

Guideline for an approach to undertaking a comparative analysis (or “gap analysis”) of the Work in Fishing Convention, 2007 (No. 188) and national laws, regulations or other measures concerning decent conditions of work on board fishing vessels with regard to minimum requirements for work on board; conditions of service; accommodation and food; occupational safety and health protection; medical care and social security

Purpose of this Guideline

- These guidelines suggest the approach the Government may wish to follow in determining the extent to which its laws and regulations and other measures would need to be adjusted or complemented to meet the requirements of the Work in Fishing Convention, 2007 (No. 188).
- Undertaking a comparative or “gap” analysis is the first step towards ratification of the Convention. It consists of a detailed legal analysis of those provisions of national laws, regulations or other measures that are intended to give effect to the provisions of Convention No. 188, and it clearly indicates where changes are needed to amend or otherwise adjust national laws or regulations, or to take other measures, to bring them in line with at least the minimum provisions of the Convention. An example of the matrix form of a gap analysis is provided in Appendix I of this document.
- In keeping with Article 19, paragraph 8 of the ILO Constitution, it should be borne in mind that “In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.” It should be noted that a similar provision, is found in Convention No. 188 in Article 6, paragraph 2: “Nothing in this Convention shall affect any law, award or custom, or any agreement between fishing vessel owners and fishers, which ensures more favourable conditions than those provided for in this Convention.”

It would be very helpful if the gap analysis could be preceded by a brief description of the fishing sector (fleet size and composition, number of fishers, etc.)

The gap analysis should include copies of all relevant legal texts (including texts in the original language).

Breadth of issues covered by the Convention

As noted above, the Convention addresses a very wide range of issues, including minimum requirements for work on board; conditions of service; accommodation and food; occupational safety and health protection; medical care and social security. It will therefore be necessary to review laws, regulations and other measures falling within the area of responsibility of several ministries, departments and agencies, and perhaps also regional or local laws, regulations or other measures. This might involve, for example: the labour ministry, agriculture/fisheries ministry,

maritime safety authorities, social security department, port health authorities, coast guard, national statistics institute, and perhaps others.

Scope of the Convention

Article 2, paragraph 1, provides that “Except as otherwise provided herein, this Convention applies to ALL fishers and all fishing vessels engaged in commercial fishing operations”. This should be read in conjunction with the definitions in Article 1. Looking at Article 1(a), note that “commercial fishing” means ALL fishing operations, including fishing operations on rivers, lakes or canals, with the exception of subsistence fishing and recreational fishing (See Appendix II for an ILO informal opinion concerning the meaning of “subsistence fishing”).

When undertaking the gap analysis, it will therefore be very important to review the laws, regulations and other measures concerning all fishers and fishing vessels engaged in commercial fishing operations. The analysis should not, for example, automatically exclude “artisanal” or “small-scale” fishing vessels from its coverage.

Note that Article 1(e) provides that “fisher means every person employed or engaged in any capacity or carrying out an occupation **on board any fishing vessel**, including persons working on board who are paid on the basis of a share of the catch but excluding pilots, naval personnel, other persons in the permanent service of a government, shore-based persons carrying out work aboard a fishing vessel and fisheries observers”.

The scope of the Convention, as noted above, does NOT cover fishers who are not working on vessels and it would NOT cover fishworkers working ashore (for example, in post-harvesting activities such as processing (when done ashore) and marketing). Such workers could, however, be addressed in a separate document.

Note that, in accordance with Article 2, paragraph 2, “In the event of doubt as to whether a vessel is engaged in commercial fishing, the question shall be determined by the competent authority after consultation”. It will be important to ensure that the gap analysis reflects the laws, regulations or other measures concerning all fishers and vessels engaged in commercial fishing vessel operations. If there is doubt at this stage (the stage of undertaking the gap analysis) these fishers and vessels should be included.

Article 2, paragraph 3, provides that “Any Member, after consultation, may extend, in whole or in part, to fishers working on smaller vessels the protection provided in this Convention for fishers working on vessels of 24 metres in length and over”. This provision has led some to believe that Convention No. 188 is mandatory only for vessels over 24 metres in length. This is not the case. What this provision means is that a State may, after consultation, decide to apply some of the provisions concerning these larger vessels to smaller vessels. The Convention also includes provisions for ALL vessels. For example, Article 29 (which concerns medical care) requires ALL vessels to carry “instructions or other information in a language and format understood by the fisher or fishers”. Article 30 (which also concerns medical care) requires that “fishing vessels of 24 metres in length and over, taking into account the number of fishers on board, the area of operation and the duration of the voyage” [...] “shall carry a medical guide adopted or approved by the competent

authority, or the latest edition of the *International Medical Guide for Ships*". However, through Article 2, paragraph 3, a State may decide, after consultation, to also require the smaller vessels (those under 24 metres in length) to carry a medical guide and not only instructions.

