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INTERNATIONAL LABOUR ORGANIZATION

**Tripartite Subgroup of the High-level  
Tripartite Working Group on Maritime  
Labour Standards**  
(second meeting)

Preliminary draft for a consolidated maritime  
labour Convention

Geneva, 2003



INTERNATIONAL LABOUR OFFICE GENEVA

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## COMMENTARY

### General

The preliminary draft for a Convention on maritime labour standards, to which this Commentary relates, has been prepared for the next (February 2003) meeting of the Tripartite Subgroup of the High-level Tripartite Working Group on Maritime Labour Standards.

It is in a varying state of completion. The Articles on fundamental principles and rights, at the start of the proposed Convention, and Title 5 on enforcement are in an advanced state in view of the related discussions of the High-level Group and the Subgroup.

With respect to Titles 1 to 4, on the substantive rights, only the Regulations can be considered as reflecting complete proposals with respect to both substance and form. Parts A and B of the Code for each set of Regulations mainly consist of the relevant provisions of existing instruments: those of international labour Conventions in Part A and those of international labour Recommendations in Part B. Where provisions in the preliminary draft are taken from existing instruments (sometimes with substantial adaptations), their text is followed by a reference to the source, placed in brackets.

Titles 1 to 4 thus so far contain proposals as to substance, rather than form. In particular, there was insufficient time to convert the Code into the simple and clear statements suggested by the High-level Group. This is also true of the Code in Title 5. It is intended to revise the text in this way for the third meeting of the High-level Group in June-July 2003. An example of the style envisaged, at least for Part B of the Code, is given in Chapter I of Section B5.1 in Title 5: Code, Part B. The provisions in the Code for Titles 1 to 4 would also need to be reviewed to correct obvious anachronisms and to eliminate duplication.

However, even after the elimination of duplication and the introduction of a simpler style, the preliminary draft shows that the Convention will still be a very bulky document. Consideration might therefore be given to finding a more convenient arrangement for its various components. For example, sections containing long technical specifications, such as those relating to accommodation in Section A3.1, could be placed in a separate part, such as an Annex. The body of the Convention would control the legal status of such parts (whether binding or not) as well as the procedure for their amendment.

The Office is in particular need of guidance from the Subgroup on the distribution of the provisions in Titles 1 to 4 between the mandatory Part A and the non-mandatory Part B of the Code relating to each of those titles. The High-level group has given some indications that provisions of existing Conventions in Part A of the Code might be transferred to Part B. Having regard to the objective of widespread ratification, it seems essential to transfer a large number of provisions currently in Part A of the Code to Part B, in view of the level of detail in the Conventions concerned and in some cases the comparatively low ratification levels. In this connection, the Office suggests that provisions in Part A that are not essential from the point of view of the Decent Work Agenda or to maintain a level playing field could be transferred to Part B, provided that Part A is sufficiently comprehensive: it must cover all aspects of implementation that are necessary to

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enable proper verification by the flag State and the port State and under the international supervisory procedures. This coverage should be expressed in mandatory terms, even if they might sometimes be of a general character. The Subgroup's advice is requested on:

- (a) the validity of this approach; and
- (b) how this approach, or any other approach suggested by the Subgroup, might be applied with respect to concrete provisions of the preliminary draft.

It is hoped therefore that, at its February 2003 meeting, the Subgroup will:

- (a) review the Articles and Title 5, as well as the Regulations in Titles 1 to 4, from the point of view of substance, and make general suggestions concerning structure and drafting;
- (b) review the content of the Code in Titles 1 to 4; and
- (c) provide guidance concerning the transfer of provisions from Part A to Part B.

The results of this review and guidance will be incorporated in the more complete preliminary draft to be submitted to the High-level Group in June-July 2003.

#### **Comment 1 (on Article I)**

This Article is intended to set out general definitions (paragraph 1) of terms occurring in different parts of the Convention, as well as (paragraph 2) the general scope of application of the Convention. Definitions specific to a particular subject will be given in the part relating to that subject. The opening words of each of the two paragraphs of the article allow the general definitions and the scope to be the subject of specific variations for the purpose of particular provisions of the Regulations or the Code.

At the second meeting of the High-level Tripartite Working Group, the Shipowners' representatives considered that domestic, coastal and near coastal services should be excluded from the scope of the Convention. The Seafarers' representatives could not accept such an exclusion, but recognized that particular cases could be discussed on a case-by-case basis. The Government representatives, in general, considered that all seafarers should indeed be covered, but that some flexibility could be left to each Member to decide to exclude ships on coastal voyages, subject to tripartite consultations. Paragraph 4 of Article I seeks to offer an intermediate solution.

#### **Comment 2 (on Article II and Article III)**

These articles set out fundamental principles and rights taken, for the most part, from the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147). They begin however with a reference to the principles and rights contained in the eight fundamental Conventions mentioned in the Preamble. Under Article II, paragraph 1, a Member ratifying the Convention would individually reaffirm the legal statement agreed without dissent at the 1998 International Labour Conference in the ILO Declaration on Fundamental Principles and Rights at Work: namely that "all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance

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with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions”.

In addition to stating certain fundamental principles and rights, Convention No. 147 and the 1996 Protocol refer to some of these fundamental Conventions in their Appendices, as well as to other maritime labour Conventions, and require each ratifying Member “to satisfy itself that the provisions of [its relevant] laws and regulations are substantially equivalent to the Conventions or Articles of Conventions ..., in so far as the Member is not otherwise bound to give effect to the Conventions in question”. To reflect the same kind of obligation, the preliminary draft, as far as the fundamental Conventions are concerned, requires each ratifying Member to ensure decent conditions of work “in full respect for the fundamental principles and rights” identified in the ILO Declaration referred to above (see Article II, paragraph 2(b)). It would not be necessary for the new Convention to specifically refer to the other maritime labour Conventions mentioned in the Appendices to C147 and P147 as their provisions would be part of the Convention itself and all ratifying Members would be required to have laws and regulations that were at least “substantially equivalent” to the provisions concerned (see Article IV, paragraph 3(a)).

