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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

Report of the open Working Group

Chairman: Mr. Antonio Gonzalez de Leon (Mexico)

1. The Working Group open to all Member States was established under General Assembly resolution 34/172, of 17 December 1979, to elaborate an international convention on the protection of the rights of all migrant workers and their families. 1/ On that occasion the General Assembly expressed its deep concern at the fact that migrant workers still were not exercising their rights in the sphere of work as defined by the relevant international instruments, requested the Secretary-General to give the Working Group all necessary support, with a view to facilitating the elaboration of that international convention, and invited the international organizations concerned to co-operate with a view to the elaboration of such a convention.
2. The Economic and Social Council, at its first session of 1980, mindful of the efforts which must still be made in order to protect the rights and improve the living conditions of all migrant workers and their families, decided 2/ to follow the progress of work relating to the elaboration by the General Assembly of the international convention in question.
3. The Committee on Social and Humanitarian Affairs of the General Assembly (Third Committee) convened the open Working Group, which held its first meeting on 8 October 1980, at which time it elected its Chairman unanimously.

1/ Official Records of the General Assembly, A/RES/34/172.

2/ Resolution 1980/16, of 30 April 1980.

4. Between that date and 19 November 1980 the Group held 10 meetings in which a large number of delegations, representing all regions, took part. At all times the Group had the support of the Division of Human Rights and was able to consult the Office of Legal Affairs of the Secretariat.

5. As its first task, the Group held a broad exchange of preliminary points of view on the subject of the basic rights of migrant workers and their families, which proved to be of considerable value because of the newness of the item in the context of the United Nations General Assembly. The question of migrant workers has been dealt with for years in the International Labour Organisation, but in the General Assembly, except for consideration from the purely procedural standpoint, this was the first time that delegations had the opportunity to embark on an in-depth study of the substance of the item. From the outset the participating delegations realized that at the thirty-fifth session of the General Assembly they would not be able to make great progress in dealing with the item, much less begin the work of drawing up a draft convention. Accordingly, they sought in this preliminary exchange of views to identify the essential elements which should be included in an international instrument such as that envisaged by the General Assembly.

6. When it began its work the Working Group had before it a report prepared by the Secretary-General and a document prepared by the International Labour Organisation. The report of the Secretary-General 3/ presents a survey of some international instruments in the field of human rights concerning distinctions in the enjoyment of certain rights as between nationals and individuals who are not citizens of the States in which they live.

7. The document of the International Labour Organisation 4/ refers to the possible contents of a United Nations convention on the protection of the rights of all migrant workers and their families and includes a description of rights to be accorded to all migrant workers and their families, whether lawfully admitted to the territory of the State concerned or not, and rights to be accorded to migrant workers and their families lawfully admitted to the territory of the State concerned. In the context of that second category, the document refers to 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 rights related to the protection of health. Lastly, reference is made to safeguards in relation to enforcement of rights, to international co-operation and to the relationship which should exist between the future convention on the subject and other international instruments.

8. In the light of the first stage of the general debate, the Chairman of the Working Group on 31 October 1980 sought to reflect in a working paper 5/ the main concerns which, with reference to the basic rights of migrant workers and their

3/ A/C.3/35/WG.1/CRP.1, of 30 September 1980 (annex I).

4/ A/C.3/35/WG.1/CRP.2, of 7 October 1980 (annex II).

5/ A/C.3/35/WG.1/CRP.3 (annex III).

families, emerged from the two reference documents or had been reflected in the course of the debates of the Working Group. The working paper makes a distinction between the basic human rights of migrant workers and their families, the labour rights of migrant workers and the migrant status of migrant workers and their families, and notes that for the sake of consistency it would be advisable to attempt to define, or at least to describe, the concept of 'migrant worker' and the concept of 'family'. The working paper also included some tentative ideas which should be reflected in the preamble to the future convention, and reference was made to the desirability of including in the convention a non-discrimination clause, a clause on limitation of the rights of migrant workers and a clause on the preservation of the acquired rights of migrant workers.

9. The delegation of Italy presented its views on 5 November 1980 in a working paper 6/ reflecting its Government's various preoccupations in the matter, basically in regard to provisions of general application, provisions concerning persons authorized to take up paid employment or to exercise independent activities in the territory of another State, and provisions concerning alien workers employed by foreign companies or enterprises for specified periods in a third State.

10. In turn, the Chairman of the Working Group submitted a new working paper on 12 November 1980, containing an outline for an international convention on the protection of the rights of all migrant workers and their families. This working paper 7/ includes a synthesis of the basic themes which, in his opinion, had been identified both in the reference documents and in the discussions that took place at the various meetings of the Group, and a number of suggestions are made regarding the preamble to the future convention; attention is drawn to the basic elements that should be taken into account in defining the concepts of 'migrant worker' and 'family' and a number of suggestions are made regarding the general provisions, including the limitation, non-discrimination and preservation of acquired rights clauses. Some suggestions are also made regarding the future provisions on human rights, on labour rights and on migratory status and, in conclusion, attention is drawn to certain elements which should be taken into account in drafting the final provisions of the future convention. The content of this working paper reflects the Chairman's perceptions regarding the substantive areas that became prominent during the discussions, but does not of course pre-judge in any way the final content of the convention nor is it binding individually on any delegation.

11. Lastly, the delegation of the United States of America expressed its main concerns on 19 November 1980, in a working paper 8/ in which attention is drawn to certain aspects of the matter that are of special significance to that delegation.

12. At its last meeting, the Working Group decided to attach to the present report the six documents referred to, so that, through the Secretary-General, they

6/ A/C.3/35/WG.1/CRP.4 (annex IV).

7/ A/C.3/35/WG.1/CRP.5 (annex V).

8/ A/C.3/35/WG.1/CRP.6 (annex VI).

could be transmitted to the Governments of Member States in order that they might take them into account in participating in the next stage of the work of the Working Group, when it is hoped it will not only give final approval to an outline of the future convention but also reach a meeting of minds on the drafting of the preamble and its articles.

13. The Chairman of the Working Group, in accordance with this decision, has pleasure in transmitting the documents mentioned to the General Assembly so that it may take the appropriate action.

14. Lastly, the Chairman of the Working Group wishes to convey his gratitude to all the participating delegations and representatives of the specialized agencies concerned, in particular the ILO, for their interest and active participation in this first stage of the Group's work, and expresses his hope that, during the second stage, an effective start can be made on fulfilling the mandate assigned to it by the General Assembly, that is, the drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families.

ANNEX I

A/C.3/35/WG.1/CRP.1
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Thirty-fifth session
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MEASURES TO IMPROVE THE SITUATION AND ENSURE THE HUMAN
RIGHTS AND DIGNITY OF ALL MIGRANT WORKERS

Survey of some international instruments in the field of
human rights concerning distinctions in the enjoyment of
certain rights as between nationals and individuals who
are not citizens of the States in which they live

Report by the Secretary-General

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INTRODUCTION

1. By its resolution 34/172 of 17 December 1979, the General Assembly, at its thirty-fifth session, decided to create a working group open to all Member States to elaborate an international convention on the protection of the rights of all migrant workers and their families. The Assembly requested the Secretary-General, in application of the provisions of Economic and Social Council resolution 1979/13, to give the working group all necessary support, with a view to facilitating the elaboration of the international convention on the protection of the rights of all migrant workers and their families. 1/ In order to facilitate the task of the working group, the Secretariat has prepared the present survey.
2. The survey is directed primarily at those provisions which appear to provide or to allow for "distinctions" between nationals and non-nationals. 2/ However, it has been considered necessary for understanding the over-all import of each instrument to mention briefly also the numerous provisions which seem to make no distinction whatever between these two categories of persons.
3. Part One, which follows the outline of the publication entitled Human Rights: A Compilation of International Instruments of the United Nations, 3/ deals with a number of provisions adopted by, or under the auspices of, the United Nations.
4. In Part Two, certain instruments of the specialized agencies have been given consideration, in particular, those included in the "compilation" mentioned above. Part Three refers to certain human rights instruments of regional intergovernmental organizations, while Part Four deals succinctly with the 1949 Geneva Conventions for the Protection of the Victims of War.

1/ Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 46 (A/34/46), pp. 188-189.

2/ For the purpose of this survey, the words "national" and "citizen" and "nationality" and "citizenship" have been used interchangeably, in spite of the fact that this is not necessarily the case in the legal systems of some Member States.

3/ United Nations publication, Sales No. 73.XIV.2.

PART ONE. INSTRUMENTS IN THE FIELD OF HUMAN RIGHTS ADOPTED
BY THE UNITED NATIONS OR UNDER ITS AUSPICES

I. THE INTERNATIONAL BILL OF RIGHTS

A. The Universal Declaration of Human Rights

(Proclaimed by the General Assembly in resolution 217 A (III) of
10 December 1948)

(1) Provisions of general scope ratione personae

5. Article 2, paragraph 1, of the Declaration proclaims that "everyone is entitled to all the rights and freedoms set in this Declaration without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Though nationality or citizenship are not included in this provision, both the text of the article and the debates thereon in various bodies tend to show that the enumeration was not meant to be exhaustive and that article 2 was intended to have general application. ^{4/} With the few exceptions dealt with under section 2 below, most specific rights and freedoms proclaimed in the Declaration are recognized to "everyone" without qualification. The principle of applicability to non-citizens is specially recognized in article 16 which proclaims the right of men and women to marry and to found a family "without any limitation due to race, nationality or religion".

6. While the principle of general application is basically accepted in the Declaration, it may also be relevant to consider the possible relationship between this principle and the limitation clause in article 29, according to which any limitations on the rights and freedoms proclaimed in the Declaration must be determined by law and have as a purpose solely the protection of the rights and freedoms of others and the safeguard of "morality, public order and the general welfare in a democratic society". The scope of article 29 and of all other provisions of the Declaration is itself qualified by article 30 which forbids any acts or activity aimed at the destruction of any of the rights and freedoms set forth in the Declaration.

