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REPORT OF THE ECONOMIC AND SOCIAL COUNCIL

Report of the open-ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families

Chairman: Mr. Claude HELLER (Mexico)

Vice-Chairman: Mr. Juhani LONNROTH (Finland)

INTRODUCTION

1. The Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, open to all Member States, was established under General Assembly resolution 34/172 of 17 December 1979.

2. The Working Group has since held the following sessions at United Nations Headquarters: (a) the first session, during the thirty-fifth session of the General Assembly, from 8 October to 19 November 1980; (b) a first inter-sessional meeting, from 11 to 22 May 1981; (c) a second session, during the thirty-sixth session of the Assembly, from 12 October to 20 November 1981; (d) a second inter-sessional meeting, from 10 to 21 May 1982; (e) a third session, during the thirty-seventh session of the Assembly, from 18 October to 16 November 1982; (f) a third inter-sessional meeting, from 31 May to 10 June 1983; (g) a fourth session, during the thirty-eighth session of the Assembly, from 27 September to 6 October 1983; (h) a fourth inter-sessional meeting, from 29 May to 8 June 1984; (i) a fifth session, during the thirty-ninth session of the Assembly, from 26 September to 5 October 1984; (j) a fifth inter-sessional meeting, from 3 to 14 June 1985; (k) a sixth session, during the fortieth session of the Assembly, from 23 September to 4 October 1985; (l) a seventh session, during the forty-first session of the Assembly, from 24 September to 3 October 1986; (m) a sixth inter-sessional meeting,

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from 1 to 12 June 1987; (n) an eighth session, during the forty-second session of the Assembly, from 22 September to 2 October 1987; (o) a seventh inter-sessional meeting, from 31 May to 10 June 1988; (p) a ninth session, during the forty-third session of the General Assembly, from 27 September to 7 October 1988; (q) an eighth inter-sessional meeting, from 31 May to 9 June 1989; and (r) a tenth session, during the forty-fourth session of the General Assembly, from 26 September to 6 October 1989.

3. In its resolution 43/146 of 8 December 1988, the General Assembly, inter alia, took note with satisfaction of the reports of the Working Group (A/C.3/43/1 and A/C.3/43/7) and, in particular, of the progress made by the Group and decided that, in order to enable it to complete its task as soon as possible, the Working Group should again hold an inter-sessional meeting of two weeks' duration in New York, immediately after the first regular session of 1989 of the Economic and Social Council. In paragraph 3 of the resolution, the Assembly invited the Secretary-General to transmit to Governments the reports of the Working Group so as to enable the members of the Group to continue the drafting, in second reading, of the draft Convention during the inter-sessional meeting to be held in the spring of 1989, as well as to transmit the results obtained at that meeting to the Assembly for consideration during its forty-fourth session. In paragraph 4 of the resolution, the Assembly also invited the Secretary-General to transmit those documents to the competent organs of the United Nations and to the international organizations concerned, for their information, so as to enable them to continue their co-operation with the Working Group. Further, the Assembly decided that the Working Group should meet during the forty-fourth session of the Assembly, preferably at the beginning of the session, to continue the second reading of the draft International Convention and requested the Secretary-General to do everything possible to ensure adequate secretariat services for the Working Group for the timely fulfilment of its mandate, both at its inter-sessional meeting after the first regular session of 1989 of the Economic and Social Council and during the forty-fourth session of the Assembly.

4. In pursuance of General Assembly resolution 43/146, the Working Group met at United Nations Headquarters from 26 September to 5 October 1989.

5. The session was opened by the Vice-Chairman of the Working Group, Mr. Juhani Lönnroth, who paid tribute to the late Chairman of the Working Group, Mr. Antonio González de León (Mexico), who had died on 1 September 1989. The Working Group observed a minute of silence in his memory, and the Vice-Chairman, on behalf of the Working Group, conveyed its sincerest sympathy and condolences to his family and to the Government of Mex'

6. The Working Group elected Mr. Claude Heller (Mexico) as its new Chairman. Thus the fall session of 1989 was carried out under the chairmanship of M Claude Heller and the vice-chairmanship of Mr. Juhani Lönnroth. The Working Group held 15 meetings with the participation of delegations from all regions. Observers from the International Labour Office and the World Health Organization (WHO) also attended the meetings.

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7. The Working Group had before it the following documents:

(a) Report of the Working Group on its inter-sessional meeting in the spring of 1989 (A/C.3/44/1);

(b) Text of the preamble and articles of the draft Convention provisionally agreed upon by the Working Group during the first reading (A/C.3/39/WG.I/WP.1);

(c) Text of the preamble and articles of the draft Convention adopted on second reading by the Working Group (A/C.3/44/WG.I/WP.1/Rev.1);

(d) Text of pending articles and parts of articles of the draft Convention still in brackets on second reading (A/C.3/44/WG.I/CRP.1 and A/C.3/44/WG.I/CRP.1/Rev.1);

(e) Proposals for part VII (formerly part VI) of the draft Convention, submitted by Mexico (A/C.3/43/WG.I/CRP.1/Rev.1);

(f) Letter dated 9 June 1989 from the Chairman of the Working Group, addressed on behalf of the Working Group to the Under-Secretary-General for Human Rights;

(g) Working paper submitted by Japan containing proposals for parts VIII and IX of the draft Convention (A/C.3/44/WG.I/CRP.3);

(h) Proposals for article 50 of the draft Convention submitted by Portugal and the Federal Republic of Germany (A/C.3/44/WG.I/CRP.4);

(i) Working paper submitted by Japan containing proposals relating to articles 50, 56, 62, 70, 72 and 74 of the draft Convention (A/C.3/44/WG.I/CRP.5/Rev.1);

(j) Pending articles and parts of articles of the draft Convention still in brackets on second reading (A/C.3/44/WG.I/CRP.6 and Add.1 and 2).

8. For reference the following documents were available to the Working Group:

(a) Previous reports of the Working Group (A/C.3/35/13, A/C.3/36/10, A/C.3/37/1, A/C.3/37/7 and Corr.1 and 2 (English only), A/C.3/38/1, A/C.3/38/5, A/C.3/39/1, A/C.3/39/4 and Corr.1 (English only), A/C.3/40/1, A/C.3/40/6, A/C.3/41/3, A/C.3/42/1, A/C.3/42/6, A/C.3/43/1 and A/C.3/43/7);

(b) Letter dated 3 May 1988 submitted by the International Labour Office (A/C.3/43/WG.I/CRP.2);

(c) Working paper submitted by Finland, Greece, Italy, Morocco, the Netherlands. Norway, Portugal, Spain, Sweden and Yugoslavia containing proposals for part VII of the draft Convention entitled "Application of the Convention" (A/C.3/43/WG.I/CRP.5);

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(d) Working paper submitted by Finland, Greece, India, Italy, Norway, Portugal, Spain and Sweden containing a proposed text for article 62 ter (Self-employed migrant workers) (A/C.3/43/WG.I/CRP.6);

(e) Cross-references in the draft Convention (A/C.3/40/WG.I/CRP.3);

(f) Working paper concerning self-employed migrant workers submitted by Finland, Greece, India, Italy, Norway, Spain and Sweden, subsequently joined by Portugal, containing proposals for additional provisions in article 2 and part IV of the draft Convention (A/C.3/40/WG.I/CRP.6);

(g) Letter dated 21 August 1985 from the Vice-Chairman of the Working Group addressed to the Chairman of the Working Group (A/C.3/40/WG.I/CRP.7);

(h) Working paper submitted by the United States of America containing a proposal relating to article 2 of the draft Convention (A/C.3/40/WG.I/CRP.8);

(i) Proposal by Australia for a new subparagraph of article 2, paragraph 2, of the draft Convention (A/C.3/40/WG.I/CRP.9);

(j) Working paper submitted by Denmark: revised proposal to replace article 89 in document A/C.3/39/WG.I/WP.1 (A/C.3/40/WG.I/CRP.11);

(k) Report of the Secretary-General on policies related to issues concerning specific groups: the social situation of migrant workers and their families (E/CN.5/1985/8);

(l) The observations of the International Labour Office on the text provisionally agreed upon during the first reading (A/C.3/40/WG.I/CRP.1);

(m) Comments of the Government of Colombia on the report of the Working Group (A/C.3/40/WG.I/CPR.2);

(n) Proposed text for articles 70 and 72 of the draft Convention, submitted by the delegation of Mexico (A/C.3/40/WG.I/CRP.4);

(o) Working paper submitted by Finland, Greece, Italy, Norway, Portugal, Spain and Sweden concerning the definition of "migrant workers" contained in the revised proposal for part I, articles 2 and 4, and part IV of the draft Convention (A/C.3/38/WG.I/CRP.5);

(p) Compilation of proposals made by members of the Working Group (A/C.3/36/WG.I/WP.1).

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I. ORGANIZATION OF WORK

9. At the 1st meeting, on 26 September 1989, the Chairman, speaking on the organization of the work of the Working Group, said that the Working Group would take note of the Japanese proposals regarding parts I to VII of the draft Convention submitted at the June 1989 meeting, but that would not entail a general reopening of the debate on the articles already adopted. The Japanese views would be reflected in the report as had been the practice of the Working Group.

10. At the same meeting, the representative of Japan, referring to the comments made by Japan on parts I to VII of the draft Convention, submitted by her delegation at the June 1989 meeting of the Working Group, made a general statement on the draft Convention. She stated that her Government fully understood the need for protecting migrant workers and their families, but recognized that problems concerning migrant workers varied in each country. Besides, protection was accorded by Convention No. 143 of the International Labour Organisation (ILO), although only 15 States remained at the present time parties to it. The drafting of the Convention should be such so as to warrant the broadest possible ratification; if the draft was detailed then the practicality and applicability of the Convention would be limited. Concerning article 82 on ratification, the draft Convention should also be subject to acceptance or approval and not only to ratification. The Japanese Government had difficulty in particular with the following four points: (a) the draft Convention provided for more favourable treatment for migrant workers than for nationals or other foreigners in the State of employment (see in particular art. 17, paras. 3 and 8; art. 22, para. 8; art. 27, para. 2; and art. 44). It was necessary to ensure equality of treatment with nationals; (b) in the draft there were provisions regarding the basic legal system of a sovereign State, such as penal procedures, public elections and the educational system, which required careful consideration (art. 16, para. 7; art. 17, para. 8; art. 18, para. 1; art. 19, para. 2; arts. 41, 42, 45 and 67); (c) careful consideration should be given to provisions concerning the basis of immigration control, such as article 19, paragraph 2; article 22, paragraph 4; article 33, paragraph 1; article 44, paragraphs 1 to 3; article 49, paragraph 3; article 50; article 56 and article 68; (d) the realization of some provisions of the draft Convention required positive measures by each State party. Those provisions should be improved to take into account the financial situation of each country (see, for example, art. 22, para. 8; art. 33, para. 3; art. 43; art. 45; art. 51; art. 62 and art. 69).

11. The representative of Japan added that flexibility was required for each provision of the draft Convention to enable each State party to take the necessary measures for implementing the provisions of the Convention in accordance with national laws, customs and situations.

12. The representative of Japan also pointed out that part of the questions before the Working Group were already dealt with in the International Covenant on Civil and Political Rights and the ILO Convention. Therefore, consistency with those instruments should be maintained and not be sacrificed in favour of early adoption of the Convention. Besides, the Government of Japan considered that, before the draft Convention was brought before the General Assembly, the comments of Governments must be sought and published.

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II. CONSIDERATION OF THE ARTICLES OF THE INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND THEIR FAMILIES

13. This part of the present report contains exclusively the results of the discussion on the provisions of the draft Convention still pending during the second reading. The discussion was based on proposals contained in documents A/C.3/39/WG.1/WP.1, A/C.3/44/WG.1/CRP.4, A/C.3/44/WG.1/CRP.5/Rev.1 and A/C.3/44/WG.1/CRP.6 and Add.1 and 2; on pending proposals contained in the Working Group's last report (A/C.3/44/1) and on new proposals submitted in the course of the present session.

Article 2, paragraph 2 (h)

14. At its 4th and 5th meetings, held on 27 and 28 September 1989, the Working Group took up article 2, paragraph 2 (h), as contained in document A/C.3/44/WG.1/WP.1/Rev.1 and which was also reproduced in document A/C.3/44/WG.1/CRP.6, as follows:

> "(h) [The term "self-employed worker" refers to a person who engages in a remunerated activity otherwise than under a contract of employment and who shall be considered a migrant worker when he or she earns his or her living through this activity in a State of which he or she is not a national [normally working alone or together with members of his or her family].]"

> "(h) [The term "self-employed worker" refers to a person who engages in a remunerated activity otherwise than under a contract of employment and who shall be considered a migrant worker when he earns his living through this activity in a State of which he is not a national [normally working alone or together with members of his family].]"

15. The Working Group also had before it a text for paragraph 2 (h) of article 2 which had emerged from informal consultations at the Working Group's last session, in June 1939, and which was contained in paragraph 8 of the Group's report (A/C.3/44/1), reading as follows:

> "The term 'self-employed worker' refers to a migrant worker engaged in a remunerated activity otherwise than under a contract of employment and who earns his living through this activity normally working alone or together with members of his family, and to any other migrant worker recognized as self-employed by applicable legislation of the State of employment or bilateral or multilateral agreements."

16. At that session the Working Group noted that there had been a consensus in informal consultations. However, since some delegations had no final instructions concerning the adoption of the proposals, the Working Group decided to postpone their adoption to the present session. The Vice-Chairman invited the delegations to indicate whether they now were able to accept the text based on informal consultations.

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17. The representative of Australia pointed out that the words "who is" should be inserted between the words "worker" and "engaged" in the first line of the paragraph.

18. The representative of Japan stated that her delegation did not see a major difference between the first proposal and the text which had emerged from the informal consultations. She added that since ILO Convention No. 143 did not cover self-employed workers and that the purpose of the Convention was to protect migrant workers and not workers who might become rich employers, her delegation would propose the deletion of paragraph 2 (h) of article 2 together with paragraph 4 of article 52 and article 62 ter, which also dealt with self-employed workers.

19. The representative of France stated that while, after careful consideration, his delegation was inclined to join the consensus, it would still welcome clarification on the proposed text.

20. The representative of Algeria, while sharing the concern expressed by the delegation of Japan, stated that her delegation had expressed similar views at the outset of the drafting of the Convention. Despite the efforts made to reach a consensus, her delegation still continued to have some doubts about the provisions for the protection of categories of persons whose migrant worker status could legitimately be challenged. Clearly, the purposes and objectives of the present Convention were not to protect employers.

21. The representative of Morocco stated that after further consideration of the proposal, her delegation also continued to have some doubts about the inclusion of the proposal for paragraph 2 (h) in the Convention. She recalled that in recommending the drafting of the Convention, one of the major objectives of the Sub-Commission on Prevention of Discrimination and Protection of Minorities was to prevent exploitation of workers. In allowing a migrant worker to become an employer of other migrant workers, the proposal did not provide any guarantees for preventing exploitation of other workers. In her view, the proposal was too broad and needed further improvement. She suggested the deletion of the word "normally", which in the French version had been placed before the term "earns his living". She felt that in that context the expression "earns his living" should be precisely defined and that there was a need to specify that the self-employed worker would not become an employer and that members of his family would not become his employees, who could be exploited by him.

22. The representative of Italy said that although migrant workers were perceived as workers depending on employers, it was a fact that there were in a number of countries a considerable number of people working as self-employed workers. Therefore they should be entitled to some of the rights granted to migrant workers.

23. The representative of the Federal Republic of Germany stated that his delegation also shared the concern expressed by some delegations about including the proposal for paragraph 2 (h) of article 2 in the Convention. He said that it would be difficult to include in the definition a formula which would refer to the exploitation of the family members of the self-employed worker. He added that if such a proposal were to be adopted he would request that his opposition be reflected in the report.

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24. The representative of the United States said that his delegation did not have any strong feeling about including or excluding self-employed workers. However, he felt that the exclusion of self-employed workers on the mere ground that they were working together with a small number of persons other than members of their families would do a disservice to the present Convention.