### **Comment 3 (on Article IV)**

Paragraphs 1 and 2 of this Article define the basic structure of the new Convention as agreed in the High-level Tripartite Working Group. Under the Articles at the first level of the Convention, the principles and rights of the Convention are to be set out in binding *Regulations* (second level) and each Regulation is to be implemented in accordance with the details set out in the *Code*. *Part A* of the Code (third level) is also to be binding. *Part B* (fourth level) would not be binding, but ratifying Members would give full consideration to following the guidance contained in it.

Paragraph 3 sets out the main elements of flexibility to be introduced into the Convention:

Subparagraph (a) relates to the concept of “*substantial equivalence*”, a possibility which was approved by the High-level Tripartite Working Group provided that the concept was applied in a clear and transparent way. In this connection, the preliminary draft introduces two elements which are not contained in Convention No. 147, which first referred to “substantial equivalence”. In the first place, it would be up to the Member which was unable to implement an obligation in the precise manner set out in the Convention to *demonstrate* that its national laws or regulations were substantially equivalent. In the second place, the concept would be defined in the Convention itself. Paragraph 4 provides a general definition, which is based on the analysis made by the Committee of Experts on the Application of Conventions and Recommendations in its 1990 General Survey on Convention No. 147,<sup>1</sup> and cited with approval at the last meeting of the High-level Group. The Committee of Experts made it clear that the precise application of the concept might often depend upon the specific provision concerned; paragraph 4 thus provides for the possibility of further directions being given in the Code (either in the binding Part A or as guidance in Part B) with respect to particular provisions of the Convention.

<sup>1</sup> ILO: *Labour Standards on Merchant Ships*, International Labour Conference, 77th Session, Geneva, 1990, paras. 65-79.

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Subparagraph (a) of paragraph 3 provides for the possibility of the progressive achievement of the requirements of the new Convention to enable ratification by Members that are not yet in a position to implement all its provisions. The exercise of such a possibility would be made subject to the conditions specified in paragraph 5, and the Members concerned would be required to report on their progress towards full achievement (paragraph 6). These reports would be reviewed by the ILO Committee of Experts referred to above. This kind of flexibility has not yet been discussed in the High-level Tripartite Working Group, but there is at least one precedent for it (in the Minimum Age Convention, 1973 (No. 188) – Article 2, paragraph 4) and it would seem useful to include the proposed provision in the draft, even if it is not immediately activated; in this connection it should be noted that the possibility of implementing an initial lower standard would be allowed “*to the extent expressly permitted in the Code*”: in other words, this form of flexibility would depend, in each case, on the existence and terms of enabling provisions in the Code.

The flexibility which would allow a Member ratifying the new Convention to “pick and choose” between the different families of rights (following the “MARPOL approach”<sup>2</sup>), or to exclude the application to it of specific rules, has not yet been the subject of any conclusions in the High-level Tripartite Working Group. The Shipowners’ representatives and certain Governments have expressed support for such an approach. The Seafarers’ representatives are opposed to it. In general, Governments have indicated that a conclusion would depend upon the content of the new instrument and the flexibility provided in it. As far as flexibility is concerned, it seems to be agreed that the concept of substantial equivalence should be applicable and also that some of the detailed obligations of existing international labour Conventions should be transferred from the binding Part A of the Code to the non-binding Part B. The approach that seems to be favoured by the High-level Group in general would be first to ascertain the specific difficulties of Governments in connection with the implementation of the existing Conventions, and then to find ways of introducing the necessary flexibility to overcome those difficulties. At a later date, if it is found that the difficulties could not be adequately dealt with through flexibility, the question of allowing options would be considered. For these reasons, the MARPOL approach is not reflected in the present preliminary draft.

Paragraph 7 sets out the principle of “no more favourable treatment” contained in IMO Conventions and approved by the High-level Group.

#### **Comment 4 (on Article V to Article VII)**

These “final clauses” are based on the standard provisions of international labour Conventions, with particular reference to Convention No. 147. The conditions for ratification of the new Convention in Article 5 would be the same as for Convention No. 147 (Article 5). The number and weight of ratifications required for entry into force, in accordance with paragraph 2 of Article VI, still needs to be discussed. The main consideration may be the desirability of early entry into force weighed against the undesirability of having a long transitional period in which some countries are bound by the new Convention and others by the present Conventions.

<sup>2</sup> See the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL 73/79), Article 14.

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## **Comment 5 (on Article VIII)**

This outline of an article is intended simply as a reminder of choices that will have to be made at a later date, when the content of the new Convention and its potential for speedy ratification become clear. It concerns the situation of the Conventions which will be revised by the new Convention, which could comprise all existing maritime labour Conventions. Difficult questions are raised in connection with the options provided by a provision to be found in more or less similar terms in international labour Conventions adopted since 1929. In Convention No. 147, for example, the provision reads as follows (Article 11):

“1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:

- (a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions [restricting the possibility of denunciation to specified times], if and when the new revising Convention shall have come into force;
- (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.”

