

INTERNATIONAL LABOUR ORGANIZATION

**International Labour Standards Department**

**Sectoral Policies Department**

Background paper and questionnaire for the Working Group of the Special Tripartite Committee established under the Maritime Labour Convention, 2006 (MLC, 2006)

*The preparation of proposals related to the protection of seafarers' wages when the seafarer is held captive on or off the ship as a result of acts such as piracy or armed robbery, including an amendment to the Code of the MLC, 2006 to address these issues*

First round of consultations

September-October 2016

INTERNATIONAL LABOUR OFFICE, GENEVA

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## **Part I – Background document**

### **A. Introduction**

1. The second meeting of the Special Tripartite Committee (STC) established under Article XIII of the Maritime Labour Convention, 2006 (MLC, 2006) (Geneva, 8-10 February 2016), decided, in accordance with article 15 of its Standing Orders, to establish a Working Group with the following terms of reference:
  - (i) to examine issues related to the protection of seafarers' wages when the seafarer is held captive on or off the ship as a result of acts such as piracy or armed robbery, and to prepare proposals including an amendment to the Code of the MLC, 2006, to address these issues;
  - (ii) to recommend improvements to the process for preparing proposals for amendments to the Code of the MLC, 2006, for consideration by the STC in accordance with Article XV of the Convention and article 11 of the Standing Orders of the STC, to promote their earlier and fuller consideration by member States and representative organizations of Seafarers and Shipowners; and
  - (iii) to deliver a report, with recommendations, to be submitted to the third meeting of the STC, not later than nine months before the meeting<sup>1</sup>.
2. The decision to establish a Working Group was then endorsed by the Governing Body of the International Labour Office (ILO) at its 326th Session (March 2016)<sup>2</sup>.
3. This background paper addresses possible proposals, including a possible amendment to the Code of the MLC, 2006, to address the issue of protection of seafarers' wages when the seafarer is held captive on or off the ship as a result of acts such as piracy or armed robbery. Part I of the background paper presents the proposal submitted by the group of Seafarer representatives appointed to the STC, as well as the general observations and suggestions made in advance of the second meeting of the STC, and the relevant discussions at that meeting; the scope and nature of acts such as piracy and armed robbery and non-payment of wages of seafarers in such situations; examples of how the protection of seafarers' wages held captive may or may not be addressed at the national level, the international level and by collective agreements. Part II contains a questionnaire to elicit input from the members of the Working Group in order to establish a possible way forward.

### **B. Summary of work undertaken by the STC on the protection of seafarers' wages when the seafarer is held captive on or off the ship as a result of acts such as piracy or armed robbery**

4. The procedures to be followed with respect to proposals for amendments to the Code under Article XV of the Convention are set out in Article 11 of the Standing Orders of

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<sup>1</sup> Resolution concerning the establishment of a Working Group of the Special Tripartite Committee, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/meetingdocument/wcms\\_452072.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcms_452072.pdf)

<sup>2</sup> Document GB.326/LILS/6 available at: [http://www.ilo.org/gb/GBSessions/GB326/lils/WCMS\\_458136/lang--en/index.htm](http://www.ilo.org/gb/GBSessions/GB326/lils/WCMS_458136/lang--en/index.htm).

the STC.<sup>3</sup> In keeping with these procedures, in 2015 the group of Seafarer representatives appointed to the STC submitted a proposal to amend the Code of the MLC, 2006 relating to Regulation 2.2 of the MLC, 2006. The proposal consisted in adding the following new paragraph [5bis] or [7] after the present paragraphs 5 or 6 of Standard A2.2 – Wages<sup>4</sup>:

‘Where a seafarer is held captive by pirates, payments as provided for in paragraph 1 of this Standard, including any allotments, shall continue to be paid during the entire period of the seafarer’s captivity’.

5. The proposal aimed to ensure the payment of wages during the period for which a seafarer is held captive by pirates<sup>5</sup>. It sought to address some of the concerns that were raised, in particular, by Working Group 3 of the Contact Group on Piracy off the Coast of Somalia in the draft *Interim guidelines on measures relating to the welfare of seafarers and their families affected by piracy off the Coast of Somalia* (hereafter the *Interim Guidelines*)<sup>6</sup>.
6. In keeping with Article 11 of the Standing Orders of the STC, the Office communicated the Seafarers’ proposal to all Members of the ILO, with an invitation to transmit to the Office their observations or suggestions concerning the proposal. In its comments<sup>7</sup>, some Governments generally welcomed the proposal (Brazil, Cambodia, China, Estonia, India, Mauritius, Panama, Republic of Korea, Switzerland, Syrian Arab Republic, United Republic of Tanzania, Turkey and Vietnam).
7. In addition, many diverse views were expressed on the subject. These included that there should be a clear understanding of the reasoning behind the amendment<sup>8</sup>; that the amendment could be difficult to implement if it extended to periods in which seafarers are unable to perform work owing to the fault of a third party<sup>9</sup>; that it could be appropriate to extend the amendment to a situation in which a seafarer is not able to work owing to circumstances which are reasonably attributable to the shipowner/employer and during the duration of which the shipowner must therefore pay the seafarer’s normal salary<sup>10</sup>; that the situation in which a seafarer is held captive by pirates should be considered as an

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<sup>3</sup> Standing Orders of the Special Tripartite Committee established for the Maritime Labour Convention, 2006 [http://www.ilo.org/global/standards/maritime-labour-convention/special-tripartite-committee/WCMS\\_183944/lang--en/index.htm](http://www.ilo.org/global/standards/maritime-labour-convention/special-tripartite-committee/WCMS_183944/lang--en/index.htm)

<sup>4</sup> Background paper for discussion at the second meeting of the Special Tripartite Committee established under Article XIII of the Maritime Labour Convention, 2006 (Geneva, 8–10 February 2016) [STCMLC/2016, Appendix C].

<sup>5</sup> Ibid, para 8.