(2) Articles which appear to draw distinctions between citizens and non-citizens

(a) Rights which appear to be restricted to citizens

7. Article 13 (2) states that everyone has the right to return to "his" country. When an amendment to provide for this right was introduced in the Third Committee,

^{4/} See in particular the report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, first session, document E/CN.4/52 and summary records of the Sub-Commission contained in documents E/CN.4/Sub.2/SR.3-6.

it was said that though the ideal would be that any person should be able to "enter" any country of his choice, the minimum requirement was that any person should be able to "return" to "his" country. No definite indication can be found in the records of the discussion in the Third Committee as to whether the words "his country" also referred to the concept of permanent residence in addition to that of nationality. 4a/

8. Article 21 recognizes the right of everyone to take part in the Government of his country and to have equal access to public service in his country. The wording of the article as well as the "travaux préparatoires" show that the provisions of this article refer only to nationals or citizens of a particular State and were not intended to include aliens. 5/

(b) Provision essentially applicable to non-citizens

9. The right "to seek and to enjoy in other countries asylum from persecution" is recognized to "everyone" by article 14, except in the case of persecutions genuinely arising "from non-political crimes or from acts contrary to the purposes and principles of the United Nations". 5a/ The addition of the words "to enjoy" in the Third Committee was explained as being for the purpose of making it clear that an individual who had been granted asylum could not be arbitrarily expelled, though in the view of some members of the Committee he could be subjected to certain restrictions imposed by the receiving State for reasons of national security or public order. 6/

B. International Covenant on Economic, Social and Cultural Rights

(Adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966; in force since 23 March 1976)

10. Article 2, paragraph 1, states that each Party shall strive to the maximum of its resources "with a view to achieving progressively the full realization of the

4a/ Official Records of the General Assembly, Third Session, Third Committee, 120th meeting. For a discussion of the corresponding provision in the International Covenant on Civil and Political Rights, see sect. C below.

5/ Official Records of the Economic and Social Council, 1947, document E/CN.4/SR.40, pp. 3 and 4; *ibid.*, 1948, documents E/CN.4/AC.1/SR.41 and E/CN.4/SR.61; Official Records of the General Assembly, Third Session, Third Committee, 133rd meeting.

5a/ For a discussion of this article in the Drafting Committee of the Human Rights Commission see document E/CN.4/AC.1/SR.36 and 37 and in the Commission see document E/CN.4/SR.56 and 57.

6/ Official Records of the General Assembly, Third Session, Third Committee, 121st and 122nd meetings. See also in this connexion article 13 of the International Covenant on Civil and Political Rights concerning the right of "everyone lawfully in the territory of a State party" not to be arbitrarily expelled therefrom. No parallel article exists in the Universal Declaration. On the other hand, the Covenants do not contain any provision on the right of asylum.

rights recognized in the present Covenant by all appropriate means ...". According to article 2, paragraph 2, "the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Article 2, paragraph 3, provides that "developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals".

11. Paragraph 2 as originally proposed by the Human Rights Commission read as follows: "The States Parties hereto undertake to guarantee that the rights enunciated in this Covenant will be exercised without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." 7/ [emphasis added]. It will be noted that the two main changes effected in the text of paragraph 2 by the Third Committee were the replacement of the word "distinction" by "discrimination" and of the expression "such as" by "as to" immediately following the words "of any kind".

12. One of the questions that arises is whether the omission of the word "such" - "notamment" in the French text - was meant to give the enumeration of the types of discrimination prohibited under the paragraph an exhaustive rather than an illustrative character, and thereby to allow for "distinctions" between nationals and non-nationals. It will be recalled that the equivalent articles in both the Universal Declaration of Human Rights (art. 2, para. 1) in the Covenant on Civil and Political Rights (art. 2 (1)) use the words "such as" in the enumeration of the types of distinctions forbidden under them.

13. When the text adopted by the Human Rights Commission was discussed in the Third Committee, 8/ the majority of the representatives were of the opinion that it would be impracticable to extend the rights guaranteed under the Covenant on economic, social and cultural rights to everybody without any "distinction" whatsoever. Some of them felt, in particular, that their countries would be justified in continuing to restrict certain rights to their own nationals, provided that such differential treatment was not unjust or arbitrary. The majority welcomed therefore a three-Power amendment 9/ which, as revised by its authors, would replace the word "distinction" in paragraph 2 by "discrimination". In the view of those representatives supporting the amendment the use of the word "discrimination" in the text of the article would prevent "arbitrary action giving rise to privilege" while allowing States sufficient latitude to make legitimate distinctions between certain categories of individuals such as nationals and

7/ Official Records of the General Assembly, Seventeenth Session, Annexes, agenda item 43, report of the Third Committee, document A/5365.

8/ Ibid., paras. 36 to 82. See also summary records of the 1181st to 1185th meetings and of the 1202nd to 1207th meetings of the Third Committee.

9/ A/C.3/L.1028/Rev.1.

non-nationals. 10/ The amendment was eventually revised a second time after the sponsors had accepted a suggestion 11/ to use in the Spanish text the phrase "sin discriminación alguna por motivos de" which was translated into English to read "without discrimination of any kind as to". 12/ There is no record of the substitution of the words "as to" for "such as" having been the object of any substantive intervention prior to the adoption of the amendment. 13/

14. Concerning the words "other status" at the end of paragraph 2, no precise indication is to be found in the "travaux préparatoires" as to their exact meaning and, in particular, as to whether they might cover the case of non-nationals.

15. The reservation contained in paragraph 3 was introduced in the Third Committee by the representatives of two developing countries. During the debate, 14/ the majority of the speakers said, in support of the clause that it was necessary, in their view, to prevent non-nationals from monopolizing the economy of developing countries. Those opposed to this provision viewed the amendment either as discriminatory against aliens and a violation of article 2, paragraph 2, or as unnecessary in view of the provisions of article 2, paragraphs 1 and 2 of the Covenant. It will be noted that the provisions of paragraph 3 of article 2 are limited to developing countries and apply only to "economic rights" as distinct from "social" and "cultural" rights.

16. In connexion with the above-mentioned debate regarding the extent to which economic rights should be granted to foreigners in developing countries, a number of representatives referred to articles 1 (2) and 25 concerning the right of peoples to self-determination, and in particular to their free enjoyment and disposal of their natural wealth and resources. It was stressed, in particular, that according to article 1 (2) in no case may a people be deprived to its own means of subsistence. 15/

10/ Third Committee, 1204th meeting.

11/ Ibid., paras. 38 and 51.

12/ A/C.3/L.1028/Rev.2. The French translation as adopted by the Third Committee read sans discrimination aucune fondée notamment sur. However, when the article was finally adopted by the Assembly, the word notamment had disappeared from the French text.

13/ The vote on the amendment was 76 to 2 with 13 abstentions.

14/ A/5365.

15/ Third Committee, 1404th to 1406th meetings. See also Official Records of the General Assembly, Twenty-first Session, Annexes, agenda item 62, report of the Third Committee, document A/6546, paras. 95-101 and 553-556.

17. Still another question that might arise concerns the extent to which the limitation clause in article 4 16/ may affect the rights of non-citizens under the Covenant.

18. All the economic, social and cultural rights set forth in the substantive articles of the Covenant are recognized to "everyone", but this work has to be read in the context of the general provisions mentioned above. It will be noted also that article 7 (a) (i) stipulates the right of everyone to fair wages and equal recommendation for work of equal value "without distinction of any kind". During the discussion at the Commission reference was made by some members to the need to ensure equality between nationals and non-nationals. 17/

C. International Covenant on Civil and Political Rights and Optional Protocol
(Adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966; in force since 3 January 1976)

(1) Provisions of general scope ratione personae

19. The scope ratione personae of the obligations imposed by the Covenant on Civil and Political Rights is defined in article 2, paragraph 1, under which each State party "undertakes to respect and ensure" the rights recognized in the Covenant to "all individuals within its territory and subject to its jurisdiction ... without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." In view of the illustrative character of this provision, it would seem that distinctions on grounds of nationality are implicitly precluded as a general rule under the Covenant.

20. Similarly, with the exceptions dealt with in sections 2 and 3 below, the specific substantive rights set forth in part III of the Covenant, are formulated in such a way as to be applicable to nationals and non-nationals alike.

21. However, certain other aspects of the Covenant may need to be considered in order to determine precisely to what extent the principle of universal application ratione personae has been embodied in that instrument. One question is whether the limitation clauses contained in many substantive articles, referring to such

16/ Article 4 provides that "States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society".

17/ A/2929, chap. VIII, para. 8. See also E/CN.4/SR.218 and 279-281. For the discussion in the Third Committee see also Official Records of the General Assembly, Eleventh Session, Annexes, agenda item 31, document A/3525, paras. 48-50.

concepts as "national security", "public order (ordre public)", "public morals" etc. ... might not be invoked in support of a refusal to grant various rights to aliens. Another question concerns the effects of article 4, which authorizes the States parties to adopt measures derogating from their obligations under the Covenant in time of public emergency "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion, or social origin". It will be noted that nationality as such is not one of the grounds listed in the non-discrimination clause, but that in accordance with article 4, paragraph 2, no derogation may be made from article 6 (right to life), article 7 (inhuman or degrading treatment), article 8, paragraphs 1 and 2 (slavery and servitude), article 11 (prison for inability to fulfil contractual obligations), article 15 (retroactive application of criminal law), article 16 (recognition as a person before the law) and article 18 (freedom of thought, conscience and religion).

22. Consideration may also be given to the provisions concerning the inherent right of all peoples to their natural wealth and resources contained in articles 1 (2) and 47 which correspond to articles 1 (2) and 25 of the Covenant on Economic, Social and Cultural Rights.

23. The provisions concerning remedies at the national and international levels appear also to be of general application. Thus article 2, paragraph 3, of the Covenant imposes the obligation on States Parties to ensure first that "any person", whose rights or freedoms recognized under the Covenant have been violated, shall have an effective remedy and secondly that "any person" claiming such a remedy shall have his right thereto determined by a competent authority.

24. Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights concerning the right of individual petition declares that States Parties to the Protocol recognize the competence of the Human Rights Committee to receive and consider communications "from individuals subject to /their/ jurisdiction" who claim to be victims of a violation by /any State Party to the Covenant and the Protocol/ of any of the rights guaranteed under the Covenant.