Thus, if an existing instrument (containing the above provision) is identified as a revised Convention, each Member that has ratified it which becomes a party to the new Convention would cease to be a party to the revised Convention. In addition, the latter Convention would be blocked to further ratification when the new Convention came into force. This would be the normal consequence and the question arises as to whether or not the new Convention should “otherwise provide”. On the one hand, it is clearly undesirable for a Member to be party to two different Conventions covering the same subject matter (although duplication in such matters as reporting under article 22 of the ILO Constitution could no doubt be avoided in practice). Moreover, allowing other Members to ratify the revised Conventions would tend to perpetuate a system which it is desired to replace as soon as possible by a single Convention. On the other hand, those other Members may not be in a position to ratify the new Convention, in particular because of the vast scope of its subject matter. Would the desirability of quickly replacing the old system be a sufficient justification for preventing such Members from assuming any further obligations with respect to maritime labour standards? In addition, the ipso jure denunciation would break the legal link between Members which have accepted the same obligations just because they are parties to different instruments.

## **Comment 6 (on Article XI to Article XIII)**

These articles cover the procedures for amendment of the new Convention, dealt with in a report prepared for the second meeting of the High-level Tripartite Working Group.<sup>3</sup> Article XI would invite the ILO Governing Body to establish the special tripartite committee envisaged by the High-level Tripartite Working Group. This committee would be charged with generally reviewing the working of the new Convention, and be given specific functions with respect to the simplified amendment procedure. It would consist of representatives of Governments which had ratified the new Convention and of Shipowners’ and Seafarers’ representatives

<sup>3</sup> ILO: *Simplified amendment procedure for the proposed new maritime labour Convention*, High-level Tripartite Working Group on Maritime Labour Standards (second meeting), Geneva, 2002, doc. TWGMLS/2002/2.

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chosen by the Governing Body (who might in practice be the same as the members of the Joint Maritime Commission<sup>4</sup>). There would thus not be national tripartite delegations, as in the International Labour Conference. The social dialogue in this case would rather operate on a global basis, on the model of the Governing Body. This is justified in view of the essentially globalized nature of the maritime sector.

The Government representatives of non-ratifying Members could participate in the Committee without right of vote. During the discussions at the second meeting of the High-level Group, a number of Government representatives expressed the view that those non-ratifying Members should also have the right to vote. They also stressed the need for equitable regional representation. The degree of participation of such Members in the adoption of amendments under the simplified procedure is discussed below. It should be noted that, if the Convention limited the right to vote on amendments to the representatives of Governments that had ratified the Convention, it could at the same time accord full voting rights to all Members of the Organization on other matters. The question of equitable regional distribution would depend upon whether or not the Committee should be open-ended, as at present conceived. The task of ensuring such distribution with respect to the appointment of officers and the membership of subcommittees could perhaps best be left to the Governing Body.

Article XII relates to the amendment of the Convention as a whole, involving an express ratification procedure. The procedure envisaged would be an innovation for the ILO, but the legal effects of this *amendment* procedure would be the same as that of the procedures used in the ILO for the *revision* or modification of instruments, with one important exception: there would be no separate revising Convention or protocol; there would be a single amended Convention, in which the legal link between all the ratifying Members would be retained (see the last sentence of Comment 5 above), even though some of them might be bound by different versions of the same provision, rather than by different Conventions, as at present. Members subsequently ratifying the Convention would be bound by all amendments adopted so far unless provided otherwise in any amendment (Article XII, paragraph 9). The legal effect would thus be the same as that of closing a revised Convention to further ratification. This is also the reason for the distinction made in this Article with respect to the object of ratification: since Members which had not yet ratified the Convention would be bound by its latest version, they would receive, for consideration with a view to ratification, a copy of the whole Convention as amended up to the current time (paragraph 4); whereas Members which had already ratified the Convention would receive only the specific amendment for consideration (paragraph 3). The amendment would only come into force if the ratifications of the amendment taken together with the ratifications of the Convention as amended fulfil the requirements set out in paragraph 5. These requirements might be the same as those set for the initial entry into force of the Convention itself under Article VI, paragraph 2.

Article XIII would introduce the most important innovation of the new Convention: the amendment of certain provisions through tacit acceptance rather than express ratification. This subject was dealt with in depth in the report submitted to the High-level Tripartite Working Group, referred to above, and discussed in detail at the second meeting. There was general agreement on the

<sup>4</sup> *ibid.*, para. 18.

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concept itself and on the main elements of the amendment procedure proposed.<sup>5</sup> This Comment will not repeat the explanations given in this respect in the Office report referred to. However, differences of opinions were expressed at the meeting on important issues. These are discussed below.

*Level of amendment.* Most of the Government representatives at the second Meeting considered that the simplified amendment procedure could only be used at the third and fourth levels of the Convention, covering the provisions of the Code, Part A and Part B (see Comment 3 above). One or two Government representatives, however, reserved their position with respect to the binding Part A of the Code or stated that certain provisions, particularly those relating to enforcement, should always be subject only to the express amendment procedure. The Seafarers' representatives strongly considered that it should be possible to use this tacit acceptance procedure also at the second level, i.e. that of the Regulations setting out basic principles and rights, provided that the revision was made at a maritime session of the International Labour Conference. Some Government representatives agreed, subject to the proviso that any amendment adopted without express ratification, normally involving national parliamentary processes, should be justified by reference to a specific provision at the first level, covering fundamental principles and rights. The position of these and other Government representatives reflects a constitutional requirement at both the national level and, as explained in the Office's report on the subject,<sup>6</sup> at the international level (article 19 of the ILO Constitution). Whereas the International Labour Conference or a national Parliament is not required to legislate down to the last detail, but can arrange for the detailed implementation of a Convention or law to be drafted or amended in accordance with a procedure at a lower level, each detailed provision must be clearly based on a general provision that has passed through the process of express ratification or parliamentary approval.