Implementation

Note that Article 6, paragraph 1 provides that: "Each Member shall implement and enforce laws, regulations or other measures that it has adopted to fulfil its commitments under this Convention with respect to fishers and fishing vessels under its jurisdiction" and that "Other measures may include collective agreements, court decisions, arbitration awards, or other means consistent with national law and practice".

As noted, the length of the vessel is one of the primary means of determining whether or not certain provisions will apply to a particular vessel. Note that, through Article 5, a State may choose to use Length Overall (LOA) (defined in Article 1(j)) in place of Length (L) (defined in Article 1(i)) throughout the Convention, and may also use gross tonnage (gt) (as defined in Article 1(h)) for certain requirements concerning accommodation (See discussion below with respect to Annex III of the Convention).

Structure of the Convention – provisions for all vessels and provisions for larger vessels and/or those at sea for longer periods of time

It is very important when undertaking the gap analysis to be aware that for many issues covered by the Convention (e.g. medical care, as noted above, for occupational safety and health, for accommodation) the Convention has requirements for ALL vessels and then has higher requirements for vessels 24 metres in length or more or vessels at sea for longer periods (e.g. more than three days), or sometimes either or both. It is therefore important, when reviewing national laws, regulations or other measures, to determine if these are related to vessel size or time spent at sea.

Exclusions or exemptions

- Convention No. 188 provides for two main types of exclusions/exemptions:

Article 3 provides for the possibility of exclusions "where the application of the Convention raises special problems of a substantial nature in the light of the particular conditions of service of the fishers or of the fishing vessels' operations concerned". These exclusions:

- may be made after consultation by the competent authority with the representative organizations of employers and workers concerned, and in particular the representative organizations of fishing vessel owners and fishers, where they exist;
- may concern all the requirements of this Convention, or only certain of its provisions; and
- may be made with respect to:
 - fishing vessels engaged in fishing operations in rivers, lakes or canals;

- limited categories of fishers or fishing vessels.

When such exclusions are permitted, the competent authority must, where practicable, take measures, as appropriate, to extend progressively the requirements under this Convention to the categories of fishers and fishing vessels concerned.

Therefore, when undertaking the gap analysis, it is necessary to consider all fishers and all commercial fishing vessels. If fishing vessels are excluded because they are engaged in fishing operations in rivers, lakes or canals, or because they are among the limited categories of fishers or fishing vessels excluded, it will still be necessary to reflect, in the gap analysis document, any laws, regulations or other measures that may provide protection with respect to the issues addressed in the requirements of the Convention. This will be necessary in order to undertake the obligations set out in Article 3, paragraph 3.

Article 4 provides for the possibility of “progressive implementation” of certain specified provisions of the Convention “where it is not immediately possible for a Member to implement all of the measures provided for in this Convention owing to special problems of a substantial nature in the light of insufficiently developed infrastructure or institutions”. The provisions concerned are:

- Article 10, paragraph 1 (which concerns medical examination)
- Article 10, paragraph 3, in so far as it applies to vessels remaining at sea for more than three days (which also concerns medical examination)
- Article 15 (which concerns the crew list)
- Article 20 (which concerns the fisher’s work agreement)
- Article 33 (which concerns risk evaluation with respect to occupational safety and health and accident prevention)
- Article 38 (which concerns protection in the case of work-related sickness, injury or death)

“Progressive implementation” can only be used in accordance with a plan drawn up in consultation with the representative organizations of employers and workers concerned, and in particular the representative organizations of fishing vessel owners and fishers, where they exist. It cannot be used with respect to fishing vessels which:

- are 24 metres in length and over; or
- remain at sea for more than seven days; or
- normally navigate at a distance exceeding 200 nautical miles from the coastline of the flag State or navigate beyond the outer edge of its continental shelf, whichever distance from the coastline is greater; or

- are subject to port State control as provided for in Article 43 of this Convention, except where port State control arises through a situation of force majeure.

It will therefore be important to obtain information on the fishing vessels in the country concerned, particularly as concerns vessels over 24 metres in length, those navigating long distances from the coastline of the State, and those undertaking voyages to foreign ports. It may be helpful to include a chart or matrix containing such information as an introduction or annex to the gap analysis.