(2) Articles which appear to make distinctions between citizens and non-citizens

25. There was general agreement in the Commission on Human Rights that, notwithstanding the provisions of article 2, paragraph 1, the distinctions made between nationals and non-nationals in certain substantive articles of part II of the Covenant, such as article 25 on political rights which refers to "every citizen", would apply. 18/

18/ Official Records of the General Assembly, Tenth Session, Annexes, agenda item 28 (part II), document A/2929, chap. V, para. 6.

(a) Rights restricted to citizens

26. Article 25 concerning political rights recognizes the right of "every citizen" to take part in the conduct of public affairs and to have access to public service in "his" country.

(b) Rights which refer specifically to non-citizens

27. Under article 13, "an alien lawfully in the territory of a State Party has the right not to be arbitrarily expelled therefrom" and, "except where compelling reasons of national security otherwise require" to have his case reviewed by the competent authority. It may be observed that the wording of article 13 bears close resemblance to article 31, paragraph 2, of the Convention Relating to the Status of Stateless Persons and with article 32, paragraph 2, of the Convention Relating to the Status of Refugees.

(3) Articles in respect of which certain questions seem to arise concerning their applicability to non-citizens

(a) The right of everyone lawfully within the territory of a State to freedom of movement within it and the right of everyone to leave any country including one's own (article 12, paragraphs 1 to 3)

28. During the discussion in the Commission on Human Rights of the limitation clause contained in paragraph 3 of article 12 19/ several speakers felt that, among the restrictions that might be considered legitimate or necessary were those which might be imposed on immigrants as a temporary measure or on migrant workers under certain circumstances. 20/ On the other hand, in the course of the debate concerning the requirement that any restrictions should be "consistent with the other rights recognized in the present Covenant", attention was drawn to the importance of the general provisions on non-discrimination in article 2, paragraph 1, as applied to article 12. 21/

(b) The right to return to one's country (article 12, paragraph 4) 22/

29. Article 12 (4) states that "no one shall be arbitrarily deprived of the right to enter his own country". Early drafts of this paragraph discussed in the Commission on Human Rights dealt only with the right of "nationals" to enter their own countries. The present wording was eventually adopted in order to cover the

19/ Paragraph 3 states that "The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Covenant".

20/ Official Records of the General Assembly, Tenth Session, Annexes, agenda item 28 (part II), document A/2929, chap. VI, paras. 51-57.

21/ Ibid.

22/ Compare the wording of this provision with article 13 (2) of the Universal Declaration which speaks of the right of everyone to "return" to his country, in para. 7 above.

cases of States where the right of "return" was governed not only by a criterion based on nationality but also, or alternatively, by the fact of permanent residence. The word "enter" was preferred to "return", so as to include cases such as those of persons born abroad who had never been to the country of their nationality. 23/

(c) Rights relating to marriage (article 23)

30. In connexion with article 23 which covers the rights relating to marriage and in particular to the provision in paragraph 2 concerning "the right of men and women of marriageable age to marry and to found a family", it was proposed in the Commission on Human Rights to include a clause prohibiting discrimination on grounds of race, nationality or religion as in article 16 of the Universal Declaration. However, other speakers were of the opinion that in view of the comprehensive provisions of article 2, paragraph 1, which governed all articles in the Covenant, no specific non-discrimination clause was required and that any enumeration of the grounds of discrimination was dangerous since it risked omitting important elements. 24/

31. During the discussion of article 4 (2) at the eighteenth session of the General Assembly, it was argued that article 23 (then article 22) should not be subject to derogation in times of emergency, but those opposed pointed out that in many countries the marriage of a national to an alien bestowed on the alien the right to citizenship in the country of the spouse and that a State might feel obliged, for example, to bar in war time marriage between its nationals and enemy aliens. 25/

(d) Rights of children to special measures of protection (article 24, paragraph 1)

32. Article 24, paragraph 1, concerning the right of "every child" to such measures of protection as are required by his status as a minor contains a non-discrimination clause couched in the following terms "without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth". It will be noticed that the enumeration appears to be exhaustive and that nationality is not one of the grounds included in the clause. In reply to a question as to whether the words "national origin" referred to aliens, it was said on behalf of the sponsors of the draft that the words referred only to different ethnic groups within the same country. 26/

23/ Document A/2929, chap. VI, para. 60. For the discussions in the Third Committee see Official Records of the General Assembly, Fourteenth Session, Annexes, agenda item 34, document A/4299.

24/ Document A/2929, chap. VI, paras. 166-167.

25/ Official Records of the General Assembly, Eighteenth Session, Annexes, agenda item 48, document A/5655, paras. 51-53.

26/ Ibid., paras. 57-85.

(e) Equality before the law (article 26)

33. Article 26 recognizes the equality of all persons before the law and also imposes the obligation on States Parties to guarantee to "all persons" equal and effective protection "against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". As can be seen, the non-discrimination clause is couched in the same illustrative terms as article 2 (1), and therefore discrimination against non-citizens would seem to be implicitly forbidden.

34. It should be added, however, that during the discussion of the article in the Commission on Human Rights and in the Third Committee, several representatives felt that neither the restriction of political rights to citizens nor various measures to control alien property would constitute discrimination under article 26. Article 1, paragraph 2, concerning the right of peoples to permanent sovereignty over their natural wealth and resources was mentioned in this regard. In the light of such statements, suggestions to replace the word "persons" by "citizens" and to delete the term "or other status" were not maintained. 27/

(f) Rights of minorities

35. Article 27 of the Covenant deals with the rights of "ethnic, religious or linguistic minorities". There appears to have been no formal agreement that minorities in the sense of article 27 should be composed only of nationals of the State in which they live. In the course of the debates, the term "national minorities" and "every person" were rejected; 28/ it was agreed that the article should cover only separate groups, well-defined and long-established on the territory of a State while in the Third Committee the view was repeatedly stressed by many representatives from countries of immigration that persons of similar backgrounds who enter their territories voluntarily, through a gradual process of immigration, could not be regarded as minorities, as this would endanger the national integrity of the receiving State. 29/

27/ Official Records of the General Assembly, Tenth Session, Annexes, agenda item 28 (part II), document A/2929, chap. VI, paras. 180-182, and Sixteenth Session, Annexes, agenda item 35, document A/5000, para. 113.

28/ A/2929, chap. VI, para. 184.

29/ Official Records of the General Assembly, Sixteenth Session, Annexes, agenda item 35, A/5000, paras. 119-124.

II. INSTRUMENTS AIMED AT THE ELIMINATION OF
RACIAL DISCRIMINATION

A. United Nations Declaration on the Elimination of All Forms of Racial Discrimination

(Proclaimed by the General Assembly in resolution 1904 (XVIII) of 20 November 1963)

36. The Declaration as a whole is couched in comprehensive terms. Thus, for example, article 2, paragraph 1, emphatically states that "no State, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on the ground of race, colour or ethnic origin". It would seem therefore that discrimination between aliens and nationals on grounds of race is prohibited by this instrument. On the other hand there is nothing in the Declaration which would prohibit States to make distinctions between citizens and non-citizens, qua non-citizens.

37. Article 6 forbidding racial discrimination "in the enjoyment by any person of political and citizenship rights in his country" is clearly confined to citizens but discrimination on racial grounds as regards access to citizenship is specifically prohibited by article 3, paragraph 1.

B. International Convention on the Elimination of All Forms of Racial Discrimination

(Adopted by the General Assembly in resolution 2106 A (XX) of 21 December 1965; in force since 4 January 1969)

(1) General provisions

38. Article 1, paragraph 1, states that in the Convention the term "racial discrimination" shall apply to "any distinction, exclusion, restriction, or preference based on race, colour, descent or national or ethnic origin". From the text of the article it would seem that the enumeration therein is exhaustive, while the preparatory work tends to indicate that the term "national origin" was used in a historical and cultural sense distinct from the concepts of "nationality" or "citizenship". ^{30/} Such interpretation is further borne out by paragraphs 2 and 3 below.

39. Article 1, paragraph 2, lays down that the Convention "shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens. This provision does not exclude aliens from the protection of the Convention but its effect is to allow distinctions between citizens and aliens qua aliens. Paragraph 3 of article 1 further declares that laws concerning nationality, citizenship or naturalization are not affected by the Convention provided that they do not discriminate against any particular nationality.

^{30/} See for instance discussions at the Third Committee, Official Records of the General Assembly, Twentieth Session, 1304th meeting.

(2) Specific rights protected by the Convention

40. Article 5 guarantees "the right of everyone without distinction as to race, colour, or national or ethnic origin, to equality before the law" notably in the enjoyment of a series of civil and political rights spelled out in sections (a), (b), (c), (d) and (f) and of certain economic, social and cultural rights listed under section (e) of article 5. This provision must be read in conjunction with the reservation clauses in article 1, paragraphs 2 and 3.

(3) Remedies

41. Article 6 imposes the obligation on States Parties of assuring that "everyone within their jurisdiction" shall enjoy effective protection and remedies through the competent national tribunals and other State institutions, against any acts of racial discrimination contrary to the Convention. It would seem to follow therefore that a non-citizen is entitled to a remedy in the courts or other institutions of the State where the discriminatory act has taken place unless such act can be characterized as a distinction, exclusion or restriction imposed by a State, under article 1 (2) against aliens qua aliens.

42. Article 14 empowers the Committee on the Elimination of Racial Discrimination to entertain communications from individuals or groups of individuals "within the jurisdiction" of those States parties that have made a declaration recognizing the Committee's competence in this respect. 31/

C. International Convention on the Suppression and Punishment of the Crime of Apartheid 32/
(Adopted and opened for signature and ratification by General Assembly resolution 3068 (XXVIII) of 30 November 1973)

43. The provisions of the International Convention on the Suppression and Punishment of the Crime of Apartheid are applicable regardless of the nationality of the authors and victims of such a crime.

44. Article IV (b) imposes the obligation upon States Parties to adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.

31/ The provision of this article had not yet come into effect on 1 January 1980 since fewer than 10 States Parties had made such a declaration.

32/ The text of the International Convention on the Suppression and Punishment of the Crime of Apartheid is reproduced in Human Rights: A Compilation of International Instruments of the United Nations, pp. 30-32.

