislation with the Convention); Egypt (request for information regarding the steps taken to give effect to several provisions of the Convention); Guyana (request to take steps to ensure that captains and apprentices are not excluded from the scope of the legislation with regard to repatriation); Turkey (request to take immediate steps to rectify the many gaps in applying the provisions of the Convention – Articles 2–12 of Convention No. 166); and Mexico (request to take the necessary steps to give effect to several Articles of the Convention).

[8] See GB.194/PFA/12/5, Appendix I, p. 76 (ILO working document, Nov. 1974).

[9] See *Official Bulletins* Vol. LXII, 1979, series A and Vol. LXX, 1987, series A.

[10] It does not contain the standard provision that the ILO has included in its instruments since 1929 which specifies the consequences of adopting a later version of an instrument. See, in this regard, the *Introductory Note* prepared for the Third meeting of the Special Tripartite Committee (STC).

11. Following the work undertaken by the Cartier Working Party, the Governing Body decided that:

- Convention No. 23 should be classified as "outdated";
- Recommendation No. 27 should be classified as a "revised Recommendation"; [11] and
- Convention No. 166 and Recommendation No. 174 should be classified under "up-to-date instruments".

B. Application and consolidation

12. Convention No. 23 appears in the Appendix to Convention No. 147. States that have ratified Convention No. 147 have undertaken to satisfy themselves that their laws and regulations are substantially equivalent [12] to the Conventions or Articles of Conventions referred to in the Appendix to this Convention, in so far as the State is not otherwise bound to give effect to the Conventions in question. In this regard, of the 14 member States that remain bound by Convention No. 147, only seven have ratified Convention No. 23. Seven States are therefore required to have substantially equivalent legislation to Convention No. 23, in accordance with Article 2(a) of Convention No. 147. [13]

13. Convention No. 166 appears in the Supplementary Appendix (Part B) to the Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976. However, following ratification of the MLC, 2006 by the States that had previously ratified the Protocol, member States are no longer bound by the latter.

14. Convention No. 23 and Convention No. 166 were revised by the MLC, 2006. The MLC, 2006, reflects the main content of Convention No. 166 under Regulation 2.5, which is incorporated and reorganized in line with its unique structure, and which distinguishes between Regulations and Standards on the one hand, and Guidelines on the other hand. Repatriation now appears under the conditions of employment covered separately under Title 2 of the MLC, 2006, alongside seafarers' employment agreements, wages, hours of work and entitlement to leave. Moreover, while repatriation did not figure initially among the elements to be inspected in order to obtain a maritime labour certificate, the financial security element introduced as a result of the 2014 amendments is contained on the list of elements subject to inspection (see Appendix A5-I of the MLC, 2006). Recommendation No. 174 was incorporated under Regulation A2.5.1, paragraph 5(a) of the MLC, 2006. Convention No. 23 remains open for ratification, which is not the case for Convention No. 166. [14]

[11] The Cartier Working Party had considered it to be "replaced" but it was in fact a "revised" and not a "replaced" Recommendation according to the terminology accepted by the Standards Review Mechanism tripartite working group.

[12] ILO: *General Survey of the Reports on the Merchant Shipping (Minimum Standards) Convention (No. 147) and the Merchant Shipping (Improvement of Standards) Recommendation (No. 155), 1976*, Report III (Part 4B), International Labour Conference, 77th Session, Geneva, 1990, p. 39 ff.

[13] Those States are: Brazil, Costa Rica, Dominica, Iceland, Israel, Trinidad and Tobago, and the United States. However, Brazil has ratified Convention No. 166.

[14] In this regard, see the *Introductory Note* prepared for the third meeting of the STC.

C. Situation in relation to international labour standards

15. The matter of the repatriation of seafarers was discussed on two occasions (1926, 1987) almost 60 years apart. The 1926 instruments (Convention No. 23 and Recommendation No. 27) appeared to have been rendered outdated, with regard to the protections they provided, which justified their revision in 1987 and then more recently in 2006.

16. Following the adoption of the 2014 amendments to the MLC, 2006, which strengthen the financial security system in the event of abandonment, it could be considered that Convention No. 166 and Recommendation No. 174 are insufficient to ensure adequate protection with regard to repatriation. In fact, even if the repatriation scheme outlined in those instruments is largely incorporated into the MLC, 2006, their approach to situations in which shipowners defaults on their obligations no longer corresponds to the approach set out in the MLC, 2006. Furthermore, vessels flying the flag of a State that has ratified Convention No. 166 may encounter difficulties when undergoing an inspection by a port State while docked in a country that has ratified the MLC, 2006, owing to the no more favourable treatment clause that it contains. [15]

17. One of the recurring issues concerning application of the Conventions relating to maritime labour is their possible extension to categories of workers other than seafarers, as defined by the MLC, 2006. A number of national laws have established a common framework for fishers and seafarers on the basis of these sectoral Conventions. Convention No. 166, in view of its scope of application, enables member States to extend the protection it offers to commercial maritime fishing vessels. [16] It should be recalled that the possible abrogation or withdrawal of a Convention does not affect any national legislation that has been adopted with a view to giving effect to it, or in general prevent a State from continuing to apply the instrument if it wishes to do so. [17] It is important to emphasize that prior to the adoption of the Work in Fishing Convention, 2007 (No. 188), no ILO instrument directly addressed the repatriation of fishers. However, the adoption of Convention No. 188 now provides comprehensive and renewed protection for workers in this sector.

III. Key points to consider in deciding the status of the instruments

18. In the context of the review to determine the status of Convention No. 23 and Convention No. 166, as well as Recommendation No. 27 and Recommendation No. 174, relating to the repatriation of seafarers, account should be taken of the following considerations, which are particularly relevant:

(1) Convention No. 23 appears to be completely outdated in terms of the protection it accords to seafarers with regard to repatriation. However, 16 member States remain bound by that Convention, and it appears in the Appendix to Convention No. 147, which remains relevant for seven States.

(2) Recommendation No. 27 was revised by the instruments adopted in 1987.

[15] Article V, paragraph 7 of the MLC, 2006.

[16] This seems to be the case in Egypt, from the information submitted to the CEACR.

[17] See ILO: Abrogation of four and withdrawal of two international labour Conventions, Report VII(2), International Labour Conference, 106th Session, Geneva, 2017, p. 5.

(3) Only five States remain bound by Convention No. 166. It mainly reflects the level of protection accorded by the MLC, 2006, with the exception of the financial security mechanism in the event of abandonment, introduced by the 2014 amendments. Convention No. 166 may be extended to include commercial maritime fishing.

(4) The content of Recommendation No. 174 has been incorporated into the MLC, 2006.

IV. Possible action to consider with respect to the instruments

19. In the light of the foregoing, the Special Tripartite Committee (STC) might wish:

1. To classify Convention No. 23 as "outdated" and to propose its abrogation. In this regard, the STC might wish to recommend that States that are still bound by Convention No. 23 should be encouraged to ratify the MLC, 2006.
2. To classify Recommendation No. 27 and Recommendation No. 174 as "outdated" and to propose their withdrawal.
3. To classify Convention No. 166 as "outdated". In this regard, the STC might wish to consider that:
   (a) States that are still bound by Convention No. 166 should be encouraged to ratify the MLC, 2006;
   (b) States that are still bound or that were previously bound by Convention No. 166 and have extended its protection to fishing vessels should be encouraged to ratify Convention No. 188; and
   (c) The status of this Convention should be reviewed during the next meeting of the STC, in order to decide upon its possible withdrawal or abrogation.