In the light of the above constitutional requirement, the Office proposed an approach under which the Regulations would be rather specific so as to clearly provide a sufficiently wide basis for amendment through a tacit acceptance procedure. The provisions exemplified in this connection were generally considered to be too detailed at the second meeting of the High-level Group, and the Shipowners' and Seafarers' representatives largely reached agreement on simple and concise statements of the proposed basic principles and rights of the Convention. There was insufficient time for these to be discussed by the meeting as a whole. However, if there is general agreement at least on the approach adopted, some other way would need to be found to provide the necessary basis for amending the provisions of the Code under the simplified procedure; suggestions in this connection are made in Comment 7 below.

A Government representative also proposed that it should be possible for a ratifying Member to notify the Organization, prior to entry into force of an amendment, that it would be bound by the amendment only after it had expressly accepted it. Members would in addition have the right to declare, at the time of ratification of the Convention, that all amendments would enter into force for them

<sup>5</sup> An adjustment has been made with respect to the support needed for proposed amendments (see Article XIII, paragraph 2) to take account of the fact that, as the number of representatives on the special tripartite committee increases, the requirement of support by half the members of the group concerned might become too onerous.

<sup>6</sup> Doc. TWGMLS/2002/2, op. cit., para. 3.

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only upon their express acceptance. These suggestions were based on provisions of the recent International Convention on the Control of Harmful Anti-fouling Systems on Ships, adopted in the framework of the International Maritime Organization on 5 October 2001.

The preliminary draft seeks to take account of all the above positions as far as possible. It adopts the approach of having concise statements in the Regulations; these statements are accompanied by provisions containing directions giving the necessary basis for amendments by tacit acceptance. It seems difficult to devise a system which would provide the necessary authority for the simplified amendment of the concise statements themselves. However, through the accompanying provisions, to the extent that they are acceptable to national Governments and Parliaments, it may be possible to meet the concern expressed by the Seafarers' representatives for the greatest possible flexibility with respect to the use of the tacit acceptance procedure in order to be able to cover future unforeseen problems.

The proposal to allow a Member to make a notification that a particular amendment must be expressly accepted by it would seem to be in the general interest provided that this notification is made during the period when the Member concerned could have notified its disagreement. Such a provision would ensure that Members which were unsure whether or not to accept an amendment could safeguard their individual positions without blocking the entry into force of the amendment for other Members. On the other hand, to allow individual Members, at the time of ratification of the Convention, to totally exempt themselves from the tacit amendment procedure would seem to be inconsistent with the concept of a level playing field. It would seem preferable for Members to identify the areas concerned, such as that of enforcement mentioned above, during the preparation of the Convention, and to remove them from the scope of the simplified amendment procedure. These considerations are reflected in Article XIII of the preliminary draft.

Further consideration might be given to the question whether amendments to the non-binding Part B of the Code, which have the same force as international labour Recommendations, should be required to be submitted for tacit acceptance by members. International labour Recommendations, enter into effect upon adoption by the International Labour Conference.

*Position of non-ratifying Members.* Under the simplified amendment procedure as presented to the second meeting of the High-level Group, ILO members which had not ratified the new Convention could take part in the special tripartite committee that would adopt the amendments, but they would not have the right to vote in that Committee, and they would not be entitled to formally propose an amendment. All such amendments would, however, have to be approved by a two-thirds majority of the International Labour Conference, in which non-ratifying Members would of course take part on the same footing as other Members. A number of Government representatives at the second meeting considered that non-ratifying Members should also have the right to propose amendments, and a few of them maintained that such Members should have the right to vote on the amendments. Two representatives were of the view that all Members should have the right to notify their disagreement with an amendment during the actual tacit acceptance procedure. Many other Government representatives considered that voting should be restricted to ratifying Members. The importance was stressed of ensuring that obstacles to ratification by particular Members were properly taken into account. While it may be problematic to allow Members which are not bound by the obligations of the Convention to have a decisive role over the way in which the parties to the Convention are to implement those obligations, it may indeed be

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useful to allow non-ratifying Members to make proposals for amendments that might permit ratification by them. At the second meeting, emphasis was placed on the importance of having the necessary flexibility to ensure the widest possible ratification of the Convention. Provided that the Convention is made sufficiently flexible to place its obligations within reach of all Members of the Organization, it would seem reasonable to make ratification a condition for full participation in the development of the new Convention. These considerations are reflected in paragraph 4 of Article XI and paragraph 2 of Article XIII of the preliminary draft.

### **Comment 7 (on Regulation 1.1; Section A1.1)**

As explained in Comment 6 above, under *Level of amendment*, this preliminary draft adopts the approach, favoured by the Shipowners' and Seafarers' representatives, of having the basic principles of the Convention expressed in concise statements. Where necessary, however, these statements are accompanied by provisions containing directions as to the nature and scope of future amendments of the Code by tacit acceptance. Provisions of this kind are often contained in Acts of Parliament as a means of controlling the scope of subsidiary legislation. Although these provisions in the Regulations may often duplicate the detailed provisions of the Code, these or equivalent provisions are essential in order to provide the necessary legal authority for the amendment of the Code by the proposed simplified procedure.

In the present case, the directions in paragraphs 2 to 5 of Regulation 1.1 are in fact exceptionally long because of its importance. The Convention would, in effect, be giving Governments authority to change the minimum ages fixed in it without going back to their Parliaments on a matter involving both the fundamental rights of the child and the possible postponement of a young person's right to take on a particular job. The directions proposed here would, in particular, state the rationales for setting the ages concerned (see paragraphs 2(a) and 4), thus limiting any modification considered necessary in the future to fairly precise circumstances. Thus, the essence of any such modifications would already have been approved by national Parliaments prior to ratification of the new Convention.