<sup>6</sup> International Maritime Organization (IMO) (2014): *Interim guidelines on measures relating to the welfare of seafarers and their families affected by piracy off the coast of Somalia*. Submitted by Italy, Republic of Korea, Philippines, the Baltic and International Maritime Council, ICC, ICMA, IFSMA, IMHA, INTERCARGO, INTERTANKO, ITF, the Nautical Institute, and OCIMF. MSC 93/16/1. London. Available at <http://intertanko.com/Documents/MSC%2093-16-1.pdf>. The Contact Group on Piracy off the Coast of Somalia, created on 14 January 2009, pursuant to United Nations Security Council Resolution 1851(2008), is a voluntary, *ad hoc* international forum of approximately 80 countries, organizations and industry groups with a common interest in combating piracy in the Gulf of Aden and the Indian Ocean.

<sup>7</sup> Summary of observations and suggestions on the proposals for amendments to the Code of the Maritime Labour Convention, 2006: Information document for discussion at the second meeting of the Special Tripartite Committee established under Article XIII of the Maritime Labour Convention, 2006 (Geneva, 8–10 February 2016) at [http://www.ilo.ch/wcmsp5/groups/public/---ed\\_norm/---normes/documents/genericdocument/wcms\\_448665.pdf](http://www.ilo.ch/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_448665.pdf).

<sup>8</sup> Ibid, para 6.

<sup>9</sup> Ibid, para 10.

<sup>10</sup> Ibid, para 10.

event of force majeure for which the shipowner could not be held responsible<sup>11</sup>; that it was a concern that the shipowner's responsibility may go beyond their legal obligations<sup>12</sup>; that there should be further review of the legal consequences of the expiration of an employment contract during the period of captivity of a seafarer<sup>13</sup>; that compensation to seafarers affected by piracy should not be limited to wages and the responsibilities of the relevant entities should be carefully considered<sup>14</sup>; that regard should be had to the *Interim Guidelines* and various recommendations including shipowners insurance cover in respect of crew, employment terms and agreements, compensation for losses, financial support and future employment<sup>15</sup>; that the proposed amendment required the development of guidelines as provided in the existing Standards of the MLC, 2006<sup>16</sup>; that the obligation of shipowners to pay wages during captivity should not be unlimited<sup>17</sup>; that the proposed amendment related to a situation in which the employment contract should be considered as suspended and giving rise to complex issues<sup>18</sup>; that it is not reasonable to place the risk stemming from pirates on shipowners, who already suffered from damages related to the detention of the vessel, delayed cargo delivery and other such expenses and that instead, negotiations should be initiated with insurance undertakings to establish an adequate insurance coverage for shipowners in case of piracy<sup>19</sup>; that this amendment would impose further obligations on shipowners, who are already confronted with a heavy administrative burden to prove that they are in compliance with the requirements of the Convention<sup>20</sup>; and that shipowners are directly responsible for the vessel and its crew in the event of piracy<sup>21</sup>.

8. Reference is made to the proposal submitted in this context by the Russian Federation to include a clause in Standard A2.2 as follows<sup>22</sup>:

‘Where the freedom of a seafarer is restricted owing to circumstances outside the shipowner’s or seafarer’s control, or the ship is hijacked, or in the event of other illegal acts committed against the ship, payments as provided for in paragraph 1 of this Standard, including any allotments, shall continue to be paid during the entire period of such acts, in accordance with the law of the flag State’.

9. Reference is also made to the proposal by the Government of China that corresponding language should be added to Standard A2.1, Seafarers’ employment agreements, paragraph 4(e) and that after ‘the amount of seafarer’s wages’, the words ‘including paying wages during the entire period of a seafarer’s captivity by pirates’ should be added namely<sup>23</sup>:

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<sup>11</sup> Ibid, para 11.

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

<sup>13</sup> Ibid, para 12.

<sup>14</sup> Ibid, para 13.

<sup>15</sup> Ibid, para 14.

<sup>16</sup> Ibid, para 15.

<sup>17</sup> Ibid, para 16.

<sup>18</sup> Ibid, para 17.

<sup>19</sup> Ibid, para 18.

<sup>20</sup> Ibid, para 19.

<sup>21</sup> Ibid, para 20.

<sup>22</sup> Summary of observations and suggestions on the proposals for amendments to the Code of the Maritime Labour Convention, 2006, STCMLC/2016/2, para 21, Government of the Russian Federation.

<sup>23</sup> Summary of observations and suggestions on the proposals for amendments to the Code of the Maritime Labour Convention, 2006, STCMLC/2016/2, para 23, Government of China.

## Standard A2.1 – Seafarers’ employment agreements

...

‘4.

(e) the amount of the seafarer’s wages including paying wages during the entire period of a seafarer’s captivity by pirates or, where applicable the formula used for calculating them;’ (emphasis added)

10. The interventions made during the general discussion of the second meeting of the STC on the proposed amendment<sup>24</sup> generally reflected the recognition for the need to address the matter, with several Governments noting that their own seafarers had suffered from this problem. However, different views were expressed on what aspects of the issue should be considered, on the approach to be taken (e.g. whether to amend the MLC, 2006 or follow another approach) and on the scope of the situations to be addressed (e.g. whether “piracy” was too restrictive).
11. Following STC practice, Government, Shipowner and Seafarer representatives were provided the opportunity to submit written amendments, during the meeting, to the original proposal by the Seafarers. The following written amendments relevant to the piracy issue were submitted<sup>25</sup>:

Amendment submitted by the Republic of Korea

Standard A2.2, new paragraph [5bis] or [7]

After the words ‘by pirates’, *insert* ‘and while in the service of the ship’;

Amendment submitted by the Seafarer representatives

Standard A2.2, new paragraph [5bis] or [7]

*Replace* the words ‘held captive by pirate’ by ‘unlawfully held captive on board or off the ship’;

Amendment submitted by the Shipowner representatives

Standard A2.2, new paragraph [5bis] or [7]

*Delete* the proposed new paragraph [5bis] or [7];

Amendment submitted by Greece

Standard A2.2, new paragraph [5bis] or [7]

*Replace* the proposed paragraph by: ‘Each Member shall require that payments, including any allotments, of seafarers which are held captive onboard or off the ship, such as in cases of piracy or armed robbery, are made in accordance with their employment and/or with any applicable bargaining agreement’; and

Amendment submitted by the Seafarer representatives

Standard A2.2, new paragraph [5bis] or [7]

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<sup>25</sup> Summary of observations and suggestions on the proposals for amendments to the Code of the Maritime Labour Convention, 2006, STCMLC/2016/2, para 21, Government of the Russian Federation.

