

# International Labour Law and Domestic Law



A training manual for judges,  
lawyers and legal educators

**Occupational safety and health**



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# Preface

Almost 100 years after the founding of the International Labour Organization (ILO), international labour standards continue to be the ILO's principal instruments. Together with a tripartite approach, these standards represent the ILO's principal comparative advantage in its commitment to social justice and decent work for all.

The ILO's standard-setting activity is not static. On the contrary, it develops over time to remain relevant, particularly in the current context, which is so different from the climate that prevailed when the ILO was in its infancy.

The International Training Centre of the ILO (ITCILO) plays a key role in promoting and reinforcing the impact of international labour law, and helps to make it a living instrument. Its training activities are essential for developing skills at domestic level that make it possible for ILO standards to be enforced and applied more stringently. This involves building the capacities not only of the traditional tripartite constituents, but also of judges and legal practitioners. The ILO's International Labour Standards Department and the ITCILO firmly believe that labour tribunals, the lawyers who appear before them, the tutors responsible for training future lawyers and the legal advisers to employers' and workers' organizations are crucial to the effective, in-depth application of international labour law and to the achievement of the objectives of decent work.

Today, these professionals are constantly and systematically in contact with systems other than those in which they practice. What is more, technological resources and technical capacity have made it possible to establish lasting institutional links and to foster exchanges of knowledge among members of the legal profession. Besides the traditional domestic sources on which these experts rely, they may henceforth take inspiration from, and indeed use, the instruments made available by the international community.

Depending on the country concerned, ILO Conventions and Recommendations and the work of the ILO's supervisory bodies may therefore represent a direct source of law, as well as an important source of guidance and inspiration in the application of domestic labour law.

ILO standards can also be regarded as contributing to the globalization of the law, but with a clear understanding that, rather than replacing domestic legal systems, the purpose of international labour law is on the contrary to reinforce them.

Against this background, the ILO's International Labour Standards Department and the ITCILO collaborated in the development of the training manual "International labour law and domestic law: A training manual for judges, lawyers and legal educators", which was published in 2010. This chapter broadens the areas covered by the manual and provides judges, lawyers and legal educators with an in-depth examination of international labour standards relating to occupational safety and health (OSH), as well as concrete illustrations of how these can be used to settle labour disputes involving OSH.

This chapter is the result of collaboration between the International Labour Office and the ITCILO. The work was coordinated by Alessandro Chiarabini (ITCILO) and the text was drafted by Catherine Bråkenhielm, former Coordinator for Occupational Safety and Health at the International Labour Standards Department of the ILO. Invaluable and insightful feedback was

provided by Horacio Guido and Graciela Jolidon (ILO/NORMES), as well as by Joaquim Pintado Nunes, Andrew Christian, Frédérique Laisné-Auer, Tzvetomira Radoslavova (LABADMIN/OSH) and Olena Vazhynska (ITCILO).

We hope this chapter will be adopted and used by a substantial number of national training institutions, judges and lawyers, thereby contributing to the development of new generations of legal practitioners working in the field of labour law, who will be better equipped to exercise their profession in the service of social justice.

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# Occupational safety and health

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## I. Introduction

### I.A A century-old legacy

Occupational safety and health (OSH) has been a constant ILO concern since the Organization was founded in 1919. This concern has its roots in the extensive damage to human health resulting from the Industrial Revolution of the 1800s. The ILO's efforts have resulted in the adoption of a large body of international standards, in fact almost 80 per cent of all ILO standards and instruments are wholly or partly concerned with OSH-related issues. The principles and tools adopted to address OSH issues have evolved in line with technological, economic and scientific developments over the past century, and the resulting body of standards comprises a mix of precise rules and requirements, as well as comprehensive process-based provisions.

### I.B The paradigm shift

Until the 1970s, national and international OSH standards were characterized by a piecemeal approach aiming to afford protection in specific areas of industrial activity or against specific substances. Developments in the early 1970s triggered a paradigm shift in perceptions of how to regulate OSH. These developments included the work of the Committee on Safety and Health at Work in the United Kingdom, expressed in the Robens' Report (1972), which called for a holistic approach to OSH.<sup>1</sup> The resulting Health and Safety at Work etc Act 1974 (HSW Act) was a comprehensive framework statute which replaced industry-specific safety and health legislation. In addition to regulating the responsibilities of the main stakeholders, the HSW Act introduced a policy-based approach to OSH. At the global level, the principle of prevention, and the more far-reaching precautionary approach, emerged in the context of discussions on the human environment,<sup>2</sup> triggering ILO efforts to place increased emphasis on prevention in the working environment. Early efforts were programmatic, including adoption of the Programme for the Improvement of Working Conditions and Environment (PIACT).<sup>3</sup> In terms of ILO standards, the first effort to develop a comprehensive standard similar to the HSW Act was only a partial success. The *Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148)* and its accompanying *Recommendation No. 156* is limited to standards regarding air pollution, noise and vibration.

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<sup>1</sup> The Committee on Safety and Health at Work; *Safety and Health at Work*, report of the Committee 1970-72 (London, 1972) led by Lord Robens.

<sup>2</sup> The United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972.

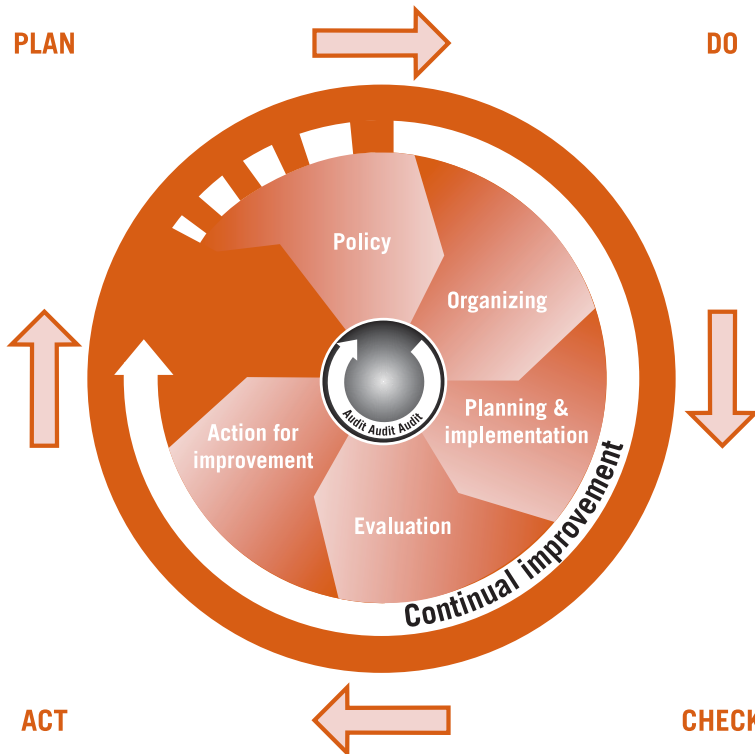
<sup>3</sup> de Givry, J. (1978), *The ILO and the Quality of Working Life - A New International Programme: PIACT, International Labour Review*.

### I.C A comprehensive regulation

Not until the adoption in 1981 of the **Occupational Safety and Health Convention, 1981, (No. 155)** and its supplementing **Recommendation No. 164** was the ILO's objective fully realized. Convention No. 155 is a comprehensive, dynamic and flexible instrument which affirms that OSH should be based on the principle of prevention. It prescribes specific responsibilities for governments, as well as responsibilities, duties and rights for employers, workers and their representatives. It also introduces the iterative cyclical Plan-Do-Check-Act model to the management of OSH, an early expression of the modern OSH management-systems approach based on risk assessment, which is the logical foundation of the principle of prevention.

### I.D Towards a management-systems approach

Applying a cyclical management-systems approach – i.e. the Plan-Do-Check-Act- model – to OSH was a novel concept. The model<sup>4</sup> can be illustrated as follows:



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<sup>4</sup> Also called the Deming cycle, popularized by Dr. W. Edwards Deming.

In order to enhance understanding and promote the practical application of this model, additional guidance tools were developed, including the [Guidelines on Occupational Safety and Health Management Systems \(ILO-OSH 2001\)](#) to promote bipartite enterprise-level management of OSH systems, and the [2002 Protocol to Convention No. 155 concerning the Recording and Notification of Occupational Accidents and Diseases](#), which promotes national efforts to elaborate occupational injury and disease statistics – an important factor in making informed decisions when formulating national OSH programmes and strategic compliance plans. Note should also be taken of the [List of Occupational Diseases Recommendation, 2002 \(No. 194\)](#), which includes an updated list of occupational diseases<sup>5</sup> and plays an important role for both compensation and prevention purposes.

## **I.E The 2006 Promotional Framework**

The slow take-up of the 1981 paradigm shift was considered in the context of a 2003 discussion on how to further enhance the coherence, relevance and impact of ILO OSH activities.<sup>6</sup> The resulting consensus was that there was a need for further standards, which triggered the development and adoption of the [Promotional Framework for Occupational Safety and Health Convention, 2006 \(No. 187\)](#) and its supplementing [Recommendation No. 197](#). The objective of these instruments is to ensure that priority is given to OSH in national agendas and to further develop the national policy approach to OSH. Building a “national preventative culture” is stated to be of societal significance and, for the first time in international standards, a safe and healthy working environment is described as a *right*. Convention No. 187 is a framework instrument, as it calls upon governments to take into account “the principles set out in instruments [...] relevant to the promotional framework,” listed in the Annex to Recommendation No. 197. Together with Convention No. 155, Convention No. 187 serves as roadmap for developing and continuously improving national OSH systems based on prevention and the principles singled out in the instruments as being the most relevant among the OSH standards.<sup>7</sup>

## **I.F Relevance of OSH instruments for judges and legal practitioners**

The scale of the human and economic burden caused by occupational accidents and diseases is the stark backdrop to the need for increased awareness and action to improve safety and health at work for the global working population. Judges and legal practitioners have a crucial role to play by giving concrete expression to the general principles governing modern national and international standards, including employers’ obligation “to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and process under their control

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<sup>5</sup> Updating the Schedule annexed to the [Employment Injury Benefits Convention, 1964 \(No. 121\)](#).

<sup>6</sup> ILO: *ILO standards-related activities in the area of occupational safety and health: An in-depth study for discussion with a view to the elaboration of a plan of action for such activities*, Report VI, ILC, 91<sup>st</sup> Session, Geneva, 2003.

<sup>7</sup> The instruments relevant for the promotional framework include 18 Conventions and 21 Recommendations listed in the Annex to the [Promotional Framework for Occupational Safety and Health Recommendation, 2006 \(No. 197\)](#). See also below.

are safe and without risks to health.”<sup>8</sup> It should also be emphasized that Convention No. 155 provides for this obligation to be implemented by laws or regulations *or any other method consistent with national conditions and practice*.<sup>9</sup> In addition to collective agreements, which in some countries are an acceptable means of regulating OSH, the “other methods” can include judicial decisions. This is an added incentive for more extensive use of the national court system and judicial decisions. Furthermore, as knowledge and information is the key to both prevention and effective judicial mechanisms, it is hoped that the present manual will contribute to ensuring that national courts, judges and legal educators are well informed as to the complexities of OSH and how the relevant stakeholders should carry out their respective responsibilities for ensuring a safe and healthy working environment.

## **II. Occupational Safety and Health Convention, 1981 (No. 155)**

The Convention comprises sections regulating scope and definitions, national policy and the principles underpinning it, action required at the national level, and action required at the enterprise level.