25. At its 5th meeting, on 28 September 1989, the Working Group resumed consideration of paragraph 2 (h) of article 2.

26. The Vice-Chairman explained that certain delegations had been reluctant to join a consensus in support of the adoption of the provision owing to a discrepancy between the English and French versions of the text under consideration. He stated that in the French text (A/C.3/44/1, para. 8), placement of the word "normalement" before the words "sa subsistence", which suggested that a self-employed worker would be able to derive his income from a variety of sources, was incorrect. He referred to the English version of the text, indicating that this was the original text, and stated that the text was meant to mean that a self-employed worker should earn his living only through his self-employment and normally working alone. He could, however, also work together with his family members and, only if the legislation of the State of employment so permitted, with some other persons. He proposed that the Working Group should adopt the text with the understanding that the intent of the text as drafted was to protect those of a low income and not wealthy investors and that the term "family members" was to be used as defined in article 4 of the draft Convention as adopted during the second reading.

27. In view of the explanation by the Vice-Chairman, the representatives of France and Morocco, who had not been willing to join a consensus, expressed support for the text in the original English version.

28. The representative of the Federal Republic of Germany said that his delegation continued to oppose the application of the Convention to self-employed workers and to the other categories enumerated in article 2, paragraph 2. However, since the Working Group had reached a consensus on the definition of those self-employed workers who, under article 2, paragraph 2 (h), should fall within the scope of the Convention, his delegation, in order not to block the consensus and as it had done with the other categories of that same paragraph, would be satisfied with having its position reflected in the report. Nevertheless, he wished to call the Working Group's attention to the need for clarification of the definition contained in article 2, paragraph 2 (h). If the Working Group intended that the Convention should apply, in the manner to be specified in article 62 _ter_, solely to those self-employed workers meeting the criteria set forth in article 2, paragraph 2 (h) and should exclude any self-employed workers not meeting those criteria, then it was his opinion that such a distinction should be expressly stated. Otherwise, the present wording might give rise to the absurd conclusion that by virtue of the very broad definition of a migrant worker contained in article 2, paragraph 1, the Convention as a whole would apply to self-employed workers who did not meet the criteria in article 2, paragraph 2 (h), while those self-employed workers who met those criteria would be subject only to the provisions set forth in article 62 _ter_. As the Working Group did not share his view concerning the need for such an addition, the representative of the Federal Republic of Germany, not wishing to block the consensus, was content to have his proposal reflected in the report.

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29. The representative of Australia expressed support for the question raised by the representative of the Federal Republic of Germany and agreed that article 3, paragraph (f), should be amended to take account of it.

30. In connection with the issue raised, the Vice-Chairman indicated that he was of the view that paragraph (f) of article 3 should cover the situation. Self-employed workers other than those indicated in the definition (art. 2, para. 2 (h)) would not be covered by the Convention unless specifically included in accordance with the national legislation of the State of employment. The representative of Italy stated that article 57 as adopted during the second reading indicated that only migrant workers who were documented or in a regular situation would enjoy the rights set forth in part III of the Convention. He pointed out, therefore, that no one could benefit from being a self-employed worker unless their host country had accorded them such status.

31. Following the adoption of the provision the representative of Japan put on record that her delegation was of the view that the draft Convention should not extend to self-employed workers.

32. The Working Group thus decided to adopt paragraph 2 (h) of article 2 on second reading.

33. The text of paragraph 2 (h) of article 2, as adopted during the second reading, reads as follows:

Article 2

2. ...

...

(h) The term "self-employed worker" refers to a migrant worker who is engaged in a remunerated activity otherwise than under a contract of employment and who earns his living through this activity normally working alone or together with members of his family, and to any other migrant worker recognized as self-employed by applicable legislation of the State of employment or bilateral or multilateral agreements.

Article 3, paragraph (f)

34. As a consequence of the adoption of paragraph 2 (h) of article 2 of the draft Convention, the Working Group reverted to paragraph (f) of article 3 at its 5th and 13th meetings, on 28 September and 4 October 1989. The text of paragraph (f) of article 3, which the Working Group had left pending in brackets and which was contained in document A/C.3/44/WG.1/WP.1/Rev.1, reads as folows:

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"Article 3

"The present Convention shall not apply to:

"...

"[(f) Self-employed workers.]"

35. The representative of the Federal Republic of Germany proposed that article 3, paragraph (f) should read:

"(f) Self-employed workers other than those referred to in article 2, paragraph 2 (h) of the Convention."

36. In view of the Working Group's adoption of a new paragraph 2 (h) of article 2 of the draft Convention and decision, delete the whole of article 60 relating to seafarers (see paras. 107-125 below), the Group decided to delete paragraph (f) of article 3 of the draft Convention as it stood.

37. At its 12th meeting, on 4 October 1989, the Working Group took up further consideration of paragraph (f) of article 3.

38. The Chairman read out a text of a proposed new paragraph (f), which had emerged from informal consultations as follows:

"(f) Seafarers and workers on an off-shore installation who have not been admitted to take up residence and engaged in a remunerated capacity."

39. The representative of Finland indicated that the attempt to add a further paragraph to article 3 was a departure from the established practice of the Working Group to extend the scope of the Convention to protect the right of as many categories of migrant workers as possible. He indicated that he would not be in a position to support the adoption of the text until he had received instructions from his Government. The Working Group decided to postpone the decision on the adoption of the provision until all delegations were in a position to respond.

40. After further informal consultations, the Working Group, at its 13th meeting, adopted a new paragraph (f) for article 3.

41. The representative of the Federal Republic of Germany stated that, while his delegation continued to oppose the application of the Convention to all categories of seafarers and workers on an offshore installation, it would not oppose the consensus provided its position was reflected in the report.

42. The representative of Japan placed on record the reservations of her delegation on paragraph (f) of article 3 for the reason that seafarers should be excluded from the draft Convention.

43. The Observer for the International Labour Office (ILO) stated that the solution finally adopted by the Working Group concerning the application of the

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Convention to seafarers, had naturally led him to refer to the position adopted by the supervisory bodies of the International Labour Organisation on the application to seafarers of the provisions of Convention No. 111 concerning Discrimination in Respect of Employment and Occupation (1958). The Committee of Experts on the Application of Conventions and Recommendations considered that, in order to determine whether distinctions in employment and occupation based on nationality or place of residence come within the criteria of discrimination prohibited under that Convention (*inter alia*, national extractio , they should be examined on a case-by-case basis in the light of their practical implications. The Committee of Experts also concluded recently that the possibility of applying separate collective agreements establishing different wage levels, depending on the nationality of the seafarers employed on ships flying the flag of a country of which they are not residents, establishes discrimination against non-resident non-citizens on grounds of national origin and hence introduces discrimination in treatment contrary to the Convention. The exclusion set forth in paragraph (f) of article 3 was therefore contrary to the general ILO international labour standard concerning discrimination in employment.

44. The text of new paragraph (f) for article 3 as adopted on second reading by the Working Group reads as follows:

> Article 3
>
> ...
>
> (f) Seafarers and workers on an off-shore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employment.

Paragraph 3 of article 43

45. As a result of the informal consultations relating to article 62 *bis* and following its adoption (see paras. 141-150 below), the Working Group at its 13th meeting, on 4 October, adopted a new paragraph 3 for article 43.

46. The representative of Japan stated that her delegation wished to keep the words "whenever appropriate" in paragraph 3 of article 43.

47. The representative of the Federal Republic of Germany stated that his delegation would join the consensus in adopting paragraph 3 of article 43 only if it was not interpreted as imposing upon the employer an obligation to build the institutions referred to in the paragraph.

48. Regarding paragraph 3 of article 43, the representative of Finland explained that the earlier proposal for paragraph 3 would be deleted and a new proposal for that paragraph adopted.

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49. The text of paragraph 3 of article 43 as adopted by the Working Group on second reading reads as follows:

Article 43

...

3. States of employment shall not prevent an employer of migrant workers from establishing housing or social or cultural facilities for them. Subject to article 69, a State of employment may make the establishment of such facilities dependent on the same requirements concerning their installation as generally apply in that State.

Article 50

50. The Working Group considered article 50, which had been left pending from its 1st to 10th meetings, from 26 September to 2 October 1989. The following proposals of the Mediterranean and Scandinavian (MESCA) group, India, Canada, Italy, the Union of Soviet Socialist Republics, Egypt and the Chairman, as well as an informal consensus text, were before the Working Group (A/C.3/44/WG.1/CRP.6).

A. Text of article 50 proposed by the Mediterranean and Scandinavian (MESCA) group of countries

"[1. Members of the families of migrant workers who have been residing with the migrant worker in the State of employment shall not be regarded as in an irregular situation in the case of death of the migrant worker or divorce or separation.

"[2. States of employment shall favourably consider granting to these family members authorizations to stay at least during the remaining period of the migrant workers' relevant authorizations and in this respect take into account the length of time for which they have already resided in that State.]"

B. Proposal by the representative of India to merge paragraphs 1 and 2

"[Members of the families of migrant workers who have been residing with the migrant worker in the State of employment shall be permitted to stay during the remaining period of the migrant worker's relevant authorization in the case of the death of the migrant worker or divorce.]"

C. Proposal by Canada to combine paragraphs 1 and 2

"[As a result of the death, separation or divorce of a migrant worker, the State of employment shall favourably consider, on humanitarian grounds, granting the members of the family of such migrant worker permission to remain

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for a reasonable period of time, taking into account the length of time for which they have already resided in that State.]"

D. Text which had emerged as a result of informal consultations

"[States of employment shall, in case of the death of a migrant worker, divorce or separation according to applicable law, give favourable consideration to granting the members of the family of the migrant worker permission to stay. If such permission is not granted, they shall be given a reasonable period of time before departure to settle their affairs in the State of employment.]"

E. Text of article 50 proposed by Italy

"[Members of the families of migrant workers who have been admitted to reside with the migrant worker in the State of employment in consideration of family reunion (or in application of article 44) shall not be regarded as being in an irregular situation as a result of the death of the migrant worker or divorce or separation. To this effect, States shall favourably consider granting these family members authorizations to stay at least during the remaining period of the migrant worker's relevant authorizations and, in this respect, take into account the length of time for which they have already resided in that State.]"

F. Proposal by the USSR for paragraph 1

"[In case of the death of the migrant worker or divorce or separation, the authorities of the State of employment should not take that opportunity to resort to the expulsion of family members.]"

G. Proposal by Egypt for paragraph 2

"[States of employment shall grant these family members authorizations to stay at least during the remaining period of the migrant workers' relevant authorizations.]"

H. Proposal by the Chairman in an effort to reach consensus

"[States of employment shall, in the case of death of a migrant worker, divorce or legal separation, according to applicable law, give favourable consideration to granting permission to stay to the members of the family of the migrant worker [taking especially into account the length of time for which they have already resided in the State of employment]. If such permission is not granted, they shall be given, before departure, a reasonable period of time to settle their affairs in the State of employment.]"

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51. The following proposals of Portugal and the Federal Republic of Germany were contained in document A/C.3/44/WG.1/CRP.4:

A. New proposal for article 50 submitted by Portugal

"1. Wherever not granted otherwise, a State of employment shall in the case of death of a migrant worker or divorce or separation according to applicable law, give favourable consideration to granting the members of the family who are documented or in a regular situation as regards their stay in the State of employment permission to stay and/or work, taking especially into account the length of time they have already resided in that State.

"2. Members of the family to whom such permission is not granted shall be allowed, before departure, a reasonable period of time to settle their affairs in the State of employment."

B. New proposal for article 50 submitted by the Federal Republic of Germany

"If a migrant worker authorized to stay permanently in the State of employment dies, or is divorced or legally separated according to the applicable law, the State of employment shall give favourable consideration to granting the members of the family of the migrant worker who have resided legally in its territory for a prescribed period of time, or who were born there, permission to stay. The granting of such permission may be made conditional upon the persons in question being able to support themselves without recourse to the social assistance of the State of employment. If such permission is not granted, the family members shall be given, before departure, a reasonable period of time to settle their affairs in the State of employment."

52. At the same meeting the representative of Algeria proposed the following text for article 50:

"1. The provisions of this article may not be interpreted as adversely affecting, in the case of death of the migrant worker, any right to stay and work granted the members of his family by the legislation of the State of employment or by bilateral or multilateral agreements in force.

"2. States in which such a right is not granted shall give favourable consideration to granting the members of the family of the migrant worker permission to stay. If such permission is not granted, the family members shall be given, before departure, a reasonable period of time to settle their affairs in the State of employment."

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53. The following proposal by Japan was contained in document A/C.3/44/WG.1/CRP.5/Rev.1:

> "States of employment shall, in the case of death of a migrant worker, divorce or legal separation, according to applicable law, give favourable consideration to granting the members of the family who are in a regular situation (in lawful status) of the migrant worker permission to stay during the remaining period of their authorization."

54. The representative of the Federal Republic of Germany drew attention to an error in the French text of document A/C.3/44/WG.1/CRP.6, namely the word "irregulière" in the title for part IV should be replaced by the word "regulière".

55. The representatives of the Federal Republic of Germany and Finland, referring to the Algerian proposal, stated that they would prefer a reference in article 50 not only to the case of death of the migrant worker but also to cases of divorce or legal separation. The representative of Italy suggested the expression "in case of dissolution of marriage". Regarding paragraph 1 of the Algerian proposal, he pointed out that article 78 of the draft Convention already adopted on second reading was indeed a general clause covering similar cases and should not be repeated. That view was shared by the representative of the USSR.

56. The Working Group continued discussion on article 50 at its 3rd meeting, on 27 September 1989. The Chairman announced that after informal consultations the following text had emerged:

> "<u>Article 50</u>
>
> "1. In the case of death of the migrant worker or dissolution of marriage the State of employment shall favourably consider granting family members of such migrant worker residing in that State on the basis of family reunion an authorization to stay; the State of employment shall take into account the length of time for which they have already resided in that State.
>
> "2. Members of the family to whom such authorization is not granted shall be allowed before departure a reasonable period of time to settle their affairs in the State of employment.
>
> "3. The provisions of the preceding paragraphs may not be interpreted as adversely affecting any right to stay and work otherwise granted to such family members by the legislation of the State of employment or by treaties applicable to that State."

57. The representative of the Federal Republic of Germany stated that the text of paragraph 1 of that text should clearly indicate that both the migrant worker and the members of his family should have resided legally in the State of employment and that the members of the family should not be dependent on social assistance, which were aspects of his proposal contained in document A/C.3/44/WG.1/CRP.4. While he maintained his proposal in that regard, in a spirit of co-operation, he would not oppose a consensus. He had also endorsed paragraphs 2 and 3 of the informal consensus text that the Chairman had read out.

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58. The representative of Finland, referring to paragraph 1 of the informal consensus text, said that reference should also be made to legal separation.

59. Following these discussions the Working Group deferred article 50 for further informal consultations.

60. At its 10th meeting, on 2 October 1989, the Working Group resumed consideration of article 50. The Working Group had before it a new proposal submitted by Algeria and Morocco reading as follows:

> "In the case of death of the migrant worker, divorce or separation, the right to stay and work enjoyed by the members of his family under the legislation of the State of employment or under bilateral or multilateral agreements in force shall not be adversely affected."

61. The Working Group also had before it an amendment submitted by Algeria and Morocco relating to paragraph 2 of the proposal by Portugal contained in document A/C.3/44/WG.1/CRP.4. The amendment reads as follows:

> "States in which such a right is not enjoyed shall give favourable consideration to granting the members of the family of the migrant worker permission to stay in the country. If such permission is not granted, the members of the family of the migrant worker shall be given, before departure a reasonable period of time to settle their affairs in the State of employment."

62. In submitting this proposal, the representative of Algeria had considered it unnecessary to dwell on the reasons behind the amendment inasmuch as the Working Group had considered the question at length and all its members were familiar with the views expressed by her delegation. She had wanted to point out that, in the view of the sponsoring delegations, there was no need for such a clause in the Convention since the diversity of situations in many countries obviously could not be covered by too general a text that might have adverse effects on the situation of migrant workers' families. She emphasized the spirit of compromise of the Moroccan and Algerian delegations in arriving at a consensus text, but felt that the Working Group should be induced to acknowledge its failure to reach agreement and consider excluding such a provision.

63. The representatives of Australia and the United States sought clarification as to whether the new proposal by Algeria and Morocco would replace the entire article 50 and, if not, how it would relate to the text of article 50 that had emerged from the informal consultations.

