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REPORT OF THE ECONOMIC AND SOCIAL COUNCIL

Draft report of the Open-ended Working Group on the Elaboration
of an International Convention on the Protection of the Rights
of All Migrant Workers and Their Families

Chairman: Mr. Antonio GONZALEZ DE LEON (Mexico)

Addendum

Article 68

32. At its 5th and 6th meetings on 29 September, the Working Group had before it some proposals 1/ submitted by the delegation of India which the Working Group, at its spring session of 1983, had agreed to defer to a later stage with a view to ascertaining where they would be more appropriately covered in the draft Convention. The proposals read as follows:

- "V.3A Each contracting Party shall inspect or provide for inspection of the conditions of work of migrant workers in the same manner as for national workers, with a view to ensuring that working conditions are in keeping with standards of safety and health and principles of human dignity. Such inspection shall be carried out by the competent bodies or institutions of the State of employment and by any other authority so authorized by other respective State authorities.
- V.3B Each contracting Party shall ensure that the competent national authorities, acting within their competence, carry out inspections to ensure that standards of fitness of accommodation and other living

conditions are kept up for migrant workers as for its own nationals. In appropriate cases, such inspections shall be carried out in collaboration with the respective consular authorities.

- V.3C Each contracting Party shall, within the framework of its laws, bilateral or multilateral agreements, provide all help and assistance necessary for the transport to the State of origin of the bodies of the deceased migrant workers as a result of an accident from their employment or other economic activity.
- V.3D The States Parties would take appropriate steps in according recognition to educational and vocational qualifications acquired in States other than the State of employment. Arrangements for such recognition may be provided for, wherever necessary, in bilateral and/or multilateral agreements on equivalence of diplomas, degrees and other vocational qualifications."

33. The representative of India stressed that his proposals could be incorporated in part V, in particular in proposed article V.3 of document A/C.3/36/WG.1/CRP.1/Add.3, or article 63 as supplementary elements which would complement the provisions of part V.

34. The representative of the United States stated that some of the issues contained in the proposals by India were already covered in other parts of the Convention and some of them were already regulated by bilateral or multilateral agreements such as those prepared in the framework of UNESCO. The representative of Sweden pointed out that some of the elements contained in the proposals by India could be found in other international instruments such as the European Convention on the Legal Status of Migrant Workers. He added that, although they might be considered for inclusion in the draft Convention, he did not think that part V would be the appropriate place for them. In that connection, the representative of Italy suggested co-ordinating their contents with part III of the draft Convention. The representative of the USSR expressed his support for the inclusion of the proposals by India in part V of the Convention. In his view, those proposals contained new elements which were needed to fill the gaps of the draft Convention; therefore, they merited some attention by the Working Group and could not be excluded from part V.

35. After the discussion and informal consultations with delegations, the Chairman proposed to consolidate the Indian proposals in one single article which would be article 68 of part V of the draft Convention, reading as follows:

"(i) The States Parties shall provide measures to establish and ensure that working and living conditions of migrant workers are in keeping with the standards of fitness, safety, health and principles of human dignity. Such measures shall include inspection of the working and living premises of migrant workers by such competent authorities as designated by each State Party concerned. The said authorities shall also make recommendations for the improvement in the quality of conditions so inspected.

(ii) The States Parties shall ensure that wherever necessary, assistance is provided for the transportation of the bodies of deceased workers and that death compensation matters are promptly settled."

36. During the consideration of this new version for article 68, the representative of France proposed adding the words "if not yet provided for in their legislation" after the word "States Parties shall". The representative of the Federal Republic of Germany proposed an alternative proposal which would be put in brackets to the French proposal, reading: "[in the same manner as they do for their national workers]". The representative of Greece suggested adding the words "and members of their families" after the words "living premises of migrant workers" and in the second paragraph, to replace the term "the bodies of deceased workers" by the term "the bodies of deceased workers or members of their families". The representative of Argentina proposed replacing the word "transportation" by the word "repatriation to the State of origin". The representative of the Netherlands placed his reservation on the proposed article 68, in particular to the word "assistance" and stated that in some countries the repatriation of the body of a deceased worker was not arranged by the government authorities. Therefore he suggested that part 2 of the proposed article 68 should be restricted to an obligation for the States concerned to remove legal obstacles to the repatriation of a body.

