Forging or Foregoing the ‘Genuine Link’?
A Reflection on the Maritime Labour Convention, 2006 and Other Approaches

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A Preliminary Note

Preparing this essay for a book recognizing Edgar Gold’s contributions has afforded me the opportunity to reflect on a topic that was the subject of my first academic publication, following an admiralty law course at Dalhousie Law School taught by Edgar Gold. My voyage in the law has, in many respects, followed in Edgar’s wake. I too became fascinated with this field and its mix of public and private international law that engages broader public interest matters including international economic development, trade, environmental protection, and human, social and labour rights. That first publication, in July 1985, entitled “‘Darkening confusion mounted upon darkening confusion’: The Search for the Elusive Genuine Link,” began by thanking Edgar for “…his criticism and encouragement throughout the drafting of this article.” I have returned several times to the question of the genuine

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link, a topic\(^3\) that I exuberantly described as “…a colourful story replete with debate, stratagem, strife and disaster…a vivid illustration of the interface between law, commerce, politics and economic philosophy.”\(^4\) Nearly a quarter of a century later I found myself again contemplating ‘the problem of the genuine link’, first in preparing a study on ‘the role of the genuine link’ for a meeting of several United Nations organizations and, more recently, to some degree, in various publications related to the Maritime Labour Convention, 2006\(^5\) (MLC, 2006). It seems fitting, therefore, that this essay which revisits, perhaps for the last time on my part, the question of the genuine link, begin, as I did when writing that first paper in 1984, with an acknowledgment and an expression of deepest gratitude to Edgar Gold for his support and friendship over nearly three decades.

**Defining the ‘Genuine Link’ – The Recurring Preoccupation**

In 1958 the first United Nations Conference on the Law of the Sea (UNCLOS I), held in Geneva, adopted, *inter alia*, the Convention on the High Seas, a Convention that described itself as “Desiring to codify the rules of international law relating to the high seas.”\(^6\) Articles 4 and 5 of that Convention provided:

**Article 4**

*Every State, whether coastal or not, has the right to sail ships under its flag on the high seas.*

**Article 5**

1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in it territory and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. *There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*

2. Each State shall issue ships to which it has granted the right to fly its flag documents to that effect. (emphasis added)

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\(^4\) McConnell, *supra* note 1, 365.