64. The representative of the Federal Republic of Germany, in pointing out the difference between the proposal of Algeria and Morocco and the text that had emerged from the informal consultations, stressed the need to have a clearer text and to include the clause contained in paragraph 3 of the text which had emerged from the informal consultations.

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65. The representative of Italy said that the new proposal submitted by Algeria and Morocco was quite different from the text that had emerged from the informal consultations. He pointed out that there was an important element missing in the new proposal, namely that, in case of death of the migrant worker, the State of employment should consider favourably granting an authorization to stay to the family of the migrant worker.

66. The representatives of the Netherlands and Finland stated that the proposal was too vague but if it was to be considered as an addition to the text that had emerged from the informal consultations, their delegations would be ready to discuss it further.

67. After some discussion, the Working Group decided to defer article 50 to a later stage.

Article 52, paragraph 4

68. At its 5th meeting, on 28 September 1989, the Working Group took up consideration of paragraph 4 of article 52 on the basis of the text contained in document A/C.3/44/WG.1/WP.1/Rev.1. The text read as follows:

> "[4. States of employment shall prescribe the conditions under which a migrant worker who has been admitted to take up employment may be authorized to engage in work on his or her own account and vice versa. Account shall be taken of the period during which the worker has already been lawfully in the State of employment.]"

69. The Vice-Chairman drew the attention of the Working Group to the report on one of its previous sessions (A/C.3/43/1, para. 109) in which it was indicated that the contents of proposed paragraph 4 of article 52 had been decided upon but that the final adoption of the provisions had been left pending until it was known whether the Convention would cover self-employed workers or not.

70. In view of its decision to adopt paragraph 2 (h) of article 2, the Working Group decided to adopt paragraph 4 of article 52 without brackets.

71. Following the adoption of the provision, the representative of Japan indicated that, consistent with its views on article 2, paragraph 2 (h) that self employed workers should not be covered by the Convention, her delegation wished its reservation to paragraph 4 of article 52 reflected in the report. The representative of the Federal Republic of Germany indicated that, although he had not opposed the adoption of paragraph 4 of article 52, his delegation was still of the view that the Convention should not extend to self-employed workers.

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72. The text of paragraph 4 of article 52, as adopted during the second reading reads as follows:

Article 52

...

4. States of employment shall prescribe the conditions under which a migrant worker who has been admitted to take up employment may be authorized to engage in work on his own account and vice versa. Account shall be taken of the period during which the worker has already been lawfully in the State of employment.

Article 54, paragraph 2

73. At its 13th meeting, on 4 October 1989, the Working Group decided to adopt a second paragraph for article 54.

74. The representative of Algeria reiterated her objection in principle in connection with article 62, and requested that the report should reflect her delegation's consent to moving the provision under consideration to article 54 so as not to obstruct the compromise that had emerged from the informal consultation; however, that consent did not in any way prejudice the position it would take on the text of article 62 proposed by some delegations, because the latest version put forward had not altered the substance of the original proposal.

75. The text of paragraph 2 of article 54 as adopted by the Working Group on second reading reads as follows:

Article 54

...

2. If a migrant worker claims that the terms of his work contract have been violated by his employer, he shall have the right to address his case to the competent authorities of the State of employment, on terms provided for in article 18 (1) of the present Convention.

Article 56

76. The Working Group considered on second reading article 56 from its 1st to 4th meetings, from 26 to 27 September 1989, on the basis of the following proposals, as contained in document A/C.3/44/WG.1/CRP.6:

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A. Text of article 56 adopted at the first reading, contained in document A/C.3/39/WG.1/WP.1

[1. (The Working Group adopted the introductory paragraph in June 1988, see para. 205 of the Working Group's report (A/C.3/42/1)):

...

[(a) For reasons of national security, public order (ordre public) or morals;

[(b) If they refuse, after having been duly informed of the consequences of such refusal, to comply with the measures prescribed for them by an official medical authority with a view to the protection of public health;

[(c) If a condition essential to the issue or validity of their authorization of residence or work permit is not fulfilled;

[(d) In accordance with the applicable laws and regulations of the State of employment.]

2. [In accordance with applicable laws] any such expulsion shall be subject to the procedural safeguards provided for in part II of the present Convention.

[3. Before any expulsion or deportation be carried out, all fundamental rights of migrant workers must be legally safeguarded.]

B. Text of article 56 proposed by the MESCA group of countries

[1. (The Working Group adopted the introductory paragraph in June 1988, see para. 205 of the Working Group's report (A/C.3/42/1)):

...

[(a) For reasons of national security or public order (ordre public);

[(b) If they refuse, after having been duly informed of the consequences of such refusal, to comply with the measures prescribed for them by an official medical authority with a view to the protection of public health;

[(c) If a condition essential to the issue of validity of their authorization of residence or work permit is not fulfilled.

[2. Any such expulsion shall be subject to the safeguards established in part III of the present Convention.]

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C. Text of article 56 proposed by the representatives of Finland and Italy

[The Working Group adopted the introductory paragraph in June 1988, see para. 205 of the Working Group's report (A/C.3/42/1):

[Expulsion shall not be resorted to as a means of depriving a migrant worker or a member of his family of the rights arising out of the authorization of residence and the work permit.

[In taking a decision to expel a migrant worker or a member of his family, account should be taken of humanitarian considerations and of the length of time the person concerned has already resided in the State of employment.]

77. At the same meeting, the representative of the Federal Republic of Germany submitted the following proposal, pointing out that it combined aspects of the Finnish and Italian proposals, the United States proposal and article 7 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live:

"Migrant workers and members of their families referred to in this part of the Convention may not be expelled from a State of employment on grounds of race, colour, religion, culture, descent or national or ethnic origin nor for the purpose of depriving them of the rights arising out of the authorization of residence and the work permit."

78. The representative of France pointed out that under part III of the Convention, article 22 on expulsion protected all migrant workers, whether regular or irregular. The proposal of the Federal Republic of Germany, referring only to migrant workers in a regular situation, since it was under part IV of the Convention, could be taken to mean that expulsion of migrant workers in an irregular situation could take place on grounds of race, colour, religion, culture, descent or national or ethnic origin. He therefore disagreed with the proposal by the Federal Republic of Germany. The representative of Italy shared the view of the representative of France.

79. The representative of India stated that she maintained the proposal of her delegation made at the June 1989 meeting (A/C.3/44/1, para. 22).

80. The representative of the United States said that his delegation preferred to delete article 56 altogether since this Convention should in no way restrict the sovereign right of each State to determine its own immigration policy, including grounds for entry and stay in its territory. However, he could reluctantly accept a general article formulated along the lines of the Italian and Finnish proposal.

81. The representative of Australia referred to the introductory phrase for article 56, already discussed at the June 1988 meeting. He pointed out that there was inconsistency between paragraph 205 and paragraph 219 of the report on that discussion (A/C.3/43/1). Those paragraphs read as follows:

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"205. At its 7th meeting, on 3 June, the Working Group adopted on second reading the introductory paragraph of article 56 which reads as follows:

'Migrant workers and members of their families referred to in this part of the Convention may be expelled from a State of employment, subject to the safeguards established in part III of the Convention, only for the following reasons:'

"...

"219. At the 11th meeting, on 7 June, the Chairman announced that despite further informal consultations no consensus had been reached on article 56. Reporting on those consultations, the Vice-Chairman said that no consensus existed on the reasons for expulsion. There was agreement, however, that there was reason to go beyond the International Covenants with regard to expulsion of documented migrant workers and thus reason to include article 56 in the Convention. In view of this situation, the Working Group decided to hold further informal consultations and to consider this article at its next session."

The representative of Australia suggested that the introductory phrase should be dropped and the Working Group should discuss article 56 on the basis of the current proposals.

82. The representative of Japan stated that she could accept the Indian proposal with an amendment, namely to add the words "and regulations" after the word "laws". The Indian proposal as amended by Japan would then read as follows:

"Migrant workers and members of their families in a regular situation may not be expelled from its territory by a receiving State, except in accordance with national laws and regulations, or in accordance with existing bilateral agreements.

83. Referring to article 56 as a whole, the Chairman pointed out that there was consensus in the Working Group that the aim of the article was to prevent arbitrary expulsion and to take into account humanitarian considerations in case such expulsion took place.

84. The representative of Finland agreed with the representative of Australia that the introductory phrase of article 56 was no longer needed. He consequently proposed after informal consultations the following new formulation for article 56, thus amending an earlier common proposal by Italy and Finland:

"Migrant workers and members of their family referred to in this part of the Convention may not be expelled from a State of employment except for reasons defined in the national legislation of that State, and subject to the safeguards established in part III of this Convention.

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"Expulsion may not be resorted to for the purpose of depriving a migrant worker or a member of his family of the rights granted to them by virtue of the authorization of residence and the work permit.

"In taking a decision to expel a migrant worker or a member of his family, account should be taken of humanitarian considerations and of the length of time the person concerned has already resided in the State of employment."

85. At its 2nd meeting, on 26 September 1989, the Working Group had before it a text for article 56 which had emerged from the informal consultations, reading as follows:

1. Migrant workers and members of their families referred to in this part of the Convention may not be expelled from a State of employment, except for reasons defined in the national legislation of that State, and subject to the safeguards established in part III of this Convention.

"2. Expulsion may not be resorted to for the purpose of depriving a migrant worker or a member of his family of the rights arising out of the authorization of residence and the work permit.

"3. In considering whether to expel a migrant worker or a member of his family, account should be taken of humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment."

86. The representative of Morocco stated that her delegation was not satisfied with the term "may not" which is translated into French as "pourrait ne pas être". Instead, she preferred the words "shall not" or "ne sera pas" in the French version, as the purpose of the article was not to lay emphasis on the possibility of expelling a migrant worker.

87. In commenting on the meaning of the words "may not be" or "shall not be", the representative of the United States stated that in the present context there was not a major difference between the two expressions.

88. The representative of France stated that his delegation would have preferred the words "ne peuvent être expulsés" rather than using expressions that would be relatively too strong. However, his delegation would not hinder any consensus.

89. The representative of Mexico pointed out that in Spanish text the words "no podrán ser expulsados" should be used.

90. The representative of India stated that, generally speaking, his delegation would not have major problems with the proposal; however, he would prefer to replace the words "except for reasons defined in the national legislation" by the words "in accordance with national law".

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91. Referring to the words "pourront" or "ne peuvent", the representative of Italy stated that either one could be used in the text as the meaning of the text would not change.

92. The representative of Denmark stated that his delegation had no problem with the article as it had emerged from informal consultations.

93. The representative of Australia, referring to the proposal by the representative of India, which consisted of replacing the expression "except for reasons defined in the national legislation" by the words "in accordance with national law", stated that such a proposal would weaken the provisions of article 56. He added that the text as worded provided more safeguards.

94. The representative of Canada stated that, generally, the words "may" and "shall" had different connotations. However, in relation to the phrasing in paragraph 1, the meaning was the same. Thus, the proposal made by the representative of Morocco was acceptable. The representative of Canada also expressed his agreement with the interpretation given by the representative of Australia to the suggested amendment by the representative of India and stated his preference for the retention of the phrase, "except for reasons defined". Finally, he stated that it was his understanding that the phrase "national law" was to be interpreted as subsuming both laws and regulations and therefore was synonymous with the phrase "national legislation".

95. In an effort to reach a compromise and to accommodate the proposal made by the representative of India, the representative of France suggested that the word "reasons" be replaced by the word "conditions".

96. The representative of India, while maintaining his preference for the words "in accordance with national law", stated that his delegation could accept the proposal by the representative of France to replace the word "reasons" by the word "conditions".

97. The representative of Finland stressed his preference for retaining the word "reasons" instead of the word "conditions". In his view, the word "conditions" referred to procedural conditions, which had already been taken care of by article 22.

98. The representative of the Federal Republic of Germany suggested that the words "except for reasons defined in the national legislation" be replaced by the words "in accordance with or for reasons defined in the national legislation".

99. In response to the proposal by the Federal Republic of Germany, the representative of Finland said that such a suggestion would further complicate the meaning of the proposal and make the rest of the paragraph redundant.

100. The representative of the United States expressed his support for retaining the words "for reasons defined in national legislation".

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101. As the Working Group was nearing a consensus, the representative of the Federal Republic of Germany reiterated his earlier proposal for the inclusion of a fourth paragraph, which was contained in paragraph 214 of the Working Group's report (A/C.3/43/1), reading as follows:

> "States of origin or, where appropriate, the States referred to in article 22, paragraph 7, of the Convention shall be required not to oppose the return or, respectively, the entry into their territory of the persons referred to in this article."

The representative of the Federal Republic of Germany stated that if the Working Group could not support his proposal his delegation would be satisfied if its position was reflected in the report.

102. The representative of Morocco stated that it was superfluous to make it an obligation for the State of origin to receive its own nationals.

103. The representative of the United States placed on record that his delegation would have preferred to insert the word "sole" before the word "purpose" in the second paragraph. The representative of the Netherlands supported that suggestion.

104. The representative of Finland stated that his delegation would interpret the second paragraph in conjunction with the first paragraph imposing a further restriction on the national legislation and implying that, for example, economic reasons, such as a cyclical downturn, could not be invoked as reasons for expulsion. Regarding the suggestion made by the representative of the Federal Republic of Germany, he said that he would not be able to join a consensus on behalf of the Working Group because the concern of the Federal Republic of Germany had already been covered by article 8. He further added that an expelling State could not force a third State to accept an expelled migrant worker.

105. The representatives of the United States and Canada stated that while they were prepared to accept the consensus that had emerged in respect of article 56, it was the view of their delegations that the phrase "for the purpose of depriving a migrant worker" in paragraph 2 of article 56 was intended to mean that a person could not be expelled solely for the purpose of depriving them of their rights. In the view of these representatives, it was self-evident that one of the effects of expulsion would be to deprive an individual of his rights in the State of employment but that expulsion should not be undertaken solely for that purpose.

106. The Working Group then adopted on second reading a text for article 56, reading as follows:

<u>Article 56</u>

1. Migrant workers and members of their families referred to in this part of the Convention may not be expelled from a State of employment, except for reasons defined in the national legislation of that State, and subject to the safeguards established in part III of this Convention.

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2. Expulsion shall not be resorted to for the purpose of depriving a migrant worker or a member of his family of the rights arising out of the authorization of residence and the work permit.

3. In considering whether to expel a migrant worker or a member of his family, account should be taken of humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment.

Article 60

107. The Working Group considered article 60 regarding seafarers and workers on offshore installations from its 3rd to 13th meetings, from 27 September to 4 October 1989, on the basis of article 60 as contained in document A/C.3/39/WG.1/WP.1, reading as follows:

"1. Seafarers, as defined in article 2 (c), workers on permanent offshore installations, as defined in article 2 (2) (d), and members of their families shall enjoy the following rights:

"(a) If the said workers have been authorized to take up residence in the State of employment, they and the members of their families shall be entitled to the rights provided for in parts II and III of this Convention;

"[(b) If the said workers have not been authorized to take up residence in the State of employment, they shall be entitled to all of the above-mentioned rights which could be applied to them by reason of their presence or work in the State of employment, excluding rights relating to or arising out of residence [and rights arising out of article 45].]

"2. For the purpose of this article, the State of employment means the State under whose flag or jurisdiction is operated the ship or installation on which the migrant worker is engaged."

108. The Working Group also had before it a revised text for article 60 submitted by the MESCA group of countries contained in paragraph 277 of its report (A/C.3/43/1), reading as follows:

"1. Seafarers, as defined in article 2 (c), workers on permanent offshore installations, as defined in article 2 (2) (d), shall enjoy the following rights:

"(a) If the said workers have been granted a residence permit in the State of employment, they and the members of their families shall be entitled to the rights provided for in part IV of this Convention.

"(b) If the said workers have not been authorized to take up residence in the State of employment, they shall be entitled to all of the above-mentioned rights which could be applied to them by reason of their presence or work in the State of employment, excluding rights relating to or arising out of residence.

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"2. For the purpose of this article, the State of employment means the State under whose flag or jurisdiction is operated the ship or installation on which the migrant worker is engaged."