<sup>25</sup> Summary of observations and suggestions on the proposals for amendments to the Code of the Maritime Labour Convention, 2006, STCMLC/2016/2, para 23, Government of China.

<sup>25</sup> The full text of all amendments submitted to the second meeting of the STC may be found in Annex III of the *Final report*.

*Add at the end of the sentence the words ‘, even if the seafarers’ employment agreement expires or is terminated’.*

12. Following the agreement by the meeting that the best way to move forward on this issue would be to establish a Working Group of the STC<sup>26</sup>, which would carry out its work prior to the third meeting of the STC, the Chairperson invited the members of the STC to express their views concerning piracy, which could be taken into consideration by the Working Group. The comments may be summarized as follows: that over 300,000 Filipino seafarers were working on board ships on any given day and, since 2006, over 1,000 had been victims of piracy and the issue of the protection of seafarers’ wages in such circumstances was a very real concern<sup>27</sup>; that issue of piracy was a very important issue, of which the protection of seafarers’ wages when held in captivity was only one aspect<sup>28</sup>; that the objective should be to encourage governments and the social partners to develop policies to deal with the issue<sup>29</sup>; that there should be consideration of the broader issues involved when seafarers were deprived of liberty for reasons beyond their control<sup>30</sup>; that the proposed amendment should be redrafted with clearer definitions of such issues as the period of captivity and systems for the provision of financial support for the affected seafarers<sup>31</sup>; that the Working Group was an opportunity for more serious consideration of the issues involved, which went beyond piracy<sup>32</sup>; that it was essential to make progress on the issue as rapidly as possible<sup>33</sup>; that it was important to emphasise the human face of piracy<sup>34</sup>; that other aspects should also be taken into consideration, such as the mental health effects on seafarers and their treatment once they had been released<sup>35</sup>.
13. As noted in the Introduction above, the Working Group was formally established through the adoption of an STC resolution. During the debate on the terms of reference of the resolution,<sup>36</sup> there were many additional interventions concerning the piracy issue. These included that the Working Group should consider not only a possible amendment to the Code but other possible solutions as well (there was concern that the options available should not be restricted to amending the Code)<sup>37</sup>; that seafarers allotments should be addressed<sup>38</sup>; that the protection should cover both when the seafarer is held on the ship and ashore<sup>39</sup>; the scope of the situations to be covered<sup>40</sup>; the possible need to address the elements of the wages or payments to be covered<sup>41</sup>; whether there should or should not be limitations on the period during which the wages should be paid<sup>42</sup>.

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<sup>26</sup> Final Report, paras. 101 and 102.

<sup>27</sup> Ibid, para 104.

<sup>28</sup> Ibid, para 105.

<sup>29</sup> Ibid, para 106.

<sup>30</sup> Ibid, para 107.

<sup>31</sup> Ibid, para 108.

<sup>32</sup> Ibid, para 109.

<sup>33</sup> Ibid, para 110.

<sup>34</sup> Ibid, para 111.

<sup>35</sup> Ibid, para 113.

<sup>36</sup> Ibid, paras. 135 to 160.

<sup>37</sup> Final Report, para. 135, 148.

<sup>38</sup> Ibid, para. 136.

<sup>39</sup> Ibid, para. 136, 139, 140.

<sup>40</sup> Ibid, para. 142, 143; 145

<sup>41</sup> Ibid, para. 143

<sup>42</sup> Ibid, para. 147

14. The Chairperson of the STC indicated that all the amendments and comments made during the STC would be submitted to the Working Group for examination. In this context, it may be useful to set out, in one place, the initial proposal by the Seafarers together with comments received on the text of that specific proposal both in advance of and during the second meeting of the STC:

‘Where a seafarer is [abducted and]<sup>43</sup> held captive ~~by pirates~~<sup>44</sup> [international terrorists, and related transnational organized criminals]<sup>45</sup> [unlawfully held captive on board or off the ship]<sup>46</sup> [and while in the service of the ship]<sup>47</sup>, payments as provided for in paragraph 1 of this Standard, including any allotments [as provided for in paragraph 4 of this Standard],<sup>48</sup> shall continue to be paid during the entire period of the seafarer’s captivity [even if the seafarers’ employment agreement expires or is terminated]<sup>49</sup>.

### **C. Scope and nature of acts such as piracy and armed robbery and non-payment of wages of seafarers in such situations**

15. A report from the International Chamber of Commerce's International Maritime Bureau (IMB) for the period 1 January to 30 June 2016 indicates that piracy and armed robbery at sea has fallen to its lowest levels since 1995, despite a surge in kidnappings off West Africa. For the period 1 January 2016 to 30 June 2016, 98 incidents of piracy and armed robbery were reported to the IMB<sup>50</sup> compared to 134 in the same period in 2015. Five vessels were reported hijacked and a further 72 boarded, nine fired upon and 12 reporting attempted attacks. Worldwide, 64 seafarers were taken hostage; 44 seafarers were kidnapped; four seafarers were injured; three seafarers were assaulted and a further three were threatened according to the IMB report<sup>51</sup>.
16. ‘Despite global improvements’, it is reported that, as of 25 July 2016, ‘kidnappings are on the rise, with 44 crew captured for ransom in 2016, 24 of them in Nigeria. This is up from 10 in the first half of 2015’, according to the IMB, which adds that in the Gulf of Guinea, “rather than oil tankers being hijacked for their cargo, there is an increasing number of incidents of crew being kidnapped for ransom”<sup>52</sup>.
17. It has also been reported in the media that the frequency of Nigerian piracy and armed robbery at sea from January 2016 to April 2016 “was 119% up on 2015” with kidnaps trebling over the past year, from about one a month to about three a month, and that the