37. The representative of the United States said that the term "assistance" was ambiguous and proposed putting the entire article 68 in brackets. He stated that the provision of that article related to consular matters and therefore should be dealt with under consular arrangements.

38. At the same meeting, the Working Group provisionally agreed at first reading to place the entire text, as revised, in brackets, pending further consideration. The text of article 68 reads as follows:

"Article 68

[(1) The States Parties shall, if not yet provided for in their legislation, [in the same manner as they do for national workers] provide measures to establish and ensure that working and living conditions of migrant workers and members of their families are in keeping with the standards of fitness, safety, health and principles of human dignity. Such measures shall include inspection of the working and living premises of migrant workers and members of their families by such competent authorities as designated by each State Party concerned. The said authorities shall also make recommendations for the improvement in the quality of these conditions.

(2) The States Parties shall ensure that, wherever necessary, assistance is provided for the repatriation to the State of origin of the bodies of deceased migrant workers or members of their families and that death compensation matters are promptly settled.]"

39. In the course of the consideration of this article, the representative of Greece submitted a proposal for consideration at the second reading, as follows:

"Article 68

The State of origin and the State of employment shall ensure and guarantee the human rights and dignity of all migrant workers and members of their families by concluding bilateral agreements or conventions and establishing procedures and mechanisms to guarantee justice and equality of treatment to migrant workers and their families."

Title for part V

40. At its 4th, 5th and 6th meetings on 28 and 29 September, the Working Group considered a title for part V of the draft Convention. In this connection, it may be recalled that, at its spring session of 1983, the Working Group decided to postpone consideration of the title of part V until completion of the articles pertaining to that part. 2/

41. For the consideration of the title, the Working Group had before it the initial title reproduced in the report of the Working Group (A/C.3/38/1) reading as follows:

Part V: Promotion of sound and equitable conditions for
international migration of workers and
their families

42. Further, the Working Group also had before it two alternative proposals respectively submitted at the spring session by the delegations of the United States and India.

43. The text submitted by the United States read as follows:

"Promotion of humane and equitable conditions for migrant workers and their families during international migration in accordance with applicable laws and regulations".

44. The text submitted by India read as follows:

"Provisions for the promotion of sound and equitable conditions for international migration and steps for the protection of the rights of all migrant workers and their families".

45. After a brief exchange of views on the proposals on the basis of the formulation of the text of the provisionally agreed article 62, the Working Group at first reading provisionally agreed on a title for part V of the draft Convention reading as follows:

"Part V: Promotion of sound, equitable and humane conditions in connection with lawful international migration of workers and their families"

46. At its sixth meeting, the Working Group thus concluded consideration of part V of the draft Convention.

Part VII: General provisions

47. At its seventh meeting on 30 September, the Working Group began consideration of part VII of the draft Convention on the basis of suggestions submitted by Finland, Greece, Italy, Norway, Portugal, Spain and Sweden (A/C.3/38/WG.1/CRP.6). The representative of Italy, in presenting the suggestions on behalf of the sponsors, stressed the need for the inclusion in the Convention of a part dealing with certain basic problems such as the relationship between the Convention and domestic law on the one hand, and other international treaties on the other. He explained that the spirit of the proposal was to enhance the most favourable conditions. He further stressed the need for States Parties to adopt necessary measures to execute the provisions of the Convention.

48. In the course of the general debate on the new suggestions, a number of representatives voiced difficulties in discussing a text which had just been tabled and on which they had been unable to consult their respective Governments. The representatives of the Federal Republic of Germany and the United States in particular reserved their position with regard to any text to which the Working Group might provisionally agree at first reading. The Working Group decided to proceed to the consideration of part VII on the understanding that those concerns would be reflected in the report.

49. At the 7th meeting, the representative of India proposed the following additional articles for inclusion in part VII: 3/

"Part VII.5

This Convention does not prevent members from concluding multilateral or bilateral agreements with a view to resolving problems arising from its application.

Part VII.6

This Convention recommends, in addition to other recommendations implicit in the Convention, supplementary agreements, the methods of (i) application of social security systems, (ii) avoidance of double taxation, (iii) evolution of model-contract procedures, (iv) transfer of migrant workers' savings and (v) validity of documents."

50. As a number of other members expressed the view that the intent behind the proposal made by India was already covered by the original suggestions for part VII, in particular article VII.1, debate on the suggestions by India was postponed until after consideration of part VII and the holding of consultations between the Chairman and interested delegations.