New article 60

109. At its 3rd meeting, on 27 September 1989, the Working Group was seized with the following proposal by the Netherlands and Norway for article 60 regarding seafarers:

"1. Seafarers, as defined in article 2 (2) (c), workers on offshore installations, as defined in article 2 (2) (d), and members of their families, shall enjoy the following rights:

"(a) If the said workers have been authorized to stay and to work in the State of employment, they and the members of their families who are documented or in a regular situation shall be entitled to all the rights provided for in part IV of this Convention;

"(b) In derogation of article 57, if the said workers have not been authorized to stay or to work in the State of employment, such States shall give favourable consideration to granting the migrant workers rights such as those provided for in parts III and IV of this Convention, which could be applied to them by reason of their work in the State of employment.

"2. For the purpose of this article, the State of employment means the State under whose flag the ship is operating or in which the offshore installation is registered, unless the seafarer or worker on an offshore installation has a contract of employment with an employer or an enterprise who is under the jurisdiction of another State, in which case the latter State shall be considered as the State of employment."

110. Commenting on the above-mentioned proposal, the representative of Finland emphasized that the general purpose of including such a provision was to specify which rights applied to that category of workers. If part V of the draft Convention did not specify those rights then the general provisions of the Convention would apply. Regarding subparagraph (b) of paragraph 1, he suggested deletion of reference to part III because its retention would exclude applicability of basic human rights to seafarers. Similarly, reference to article 57 should also be deleted. The view of Finland regarding part III was shared by Greece and Algeria.

111. The representative of Japan stated that in the view of her Government no reference to seafarers should be made in the Convention since there were already ILO Conventions and recommendations on the matter.

112. The representative of the United States shared the view of Japan and pointed out that the ILO had already adopted 26 Conventions and 21 recommendations on seafarers, and that other general ILO Conventions also covered seafarers. He suggested that it should be mentioned in part I, article 3 that seafarers were

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excluded from the scope of the Convention. Inclusion of seafarers would require amending the definition of "State of employment" already adopted by the Working Group.

113. The representative of the Federal Republic of Germany stated that seafarers should not be covered by the Convention. Regarding subparagraph (a) of paragraph 1 of the proposal, he said that in his country there were no seafarers or workers on offshore installations that needed work permits as normal migrant workers. Their inclusion in the Convention would give rise to expectations for employment and stay in the State of employment. In fact, it was rather obvious that shipowners would not employ normal migrant workers because they would be reluctant to accord them all those rights. Regarding subparagraph (b) of paragraph 1, he said the approach was acceptable for his delegation with some minor changes, including replacing the phrase "by reason of their work" by the phrase "by nature of their work or activity".

114. The representative of the Netherlands said that he fully shared the concerns expressed by the United States, Japan and the Federal Republic of Germany. However, his proposal was based on the consideration that seafarers had to be included in the draft Convention since several delegations had expressed strong feelings on that point. As far as his delegation was concerned, all rights in part III of the Convention, with the exception of those provided in article 25, could be granted to seafarers. Referring to the text of the proposal by the Netherlands and Norway, he said that in subparagraph (b) of paragraph 1 he could accept deletion of reference to part III and only mention article 25 as well as part IV.

115. The representative of Greece stated that the new article 60 should be maintained in the Convention. The representative of Italy said that reference to part III should be maintained in subparagraph (a) of paragraph 1 since it referred to basic human rights. Paragraph 2 of the proposed article was important, he said, because it implied equality of treatment of seafarers with nationals.

116. The representative of Algeria drew the attention of the Working Group to the contradiction contained in paragraph 1 (b) of the proposal submitted by Norway and the Netherlands which, far from covering the situation of seafarers authorized to work, but not to take up residence, might imply that migrant workers in this category were in an irregular situation, which was clearly not the intention of the sponsors.

117. With reference to paragraph 2 of new article 60, the representative of Australia stated that if the State of employment was defined by the flag State, that could result in difficulties since there were different provisions in different legal systems which might result in a clash of jurisdictions. That view was shared by the representative of the United States.

118. The representative of France, referring to paragraph 2, stated his disagreement with the phrase "unless the seafarer or worker of an offshore installation has a contract of employment with an employer or an enterprise who is under the jurisdiction of another State". He said that this phrase would give rise to problems of jurisdiction among several countries.

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119. The representative of Denmark agreed with several other delegations such as Norway, the Netherlands and the Federal Republic of Germany that it was not extremely necessary to include seafarers in the Convention given the complexity of the problems connected with that category of workers and given the protection already accorded to them in numerous ILO Conventions. Besides, his delegation had a problem of substance, because his country would not be able to secure equal treatment with respect to remuneration for people who were not residents of Denmark, be they Danish or not. The reason for this was that the Act on the Danish International Ships register (DIS) contained a section which stipulated that collective agreements on wages and working conditions for employees on vessels on DIS, which had been concluded by a Danish trade union, might only comprise persons who were residents of Denmark. It was the firm belief of the Danish delegation that this was not a discriminatory provision with regard to national origin. Employment on board ships registered in DIS was open to anybody residing in Denmark. All seamen, no matter where they resided, were covered by Danish legislation and had the right to organize and conclude collective agreements. All persons employed on board a Danish ship thus had the same basic rights.

120. After further discussion the Working Group agreed that, since there was no consensus regarding new article 60, informal consultations would be held to facilitate the Group's task.

121. At its 13th meeting, on 4 October 1989, the Working Group resumed consideration of article 60.

122. As the Working Group was nearing a consensus on action concerning article 60, the representative of Finland stated that his delegation could join the consensus on excluding one part of the category of seafarers from the application of this Convention on the condition that this should not be interpreted as preventing such migrant workers from the enjoyment of any right that may be granted to them by virtue of existing national legislation or international human rights instruments.

123. The representative of the Federal Republic of Germany placed on record the reservation of his delegation on the exclusion of a provision relating to seafarers. He stated that in order not to block the consensus he would accept the position of his delegation being reflected in the report.

124. The representatives of Portugal and Japan also placed on record the reservations of their delegations on the exclusion of seafarers.

125. The Working Group decided to delete article 60 relating to seafarers and to adopt a new paragraph for article 3 (f) (see paras. 34-44 above).

Article 62

126. The Working Group considered article 62 from its 3rd to 13th meetings, from 27 September to 4 October 1989, on the basis of the following texts appearing in document A/C.3/44/WG.1/CRP.6.

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"A. Pending parts of the proposal for article 62 contained in document A/C.3/39/WG.1/WP.1

"1. (a) To have written employment contracts in a language they understand, the provisions of which shall not derogate from the rights provided for in this Convention. States concerned shall endeavour in so far as practicable to take measures to ensure that such employment contracts are not modified or substituted to the disadvantage of migrant workers;

"(b)*

"(c) [Without prejudice to the rights recognized in article 48], to have their earnings paid in their country of origin or the country of their normal residence;

"2. States of employment shall encourage the installation by the [enterprise or] employer carrying out the specific project of any necessary facilities for project-tied migrant workers and members of their families, such as housing, schools, medical and recreational services. Any expenditure arising out of the application of this paragraph shall be borne by the [enterprise or] employer concerned unless otherwise agreed with the State of employment [concerned] States.

"3. Subject to the provisions of the present Convention applicable to project-tied migrant workers, the States concerned shall endeavour, whenever appropriate, to establish by agreement specific measures on social and economic matters relating to those workers.

"4. Without prejudice to existing instruments on social security and double taxation among States concerned, these States concerned shall take appropriate measures to ensure that project-tied workers:

"(a) Are adequately covered for the purposes of social security and do not suffer in their State of origin or normal residence any diminution or denial of rights or duplication of social security deductions;

"(b) In addition to the provisions of article 49, they do not suffer from double taxation."

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* Elements contained in paragraph 1 (b) of the present proposal were incorporated into paragraph 1 (a) and adopted on second reading by the Working Group in the spring of 1988 (A/C.3/43/1, para. 315).

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"B. <u>Pending parts of the proposal for article 62 by the Mediterranean and Scandinavian (MESCA) group of countries as reproduced in paragraph 295 of the Working Group's report (A/C.3/43/1)</u>

"...

"[(b) To have written employment contracts in a language they understand, the provisions of which shall not derogate from the rights provided for in the present Convention. States concerned shall endeavour insofar as practicable to take measures to ensure that such employment contracts are not modified or substituted to the disadvantage of migrant workers;

"[(c) To have their earnings paid in their State of origin or the State of their normal residence, without prejudice to article 47 of the present Convention.

"[2. States concerned shall facilitate the installation by the employer carrying out the specific project of any necessary facilities for project-tied migrant workers and members of their families, such as housing, schools and medical and recreational services. Any expenditure arising out of the application of this paragraph shall be borne by the employer concerned unless otherwise agreed with the States concerned.

"[3. Subject to the provisions of the present Convention applicable to project-tied migrant workers, the States concerned shall endeavour, whenever appropriate, to establish by agreement specific measures on social and economic matters relating to those workers.

"[4. Without prejudice to existing instruments on social security and double taxation among States concerned, these States concerned shall take appropriate measures to ensure that project-tied workers:

"[(a) Are adequately covered for the purposes of social security and do not suffer in their State of origin or normal residence any denial of rights or duplication of social security deductions;

"[(b) Do not suffer from double taxation, without prejudice to article 48.]"

127. The representative of Finland recalled that subparagraph (a) of paragraph 1 of article 62 had already been adopted. He said that project-tied workers were a new category which had to be covered and he expressed his support for the MESCA proposal.

128. Recalling the position she had taken since this provision was first discussed, the representative of Algeria restated her objection in principle to the philosophy underlying the text of the article. If adopted, this provision should be incorporated in the section dealing with certain rights contained in the Convention

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which were excepted because of their special status. Moreover, it was discriminatory to provide additional rights only for this category. She requested that the report should reflect her delegation's position, namely, it could under no circumstances, and for obvious reasons continue a procedure intended solely to give preference to that special category. As the Working Group was involved in the preparation of a human rights instrument, it should be careful not to establish a higher category of migrant workers.

129. The representative of Japan said that the remaining parts of article 62 should be deleted altogether or should consist only of paragraph 1 and subparagraph (a) of paragraph 1, which had already been adopted. Regarding the MESCA proposal, she stated that subparagraph (b) of paragraph 1 should be deleted; in paragraph 2 the words "in case of necessity" should be added after the word "facilitate" in the first line and the last sentence deleted; and that paragraph 3 should also be deleted.

130. The representative of Italy pointed out that the purpose was not to grant supplementary rights to that category of migrant workers, but to take into account their specific situation which prevented them from enjoying certain rights granted to other migrant workers. Therefore particular rules were necessary if their adequate protection were to be ensured.

131. The representatives of the United States and the Federal Republic of Germany said that the article was according project-tied workers certain additional rights, which seemed inappropriate. The representative of the Federal Republic of Germany said that, besides, it was not clear in the proposed formulation whose obligations were those described and which State should supervise those obligations; the article, he suggested, should be reduced to the absolute minimum.

132. The representative of Morocco noted that most of the projects employing project-tied workers were carried out in developing countries. If such foreign workers enjoyed more favourable treatment, that would create problems for nationals of the same profession. The developing States where the projects took place could not provide all those exceptional rights.

133. The representatives of Yugoslavia stressed the importance of that category of workers not only for the Yugoslav economy, but for a growing number of developing countries who already had the capability to engage in construction work in other developing countries. For other developing countries in which workers were engaged as project-tied workers in foreign companies, that category became an important source for obtaining currency. That is why her delegation considered that this category needed adequate protection in the Convention. In paragraph 2 she suggested adding that this category should receive information relating to their stay and conditions of work.

134. The representative of Australia said that the assumption that project-tied migrant workers came from the developed world and not from the developing world was not correct; large numbers of workers from developing countries in fact worked as project-tied workers. He noted that while the Convention should not accord additional rights to project-tied workers, it was necessary to take account of the

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fact that certain articles of the Convention were not applicable to them. The Convention had to ensure the protection of project-tied workers so that they were not unnecessarily disadvantaged by such exceptions.

135. After some discussion the Working Group decided to take up article 62 in informal discussions.

136. At its 13th meeting, on 4 October 1989, the Working Group had before it proposals for paragraphs 3 and 4, on which the Working Group did not take action owing to lack of time. Those proposals were read by the Vice-Chairman, as follows:

"*Article 62, paragraph 3*

"Subject to bilateral or multilateral agreements in force for the States Parties concerned, these States Parties shall endeavour to enable the project-tied workers to remain adequately protected by the social security systems of their State of origin or of normal residence during the engagement in the project. The States Parties concerned shall take appropriate measures to ensure that project-tied workers do not suffer from any denial of rights or duplication of payments in this respect.

"*Article 62, paragraph 4*

"Without prejudice to the provisions of articles 47 and 48, and to specific bilateral or multilateral agreements, the States Parties concerned shall permit the payment of the earnings of project-tied workers in their state of origin or of normal residence."

137. At the same meeting the Working Group decided to combine the introductory phrase of article 62 with paragraph 1 (a), which had already been adopted by the Group on second reading, into one single paragraph.

138. The Working Group also decided to adopt paragraph 2 of article 62.

139. The representative of Japan placed on record the reservations of her delegation on article 62 as a whole, stating that there was no reason why project-tied workers should be given special treatment compared with the nationals of the State of employment or other migrant workers.

140. The text of paragraphs 1 and 2 as adopted by the Working Group on second reading, reads as follows:

Article 62

1. Project-tied workers, as defined in article 2 (2) (f), and members of their families shall be entitled to the rights provided in part IV of the present Convention, except the provisions of article 43 (1) (b), (c) and (d), as it pertains to social housing schemes, article 45 (b), [article 50] and articles 52 to 55.

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2. If a project-tied worker claims that the terms of his work contract have been violated by his employer, he shall have the right to address his case to the competent authorities of the State which has jurisdiction over that employer, on terms provided for in article 18 (1) of the present Convention.

141. The Working Group considered article 62 bis from its 8th to 14th meetings, from 29 September to 4 October 1989. At its 8th meeting, on 29 September 1989, the Working Group had before it article 62 bis regarding specified employment workers (A/C.3/44/WG.1/CRP.6), which read as follows:

"Text of article 62 bis proposed by Australia, Canada and the United States of America

"[1. Specified employment workers as defined in article 2 (2) (g) shall be entitled to all of the rights relating to migrant workers in part IV of the Convention, excluding those set forth in article 43 (1) (b) and (c); in article 43 (1) (d) as it pertains to social housing schemes; and in articles 52 and 54 (d).

"[2. Members of the family of specified employment workers shall be entitled to all of the rights relating to family members of migrant workers in part IV of the Convention, excluding those set forth in [article 50 and] article 53.]"

142. At its 12th meeting, on 4 October 1989, the Working Group resumed its consideration of article 62 bis and decided to defer further consideration of that article to informal consultations.

143. As a result of the informal consultations the Working Group, at its 13th meeting, on 4 October 1989, decided to adopt article 62 bis. The Working Group also decided to adopt the proposal for paragraph 3 of article 62 bis as a new paragraph 3 for article 43 formerly adopted by the Group on second reading (see para. 49 above).

144. The representative of Finland stated that his delegation had given its consent to the adoption of the article only on the condition that it was generally understood that its provisions would be implemented in conjunction with the definition of specified employment workers under article 2, paragraph 2 (g) and could not be used by the States parties as an escape clause for normally and indefinitely excluding the majority of migrant workers from enjoying the right of free choice of employment under article 52.

145. The representatives of Australia and Sweden expressed their support for the interpretation of the effect of article 62 bis made by the representative of Finland.

146. The representative of France expressed his support for the adoption of the articles as that category of workers was increasing in various parts of the world.

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147. The representative of the Federal Republic of Germany stated that, since his delegation was opposed to the inclusion in the Convention of the categories of migrant workers referred to in article 2, paragraph 2, it could not join the consensus on article 62 bis, but would be satisfied to have its position recorded in the report so as not to block the consensus.

148. The representative of Yugoslavia stated that she had joined the consensus on article 62 bis. However, she wanted it to be stated in the report that her delegation was not convinced of the need to include that category in the Convention.

149. The representative of Mexico stated that her delegation believed that the concerns of the sponsors of the proposal contained in draft article 62 bis were already covered in other articles of the Convention and that the article was therefore unnecessary. She added that her delegation had never been convinced of the need to include that category of workers in the Convention. However, if the Working Group ultimately decided to include that category, she wished to point out that her delegation deemed it to be unfair and was concerned that, under article 62 bis, specified employment workers would lose some rights that were otherwise granted to them under the Convention. While her delegation would not oppose the consensus that appeared to have been reached on this article, it would like its position to be duly reflected in the report.