### **II.A Scope and definitions**

Subject to a number of possible exclusions, intended to be temporary, Convention No. 155 applies to all branches of economic activity. In practice, and while general national legislation reflecting the Convention may apply, industries such as mining, shipping, fishing, aviation and the petroleum extraction industry are often subject to specific regulations. Agriculture, however, has often been subject to more extensive exclusions from OSH legislation. In such cases, a declaration must be made in a country’s initial report, in accordance with Article 1 (3) of the Convention. Otherwise, the Convention applies to all workers – including *public employees* – in the branches of economic activity concerned. Police, firefighters, the army and other civil protection authorities are often excluded from the scope of application of overarching OSH laws. Furthermore, in some countries, such as India, the Convention applies only to workers in factories employing more than ten employees.<sup>10</sup> In other countries, persons employed in domestic work or homeworkers are excluded on the ground that it is difficult in practice to enforce legislation in domestic settings.<sup>11</sup> Parties to the Convention wishing to exclude certain branches of economic activity or certain categories of workers are required to give reasons for such exclusions, describe the measures taken to afford adequate protection to excluded workers and, over time, indicate progress towards a wider application of the Convention. The exceptions are therefore intended to be temporary.

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<sup>8</sup> Convention No. 155, Article 16 (1).

<sup>9</sup> Convention No. 155, Article 8.

<sup>10</sup> India is undergoing a major labour law reform and this may soon change.

<sup>11</sup> Nevertheless, some countries, such as Austria, the Czech Republic and Sweden, appear to have overcome these difficulties. See ILO, *General Survey concerning the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Safety and Health Recommendation, 1981 (No. 164) and the Protocol of 2002 to the Occupational Safety and Health Convention, 1981*, Report of the Committee on the Application of Conventions and Recommendations (articles 19, 22, and 35 of the Constitution), Report III (Part I B); Geneva, 2009, (General Survey 2009), para. 40.

As to the specific meaning of **worker**, Convention No. 155 defines it to mean all **employed persons – including public employees**. The extension of scope to cover public employees is a significant innovation. While Convention No. 155 does not define **employer**, general guidance has been developed regarding the principles for determining the existence of an employment relationship in the [Employment Relationship Recommendation, 2006 \(No. 198\)](#). In this context, it is also relevant to note that according to the [Safety and Health in Construction Convention, 1988, No. 167](#), a worker is defined as “any person **engaged**” in construction and an employer is defined as “(i) any physical or legal person who employs one or more workers on a construction site; and (ii) as the context requires, the principal contractor, the contractor or the subcontractor.”

Convention No. 155 is silent regarding *self-employed persons* and *the informal economy*. As regards the former, it follows from Recommendation No. 164 that it is up to each country to determine what protective measures may be necessary and practicable to apply to this category of workers.<sup>12</sup>

A problematic issue is that workers in the *informal economy* often face the most unsafe and unhealthy conditions. While it could be argued that OSH laws should in principle be universal and therefore cover everyone, in practice this is not the case. The Committee of Experts regularly invites parties to Convention No. 155 to provide information on efforts made to regularize workers engaged in the informal economy and encourages concrete efforts to do so. This was the case, for example, of the efforts reported by Brazil to withdraw workers from the informal economy by issuing them with an employment record card or by registering them as independent, self-employed or as having some other status denoting inclusion in the labour market. Brazil was encouraged to continue make efforts in this direction.<sup>13</sup> Further guidance on this issue is also available in the [Transition from the Informal to the Formal Economy Recommendation, 2015 \(No. 204\)](#).

Convention No. 155 also includes a definition of health. In relation to work, it means “not merely the absence of disease or infirmity; it also includes the physical and mental elements affecting health which are directly related to safety and hygiene at work.” This definition echoes the basic principle of the [Constitution of the World Health Organization](#). It is evidence of progress towards a more holistic approach to OSH and recognition of the intrinsic relationship between OSH and the human right to health.

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<sup>12</sup> *Ibid*, para. 41.

<sup>13</sup> See Committee of Experts: *Brazil*, Observation (2011) and Direct Request (2015) on the application of Convention No 155.

## II.B Principles of a national policy

### A national OSH policy

#### **Convention No. 155 Article 4 (1)**

Each Member shall, in the light of national conditions and practice, and in consultation with the most representative organizations of employers and workers, formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment.

According to this Article, there is no one-size-fits-all model and each national OSH policy must be developed in relation to *national conditions and practice*. A national policy may have different components depending on national needs, but a coherent national policy must consist of components which are mutually compatible and which make up a consistent whole. Although it may not be possible to give equal emphasis to the development of OSH in each branch of a country's economic activity or each category of worker, the objective of national policy must be to do so.

The policy must be formulated, implemented and periodically reviewed *in consultation with* (and not *after* consultation with) the most representative organizations of employers and workers. This wording of the Convention was deliberate, formulated to indicate that governments have an obligation not to consult just once, but to engage in an on-going dialogue with the social partners. This means that employers and workers must be involved from start to finish. The active involvement of employers and workers and their representatives at all relevant levels, from shop floor to senior management (and including national policy development), is a defining feature of Convention No. 155. Different consultative mechanisms are stipulated, depending on the context, but the basic message is that the principle of prevention can only be effectively implemented through active collaboration between employers and workers and their representatives, and that early awareness and action is the most effective approach. The Convention is flexible regarding the methods for conducting this dialogue. In practice, most countries conduct their national dialogue through specific consultative mechanisms, set up either to deal with social issues in general or to deliberate more specifically on OSH issues.

The requirement to *formulate, implement and periodically review* the national policy in consultation with the social partners is an innovative and significant feature of the Convention. It marks the introduction of a requirement to establish an iterative or cyclical national policy *process* and is a recognition of the fact that OSH is a dynamic area which calls for constant adaptation to take into account technological, economic and scientific developments. This process echoes the Plan-Do-Check-Act business model, and lays down the basic elements of the OSH management-systems approach more fully articulated in Convention No. 187.

**Convention No. 155 Art. 4 (2)**

The aim of the policy shall be to prevent accidents and injury to health arising out of, linked with or occurring during work, by minimizing, so far as is reasonably practicable, the causes of hazards inherent in the working environment.

While virtually all occupational accidents and diseases are preventable, the Convention recognizes that, in practice, hazards are inherent in the working environment. These hazards must, however, be minimized “*so far as is reasonably practicable.*” While the Convention does not provide further guidance on how this concept is to be construed, this requirement is a high standard and implies the need to make continuous efforts to improve. It is in the hands of the judiciary to interpret what this means in actual practice in the national context. In the following case, the court used Convention No. 155 as part of its reasoning to justify the application of an effectual construction of OSH legislation, rather than applying the rule requiring a strict interpretation of penal statutes.

**Country: Australia (Victoria)**

*Supreme Court of Victoria Court of Appeal, The Queen v. A.C.R Roofing PTY. LTD, 1 December 2004*

The court indicated that “in cases where the rule requiring a strict construction of penal statutes collides with the need to construe industrial safety legislation effectually the latter tends to prevail.”[...] “A powerful indicator” of the proper construction in this case was that the Victoria Occupational Safety and Health Act, 1985 and its s. 21 derives from s.11 of the Industrial, Safety Health and Welfare Act, 1981, [*In footnote: At one time said to have been enacted in implementation of [Art 4 (2) of Convention No. 155]*], which was based upon ss.2 and 3 of the Health and Safety at Work etc. Act 1974 (UK). These provisions were, in turn, modelled on an employer’s common law duties of care but, in accordance with the recommendations of the Robens’ Committee, were intended to lay down “overriding duties, carrying the stamp of Parliamentary approval, [to] establish clearly in the minds of all concerned that the preservation of safety and health at work is a continuous legal and social responsibility of all those who have control over the conditions and circumstances in which work is performed.” [footnotes omitted]

**The scope of the national policy.** According to Article 5, the national policy must cover five main (and broad) “spheres of action.” Additional guidance on how to apply Article 5 in practice is provided in Paragraphs 3 and 4 of Recommendation No. 164. In addition to the protection of workers and their representatives, which is discussed separately below, the spheres of action are the following:

- The design, testing, choice, substitution, installation, arrangement, use and maintenance of the *material elements of work*. Seeking to eliminate potential workplace hazards of machinery, installations, arrangements, equipment and tools at source – i.e. when they are designed and installed – is the most cost-effective approach to prevention. This requirement is applied in virtually all countries in the world, albeit to a varying degree.
- *Adapting the working environment to the workers’ physical and mental capacities.* The growing attention paid to ergonomic principles reflects an acknowledgement of this principle, but in many countries further efforts are needed.

- *Training of persons involved – including necessary further training.* The provision of OSH-related training at all levels, or the acquisition and maintenance of the knowledge and skills necessary to operate the national OSH system at both the national level and in the workplace, is essential and must be reflected in the national policy.
- *Communication and cooperation* regarding OSH at all levels of society, from the workplace to the national level. A smooth flow of information and knowledge between the different components of the national OSH system, and cooperation between the social partners, is essential to ensuring the coherence and effectiveness of the system.
- *Protection of workers.* The national policy must take account of the protection of workers and their representatives from disciplinary measures as a result of actions properly taken by them in conformity with the national OSH policy. This provision does not provide for direct protection of workers and their representatives from disciplinary measures, but this principle must be taken account of in the national policy. It is thus up to the Member, in consultation with the most representative organizations of employers and workers, to determine how this protection is afforded.<sup>14</sup> The protection to be afforded concerns actions “properly” taken by workers and their representatives in conformity with the national policy referred to in Article 4. Guidance regarding action properly taken is offered in Paragraph 17 of Recommendation No. 164, which stipulates that “prejudicial measures should not be taken against a worker who complains of what the worker, in good faith, considers to be a breach of statutory requirements or a serious inadequacy in the health and safety measures taken by the employer.” The importance attributed to this question is evidenced by the fact that it is included among the “Principles of National Policy”. The judiciary has an important function in giving practical meaning to these requirements, including, in particular, the good faith requirement.

**Progressive extension of the national policy.** A particular feature of Convention No. 155 is its dynamic nature, not only because of Article 4, but also because it takes account of the fact that national OSH systems will (and should) develop after ratification. Article 11 sets the direction for such development and stipulates that the national policy must *progressively*<sup>15</sup> address the following other functions, in addition to those enumerated in Article 5:<sup>16</sup>

- Controlling the design, construction and layout of enterprises;
- Controlling the use of substances and work processes;
- Occupational accidents and diseases: record-keeping, notification and statistics;
- Holding inquiries;

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<sup>14</sup> This point was emphasized by the CEACR in an [Observation of 2015 concerning the application by Venezuela of Convention No. 155](#).

<sup>15</sup> The progressive performance of these functions is specifically limited to the functions listed in Article 11 and does not extend to any other provisions of the Convention.

<sup>16</sup> During the preparatory work, it was explicitly recognized that “whereas most of the instruments of the ILO had to be applied directly after ratification, the present instrument, being very wide in scope, covered the entire field of occupational safety and health, and one could hardly hope for its immediate application. The progressive aspect was therefore fundamental.” ILC, 67<sup>th</sup> Session, Geneva 1981, Provisional Record No. 25, para 55, p. 25/7.



- Publishing measures taken to implement the national policy and related data;
- Knowledge and risk assessment.

These functions relate to areas in which the implementation of a preventive approach is important, but which may be demanding both technically and in terms of resources.