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Article (VII.1)

51. At its 7th meeting, the Committee considered a text for the first article of part VII on the basis of proposed article VII.1 which read as follows:

"1. Nothing in this Convention shall have the effect of diminishing or limiting any rights or freedoms that may be afforded to migrant workers and members of their families by virtue of:

(a) The law or practice of a State Party; or

(b) Any international convention, treaty or agreement in force for the State Party concerned.

2. Nothing in the present Convention may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Convention."

52. A number of drafting changes were suggested to the chapeau of the proposed article. In particular, the representative of the Federal Republic of Germany proposed to replace "Nothing" by "No provision" at the beginning of the chapeau. The representative of the United States suggested that, in the same sentence, the words "have the effect of diminishing or limiting" be replaced by "affect". The representative of Morocco proposed that the words "may be" before "afforded" be replaced by "are" and stressed that the text should be made less negative. The chapeau was then provisionally agreed upon with the suggested drafting changes.

53. Members of the Working Group also debated, with respect to subparagraph (a), whether the proposed wording was sufficiently broad. In the view of some delegations, the words "law or practice" should be further specified. The representative of the United States proposed that the phrase should read "law and practice thereunder" or "law and practice in accordance therewith" and the representative of France suggested the wording "law or practice or jurisprudence". The representative of Italy pointed out that the original suggestion covered all situations, including common-law countries, but suggested the wording "legislation, practice and jurisprudence" in order to meet the difficulties expressed. Other delegations held the view that, since the problems arose from differences in the various legal systems, they could be solved by appropriate translation of the originally suggested terms in the various languages. It was subsequently agreed to retain the original formulation with the word "legislation" in square brackets.

54. With respect to subparagraph (b), the representative of Argentina proposed that only the word "treaty" should be retained as covering any international agreement, in accordance with the Vienna Convention on the Law of Treaties. The Working Group also debated whether the subparagraph should be amended to reflect the concern expressed by the delegation of India with regard to the adoption of other treaties in future, and some suggestions were made in that respect. Most members, however, took the view that the language proposed for the subparagraph did

no preclude the adoption of other treaties in future and that it was preferable not to include the notion of the future in an international agreement. The subparagraph was therefore provisionally adopted as suggested and as amended by Argentina.

55. Concerning paragraph 2 of article VII.1, a number of delegations expressed doubts with respect to the appropriateness of the inclusion of that paragraph in the draft Convention or of some of its wording. The representative of the United States, expressing the view that the paragraph was ambiguous and could be read as abridging certain rights, such as freedom of speech, proposed the deletion of the paragraph. Alternatively, she proposed the insertion of the word "illegal" prior to "activity" and "act". The representative of Morocco proposed changing the word "right" to "possibility" in order to strengthen the paragraph. That proposal was supported by Tunisia who also proposed replacing "destruction" by "impeding the enjoyment or exercise" and deleting the last phrase beginning with "... or at their limitations ...". The representative of France proposed that the suggested article be amended by replacing the word "implying" by "authorizing" and by amending the last phrase to read "or introduce limitations based on this Convention". The Working Group then agreed to retain provisionally, in square brackets, a text based on the original suggestions as well as the amendments proposed by Tunisia and France, as further amended in the course of the debate.

56. It was further decided, on the proposal of the Federal Republic of Germany, to retain in square brackets, as an alternative proposal for paragraph 2, the text of article 17 of the European Convention on Human Rights.

57. The text of the article as provisionally agreed read as follows:

"Article (VII.1)

"1. No provision in this Convention shall affect any rights or freedoms afforded to migrant workers and members of their families by virtue of:

- (a) The law [, legislation] or practice of a State Party; or
- (b) Any international treaty in force for the State Party concerned.

2. [No provision in the present Convention may be interpreted as authorizing any State, group or person to engage in any activity or perform any act that would impair any of the rights or freedoms recognized herein [or introduce limitations based on the present Convention]]

[2. Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.]"

Article (VII.2)

58. At its 8th meeting, the Working Group considered a text for article of the draft Convention on the basis of proposed article VII.2 reading as follows:

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"The rights provided for in this Convention shall not be capable of renunciation. It shall be unlawful to exert any form of pressure upon migrant workers and members of their families with a view to their relinquishing or foregoing any of the said rights. Any agreement to relinquish or forego any of the said rights shall be void."