- D. Charter of Rights for Migrant Workers in Southern Africa
(Adopted on 7 April 1978 by the Conference on Migratory Labour in Southern Africa and endorsed by General Assembly resolution 33/162 of 20 December 1978)

45. In this Charter the representatives of States and peoples of southern Africa, recognizing that the migratory labour system is one of the major instruments of apartheid, mindful of the gross indignities it inflicts on workers, who are denied many of their basic human rights, and noting that it undermines family life and disrupts agrarian economies, pledged to strive for the abolition of the migratory labour system practised in South Africa and, pending its elimination, agreed to the Charter of Rights for Migrant Workers in Southern Africa. Thus the scope of application of the provisions of the Charter seems to be limited to nationals of southern African States supplying labour to South Africa.

III. RESPECT FOR HUMAN RIGHTS IN ARMED CONFLICTS,
WAR CRIMES AND CRIMES AGAINST HUMANITY 33/

46. The Charter of the International Military Tribunal, Nürnberg, 34/ particularly its definition in article 6 of war crimes and crimes against humanity, 35/ the Convention on the Protection and Punishment of the Crime of Genocide, 36/ and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 37/ are applicable regardless of the nationality of the authors and victims of war crimes or crimes against humanity. Similarly, the resolutions adopted by the Teheran Conference and by the General Assembly concerning respect for human rights in armed conflicts had as their aim the protection of all the victims of armed conflicts everywhere. 38/

33/ See also the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, infra, part four.

34/ The principles of international law contained in the Charter and judgement of the Nürnberg Tribunal have been confirmed by the General Assembly in resolution 95 (I) of 11 December 1946.

35/ Reproduced in document E/CN.4/906, para. 21.

36/ Adopted by the General Assembly in resolution 260 A (III) of 9 December 1948; entered into force on 12 January 1951.

37/ Adopted by the General Assembly in resolution 2391 (XXIII) of 26 November 1968; entered into force on 11 November 1970.

38/ See, in particular, resolution XXIII of the Teheran Conference and General Assembly resolution 2675 (XXV) affirming basic principles for the protection of civilian populations in armed conflicts.

IV. SLAVERY, SERVITUDE, FORCED LABOUR AND SIMILAR
INSTITUTIONS AND PRACTICES 39/

- A. Slavery Convention of 1926 and Amending Protocol
(In force since 7 December 1953);
Supplementary Convention on the Abolition of Slavery, the Slave Trade,
and Institutions and Practices Similar to Slavery
(In force since 30 April 1957)

47. These instruments appear to grant equal protection to citizens and non-citizens.

- B. Convention for the Suppression of the Traffic in Persons and of the
Exploitation of the Prostitution of Others
(Entered into force on 25 July 1951).

48. Various provisions, particularly articles 1 to 4 and 7 to 12, tend to indicate that the Convention as a whole is equally applicable to citizens and non-citizens of the States parties. Article 5 explicitly provides that domestic remedies for any of the offences referred to in the Convention shall be available to aliens on the same terms as nationals.

49. Articles 18 and 19 provide for a series of measures relating only to alien victims of prostitution, with a view to their repatriation and temporary care and maintenance.

V. INTERNATIONAL INSTRUMENTS CONCERNING NATIONALITY,
STATELESSNESS AND REFUGEES

- A. Conventions Relating to the Status of Stateless Persons and to the Status of
Refugees, and Protocol Relating to the Status of Refugees
(The Conventions entered into force on 6 June 1960 and on 22 April 1954
respectively; the Protocol on 4 October 1967)

(1) General provisions

50. Article 3 of both Conventions imposes the obligation upon States parties to apply the provisions of each Convention to stateless persons and refugees "without discrimination as to race, religion or country of origin".

51. Article 7 (1) of both Conventions provides that a Contracting State shall accord to stateless persons and to refugees the same treatment it accords to aliens generally, except where the two Conventions contain more favourable provisions. A summary of the latter provisions is contained in section (2) below.

39/ See also the Forced Labour Convention and the Abolition of Forced Labour Convention, adopted under the auspices of the International Labour Organisation below, Part Two, chap. I, sects. A and F.

52. Article 8 of both Conventions provides that stateless persons and refugees shall be exempt from exceptional measures which may be taken by a Contracting State against the nationals of a foreign State of which the stateless person or refugee was a former citizen.

53. However, according to article 9, in time of war or "other grave and exceptional circumstances", a State party may take provisional measures "which it considers to be essential to the national security in the case of a particular person - pending a determination by the Contracting State that the person is in fact a refugee (or a stateless person) and that the continuance of such measures is necessary in his case in the interests of national security".

(2) Specific provisions

(a) Provisions assimilating stateless persons and refugees to nationals

54. Article 4 of both Conventions dealing with freedom of religion and religious education goes, in fact, further than other articles in providing that the treatment accorded to refugees and stateless persons must "at least" be as favourable as that accorded to nationals.

55. The other provisions which assimilate refugees and stateless persons to nationals are as follows:

Artistic rights and industrial property	Article 14 of both Conventions
Access to courts	Article 16 " " "
Rationing	Article 20 " " "
Elementary education	Article 22 (1) " "
Right to public relief	Article 23 of " "
Labour legislation (remuneration, working conditions, compensation for death, etc.) and social security	Article 24 " " "
Fiscal charges	Article 29 (1) " "

(b) Provisions according refugees the most favourable treatment granted to nationals of a foreign country

56. These provisions are as follows:

Right of association (including freedom to join trade unions)	Article 15 of the Refugee Convention
Right to engage in wage-earning employment	Article 17 (1) of the Refugee Convention

57. Article 17 (2) of the Refugee Convention also provides for the exemption of refugees who fulfil certain conditions from some restrictive measures which may be imposed upon the employment of aliens.

(c) Provisions enjoining treatment as favourable as possible for stateless persons and refugees and, in any event, treatment not less favourable than that accorded to aliens

58. The rights so protected are:

Rights to movable and immovable property	Article 13 of both Conventions
Right of stateless persons to freedom of association (including right to join trade unions)	Article 15 of the Convention on Stateless Persons
Right of stateless persons to engage in wage-earning employment	Article 17 (1) of the Convention on Stateless Persons
Right to self-employment	Article 18 of both Conventions
Practice of liberal professions	Article 19 " " "
Right to housing	Article 21 " " "
Non-elementary public education	Article 22 (2) " "
Freedom of movement	Article 26 of " "
Changes in respect of administrative documents	Article 29 (2) " "

(d) Special provisions concerning stateless persons and refugees as such

59. These provisions concern the following matters:

Law governing the personal status of a stateless person or refugee	Article 12 of both Conventions
Administrative assistance (particularly concerning issue of certifications and documents)	Article 25 of both Conventions
Issue of identity papers	Article 27 " " "
Issue of travel documents	Article 28 " " "
Transfer of assets to country of resettlement	Article 30 " " "
Right of stateless persons and refugees lawfully in the territory of a Contracting Party not to be expelled save on grounds of national security or public order <u>40/</u>	Article 31 of Convention on stateless persons and article 32 of Convention on refugees
Provision to facilitate naturalization	Article 32 of Convention on stateless persons; article 34 of refugee Convention

40/ For a comparison with article 13 of Covenant on Civil and Political Rights, see para. 28 above.

(e) Special provisions concerning refugees only

60. These are as follows:

Provisions concerning refugees unlawfully in the country of refuge	Article 31 of refugee Convention
Prohibition of "refoulement"	Article 33 " " "

B. Declaration on Territorial Asylum
(Proclaimed by the General Assembly in resolution 2312 (XXII) of
14 December 1967)

61. The Declaration on Territorial Asylum reaffirms the provisions contained in articles 14 and 13 (2) of the Universal Declaration of Human Rights ^{41/} and provides a series of principles to guide States in their practices relating to territorial asylum. It seems clear that the Declaration specifically refers to non-citizens.

VI. INTERNATIONAL INSTRUMENTS CONCERNING THE STATUS OF WOMEN

A. Convention on the Political Rights of Women
(In force since 7 July 1954)

62. The second preambular paragraph of this Convention seems to indicate that the rights guaranteed under it do not extend to alien women.

B. Declaration on the Elimination of Discrimination against Women
(Proclaimed by the General Assembly in resolution 2263 (XXII)
of 11 December 1967)

63. The Declaration contains no explicit indication as to whether the rights proclaimed therein extend to women who are non-citizens of the country in which they live. However, the very purpose of the Declaration, which is to ensure the equality between sexes, seems to indicate that the rights and remedies which are available to male non-citizens under other international instruments and national laws should be available in equal conditions to alien women.

C. Convention on the Elimination of All Forms of Discrimination against Women
(Adopted by the General Assembly in resolution 34/180 of 18 December 1979)

64. The Convention prohibits any distinction, exclusion or restriction based on sex. It contains no specific clause indicating whether its provisions may extend to women who are not citizens of the country in which they live. However, in its preamble the Convention recalls some international instruments the provisions of which may be applicable to non-citizens, without distinction based on race, colour, sex, language, religious opinion, etc.

^{41/} See paras. 7 and 9 above.

VII. MARRIAGE, THE FAMILY AND CHILDREN

65. Neither the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 42/ nor the General Assembly recommendation on the same subject contained in resolution 2018 (XX), 43/ nor the Declaration on the Rights of the Child 44/ provide for any distinction between citizens and non-citizens. The preamble of the Convention refers to article 16 of the Universal Declaration of Human Rights which prohibits all limitations to marriage on grounds, inter alia, of nationality, while article 1 of the Declaration proclaims that "every child without any exception whatsoever" shall enjoy "all" the rights set forth in the Declaration.

VIII. WELFARE, SOCIAL PROGRESS AND DEVELOPMENT

66. Heading the Declaration on Social Progress and Development (General Assembly resolution 2542 (XXIV) of 11 December 1969) is a general non-discrimination clause in article 1 which proclaims the right of all peoples and all human beings to live in dignity and freedom and to enjoy the fruits of social progress "without distinction as to ... nationality ...".

67. Articles 2 (b) and 18 (a) (concerning the recognition and implementation of civil and political rights and of economic, social and cultural rights), 11 (f) (on the need to ensure that all individuals are aware of their rights and obligations) and 12 (b) (on the elimination of all forms of discrimination) contain non-discrimination clauses which appear to exclude implicitly discrimination against aliens.