150. The text of article 62 bis as adopted by the Working Group reads as follows:

Article 62 bis

1. Specified employment workers as defined in article 2 (2) (g) shall be entitled to all of the rights relating to migrant workers in part IV of the Convention, excluding those set forth in article 43 (1) (b) (c); in article 43 (1) (d) as it pertains to social housing schemes; and in articles 52 and 54 (d).

2. Members of the family of specified employment workers shall be entitled to all of the rights relating to family members of migrant workers in part IV of the Convention, excluding those set forth in [article 50 and] article 53.

Article 62 ter

151. At its fifth meeting, on 28 September 1989, the Working Group took up consideration of article 62 ter on the basis of the text contained in document A/C.3/44/WG.1/CRP.6. The text read as follows:

"[1. Self-employed migrant workers as defined in article 2 (2) shall be entitled to all the rights provided for in part IV of the Convention with the exception of such rights which are exclusively applicable to workers having a contract of employment.

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"[2. Without prejudice to articles 37 and 52 of the present Convention, the termination of the economic activity of the self-employed migrant workers shall not in itself imply the withdrawal of the authorization for them or for the members of their families to stay or to engage in a remunerated activity in the State of employment except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted.

"[3. The self-employed migrant workers shall enjoy equality of treatment with self-employed nationals of the State of employment in respect of access to any public subsidies or other support measures relating to their activity.]"

152. The Vice-Chairman reported that the view had emerged from informal consultations that, because paragraph 3 of the article referred to the domestic policy of Governments and not human rights, it was not an appropriate issue to include in an international convention. He therefore suggested that the Working Group should consider adopting the article without paragraph 3.

153. The representative of the United States suggested the following linguistic amendments to the text in order to make it consistent with article 2, paragraph 2 (h): the deletion of the word "migrant" from line 1 of paragraph 1 and the insertion of "h" after "article 2 (2)" in line 1. The Vice-Chairman also suggested the deletion of the word "migrant" from line 2 of paragraph 2.

154. The representative of the Federal Republic of Germany indicated that, consistent with his opposition to the Convention covering self-employed workers, he did not support the adoption of article 62 ter. He however indicated that in order to not block the consensus he would be satisfied with having his views reflected in the report.

155. The Working Group decided to adopt the article without paragraph 3 and including the linguistic changes suggested by the representative of the United States and the Vice-Chairman.

156. Following the adoption of article 62 ter, the representative of Japan indicated that, consistent with her delegation's views on articles 2, paragraph 2 (h), 3 (f) and 52, paragraph 4, her delegation did not support the adoption of article 62 ter and placed its reservations on record.

157. The text of article 62 ter, as adopted during the second reading, reads as follows:

Article 62 ter

1. Self-employed workers as defined in article 2 (2) (h) shall be entitled to all the rights provided for in part IV of the Convention with the exception of such rights which are exclusively applicable to workers having a contract of employment.

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2. Without prejudice to articles 37 and 52 of the present Convention, the termination of the economic activity of the self-employed workers shall not in itself imply the withdrawal of the authorization for them or for the members of their families to stay or to engage in a remunerated activity in the State of employment except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted.

Title of part VI

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

158. During the consideration of the title of part VI, the representative of France suggested that the word "lawful" be deleted on the basis of the content of that part of the draft Convention.

159. The representative of the Federal Republic of Germany expressed his objection to deleting the word "lawful" because without the word the title might suggest that it would also concern illegal migration.

160. The representative of Morocco recalled that as the Convention was recommended within the framework of the Decade to Combat Racism and Racial Discrimination, one of its main objectives was to avoid the recurrence of the incidents of 1972 involving clandestine migrant workers. Therefore, she said that her delegation did not have any problem in maintaining the word "lawful".

161. The representative of Finland suggested that one of the main objectives of the Convention was to ensure lawful conditions of migration. All the various concerns could be met if the word "lawful" was placed before the word "conditions".

162. The Working Group decided to take up the discussion of the title of part VI in informal consultations.

163. At its 3rd meeting, on 27 September 1989, the Working Group adopted the title of part VI of the Convention as follows:

PART VI

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

Article 75

164. The Working Group considered article 75 from its 5th to 11th meetings, from 28 September to 3 October 1989, on the basis of the text of article 74 contained in document A/C.3/44/WG.1/CRP.6/Add.1. The text read as follows:

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"Article 74

"1. A State Party to the present Convention may at any time declare under this article that it recognizes the competence of the Committee to the effect that a State Party considers that another State Party is not giving effect to the provisions of this Convention. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following paragraphs.

"2. If a State Party to the present Convention considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of the Committee. The Committee shall then transmit the communications to the other State Party concerned. This State shall then, within three months, submit to the Committee written explanations or statements clarifying the matter and the remedy that may have been taken by that State.

[The rest of the article is the same text as in the left-hand column of document A/C.3/43/WG.1/CRP.1/Rev.1, but renumbered (2=3, 3=4, etc.).]

"3. If within six months of the Committee's transmission of the initial communication to the State Party concerned the matter is not adjusted to the satisfaction of both Parties, either State shall have the right to request the Committee to deal with the matter in accordance with the following paragraphs of this article.

"4. The Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the present Convention.

"5. The Committee shall hold closed meetings when examining communications under this article.

"6. In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in paragraph 3, to supply any relevant information.

"7. The States Parties concerned, referred to in paragraph 3, shall have the right to be heard by the Committee and to make submissions in writing.

"8. The Committee shall, within twelve months after the transmission of the initial communication under paragraph 3, submit a report:

"(a) If a solution within the terms of paragraph 6 is reached, the Committee shall confine it eport to a brief statement of the facts and the solution reached;

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"(b) If a solution within the terms of paragraph 6 is not reached, the Committee shall confine its report to a brief statement of facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

The report shall be communicated to the States Parties concerned."

165. The Vice-Chairman indicated that the debate on the possible adoption of the proposed text centred on whether States should be subject to an automatic inter-State complaints procedure or whether such a procedure should be optional. He suggested that the question of inter-State complaints was linked to the question of an optional procedure for individual complaints. In that connection, he drew the attention of the Working Group to a discussion it had previously carried out on the issues reported in document A/C.3/44/1, from paragraph 81 onwards.

166. With regard to the possibility of an inter-State complaints procedure, the representative of the Federal Republic of Germany, citing the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as a precedent, which in his view only provided for an optional procedure, stated that since the draft Convention contained some provisions not pertaining to absolute rights there should not be an automatic inter-State complaints procedure. He indicated, however, that he could support an optional inter-State procedure. The representative of Japan also felt unable to support an automatic inter-State procedure because that would mean that the Convention would be recognizing parallel complaints procedures, and referred to the text of former article 75 which was already adopted but had yet to be numbered. She indicated that her delegation was not willing to support an optional inter-State complaints procedure but drew the attention of the Working Group to proposed amendments suggested by her delegation to the text of former article 74 in document A/C.3/44/WG.1/CRP.5/Rev.1, paragraphs 7-16.

167. The representative of Morocco indicated that inter-State complaints procedures had been an important means of securing the protection of human rights. She indicated that at the time of the adoption of the International Covenants that procedure had not been given full emphasis because they dealt only with the protection of rights of individuals vis-à-vis the Government of their country and because, in the case of the International Covenant of Economic, Social and Cultural Rights, the rights covered were of a progressive and not an absolute nature. She added that since the present Convention contained essentially absolute rights which also transcended the question of nationality, then it should be supported by an inter-State complaints procedure.

168. The representatives of France and the United States expressed a willingness to support the adoption of an optional inter-State complaints procedure. The representative of the United States pointed out, however, that, in his view, the minimal use of the various existing inter-State complaint procedures indicated the lack of effectiveness of that approach towards the protection of human rights.

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169. The representatives of Algeria and the Netherlands expressed a strong wish for there to be an inter-State complaints procedure. The representative of Denmark expressed support for such a procedure and stated that he had no strong feelings regarding whether it should be optional or automatic. The representative of Australia indicated that he could accept either an automatic or an optional procedure. The representatives of Italy and the USSR expressed a preference for an automatic inter-State complaints procedure but were willing to support the adoption of an optional procedure in the interest of seeking as wide an acceptance of the terms of the Convention as possible. The representative of Yugoslavia stated that as a country of emigration, Yugoslavia would prefer a mandatory inter-State complaints procedure. However, to be realistic, she stressed that the establishment of more flexible complaints procedures might attract a greater number of countries to ratify the Convention. She therefore supported what had been said by the delegations of Italy and the USSR. The representative of Italy indicated that with the drafting of a convention it was most important for the drafters to seek a broad acceptance of the substantive parts of the Convention and not to make ratification to the text conditional on subsidiary or procedural provisions.

170. During the debate on article 75, tho Vice-Chairman reminded the Working Group of a proposal by the Netherlands for an individual complaints procedure and drew its attention to paragraph 82 of document A/C.3/44/1 in which the proposal was reported.

171. The representative of Japan expressed her unwillingness to support the adoption of an individual complaints procedure. The representative of the United States also expressed an unwillingness on the grounds that such a procedure would entail difficult procedural obstacles for an individual and even where the Committee found in favour of the individual, it would not be in a position to offer redress but only call the attention of the relevant Government to the situation it had reviewed. In view of the foregoing, the representative of the United States questioned whether it would be appropriate to incur the large cost of setting up and maintaining such a procedure.

172. The representative of Italy stated that the present Convention contained individual rights, as well as provisions encouraging Governments to adopt administrative and legislative measures. He indicated that it would be appropriate for individual complaints to be made only in connection with the former and questioned whether it would be possible to categorize strictly the various provisions of the Convention.

173. The representative of France was also opposed to the inclusion in the Convention of an article 75 bis dealing with an individual complaints procedure. However, he added that he would not oppose the consensus.

174. The representatives of the Union of Soviet Socialist Republics and Yugoslavia expressed support for the adoption of an individual complaints procedure. The representative of Australia indicated that there was no reason why there should be any rigid opposition to the adoption of that procedure since, it being an optional one, States that did not agree with it would be free not to be bound by it. The representatives of Algeria, the Netherlands and Denmark all expressed support for the view put forward by the representative of Australia.

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175. The representatives of Algeria and the Netherlands were of the view that an individual complaints procedure was an effective means of protecting human rights. The representative of the Netherlands indicated that in order to ensure that the cost of establishing and maintaining the procedure was not incurred without substantial support for it he would amend his proposal, which had been based on the model in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, by raising the necessary number of States for entry into force of the procedure from 5 to 10. In addition, he suggested that the words "or is unlikely ... violation of this Convention" from paragraph 5 (b) of the proposed article be deleted. The representative of the United States indicated that the amended proposal by the representative of the Netherlands would be a useful basis for further discussion.

176. The representative of Morocco noted that ILO constantly received allegations of violations of rights and questioned, since there would always be a representative of the International Labour Office in the Committee, whether the Committee would be seized of the complaint if notified thereof by the representative of the International Labour Office.

177. Referring to this question, the Observer for the International Labour Office drew attention to the existing grievance and complaint procedures of the International Labour Organisation.

Paragraph 1 and paragraph 1 (a) of article 75

178. At its 6th meeting, on 28 September 1989, the Working Group took up consideration of paragraphs 1 and 1 (a) of article 75.

179. The representative of Japan introduced her delegation's amendment pertaining to article 75 (former article 74) contained in document A/C.3/44/WG.1/CRP.5/Rev.1.

180. The Vice-Chairman noted that the MESCA proposal for article 75 and the proposal by Japan were very close to the wording of article 41 of the International Covenant on Civil and Political Rights and article 21 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or unishment.

181. Turning to the proposal by MESCA, the representative of Algeria proposed replacing the words "is not giving effect to the provision of this Convention" by the words "is not fulfilling its obligations under the present Convention".

182. The representative of the United States expressed his support for the proposal by Japan including the amendment suggested by Algeria.

183. The representative of the Federal Republic of Germany pointed out that the translation into French of the proposals by Japan, contained in document A/C.3/44/WG.1/CRP.4 should be in line with the provisions of article 41 of the International Covenant on Civil and Political Rights.

184. The representative of the Netherlands stated that the amendment of Japan was pertinent and that his delegation was in favour of adopting it.

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185. The Working Group then adopted a text for paragraph 1 of article 75 on the basis of the proposal submitted by Japan for paragraph 1, as follows:

Article 75

1. A State Party to the present Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Convention. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

Paragraph 1 (a) of article 75

186. The Working Group then took up subparagraph (a) of paragraph 1 of article 75.

187. The representative of Japan introduced the amendments of her delegation relating to paragraph 1 (a) of article 75.

188. The representative of Morocco stated that since the amendments submitted by Japan to the text proposed by MESCA were quite substantive ones, it would be useful to have further clarification on the reasons behind those amendments. The representative of Algeria shared that view.

189. The representative of Japan stated that her delegation has basically formulated her proposal for the subparagraph on the wording of article 41 of the International Covenant on Civil and Political Rights. She stressed that her delegation wished to have an optional complaints procedure as opposed to a mandatory procedure, such as the procedure of the International Convention on the Elimination of All Forms of Racial Discrimination, whereby if the matter was not adjusted within six months after the receipt by the recipient of the initial communication, either State should have the right to refer the matter again to the Committee.

190. The representative of Sweden stressed that in the case of complaint, the State party to which the complaint was addressed should be the first one to receive the communication. He therefore expressed his full support for the text proposed by Japan.

191. The representative of the United States also supported the view expressed by Sweden that the State about whom the communication was written should be the only one to receive the communication, at least initially, as a number of problems could better be resolved between States without receiving publicity.

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192. The representative of the Federal Republic of Germany stated that when a dispute arose between States in that provision, they should be given the possibility of settling it before the Committee was seized of it. He expressed his preference for the proposal by Japan.

193. The representative of France, while understanding the objective of the proposal by Japan, expressed the view that since the Committee was given recognition at the beginning of the article, it should be mentioned somewhere in the subparagraph.

194. The representative of Algeria questioned why MESCA had agreed to retain the proposal by Japan instead of its own proposal and was surprised that the Working Group had not stood firm in defence of a text supported by many other delegations.

195. The representative of Italy explained that the proposal by MESCA included some new elements that were already contained in brackets in the text of the first reading. He stated that the sponsors were ready to take into account any new modification. However, he felt that at the present stage the Committee should not be involved unless the States failed to settle the dispute among themselves. The representative of Sweden shared that view.

196. The representative of Morocco, turning to the reference made by the representative of Japan concerning the mandatory inter-State complaints procedure of the International Convention on the Elimination of All Forms of Racial Discrimination, stated that the moment the competence of the Committee was recognized, the Committee should be seized of the communication.

197. The representative of Canada stated that his delegation had no strong views on using either the proposal by Japan or the proposal by MESCA; however, he stressed that during the initial stage of the settlement of disputes between States there might not be a need to involve the Committee.

198. The representative of the Soviet Union stated that since the Committee was mentioned earlier it was logical that it should be mentioned in the provision that the Committee might be informed. In that connection, he proposed inserting the following sentence "This State Party may also inform the Committee of the matter", after the first sentence of paragraph 1 (a) of the proposal by Japan.

199. The representative of Morocco drew the Working Group's attention to the translation into French of the proposals relating to article 75, contained in document A/C.3/44/WG.1/CRP.5/Rev.1, which should be based on the wording of article 41 of the International Covenant on Civil and Political Rights or article 21 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

200. The representative of China supported the view that the Committee might also be informed.

201. The representative of Mali made similar observations and supported the view that the Committee might also be informed.

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202. After some discussion the Working Group decided to adopt paragraph 1 (a) as follows:

Article 75

1. ...

(a) If a State Party to the present Convention considers that another State Party is not fulfilling its obligations under the present Convention it may, by written communication, bring the matter to the attention of the State Party. This State Party may also inform the Committee of the matter. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

203. At its 7th meeting, on 29 September 1989, the Working Group took up consideration of paragraphs 1 (b), (c), (d), (e), (f), (g) and (h) of article 75 on the basis of proposals contained in documents A/C.3/44/WG.1/CRP.5/Rev.1 and A/C.3/44/WG.1/CRP.6/Add.1.