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<sup>43</sup> Summary of observations and suggestions on the proposals for amendments to the Code of the Maritime Labour Convention, 2006, STCMLC/2016/2, para 25, Swiss Federation of Trade Unions

<sup>44</sup> Summary of observations and suggestions on the proposals for amendments to the Code of the Maritime Labour Convention, 2006, STCMLC/2016/2, para 26, Turkish Seafarers Union

<sup>45</sup> Summary of observations and suggestions on the proposals for amendments to the Code of the Maritime Labour Convention, 2006, STCMLC/2016/2, para 22, Government of Thailand

<sup>46</sup> STCMLC/2016/D.16. Amendment submitted by the Seafarer representatives

<sup>47</sup> STCMLC/2016/D.1. Amendment submitted by the Republic of Korea

<sup>48</sup> Summary of observations and suggestions on the proposals for amendments to the Code of the Maritime Labour Convention, 2006, STCMLC/2016/2, para 24, The National Confederation of Transport (CNT) and the National Confederation of Industry (CNI) of Brazil

<sup>49</sup> STCMLC/2016/D.23. Amendment submitted by the Seafarer representatives

<sup>50</sup> Report of ICC International Maritime Bureau Piracy and armed robbery against ships Report for the period 1 January to 30 June 2016, at page 24.

<sup>51</sup> Report of ICC International Maritime Bureau Piracy and armed robbery against ships Report for the period 1 January to 30 June 2016, at page 24.

<sup>52</sup> *Per* Captain Mukundan in ICC IMB media release dated 25 July 2016.



number of actual incidents is almost certainly under reported<sup>53</sup>.

18. In some instances where seafarers were held captive, it was reported that they had not been paid their wages<sup>54</sup>.
19. In the State of Maritime Piracy 2015 Oceans Beyond Piracy (OBP) Report it is stated, among other things:

‘Lost wages

In addition to the severe physical, psychological, and emotional toll that hostages and their families experience, there is a significant financial burden on the hostages as well. All of the hostages held in 2015 were from poor families in developing nations and were presumably the primary or sole breadwinners in their homes. However, these seafarers have not and will not receive pay for their time in captivity. This amounts to a significant sum and can be crippling to their families back home. In 2015 alone, using the mandated minimum wage from the Maritime Labour Convention-mandated minimum wage of \$23 a day, the seafarers of Naham 3, Prantalay 12, Siraj, and Jaber accrued approximately \$415,000 in lost wages. Over the duration of their captivity so far, the crews of Prantalay 12 and Naham 3 lost \$1.06 million in wages<sup>55</sup>.

#### **D. Protection of seafarers’ wages held captive and national law**

20. At the second meeting of the STC, the Government of **Denmark** indicated that it had already adopted provisions with regard to the wages of seafarers held in captivity, and that it was clear that, even if the employment agreement expired during the period of captivity, the seafarer was not at liberty to take up other employment and that the wages should continue to be paid<sup>56</sup>.
21. The Consolidated Act No. 73 of 17 January 2014 issued by the Danish Maritime Authority<sup>57</sup> provides that:

‘Section 19a. It shall not be possible to dismiss seafarers held hostage in connection with piracy. The employment shall not terminate though the ship is lost in connection with piracy or the shipowner is no longer able to have it at his disposal. *Subsection 2.* When released, the hostages shall be entitled to a free journey home with subsistence to their own domicile at the shipowner’s expense’.

22. If seafarers cannot be dismissed while held hostage, it follows that wages – and any other benefits of employment - must continue to be payable for the entire duration of the period that seafarers are held hostage. Further, since employment shall not terminate although the ship is lost (which would appear to include the sinking of the ship), it is a reasonable implication that wages are payable whether seafarers are held hostage on or off the ship.

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<sup>53</sup> See article by David Osler in *Lloyd’s List* 6 June 2016 <https://www.lloydlist.com/ll/sector/ship-operations/article526908.ece>

<sup>54</sup> See, for example, the report in *The National UAE* 27 June 2013 concerning the *MV Iceberg* where it is said that the wages of the crew were not paid for nearly three years while being held captive. It was reported, for example, in the *Sunday Times* that wages were not paid in respect of the *MV Albedo* see: Fate unknown of Lankan seamen aboard hijacked ship by Leon Berenger [http://www.sundaytimes.lk/110424/News/nws\\_21.html](http://www.sundaytimes.lk/110424/News/nws_21.html)

<sup>55</sup> <http://oceansbeyondpiracy.org/reports/sop2015/east-africa>

<sup>56</sup> Final report. Second meeting of the Special Tripartite Committee established under Article XIII of the Maritime Labour Convention, 2006 (MLC, 2006) (Geneva, 8–10 February 2016) STCMLC/2016/7, para 44.

<sup>57</sup> Only the Danish version has legal validity.

The prohibition against dismissal of seafarers is, however, restricted to piracy and is not expressly extended to armed robbery.

23. In the Ship Labour Act of **Norway**, for example, if a seafarer is taken captive by pirates or armed robbers and is subsequently dismissed, a court will determine whether the dismissal is unfair. The seafarer is protected against dismissal on the ground that an employee may not be dismissed unless it is objectively justified on the basis of circumstances related to the undertaking, the employer or the employee<sup>58</sup>. Pirates or armed robbers are not, however, mentioned in the Ship Labour Act; and there would appear to be no recorded rulings regarding the dismissal of seafarers held captive by pirates.
24. In some national legislation provision is made for the payment of wages of seafarers for a limited period in the event that their vessel is “lost” It has been argued in court that the loss of a vessel includes capture of the vessel by pirates. In the law of the **United Kingdom**, for example, (which is substantially the same in common law jurisdictions, such as, **Singapore**<sup>59</sup> and **South Africa**<sup>60</sup>), section 38 of the Merchant Shipping Act 1995 provides that seafarers have a right to wages in the event that their ship is wrecked or lost:

‘(1) Where a United Kingdom ship is wrecked or lost a seaman whose employment in the ship is thereby terminated before the date contemplated in the agreement under which he is so employed shall, subject to the following provisions of this section, be entitled to wages at the rate payable under the agreement at the date of the wreck or loss for every day on which he is unemployed in the two months following that date’.