68. Several provisions of the Declaration are specifically proclaimed as extending to "all" and to "everyone" or to "the whole or entire population". Examples are articles 6 (on the right to work), 10 (a) (on the right to work to form trade unions), 10 (d) (provisions of health protection), 10 (f) (provision of adequate housing), 11 (a) (provision of social security and insurance schemes), 19 (a) (provision of free health service) and 20 (freedom of association for all workers).

42/ The Convention came into force on 9 December 1964.

43/ See also in this connexion article 16 of the Universal Declaration of Human Rights, article 23 (2) and (3) of the Covenant on Civil and Political Rights, article 5 (d) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination, article 1 (c) (i) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, and article 6 (3) of the Declaration on the Elimination of Discrimination against Women.

44/ Proclaimed by the General Assembly in resolution 1386 (XIV) of 20 November 1959.

69. Article 19 (c) includes as a means of achieving the objectives of social progress set forth in the Declaration "the adoption of measures and the provision of social welfare services to migrant workers and their families in conformity with the provisions of ILO Convention No. 97 and other relevant international instruments". 45/

70. The Declaration on the Rights of Mentally Retarded Persons (General Assembly resolution 2856 (XXVI) of 20 December 1971) does not appear to make any distinctions either between citizens and non-citizens.

IX. PROCLAMATION OF TEHERAN

(Proclaimed by the International Conference on Human Rights
in Teheran on 13 May 1968)

71. Paragraph 1 proclaims as imperative that "the members of the international community fulfil their solemn obligations to promote and encourage respect for human rights and fundamental freedoms for all without distinctions of any kind such as race, colour, sex, language, religion, political or other opinions".

72. Paragraph 5 declares as the primary aim of the United Nations in the human rights field "the achievement by each individual of the maximum freedom and dignity". To this end "the laws of every country should grant each individual, irrespective of race, language, religion, or political belief, freedom of expression, of information, of conscience and of religion, as well as the right to participate in the political, economic, cultural and social life of his country".

73. It will be noted that the non-discrimination clause in paragraph 1 is formulated in non-exhaustive terms. On the other hand paragraph 5 refers to the right of each individual to participate without discrimination in the political, economic, cultural and social life of "his" country.

45/ For the relevant articles of ILO Convention No. 97, see paras. 77-81 below.

PART TWO: SOME HUMAN RIGHTS INSTRUMENTS ADOPTED BY THE
SPECIALIZED AGENCIES

I. SOME INSTRUMENTS ADOPTED BY OR UNDER THE AUSPICES
OF THE INTERNATIONAL LABOUR ORGANISATION

A. Forced Labour Convention (No. 29), 1930
(Entered into force on 1 May 1932)

74. Both from the definition of forced labour in article 2 and from the substantive provisions of the Convention it seems evident that the provisions of the Convention extend to citizens and non-citizens alike.

B. Freedom of Association and Protection of the Right to Organize
Convention (No. 87), 1948
(Entered into force on 4 July 1950)

75. The Convention guarantees in article 2 the right of workers and employers, "without distinction whatsoever" to establish and to join organizations of their own choosing without previous authorization.

C. Right to Organize and Collective Bargaining Convention (No. 98), 1949
(Entered into force on 18 July 1951)

76. The Convention in article 1 provides that "workers" shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. No distinction between different categories of workers is made in the Convention, whether on grounds of nationality or on any other grounds.

D. Convention No. 97 concerning Migration for Employment, (Revised 1949) 46/
(Came into force on 22 January 1952)

77. The main provisions of the Convention for the purposes of this survey are

46/ The General Assembly in resolution 2920 (XXVII) of 15 November 1972 urged Governments which had not yet done so to give high priority to the ratification of this Convention in the context of their efforts to eliminate illicit trafficking in foreign labour. On the rights of migrant workers see also *inter alia* the following ILO resolutions: Recommendation No. 86 concerning Migration for Employment (Revised 1949); Recommendation No. 100 concerning the Protection of Migrant Workers in Under-developed Countries and Territories, 1955; Resolution V concerning Action by the International Labour Organisation for Migrant Workers, 1967; Resolution VIII concerning Trade Union Rights and their Relation to Civil Liberties, 1970 (particularly operative para. 8 inviting "the Governing Body to extend and expand its efforts to eliminate the discriminatory practices on the basis of race, colour, sex, religion, nationality, political and trade union opinion which still exist in several countries, including countries and territories under a colonial régime or foreign domination in any form"); Resolution III concerning ILO Action for Promoting the Equality of Migrant Workers in All Social and Labour Matters, 1971, and Resolution IV concerning Conditions and Equality of Treatment of Migrant Workers, 1972 (referred to also in General Assembly resolution 2920 (XXVII)).

spelled out in article 6 which provides that each Party to the Convention shall accord "without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory treatment no less favourable than that which it applies to its own nationals in respect of the following matters":

- (a) Remuneration, allowances and conditions of work;
- (b) Membership of trade unions;
- (c) Accommodation;
- (d) Social security benefits subject to certain limitations;
- (e) Employment taxes, dues and contributions;
- (f) Legal proceedings relating to matters referred to in the Convention.

78. Article 8 imposes certain restrictions on the right of a State to return to his country of origin a migrant worker who has been admitted on a permanent basis on the grounds that he is unable to follow his occupation by reason of illness or injury contracted subsequent to entry, at least after a maximum of five years from the date of admission has elapsed.

79. Other articles deal with measures to facilitate the departure, and reception of migrants for employment, (art. 4) the provision of adequate medical services (art. 5) and the transfer of earnings (art. 9).

Annex II to the Convention No. 97 concerning Recruitment, Placing and Conditions of Labour of Migrants for Employment recruited under Government-sponsored Arrangements for Group Transfer

80. Article 10 provides that if the employment for which a migrant worker was recruited under article 3 of the annex has been found to be unsuitable, the competent authority of the territory of immigration shall take appropriate measures to assist him in finding alternative employment which does not prejudice national workers.

81. Article 11 provides that if the migrant for employment is a refugee and becomes redundant efforts will be made by the competent authority to obtain suitable employment which does not prejudice national workers and which will ensure his maintenance until he finds suitable employment or he is resettled elsewhere. ^{47/}

E. Equal Remuneration Convention (No. 100), 1951
(Entered into force on 23 May 1953)

82. The Convention is designed to give effect to the "principle of equal remuneration for men and women workers for work of equal value" (third preambular

^{47/} See also in this respect art. 17 of the Convention on the Status of Refugees.

paragraph) "without discrimination based on sex" (art. 1 (2)). According to article 2, States parties shall promote and, in so far as is consistent with the methods in operation for determining rates of remuneration, ensure the application to "all workers" of the above-mentioned principle. 48/

F. Abolition of Forced Labour Convention (No. 105), 1957
(Entered into force on 17 January 1959)

83. The Convention does not distinguish between citizens and non-citizens. Article 1 (e) specifically imposes upon States parties the obligation to suppress and not to make use of any form of forced or compulsory labour "as a means of racial, social, national or religious discrimination".

G. Discrimination (Employment and Occupation) Convention (No. 111), 1958
(Entered into force on 15 June 1960)

84. According to article 1 (a), for the purpose of the Convention discrimination "includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation". Article 1 (b) makes it optional for a State party to regard any other grounds of distinction as discriminatory under the Convention, "after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies".

H. Convention No. 110 concerning Conditions of Employment of Plantation Workers, 1958
(Entered into force on 22 January 1960)

85. The Convention requires in article 2 that States parties apply its provisions equally to all plantation workers without distinction as to, inter alia, nationality.

I. Equality of Treatment (Social Security) Convention (No. 118), 1962
(Entered into force on 25 April 1964)

86. This Convention provides for equality of treatment in matters concerning social security between nationals of States parties to the Convention (art. 3) without any condition of residence (art. 4) on the basis of reciprocity (arts. 3 and 7).

87. According to article 10, paragraph 1 "the provisions of the Convention apply to refugees and stateless persons without any condition of reciprocity".

48/ See in this context art. 7 (a) (i) of the Covenant on Economic, Social and Cultural Rights which recognizes the right of "everyone" to "equal remuneration for work of equal value without distinction of any kind" (para. 18 above).



J. Employment Policy Convention (No. 122), 1964
(Entered into force on 15 July 1966)

88. The Convention imposes upon States parties the obligation to adopt policies aimed at ensuring that there is work "for all who are available for and seeking work" (art. 1 (2) (a)). The right to free choice of employment is provided for in article 1 (2) (c) "irrespective of race, colour, sex, religion, political opinion, national extraction or social origin".

K. Workers' Representatives Convention (No. 135), 1971
(Entered into force on 30 June 1973)

89. The object of the Convention is to strengthen the protection of workers' representatives against any acts prejudicial to them based on their status or activities or participation in union activities (art. 1).

90. According to article 4, "national laws or regulations, collective agreements, arbitration awards or court decisions may determine the type or types of workers' representatives which shall be entitled to the protection and facilities provided for in this Convention".

L. Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)
(Entered into force on 9 December 1978)

91. The Convention comprises two parts respectively dealing with migrations due to abusive conditions and equality of opportunity and treatment.

92. As concerns the question of residence, article 8, part I, of the Convention provides that on the condition that a migrant worker has resided legally in a territory for the purpose of employment, he should not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which should not in itself imply the withdrawal of his authorization of residence, or, as the case may be, work permit. Accordingly, the migrant worker should enjoy equality of treatment with nationals in respect in particular of guarantees of security of employment, the provision of alternative employment, relief work and retraining.

93. Regarding the question of equality of opportunity and treatment, in part II of the Convention, States parties are required to pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

94. The provisions of part II of the Convention do not apply to

(a) Frontier workers;

(b) Artistes and members of the liberal professions who have entered the country on a short-term basis;

(c) Seamen;

(d) Persons coming specifically for purposes of training or education;

(e) Employees of organizations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignments.

M. Migrant Workers Recommendation, 1975 (No. 151)
(Adopted on 24 June 1975)

95. The Migrant Workers Recommendation, 1975, (No. 151), spells out the measures to be taken to ensure equality of opportunity and treatment for nationals and migrant workers. It lays down the principles of social policy to enable migrant workers and their families to share in advantages enjoyed by nationals. It recommends the adoption of provisions regarding reunification of families, protection of the health of migrant workers, and social services. It also recommends the adoption of certain minimum standards on questions relating to residence and loss of employment, which may be applicable to migrant workers as they are to nationals.

