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REPORT OF THE ECONOMIC AND SOCIAL COUNCIL

MEASURES TO IMPROVE THE SITUATION AND ENSURE THE HUMAN  
RIGHTS AND DIGNITY OF ALL MIGRANT WORKERS

Paper prepared by the International Labour Organisation

Possible contents of a United Nations convention on  
protection of the rights of all migrant workers and  
their families

1. General Assembly resolution 34/172 provides for the creation of a working group to elaborate an international convention on the protection of all migrant workers and their families. During the discussions preceding the adoption of this resolution, it was recognized that international standards in this field already existed, particularly those adopted by the ILO (to which reference is made in the preamble to the resolution), but it was felt that, since the protection of migrant workers and their families involved action beyond the specialized field of competence of any one agency, a global United Nations convention would be desirable.
2. The above-mentioned resolution invited the international organizations concerned to participate in the work of the General Assembly working group. The Governing Body of the International Labour Office, when informed of the resolution, considered that, in view of the experience and specialized competence of the ILO, regarding the protection of migrant workers, it should participate actively in the work of the working group.
3. Concern has been expressed about the importance, in elaborating the proposed United Nations convention, of avoiding duplication or conflict with existing conventions. In the light of this, and having regard to the detailed technical nature of the relevant ILO standards, it would seem appropriate to aim, in the proposed United Nations convention, to lay down standards of a general nature, bearing in mind human rights principles, and to deal in particular with aspects which are not dealt with, or dealt with only to a limited extent, in existing international instruments. In so far as provisions of the new United Nations

convention dealt with matters already regulated in other international instruments, special care would need to be exercised to ensure the greatest possible consistency among them.

4. Having regard to the foregoing comments, consideration might be given to including in the proposed United Nations convention provisions on the following subjects: the rights to be accorded to all migrant workers and their families, whether lawfully admitted to the territory of the State concerned or not; the rights to be accorded to migrant workers and their families lawfully admitted to the territory of the State concerned as regards human rights in general, rights related to the protection of the family, residence status, rights in connexion with education and preservation of cultural identity and the protection of health; safeguards in relation to enforcement of rights; international collaboration; relation of the United Nations instrument to other international standards.

5. In the light of earlier United Nations studies and discussions, it is to be expected that the General Assembly working group would not consider it appropriate to confine the contents of the proposed convention to migrants and their families lawfully admitted to the territory of the State concerned, but would also wish to consider the rights which ought to be accorded, as minimum protection, to persons in different types of irregular situations. This point is reflected in the list of subjects enumerated in the preceding paragraph. More generally, the working group may wish to examine what definitions should be included in the instrument of the various categories of migrant workers. In considering the substantive contents of the instrument, consideration will also have to be given to the extent to which its provisions would apply, or would be subject to adaptation in their application, to particular categories of migrant workers. Categories whose position may require special consideration in this connexion include persons who have been admitted for permanent settlement, persons who on account of length of residence have acquired an enhanced status, persons admitted for a fixed-term period, frontier-workers, seamen, persons admitted for training and education, and workers admitted temporarily for execution of a specific assignment.

6. The following paragraphs seek to provide indications on the manner in which the various subjects previously mentioned might be regulated.

Rights to be accorded to all migrant workers and their families, whether lawfully admitted to the territory of the State concerned or not

7. As regards the basic guarantees to be provided to all, including persons in an irregular situation, consideration might be given to a number of principles contained in the draft declaration on the human rights of individuals who are not citizens of the country in which they live, set out in document E/CN.4/1336. This draft referred, for example, to the right to security of the person (see art. 4 (i) of the draft declaration), to freedom from arbitrary arrest (*ibid.*, art. 5), to access to and equal treatment before the courts (*ibid.*, art. 4 (ii)), to protection against torture and cruel treatment (*ibid.*, art. 6), to the right to freedom of thought, conscience and religion (*ibid.*, art. 4 (vii)), to the right to freedom of opinion and expression (*ibid.*, art. 4 (viii)), to protection against arbitrary expulsion or deportation (*ibid.*, art. 7 - see also para. 33 of ILO Recommendation No. 151), to protection

against arbitrary confiscation (ibid., art. 9), to the right to communicate with the consular or diplomatic mission representing one's country (ibid., art. 10). It may be recalled, in this connexion, that Part I of ILO Convention No. 143, which deals with migrations in abusive conditions, provides in article 1 for the respect of the basic human rights of all migrant workers (i.e. including migrant workers in an irregular situation). Reference is also made to article 9 of Convention No. 143, according to which, without prejudice to measures which a State may take to give persons in an irregular situation the right to stay and to take up legal employment, a migrant worker whose position cannot be regularized should enjoy protection for himself and his family in respect of rights arising out of past employment (more detailed provisions on this matter being set out in para. 34 of ILO Recommendation No. 151).

Rights to be accorded to migrant workers and their families lawfully admitted to the territory of the State concerned

(a) Human rights in general

8. Having regard to the earlier discussions which have taken place in various United Nations organs, the General Assembly working group will presumably wish to approach the question of the protection of migrant workers and their families from the point of view of human rights, as defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights. The basic principle would be equality of migrant workers and their families with nationals as regards enjoyment of the rights in question. This would however be subject to two qualifications. On the one hand, the question would require examination whether some rights should be limited to nationals or be made applicable to non-nationals only subject to certain limitations or conditions. On the other, positive action may be required in favour of migrant workers and their families to enable them effectively to enjoy the benefit and avail themselves of a number of the rights concerned.