**Institutional functions and responsibilities.** Occupational safety and health is a complex field, drawing on many disciplines and calling for the involvement of all stakeholders to fulfil the complementary functions of administration, compliance and enforcement, consultation, coordination and cooperation, as well as knowledge generation and dissemination. According to Article 6, the formulation of the national policy “shall indicate the respective functions and responsibilities in respect of OSH and the working environment of public authorities, employers, workers and others, taking account of both the complementary character of such responsibilities, and the national conditions and practice.” With a considerable amount of flexibility, the Convention also requires (in Article 15) that “arrangements appropriate to national conditions and practice” be made to ensure the necessary coordination between the national authorities and bodies and stipulates that “whenever circumstances so require and national conditions so permit, these arrangements shall include the establishment of a central body”. Further guidance as to the purpose of such arrangements is provided in Paragraph 7 of the Recommendation. In practice, central bodies have been set up in many countries.<sup>17</sup>

**Periodic review of the national situation.** Periodical review of the results of actions taken is critical in verifying the level of coherence of the system and identifying new and existing areas of concern that need further improvement. The national policy process requirements are therefore coupled with a requirement, in Article 7, that the national OSH situation “be reviewed at appropriate intervals.” As will be further discussed below, at the time of the development of Convention No. 155 national procedures for the systematic monitoring of OSH developments and progress were uncommon. The application of procedures for the notification of occupational accidents and diseases, and the production of annual statistics, are therefore included among the functions that can be developed “progressively” pursuant to Article 11 d). An example of the significance given to available data in relation to the application of the Convention is expressed in paragraph 26 of a [1997 representation](#)<sup>18</sup> [alleging non-compliance by Uruguay with Convention No. 155](#), summarized in the box on next page.

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<sup>17</sup> See footnote 91 in [the 2009 General Survey](#).

<sup>18</sup> The representation procedure is governed by articles 24 and 25 of the ILO Constitution. It grants an industrial association of employers or of workers the right to present to the ILO Governing Body a representation against any Member State which, in its view, has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party. See under [Representation](#) on the ILO website.

### **Country: Uruguay**

The Committee considers that the number of fatal accidents is not in itself a sufficient indicator enabling the application of the Convention to be assessed. The Committee regrets that it does not have more precise information available, such as the number of industrial accidents causing complete disability on a temporary or permanent basis relative to the number of workers in the branch of activity concerned, or better still to the number of hours worked. The Committee considers, however, that an increase or decrease in the number of fatal industrial accidents is an indication of whether the Convention has been applied. Without dismissing the action taken by the Government with a view to ensuring that accidents are prevented and risks reduced, the Committee observes that the allegations made by the complainant organization regarding the health and safety situation of workers in the construction industry call into question the results of the policy introduced to prevent accident and damage and to reduce risks. However, based on the information provided by the Government, the Committee recalls a downward trend in the number of fatal industrial accidents, although last year – 1996 in comparison with 1995 – it increased in absolute terms. The Committee considers the downward trend to be a consequence of the measures adopted after the representation was made, pursuant to Article 4 of the Convention. The Committee hopes that the determined and continued implementation of the measures in question, together with their evaluation, will ensure that the accidents and damage to health resulting from work are prevented.

In line with an increased awareness of the importance of data of this kind, procedures for recording and notifying occupational accidents and diseases were further developed in the Protocol<sup>19</sup> of 2002 to Convention No. 155 and subsequently complemented with requirements in Convention No. 187 regarding the use of objectives, targets and indicators to monitor OSH progress.

## **II.C Action at the national level**

**Implementation at the national level.** According to Article 8, the Convention must be implemented “by laws or regulations or any other method consistent with national conditions and practice and in consultation with the representative organizations of employers and workers concerned.” The flexibility this offers allows for implementation through, for example, collective bargaining agreements and court decisions. In practice, OSH is an area which is extensively regulated and many countries consider it difficult to strike a proper balance between the need for binding laws and regulations, on the one hand, and flexible provisions adaptable to the changing nature of OSH based on technological and scientific developments, on the other. The Netherlands is one of the countries that has sought to apply some innovative mechanisms.<sup>20</sup> These mechanisms, and their implications in the context of ILO standards, have been examined in detail in a [2014 representation concerning the application by the Netherlands of Conventions Nos. 81, 129 and 155](#).

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<sup>19</sup> The Protocol to Convention No. 155 is also a Convention subject to ratification, but it can only be ratified by the parties to Convention No. 155, or in conjunction with a new ratification of Convention No. 155.

<sup>20</sup> See also paras. 90-95 in [the 2009 General Survey](#).

The **enforcement of laws and regulations**, according to Article 9 (1), is to be secured by an adequate and appropriate system of inspection. Recommendation No. 164 stipulates that “an adequate and appropriate system” must be guided by the provisions of the **Labour Inspection Convention, 1947 (No. 81)** and the **Labour Inspection (Agriculture) Convention, 1969 (No. 129)**.<sup>21</sup> While increasing importance is given to the role of inspectors in ensuring prevention, including the implementation of workplace risk assessments, the question of the balance to be struck between preventive/advisory and enforcement functions was one of the issues examined in a **2015 representation concerning the application by Portugal of Conventions Nos. 81, 129 and 155**. In this case, emphasis was placed on the close relationship between Convention No. 155, on the one hand, and Conventions Nos. 81 and 129, on the other. The following statement from a **2009 representation concerning the application by Mexico of Conventions Nos. 150, 155 and 170** is also instructive:

**Country: Mexico**

The case concerned alleged violations by Mexico in relation to a mining accident on 19 February 2006, when a methane explosion caused the death of 65 miners (the Accident). The Committee found that the obligations under Articles 8 and 9 of Convention No. 155 “impose an obligation on member States that ratify this Convention to adopt laws and regulations or take other measures to give effect to Article 4 of the Convention and to secure their enforcement. This obligation does not make the Government liable for any and all occupational safety and health accidents and diseases. The Committee notes, in particular, that, [while] no definitive cause of the Accident can be established at this time [there is] information on the possible causes of the Accident, and sets out a number of hypotheses. It has been established that at the time of the Accident, there were a number of deficiencies in the Mine that could have been identified through a proper risk assessment or that were identified but not remedied. While the question of whether these deficiencies, either in isolation or combined, did trigger the Accident cannot be conclusively answered, the Committee finds that based on the facts in this case the labour inspection service in Sabinas did not follow up on its own recommendations and did not ensure that they were properly complied with, including by the imposition of effective and dissuasive sanctions. Given these circumstances, the Committee concludes that the Government of Mexico did not do all that was reasonably expected of it to avoid or minimize the effects of the Accident [...]

<sup>21</sup> For further guidance, see ILO: *Labour Inspection*, Report III (Part 1B) ILC, 95<sup>th</sup> Session, Geneva 2006 [2006 General Survey on Inspection].

A significant problem in practice, which may be seen as violation of the obligations undertaken under Convention No. 155 (and the related Conventions Nos. 81 and 129), is the lack of resources made available to labour inspectorates. In a [1996 representation concerning the application by Uruguay of Conventions Nos. 155, 62, 81 and 129](#), the Committee concludes in para 31 (a) that:

**Country: Uruguay**

[...] “although effect has been given to the Conventions in national law and the Government has made efforts to improve the inspection system and prevent accidents in the construction sector, the high number of occupational accidents, including many fatal accidents, in the construction sector as a result of failure to comply with the national legislation that is in force in this area give grounds for considering that in practice the application of Conventions Nos. 62, 81, 150 and 155 is not ensured.”

Article 9 (2) of Convention No. 155 also requires that the enforcement system provide for adequate penalties for violations of the laws and regulations. In practice, most legal systems set certain maximum levels for penalties. But within these margins, the assessment and meting out of adequate penalties by the courts is a crucial element in ensuring that the system functions properly.

**Guidance and information on OSH.** As noted above, the national policy must ensure communication and cooperation at all levels (Article 5 (d)). The requirement that the Government be actively involved in ensuring implementation of the national OSH system – in addition to developing laws and regulations – is further reinforced in Article 10, which specifically requires that measures be taken to provide guidance to employers and workers regarding compliance with legal obligations. These requirements are directly related to the fact that prevention depends on the timely availability of knowledge and information. The importance attributed to this function can be seen in the case of [Brincat And Others v. Malta of July 24, 2014](#)<sup>22</sup> before the European Court of Human Rights.

**Responsibilities of designers, manufacturers, importers and other providers of machinery.** In line with the preventive approach, Article 12 of the Convention requires that designers, manufacturers and importers be made responsible for ensuring that machinery, equipment and substances do not present hazards, that information and instructions be made available, and that they keep abreast of the latest scientific and technological developments necessary for performing their obligations. These may include obligations to provide information sheets for dangerous substances (e.g. chemicals)<sup>23</sup> and machinery (including instructions for use).<sup>24</sup>

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<sup>22</sup> See also below, Section VI, Other International Standards.

<sup>23</sup> See footnote 31.

<sup>24</sup> The ILO database [LEGOSH](#) contains many examples of national practice regarding OSH. Examples regarding the application of Article 11 can be found [here](#).

**Protection of workers who remove themselves from situations presenting imminent and serious danger.** The general protection afforded under Article 5 (d) (discussed earlier) is substantively related to the more specific situations provided for in Article 13 of this part of the Convention and in Article 19 (f) of the following part, which deal with circumstances in which workers may find themselves in situations of imminent and serious danger at work.

### Convention No. 155

Art. 13. A worker who has removed himself from a work situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health shall be protected from undue consequences in accordance with national conditions and practice.

Art. 19. [There shall be arrangements at the level of the undertaking under which ...] f) a worker reports forthwith to his immediate supervisor any situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health; until the employer has taken remedial action, if necessary, the employer cannot require workers to return to a work situation where there is continuing imminent and serious danger to life and health.

Articles 13 and 19 (f), read together with Article 5 (e), mean that no “undue” disciplinary action should be taken against workers who remove themselves from work if: (a) the workers concerned have a reasonable justification to believe that there is an imminent and serious danger to their life and health; (b) the workers subsequently and without delay comply with the workplace arrangements contemplated in Article 19 (f); and (c) the workers’ actions have been properly taken in conformity with the national policy pursuant to Article 4. According to Article 13, it is for the worker himself to assess whether the work situation presents imminent and serious danger.<sup>25</sup> Furthermore, while the decision to exercise this right rests with the worker, the protection afforded is from “undue consequences”. The importance of this provision is, inter alia, evidenced by the fact that it is a national requirement and not one that depends on workplace arrangements.<sup>26</sup>

**Inclusion of OSH at all levels of education and training.** This requirement is a further expression of the need to ensure that OSH skills are taught and maintained. In practical terms, it means that OSH should be mainstreamed in university, primary and secondary school, as well as in technical and vocational education and training curricula. Training is also a necessary component of a national OSH system, according to Article 4.3.c of Convention No. 187. This requirement of Convention No. 155 is an early articulation of the fact that OSH is a matter of relevance not only for workers, employers and their representatives, but also for society at large, and is later expressed in Article 3.3 of Convention No. 187. The Committee of Experts has on numerous occasions requested information from parties to Convention No. 155 on the practical application of Article 14.

<sup>25</sup> In subsequent ILO Conventions, workers are granted an express *right* to removal. See. Article 12 (1) of Convention No. 167; Article 8 of Convention No. 170; Article 13 (e) of Convention No. 176; and Article 8 (1) c) of Convention No. 184. See also paras. 294-298 of the 2017 General Survey.

<sup>26</sup> The preparatory work for Convention No. 155 was ongoing at the time of the decision by the US Supreme Court of Justice in the case *U.S. Supreme Court - Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980). It is not improbable that the articulation of Articles 5 (e), 13 and 19 (f) in Convention No. 155, as well as Paragraph 17 in the Recommendation No. 164, were influenced by this landmark decision.

**Coordination and cooperation.** To ensure that national policy is coherent, there must be arrangements to promote dialogue and exchange between the various mechanisms and entities making up the national OSH system. In practice, such mechanisms and entities often include representatives of employers' and workers' organizations and of civil society. With a considerable amount of flexibility in its articulation, Article 15 (2) stipulates that these coordination and cooperation mechanisms should include the establishment of a central body. This is in fact common practice. Further guidance on Article 15 is provided in Paragraph 7 of Recommendation No. 164.

## **II.D Action at enterprise level**

Although national policy requirements and actions at the national level are essential, occupational safety and health is primarily a workplace issue. Convention No. 155 clearly sets forth the responsibilities, rights and duties of employers, workers and their representatives at the level of the individual enterprise.