### **Comment 8 (on Regulation 1.3; Section A1.3)**

Paragraph 2 of Regulation 1.3 takes account of the fact that responsibility for certificates of competency have been taken over by the International Maritime Organization in its International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW Convention). In the view of the High-level Tripartite Working Group such a transfer would also be appropriate, if a satisfactory arrangement can be made, in the case of certificates of qualification for able seamen. For this reason, Chapter I of Section A1.3 simply refers to the STCW Convention. On the authority of paragraph 2 of the Regulation just referred to, the responsibility for certificates of qualification for able seamen (in Chapter II) could in due course similarly be transferred, through the use of the tacit acceptance procedure. Certificates of qualification for ships' cooks are dealt with in Title 3 of the Convention, in the context of food and catering.

### **Comment 9 (on Section B1.4)**

This section, on vocational training, is in need of substantial review so as to avoid duplication with the relevant provisions of the STCW Convention, as amended (STCW 95).

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### **Comment 10 (on Regulation 1.6)**

Regulation 1.6 and the related provisions of the Code (Section A1.6) are included in this preliminary draft for the purpose of illustration only. Firstly, the content of the relevant Convention (the Seafarers' Identity Documents Convention, 1958 (No. 108)) is under revision (the provisions included in Part A of the Code are based on the preliminary draft of possible provisions contained in a preparatory document<sup>7</sup> for that revision). Secondly, the Shipowners' and Seafarers' representatives have expressed the view that the subject of seafarers' identification should be dealt with in a separate instrument.

### **Comment 11 (on Section B1.2)**

Section B1.2 is an example of how guidelines might be incorporated by reference into Part B of the Code of the consolidated Convention (see also Section B1.4 III, paragraph 7).

### **Comment 12 (on Regulation 2.1; Section A2.1)**

The term "articles of agreement" used in the heading of this Regulation and the corresponding sections of the Code reflects terminology that is important in English-speaking legal systems, but may make little sense in other systems. For this reason, it is proposed that the term not be used in the statement of the general principle in Regulation 2.1 and that an explanation be given in the Code (Section A2.1 I, paragraph 1).

The requirement in Section A2.1 (paragraph 2 of Chapter III) that articles of agreement be accompanied by a translation into English if not in that language appears essential for the purposes of port State control, in particular. Such a translation is required, for example, in the case of the table with the shipboard working arrangements referred to in Chapter III, paragraph 8, of Section A2.3.

Paragraph 1 of Chapter IV of Section A2.1 refers to the notice to be given for termination of an indefinite contract and is based on the Seamen's Articles of Agreement Convention, 1926 (No. 22). However, the actual period of notice has been left blank in the preliminary draft as the minimum period of 24 hours provided for in Convention No. 22 seems manifestly too short in today's conditions.

### **Comment 13 (on Regulation 2.2; Section A2.2)**

Regulation 2.2, relating to wages, refers to the principle of *equal remuneration for work of equal value*. This principle is enshrined in the preamble to the ILO Constitution and is expressed in the Seafarers' Wages, Hours of Work and the Manning of Ships Recommendation, 1996 (No. 187) (Paragraph 6(a), reproduced in the preliminary draft as Section B2.2 I, paragraph 4(a)). At the second meeting of the High-level Tripartite Working Group, the Shipowners' and Seafarers' representatives presented a proposal on the main content of the Convention, but were unable to reach agreement on the inclusion of the principle referred to. There was insufficient time for their proposal to be discussed at the meeting and the Government representatives have not therefore expressed their

<sup>7</sup> ILO: *Improved security of seafarers' identification*, Report VII(1), International Labour Conference, 91st Session, Geneva, 2003.

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views. Regulation 2.2 of the preliminary draft tentatively seeks a solution on the assumption that the disagreement relates not so much to the validity of the principle itself, but rather on how it is to be interpreted in a multinational environment like that of the maritime industry.

Paragraph 1 of Section A2.2 relates to the actual obligation to pay wages, which is not contained in existing Conventions.

#### **Comment 14 (on Section A2.3)**

Paragraph 8 of Chapter III of this Section on hours of work refers to the posting of a table with the shipboard working arrangements in a “standardized format”. A model of such a table might be recommended in Part B of the Code. The preliminary draft suggests such a model for the format of the records of the seafarers’ hours of work to be established by the competent authority in accordance with paragraph 2 of Chapter V of this Section.

#### **Comment 15 (on Section A2.4)**

Chapter I of this Section, on annual leave, requires Members at the time of ratification to declare the minimum period of such leave. This provision is based on the requirement in the Seafarers’ Annual Leave with Pay Convention, 1976 (No. 146). In order to ensure continuity in the obligations of Members that have ratified that Convention, the preliminary draft specifically exempts them from making the same declaration again unless they wish to specify a longer minimum period.

It is envisaged that most of the provisions in the new Convention will be based on existing Conventions (or Recommendations), thus making it easier for Members that have ratified those Conventions to also ratify the new Convention. The transitional provision in Chapter VII of Section A2.4 covers the situation where there is more than one Convention on the same subject. In such a case, the preliminary draft normally takes the provisions of the more recent Convention. Under the approach suggested in the preliminary draft, Members that had only ratified an earlier Convention on the subject would, during a transitional period, be permitted to continue to perform their obligations under the earlier Convention, instead of the corresponding provisions of the new Convention. In order to be able to ratify the consolidated Convention, ILO Members will need to review a wide range of laws and to make any necessary adjustments. If a Member has already adapted its legislation to the requirements of an adequate Convention on a particular subject, it might be unreasonable to require it to readjust its legislation before ratifying the new Convention. Other examples of transitional provisions of this kind are contained in Section A2.6 VI on repatriation and Section A3.1 XIV on crew accommodation.