II. INSTRUMENT ADOPTED BY THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Convention Against Discrimination in Education, 1960
(In force since 22 May 1962)

96. According to article 1 (1) "for the purposes of this Convention 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education ...".

97. Article 3 specifically provides in paragraph (e) that, in order to eliminate and prevent discrimination, States parties undertake "to give foreign nationals resident within their territory the same access to education as that given to their own nationals". This clause may be read in conjunction with paragraph (c) which imposes on States parties the obligation "not to allow any differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and the grant of scholarships or other forms of assistance to pupils and necessary permits and facilities for the pursuit of studies in foreign countries".

98. Article 5 (c) recognizes the right of members of "national minorities" under certain conditions to carry on their own educational activities.

PART THREE: SOME HUMAN RIGHTS INSTRUMENTS ADOPTED BY REGIONAL ORGANIZATIONS

I. SOME HUMAN RIGHTS INSTRUMENTS ADOPTED UNDER THE AUSPICES OF
THE COUNCIL OF EUROPE

A. The European Convention on Human Rights
(Entered into force on 3 September 1953)

(1) Relevant provisions concerning the scope and applicability of the
Convention

99. Article 1 enacts that States parties "shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention".

100. Article 14 contains a non-discrimination clause to the effect that the enjoyment of the rights and freedoms set forth in the Convention "shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

101. Article 15 lays down a general derogation clause "in time of war or other public emergency threatening the life of the nation". According to paragraph 2, the clause does not apply, however, to the rights guaranteed in articles 2, (right to life), 3 (inhuman or degrading treatment), 4 (1) (slavery or servitude) and 7 (provision against retroactivity).

102. Article 16 authorizes States parties to impose restrictions on "the political activity of aliens".

(2) Remedies

103. Article 13 establishes that "everyone whose rights and freedoms under the Convention have been violated shall have an effective remedy before a national authority ...".

104. The right of individual petition to the European Commission of Human Rights is available, under the optional clause in article 25, to "any person, non-governmental organization or group of individuals" against a State party which has declared that it recognizes the competence of the Commission to receive such petitions.

105. According to article 48 (b), a High Contracting Party has the right to bring a case before the Court of Human Rights inter alia in those cases where one of its nationals is alleged to be a victim, provided that the High Contracting Parties concerned have accepted the Court's compulsory jurisdiction under article 46 (1).

B. Protocol No. 4 to the European Convention Protecting Certain Additional Rights
(Entered into force on 2 May 1968)

106. Subject to the restrictions laid down in paragraphs 3 and 4, ^{49/} article 2, paragraph 1 guarantees the right to liberty of movement and freedom to choose his residence to "everyone lawfully within the territory of a State", while paragraph 2 provides that "everyone shall be free to leave any country including his own".

107. Article 3 guarantees the right of everyone to enter and not to be expelled from the territory of the State of which he is a national.

108. The collective expulsion of aliens is prohibited by article 4.

C. European Social Charter, 1961
(Came into force on 26 February 1965)

109. The appendix to the charter provides that without prejudice to articles 12 (4) and 13 (4), the persons covered by articles 1 to 17 (which lay down the specific rights recognized by the charter) "include foreigners only in so far as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of articles 18 and 19. This interpretation would not prejudice the extension of similar facilities to other persons by any of the Contracting Parties".

110. Articles 12 (4) and 13 (4) impose concrete obligations on States parties to extend to the nationals of the other Contracting Parties certain social security benefits and social and medical assistance in case of want.

111. Under articles 18 and 19 States parties undertake to take a series of specific measures in order to ensure the effective exercise of the right to engage in a gainful occupation in the territory of any other Contracting Party (art. 18) and of the right of migrant workers and their families to protection and assistance in the territory of any other Contracting Party (art. 19).

112. The appendix also provides that in the case of refugees lawfully staying in their territory, States parties will grant to them "treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Contracting Party under the said Convention on the Status of Refugees and under any other existing international instruments applicable to those refugees".

113. Article 30 contains a derogation clause in time of war or other public emergency threatening the life of the nation.

^{49/} According to para. 3 "no restrictions shall be placed on the exercise of these rights (i.e. those provided under paras. 1 and 2) other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of 'ordre public', for the prevention of crime, for the protection of health and morals or for the protection of the rights and freedom of others". Para. 4 lays down that "the rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society".

D. The European Convention on the Legal Status of Migrant Workers
(Adopted on 24 November 1977)

114. The provisions of this Convention appear to be only applicable to migrant workers who are nationals of the member States of the Council of Europe.

115. Article 1 states that in the Convention, the term "migrant worker" shall mean a national of a Contracting Party who has been authorized by another Contracting Party to reside in its territory in order to take up paid employment. This article implicitly seems to refer to Contracting Parties of the Council of Europe.

116. While providing for the territorial scope of application of this Convention, article 35 (D) of the Convention specifies that the application of any State may extend the application of the Convention to all or any of the territories for whose international relations it is responsible or on whose behalf it is authorized to give undertakings.

E. Charter of Rights for Migrant Workers in Southern Africa
(Adopted on 7 April 1978 by the Conference on Migratory Labour in Southern Africa and endorsed by General Assembly resolution 33/162 of 20 December 1978) 50/

II. SOME HUMAN RIGHTS INSTRUMENTS ADOPTED UNDER THE AUSPICES
OF THE ORGANIZATION OF AMERICAN STATES

A. American Declaration on the Rights and Duties of Man
(Adopted by the Ninth International Conference of American States, in Bogotá, Colombia, held in 1948)

117. The Declaration contains 28 articles covering the rights to which "every person" is entitled. Article II proclaims that "all persons ... have the rights and duties established in this Declaration without discrimination as to race, sex, language, creed or any other factor".

118. None of the articles of the Declaration make any distinction between citizens and non-citizens with the exception of articles VIII and XX. Article VIII restricts the right to freedom of residence and of movement within the territory of a State and the right not to leave it except by his own will to nationals, while article XX recognizes the right of "every person" to participate in elections and in the Government of "his" country.

119. The right of "every person" to "seek and receive asylum in foreign territory in case of pursuit not resulting from ordinary crimes" is set forth in article XXVII.

50/ For consideration of the instrument mentioned here, see para. 45 above.

B. American Convention on Human Rights, 1969
(Signed at San José, Costa Rica on 22 November 1969)

120. The second paragraph in the Preamble to the Convention recognizes that "the essential rights of men are not derived from one's being a national of a certain State, but are based upon attributes of the human personality and that they therefore justify international protection ...".

(1) General provision concerning non-discrimination

121. Article 1 provides that States parties must ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms (recognized in the Convention) without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition".

(2) Specific provisions

122. Most of the specific provisions contained in chapter II which spell out the various rights guaranteed by the Convention do not distinguish explicitly between citizens and non-citizens. These articles have to be read in conjunction with the general non-discrimination clause in article 1 quoted above. The following specific provisions do distinguish between citizens and non-citizens:

(a) Provisions extending only to citizens:

- (i) Article 22, paragraph 5, concerning the right of everyone to stay and to enter the country "of which he is a national":
- (ii) Article 23 dealing with the right of every citizen to participate in Government and to have access to the public service of his country.

(b) Provisions concerning non-citizens only:

- (i) Article 22 restricting the right of a State to expel or deport aliens (paras. 6 and 8) and altogether prohibiting the collective expulsion of aliens (para. 9):
- (ii) Article 22, paragraph 7, concerning the right of asylum.

(3) Derogation clause

123. Article 27 allows, with some exceptions and under certain conditions, a State party to take measures derogating from its obligations under the Convention "in time of war, public danger or other emergency that threatens [its] independence or security".

(4) Remedies

124. Article 25 recognizes to "everyone" the right to an effective recourse to a competent court or tribunal against any acts that violate his fundamental rights recognized inter alia by this Convention.

125. Article 44 establishes the right of individual petition to the Inter-American Commission on Human Rights by "any person or group of persons" without any qualifications.

PART FOUR: THE GENEVA CONVENTIONS FOR THE PROTECTION
OF VICTIMS OF WAR, 1949

126. One of the elements common to the definitions of Protected Persons in Geneva Conventions I, II and III is that members of resistance movements in international armed conflicts, in order to benefit from these conventions, should "belong to a party to the conflict". A nationality link with a party to the conflict does not seem to be required, nor a formal recognition by such a party. Evidence of a factual relationship between resistance movements and the Government which they claim to support is, however, necessary.

127. Article 4 of Geneva Convention IV, on the Protection of Civilian Persons in Time of War, defines Protected Persons as "those who, at a given moment and in any manner whatsoever find themselves, in case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are".

128. However, article 13 provides that the provisions of part II of Convention IV "cover the whole of the populations of the countries in conflict without any adverse distinction", based, inter alia, upon nationality.

129. The status of aliens in the territory of a Party to the conflict is dealt with in part III, section II (arts. 35-46) of Geneva Convention IV.

130. Article 48 in section III concerning Occupied Territories deals with the right to leave of those persons who are not nationals of the Power whose territory is occupied.

131. Article 3, common to the four Conventions, lays down the minimum provisions which States parties shall be bound to apply in conflicts not of an international character. There is, in this provision, no explicit distinction between nationals and non-nationals.

A. Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
(Adopted on 8 June 1977, entered into force on 8 December 1978)

132. As provided in its article 1 (3), this Protocol supplements the Geneva Conventions of 12 August 1949 for the protection of war victims and applies in the situations referred to in article 2 common to those Conventions.

133. Article 9 (1) stipulates that the provisions of Part II of this Protocol with respect to the wounded, sick and shipwrecked shall apply to all those affected by a situation referred to in article 1 of this Protocol, without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.

134. The definition given in article 50 of this Protocol of the terms "civilians and civilian population in armed conflicts" seems to be broad enough to eliminate any possible distinction between nationals and non-nationals in case of armed conflicts.

135. Regarding the treatment of persons in the power of a Party to the conflict, article 75 (1) of this Protocol provides that persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. It also provides that each Party shall respect the person, honour, convictions and religious practices of all such persons.