9. If the above-mentioned approach were adopted, two main methods might be followed. One would be to state as a general principle the right to equality as regards the rights provided for in the two Covenants, and then to specify any limitations or conditions governing the enjoyment of particular rights by non-nationals as well as any positive action to be taken to enable migrant workers and their families to enjoy the benefit of the rights concerned. The other method would be to deal individually with each of the rights in question (including any special limitations or conditions applicable to its enjoyment by non-nationals and/or positive measures in their favour). In so far as rights were already covered in the preceding section relating to all migrant workers and their families, whether lawfully admitted or not, it would, of course, be unnecessary to deal with them again in the present section.

10. One of the questions which the working group may wish to examine in this context, in the light of developments which have taken place in various countries, is in what circumstances and under what conditions it would be appropriate to extend to migrant workers and their families political rights at different levels (national, provincial, local).

11. In considering economic and social rights, it would evidently be appropriate to bear in mind that provisions on equality of opportunity and treatment as regards employment and occupation and related social fields are already contained in ILO Conventions Nos. 97 (art. 6) and 143 (Part II).

(b) Rights related to the protection of the family

12. ILO Recommendation No. 151 contains, in paragraphs 13 and 19, a number of provisions regarding the reunification of families. These relate to measures to be taken by countries of employment and countries of origin to facilitate the reunification of families of migrant workers as rapidly as possible, measures in respect of the provision of accommodation and reception services, and arrangements to permit a migrant worker who cannot be joined by his family in the country of employment to visit or be visited by his family. Consideration might be given to including appropriate provisions regarding such questions in the proposed United Nations convention.

13. Consideration might also be given to the desirability of including provisions relating to the determination of guardianship and maintenance rights in the event of separation or divorce and the enforcement in one State of judgements regarding these matters obtained in another State. Reference might be made in this connexion to the Convention of 1956 on the recovery abroad of maintenance.

14. ILO Convention No. 97 already contains (art. 9) provisions on transfer of earnings and savings to the migrant's home country.

(c) Residence status

15. Two general provisions on residence are contained in ILO standards. First, as regards admission, it is left to the competent authorities of the country of immigration to authorize admission to their territory (Convention No. 97, annex I, art. 3, para. 5 and annex II, art. 3, para. 7). Secondly, there should be minimum procedural guarantees against arbitrary expulsion (Recommendation No. 151, para. 33).

16. The existing ILO conventions also contain certain provisions regarding protection of residence of persons lawfully admitted in case of loss of employment (Convention No. 143, art. 8) and of persons admitted on a permanent basis in case of incapacity (Convention No. 97, art. 8).

17. The possibility of including guarantees against arbitrary expulsion or deportation has already been suggested in the section relating to the protection of all migrant workers and their families, whether lawfully admitted or not. Beyond this, consideration might be given to the desirability of dealing more generally with the nature and effects of residence guarantees to be accorded to migrant workers and their families or at least requiring the establishment of legislation regulating these matters.

(d) Rights in connexion with education and preservation of cultural identity

18. ILO Convention No. 143 (art. 12 (f)) requires steps to be taken to assist and encourage the efforts of migrant workers and their families to preserve their national and ethnic identity and their cultural ties with their country of origin, including the possibility for children to be given some knowledge of their mother tongue. It also provides (art. 10) for equality of opportunity and treatment as regards (inter alia) cultural rights.

19. The proposed United Nations convention might deal in greater detail with education and preservation of cultural identity. UNESCO would be the competent agency to advise on the contents of such provisions.

20. The Convention and Recommendation against Discrimination in Education, adopted by the General Conference of UNESCO at its eleventh session on 14 December 1960, already prohibit "discrimination ... based on ... national ... origin", amongst other forms of discrimination in education (art. I.1 of the Convention).

21. These instruments also require member States to "give foreign nationals resident within their territory the same access to education as that given to their own nationals" (art. 3 (e) of the Convention).

22. Under objective 1.2 of its medium-term plan for 1977-1982 (Appreciation and respect for cultural identity), UNESCO is carrying out a number of programmes, in the fields of education and the social sciences, undertaken for and with migrant workers and their associations.

(e) Rights related to the protection of health

23. In the comments submitted in response to General Assembly resolution 33/163, WHO indicated the issues in the field of health which, in its view, should be dealt with in the proposed United Nations convention (see document A/34/535, pp. 23-24). WHO would be the competent agency to advise on the contents of such provisions. It is recalled that ILO instruments contain certain provisions regarding medical examinations of migrant workers and members of their families (Convention No. 97, art. 5) and measures for the protection of migrant workers against risks to their health and safety (Recommendation No. 151, paras. 20 to 22).

Safeguards in relation to enforcement of rights

24. Consideration might be given to the inclusion in the proposed convention of provisions relating to the availability of appropriate procedures to enable migrant workers and their families to secure enforcement of the rights provided for in the convention and to measures to assist them to avail themselves of such remedies. These measures might include also measures of consular protection, in accordance with the Vienna Convention on Consular Relations of 1963.

International collaboration

25. It would be appropriate to include in the proposed convention provisions regarding collaboration among States for the purpose of implementing the convention and the conclusion for this purpose, where necessary, of bilateral or multilateral arrangements (including arrangements at the regional or subregional levels).

26. One might also envisage that some of the matters dealt with in the convention might be subject of more specific international instruments. Reference may be made in this connexion to article 23 of the Covenant on Economic, Social and Cultural Rights.

Relation to other international standards

27. As has been done in the Covenants on Human Rights and certain other United Nations instruments, it would appear appropriate to include a saving clause so that nothing contained in the convention would entitle States parties to other international instruments to take legislative measures which would prejudice, or to apply the law in such a manner as would prejudice, the guarantees provided for in such other instruments.