#### **Comment 16 (on Regulation 2.5; Section A2.5; Section B2.5)**

The Shipowners’ representatives consider that the provisions on continuity of employment would be better placed under Title 4 (social security) of the Convention.

Because of the importance of the issue of employment, one of the components of the Decent Work Agenda, the existing provisions for records of employment (in Chapter III of Section A2.5) have been strengthened by the addition of a provision to Part B of the Code: Chapter III of Section B2.5. A model form for such records might also be included in Part B.

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### **Comment 17 (on Section A2.6; Section B2.6)**

Chapter IV of Section A2.6 on the right to repatriation places the obligation on the flag State to ensure that the costs of repatriation are covered if a shipowner fails to respect its obligation in this respect. Because of the importance of this right, a Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers has adopted, as a short-term solution, a resolution and related guidelines on the provision of financial security in the case of abandonment of seafarers. The guidelines provide for the forms that the financial security system may take. Part A or Part B of the Code might therefore be expanded in this respect.

Paragraph 3 of Chapter I of Section B2.6 would recognize the right of a Member to detain a vessel of a shipowner (or to request its detention if in a foreign port) if the latter fails to carry out the obligations relating to repatriation and the repatriation costs are borne by the Member concerned (which might be the flag State, the port State or the State of the seafarer's nationality). The legal basis for a detention of this kind would be the creditor's right of attachment on the debtor's property until the debt is paid. It would thus not be the same as the basis for port-State detentions referred to below under point (d) of Comment 29 below. The recognition of this right in the Convention might however be useful as an incentive to port States to take the necessary action in the case of a shipowner's failure to repatriate.

### **Comment 18 (on Section B3.1)**

As air conditioning is no longer a luxury in ships trading in hot climates and even in temperate areas, consideration might be given to placing in the mandatory Part A of the Code at least some provisions of Chapter I of this Section.

### **Comment 19 (on Section B3.2)**

Provisions based on the World Health Organization's revised *Guide to ship sanitation*, as well as other WHO documentation in such areas as nutrition, might be included in this section of Part B of the Code on food and catering.

### **Comment 20 (on Section A3.4)**

Chapter VIII of this Section requires the adoption of a medical report form for seafarers' diseases and injuries. A model for such a form might be included in the Convention.

### **Comment 21 (Section A3.6)**

As already suggested in the context of repatriation (see Comment 17 above), this section on what has been termed "shipowners' liability" could be expanded to provide for guarantees of payment to the seafarer if shipowners fail to carry out their obligations under this Section.

### **Comment 22 (on Title 4)**

Since the difficult question of social security has not yet been discussed in the High-level Tripartite Working Group, the suggestions under Title 4 in the preliminary draft should be considered simply as a reminder of the components of a complete system of social security protection.

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Because of the complexity of the subject and the paucity of ratifications of the relevant Conventions, a thorough discussion will first be needed on the extent to which, and the ways in which, such protection could be provided for at the present time and in the foreseeable future.

If it were considered feasible and realistic for the Convention to provide for a complete system of social security protection, the Convention would have to set the full realization of the right to social security as the basic principle – as is done in Regulation 4.1 of the preliminary draft. At the same time, it could allow the Code to set initial and intermediate standards (see paragraph 3 of Regulation 4.1). If the principle of full protection were not set out in the Regulations, albeit as an objective, it would not be possible to use the simplified amendment procedure to strengthen the protection when circumstances so permitted (see Comment 6 above).

### **Comment 23 (on Title 5)**

This Title, on enforcement, is a conglomerate of three different elements:

- *existing provisions*: in the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), the Labour Inspection (Seafarers) Convention, 1996 (No. 178), and the Labour Inspection (Seafarers) Recommendation, 1996 (No. 185);
- *provisions suggested by the Office*: outlined in a report prepared for the second meeting of the High-level Tripartite Working Group<sup>8</sup> and adjusted in the light of the High-level Group's comments;
- *new elements*: based on the discussions of the second meeting or contained in related proposals, the most important of these elements relating to the scope of inspection, to the follow-up and certification of compliance with the Convention and to internal grievance procedures.

The opening paragraph is partly based on a suggestion made at the second meeting concerning the simplified amendment procedure (see Comment 6 above, under Article XIII). As an exception to the normal rule, that procedure would not be applicable for the body of Part A of the Code. It could however be used to amend the appendices, particularly Appendix 5.1 relating to the scope of inspections.

### **Comment 24 (on Regulation 5.1, paragraphs 2 and 3; Section A5.1 I and Section B5.1 I)**

*Policies and procedures for compliance.* The above provisions under *Flag state responsibilities* seek to capture the essence of a principle that was generally agreed at the second meeting of the High-level Group, namely that there should be continuous follow-up on compliance with the requirements of the new Convention by every ship registered in the Member concerned. There was, however, disagreement concerning the methods to be used for such follow-up. Many representatives considered that it was essential to maintain the method of periodic

<sup>8</sup> ILO: *Considerations for provisions on inspection and control in a consolidated maritime labour Convention*, High-level Tripartite Working Group on Maritime Labour Standards (second meeting), Geneva, 2002, doc. TWGMLS/2002/1.

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inspections, while recognizing that for many aspects of the Convention the results of such inspections might become out of date by the next voyage of the ship concerned, or even earlier.

Other representatives favoured an approach suggested by the Norwegian Government representative, along the lines of the International Safety Management (ISM) Code under the SOLAS Convention of the International Maritime Organization. Under this approach, shipowners would have to establish and enforce a human resources policy ensuring that their laws and regulations on working and living conditions were continuously complied with on all their vessels. They would also have to appoint a focal point for reporting to the highest level of management on compliance with the policy. The shipowners' policies and procedures would be subject to a quality assessment by the Government and to its approval in the form of a "Document of Compliance". In addition, each of the ships covered by a policy would require certification from the competent authority that the system was actually functioning effectively.