B. Protocol II Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims in Armed Conflicts

(Adopted on 8 August 1977, it entered into force on 8 December 1978)

136. In accordance with the provisions of its first article, this Protocol, which develops and supplements article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by article 1 of Protocol I. However, this Protocol does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

137. Article 2 of this Protocol stipulates that this Protocol applies without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth, or other status, or on any other similar criteria to all persons affected by an armed conflict, as defined in article 1 of this Protocol.

ANNEX II

A/C.3/35/WG.1/CRP.2

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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.

ANNEX III

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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 WORKERSWorking paper prepared by the Chairman of the Working Group

1. An international convention on the protection of the rights of all migrant workers and their families, if it is to serve as a general framework to ensure recognition, observance and protection of such rights, should distinguish between three main areas of concern: the basic human rights of migrant workers and their families, the labour rights of migrant workers and the migrant status of both migrant workers and their families.
2. So far as the basic human rights of migrant workers and their families are concerned, to which these persons are entitled independently of their migrant status and their labour rights, five aspects should be taken into consideration: civil, political, economic, social and cultural rights, in order to extend as far as possible the principle of equal treatment and opportunities for aliens and nationals. The relevant provisions can be drawn from a multiplicity of widely accepted international instruments, such as the Universal Declaration of Human Rights, the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the United Nations Convention on the Elimination of All Forms of Racial Discrimination, as well as from other relevant conventions and documents that have emerged in ILO, UNESCO, WHO and other organs of the United Nations system and in regional organizations. This area should cover not only all aspects of individual freedom and equality before the law, but family rights and guarantees as well. Rights and obligations in this area should be considered in relation both to migrant workers and their families and to employers and authorities of the sending and receiving States.
3. With respect to the labour rights of migrant workers, which are also independent from their migrant status, the principle of equal treatment and opportunities should also be extended as far as possible. This area should mainly encompass provisions relating to recruitment, hiring and working conditions; rights of association and assembly; safety and health conditions; protection and

/...

compensation for accidents; and other related aspects. Some provisions should refer to fiscal aspects (tax payment and tax evasion, etc.), welfare services (payment of contributions, benefits therefrom, etc.) and the influence that tax and welfare payments may have on the migrant status of migrant workers. Rights and obligations in this area should be considered in relation both to migrant workers and to employers, intermediaries and local authorities.

4. Finally, in the area of the migrant status of migrant workers and their families, attention should be concentrated on questions such as definition of that status and its different categories; acquisition of rights; cancellation of work permits; family rights and family reunification; treatment of workers without documents; conditions of detention and deportation; prohibition of razzias and other forms of mass or sudden arrest; transportation conditions, etc. Rights and obligations in this area should be considered in relation both to migrant workers and their families and to local and national authorities.

5. In order to proceed thus, it would be advisable to attempt to define, or at least to describe, the concept of "migrant worker". Such a definition or description may have to be approached from a number of different viewpoints, since migrant workers may be temporarily or permanently in the receiving State; they may be alone or accompanied; they may have travelled voluntarily, involuntarily or even under duress; they may be unskilled, skilled or even professional workers; they may be organized or not organized; they may have proper documents or no documents; and they may be acting on the basis of agreements or arrangements between their own government and the government of the receiving State, on the basis of a bilateral or multilateral convention, or without any such basis. All these distinctions will have a bearing on the nature and scope of the rights and obligations both of migrant workers and their families and of governments in the sending and receiving State. At any rate, any definition or description of the "migrant worker" should take into account the fact that the main concern is persons who go from their country of origin to another country principally for the purpose of seeking or performing a legitimate and remunerated activity.

6. A definition or description of the concept of "family" in this context should also be attempted, although in view of the diversity of family systems varying from country to country, perhaps an economic approach (economic dependence) might be very useful.

7. The substantive provisions of the convention should be preceded by the necessary preambular considerations, which should include, at least:

- a recognition of the current and foreseeable size and characteristics of the flow of migrant workers in many areas of the world;
- a recognition of the beneficial effects of migrant workers in the economy of the receiving States;
- a reference to the impact of migrant workers on regional integration processes;

- an acknowledgment of the positive and negative effects of migration on the families of workers;
- an acknowledgment of the work already done on these and related matters by the various organs of the United Nations system, in particular by the Commission on Human Rights, ILO, UNESCO and WHO;
- a reaffirmation of the essential principles recognized in the principal instruments and documents on human rights.

8. It would perhaps be advisable to include a non-discrimination clause, along the lines of article 4, paragraph 2, of the Covenant on Civil and Political Rights, as well as a limitation clause similar, mutatis mutandis, to article 29 of the Universal Declaration of Human Rights.

9. Another clause on the preservation of acquired rights, similar to article 31 of the European Convention on the Legal Status of Migrant Workers would perhaps also be advisable, in order to establish that no provision (of the convention) can justify less favourable treatment than that enjoyed by migrant workers under the national legislation of the receiving countries or under bilateral or multilateral conventions to which such countries are parties.

10. Lastly, the convention should include the customary final clauses concerning signature, ratification and entry into force; denunciation and notifications, etc.

ANNEX IV

A/C.3/35/WG.1/CRP.4
5 November 1980

ORIGINAL: ENGLISH

Thirty-fifth session
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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

Working paper submitted by Italy

Introduction

1. The Working Group is charged with the preparation of an international Convention on all migrant workers and their families which should cover the generality of rights of migrant workers, political, civil, cultural, economic and social, within the context of fundamental rights and freedoms as expressed in the relevant United Nations Declaration and Covenants.
2. It has to be taken into account that ILO conventions and recommendations and other international instruments already deal with specific problems concerning the status of migrant workers, and that some specialized agencies, such as ILO, have a specific competence in this field. Therefore the proposed convention should have a wide scope, in order to cover the generality of persons staying in another country for reasons of work, and in order to cope with the whole range of problems with which these workers are confronted; on the other hand the proposed convention should essentially contain rules of general application within the context of human rights; moreover it should cover other aspects which are not sufficiently considered by existing international instruments.

In this regard, it must be added that many situations concerning migrant workers show regional peculiarities and could be best dealt with at a regional level.

Therefore the proposed convention should be intended to complete the United Nations Covenants on human rights in connexion with the specific problems concerning migrant workers and have the same character as the Covenants.

3. As far as rules of general application are concerned, it seems that fundamental guarantees should be recognized in relation to the specific situation of migrant workers: the proposed Convention should therefore provide appropriate legal protection in order to ensure non-discrimination, de facto or in law, in the enjoyment of basic freedoms and human rights for all migrant workers.

4. Special consideration should be given to situations not covered until now by existing international instruments.

In this connexion, particular attention should be given to a new kind of "migration", which is taking up a growing importance in today's world-wide economic relations and which plays a considerable role in co-operation for development: that is groups of workers, employees and technicians, nationals of one State, which move for given periods to other States in order to execute works contracted by foreign public or private companies.

Special rules should also be provided for independent workers or professionals established in other States.

Section I - Provisions of general application

5. Basic rights should be recognized with respect to all persons and their families who have entered the territory of another State, whatever the legal basis of such entrance, in order to take up in that State paid employment or to exercise independent activities or being employed by foreign contractors operating in that country, or visiting the other country for reasons of work whatever the duration of their stay.

They should be able to benefit of the protection of consular or diplomatic authorities of the State of which they are nationals and communicate with these authorities. Guarantees should be provided for in cases of arrest or detention in the course of administrative, civil and criminal proceedings, and in relation to measures of expulsion or deportation. Their access to tribunals should not be discriminated. The fundamental freedoms of thought, opinion, expression and religion, the protection of their rights to property, the safeguard against unhuman treatment and the security of their persons should also be recognized. Finally, their right to leave the country they have entered should not be subject to limitations not connected with fundamental reasons of national security, and the rights they have acquired in that country in relation to their work or employment should be protected.

Section II - Provisions concerning persons authorized to take up paid employment or to exercise independent activities in the territory of another State

6. These migrant workers and members of their families should be granted, in the receiving State, on equal terms as nationals, the benefits of those fundamental rights, as expressed in the United Nations Covenants on political and civil rights and on economic, social and cultural rights; taking into account their status of foreigners, restrictions might be therefore admissible, only in the field of political rights. However adequate measures should be taken in order to make possible their participation in decisions concerning local community life, including information, consultation and other forms of active participation to local administration, taking into account their degree of integration in the local community.

7. For salaried workers the following principles should also be emphasized:

Admission and residence in the receiving country should not be subject to such conditions which might prevent promotion of equality of treatment and opportunities of migrant workers in relation to nationals as far as conditions of work, unemployment, re-employment are concerned.

Equality of treatment should be realized in connexion with social benefits (housing, education, old age, social security, health insurance schemes), subject, wherever necessary (in particular for the reciprocal recognition of these benefits in the relevant State) to specific bilateral or multilateral agreements in these matters. The principle of equality of treatment should govern also the application of taxation laws.

Special care should be accorded to the protection of families of migrant workers, taking into account the specific problems of women and children which entails, if the family remains in the country of origin, the possibility of transferring the earnings and savings of migrant workers to this country and, if the family has been reunited in the receiving country, the adoption of specific measures in order to favour the integration of its members, in the new social environment (problems of housing, schooling, etc.).

Concerned States should also agree on measures to facilitate family reunion and in this connexion should give special attention to the problems of migrant women in order to avoid any discrimination between men and women in the access to work.

8. In relation to self-employed workers, conditions for engaging in a gainful occupation in the territory of the receiving State should be clearly defined and should lead to equality of treatment with nationals of this State, including membership in bodies of an economic or professional nature, whenever such conditions are fulfilled. Restrictions should be eliminated after given periods of residence in the receiving State, if other necessary qualifications (professional or technical) are present, it being understood that certain listed occupations may be exclusively reserved to nationals, or their exercise by aliens be subject to reciprocity or to the existence of specific agreements. The list of such occupations should be limited and subject to reductions. No charges, taxes or other duties should be imposed on foreign workers which are not required from nationals. The family of these workers should also receive adequate protection.