**Employers' duties and responsibilities.** The Convention establishes that employers are primarily responsible for ensuring safety and health at work. Pursuant to Article 16 (1), employers are specifically required to ensure that, so far as is reasonably practicable, the *workplaces, machinery, equipment and processes* under their control are safe and without risk to health. In the following case, Article 16 of Convention No. 155 and the **Protection of Workers Health Recommendation, 1953, (No. 97)** were used to interpret the Constitution of Costa Rica:

### **Country: Costa Rica**

*Supreme Court of Justice, Constitutional Chamber, Hernán Oconitrillo Calvo v. the Municipality of San José, 23 April 1999. Decision No. 1999-02971*

In the present case, a worker instituted proceedings against the Municipality of San José for not abiding by recommendations concerning unhealthy conditions of workplaces where the officials carry out their work, as a result of which the workers suffered serious illnesses. Article 1 of the Constitution of Costa Rica grants the right to protection of health in the workplace, but the Court recognized that there was no law dealing with this matter. The Court interpreted the principle in the National Constitution in the light of, inter alia, Convention No. 155 and Recommendation No. 97 and, on these grounds, declared a violation by the Municipality of the right to a healthy work environment.

More specifically, the following case before the Supreme Court of Victoria illustrates the significance of the employer's *control*, by establishing the primary employer's responsibility for subcontracted workers.

**Country: Australia (Victoria)**

*Supreme Court of Victoria Court of Appeal, The Queen v. A.C.R Roofing PTY. LTD, 1 December 2004*

S.21(1) of the Victoria OSH Act 1985 (the Act) stipulates that “an employer shall provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health”. According to s.21(3) this obligation extends to any contractor engaged “in relation to matters over which the employer has control, either (a) under a contract entered into between the contractor and the employer; or (b) under a contract entered into between the contractor and some other person”. The present case hinged on whether the employees of a subcontractor were employees of the [principal] employer. The court stated that a contractor could just as well be regarded as engaged by the employer in relation to matters over which the employer has control, whether the contractor were engaged directly by the employer or by another contractor under a sub-contract [...] or some remoter species of sub-contract, regardless of the layers of contractual relations that might separate the contractor from the employer. In terms of the required control, and while there were certain aspects of the lifting in question that were within the control of the sub-contracted company, the erection of a safety mesh was a matter of a different order. In the circumstances of the case, the principal employer had recognized that it had a duty to its employees to ensure that the mesh was installed before the work began. The Court affirmed that, according to s.21(3), it owed the same duty to the employees of contractors working on the roof and that the principal employer “could not have absolved itself of its duty to the employees by leaving it up to them to decide whether they were willing to take the risk.” Although each case must be judged on its own merits, and although there will be cases where accidents occur without fault on the part of the employer, employee carelessness is not in itself a defense for failing to do what is practicable to guard employee health and safety. On these grounds the Court rejected the appeal to reverse the conviction of the principal employer.

According to Article 16 (2), employers are also required to ensure that, so far as is reasonably practicable, the *chemical, physical and biological substances* under their control are without risk to health when the appropriate protection measures are taken.

While Article 16 (1) and (2) defines the general scope of the duties and responsibilities of employers, further guidance on the practical means which might be used to give effect thereto are provided in Paragraphs 10, 14 and 15 of Recommendation No. 164. These provisions articulate some of the essential principles of the systems approach to the management of OSH, i.e. assessing risks, developing preventive plans and control measures, implementing them and reviewing the outcome of actions taken. Further guidance in this respect is provided in the [Guidelines on Occupational Safety and Health Management Systems Guidelines \(ILO-OSH\) 2001](#) (ILO-OSH 2001). For instance, Paragraph 14 of Recommendation No. 164 recommends that employers should set out an OSH policy in writing. Section 3.1 of ILO-OSH 2001 provides guidelines as to what such a policy should contain. Paragraph 15 (1) stipulates that systematic safety audits should be conducted, and Section 3.13 of ILO-OSH 2001 provides guidelines regarding what aspects should be audited. Paragraph 15 (2) and

Section 3.5 both concern OSH documentation. It is particularly important to highlight the hierarchy of responsibility for prevention and control measures (Section 3.10.1).<sup>27</sup>

### **ILO-OSH 2001**

#### *3.10.1. Prevention and control measures*

3.10.1.1. Hazards and risks to workers' safety and health should be identified and assessed on an ongoing basis. Preventive and protective measures should be implemented in the following order of priority:

- (a) eliminate the hazard/risk;
- (b) control the hazard/risk at source, through the use of engineering controls or organizational measures;
- (c) minimize the hazard/risk by the design of safe work systems, which include administrative control measures; and
- (d) where residual hazards/risks cannot be controlled by collective measures, the employer should provide for appropriate personal protective equipment, including clothing, at no cost, and should implement measures to ensure its use and maintenance.

Article 16 (3) of Convention No. 155 further requires that employers provide adequate *protective clothing and equipment* to prevent, so far as is reasonably practicable, risks of accidents or adverse effects on health. This provision is complemented by the more general requirement of Article 21 that *OSH measures shall not involve any expenditure for the workers*. The OSH measures include costs for medical examinations.

According to Article 17, whenever *two or more enterprises engage in activities simultaneously at one workplace*, they shall collaborate in applying the requirements of this Convention. Paragraph 11 of the Recommendation provides the additional guidance that in these cases "they should collaborate in applying the provisions regarding occupational safety and health and the working environment, without prejudice to the responsibility of each undertaking for the health and safety of its employees. In appropriate cases, the competent authority or authorities should prescribe general procedures for this collaboration." These requirements are of great practical significance and this is an area specifically regulated in many countries.<sup>28</sup> In a case decided by the Supreme Court of Justice in Spain, Article 17 was applied directly to fill a legal gap:

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<sup>27</sup> See also Article 6 of the *Safety and Health in Mines Convention, 1995 (No. 176)*.

<sup>28</sup> See the *2009 General Survey*, paras. 175-180.



**Country: Spain**

*Supreme Court of justice, Appeal for reconsideration, Juan Ramón v. Cubiertas y Mzov S.A. Nesco et al., 9 October 2001*

In this case, the Court was required to resolve an appeal for reconsideration lodged by a group of insurance companies seeking exemption from liability for an accident suffered by Mr. Juan Ramón in 1995, which left him paraplegic. In the relevant parts, the Court found that the judge in the first instance had made a mistake in upholding the duty of coordination of the enterprises at issue based on a law of 1996, as this law was not in force at the date of the incident. The Court added, however that “[t]he duty of coordination already exist[ed] in our legal system at the time of the accident, albeit contained in a different regulation, such as Article 17 of ILO Convention No. 155, ratified by Spain on 26 July 1985[...].”

Pursuant to Article 18, employers are required to take measures for dealing with *emergencies and accidents*, including adequate first aid arrangements. In practice, and depending on the size and activity of the undertaking, national regulatory requirements comprise the availability of first-aid kits and the installation of emergency response systems, advance planning, evacuation procedures and firefighting capacities, as well as coordination with public emergency response services. A coordinated approach involving public emergency services is common in all industrialized countries, particularly in the context of legislation relating to major hazard installations and the transportation of hazardous materials. Furthermore, countries that have ratified the ILO [Prevention of Major Industrial Accidents Convention, 1993 \(No. 174\)](#), – developed following the explosion of the Union Carbide India Limited Factory in Bhopal, India 1984<sup>29</sup> – are required to establish stringent emergency response capabilities in highrisk undertakings processing large quantities of highly hazardous materials, such as chemical products with toxic, flammable or explosive properties. All EU Member States are required to comply with the Directive concerning major accident hazards.<sup>30</sup>

**Availability of OSH services and advice.** Occupational safety and health is a very complex domain that draws on many scientific fields, medicine, social sciences and even economics. Its effective implementation in the workplace requires staff with skills and experience, as well as specialized installations and equipment. In most countries, such personnel must have specific competence. The level of expertise and the number of qualified persons and facilities required will depend very much on the size of the enterprise in terms of number of workers employed, as well as its activities and the potential hazards and associated risks such activities may entail. A flexible approach was favored in the 1981 instruments, and guidance is provided in Paragraph 13 of the Recommendation.

<sup>29</sup> Considered the world’s worst industrial disaster. According to publicly available sources, the official immediate death toll was 2,259 which subsequently rose to 3,787. A government affidavit dated 2006 stated that the leak caused 558,125 injuries, including 38,478 temporary partial injuries and approximately 3,900 severely and permanently disabling injuries.

<sup>30</sup> In Europe, the catastrophic accident that occurred in the Italian town of Seveso in 1976 prompted the adoption of legislation on the prevention and control of such accidents. The so-called Seveso Directive ([Directive 82/501/EEC](#)) was later amended in view of the lessons learned from the accidents in Bhopal, Toulouse and Enschede, resulting in Seveso-II ([Directive 96/82/EC](#)). In 2012, Seveso-III ([Directive 2012/18/EU](#)) was adopted, taking into account, amongst other things, changes in the EU legislation on the classification of chemicals and increased rights for citizens to access information and justice.

The need for more stringent provisions led to the adoption of the [Occupational Health Services Convention, 1985 \(No. 161\)](#), a few years after the adoption of Convention No. 155, providing for the establishment of enterprise-level occupational health services. These services are entrusted with essentially preventive functions and are responsible for advising the employer, the workers and their representatives on maintaining a safe and healthy working environment. The [Occupational Health Services Recommendation, 1985 \(No. 171\)](#) provides further guidance on the functions, organization and specialized training and experience requirements of the personnel engaged in these services, emphasizing, inter alia, the multidisciplinary nature of their work.

**Rights and duties of workers and their representatives.** Cooperation between employers and workers is an essential principle of OSH, without which no tangible progress can be achieved. The initial focus of the workplace arrangements provided for in Article 19 (a) is therefore that *workers shall co-operate* with the employer in the fulfilment of the obligations placed on them. How this requirement translates into actual practice varies. According to Paragraph 16 of the Recommendation, these arrangements should aim to ensure that workers take care of their own safety and that of others, comply with instructions and procedures, use safety devices and protective equipment correctly, and report hazardous situations and any accidents or injury to health which may arise.

Article 19 (b) further requires that *representatives of workers cooperate* with the employer in the field of OSH. This indicates a broader range of functions to be performed by these representatives in the implementation of OSH measures at the enterprise.

Article 19 (c) further underscores the importance of the role of worker representatives by stipulating that they must be *given adequate information* regarding OSH measures and that they must be *able to consult with their representative organizations* – on condition, however, that they do not disclose commercial secrets.<sup>31</sup> Paragraph 12 (2) of the Recommendation explains the attributions and functions that should be performed by “workers’ safety delegates, workers’ safety and health committees, and joint safety and health committees, or, as appropriate, other workers’ representatives ...”.

According to Article 19 (d), *workers and their representatives [are] to be given appropriate OSH training*, which further emphasizes the general importance attributed to training in Article 5 (d). Logically, it is necessary to ensure that workers can implement the required preventive and protective measures, and that their representatives can participate with the employer in managing OSH. This is illustrated in the following case relating to the [Guarding of Machinery Convention, 1963 \(No.119\)](#):<sup>32</sup>

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<sup>31</sup> The issue of commercial secrets was the subject of intense debate in the discussions concerning the [Chemicals Convention, 1990 \(No. 170\)](#), which triggered the development of the UN Globally Harmonized System of Classification and Labelling of Chemicals (GHS). The GHS covers all chemicals, including pure substances and mixtures (except pharmaceutical products) and defines the chemical hazard communication requirements (labelling and data sheets) with reference to the workplace, the transportation of dangerous goods, consumers and of the environment. The GHS includes a detailed section (Section 1.4.8 of the English version [http://www.unece.org/fileadmin/DAM/trans/danger/publi/ghs/ghs\\_rev07/English/01e\\_part1.pdf](http://www.unece.org/fileadmin/DAM/trans/danger/publi/ghs/ghs_rev07/English/01e_part1.pdf)) on the issue of commercial secrets, drafted collaboratively by the representatives of employers’ and workers’ organizations.