Paragraph 1 (b)

204. The Working Group considered a text for paragraph 1 (b) on the basis of paragraph 3 of the proposal contained in document A/C.3/44/WG.1/CRP.6/Add.1. The representative of Japan indicated that her delegation had proposed amendments to that proposal (A/C.3/44/WG.1/CRP.5/Rev.1, para. 10) based on paragraphs 1 (b) and (c) of article 41 of the International Covenant on Civil and Political Rights.

205. The representatives of Algeria, the Federal Republic of Germany, the United States and the Soviet Union expressed support for the adoption of subparagraph (b) of the Japanese proposal. The Working Group adopted the proposal. The text of paragraph 1 (b) of article 75, as adopted during the second reading, reads as follows:

Article 75

1. ...

...

(b) If the matter is not adjusted to the satisfaction of both States parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

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Paragraph 1 (c)

206. The attention of the Working Group was drawn to the proposed amendments, submitted by Japan and contained in document A/C.3/44/WG.1/CRP.5/Rev.1, to former article 74. The representative of Japan indicated that her delegation would like the inclusion of a provision requiring the exhaustion of local remedies as a pre-condition for the Committee's competence to entertain complaints by States. In her introduction of the proposed provision the representative of Japan further indicated that it was based on article 41, paragraph 1 (c) of the International Covenant on Civil and Political Rights and article 21, paragraph (1) (c) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but that since the present Convention did not deal exclusively with fundamental rights, then the second sentence of those models, excluding the application of the rule in certain circumstances, had been omitted.

207. The representative of Morocco said that she was most unwilling to support the adoption of the provision on the ground that it was illogical to make an inter-State complaints procedure on the international level conditional on the exhaustion of remedies at the domestic level. The representatives of Algeria and Denmark were also unwilling to support the adoption of the provision proposed by the representative of Japan because the practical effect of requiring the Committee to ascertain that domestic remedies had been exhausted in all cases would result in the Committee being so overburdened with settling procedural issues that it would not have much opportunity to deal with the substance of its work.

208. The representatives of Italy, the Federal Republic of Germany and the United States suggested that it was not illogical to demand the exhaustion of domestic remedies in the case of the present inter-State complaints procedures because many of the issues regulated by the present Convention were also covered by domestic legislation.

209. The representatives of the Federal Republic of Germany and Italy, supported by the representative of the United States, also indicated that with the inclusion of the word "available" there was no logical inconsistency in the proposed provision. They pointed out that if there were no remedies, such as because the disputed matter was not dealt with by domestic legislation, then, as a result of the inclusion of the word "available", domestic remedies could be considered exhausted. They also suggested that States should be allowed to maintain their sovereignty by being allowed to redress wrongs committed within their domestic legal systems before the situation was referred to international dispute settlement procedures.

210. In addition to the foregoing, the representative of Canada indicated that the requirement of exhaustion of domestic remedies would eliminate spurious or ill-founded complaints. The representative of Italy stated that such a provision would allow States to be judged on their consistent behaviour and final position and not just on an isolated incident involving one or two individuals which could have been redressed by domestic legislation. The representative of the United States was in favour of the provision because it would avoid the situation where, in seeking a remedy from both domestic legislation and the Committee, there would be conflicting decisions and possible confusion.

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211. The representatives of Italy and the Soviet Union were in favour of the adoption of the provision because, in their opinion, it was an established principle of international law that all domestic remedies be exhausted before a complaint was made at the international level. The representative of the Soviet Union emphasized that whether or not the provision was adopted by the Working Group, the principle it contained would always have to be applied by the Committee.

212. In order to allay the concern of some participants in the Working Group that the Committee may become bogged down in checking the exhaustion of domestic remedies, the representative of Canada suggested that the provision could be amended to make it clear that complainants would have to inform the Committee of available domestic procedures and that the Committee would only have to check that such procedures had been exhausted. With the same aim in mind, the representative of the Soviet Union suggested the deletion of the words "it has ascertained that" from the text. As a further method of allaying the concerns of certain participants in the Working Group, the representative of the Soviet Union indicated that the provision could omitted from the text of the Convention and a statement made for the report that the omission should not be taken as affecting the normal standards of international law.

213. The representatives of Algeria, Mali and Morocco were of the view that article 7, as proposed in document A/C.3/44/WG.1/CRP.6/Add.1, contained enough safeguards to prevent ill-founded claims, notably the time-frame within which it was set. The representative of Morocco further pointed out that since States had six months under paragraph 1 (b) to seek satisfaction, it was likely that domestic remedies would be exhausted anyway. The representative of Morocco, supported by the representative of the Netherlands, stated that in drafting the present Convention the Working Group should not necessarily feel constrained by precedent but that, especially since it was dealing with an issue novel to international law, it should feel free to be innovative.

214. During the debate concerning the proposed provision by Japan the representatives of Japan and the Federal Republic of Germany indicated that it was correct for the proposal not to contain the usual exclusion clause found in such models as article 41, paragraph 1 (c) of the International Covenant on Civil and Political Rights and article 21, paragraph 1 (c) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, on the basis of the reason outlined by the representative of Japan in her introductory statement. However, the representatives of Algeria, Canada, France and the United States indicated that if the proposal by Japan were to be adopted then it should contain the usual exclusion clause because the present Convention also protected such fundamental rights as the right to life and the right to security of the person.

215. Following the foregoing debate, and in view of its inability to achieve consensus, the Working Group decided to take up further discussion of the proposal in informal consultations.

216. At its 9th meeting, on 2 October 1989, the Working Group resumed its consideration of paragraph 1 (c).

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217. The representative of Finland read out a proposed text for the subparagraph as it had emerged from informal consultations. The Working Group decided to adopt the text.

218. The text of paragraph 1 (c) of article 75 as adopted on second reading is as follows:

Article 75

1. ...

...

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where, in the view of the Committee, the application of the remedies is unreasonably prolonged;

Paragraph 1 (d)

219. The representatives of Australia and Morocco indicated that notwithstanding the intention of the delegation of Japan, the effect of Japan's proposed provision was that former paragraph 4 could not be adopted until the Working Group had decided on the proposal, because the wording of former paragraph 4 depended on whether the provision proposed by Japan was adopted or not.

220. The Working Group decided to consider the text of former paragraph 4 after it had decided on the fate of the proposal by Japan.

221. At the 9th meeting, on 2 October 1988, the representative of Finland read out a proposed text for subparagraph (d) as it had emerged from informal consultations. The Working Group decided to adopt the text.

222. The text of paragraph 1 (d) of article 75 as adopted during the second reading is as follows:

Article 75

1. ...

...

(d) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on a basis of the respect for the obligations set forth in the present Convention;

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Paragraph 1 (e)

223. At its 7th meeting, on 29 September 1989, the Working Group adopted the text of paragraph 1 (e) as it was in former paragraph 5. The text of paragraph 1 (e) of article 75, as adopted during the second reading, reads as follows:

Article 75

1. ...

...

(e) The Committee shall hold closed meetings when examining communications under this article;

Paragraph 1 (f)

224. At the same meeting the Working Group considered a text for paragraph 1 (f) on the basis of paragraph 6 of the proposal contained in document A/C.3/44/WG.1/CRP.6/Add.1. The representative of Japan drew the attention of the Working Group to proposed amendments submitted by her delegation which were contained in paragraph 12 of document A/C.3/44/WG.1/CRP.5/Rev.1. The representatives of Italy, the United States and the Federal Republic of Germany were of the view that, as it was more specific, the text of the Japanese proposal was preferable to the former text. The Working Group decided to adopt the text on the basis of the Japanese proposals.

225. The text of paragraph 1 (f) of article 75, as adopted during the second reading, reads as follows:

Article 75

1. ...

...

(f) In any matter referred to it in accordance with subparagraph (b) of this article, the Committee may call upon the States parties concerned, referred to in subparagraph (b), to supply any relevant information;

Paragraph 1 (g)

226. At the 7th meeting, on 29 September 1989, the Working Group considered a text for paragraph 1 (g) on the basis of paragraph 7 of the proposal contained in document A/C.3/44/WG.1/CRP.6/Add.1. The representative of Japan drew the attention of the Working Group to the proposed amendments submitted by her delegation in paragraph 13 of document A/C.3/44/WG.1/CRP.5/Rev.1.

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227. The representatives of Algeria and the Federal Republic of Germany indicated that as it allows for the possibility of oral and written submissions to the Committee, the Japanese proposal was preferable to former paragraph 7, which only provided for written submissions. The Working Group decided to adopt the Japanese proposal.

228. The text of paragraph 1 (g) of article 75, as adopted during the second reading, reads as follows:

Article 75

1. ...

...

(g) The States parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

Paragraph 1 (h)

229. At its 7th meeting, the Working Group also considered a text for paragraph 1 (h) on the basis of paragraph 8 of the proposal contained in document A/C.3/44/WG.1/CRP.6/Add.1. The representative of Japan drew the attention of the Working Group to the proposed amendments submitted by her delegation in paragraph 14 of document A/C.3/44/WG.1/CRP.5/Rev.1.

230. The representatives of Algeria and Morocco expressed a preference for the text of former paragraph 8 because the chapeau of that paragraph referred to the transmission date of communications. They found this preferable because transmission dates were more easily verifiable and with the advent of such modern technology as Fax and telex machines there would be little or no delay between dates of transmission and dates of receipt.

231. The representatives of the Federal Republic of Germany, France, Italy and Japan found the Japanese proposal preferable because it referred, in the chapeau, to dates of receipt of notice of communications. The representatives of the Federal Republic of Germany and Italy were of the view that this would avoid the situation where the Committee would be given a very short period in which to submit its report. In addition, they were of the view that if there was to be any delay then the benefit of such a delay should accrue to the Committee.

232. In view of its inability to reach a consensus on the foregoing issue, the Working Group decided to take up further consideration of paragraph 1 (h) in informal consultations.

233. At its 8th meeting, on 29 September 1989, the Working Group resumed its consideration of subparagraph (h) of former paragraph 8. The Chairman said that after informal consultations the following formulation was suggested, based on article 21 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

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"(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

"(i) If a solution within the terms of subparagraph ___ is reached, the Committee shall confine its report to a brief statement of the fact and of the solution reached;

"(ii) If a solution within the terms of subparagraph ___ is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned."

234. While they approved of the introductory sentence of subparagraph (h) and subparagraph (h) (i), the representatives of Morocco and Algeria believed that subparagraph (h) (ii) confined the Committee to a purely passive role and that, in cases where a solution had not been reached, the Committee should be able to explain its views in its report and even to submit recommendations. No attempt was being made to set the Committee up as a court of law, but to enable it to act as a true mediator.

235. The representative of the Federal Republic of Germany said that he could only accept the version either of MESCA, which had been adopted at first reading (A/C.3/39/WG.1/WP.1), or that of Japan (A/C.3/44/WG.1/CRP.5/Rev.1). Referring to the role of the Committee, he said that he could not accept having the Committee decide to mediate on specific cases. The latter view was supported by the representative of Sweden who said that if the Committee were treated as a tribunal then very few States would accept the optional procedure of article 75. Japan shared the above opinion.

236. The representative of Sweden stated that the role of the Committee under this article was not one of a tribunal, and that such a role could have the consequence that very few States would accept the optional procedure under article 75.

237. The representatives of Morocco and Algeria stated that their delegations no longer supported the MESCA proposal. Referring to other procedures on inter-State disputes established under international instruments, they pointed out that the bodies dealing with such disputes could not make general recommendations. In that connection they referred to articles 12 and 13 of the International Convention on the Elimination of All Forms of Racial Discrimination. In the view of their delegations, a good offices role should be given under the Convention to the Committee in inter-State disputes: the Committee should submit a report and make recommendations or, if no solution was reached, draw its own conclusions.

238. At its 8th meeting, on 29 September, the Working Group adopted on second reading the introductory phrase of subparagraph (h) and subparagraph (h) (i) as follows:

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Article 75

...

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (f) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

239. Continuing the debate on subparagraph (h) (ii), the representative of Italy made a distinction between good offices and conciliation in international law. Under good offices, the international body concerned tried to assist in a conflict without proposing solutions. Under a conciliation procedure the international body concerned could propose solutions. Articles 41 and 42 of the International Covenant on Civil and Political Rights, for example, both provided for a good offices procedure.

240. The representative of Canada, while welcoming a good offices role of the Committee in inter-State disputes, felt that the text should be strengthened to make the Committee's position more active. Thus he suggested the inclusion of a third subparagraph that would read:

"The views of the Committee after the good offices role has been completed shall be submitted to the States concerned."

241. Several delegations agreed with the Canadian suggestion. The representative of Morocco proposed that the suggested addition be made in subparagraph (h) (ii), and that the word "confine" in that subparagraph be replaced by a more appropriate term that would reflect the more active role of the Committee.

242. After further discussion, the Working Group deferred the consideration of subparagraph (h) (ii) of former paragraph 8 to informal consultations.

243. At the 9th meeting, on 2 October 1989, the representative of Japan drew the attention of the Working Group to paragraph 15 of document A/C.3/44/WG.1/CRP.5/Rev.1, in which her delegation had proposed the insertion of a new provision in the article, as follows:

"(i) The Committee shall include in its annual report under article 73 (7) a summary of its activities under this paragraph of this article."

244. In support of the adoption of the Japanese proposal, the representative of the Federal Republic of Germany suggested that the provision was a useful one. The representatives of Finland and Morocco, however, questioned the necessity of the proposed provision since in their view, article 73, paragraph 7, already covered the situation that the proposal was meant to provide for. The representative of Japan indicated that the situation covered by the proposal was different from that referred to in article 73, paragraph 7.

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245. The representative of Algeria supported the proposal by the representative of Japan but indicated that, as it was important for the Committee to report to the General Assembly on its activities under this specific mandate, she would wish to amend it so that the Committee, as in the case of the individual complaint procedure of article 14, paragraph 8 of the International Convention on the Elimination of All Forms of Racial Discrimination, could also summarize explanations and statements of the States Parties concerned, as well as its own suggestions and recommendations.

246. The representative of Italy questioned the utility of the provision in any formulation. He was of the view that the reports it would provide for could upset delicate negotiations at critical stages in the exercise of good offices by the Secretary-General. He was of the view that in making any report the Committee would have to arrive at at least preliminary conclusions, thus prejudging matters which had not yet been settled finally. In that connection, the representative of France indicated that he would only be willing to support the adoption of the provision if it were made clear that the report made under the provision was not to refer to matters still pending before the Committee. The representative of Japan emphasized that, since the inter-State complaints procedure provided for in article 75 was essentially a confidential one, the Committee should only produce brief summaries of its activities in that regard.

247. The representative of Algeria stated that, while she was not insisting on the adoption of her amendments to the proposal, she had not been convinced by the reasons adduced for their inclusion. She indicated that the concern expressed, among others, by the representative of Italy was unwarranted because in the context of the individual complaints procedure of the Committee on the Elimination of Racial Discrimination, the Committee could prepare reports on questions before it without those reports being regarded as prejudicing questions awaiting consideration.

248. The representative of the Federal Republic of Germany suggested that, since paragraph 1 (h) (ii) of the article had not yet been adopted, the Working Group should postpone further consideration of the Japanese proposal until it had taken a decision on that provision.

249. In view of its inability to reach a consensus on this proposed provision, the Working Group decided to postpone further consideration of it until informal consultations had been held.

250. At its 11th meeting, on 3 October 1989, the Working Group resumed its consideration of subparagraph (h) (ii) of former paragraph 8 on the basis of a text proposed by Finland during informal consultations. At the same meeting, the Working Group adopted subparagraph (h) (ii) on second reading, as follows:

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Article 75

...

(ii) If a solution within the terms of subparagraph (d) is not reached, the Committee shall, in its report, set forth the relevant facts concerning the issue between the States Parties concerned. The written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. The Committee may also communicate only to the States Parties concerned any views that it may consider relevant to the issue between them. In every matter, the report shall be communicated to the States Parties concerned.

251. The representative of Japan stated that, in the light of the adoption of subparagraph (h) (ii), her delegation withdrew its proposal for subparagraph (i) of paragraph 1 of the article (see para. 243 above). The understanding of her delegation was that the whole procedure of the article remained confidential. That view was shared by the delegation of the Federal Republic of Germany.