25. Section 38(1) of the Act, which has been superseded in respect of merchant shipping by regulation 48 of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers, etc.) Regulations 2014,<sup>61</sup> applies in respect of certain other vessels<sup>62</sup>. Regulation 48 states:

**Shipowners’ liability for seafarer unemployment and losses following loss or foundering of ship**

**48.**—(1) This regulation applies in relation to a seafarer working on board a ship which founders or is lost.

(2) If the loss or foundering of the ship causes the seafarer to become unemployed, the shipowner must pay to the seafarer an amount equivalent to the wages which would otherwise have been payable under the seafarer employment agreement for every day on which the seafarer is unemployed in the two month period

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<sup>58</sup> See section 5-6 of the Ship Maritime Labour Act. As to permanent or temporary appointments, see the Ship Maritime Labour Act section 3-4.

<sup>59</sup> See, for example, section 64 of the Singapore Merchant Shipping Act.

<sup>60</sup> See, for example, section 140 of the South African Merchant Shipping Act.

<sup>61</sup> See <http://www.legislation.gov.uk/uksi/2014/1613/regulation/48/made>. The amendment is made by S.I. 2014/1614 – see: <http://www.legislation.gov.uk/uksi/2014/1614/regulation/2/made>

<sup>62</sup> Regulation 2(2) of the Merchant Shipping (Maritime Labour Convention) (Consequential and Minor Amendments) Regulations 2014 provides that section 38(1) applies “to sea-going United Kingdom ships and masters and seamen employed in them only if they are— (a) fishing vessels; (b) ships of traditional build; or (c) vessels which are not ordinarily engaged in commercial activities.”

commencing on the day following the day on which the loss or foundering occurred....

(5) A seafarer may recover any sum due from the shipowner under paragraph (2) ... as a civil debt.

26. It has not been judicially determined whether “loss” in regulation 48 includes loss as a result of piracy or armed robbery; and it is uncertain whether section 38 applies if the ship is not physically wrecked or lost as the result of piracy or armed robbery but captured instead. The precursor of section 38 was section 158 of the Merchant Shipping Act 1894, which aimed to ensure payment of seafarers’ wages even if no freight was earned due to the loss of their ship<sup>63</sup>. Under section 158, the “loss” of the ship was held in *Sivewright v Allen* not to mean “mere capture of a ship by an enemy or a seizure by pirates” unless - in addition - there was “physical destruction of the ship”<sup>64</sup>. In *Horlock v Beal*<sup>65</sup> the court held that “loss” was confined to “physical loss”<sup>66</sup>.
27. Even if section 38 is applicable to the capture of the ship by pirates or armed robbers, the entitlement of seafarers to wages extends to two months only, no matter how much longer the seafarers are held captive.
28. It is also uncertain under English common law whether seafarers are entitled to wages for the entire duration of their captivity whether they are on or off their ship. Service to the ship is a prerequisite for wages; and although service ‘on board’ the ship was a statutory requirement<sup>67</sup> (until it was removed in 1956)<sup>68</sup> a strictly literal construction was not placed upon the phrase. But this line of cases would not appear to extend to cover seafarers held captive off the ship for an extended period of time. Instead, a different line of cases, suggests that, provided the seafarers return to their ship after being held captive, and continue the voyage with the approval of the shipowners, they are entitled to their wages<sup>69</sup>, provided they are onboard and without injury or ill health so that they can complete the voyage.

## **E. Protection of seafarers’ wages held captive at the international level**

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<sup>63</sup> As to the termination of the seafarers’ employment agreement and a total loss of wages, see, for example: *The Elizabeth* (1819) 2 Dodson 403, 408; *The Neptune* (1824) 1 Hagg. Adm. 227, 232; and *Ellerman Lines Ltd v Murray, White Star Line & Co Ltd v Comerford* [1931] AC 126 (HL) 126, 130, 144. But see section 158 of the Merchant Shipping Act 1894; section 185 of the Merchant Shipping Act 1854; the Merchant Shipping (International Labour Conventions) Act 1925 and the Merchant Shipping Act 1970, s 100(3), Sch 5.

<sup>64</sup> *Per* Ridley J in *Sivewright v Allen* [1906] 2 KB 81.

<sup>65</sup> [1916] AC 486 at 490, 524.

<sup>66</sup> *Horlock v Beal* [1916] AC 486 at 490, 524. Compare *The Olympic* [1913] P 92 *Barras v Aberdeen Steam Trawling and Fishing Co* [1933] AC 402.

<sup>67</sup> See the Admiralty Court Act, 1861.

<sup>68</sup> See s. 1(1) (o) of the Administration of Justice Act 1956 but see *The Chieftain* (1863) 167 E.R. 316, 320; and *The Ever Success* [1991] 1 Lloyd’s Rep 824.

<sup>69</sup> See, for example, *Beale v Thompson* 102 ER 940 ; and *Delamainer v Winteringham* (1815) 4 Camp 186. But in compare *Horlock v Beal* [1916] AC 486, 490, 524 and 514.

## **E1. Definitions of piracy and armed robbery in international law<sup>70</sup>**

29. The following are internationally agreed definitions of “piracy” and “armed robbery”.

### **Piracy**

Article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) determines that Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

### **Defining Armed Robbery against ships**

IMO Assembly Resolution A.1025(26) (Annex, paragraph 2.2) on IMO's Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, determines that armed robbery against ships consists of any of the following acts:

- (a) any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea;
- (b) any act of inciting or of intentionally facilitating an act described above."