9. Workers who have entered illegally the territory of the receiving country and are illegally employed must be granted the fundamental rights defined in section I of this working paper, and their situation should not deprive them of the guarantees envisaged in part I of ILO Convention 143.

Section III - Provisions concerning alien workers employed by foreign companies or enterprises for specified periods in a third State

10. Besides the general guarantees envisaged in section I, the particular situation of these workers commands specific engagement on the part of the receiving State.

Their recruitment is necessarily subject to laws and regulations of the State where it is made and their work contract should be regulated, except as otherwise provided by the parties within the limits of imperative provisions of applicable law, by the law of the State where the seat of the enterprise is located.

Their stay and their professional activity in the receiving country should be guaranteed by the required authorizations for all the duration necessary for the execution of the works for which they are transferred to that country.

They should enjoy equality of rights with nationals in matters of taxation, housing, social security, protection of families, schools for children.

11. Moreover, further specific rules should apply concerning their living conditions. In fact, often the enterprise for which they work will be ready to provide houses, schools, hospitals: the receiving State should favour the installation of such facilities. Their salary might be paid in the country of origin, and social security schemes of this country might be applicable, in which cases double taxation of salary and double submission to the social security system should be avoided.

Members of the family should always be allowed to join the workers in the receiving country, during the period of his stay, for short duration visits or to live with him, if they so wish.

12. Furthermore, the protection of the person of the workers concerned would imply the acceptance of certain standards, especially in order to avoid that in civil, administrative, criminal and taxation matters, liability arising out of obligations incurred by the enterprise as such might determine any direct or indirect responsibility of its salaried personnel - as opposed to members of its governing bodies or its legal representatives. In particular, no measures entailing a deprivation of liberty or limiting the freedom to leave the host country should be admitted in these cases.

13. States should also, for the purpose of giving effect to a fuller protection of these workers, grant foreign contractors all rights and facilities provided for in their respective contract for the execution of their obligations and should avoid all measures designed to bring a prejudice to the regular development of their activities and causing damages to persons employed by such enterprises.

Final considerations

14. Principles indicated above should be considered as the appropriate basis for the elaboration of the proposed Convention on the protection of rights of all migrant workers and their families. This Convention must not prejudice the application of other relevant conventions and instruments. Its main object should be to provide the framework for more detailed international rules, to be adopted by the United Nations specialized agencies as well as by the concerned organizations and countries on a regional or bilateral basis.

ANNEX V

A/C.3/35/WG.1/CRP.5
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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

Working paper presented by the Chairman of the Working Group

OUTLINE FOR AN INTERNATIONAL CONVENTION ON THE PROTECTION OF THE
RIGHTS OF ALL MIGRANT WORKERS AND THEIR FAMILIES

In the second stage of its work, the Working Group will proceed to draft the preliminary text of a convention which should include the following elements:

Preamble

- recognition of the contemporary and foreseeable dimension and characteristics of the flow of migrant workers in many areas of the world;
- recognition of the beneficial effects of migrant workers on the economy of countries of origin and countries of destination;
- reference to the impact of migrant workers in regional integration processes;
- reference to the role of migrant workers in the context of a new international economic order;
- recognition of the positive and negative effects of migration on the families of migrant workers;
- acknowledgement of the work already accomplished on these and related matters by the various organs of the United Nations system (HRC, ILO, UNESCO, WHO, etc.) and by regional organizations;
- reaffirmation of the main principles recognized in the basic instruments and documents on human rights;

/...

- recognition of the urgency of adopting further measures to improve the situation and ensure the fundamental rights and dignity of all migrant workers and their families.

Definitions

For the purposes of the convention, a definition of two concepts is required: the concept of "migrant worker" and the concept of "family". In this respect, a combination of several approaches will be needed, since migrant workers may:

- be temporarily or permanently in the country of destination;
- be alone or accompanied;
- have travelled voluntarily or involuntarily;
- be unskilled, skilled or professional labour;
- be organized or non-organized;
- be properly documented or undocumented;
- be covered or not by a bilateral or multilateral agreement among governments;
- be under contract or independent.

In any event, the definition of "migrant worker" will refer to persons leaving their country for the purpose of seeking or performing a legitimate and remunerated activity.

In view of the diversity of family systems which vary from country to country, the definition of "family" should perhaps be based on the notion of economic dependency.

General provisions

Limitation clause, related to the national legislation and the local usage and customs of the country of destination.

Clause on non-discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, economic position, birth or any other status.

Clause on the preservation of acquired rights on the basis of existing legislation or international instruments.

Provisions on human rights

Provisions in the area of fundamental human rights should constitute a reaffirmation of all inalienable rights recognized in the basic instruments and documents in this field, including the Universal Declaration, the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Racial Discrimination.

These rights are inherent to all persons, irrespective of their migratory status, and the provisions concerning these rights should extend them to all migrant workers individually and with their families, at the place of arrival and departure, as well as en route.

Attention should be paid to the special problems of women and children, as well as to family guarantees.

Particular attention should also be paid to the possibility of massive violation of these rights with respect to migrant workers, as well as to the right of migrant workers to the consular or diplomatic protection of their Governments in the event of denial of justice.

Labour rights

Rights arising out of a labour relationship, i.e., the relationship which is established ipso facto between the worker and the employer as a result of the agreement to perform a given task in exchange for a given remuneration, are independent from the migratory status of the worker. The provisions concerning labour rights, therefore, must recognize this fact and should extend all rights in this field which have been recognized in various international instruments - mainly within the framework of the ILO - to all migrant workers, including workers who cross frontiers to go to their employment or commuters.

The convention should cover not only those who perform their work in the country of the employer, but also those who work in a third country, that is, in a country which is neither the worker's nor the employer's.

In relation to both workers and employers, attention should be paid to certain fiscal aspects (tax payment and tax evasion, etc.) and also to the effect that tax payment and welfare and social security contributions may have on the migratory status of migrant workers.

Migratory status

The determination of criteria for the admission of alien workers into a country is a matter which falls exclusively within the competence of each admitting State, and no encouragement should therefore be given to surreptitious migration. Nevertheless, the flow of undocumented migrant workers is a reality resulting from the supply and demand of manpower at the international level, and

the convention should contain some provisions, which, without legitimizing irregular migration, would aim at eliminating the violation of human rights and the jeopardizing of labour rights which may result from such irregularity.

Thus, provisions in this area should clearly establish the rights and obligations of both the migrant workers and their families, on the one hand, and Governments on the other. Migrant workers should conform to the migration legislation of the country of destination and Governments should enforce such legislation without affecting the basic human rights and labour rights acquired by migrant workers. In this context, the obligations of intermediaries or labour contractors should also be taken into consideration.

With regard to law enforcement and due and equitable process of law vis-à-vis undocumented migrant workers, the convention must include inter alia provisions on:

- migration in abusive conditions;
- conditions of detention and transfer;
- protection against arbitrary treatment;
- massive or sudden expulsion;
- conditions of voluntary departure;
- deportation proceedings;
- right of appeal and legal counsel;
- administrative and pecuniary sanctions;
- remuneration for work while in detention;
- right to visit;
- costs of expulsion or deportation.

The consequences of migratory irregularities for the families of migrant workers, and also the effect which such irregularities may have on rights acquired by workers, should also be covered in the convention.

Attention should also be paid to the co-operation that Governments of countries of origin and destination may establish with respect to conditions for the return of migrant workers to the country of origin, and also for the transfer of their wages and savings.

Final clauses

The convention should include inter alia provisions on:

- signature, ratification and accession;
- entry into force and duration;
- scope of application;
- domestic and international measures for application and follow-up of application;
- settlement of disputes on interpretation and application;
- amendments;
- denunciation;
- notification.

ANNEX VI

A/C.3/35/WG.1/CRP.6
19 November 1980

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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

Working paper presented by the United States of America

In formulating comments and recommendations regarding the drafting of a proposed international convention on the protection of the rights of all migrant workers and their families, the attention of Member States, specialized agencies and other international organizations is respectfully directed to the following considerations in addition to those set forth in United Nations documents A/C.3/35/WG.1/CRP.1, CRP.2, CRP.3, CRP.4 and CRP.5:

- (1) The necessity of adopting a concise, unambiguous definition of "migrant worker" which can be objectively applied.
- (2) The obligation of "migrant workers", however defined, to comply with the laws and regulations of both States of origin and receiving States.
- (3) The importance of avoiding overlap or conflict with existing multilateral, regional and bilateral instruments or arrangements.
- (4) The sovereign right of every State to determine and apply its own immigration laws and policies concerning admission to its territory.
- (5) The right of the competent governmental or non-governmental authorities in each State to establish procedures and standards governing admission to certain professions or trades in that State.
- (6) The need to consider with the utmost care the extent to which a convention should deal with the rights of foreign workers whose presence in a State of destination is unlawful, given the undesirability of encouraging breaches of national legislation.
- (7) The need to consider the manner in which the convention should distinguish between foreign nationals lawfully admitted by a State for the purpose of work and foreign nationals unlawfully present and working in a State.

(8) The question of the obligations of States of origin to co-operate with the labour and immigration authorities of States of destination, to take measures to monitor and regulate the movement of migrant workers at the request of States of destination, and to accept the return of their citizens found to be present illegally in another State or to have been admitted to another State only temporarily for the purpose of work.

(9) The question of the duration of migrant worker status and the criteria which the convention should set forth for determining when that status has ended.

(10) The question of whether the convention can grant rights and benefits to migrant workers which are greater than those enjoyed by citizens of a State.

(11) The question of the appropriateness of dealing in any new convention with labour standards and labour rights, which are matters within the competence and expertise of the International Labour Organisation (ILO), bearing in mind the following points:

(a) The constitutional mandate of the ILO since 1919, which includes "protection of the interests of workers when employed in countries other than their own".

(b) The competence of the ILO over all matters involving labour standards and labour rights, as opposed to matters exclusively involving human rights.

(c) The ability of tripartite committees formed at the annual ILO General Conference to draft international labour conventions reflecting the interests of workers, employers and Governments.

(d) The lengthy experience of the ILO secretariat, Committee of Experts and Conference Committee on Application of Conventions and Recommendations at implementing and monitoring labour standards, as well as the ILO's machinery for doing so through a detailed reporting system and well-established system of direct contacts with Member States.