Other exemptions may be possible in specific Articles of the Convention. For example, in Article 10 (which concerns medical examination), paragraph 1 provides that “No fishers shall work on board a fishing vessel without a valid medical certificate attesting to fitness to perform their duties” however paragraph 2 provides that “ The competent authority, after consultation, may grant exemptions from the application of paragraph 1 of this Article, taking into account the safety and health of fishers, size of the vessel, availability of medical assistance and evacuation, duration of the voyage, area of operation, and type of fishing operation”.

Other types of flexibility in the Convention

Substantial equivalence (provided for in Article 14(3) and Article 28(2))

- With respect to manning and hours of rest, Article 14, paragraph 3 provides that: “The competent authority, after consultation, may establish alternative requirements to those in paragraphs 1 and 2 of this Article. However, such alternative requirements shall be **substantially equivalent** and shall not jeopardize the safety and health of the fishers.”
- With respect to accommodation, Article 28, paragraph 2, provides that: “A Member which is not in a position to implement the provisions of Annex III may, after consultation, adopt provisions in its laws and regulations or other measures which are **substantially equivalent** to the provisions set out in Annex III, with the exception of provisions related to Article 27.”
- “Substantial equivalence” means that there may be differences or deviations in detail as between the requisite national laws, regulations or other measures and the prescriptions of the Convention, but that the States should engage themselves to assure that the general goals intended by the provisions of the Convention are respected. Thus, where there is not full conformity with the detailed prescriptions of the Convention, the test to be applied involves first determining what the general goal or goals of the Convention is or are, i.e. its object or objects and purpose or purposes. These may present themselves as one main general goal and several subordinate goals. The test for substantial equivalence may then be, first,

whether the State has demonstrated its respect for or acceptance of the main general goal of the Convention and enacted laws or regulations which conduce to its realisation; and if so, secondly, whether the effect of such laws or regulations is to ensure that in all material respects the subordinate goals of the Convention are achieved.

Flexibility in Annex III concerning Accommodation

- Flexibility with respect to existing and undecked vessels – Note that, in accordance with paragraph 2, Annex III “shall apply to all **new, decked fishing vessels**, subject to any exclusions provided for in accordance with Article 3 of the Convention. The competent authority may, after consultation, also apply the requirements of this Annex to existing vessels, when and in so far as it determines that this is reasonable and practicable.”
- Flexibility with respect to vessels at sea less than 24 hours where fishers do not live on board – Note that, in accordance with paragraph 2 of Annex III: “The competent authority, after consultation, may **permit variations** to the provisions of this Annex **for fishing vessels normally remaining at sea for less than 24 hours where the fishers do not live on board the vessel in port**. In the case of such vessels, the competent authority shall ensure that the fishers concerned have adequate facilities for resting, eating and sanitation purposes.” Also note, in paragraph 4, that such variations must be reported to the ILO.
- Flexibility with respect to using gross tonnage instead of Length (L) or Length Overall (LOA) for certain provisions of Annex III. These provisions are cited in Annex III, paragraph 8, and concern the following paragraphs of this Annex:
 - paragraph 14 (headroom)
 - paragraphs 37, 38 (floor area in sleeping rooms)
 - paragraph 41 and 43 (persons in sleeping rooms)
 - paragraph 46 (minimum inside dimensions of the berths)
 - paragraph 49 (desk suitable for writing, with a chair, in sleeping rooms)
 - paragraph 53 (mess-room accommodation shall be separate from sleeping quarters)
 - paragraph 55 (a refrigerator of sufficient capacity and facilities for making hot and cold drinks shall be available and accessible to fishers at all times)
 - paragraph 61 (number of tubs or showers or both, number of toilets, and number of washbasins for fishers)

- paragraph 64 (facilities for washing, drying and ironing clothes)
 - paragraph 65 (facilities for washing, drying and ironing clothes with respect to vessels 45 metres in length and over)
 - paragraph 67 (separate sick bay with respect to vessels 45 metres in length and over)
- Flexibility with respect to differing and distinctive religious and social practices concerning accommodation - Paragraph 84 of Annex III provides that: “ The competent authority, after consultation, may permit derogations from the provisions in this Annex to take into account, without discrimination, the interests of fishers having differing and distinctive religious and social practices, on condition that such derogations do not result in overall conditions less favourable than those which would result from the application of this Annex.”

Bearing in mind this flexibility in Annex III, it will be important when undertaking the gap analysis to consider what national laws, regulations or other measures are applicable (or not applicable) to:

- undecked vessels, and
- vessels at sea less than 24 hours where fishers do not live on board.

It will also be important to know whether or not the country concerned, whether at the national or local level, uses gross tonnage as the basis for regulating requirements for accommodation of fishing vessels.