59. A number of delegations pointed out that the text was ambiguous in certain respects and proposed a number of changes. It was stated, in particular, that the second sentence was unclear and should be made more specific. The representative of Morocco, supported by the representative of the USSR, proposed, in that respect, to amend the sentence to read "Any form of pressure ... shall be subject to penalties". The representative of Italy proposed the wording: "No form of pressure ... shall be permitted". In his view, the actual measures to be taken would be up to each individual State Party. The representative of the United States, supported by the representative of France, held, however, that the amendments proposed did not solve the inherent ambiguity of the second sentence and proposed its deletion. It was subsequently decided to retain provisionally the two alternative formulations proposed for that sentence, together with the original suggestion, in square brackets.

60. With regard to the third sentence, a number of doubts were voiced concerning the meaning of the term "agreement". The representative of Italy, on behalf of the sponsors, indicated that the term was intended to cover all types of agreement, international or domestic. The representative of France suggested that that word be replaced by "action". The representative of the United States proposed the wording "personal service contract", amending it subsequently to read "agreement or contract the effect of which is ...". The representative of India, stating that it was insufficient to refer only to the effect of such agreement or contract, proposed the inclusion also of the word "implying". On the suggestion of the representative of Argentina, the words "Any provision in" were also inserted at the beginning of the sentence in order to clarify that only the offending provisions, and not the entire agreement, would be nullified. It was then agreed to retain provisionally the third sentence, as amended, with the proposals of India and the United States in square brackets.

61. The text of the article provisionally agreed upon read as follows:

"Article (VII.2)

"The rights provided for in this Convention shall not be capable of renunciation. [It shall be unlawful to exert any form of pressure upon migrant workers and members of their families with a view to their relinquishing or foregoing any of the said rights.] [Any form of pressure upon migrant workers and members of their families with a view to their relinquishing or foregoing any of the said rights shall be subject to penalties.] [No form of pressure upon migrant workers and members of their families with a view to their relinquishing or foregoing any of the same rights shall be permitted.] Any provision in any agreement or contract [the effect of which is] [implying] the relinquishment or foregoing of any of the said rights shall be void."

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Article (VII.3)

62. At its 8th meeting, the Working Group considered a text for article of the Convention on the basis of the proposed article VII.3 contained in document A/C.3/38/WG.1/CRP.6 which read as follows:

"Everyone whose rights as set forth in this Convention are violated shall have an effective remedy, including cases in which the violation has been committed by persons acting in an official capacity."

63. In the course of the debate, concern was expressed by a number of delegations regarding the mechanism by which remedy could be obtained. The representative of Italy, on behalf of the sponsors, expressed the view that the term "remedy" should be left broad so as to allow each legal system to use the remedies provided for within that system, on the sole condition that they be effective. The representative of Morocco suggested that the words "by way of recourse" should be inserted after "effective remedy". The representative of India proposed the following wording: "... shall have recourse to the remedies effectively available". As there was general agreement that the article, based on subparagraph (a) of article 2(3) of the International Covenant on Civil and Political Rights, was not complete, the Working Group agreed to retain provisionally a text corresponding to that of the Covenant. The words "in accordance with its constitutional processes and with the provisions of this Convention" were inserted in square brackets at the request of the representative of the United States.

64. Article (VII.3) as provisionally agreed upon read as follows:

"Each State Party to the present Convention undertakes [in accordance with its constitutional processes and with the provisions of this Convention]:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted."

Article (VII.4)

65. At its 8th meeting, the Working Group considered a text for article of the draft Convention based on the proposed article VII.4 in document A/C.3/38/WG.1/CRP.6, which read as follows:

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"States Parties undertake to adopt all necessary measures aimed at implementing the provisions of the present Convention."

66. After a brief discussion, in which the United States representative proposed to add "in accordance with its constitutional procedures" the Working Group decided to retain provisionally the following text for Article (VII.4):

"Each State Party undertakes [in accordance with its constitutional procedures and with the provisions of this Convention] to adopt the legislative and other measures that are necessary to implement the provisions of the present Convention."

Notes

1/ For further details, see the Working Group's report on its spring session (A/C.3/38/1, paras. 93-96).

2/ For further details see the report of the Working Group on its spring session (A/C.3/38/1, paras. 67 to 77).

3/ Articles in part VII have to be renumbered after the consideration of part VI.