The approach adopted in the present preliminary draft is to lay down the essential obligations and to leave Members completely free to decide upon the form their policies and procedures for compliance would take. The essential obligations (see paragraphs 4(b) and 9 of Regulation 5.1) could be summarized as follows:

- every ship under the Member's flag must be covered by effective policies and procedures, designed to ensure full compliance with the relevant requirements of the Convention;
- the policies and procedures must be approved by the competent authority of the Member;
- the competent authority must, from time to time, certify that they are being properly followed.

In order to allow freedom as to the form of implementation, the draft uses very general wording such as "documentation" of compliance and "certification". The Code (Section A5.1 I, paragraph 6 and Section B5.1 I, paragraph 1, last sentence) also makes it clear that the system adopted could be closely coordinated with related certifications, particularly those required under conventions of the International Maritime Organization, so that there could be a single certificate covering all related aspects in the country concerned. Such a feature was considered essential by some Government representatives. Section B5.1 I of the Code suggests a form that the documentation might take. After stating the essential criteria, it suggests, as a possible model, an ongoing commitment in an approved "Declaration". This model is outlined in Appendix 5.2 to the preliminary draft. It is to a large extent based on a suggestion made by the representative of the Government of the United Kingdom, with the addition of the periodic certifications referred to above.

*Scope of the inspection.* At the High-level Group's second meeting, concern was expressed that inspections should be limited to matters that could actually be inspected, and a list was drawn up of the general areas concerned. They are listed in Appendix 5.1 to the preliminary draft. This draft draws a distinction between principle and practice: in paragraph 5 of Section A5.1 I, it states the principle that all aspects of seafarers' working and living conditions are to be covered by the documentation of compliance, but recognizes that they could in practice be limited to the general areas listed. The fact that certain aspects of living and working

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conditions would not be inspected in practice would not, however, place them in practice outside the scope of the enforcement provisions, as the existing procedures for inspection upon complaints, covering any aspect of living and working conditions, would remain in place and in fact be reinforced by a requirement for adequate grievance procedures (Regulation 5.1, paragraph 14).

*Inspection criteria.* A related point raised at the second Meeting was the need for inspectors to have clear criteria as to how they would carry out inspections. This point is taken into account in Section A5.1 IV, paragraph 3 (the requirement for “clear guidelines” is an addition to existing requirements) and Section B5.1 IV, paragraph 4 (for flag state inspections) and Section B5.2, paragraph 1 (for port state inspections). Guidance on such criteria is also envisaged for inclusion in Appendix 5.1.

### **Comment 25 (on Section A5.1 III)**

The provisions under this heading introduce an adjustment into the schedule and nature of the inspections required by the Labour Inspection (Seafarers) Convention, 1996 (No. 178). Under Article 3, paragraph 1, of that Convention, routine inspections are to be carried out at intervals of three years or less and “when practicable, annually”. The preliminary draft removes the reference to annual inspections in that context, but adds (Section A5.1 III, paragraph 2) a requirement for “spot checks” relating to the implementation of the policies and procedures on compliance. These checks might amount to auditing of the reliability of the procedures in place, rather than to a complete inspection. They would be at intervals of varying length (to lessen predictability) of about one year and would presumably target situations that might have changed since the last full inspection.

### **Comment 26 (on Regulation 5.1, paragraphs 8 to 10; Section A5.1 V)**

Under the above provisions the documentation of compliance would be subject to two kinds of certification by the flag State. There would be an initial certification, which would relate solely to the adequacy of the policies and procedures themselves to fulfil the requirements of the Convention. Where the flag State was relying on the concept of substantial equivalence (see Article IV, paragraphs 2(a) and 4, of the Convention), the necessary explanations would be given at this stage (see Section A5.1 V, paragraph 2). The other certifications would relate to actual compliance with the requirements of the Convention. The certifications would appear as part of the documentation of compliance or be appended to it (Section A5.1 V, paragraph 4). An illustration is given in the second part of Appendix 5.2. Any deficiencies with respect to compliance would have to be recorded in the certification, together with details concerning their correction (Section A5.1 V, paragraph 3). The purpose, as explained in Comment 25 above, would be to allow an assessment of how much reliance could be placed on the documentation of compliance for the vessel concerned. It should be borne in mind, in particular, that port state inspectors would be required to accept the documentation of compliance at its face value unless “there are clear grounds for believing that the shipboard conditions of employment and shipboard living arrangements do not conform to the standards of this Convention” (see Regulation 5.2, paragraph 2(b)).

### **Comment 27 (on Regulation 5.1, paragraphs 12 and 13; Section A5.1 VIII)**

These provisions would require each Member to carry out a quality control, including an independent evaluation, of the system of enforcement set up by the

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Member concerned. These audits would be given particular attention in the supervisory procedures based on the reporting requirement of article 22 of the ILO Constitution (see Regulation 5.1, paragraph 13). Guidance on the possible elements of such an audit could usefully be added to Part B of the Code under Title 5.

A similar quality control would be required with respect to the Member's labour-supplying responsibilities (see Regulation 5.3, paragraphs 3 and 4).

**Comment 28 (on Regulation 5.1, paragraph 14; Section A5.1 IX; Section B5.1 VI)**

The essential object of these procedures would be the establishment of effective procedures for the resolution of grievances at the level of the ship or the shipowner concerned. Resort to such procedures would often be a precondition to legal action and to complaints at port State level (see Section B5.2, paragraphs 2 and 3).