Finally, it will be important to determine whether there are any differences in national requirements for fishers on the basis of religious or social practices.

Social dialogue

The Convention calls, frequently, for “consultation”, defined as “consultation by the competent authority with the representative organizations of employers and workers concerned, and in particular the representative organizations of fishing vessel owners and fishers, where they exist”. The possibility of taking advantage of exclusions, exemptions or flexibility will be considerably diminished if there are no “representative organizations of employers and workers concerned, and in particular the representative organizations of fishing vessel owners and fishers” to be consulted or to conclude collective bargaining agreements relating to permitted variations from the requirements of the Convention.

It is therefore important for arrangements to be made to ensure that all aspects of the living and working conditions of all fishers come within the responsibility of one or more

representative organizations of employers and workers, in particular representative organizations of fishing vessel owners and fishers.

Administrative structure

It will be important for the country, either at the national or local level, to have in place, or put in place, the means to enforce national requirements implementing Convention No. 188. To assist in reviewing what administrative structure already exists and what will be needed, a matrix concerning Analysis of administrative capacity for implementation of the provisions of Convention No. 188 has been provided in Appendix III.

Appendix I - Example of a matrix used for a gap analysis

References to the Work in Fishing Convention, 2007 (No. 188)	References to the Work in Fishing Recommendation, 2007 (No. 199) – (guidance, not binding)	Existing implementing measures	Gaps identified	Suggested solutions
PART I: DEFINITIONS AND SCOPE				
Definitions and Scope Definitions – Article 1				
Definitions and scope of application Scope- Article 2, 3, 4 and 5 and Annex I				
PART II: GENERAL PRINCIPLES				
Implementation - Article 6				
Competent authority and coordination- Article 7				
Responsibilities of fishing vessel owners, skippers and fishers – Article 8				

PART III. MINIMUM REQUIREMENTS FOR WORK ON BOARD FISHING VESSELS				
Minimum age – Article 9	Protection of young persons . Paras. 1-5			
Medical examination – Articles 10 - 12	Medical examination - Paras. 6-10			
PART IV. CONDITIONS OF SERVICE				
Manning and hours of rest – Articles 13-14	Competency and training.- Para. 11			
Crew list – Article 15				
Fisher’s Work Agreement – Article 16-20, Annex II	Record of service – para. 12, Special measures- para. 13			
Repatriation – Article 21				
Recruitment and placement – Article 22 (Recruitment & placement of fishers; Private employment agencies)				
Payment of fishers – Articles 23-24	Payment of fishers – paras. 14-15			
PART V. ACCOMMODATION AND FOOD				
Accommodation and Food – Articles 25-28; Annex III	Paras. 16-34			
PART VI. MEDICAL CARE, HEALTH PROTECTION AND SOCIAL SECURITY				
Medical care – Articles 29-30	Paras. 35- 39			
Occupational safety and health and accident prevention Articles 31-33	Paras. 40-49			

Social security – Articles 34 -37	Paras. 50-52			
Protection in the case of work-related sickness, injury or death – Article 38-39				
PART VII. COMPLIANCE AND ENFORCEMENT				
Compliance and enforcement – Articles 40-44	Paras. 23-55			

Appendix II – Excerpts from an Office informal opinion on the meaning of “subsistence fishing” with respect to Convention No. 188.

[...]

In your second question, you asked whether Article 2(2) of Convention No. 188 gives discretion to national authorities for determining, after consultation, what constitutes subsistence fishing.

Article 2(2) of the Convention reads as follows:

“In the event of doubt as to whether a vessel is engaged in commercial fishing, the question shall be determined by the competent authority after consultation.”

This provision of the Convention confers certain latitude to the competent authorities to determine, in the event of doubt, whether a vessel is engaged in commercial fishing. In so doing, they may have in certain cases to determine whether a vessel is in fact engaged in subsistence fishing. In this regard, it should be recalled that the definition of commercial fishing gave rise to very little debate during the Conference discussions that preceded the adoption of Convention No. 188 (see International Labour Conference, 92nd Session, 2004, *Report V(2)*, p. 24, and *Record of Proceedings*, p. 21/15). As the preparatory work shows, the intention of the drafters of the Convention was to adopt a comprehensive set of standards on the living and working conditions of fishers and to limit to the extent possible exclusions from their scope of application. Therefore, it is only in the event of doubt that the competent national authorities are called upon to determine whether a vessel is engaged in commercial fishing, it being understood that the conformity of any such determination with the Convention would eventually be examined by the supervisory bodies of the ILO. Moreover, the Office is of the view that any approach which would tend to read in Article 2(2) of the Convention an exemption or exclusion possibility would not be consistent with either the letter or the spirit of the Convention.