## **E.2 References to piracy and seafarers' wages in international instruments and discussions**

30. At the international level, a relevant instrument with respect to payment of seafarers' wages in cases of piracy and armed robbery is IMO Assembly Resolution A27/Res.1044. The *Interim Guidelines* include provisions on the issue of protection of wages. The conventions governing maritime liens and the conventions governing ship arrest may also be relevant.

## **E.3 IMO Assembly Resolution and the Interim Guidelines developed by Working Group 3 of the Contact Group on Piracy off the Coast of Somalia**

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<sup>70</sup> <http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Pages/Default.aspx>

31. IMO Assembly Resolution A27/Res.1044 which was adopted on 30 November 2011 on Piracy and Armed Robbery against ships in waters off the coast of Somalia:

‘8. STRONGLY URGES Governments which have not already done so to promptly:

.....

(1) establish, as necessary and when requested, plans and procedures to keep substantially interested States informed, as appropriate, about welfare measures for seafarers in captivity on ships entitled to fly their flag, measures being taken for the early release of such seafarers and the status of payment of their wages;’ (emphasis added)

32. At the meeting of the Maritime Safety Committee of the IMO on 11 February 2014<sup>71</sup>, Italy<sup>72</sup> submitted to the Committee for its review the Interim Guidelines which had been developed by Working Group 3 of the Contact Group on Piracy off the Coast of Somalia.

33. The *Interim Guidelines* contain the following provisions:

‘ 3 Employment Terms and Agreements

.1 Shipowners and manning agents should review their employment contracts to consider issues such as wages, bonuses, medical and life insurance in piracy high risk areas or opportunity for repatriation if/when a ship is destined for piracy high risk areas, without detriment to employment. Seafarers held hostage should not be dismissed, and consequently the payment of their wages should continue; (emphasis added)

.2 Flag States should, where possible, encourage shipowners of ships flying their flag to review their employment contracts to consider issues such as wages, bonuses, medical and life insurance in piracy high risk areas or opportunity for repatriation if/when a ship is destined for piracy high risk areas, without detriment to employment. (emphasis added)

5 Support to Families in the Event of Hijack

.1 Shipowners should have plans in place to provide information, support, and assistance to families including guidance on how to respond to pirates and the media. Likewise, they should ensure the continued payment of wages and applicable entitlements to the affected seafarers' families. Manning agents should work in conjunction with shipowners to provide this information, support, and assistance; (emphasis added)

.2 Seafarers are also recommended to consider arranging for the transmittance of wages to their families; ...

9 Financial Support

.1 Shipowners should ensure prompt payment of all/any outstanding wages and other contractual entitlements to the affected seafarers and are encouraged to consider further ex gratia payments; (emphasis added)

.2 In the event of financial default or insolvency of shipowners, flag States should make all reasonable efforts to secure payment of outstanding wages and other contractual entitlements; (emphasis added)

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<sup>71</sup> MSC 93/16/1

<sup>72</sup> Also the Republic of Korea, the Philippines, BIMCO, ICC, ICMA, IFSMA, IMHA, INTERCARGO, INTERTANKO, ITF, the Nautical Institute, and OCIMF

.3 If the next of kin, whom a seafarer has a duty to support, does not have or receive any means for their support, the flag State or the seafarer's state of nationality is recommended to consider providing reasonable financial aid to them.

34. The IMO Maritime Safety Committee supported the goals of the *Interim Guidelines*, but the majority of the delegations that spoke were of the view that they were a matter for the ILO and the Committee instructed the Secretariat of the IMO to forward the *Interim Guidelines* to the ILO for its review and further action<sup>73</sup>.

#### **E.4 Conventions governing maritime liens**

35. The Working Group may wish to consider to what degree international Conventions concerning maritime liens (and arrest of ships, as discussed below) may or may not provide protection of wages or payments of seafarers held captive in cases of piracy or armed robbery.
36. Claims for seafarers' wages are protected by maritime liens, being secured since the maritime liens follow the vessel notwithstanding any change of ownership or of registration or of flag, and being preferred since they have priority over registered mortgages, hypothèques and charges. Three international conventions govern maritime liens.
37. Under article 8 of the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1926 there is a maritime lien:

‘on a vessel, on the freight for the voyage during which the claim giving rise to the lien arises, and on the accessories of the vessel and freight accrued since the commencement of the voyage: ... [for] (2) claims arising out of the contract of engagement of the master, crew, and other persons hired on board<sup>74</sup>.’ (emphasis added)

38. The seafarers must be hired on board. No reference is made to seafarers being held captive as a result of piracy or armed robbery and the 1926 Convention does not appear to provide for maritime liens if seafarers are held off their ships for an extended period.
39. Under article 4 (1) (a) of the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1967<sup>75</sup>;

‘The following claims shall be secured by maritime liens on the vessel: (i) wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel;’ (emphasis added).

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<sup>73</sup> MSC/93/22 30 May 2014. Report of the Maritime Safety Committee on its 93<sup>rd</sup> session, para 16.13.

<sup>74</sup>International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1926, article 8. Twenty-eight states are bound by the 1926 Convention.

<sup>75</sup> So far only six states are party to the 1967 Convention. It is probable that the Convention will never enter into force.

40. Seafarers must be employed on the vessel. No reference is made to seafarers being held captive as a result of piracy or armed robbery, and the 1967 Convention does not appear to provide for maritime liens if seafarers are held off their ships for an extended period.
41. Under article 4(1)(a) of the International Convention on Maritime Liens and Mortgages 1993<sup>76</sup> a claim against:
 

‘the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the vessel: [for] (a) claims for wages and other sums due to the master, officers and other members of the vessel’s complement in respect of their employment in the vessel, including costs of repatriation and social insurance contributions payable on their behalf’’. (emphasis added)
42. Seafarers must be employed in the vessel. No reference is made to seafarers being held captive as a result of piracy or armed robbery, and the 1993 Convention does not appear to provide for maritime liens if seafarers are held off their ships for an extended period.
43. It follows that pursuant to the international conventions on maritime liens, where seafarers are taken captive for an extended period of time off their vessel as a result of piracy or armed robbery, the entitlement to wages cannot be enforced against their ship if it has changed ownership, or executed against their ship in priority over registered mortgages, hypothèques and charges.