252. The representative of Algeria stated that she did not agree with the interpretation given by the delegations of the Federal Republic of Germany and Japan. Confidentiality would not extend beyond the period during which the case was being taken up by the Committee and, as for the other procedures applied for other bodies, in this specific case, the Committee would include in its annual report to the General Assembly a section on the inter-State complaints procedure and the cases that it had reviewed.

253. The representative of the Netherlands stated that he would have preferred a procedure along the lines of article 42 of the International Covenant on Civil and Political Rights, but in a spirit of co-operation he had joined the consensus in the Working Group.

Paragraph 2

254. At its 9th meeting, on 2 October, the Working Group took up consideration of paragraph 2 of article 75.

255. The representative of Japan introduced a proposal by her delegation that article 75 should contain a second paragraph as follows:

"2. The provisions of this article shall come into force when ... States Parties to the present Convention have made a declaration under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration."

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256. The representative of Finland, supported by the representatives of Morocco and the Netherlands, suggested that the proposed paragraph be amended so that States would have to give reasons for withdrawing their declaration, giving the Committee competence to entertain complaints against them by other States. It was the view of those delegations that since a State had voluntarily decided to subject its policies to review it should have to let the international community know why it was changing its mind. In particular, the representative of Finland indicated that if the reason for the withdrawal of competence was a small or procedural one then changes could be put into effect so that the State could leave the Committee with competence.

257. The representative of the Federal Republic of Germany indicated that he did not support the proposed amendment because it seemed to violate the sovereign right of States to avail themselves, at will and without having to give reasons, of an option presented in an international treaty. Moreover, it was unlikely that States would explain the real reasons for withdrawing their declarations.

258. The representative of Australia, supported by the representative of Sweden, also voiced unwillingness to support the adoption of the proposed amendments to the new paragraph. In doing so they indicated that it would be illogical to demand reasons for States withdrawing their declarations under article 75 when they were not required to give reasons for denunciation of the Convention as a whole. The representatives of Japan, Italy, China and India also indicated their unwillingness to support the adoption of the proposed amendments for the same reasons as in the foregoing.

259. In an effort to find a compromise to the different views, the Chairman suggested that the Working Group could adopt the paragraph with a sentence indicating that States could give reasons why, when they chose to do so, they had decided to withdraw their declarations.

260. In view of the debate on this issue and in order to not block consensus, the representative of Finland stated that he would not insist on his proposed amendments but would be satisfied for it to be reflected in the report that his delegation would have preferred for States to give reasons for withdrawing their declarations under article 75. The representatives of Algeria, Morocco and the Netherlands also wished to be associated with the foregoing statement by the representative of Finland.

261. With regard to the necessary number of declarations for the entry into force of the procedure, the representative of the Federal Republic of Germany suggested that, consistent with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, where it took 20 ratifications for the entry into force of the Convention and five declarations for the entry into force of the inter-State complaints procedures, since the present Convention was also planned to enter into force after 20 ratifications it should also have an inter-State procedure which entered into force after five declarations accepting it. The representatives of Finland, Algeria and Morocco also expressed support for the number to be five in order to have a low number of necessary declarations for the rapid entry into force of the procedure.

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262. The representative of the United States questioned the assumption by the representative of the Federal Republic of Germany that the ratio between necessary ratifications for the entry into force of the Convention against torture and necessary declarations for the entry into force of its inter-State complaints procedure was a logical one. He suggested that the ratio was merely an accident of history and not one which necessarily had to be followed. The United States representative was also of the view that in order to have sufficiently broad support for the incurring of the cost of setting up and maintaining the procedure there should be at least 10 declarations. He indicated that, regardless of whether the Committee was to be financed from the United Nations budget (to which 159 States contributed) or by States parties to the Convention (a minimum of 20), it would be more equitable to have the higher figure. The representative of Japan also suggested that the number should be at least 10 but indicated that her delegation was flexible as regards the necessary number.

263. At the 9th meeting, on 2 October 1989, the Working Group decided to adopt the text of paragraph 2 of article 75. After further informal consultations the Working Group decided to insert the number "ten" on the first line between the words "when" and "States".

264. The text of paragraph 2 as adopted during the second reading is as follows:

<u>Article 75</u>

...

2. The provisions of this article shall come into force when 10 States Parties to the present Convention have made a declaration under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

265. At its 11th meeting, on 3 October 1989, the Working Group adopted article 75 on second reading as a whole, as follows:

<u>Article 75</u>

1. A State Party to the present Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Convention. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be

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received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Convention considers that another State Party is not fulfilling its obligations under the present Convention, it may, by written communication, bring the matter to the attention of the State Party. The State Party may also inform the Committee of the matter. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted on the matter, in conformity with the generally recognized principle of international law. This shall not be the rule where, in the view of the Committee, the application of the remedies is unreasonably prolonged;

(d) Subject to the provisions of subparagraph (c) the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on a basis of the respect for the obligations set forth in the present Convention;

(e) The Committee shall hold closed meetings when examining communications under this article;

(f) In any matter referred to it in accordance with subparagraph (b) of this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (d) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

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(ii) If a solution within the terms of subparagraph (d) is not reached, the Committee shall, in its report, set forth the relevant facts concerning the issue between the States Parties concerned. The written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. The Committee may also communicate only to the States Parties concerned any views that it may consider relevant to the issue between them.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Convention have made a declaration under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General unless the State Party concerned has made a new declaration.

Article 75 bis

266. From its 10th meeting to its 12th meeting, from 2 to 4 October 1989, the Working Group took up the consideration of article 75 bis on an optional procedure for individual complaints which had been proposed by the representative of the Netherlands, on the basis of article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The proposal, contained in paragraph 82 of the report of the Working Group (A/C.3/44/1) read as follows:

"1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

"2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.

"3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

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"4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.

"5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:

"(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;

"(b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.

"6. The Committee shall hold closed meetings when examining communications under this article.

"7. The Committee shall forward its views to the State Party concerned and to the individual.

"8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the State Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration."

267. The representative of the Federal Republic of Germany reiterated the position taken by his delegation on the first reading of the proposal. While his delegation attached much importance to the principle of a mandatory procedure for hearing complaints from States combined with an optional procedure for considering complaints from individuals - a system established in other international human rights agreements - it did not regard such a system as appropriate for the Convention under discussion, which imposed sometimes very detailed obligations on States. His delegation was opposed to the inclusion of such a provision in the Convention, not only because very few States were likely to accept it, but because its very existence could generate considerable pressure on those States to accept it. Procedures of that kind could be costly. If the provision was adopted, he would request that his objection be recorded in the report.

268. The representative of Japan expressed the opposition of her delegation to the provision.

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269. The representative of the United States shared the concern of the Federal Republic of Germany and also expressed the objection of his delegation.

270. The representative of Algeria was in favour of including in the Convention a procedure for considering complaints from individuals. She said that her delegation could not understand the objections raised by some delegations, since the procedure was optional and was already included in quite a number of existing international instruments. Similarly, she was surprised that the same delegations that were trying to draft an optional protocol or the death penalty in the Third Committee could block the adoption of a human rights provision of proven utility. She believed that the relevant provision in the Convention against Torture could be reproduced by the Working Group, because it was extremely important for migrant workers subjected to a violation of the rights provided in the Convention to have a remedy. The representative of Mexico expressed the support of her delegation for the views advanced by the representative of Algeria. The representative of Greece also expressed his support for the inclusion of the proposal in the Convention.

271. The representative of Canada expressed his support for the inclusion in the Convention of the proposal for an optional individual complaint mechanism. He stated that his position was based on Canada's traditional concern for effective procedures to implement human rights obligations. However, he also expressed his concern over how the future Committee would address those rights in the Convention of an economic, social and cultural nature. Notwithstanding that concern, the representative of Canada stated that his delegation was prepared to accept the mechanism and thereby allow the Committee an opportunity to consider and express its views on complaints arising from the Convention.

272. The representative of Italy drew the Working Group's attention to the provision of article 42 already adopted by the Group. In view of that provision, he expressed some doubts about having an optional individual complaint mechanism in the Convention.

273. The representative of Sweden expressed his support for the views expressed by the representatives of Canada and Italy. He said that his delegation had always supported the individual complaint mechanism under human rights Conventions. However, in the present Convention, which addressed fundamental human rights and other rights as well, the Committee might encounter problems in dealing with individual complaints regarding certain articles or duplicate the work of some already established bodies.

274. The representative of the Netherlands reiterated that his delegation attached great importance to including a provision on individual complaints in the Convention. He stressed that whereas the inter-State procedure was in practice hardly ever effectively used, the individual complaint procedure had proved to be quite efficient in bodies such as the Human Rights Committee established under the International Covenant on Civil and Political Rights. He added that in order to accommodate some concerns raised during the discussion his delegation was ready to introduce some change to their proposal by inserting the words "of their individual rights" in the fourth line of paragraph 1 between the words "violations" and "by a State Party"; and after the word "State Party" to insert the words "as established by". He also proposed ending paragraph 5 (b) after the word "prolonged".

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275. The representative of Morocco expressed her support for maintaining the mandatory individual complaint mechanism in the Convention. She also expressed her approval for the amendment put forward by the representative of the Netherlands that the complaint related specifically to violations of individual human rights.

276. After some discussion, the Working Group decided to take up article 75 *bis* in informal consultations.

277. At its 12th meeting, on 4 October 1989, the Working Group resumed its consideration of a text for article 75 *bis* based on the proposal by the Netherlands contained in paragraph 82 of document A/C.3/44/1. The Chairman read out revised proposals for paragraph 1 and subparagraph (b) of paragraph 5 which had emerged from informal consultations, as follows:

> "1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be the victims of a violation of their individual rights by that State Party as established by the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.
>
> "5. ...
>
> "...
>
> "(b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies, in the view of the Committee, is unreasonably prolonged."

278. The representatives of the Federal Republic of Germany, the United States and France indicated that although they were not willing to support the inclusion of an individual complaint mechanism in the present Convention they did not wish to break the consensus and would be satisfied to have their views reflected in the report. In particular, the representative of the Federal Republic of Germany drew the attention of the Working Group to paragraph 85 of document A/C.3/44/1 in which the reasons for his opposition were clearly elaborated.

279. The representative of Japan also questioned the efficacy of an optional individual complaint procedure in the context of protecting the rights of migrant workers. She observed that the text of the proposed article would have been improved by the deletion of the words "or on behalf of" from line 3 of paragraph 1 and line 2 of paragraph 4, and the insertion of the word "written" before the word "information" in line 2 of paragraph 4. With regard to the first observation, she indicated that migrant workers would almost always be in a position to institute complaints personally, thus making the words "or on behalf of" unnecessary. Regarding the latter observation, she stated that the insertion of the word "written" would have made the text consistent with the equivalent provision of the Optional Protocol to the International Covenant on Civil and Political Rights and would have ensured that there was a limit to the types of information which the

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Committee had to consider. However, in order not to break the consensus, she indicated that her delegation would neither insist on its opposition to the substance of the article nor introduce its observations as amendments, but would be satisfied to have its views reflected in the report. The representatives of Canada, Sweden and the Netherlands indicated that they would have strongly opposed the observations of Japan if they had been formally introduced as amendments.

280. The representative of Italy questioned the provision of the text of paragraph 1 as proposed. He suggested that, in order to clarify the gamut of rights about which individuals could complain of violations, the words "granted them on the basis of the present Convention" should be inserted after the word "rights". He was supported by the representative of the USSR. With the same intention as the representative of Italy, the representative of the United States suggested that the words "as set forth in this Convention" should be inserted after the word "rights".

281. The representative of Australia, supported by the representative of the Netherlands, indicated that the words "as established by this Convention" contained in the proposal which had emerged from informal consultations adequately met the concern raised by the representatives of Italy, the United States and the USSR. In order to clarify the text of paragraph 1 as it had emerged from informal consultations, the representative of Australia suggested that the words "of their individual rights" in line 4 should be shifted and placed after the words "State Party" in the same line.

282. The representative of Finland indicated that the word "five" in line 1 of paragraph 8 should be replaced by the word "ten".

283. Pursuant to the foregoing discussion the Working Group decided to adopt a text for article 75 bis.

284. Following the adoption of the article, the representative of Canada stated that he welcomed the decision of the Working Group to include in the Convention a provision allowing for an optional complaint mechanism. In supporting the adoption of the article, however, he expressed concern over the fact that the complaint procedure would apply to a broad range of rights, including those of an economic, social and cultural nature. That might give rise in the future to problems of interpretation for the Committee and result in the Committee being burdened with an overwhelming number of unsubstantiated, frivolous complaints. Such possibilities would be examined closely by the Government of Canada before any decision was made in respect of the declaration accepting the optional individual complaint mechanism.

285. The representatives of Italy and France suggested that the article might have been too hastily adopted and questioned the appropriateness of the words "victims of a violation" in paragraph 1. The representative of Morocco stated that the language used was proper and cited the Optional Protocol to the International Covenant on Civil and Political Rights and article 14 of the Convention on the Elimination of All Forms of Racial Discrimination as precedent for its use in the provision.

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286. The text of article 75 bis as adopted during the second reading reads as follows:

Article 75 bis

1. A State Party to the present Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of their individual rights as established by the present Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the present Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to the present Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.

5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:

(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement

(b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies in the view of the Committee is unreasonably prolonged.

6. The Committee shall hold closed meetings when examining communications under this article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of this article shall come into force when ten States Parties to the present Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the State Parties with the Secretary-General of the United Nations, who shall transmit copies thereof

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to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

Article 77 (former article 75)

287. At its 9th and 10th meetings, on 2 October 1989, the Working Group took up consideration of a text for article 77 based on the text for former article 75 contained in paragraph 110 of document A/C.3/44/1 (the report on the June 1989 inter-sessional meeting of the Working Group) as follows:

"The provision of the present Convention concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints in the field covered by the present Convention laid down in the constituent instruments of, or in conventions adopted by, the United Nations and its specialized agencies and shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance with international agreements in force between them."

288. The Working Group also had before it a proposal in relation to this article by the Federal Republic of Germany, which was contained in paragraph 112 of document A/C.3/44/1, as follows:

"The application of article 75 shall not preclude States Parties from having recourse to other procedures for settling a dispute in accordance with international agreements in force between them."

289. The representative of Japan indicated that it would not be necessary to maintain the provision because article 75 was an optional procedure and if States made declarations accepting it they would not pursue other channels of recourse.

290. The representative of Italy indicated that the two situations were different. He stated that former article 75 meant to ensure that if, for whatever reasons, States chose to use another procedure they would be free to do so. He felt it desirable to allow States the element of choice. The representatives of Morocco, Mexico, Algeria, Finland, India and China supported the view.

291. The representative of Italy questioned whether the text of former article 75 would not have some effect on article 89 which provided for the settlement of disputes by arbitration. He indicated that although former article 75 did not preclude other procedures for dispute settlement, it did not expressly recognize article 89. He was of the view that in order to clarify the situation a sentence should be added to former article 75 stating that the terms of the provision were without prejudice to the provision contained in article 89. In addition, he suggested that the word "provision" in line 1 of the text cited in paragraph 1 above should be changed to read "provisions".

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292. The representative of the Federal Republic of Germany wondered whether article 75 would affect article 89 and referred to the International Covenant on Civil and Political Rights and to the International Convention on the Elimination of All Forms of Racial Discrimination, both of which contained proposals similar to the article under review.

293. The representative of Morocco suggested that since former article 75 and article 89 were linked, the Working Group should not make a final decision on former article 75 until it had considered the text of article 89.

294. In view of the inability of the Working Group to reach a consensus for a decision on the adoption or omission of the provision, it decided to take it up in informal consultations.

295. At its 10th meeting, the Working Group resumed consideration of the present provision.

296. During the consideration of the provision the discussion was mainly based on the question of whether to begin the provision by a sentence stipulating that "the provision of the present article does not prejudice article 75" or by a formulation that would imply that the present provision would not prejudice recourse to any other procedure since the contents of article 75 were not yet fully decided upon.

297. The representative of Australia pointed out that the provision could be adopted by referring to an unnumbered article or articles. He therefore proposed rewording the provision as follows:

> "The provisions of article ___ shall be applied without prejudice to other procedures for settling disputes or complaints in the field covered by the present Convention laid down in the constituent instruments of, or in conventions adopted by, the United Nations and its specialized agencies and shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance with international agreements in force between them."