**Comment 29 (on Regulation 5.2, paragraphs 2 to 5; Section A5.2; Section B5.2)**

These provisions originate from Article 4 of the Merchant Shipping (Minimum Standards) Convention (No. 147), the port state control provision. They embody the following four important developments:

- (a) *Reliance on the ship's documentation of compliance.* Following the procedure adopted in the equivalent provisions of conventions of the International Maritime Organization, the action of the port state control inspectors would be limited to verifying the ship's documentation of compliance and related certifications. If these indicated that the ship was in compliance with the requirements of the Convention, no further inspection would be carried out except in two cases: (i) "where there are clear grounds for believing that the shipboard conditions of employment and shipboard living arrangements do not conform to the standards of this Convention"; and (ii) where a complaint is lodged by an interested person.
- (b) *Scope of the inspection.* As would be the case with flag state inspections (see Comment 24 above), if an inspection is carried out, its scope will be limited to the general areas identified as subject to inspection in Appendix 5.1 (see Section A5.2, paragraph 1). An inspection on a complaint would be limited to the subject-matter of the complaint (see Section A5.2, paragraph 2).
- (c) *Action in the case of deficiencies.* Under Article 4, paragraph 1, of Convention No. 147, if deficiencies are found with respect to compliance, the port State may report the matter to the government of the flag State, with a copy of the notification being sent to the Director-General of the ILO. This procedure is expanded in the preliminary draft (Regulation 5.2, paragraph 3, and Section A5.2, paragraph 4) along the lines set out in the Office's report to the High-level Group:<sup>9</sup> first, a procedure is set out for reporting to the flag State, giving the latter a proper opportunity to express its position and to take any necessary action; second, an indication is given of the action that the ILO Director-General would be expected to take if the flag State response to the problem was inadequate: namely, action "to ensure that a record is kept of such

<sup>9</sup> *ibid.*, para. 46.

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information and that it is brought to the attention of parties which might be interested in availing themselves of relevant recourse procedures” (such as representations or complaints under article 24 or 26 of the ILO Constitution). Furthermore, the flag State would be required to pay particular attention in its quality control procedures to notifications indicating shortcomings in its own inspection of the ship concerned (Section A5.1 VIII, paragraph 3(a)).

- (d) *Extension of detainable defects.* Under Article 4 of Convention No. 147, a ship may be detained in the case of clear hazards to safety or health. The preliminary draft would add two more situations (explained in the report referred to above<sup>10</sup>) in which detention of the ship would appear justified. One such situation would be the likelihood of “serious material hardship” to the seafarers concerned or their families. According to the guidance given on this term in Part B of the Code (Section B5.2 I, paragraph 4), a typical situation of this kind might result from the non-payment of wages. A Government representative has pointed out that the non-payment of wages has been considered as justifying detention on a ground mentioned in Convention No. 147, namely, a clear hazard to the safety of the ship. Similarly, a situation causing serious material hardship might also constitute a health hazard justifying detention. However, the existence of a ground of detention specifically based on serious material hardship might strengthen the legal basis for the port State’s decisions in this respect. The second possible ground for detention would be repeated serious violations of the Convention on the part of the same ship (Regulation 5.2, paragraph 4(c)). This concept is explained in Section B5.2 I, paragraph 5.

### **Comment 30 (on Regulation 5.3; Section B5.3)**

In the discussions of the High-level Group emphasis has been given to the important role, in the area of enforcement, of the labour-supplying States, and efforts have been made to identify the respective responsibilities of flag States, port States and labour-supplying States. While it is easy to identify the major labour-supplying countries for seafarers, it would be difficult – and in fact wrong – to define that term for the purposes of a legal text. If the term were defined, some countries might fall outside the definition although, just as most if not all countries are called upon to act in the capacity of both flag and port States (if they are not landlocked), they may also act as suppliers of labour, albeit on a small scale, in the sense that their citizens may serve on ships registered outside their territory. The related responsibilities should therefore also apply to them. To avoid the misconception of a limited category of “labour-supplying State”, it is proposed that the Convention simply refer to “labour-supplying responsibilities”.

Another question that may need to be discussed relates to the situations in which labour-supplying responsibilities arise. A typical case is where recruitment and placement agencies are established or operated on the territory of the country concerned. In the High-level Group’s discussions reference has also been made to “labour-supplying States” in the context of social security obligations that do not depend upon contracts of employment. Lastly, the contribution that can be made to the enforcement of decent conditions of work by States having jurisdiction over contracts of employment has been stressed (irrespective of whether or not these are concluded through recruitment agencies). In the light of all these considerations, Regulation 5.3 of the preliminary draft seeks to capture all responsibilities that

<sup>10</sup> *ibid.*, para. 47.

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States may have in maritime labour matters that arise independently of their roles as flag State or port State.

An important responsibility of countries in which recruitment and placement agencies are established is to ensure that such agencies are “made jointly and severally liable with shipowners, regardless of their domicile, for breach of the contract of employment and/or articles of agreement”<sup>11</sup>. This is indeed the practice of at least one major labour-supplying State. The principle was however questioned by a Government representative at the second meeting of the High-level Group. In order to avoid a possible obstacle to ratification, the concept of joint and several liability has been placed in Part B of the Code (Section B5.3). In the mandatory part of the Convention, private recruitment and placement agencies would be required “to assume appropriate responsibility with the shipowner” for the fulfilment of contracts with seafarers.

<sup>11</sup> *ibid.*, Appendix I: *Consensual Statement of the Meeting of Experts on Working and Living Conditions of Seafarers on board Ships in International Registers* (Geneva, 6-8 May 2002), para. 10.