### **E.3 Conventions governing ship arrests**

44. Two conventions provide for the arrest of ships in respect of certain maritime claims: the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships, 1952 (1952 Convention), which entered into force on 24 February 1956, with 77 states parties to the Convention; and the International Convention on the Arrest of Ships, 1999 (1999 Convention), which entered into force on 14 September 2011, with 10 states parties to the Convention.
45. Neither the 1952 Convention nor the 1999 Convention define a ‘maritime claim’ with express reference to piracy or armed robbery<sup>77</sup>.
46. In the 1952 Convention, ‘maritime claim’ means ‘a claim arising out of ...wages, of Masters, Officers, or crew’<sup>78</sup>. This would appear to cover the situation where seafarers are held captive by pirates or armed robbers onboard or ashore, provided the claim can be said to arise out of the wages of masters, officers or crew. There is no express requirement that the seafarers must be employed on the ship. Nor is such a requirement

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<sup>76</sup> The Convention entered into force on 5 September 2004 and 13 states are bound by its provisions.

<sup>77</sup> In the South African Admiralty Jurisdiction Regulation Act 105 of 1983 a maritime claim is defined to include ‘any claim for, arising out of or relating to’, *inter alia*, ‘piracy, sabotage or terrorism relating to property mentioned in section 3(5), or to persons on any ship’: s1(1)(cc). There is, for example, no such reference to piracy in the Maritime Law Admiralty Act 1973 of New Zealand, the High Court Ordinance Chapter 4 of Hong Kong, the Federal Courts Act of Canada, the Admiralty Act No. 34 of 1988 of Australia, the Senior Courts Act 1981 of the United Kingdom, and the High Court (Admiralty Jurisdiction) Act of Singapore.

<sup>78</sup> Article 1(1)(m).

to be found in the national legislation of some states that are parties to the 1952 Convention or states having legislation comparable to the 1952 Convention<sup>79</sup>.

47. The 1999 Convention defines a ‘maritime claim’ as ‘arising out of ...wages and other sums due to the master, officers and other members of the ship’s complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf’<sup>80</sup>. It would appear that if seafarers are held captive ashore by pirates or armed robbers, their claims may not be maritime claims under the 1999 Convention, since their wages do not arise ‘in respect of their employment on the ship’. (emphasis added).
48. The Working Group may wish to recall that the 2014 amendment to the MLC, 2006 concerning Amendments to the Code implementing Regulation 2.5– Repatriation of the MLC, 2006 (and appendices), which aimed at providing protection for abandoned seafarers, despite the protection of a maritime lien, in part due to the considerable time it may take to pursue a maritime claim.

## **F. Protection of the wages of seafarers held captive and collective bargaining agreements**

### **F.1 Introduction**

49. Regulation 2.1.3 of the MLC, 2006 states that: ‘To the extent compatible with the Member’s national law and practice, seafarers’ employment agreements shall be understood to incorporate any applicable collective bargaining agreements.’

### **F.2 Collective bargaining agreements**

50. The following are different examples of collective bargaining agreements that apply to hijacking and piracy in different circumstances, as these may be helpful for the Working Group to consider when developing the way forward to addressing the issue of protection of wages. In a specific observation<sup>81</sup>, the Government of the Russian Federation proposed that, to bring the proposal into line with the provisions of the global collective agreement between the International Transport Workers’ Federation and the International Maritime Employers’ Council defining circumstances where seafarers are illegally held captive, the new paragraph should read:

‘Where the freedom of a seafarer is restricted owing to circumstances outside the shipowner’s or seafarer’s control, or the ship is hijacked, (emphasis added) or in the event of other illegal acts committed against the ship, payments as provided for in paragraph 1 of this Standard, including any allotments, shall continue to be paid during the entire period of such acts, in accordance with the law of the flag State’.

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<sup>79</sup> There is, for example, no requirement that wages must be earned on board a ship in the Maritime Law Admiralty Act 1973 of New Zealand, the High Court Ordinance Chapter 4 of Hong Kong, the Federal Courts Act of Canada, the Admiralty Act No. 34 of 1988 of Australia, the Senior Courts Act 1981 of the United Kingdom, and the High Court (Admiralty Jurisdiction) Act of Singapore.

<sup>80</sup> Article 1 (1)((o)).

<sup>81</sup> Summary of observations and suggestions on the proposals for amendments to the Code of the Maritime Labour Convention, 2006, STCMLC/2016/2, para 21.



51. The ITF-IMEC-IBF (International Transport Workers' Federation – International Maritime Employers' Council – International Bargaining Forum) International Collective Bargaining Agreement 2015 – 2017 states<sup>82</sup>:

Article 17: Warlike Operations / High Risk Area

'17.5. In case a seaman may become captive or otherwise prevented from sailing as a result of an act of piracy (emphasis added) or hijacking, irrespective whether such act takes place within or outside IBF designated areas referred to in this Article, the Seafarer's employment status and entitlements under this Agreement shall continue until the Seafarer's release and thereafter until the Seafarer is safely repatriated to his/her home or place of engagement or until all the Company's contractual liabilities end. These continued entitlements shall, in particular, include the payment of full wages and other contractual benefits. The Company shall also make every effort to provide captured seaman, with extra protection, food, welfare, medical and other assistance as necessary'.