<sup>32</sup> Convention No. 119 is not included in the Annex to Recommendation No. 197 as it has been found to require revision, albeit in respects other than the substance of its Article 1. See, generally, [the 2009 General Survey](#), para. 219. See also the 2013 Code of Practice [Safety and Health in the Use of Machinery](#).

**Country: Brazil**

*Regional Labour Tribunal of the Third Region, First Chamber, Nunes Da Silva Namir et.al v. De Faria Esdron Antonio, 20 November 2006, Case No. 00398-2006-096-03-00-5-RO*

Following the death of a worker who was cleaning machinery belonging to the enterprise, the worker's surviving spouse and children took legal action against the employer and claimed compensation. With reference to, inter alia, national legislation establishing an obligation on enterprises to instruct workers regarding the precautions to take to avoid accidents and occupational diseases, and Article 1 of Convention No. 119 (ratified by Brazil), the Court ruled that the employer should have taken measures to inform the worker of the dangers involved in the handling of machinery, as well as the precautions necessary, it being the responsibility of the employer to train workers in the use of production-line machinery since the equipment maximizes profits and constitutes the nucleus of the employer's business. On the ground that there was no evidence that the employer had adequately trained the deceased worker, the lawsuit was (partially) upheld.

Another fundamental issue, regulated in Article 19 (e) of Convention No. 155, is the entitlement of workers, their representatives and their organizations to *enquire into and be consulted by the employer on all aspects of OSH associated with their work* and to participate in inquiries. Article 19 (e) also stipulates that, for this purpose, it must be possible – subject to mutual agreement – to bring in *technical advisers*. This latter possibility may represent an important element in the resolution of complex or conflictual situations. In practice, inquiry functions are part of the normal attributions of safety and health committees or similar bodies. Article 19 (f) regulates the worker's duty to report “forthwith” any situation which he has reasonable justification to believe presents an immediate and serious danger to his life and health. As discussed previously,<sup>33</sup> this also applies in situations where workers have removed themselves from situations presenting immediate and serious danger.

**Cooperation between management and workers and/or their representatives.** As indicated on several occasions, cooperation between the relevant stakeholders is an essential requirement of Convention No. 155. Details of the types of mechanisms needed to facilitate cooperation, and how they should function, are not laid down in the Convention, but set out in Paragraph 12 of the Recommendation. Where appropriate and necessary, these measures should include the appointment of workers' safety delegates or workers' safety and health committees and/or joint safety and health committees, in accordance with national practice. Paragraph 12 also stipulates that workers should have at least equal representation with employers' representatives on joint safety and health committees. In practice, most countries require the establishment of structures to ensure cooperation between management, workers and their representatives and define, often in detail, the nature and composition of such structures according to the size and functions of the enterprise.

<sup>33</sup> See above, p. 10, Section II. C, Action at the national level, Protection of workers who remove themselves from situations presenting imminent and serious danger.

### III. Protocol of 2002 to the Occupational Safety and Health Convention, 1981 (No. 155)

The 2002 Protocol to Convention No. 155 can only be ratified by States party to Convention No. 155. The purpose of the Protocol is to strengthen the provisions of Articles 11 (c) and 11(e) of the Convention, which contain elements of a national OSH policy. It provides for the creation and periodical review, in consultation with the most representative organizations of employers and workers, of the *requirements and procedures for recording and notification of occupational accidents (including commuting accidents), diseases and dangerous occurrences*.<sup>34</sup> Keeping track of dangerous occurrences, i.e. events that may cause injury or disease, increases the chances of prevention. The Protocol also aims to harmonize recording and notification systems so as to obtain internationally comparable statistics, and calls for the annual publication of such statistics.<sup>35</sup> The social partners should be continuously involved in actions taken to implement the 2002 Protocol.

### IV. Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)

#### IV.A Purpose and main features

Convention No. 187 and its accompanying Recommendation No. 197 were adopted to promote a preventative safety and health culture.<sup>36</sup> They complement Convention No. 155, Recommendation No. 164 and the 2002 Protocol by stressing that national policy requirements should include the assessment of occupational risks or hazards, combating these at source and developing a national preventative safety and health *culture*. Convention No. 187 emphasizes the importance of the national policy process<sup>37</sup> and stipulates that the national policy on OSH must be implemented using a systems approach.<sup>38</sup> The emphasis is therefore on the interdependence and interactive nature of its different components, and on the overall outcome of efforts by all stakeholders to improve it. While the three key concepts outlined in Convention No. 187 – the national policy, system and programme – refer to action at the national level, the 2006 instruments underscore the importance of cooperation on OSH

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<sup>34</sup> See also the 1996 Code of Practice [Recording and Notification of Occupational Accidents and Diseases](#).

<sup>35</sup> The new Social Development Goal Indicators highlight the crucial importance of the collection and analysis of OSH data. See para 161, 2017 General Survey, including references.

<sup>36</sup> The 2006 instruments are substantively similar to the EU [Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work](#) (Framework Directive); the [EU OSH strategy 2007-2012](#) included a directed invitation to EU member to ratify Convention No. 187.

<sup>37</sup> In 2017, the Committee of Experts stated that “the national policy process, with the full participation of the social partners, remain the crucial engine for improving the national OSH situation and creating safe and healthy working environments.” It also cautioned that “[...] the difficulties encountered in times of economic crisis should not lead to the deterioration of the national situation concerning OSH.” 2017 General Survey, para 105.

<sup>38</sup> The concept of “system approach” should not be confused with the “national system for occupational safety and health” provided for in Article 4 of Convention No. 187.

in the workplace and arrangements to promote cooperation between management, workers and their representatives. Recommendation No. 197 provides the additional guidance that, at the workplace level, members should promote the establishment of safety and health policies, a joint safety and health committee and the appointment of worker OSH representatives, all in accordance with national law and practice. Dialogue with employers' and workers' organizations is at the heart of the Convention, which requires consultation with the social partners on the development and implementation of the instrument's three foundational concepts: a national policy, a national system and a national programme. The main aspects of Convention No. 187 are discussed in a [2013 representation concerning the alleged non-compliance by Chile with Convention No. 187](#) based on allegations that the lack of a national OSH policy, a national OHS system and a national OSH programme for addressing issues relating to teachers' work demonstrated that Chile had failed to take measures to ensure satisfactory application of Convention No. 187.

#### IV.B The right to a safe and healthy working environment

Since the adoption of the [International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#) in 1966, the right to safe and healthy working conditions has been internationally recognized as a human right, deriving from the inherent dignity of the human person.<sup>39</sup> However, Article 1 (d) of Convention No. 187 is the first instance of a safe and healthy working environment being defined as a right in an international labour standard:

##### **Convention No. 187**

###### *Article 1 (d)*

[T]he term **a national preventative safety and health culture** refers to a culture in which the right to a safe and healthy working environment is respected at all levels, where government, employers and workers actively participate in securing a safe and healthy working environment through a system of defined rights, responsibilities and duties, and where the principle of prevention is accorded the highest priority.

Furthermore, according to Article 3 (2), the right to a safe and healthy working environment must be promoted and advanced at all relevant levels.

<sup>39</sup> See Article 7 (b) of the ICESCR. See also paras 274-278 of the 2017 General Survey.

### **IV.C Progressive improvement of OSH**

The objective of the Convention is to ensure that parties promote continuous improvement of OSH, in consultation with the most representative organizations of employers and workers, through a national policy, national system and national programme, taking into account the principles set out in ILO instruments relevant to the promotional framework for OSH. This obligation includes a requirement to consider periodically what measures could be taken to ratify relevant ILO OSH Conventions. In addition to Convention No. 187 and Recommendation No. 197, the relevant instruments are those listed in the Annex to Recommendation No. 197.<sup>40</sup>

### **IV.D A national OSH policy**

Article 3 of Convention No. 187 on national policy takes up the definition set out in Article 4 of Convention No. 155. It adds that workers' right to a safe and healthy working environment must be promoted and advanced at all levels and that, in formulating the national policy, basic principles such as assessing occupational risks and hazards, combating occupational risks and hazards at source and developing a national preventative safety and health culture that includes information, consultation and training must be promoted.

### **IV.E A national OSH system**

Article 4 of the Convention stipulates that each Member must establish, maintain, progressively develop and periodically review a national system for occupational safety and health, in consultation with the most representative organizations of employers and workers. Article 4 (2) details the components that a national OSH system *shall* include, and Article 4 (3) details the elements that *it shall include where appropriate*.

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<sup>40</sup> See under VII "Other Relevant ILO OSH Instruments", below. It should be remembered that the Appendix to Recommendation No. 164 also contains a list of ILO instruments on OSH. However, following the ILO Conference discussions in 2003 and the subsequent adoption of Convention No. 187, the Committee of Experts determined that the list of instruments in the Appendix to Recommendation No. 164 should be superseded by the list of instruments in the Annex to Recommendation No. 197. See paras 218-221 of the 2009 General Survey.

**Convention No. 187, Article 4**

(2) The national system for occupational safety and health shall include among others:

a) laws and regulations, collective agreements where appropriate, and any other relevant instruments on occupational safety and health;

(b) an authority or body, or authorities or bodies, responsible for occupational safety and health, designated in accordance with national law and practice;

(c) mechanisms for ensuring compliance with national laws and regulations, including systems of inspection; and

(d) arrangements to promote, at the level of the undertaking, cooperation between management, workers and their representatives as an essential element of workplace-related prevention measures.

(3) The national system for occupational safety and health shall include, where appropriate:

(a) a national tripartite advisory body, or bodies, addressing occupational safety and health issues;

(b) information and advisory services on occupational safety and health;

(c) the provision of occupational safety and health training;

(d) occupational health services in accordance with national law and practice;

(e) research on occupational safety and health;

(f) a mechanism for the collection and analysis of data on occupational injuries and diseases, taking into account relevant ILO instruments;

(g) provisions for collaboration with relevant insurance or social security schemes covering occupational injuries and diseases; and

(h) support mechanisms for the progressive improvement of occupational safety and health conditions in micro-enterprises, in small and medium-sized enterprises and in the informal economy.

Further guidance is provided in Paragraphs 2-5 of the Recommendation, including the stipulation that Members should take into account the International Labour Organization (ILO) instruments relevant to the promotional framework for occupational safety and health listed in the Annex to the Recommendation, in particular the Occupational Safety and Health Convention, 1981 (No. 155), the Labour Inspection Convention, 1947 (No. 81) and the Labour Inspection (Agriculture) Convention, 1969 (No. 129), and should promote a management-systems approach to occupational safety and health, such as the approach set out in the Guidelines on occupational safety and health management systems (ILO-OSH 2001).<sup>41</sup>

<sup>41</sup> Countries in the process of designing or developing a national OSH policy may be in particular need of systematically collected information, not only for the purpose of devising a policy, but also for implementing it in practice. Recommendation No. 197, Paragraph 14 provides a useful checklist of relevant information to be included in such a profile, to be used as a basis for formulating and reviewing the programme.

## **IV.F A national OSH programme**

According to Article 5 (1), each Member must formulate, implement, monitor, evaluate and periodically review a national programme on occupational safety and health in consultation with the most representative organizations of employers and workers.

### **Convention No. 187, Article 5**

(...) 2. The national programme shall:

- (a) promote the development of a national preventative safety and health culture;
- (b) contribute to the protection of workers by eliminating or minimizing, so far as is reasonably practicable, work-related hazards and risks, in accordance with national law and practice, in order to prevent occupational injuries, diseases and deaths and promote safety and health in the workplace;
- (c) be formulated and reviewed on the basis of analysis of the national situation regarding occupational safety and health, including analysis of the national system for occupational safety and health;
- (d) include objectives, targets and indicators of progress; and
- (e) be supported, where possible, by other complementary national programmes and plans which will assist in achieving progressively a safe and healthy working environment.