298. Upon the suggestion of the representative of Finland the Working Group agreed to replace the word "other" by the word "any" in the final text.

299. The article would become article 77 of the Convention following the deletion or addition of some articles.

300. The text of article 77 as adopted on second reading by the Working Group reads as follows:

<u>Article 77</u>

The provisions of article 75 shall be applied without prejudice to any procedures for settling disputes or complaints in the field covered by the present Convention laid down in the constituent instruments of, or in conventions adopted by, the United Nations and its specialized agencies and

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shall not prevent the States Parties from having recourse to any procedures for settling a dispute in accordance with international agreements in force between them.

Article 79 bis

301. At its 11th meeting, on 3 October 1989, the Working Group discussed the following proposal by the Union of Soviet Socialist Republics for an article 79 bis regarding the territorial application of the Convention:

"Provisions of the present Convention shall be applied by every State Party in its territory or in other places under its jurisdiction as recognized by international law or, in the absence of such jurisdiction, under its control."

302. The representative of the Federal Republic of Germany recalled that the Working Group, at its June 1989 session, had decided not to keep old article 89 on territorial application. His delegation would be prepared to discuss the USSR proposal but had a number of difficulties, namely how necessary was the article given the already adopted provision of article 7; what was the meaning of the expression "under its control" and of the word "places".

303. The representative of Finland agreed that at the June 1989 session the Working Group had extensively discussed this issue (A/C.3/44/1, para. 232). It seemed that if no provision on territorial application was contained in the Convention, then the Vienna Convention on the Law of Treaties would be used to complement it. Besides, as a matter of procedure he would be reluctant to reopen an issue already decided upon by the Working Group.

304. Similar views were expressed by the representatives of Japan, the Netherlands, Italy, Australia, the United States and Yugoslavia. The representative of the Netherlands pointed out that the expression "under its control" suggested cases where international law did not recognize jurisdiction over a certain territory; the use of the expression might risk legitimizing certain situations. The view wa also shared by the representative of Italy.

305. The representative of the Union of Soviet Socialist Republics pointed out tha the expression "territory under its control" had been used by the International La Commission and reference to it could be found in the last report of the Commission. Given the opinions expressed, his delegation, in a spirit of co-operation, would not press its proposal. It was the understanding of the delegation of the USSR that, according to the Law of Treaties, provisions of the Convention should be obligatory for any State party with respect to its territory or other places under its jurisdiction as recognized by international law or, in the absence of such jurisdiction, under its control.

Article 84

306. At its 11th meeting, on 3 October 1989, the Working Group considered article 84 on the basis of the text which had emerged from first reading (A/C.3/39/WG.1/WP.1) reading as follows:

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"1. Where a State Party is constituted as a federal State, the national Government of such State Party shall implement all the provisions of the present Convention over whose subject matter it exercises jurisdiction.

"2. With respect to the provisions over whose subject matter the constituent units of the federal State have jurisdiction, the national Government shall immediately take suitable and effective measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units adopt appropriate measures for the fulfilment of the present Convention."

307. The representative of the United States reiterated the importance of the article for his delegation. The representative of the Federal Republic of Germany said he could go along with the article but could also see it deleted. The representative of Japan said that her delegation would not insist on her proposal regarding the article.

308. The representative of Finland recalled that the Working Group had discussed the issue at length at its June 1989 meeting. In his view, the text, as it had been formulated, would run counter to the principle of universality in the application of human rights norms. Besides, article 84 seemed to discriminate between unitary and federal States and put the latter in a favourable position. That view was shared by the USSR, Mexico, Sweden, Yugoslavia and others.

309. In that connection, the representative of Sweden pointed out that the adoption of a clause on reservations could help in the deletion of articles 84 and 85. The representative of Denmark shared that point of view.

310. The representative of Italy stated that article 84 would indeed permit selective implementation of the Convention by the States composing a federal State. However, if article 84 was not included in the Convention it would not allow accession to the Convention by federal States before all parts of those federal States agreed to its full implementation. Thus the Working Group had to make a choice.

311. The representative of France inquired how inclusion of article 84 would help in the ratification of the Convention by federal States such as the United States and whether some articles could be applied to the whole country directly, without needing the approval of the individual States.

312. The representative of the United States explained that much of the subject-matter of the Convention, such as education, social security or unemployment insurance, was within the jurisdiction of each individual state of the United States. The inclusion of article 84 would assist the federal Government to ratify the Convention. Referring to the comment by Sweden, the representative of the United States said that indeed, if an agreement was reached on appropriate article regarding reservations, then the United States would not insist on the inclusion of article 84.

313. At the 11th meeting, on 3 October 1989, the Working Group, having agreed on an article on reservations (art. 88) decided to delete article 84 from the Convention.

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Article 88

314. At its 11th meeting, on 3 October 1989, the Working Group discussed an article on reservations. The representative of Sweden recalled that at the June 1989 session there was an understanding within the Working Group that, in principle, the wording of article 28 of the Convention on the Elimination of All Forms of Discrimination against Women was acceptable. Several delegations confirmed this understanding.

315. The representative of the Federal Republic of Germany stated that it was essential to include the provision on reservations as it had been proposed on the first reading (A/C.3/39/WG.1/WP.1, art. 89). However, the provision should be amended to include the phrase "the reservations may cover any provisions in parts I to VI". Such wording was essential in order for the Federal Republic of Germany to consider ratifying the Convention in future. However, if a consensus was not reached on that point in the Working Group, the delegation of the Federal Republic of Germany would record its reservations in the report.

316. The representative of Japan also supported the provision on reservations proposed at the first reading but without paragraph 2. She also referred to the amendments proposed by Japan at the June 1989 meeting.

317. The representatives of Canada, the United States, the Netherlands, Denmark and Australia stated that the Working Group should either adopt the wording of article 28 of the Convention on the Elimination of All Forms of Discrimination against Women or have no article on reservations at all. The representative of Denmark added that his delegation no longer supported the proposal made at the first reading of article 89. He was therefore quite willing to withdraw it.

318. Taking note of the statement made by the representative of Denmark the representative of Japan expressed her support for the adoption of the text of article 28 of the Convention on the Elimination of All Forms of Discrimination against Women.

319. The representative of the Soviet Union stated his preference for including a provision on reservations in the Convention, but in order to expedite the deliberations of the Working Group he could also accept the non-inclusion of such a provision.

320. The representative of Italy said that if no provision on reservations was included in the Convention, this would mean that the Vienna Convention on the Law of Treaties would apply in this matter, including the mechanism for objections to reservations. If the wording of article 28 of the Convention on All Forms o Discrimination against Women were adopted, there would be a problem because there was no reference in that article to the mechanism for making objections to reservations. Would then an objection have the effect of excluding the applicability between two countries of specific clauses or of the whole Convention? What would be the impact of such reservation and the ensuing objection on the principle of reciprocity?

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321. The representative of Australia stated that there was agreement in the Working Group that the principle of reciprocity was not applicable in a human rights convention such as the one being drafted. This view was shared by the representatives of Algeria and Sweden.

322. At its 11th meeting, on 3 October 1989, the Working Group adopted article 88 on second reading.

323. The representative of Italy regretted that such a formulation had been adopted. He stated that it was the understanding of his delegation that the consequence of adopting article 88 was that a State could make any reservation to any provision of the Convention. The objection by another State to a reservation would have the effect that that State would not apply the provision on which the reservation had been made to the citizens of the State which had made the reservation.

324. The representative of Mexico said that in adopting article 88, it was the understanding of her delegation that reservations contrary to the spirit of the Convention would not be acceptable. A similar declaration was made by the representative of the Federal Republic of Germany.

325. The representative of Morocco stated that her acceptance of article 88 should be read in connection with paragraph 2 of that article. It was up to States Parties to see what reservations were against the spirit of the Convention. A reservation had to be accepted by States Parties in order to be valid.

326. The representative of France stated that his delegation would have preferred the adoption of a more explicit text, on the basis of the proposal appearing in paragraph 292 of the report of the Working Group at its June 1989 session (A/C.3/44/1). It was the understanding of his delegation that States parties which would make reservations on articles 2 to 5 and [illegible] of the Convention should expect identical treatment on the part of France.

327. The representative of Sweden agreed with Mexico and Morocco regarding the interpretation of article 88.

328. Upon adoption of article 88 on reservations, the delegate of Finland indicated that he was prepared to join the consensus on the condition that it was understood that this article should be interpreted in a very restrictive way. In this respect, it should be understood that a reservation excluding any of the categories of migrant workers or members of their families from the application of this Convention would be considered as incompatible with the object and purpose of the Convention. The same shall be the interpretation of a reservation that would inhibit the operation of the Committee established under article 70.

329. The representatives of Italy, Yugoslavia and Mexico wished the names of their delegations to be associated with the foregoing declaration.

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330. The representative of the Federal Republic of Germany expressed his opposition to the foregoing declaration since his delegation had wanted article 3 to be formulated excluding some, if not all, categories of migrant workers such as those mentioned in paragraph 2 of article 2 of the Convention.

331. The representative of France drew the attention of the Working Group to the declaration he had made immediately following the adoption of article 88.

332. The text of article 88 as adopted on second reading by the Working Group reads as follows:

Article 88

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

III. DISCUSSION RELATING TO THE WORKING GROUP'S METHOD OF WORK ON THE FINALIZATION OF THE DRAFT CONVENTION

333. Regarding the technical review and the finalization of the draft Convention, it is the view of the Working Group that the General Assembly should request the Secretary-General to undertake a technical review of the draft Convention, bearing in mind the guidelines of the Working Group and to provide the necessary resources. The results of the technical review should be transmitted to the Member States no later than one month prior to the next meeting of the Working Group in 1990.

334. Consequently, at its 15th meeting, on 6 October 1989, the Working Group agreed to recommend that the Third Committee request the General Assembly to authorize a meeting of the open-ended Working Group for a period of up to two weeks in the spring of 1990 immediately after the first regular session of the Economic and Social Council, with a view to completing the remaining articles and to consider the results of the technical review.

335. As a result of the adoption of new articles and the deletion of some articles in the course of the present session, the numbering of some of the articles of the draft Convention adopted on second reading and contained in document A/C.3/44/WG.1/WP.1/Rev.1 would be changed. Thus, articles 1 to 9 would keep the same numbering as in document A/C.3/44/WG.1/WP.1/Rev.1; article 61 would be renumbered article 60 as a result of the deletion of article 60; article 62 would

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become article 61; article 62 bis would become article 62; article 62 ter would become article 63; articles 63 to 75 would be renumbered articles 64 to 75; former article 75 (on inter-State complaints) would become article 76. Subsequently, the remaining articles would also be renumbered.

336. At the end of the session, the matters still pending were: article 50 (see A/C.3/44/CRP.4, A/C.3/44/CRP.5/Rev.1, paras. 1 and 2, and A/C.3/44/CRP.6); parts of article 62 (see paras. 126-140 of this report); paragraphs 8 and 9 of article 70; article 85 (A/C.3/44/1, paras. 239-247); proposals relating to article 86 (see proposal relating to article 86 in document A/C.3/44/CPR.6/Add.2).

337. At its 15th meeting, on 6 October 1989, the Working Group adopted the present report.

IV. TEXT OF PARAGRAPHS, ARTICLES AND TITLE OF PART VI OF THE DRAFT INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND THEIR FAMILIES ADOPTED ON SECOND READING BY THE WORKING GROUP DURING THE FALL OF 1989

Article 2

...

2. ...

(h) The term "self-employed worker" refers to a migrant worker who is engaged in a remunerated activity otherwise than under a contract of employment and who earns his living through this activity normally working alone or together with members of his family, and to any other migrant worker recognized as self-employed by applicable legislation of the State of employment or bilateral or multilateral agreements.

Article 3

...

(f) Seafarers and workers on an off-shore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employment.

Article 43

...

3. States of employment shall not prevent an employer of migrant workers from establishing housing or social or cultural facilities for them. Subject to article 69, a State of employment may make the establishment of such facilities dependent on the same requirements concerning their installation as generally apply in that State.

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Article 50 [Still pending]

Article 52

...

4. States of employment shall prescribe the conditions under which a migrant worker who has been admitted to take up employment may be authorized to engage in work on his own account and vice versa. Account shall be taken of the period during which the worker has already been lawfully in the State of ployment.

Article 54

...

2. If a migrant worker claims that the terms of his work contract have been violated by his employer, he shall have the right to address his case to the competent authorities of the State of employment, on terms provided for in article 18 (1) of the present Convention.

Article 56

1. Migrant workers and members of their families referred to in this part of the Convention may not be expelled from a State of employment, except for reasons defined in the national legislation of that State, and subject to the safeguards established in part III of this Convention.

2. Expulsion shall not be resorted to for the purpose of depriving a migrant worker or a member of his family of the rights arising out of the authorization of residence and the work permit.

3. In considering whether to expel a migrant worker or a member of his family, account should be taken of humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment.

Article 60 (Deleted)

Article 62 (To be renumbered article 61)

1. Project-tied workers, as defined in article 2 (2) (f), and members of their families shall be entitled to the rights provided in part IV of the present Convention, except the provisions of article 43 (1) (b), (c) and (d), as it pertains to social housing schemes, article 45 (b), [article 50] and articles 52 to 55.

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2. If a project-tied worker claims that the terms of his work contract have been violated by his employer, he shall have the right to address his case to the competent authorities of the State which has jurisdiction over that employer, on terms provided for in article 18 (1) of the present Convention.

Article 62 bis (To be renumbered article 62)

1. Specified employment workers as defined in article 2 (2) (g) shall be entitled to all of the rights relating to migrant workers in part IV of the Convention, excluding those set forth in article 43 (1) (b) and (c); in article 43 (1) (d, as it pertains to social housing schemes; and in articles 52 and 54 (d).

2. Members of the family of specified employment workers shall be entitled to all of the rights relating to family members of migrant workers in part IV of the Convention, excluding those set forth in [article 50 and] article 53.

Article 62 ter (To be renumbered article 63)

1. Self-employed workers as defined in article 2 (2) (h) shall be entitled to all the rights provided for in part IV of the Convention with the exception of such rights which are exclusively applicable to workers having a contract of employment.

2. Without prejudice to articles 37 and 52 of the present Convention, the termination of the economic activity of the self-employed workers shall not in itself imply the withdrawal of the authorization for them or for the members of their families to stay or to engage in a remunerated activity in the State of employment except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted.

Title of part VI

PART VI

Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers d their families

Article 75 (To be renumbered article 76)

1. A State Party to the present Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Convention. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in

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regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Convention considers that another State Party is not fulfilling its obligations under the present Convention, it may, by written communication, bring the matter to the attention of the State Party. The State Party may also inform the Committee of the matter. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted on the matter, in conformity with the generally recognized principle of international law. This shall not be the rule where, in the view of the Committee, the application of the remedies is unreasonably prolonged;

(d) Subject to the provisions of subparagraph (c) the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on a basis of the respect for the obligations set forth in the present Convention;

(e) The Committee shall hold closed meetings when examining communications under this article;

(f) In any matter referred to it in accordance with subparagraph (b) of this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (f) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

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(ii) If a solution within the terms of subparagraph (d) is not reached, the Committee shall, in its report, set forth the relevant facts concerning the issue between the States Parties concerned. The written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. The Committee may also communicate only to the States Parties concerned any views that it may consider relevant to the issues between them.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Convention have made a declaration under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General unless the State Party concerned has made a new declaration.

Article 75 bis (To be renumbered article 77)

1. A State Party to the present Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of their individual rights as established by the present Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the present Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to the present Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.

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5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:

(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies in the view of the Committee is unreasonably prolonged.

6. The Committee shall hold closed meetings when examining communications under this article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of this article shall come into force when ten States Parties to the present Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the State Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

Article 77 (To be renumbered article 78)

The provisions of article 75 shall be applied without prejudice to any procedures for settling disputes or complaints in the field covered by the present Convention laid down in the constituent instruments of, or in conventions adopted by, the United Nations and its specialized agencies and shall not prevent the States Parties from having recourse to any procedures for settling a dispute in accordance with international agreements in force between them.

Article 84 (Deleted)

Article 88 (To be renumbered article 89)

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

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3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

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