52. The Anglo Eastern Shipmanagement (Hong Kong) Ltd and Anglo Eastern Maritime Services Pvt. Ltd represented in Singapore by the Anglo Eastern Shipmanagement (Singapore) Pte Ltd and Singapore Organisation of Seamen states<sup>83</sup>:

17. SERVICE IN WARLIKE OPERATIONS AREAS AND HIGH RISK AREA

'17.7. In case a seaman may become captive or otherwise prevented from sailing as a result of an act of piracy (emphasis added) or hijacking, irrespective whether such act takes place within or outside IBF designated areas referred to in this clause, the seaman's employment status and entitlements under this Agreement shall continue until the seaman's release and thereafter until the seaman is safely repatriated to his/her home or place of engagement. The Company's contractual liabilities to a seaman in captivity shall not be deemed to end until the seaman is safely repatriated to his/her home or place of engagement, notwithstanding the date of expiry of contract of service. These continued entitlements shall, in particular, include the payment of full wages and other contractual benefits. The Company shall also make every effort to provide captured seaman, with extra protection, food, welfare, medical and other assistance as necessary'.

53. The Korea Special Seafarers Union – Korea Ship Managers Association CBA 2016, Confirmation of the Agreements between Labour and Management for the High Risk Area and Risk Zone states:

'High Risk Area – Gulf of Aden

(4) In the case that the ship has been hijacked, (emphasis added) special bonus shall be payed to seafarers equal to 100% of ordinary wages for the duration of the ship's stay in the war risk areas added to the duration under hijacking. In this calculation, the duration under hijacking shall be counted up to the point of the ship's arrival in safe waters upon being released.'

## G. Conclusions

54. The Working Group is invited to consider different possible approaches to addressing the issue of protection of seafarers' wages when the seafarer is held captive on or off the ship as a result of acts such as piracy or armed robbery. These approaches include a possible amendment to the Code of the MLC, 2006 and the development of a set of guidelines outside the Convention.

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<sup>82</sup> There is a similar provision in Article 17.5 of the 2015 – 2017 IBF Framework TCC Agreement; in Article 16.5 of the ITF Uniform "TCC" Collective Agreement for Crews on Flag of Convenience Ships, 1 January 2015 – 2017; in Article 20 of the ITF Standard Collective Agreement 1 January 2015; and in Article 23 of the ITF Offshore Collective Agreement 1 January 2015.

<sup>83</sup> [2015] SGIAC 97, IAC Collective Agreement No 33/2015, 17 February 2015, Industrial Arbitration Court.

55. The Office does not intend in this paper to limit possible approaches to these alternatives, and the Working Group may wish to make other proposals to address the issue.
56. Part II of this background paper contains questions for the Working Group aimed at determining a possible way forward.

**Part II - Questionnaire to establish a possible way forward on the issue of protection of seafarers' wages when the seafarer is held captive on or off the ship as a result of acts such as piracy or armed robbery.**

57. The members of the Working Group are invited to answer the following questions to establish a possible way forward on the issue of protection of seafarers' wages when the seafarer is held captive on or off the ship as a result of acts such as piracy or armed robbery.
58. The answers should be sent by 15 October 2016 to [mlcstc@ilo.org](mailto:mlcstc@ilo.org).
59. This will be followed by a second round of consultations that will take place between October and December 2016. The results of the consultations will be published in February 2017. Following a meeting of the Working Group in April 2017, the Office will publish the report, with recommendations, in May 2017, nine months before the third meeting of the STC.

## **Questions**

**The following questions focus on two (non-mutually exclusive) possibilities: an amendment to the Code of the MLC, 2006 and the development of Office guidelines outside of the Convention.**

### **I. Content of the proposal**

#### *Scope and definitions*

- (1) Should the proposal provide that shipowners should continue to pay seafarers' wages when seafarers are held captive on or off the ship as a result of:
  - a. only acts of piracy or armed robbery, or
  - b. acts of piracy, armed robbery or other similar situations? If yes, please specify.
- (2) Should the definitions of the terms "piracy" and "armed robbery" be included in the proposal?
- (3) Should the proposal state that the expression "period of captivity" is understood to have ended when the seafarer has been released and safely repatriated or at the time of the death of the seafarer? Please specify.
- (4) Should the term wages in the proposal be understood as referring to:

- a. the contractual wages as indicated in the seafarers' employment agreement?
- b. payments as provided in Standard A2.2 or payment of the *basic wage* as defined in Guideline B2.2 of the MLC, 2006 or payment of the *consolidated wage* as defined in Guideline B2.2 of the MLC, 2006?
- c. payments as provided for in paragraph 1 of Standard A.2.2 of the MLC, 2006, including any allotments?
- d. any other elements or items (including compensation)? Please specify.

*Time limitations*

- (5) Should the proposal indicate that the obligation to pay seafarers' wages should:
  - a. cover the entire period of captivity or
  - b. not exceed a maximum period? If yes, please specify what this maximum period should be.

*Seafarers' employment agreement*

- (6) Should the proposal indicate that the seafarers' employment agreement expressly refers to the shipowner's obligations and/or conditions that would apply in the event of captivity?"

*Protection against termination*

- (7) Should the proposal state that the employment of seafarers may not be terminated during the period of captivity?

*Financial security*

- (8) Should the proposal provide that there may be a financial security system in the form of a social security scheme or insurance or a national fund or other similar arrangements (for instance similar to the one provided in A2.5.2 by the 2014 amendments of the Code of the MLC, 2006) to cover the shipowners' liability for the payments of wages to seafarers held captive? If yes, please specify.

*Maritime lien*

- (9) Should the proposal make reference to maritime liens for the purpose of the protection of wages of seafarers held captive? If yes, please specify.

*Others*

- (10) Please indicate any other element that should be included in the proposal.

**II. Form of the proposal**

- (11) Should the issue of the protection of seafarers' wages when seafarers are held captive on or off the ship as a result of acts such as piracy or armed robbery be dealt with by way of:

- a. an amendment to the Code of the MLC, 2006? If yes, should the amendment refer to a Standard(s) or a Guideline(s) or both? Please specify.
- b. Office guidelines outside of the MLC, 2006?
- c. both a) and b)?

**Miscellaneous**

- (12) Please indicate any other suggestions that should be considered by the Working Group.