3. The national programme shall be widely publicized and, to the extent possible, endorsed and launched by the highest national authorities.

Articles 4 and 5 echo the provisions of Convention No. 155, requiring periodic review of the national system and continuous involvement of the social partners in this process. Article 5.2 (d) specifically provides for the use of objectives, targets and indicators of progress, which are essential complements of the review process prescribed in Article 4 of Convention No. 155, based, *inter alia*, on the information collected in accordance with the 2002 Protocol. While a national policy and a national programme both have the same ultimate goal, a national programme may be more specific than a national policy. For instance, it may target a certain area or be time-bound. Translating a national policy into practice may involve implementing several different or consecutive national programmes depending, for example, on the sectors being targeted. A national programme can also be referred to as a kind of action plan and, as such, it should be SMART i.e. Specific, Measurable, Achievable, Relevant and Time-bound. The ILO has put together [a training package on the development of a national OSH programme](#) which includes modules on national OSH systems and national OSH profiles. Moreover, the International Training Centre of the ILO organizes [an annual residential course on national OSH programmes and systems](#).

## **IV.G Promotional Framework for Occupational Safety and Health Recommendation, 2006 (No. 197)**

Recommendation No. 197, supplementing Convention No. 187, provides further useful guidance. Paragraph 7 of the Recommendation states that a national programme “should be based on principles of assessment and management of hazards and risks, in particular at the workplace level”. It also recommends that member States promote a management-systems approach to OSH as described in the Guidelines on Occupational Safety and Health



Management Systems (ILO-OSH 2001).<sup>42</sup> In some countries, establishing an OSH management system (OSHMS) is in fact a legal requirement for enterprises.<sup>43</sup> In many European countries, the law requires companies to implement the main elements of an OSHMS: developing a company OSH policy or plan, hiring an OSH practitioner or contracting/establishing an OSH service, conducting a risk assessment, implementing safe working procedures including preventive and protective measures, providing information and training on OSH, consulting with workers and periodically reviewing the results of OSH measures.<sup>44</sup> Paragraph 10 of Recommendation No. 197 also emphasizes the role of the social partners and stipulates that national programmes should “actively promote workplace prevention measures and activities that include the participation of employers, workers and their representatives”.

## V. Other relevant ILO OSH instruments

As noted above, the principles set out in relevant ILO instruments must be taken into account when developing national systems and programmes. The Annex to Recommendation No. 197 contains a list of ILO instruments relevant to the promotional framework for occupational safety and health. Together with the instruments examined in more detail above,<sup>45</sup> the list includes the following instruments of general importance, as well as instruments which target specific risks and branches of activity:

### V.A Governance Convention and related instruments

The **Labour Inspection Convention, 1947 (No. 81)** – one of the “governance” or “priority” conventions – requires ratifying Members to maintain a system of labour inspection for workplaces in industry and commerce; States may make exceptions for mining and transport. The Convention sets out a series of principles determining the fields of legislation covered by labour inspection, the functions and organizations of the inspection system, recruitment criteria, the status and terms and conditions of service of labour inspectors, and their powers and obligations. The **Labour Inspection Recommendation, 1947 (No. 81)** and the **Labour Inspection (Mining and Transport) Recommendation, 1947 (No. 82)** provide further guidance.

The **Protocol of 1995 to the Labour Inspection Convention, 1947 (No. 81)**. Every State that ratifies this Protocol undertakes to extend the application of the provisions of the Labour Inspection Convention, 1947 (No. 81) to workplaces considered “non-commercial”, i.e. neither

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<sup>42</sup> Cf. Para. 6 of Recommendation No. 197.

<sup>43</sup> This is the case, for example, in Bahrain, Colombia, Cuba, Indonesia, Peru, Singapore and Thailand. In Russia, the ILO OSHMS 2001 has been translated and adopted as a voluntary standard: Occupational safety standards system. Occupational safety and health management systems. General requirements. (ГОСТ 12.0.230-2007.МЕЖГОСУДАРСТВЕННЫЙ СТАНДАРТ Система стандартов безопасности труда СИСТЕМЫ УПРАВЛЕНИЯ ОХРАНОЙ ТРУДА).

<sup>44</sup> See LEGOSH: Theme “Employers’ duty to organize prevention formally in accordance with generally accepted OSH management principles and practices” and compare European countries: [www.ilo.org/legosh](http://www.ilo.org/legosh).

<sup>45</sup> Convention No. 155 its 2002 Protocol, Recommendation No. 164, Convention No. 187 and Recommendation No. 197.

industrial nor commercial as defined by the Convention. It also allows ratifying States to make special arrangements for the inspection of listed public services.

The **Labour Inspection (Agriculture) Convention, 1969 (No. 129)** is similar in content to Convention No. 81, requiring ratifying States to establish and maintain a system of labour inspection in agriculture. Labour inspection coverage may also be extended to tenants who do not engage outside help, sharecroppers and similar categories of agricultural workers; persons participating in a collective economic enterprise, such as members of a cooperative; and members of the family of the operator of the agricultural enterprise, as defined by national laws or regulations. The **Labour Inspection (Agriculture) Recommendation, 1969 (No. 133)** provides further guidance.<sup>46</sup>

## **V.B General provisions**

The **Occupational Health Services Convention, 1985 (No. 161)** provides for the establishment of enterprise-level occupational health services. These are entrusted with essentially preventive functions and are responsible for advising the employer, the workers and their representatives in the enterprise on maintaining a safe and healthy working environment. The **Occupational Health Services Recommendation, 1985 (No. 171)** provides further guidance.

The **Employment Injury Benefits Convention, 1964 (No. 121)** regulates benefits similar to those covered by the **Social Security (Minimum Standards) Convention, 1952 (No. 102)**, plus certain types of care at the place of work: periodic payments, corresponding to at least 60% of the reference wage, in cases of incapacity for work or invalidity; and benefits for widows, the disabled, dependent widowers and dependent children in the event of the death of a breadwinner, with periodical payments corresponding to at least 50% of the reference wage. It also includes an obligation to prescribe minimum amounts for these payments; the possibility of converting payments into a lump sum under certain conditions; and supplementary benefits for disabled persons requiring the constant help of a third person. The **Employment Injury Benefits Recommendation, 1964 (No. 121)** provides further guidance. The **List of Occupational Diseases Recommendation, 2002 (No. 194)** provides updated guidance on relevant occupational diseases.

The **Protection of Workers' Health Recommendation, 1953 (No. 97)** recommends the introduction of technical measures for the control of risks to the health of workers, including medical examinations, the recording and notification of occupational accidents and diseases, and the provision of first aid and emergency facilities at workplaces.

The **Welfare Facilities Recommendation, 1956 (No. 102)** recommends the provision of eating, rest, recreational and transport facilities for manual and non-manual workers employed in public or private enterprises, excluding workers in agriculture and maritime transport.

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<sup>46</sup> For further resources, please refer to the ILO website for Labour Inspection, as well as the **2006 General Survey on Labour Inspection**.

The **Workers' Housing Recommendation, 1961 (No. 115)** sets forth certain general principles for consideration in the context of national housing policies for the benefit of manual and non-manual workers, including those who are self-employed, and for elderly, retired or physically disabled persons.

### V.C Protection against specific risks

The **Radiation Protection Convention, 1960 (No. 115)** sets out basic requirements with a view to protecting workers against the risks associated with exposure to ionizing radiation. Protective measures include the limitation of workers' exposure to the lowest practicable level as defined by the technical knowledge available at the time<sup>47</sup> and avoidance any unnecessary exposure, as well as the monitoring the workplace and workers' health. The Convention further refers to requirements concerning emergency situations that may arise. The **Radiation Protection Recommendation, 1960 (No. 114)** provides further guidance.

The **Occupational Cancer Convention, 1974 (No. 139)** aims to establish a mechanism for creating a policy to prevent the risks of cancer caused by exposure, generally over a prolonged period, to chemical and physical agents of various types present in the workplace. For this purpose, States are obliged to determine periodically carcinogenic substances and agents to which occupational exposure must be prohibited or regulated, to make every effort to replace these substances and agents by non- or less carcinogenic ones, to prescribe protective and supervisory measures, and to prescribe the necessary medical examinations for workers thus exposed. The **Occupational Cancer Recommendation, 1974 (No. 147)** provides further guidance.

The **Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148)** stipulates that, as far as possible, the working environment must be kept free from hazards caused by air pollution, noise or vibration. To achieve this, enterprises are required to take technical measures relating to their processes or, where this is not possible, supplementary measures regarding the organization of work. This Convention was invoked in a case in Brazil. The **Working Environment (Air Pollution, Noise and Vibration) Recommendation, 1977 (No. 156)** provides further guidance on the application of the Convention.

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<sup>47</sup> In assessing compliance with these requirements, it has been the practice of the Committee of Experts to refer to current knowledge as embodied in the recommendations of the International Commission on Radiological Protection (ICRP) and other international reference sources based on the same recommendations, such as the International Basic Safety Standards (BSS) elaborated by the International Atomic Energy Agency (IAEA) and co-sponsored by a number of international organizations, including the ILO in the form of a general observation. (A general observation is an observation which is addressed to all parties to a Convention and which concerns general aspects of application relevant for all parties thereto.) The evolution of the ICRP approach to radiological protection, embodied in the 2007 Recommendations (ICRP Publication 103), has led to the revision of the BSS, the final version of which was issued in July 2014. Against this background, a revised **General Observation** was published 2016 and all parties to Convention No. 115 have been asked provide information regarding national practice in relation thereto.

**Country: Brazil**

*Regional Tribunal of the Third Region, Second Chamber Gomes de Araújo, Geraldo v. Fiat Automóveis S.A – Filial Mecânica Fire, Belo Horizonte, 31 August 2010, Case No. 01777-2009-142-03-00-1 RO*

In the present case, the employer and a worker had both appealed a decision by a lower court awarding the worker compensation for hearing loss sustained after 20 years as an industrial operator. The employer sought reversal of the decision and the worker increased damages. Amendment 45/2004 of the Brazilian Constitution provides for increased recognition of international treaties and conventions, in particular those ratified by Brazil. With reference thereto, the Court directly applied Article 13 of Convention No. 148, which prescribes a duty to inform and instruct all persons susceptible to the harmful effects of noise in the working environment. The Court concluded that the employer had not sufficiently ensured the protection of the worker and increased the damages awarded.

The **Asbestos Convention, 1986 (No. 162)** aims to prevent the harmful effects of exposure to asbestos on the health of workers by indicating reasonable and practicable methods and techniques of keeping occupational exposure to a minimum. The Convention enumerates various detailed measures, essentially involving the prevention and control of occupational exposure to asbestos, for the protection of workers against these hazards. The **Asbestos Recommendation, 1986 (No. 172)** provides further guidance. Note should also be taken of the **Resolution Concerning Asbestos, 2006**, adopted at the 95<sup>th</sup> Session of the International Labour Conference 2006, which, inter alia, requests the ILO to promote the elimination of future use of all forms of asbestos and asbestos-containing materials in all member States. Reference to this Resolution was made in the following case before the Supreme Court of India:

**Country: India**

*Supreme Court of India, Kalyaneshwari v. U.O.I & Ors, 21 January 2011*

The Claimant had lodged a public interest litigation ban on mining and manufacturing activities using asbestos or its derivatives. With reference to a previous case, the Supreme Court rejected the claim holding that “there was no reason to ban economic activities on which a large number of families depended for their livelihood”. However, with further reference to directions given in the said case, the Supreme Court noted that a review of the situation was to be carried out every ten years and when the “ILO gave directions in this behalf consistent with its recommendations or conventions.” Taking into account the guidelines issued by the Court itself [in the previous case,] and considering that the ILO had also issued new guidelines concerning the use of asbestos in a resolution adopted at the 95<sup>th</sup> Session of the International Labour Conference 2006, the Court ordered the trade unions and States to review the protection measures in place relating to primary and secondary exposure to asbestos. The Court also ordered States with a large number of asbestos industries to create regulatory bodies to supervise and control the activities of such industries with the aim of safeguarding the health of workers.