Finally, you asked whether it would be consistent with the Convention to define the term “subsistence fishing” by reference to criteria such as the number of fishers on board, the average income arising from fishing operations or the existence of an employment relationship. The Office has already provided its views on the exact meaning of subsistence fishing for the purposes of Convention No. 188 following a request made by the International

Transport Federation (ITF). You will find enclosed a copy of this document for your information. As noted therein, the issue of the definition of “subsistence fishing” was raised on certain occasions during the Conference discussions that preceded the adoption of the Convention. The Office indicated that the FAO Fisheries Glossary defines “subsistence fishery” as “a fishery where the fish caught are shared and consumed directly by the families and kins of the fishers rather than being bought by middle-(wo)men and sold at the next larger market” (see International Labour Conference, 93rd session, 2005, *Report V(2A)*, p. 77). The FAO Glossary adds that pure subsistence fisheries are rare as part of the products are often sold or exchanged for other goods or services. As noted in the document attached, this question was not raised by constituents following these explanations, and it may therefore be concluded that for the drafters of the Work in Fishing Convention, 2007 (No.188), the FAO Fisheries Glossary provided sufficient guidance on the ordinary meaning of the term “subsistence fishing” so that no separate definition was warranted. Accordingly, by the term “subsistence fishing” – as opposed to “commercial fishing” – in Article 1 of the Convention is to be understood any fishing operations aiming at satisfying the subsistence needs of the fisher and his/her family and not at obtaining economic gain.

Therefore, to respond to your specific questions, the sole criterion for determining what constitutes subsistence fishing should be a functional one, i.e. the use and purpose of the catch (direct consumption by the fisher and his/her family). Elements such as the number of fishers on board, the average amount of income arising from fishing operations, or the existence of an employment relationship would appear to bear limited relevance to the concept of subsistence fishing as understood for the purposes of Convention No. 188. Therefore, any provision in national law using such criteria to define subsistence fishing could lead to results that would not be compatible with the Convention.

This is, of course, without prejudice to the possibility offered by Article 3(1) of the Convention to exclude, under some well-defined conditions, limited categories of fishers or fishing vessels from all or certain of its provisions.

[...]

Appendix III - Analysis of administrative capacity for implementation of the provisions of Convention No. 188

References to the Work in Fishing Convention, 2007 (No. 188)	References to the Work in Fishing Recommendation, 2007 (No. 199) – (guidance, not binding)	Related existing national law, regulation or other measure concerning this issue	How existing national law, regulation or other measure related to this issue is enforced. Identify enforcing agency, means of action (e.g. inspection), penalties, etc. Include any statistics on inspections and/or sample copies of inspection reports.	Ministry/Department /Agency that would be tasked to enforce this provision of the Convention, and what additional resources would be needed.
PART I: DEFINITIONS AND SCOPE				
Definitions and Scope Definitions – Article 1				
Definitions and scope of application Scope- Article 2, 3, 4 and 5 and Annex I				
PART II: GENERAL PRINCIPLES				
Implementation - Article 6				
Competent authority and coordination- Article 7				

Responsibilities of fishing vessel owners, skippers and fishers – Article 8				
PART III. MINIMUM REQUIREMENTS FOR WORK ON BOARD FISHING VESSELS				
Minimum age – Article 9	Protection of young persons . Paras. 1-5			
Medical examination – Articles 10 - 12	Medical examination - Paras. 6-10			
PART IV. CONDITIONS OF SERVICE				
Manning and hours of rest – Articles 13-14	Competency and training.- Paras. 11			
Crew list – Article 15				
Fisher’ Work Agreement – Article 16-20, Annex II	Record of service – para. 12, Special measures- para. 13			
Repatriation – Article 21				
Recruitment and placement – Article 22 (Recruitment & placement of fishers; Private employment agencies)				
Payment of fishers – Articles 23-24	Payment of fishers – paras. 14-15			
PART V. ACCOMMODATION AND FOOD				
Accommodation and Food – Articles 25-28; Annex III	Paras. 16-34			
PART VI. MEDICAL CARE, HEALTH PROTECTION AND SOCIAL SECURITY				

Medical care – Articles 29-30	Paras. 35- 39			
Occupational safety and health and accident prevention Articles 31-33	Paras. 40-49			
Social security – Articles 34 -37	Paras. 50-52			
Protection in the case of work- related sickness, injury or death – Article 38-39				
PART VII. COMPLIANCE AND ENFORCEMENT				
Compliance and enforcement – Articles 40-44	Paras. 23-55			