The **Chemicals Convention, 1990 (No. 170)** provides for the adoption and implementation of a coherent policy on safety in the use of chemicals at work, which includes the production, handling, storage and transport of chemicals, as well as the disposal and treatment of waste chemicals, the release of chemicals resulting from work activities, and the maintenance, repair and cleaning of equipment and containers associated with chemicals. In addition, it allocates specific responsibilities to suppliers and exporting states. The **Chemicals Recommendation,**

**1990 (No. 177)** provides further guidance. As noted previously, Convention No. 170 triggered the development of the **UN Globally Harmonized System of Classification and Labelling of Chemicals (GHS)**, which covers all chemicals, including pure substances and mixtures (except pharmaceutical products) and defines chemical hazard communication requirements (labelling and data sheets) with reference to the workplace, the transport of dangerous goods, consumers and the environment.

The **Prevention of Major Industrial Accidents Convention, 1993 (No. 174)** aims to prevent or minimize the risks and effects of major industrial accidents. It considers the possible causes of such accidents, including organizational errors, human factors, component failures, deviation from normal operational conditions, outside interference and natural forces. The **Prevention of Major Industrial Accidents Recommendation, 1993 (No. 181)** provides further guidance.

## **V.D Protection in specific branches of activity**

The **Hygiene (Commerce and Offices) Convention, 1964 (No. 120)** aims to preserve the health and welfare of workers employed in trading establishments, and establishments, institutions and administrative services in which workers are mainly engaged in office work and other related services, by prescribing elementary hygiene measures to meet the requirements of welfare in the workplace. The **Hygiene (Commerce and Offices) Recommendation, 1964 (No. 120)** provides further guidance.

The **Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152)** requires ratifying States to take measures to ensure that workplaces, equipment and methods are kept safe and without risk of injury to health; that there is safe access to any workplace; that information, training and supervision are provided to ensure that workers are protected against the risks of accident or injury at work; that workers are provided with personal protective equipment and clothing and any life-saving appliances reasonably required; that suitable and adequate first-aid and rescue facilities are provided and maintained; and that proper procedures are established for dealing with emergency situations. The **Occupational Safety and Health (Dock Work) Recommendation, 1979 (No. 160)** and the **Code of Practice on Safety and Health in Dock Work** provide further guidance.

The **Safety and Health in Construction Convention, 1988 (No. 167)** provides for detailed technical preventive and protective measures, having due regard to the specific requirements of this sector. These measures relate to the safety of workplaces, machines and equipment, work at heights and work executed in compressed air. The Convention also calls for appropriate precautions when buildings are demolished, in particular buildings containing asbestos. See also Article 17 of Convention No. 162. The **Safety and Health in Construction Recommendation, 1988 (No. 175)** provides further general guidance.

The **Safety and Health in Mines Convention, 1995 (No. 176)** regulates the various aspects of safety and health associated with work in mines, including inspection, special equipment and special protective equipment for workers. It also prescribes requirements relating to mine rescue. The **Safety and Health in Mines Recommendation, 1995 (No. 183)** provides further guidance.

The objective of the **Safety and Health in Agriculture Convention, 2001 (No. 184)** is to prevent accidents and injuries arising out of, linked with or occurring in the course of agricultural and forestry work. To this end, the Convention includes measures relating to the safety of machinery, ergonomics, the handling and transport of materials, sound

management of chemicals, animal handling, protection against biological risks, and welfare and accommodation facilities. The **Safety and Health in Agriculture Recommendation, 2001 (No. 192)** provides further guidance.

## VI. Other international standards relevant to OSH

### VI.A International Human Rights Standards

The ILO OSH standards are intrinsically linked with and complemented by international instruments and covenants which recognize the human right to health as deriving from the inherent dignity of the human person. While Convention No. 187 was the first international labour standard to express the entitlement to a safe and healthy working environment as a right, this right has been internationally recognized for over fifty years, since the 1966 **International Covenant on Economic, Social and Cultural Rights** (ICESCR).<sup>48</sup> The Committee on Economic, Social and Cultural Rights (CESCR) monitors the application of the ICESCR and issues General comments interpreting the Covenant. It has recognized that preventing occupational accidents and diseases is a fundamental aspect of, and closely related to, the right to just and favourable conditions at work (see Article 7 of the ICESCR),<sup>49</sup> and that the right to a safe and healthy working environment derives from the right to achieve the highest attainable level of physical and mental health (see Article 12 of the ICESCR).<sup>50</sup> In the following case before the Supreme Court of Justice in Argentina, the Preamble to the ILO Constitution, the Preamble to the Charter of the Organization of American States and the American Convention on Human Rights, as well as the ICESCR, were invoked as treaties of importance for understanding the meaning of “social justice” in the context of a challenge to the national compensatory system for occupational accidents and illnesses.

#### Country: Argentina

*Supreme Court of Justice, Acquino, Isacio v. Cargo Servicios Industriales S.A., 21 September 2004, A. 2652. XXXVIII*

The Constitution of Argentina stipulates that treaties are hierarchically higher than laws. The treaties enumerated in Article 76, para 22 [stated above] have “constitutional hierarchy” and are to be understood as “complementing the rights and guarantees recognized” therein. On this ground, the Supreme Court found that the national compensation system for occupational accidents was markedly insufficient in a case in which a worker had been left 100% incapacitated after a fall from a roof and the employer could, by signing an insurance policy, be exempt from all liability for the work-related damages suffered by the worker. The existing system was found to be incompatible with the principles of “labour protection” and the guarantee of “decent and equitable working conditions” provided for in the national Constitution. The limitation imposed on the worker against claiming full compensation from his employer for the damages suffered due to an accident at work because the employer was exempted from civil responsibility was therefore declared unconstitutional.

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<sup>48</sup> There are 169 parties to the ICESCR.

<sup>49</sup> See CESCR General Comment No. 23 (2016) on the Right to Just and Favorable Conditions of Work (Article 7 of the ICESCR). See, in particular, paras. 25-30.

<sup>50</sup> See CESCR General Comment No. 14 (2000) on the Right to the Highest Attainable Standards of Health (Article 12 of the ICESCR). See, in particular, paras. 15 and 36 (*in fine*) and footnote 25 including reference to Convention No. 155.

## VI.B Regional standards

At the regional level, the European Union system is governed by a large body of Directives in the area of OSH, including in particular [Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work](#) (Framework Directive), upheld by the European Court of Justice. This system<sup>51</sup> is complemented by the Convention for the Protection of Human Rights and Fundamental Freedoms, or the [European Convention of Human Rights](#) of 1950 (ECHR), which came into force in 1953.<sup>52</sup> The [European Court of Human Rights](#), set up in 1959, rules on individual or State applications alleging violations of the ECHR. Based on an interpretation of Articles 2 (Right to Life), 6 (Right to a Fair Trial) and 8 (Right to Respect for Private and Family Life), the following cases are of relevance for OSH.

The first case underscores and clarifies the scope of the requirement to provide information in the area of OSH, as provided for in Article 5 (d) of Convention No. 155. The European court has interpreted Article 2 of the European Convention to include a positive obligation to provide information concerning occupational risks, as illustrated in a landmark case in which the Government of Malta was found to be in violation of Article 2 because of a failure to provide information regarding the harmful effects of asbestos to a worker in a state-owned shipyard:

### European Court of Human Rights

*Brincat and Others v. Malta, No. 60908/11, 62110/11, 62129/11, 62312/11, and 62338/11, ECHR 2005*

The case concerned shipyard repair workers who were exposed to asbestos between the 1950s and the early 2000s, which led to them suffering from asbestos-related conditions. The Court held that, in view of the seriousness of the threat posed by asbestos, and despite the room for manoeuvre (“margin of appreciation”) left to States to decide how to manage such risks, the Maltese Government had failed to meet its positive obligations under the European Convention [Articles 2 and 8] to legislate or take other practical measures to ensure that the applicants were adequately protected and informed of the risk to their health and lives. Indeed, at least from the early 1970s, the Maltese Government had been aware or should have been aware that the shipyard workers could suffer from consequences resulting from exposure to asbestos, yet took no positive steps to counter that risk until 2003. This is a landmark case because the Court found that Malta ought to have been aware of the problem of asbestos in the seventies. The Court based its conclusion on 3 main pillars: 1. The ILO Convention and Recommendation adopted in 1986 and NOT ratified by Malta; 2. A decision in a national case whereby the employer was held liable for the death of a shipyard worker in 1979 as result of exposure to asbestos; 3. The state of scientific knowledge of the medical problems connected with exposure to asbestos. Although the ILO Convention on the use of asbestos was adopted only in 1986, the Court took into account ILO activities in this sphere stating that “the adoption of such texts comes after considerable preparatory work which may take significant time, and in the ambit of the ILO after having undertaken meetings with representatives of governments and employers’ and workers’ organizations of all member countries of the organization”. Therefore Malta, as an ILO member, could not be unaware of the problematic issue of the use of asbestos, even before the adoption of Convention No. 162. Considering the state of scientific knowledge of the dangers of asbestos, the Court took account of the list, submitted by the applicants, which contained references to hundreds of articles or other publications concerning the subject at issue published from 1930 onwards (par. 106). It was found inconceivable that there was no access to any such sources of information, at least, on the part of the highest medical authorities in the country, who had an obligation to remain abreast of scientific developments and advise the Government accordingly.

<sup>51</sup> Applicable to all member States of the European Union.

<sup>52</sup> There are at present (August 2017) 47 parties bound by this Convention.

The provision of relevant information was also the issue in a case involving divers engaged by a government for oil exploration purposes. The Government of Norway was found to have failed to ensure that essential information regarding risks associated with use of decompression tables was available to divers:

### **European Court of Human Rights**

*Vilnes and Others v. Norway – 52806/09 and 22703/10, ECHR 2013*

The applicants were former divers engaged in diving operations in the North Sea for oil companies drilling in the Norwegian Continental Shelf from 1965 to 1990. They sought compensation for debilitating damage they suffered due to long-term exposure to decompression sickness. The ECHR found that there was a “strong likelihood” that the applicants’ health had significantly deteriorated because of decompression sickness, which presumably had been caused by using too-rapid decompression tables. Knowledge about how to avoid decompression illness by using slower decompression tables evolved in this period and, after the introduction of standardized tables in the 1980s, decompression sickness had become an extremely rare occurrence. The ECHR examined the question in the context of the positive obligations under Article 8 and held that the “public’s right to information” should not be confined to information concerning risks that had already materialized, but should count among the preventive measures to be taken, including regarding occupational risks. Given the uncertainty and lack of scientific consensus at the time regarding the long-term effects of decompression sickness, the authorities responsible for authorizing diving operations and protecting divers’ safety were required to take precautions to ensure that full transparency regarding the diving tables was exercised, to enable the divers to assess the risks and give informed consent. As this had not been done, the Government of Norway was found to have failed in its obligation to secure the applicants’ right to respect for their private life.

The obligation to provide information was also at issue in a case in the UK, in which the lack of an adequate procedure to enable an individual to obtain necessary information concerning the causes of health deterioration due to gas tests was considered to be a violation of its obligations to provide essential information.

### **European Court of Human Rights**

*Roche v. the United Kingdom [GC] 32555/96, ECHR 2005*

The applicant was discharged from the British Army in the late 1960s. In the 1980s, he developed high blood pressure and now suffered from hypertension, bronchitis and bronchial asthma. He was registered as an invalid and maintained that his health problems were the result of his participation in mustard and nerve gas tests conducted under the auspices of the British Armed Forces at Porton Down Barracks in the 1960s. The applicant applied for disclosure of official information to determine whether his illness was caused or aggravated by the gas tests, but failed to receive it. The Court found that, in the overall circumstances, the respondent State had not fulfilled its positive obligation to provide an effective and accessible procedure enabling the applicant to have access to all relevant and appropriate information which would allow him to assess any risk to which he had been exposed during his participation in the tests.



Finally, in the following case, the exceptional circumstances of persons suffering from diseases with very long latency periods, such as asbestos-related diseases, were considered in calculating the limitation period for submitting a claim for compensation.

### **European Court of Human Rights**

*Howald Moor and Others v. Switzerland, Nos. 52067/10 and 41072/11, ECHR 2014*

A worker was diagnosed in May 2004 with malignant pleural mesothelioma – a highly aggressive malignant tumor – caused by his exposure to asbestos during his work in the 1960s and 1970s. He died in 2005. The applicants, his wife and two daughters, complained that their right of access to a court had been breached, as the Swiss courts had dismissed their claims for damages against the deceased's employer and the national authorities, because they were time-barred. In view of the exceptional circumstances in this case, the Court considered that the application of the limitation periods had restricted the applicants' access to a court to the point of breaching Article 6 § 1 (right to a fair trial) of the Convention. While the Court was satisfied that the legal rule on limitation periods was there for a legitimate reason, namely legal certainty, it observed, however, that the systematic application of the rule to persons suffering from diseases which could not be diagnosed until many years after the triggering events deprived those persons of the chance to assert their rights before the courts. The Court therefore considered that, in cases where it was scientifically proven that a person could not know that he or she was suffering from a certain disease, that fact should be considered in calculating the limitation period.

These international and regional standards, as well as the cases referenced, demonstrate the central importance of the principles articulated in ILO Convention No. 155, complemented by the related Recommendation No. 164, the 2002 Protocol and Convention No. 187. Judges, lawyers and legal educators would be well advised to implement these instruments diligently, as appropriate, or use them as inspirational guidance to contribute to creating a safe and health working environment.



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- Observation (2015) concerning the application by Venezuela of Convention No. 155.

### **Representations (art. 24 of the ILO Constitution)**

- 1996 Report of the Committee set up to examine the representation alleging non-observance by Uruguay of the Safety Provisions (Building) Convention, 1937 (No. 62), the Labour Inspection Convention, 1947 (No. 81), the Labour Administration Convention, 1978 (No. 150), the Occupational Safety and Health Convention, 1981 (No. 155), and the Occupational Health Services Convention, 1985 (No. 161) by the Inter-Union Assembly of Workers-National Convention of Workers (PIT-CNT) and its affiliated organization, the National Single Trade Union in Construction and Similar Activities (SUNCA) under article 24 of the ILO Constitution.
- 1997 Report of the Committee set up to examine the representation alleging non-observance by Uruguay of the Occupational Safety and Health Convention, 1981 (No. 155), made

under article 24 of the ILO Constitution by the Latin American Central of Workers (CLAT)

- 2009 Report of the Committee set up to examine the representation alleging non-observance by the Government of Mexico of the Labour Administration Convention, 1978 (No. 150), the Occupational Safety and Health Convention, 1981 (No. 155), and the Chemicals Convention, 1990 (No. 170), made under article 24 of the ILO Constitution by the National Union of Federal Roads and Bridges Access and Related Services of Mexico et.al.
- 2013 Report of the Committee set up to examine the representation alleging non-observance by Chile of the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), made under article 24 of the ILO Constitution by the College of Teachers of Chile AG
- 2014 Report of the Committee set up to examine the representation alleging non-observance by the Netherlands of the Labour Inspection Convention, 1947 (No. 81), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), and the Occupational Safety and Health Convention, 1981 (No. 155), made under article 24 of the ILO Constitution by the Netherlands Trade Union Confederation (FNV), the National Federation of Christian Trade Unions (CNV) and the Trade Union Federation of Professionals (VCP) (formerly the Trade Union Confederation of Middle and Higher Level Employees' Unions (MHP))
- 2015 Report of the Committee set up to examine the representation alleging non-observance by Portugal of the Labour Inspection Convention, 1947 (No. 81), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), and the Occupational Safety and Health Convention, 1981 (No. 155), made under article 24 of the ILO Constitution by the Union of Labour Inspectors (SIT)

## European Union

- Council Directive 96/82/EC of 9 December 1996 on the control of major accident hazards involving dangerous substances, as extended by Directive 2003/105/EC (the latter extension was triggered by the disaster in Seveso in Northern Italy in 1976).
- Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (Framework Directive)
- Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work.

## Internet Links

- ILO Database on international labour standards and national legislation [www.ilo.org/normlex](http://www.ilo.org/normlex)
- Global Database on Occupational Safety and Health Legislation (LEGOSH)
- ITCILO Compendium of court decisions: <http://compendium.itcilo.org/en>

## Domestic court decisions

### Australia (Victoria state)

Supreme Court of Victoria Court of Appeal, *The Queen v. A.C.R Roofing PTY. LTD*, Appeal of conviction, 1 December 2004, Case No. 32 of 2004.

### Argentina

Labour Court of Appeal, *Larocca María Cristina v. Compañía Sudamericana de Gas S.R.L. and Other*, Civil Action related to an accident, 28 August 2013, Case No. 37.691/2010.

### Brazil

Regional Labour Tribunal of the Third Region, Second Chamber, *Gomes de Araújo, Geraldo v. Fiat Automóveis S.A – Filial Mecanica Fire*, Belo Horizonte, 31 August 2010, Case No. 01777-2009-142-03-00-1 RO.

Regional Labour Tribunal of the Third Region, First Chamber, *Nunes Da Silva Namir and others v. De Faria Esdrón Antonio*, 20 November 2006, Case No. 00398-2006-096-03-00-5-RO.

### Costa Rica

Supreme Court of Justice, Constitutional Chamber, *Hernán Oconitrillo Calvo v. the Municipality of San José*, 23 April 1999, Decision No. 1999-02971.

### India

Supreme Court of India, *Kalyaneshwari v. U.O.I & Ors*, 21 January 2011.

### Spain

Supreme Court of Justice, Appeal for reconsideration, *Juan Ramón v. Cubiertas y Mzov S.A., Necso entrecanales cubiertas S.A., Construcciones Vildavisa S.L., Revestimientos Ángel Juárez S.L., Impermeabilizaciones Olabarrieta S.L., Cia de seguros Bilbao vida, Cia. de seguros Bansyr S.A., Amsyr agrupación seguros y reaseguros, Cia. de seguros AGF-Union Fenix, Nuprocem S.A., Cia de seguros Winterthur y Revestimientos Olabarrieta S.L.*, 9 October 2001.

### USA

US Supreme Court of Justice [U.S. Supreme Court - Whirlpool Corp. v. Marshall, 445 U.S. 1 \(1980\)](#).

## European Court of Human Rights

- *Brincat and Others v. Malta*, No. 60908/11, 62110/11, 62129/11, 62312/11, and 62338/11, ECHR 2005.
- *Vilnes and Others v. Norway* – 52806/09 and 22703/10, ECHR 2013.
- *Roche v. the United Kingdom* [GC] 32555/96, ECHR 2005.
- *Howald Moor and Others v. Switzerland*, Nos. 52067/10 and 41072/11, ECHR 2014.

# Activity: Case study on international labour standards concerning OSH

## Objectives

- To familiarize participants with international labour standards on occupational safety and health, and with the work of the ILO supervisory bodies in this area.
- To make participants aware of the possibility of using international labour standards to resolve cases relating to occupational safety and health.

## Approximate duration

- 60 minutes at least to examine the case, exchange views in groups and draft a joint report.
- 10 minutes to present the report in plenary.

## Tasks

In two groups, participants are to examine and discuss the situation described below, acting as the competent court to determine the case of countries 1 and 2 respectively. Each group must present its report in plenary, referring to relevant domestic legislation, international labour standards and the work of the ILO's supervisory bodies, as applicable to the case.

### *The facts*

In Company X, the production of electrical appliances takes place in a big plant where overhead conveyors transport components throughout the plant. To protect workers from objects that occasionally fall from these conveyors, Company X has installed a horizontal wire-mesh guard screen approximately 20 feet above the plant floor. This screen is welded to angle-iron frames suspended from the building's structural steel skeleton. Every week, maintenance workers remove objects from the screen, and perform occasional maintenance work on the conveyors themselves. To do so, they are usually able to stand on the iron frames, but sometimes they find it necessary to step onto the steel mesh screen itself. In 1973, Company X began to install heavier wire in the screen because its safety had been questioned. Several workers had fallen partly through the old screen and, on 28 June 1974, a worker had fallen completely through to the plant floor below, but had survived. Maintenance workers reacted to these incidents by bringing the unsafe screen conditions to the attention of their foremen, resulting in an amendment to the safety instructions. Workers were cautioned to step only on the angle-iron frames. On 7 July 1974, two maintenance workers were ordered by their foreman to carry out maintenance work on one of the screens. Claiming that the wire mesh screen was unsafe, they refused to comply with the order. They were sent to the personnel office and were ordered to clock out, without working for the remaining six hours of their shift. They also received written reprimands, which were placed in their employment files. They returned to work the next day. Claiming that they had the right to refuse unsafe work without negative consequences, the

workers sought a) compensation for the six hours where they were not allowed to work, and b) removal of the written reprimands from their files.

## **Relevant provisions and information**

### **Relevant provisions in Country 1:**

*Act:* No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

### **Regulation:**

- (1) As a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions in the workplace. Such unsafe conditions will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace. Under such circumstances, therefore, an employer would not be wrong to take action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.
- (2) Occasions might, however, arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition in the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

### **Relevant provision in Country 2**

*Act:* In the event of serious, imminent and unavoidable danger, workers shall leave their workstation or dangerous area and proceed to a safe place without any necessity to comply with the requirements [to refer to the OSH Committee]. Workers may not be placed at any disadvantage because of their action.

### **Other relevant information**

Country 1 has not ratified Convention No. 155 but has ratified Convention No. 176.

Country 2 has ratified Conventions Nos. 155, 167 and 176.



## References

- Articles 5 (e), 13 and 19 (f) of Convention No. 155
- See [2009 General Survey](#), paras. 73-75 and 145-152.
- See [2017 General Survey](#), paras 294-298 and Box 3.8 on p. 83. Note, in particular, the statement by the Committee of Experts in para. 298.

## Approaches to solutions

### Country 1

- Was it “reasonable” for the workers to conclude that there was a real danger of death or serious injury and not enough time to act differently, and refuse to comply with the foreman’s order?
- Could Company X argue that it had taken appropriate action to eliminate the danger by revising the safety instructions and that the workers should simply have followed the safety instructions, i.e. not to walk on the mesh?

### Country 2

- Was the situation “unavoidable” according to the legislation in Country 2?
- Is the legislation in Country 2 in line with Convention No. 155?
- In Country 2, how could a possible conflict between Convention No. 155 and domestic legislation be resolved?

## Comments for trainers

- This study is based on the case [U.S. Supreme Court - Whirlpool Corp. v. Marshall, 445 U.S. 1 \(1980\)](#). Participants wanting to read this case should be cautioned that there is a complicating issue concerning the competence of the authority to issue the relevant interpretative regulations to the State Act.
- Participants can be encouraged to discuss how they would resolve this question in their domestic circumstances, and how the notions “reasonableness” and “good faith” would be established in their domestic systems.
- The preparatory work to Convention No. 155 indicates that Article 13 regulates what should happen *after* a worker has decided to remove him- or herself. It therefore implicitly attributes a right to the worker to decide whether to remove him- or herself, although it is not expressed as such.
- Participants should be invited to compare Article 13 with similar provisions, including Article 12 (1) of Convention No. 167 and Article 13 (1) (e) of Convention No. 176.





