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REPORT OF THE ECONOMIC AND SOCIAL COUNCIL

Draft International Convention on the Protection of the
Rights of All Migrant Workers and Their Families

Working paper submitted by Finland, Greece, Italy, Norway, Portugal,
Spain and Sweden: further suggestions relating to proposals
presented in document A/C.3/35/WG.1/CRP.15 and Corr.1 and 2 (Part VI
of the draft International Convention on the Protection of the
Rights of All Migrant Workers and Their Families)

Reflections on a system for supervision of
the application of the Convention

1. The purpose of this paper is to throw light on issues that arise in ensuring the effective implementation of the obligations falling on States Parties under human rights instruments of the United Nations system. It is not concerned with the initial question of the incorporation of international conventions into national law. It should merely be noted in passing that the co-sponsoring countries intend to submit a draft provision according to which the States Parties undertake to adopt all necessary measures aimed at implementing the Convention under consideration here which will go some way towards securing the effective observance of the rights recognized and the other provisions included therein. The working paper focuses on the supervisory machinery that may be needed at the international level to make certain that States Parties effectively apply the Convention once it is adopted and have appropriate mechanisms for resolving questions that may arise under it in relations between them.

2. There are numerous precedents for supervisory machinery in the United Nations as well as in the International Labour Organisation, which is the agency concerned in most of the fields covered by the Convention. Several regional instruments

outside the United Nations also have recourse to international supervision. Therefore, a brief recapitulation of the broad features of the main supervisory mechanisms adopted by the United Nations and ILO may be instructive in the elaboration of arrangements suited to the Convention on all migrant workers and members of their families.

3. In the United Nations, supervisory machinery is an integral part of the two Covenants and the Conventions on the Elimination of All Forms of Racial Discrimination and on the Elimination of All Forms of Discrimination Against Women:

(a) The International Covenant on Economic, Social and Cultural Rights, in part IV, calls on States Parties to submit reports in stages on the measures which they have adopted and the progress made in achieving the observance of the rights. The Economic and Social Council established a sessional working group to consider reports from States Parties and specialized agencies, the Covenant having associated the latter with both the examination of reports and the formulation of recommendations. The sessional working group encountered certain difficulties in discharging its responsibilities and the Economic and Social Council recast its composition and arrangements by resolution 1982/33 of 6 May 1982. The main changes include the election by the Economic and Social Council of the members of the sessional working group from among States Parties to the Covenant, the designation by Governments of experts with recognized competence in the field of human rights, and the formulation of suggestions and recommendations by this group of experts at each of its sessions based on its study of the reports by States Parties and specialized agencies;

(b) The International Covenant on Civil and Political Rights, in part IV, set up an 18-member Human Rights Committee of nationals of States Parties. Its duty is, first, to consider the reports to be submitted by States Parties on the measures they have adopted which give effect to the rights spelled out in the Covenant and on the progress made in the enjoyment of those rights. Secondly, if a State Party declares that it recognizes the competence of the Committee to consider communications to the effect that another State Party which has made such a declaration claims that the former is not fulfilling its obligations under this Covenant, and where the matter cannot satisfactorily be settled between them, the Committee shall make available its good offices with a view to a friendly solution and may appoint an ad hoc five-member Conciliation Commission for that purpose. Thirdly, the Optional Protocol to the International Covenant on Civil and Political Rights enables the Human Rights Committee to consider communications from individuals subject to the jurisdiction of a State Party who claim to be victims of a violation by that State Party of any right set forth in the Covenant;

(c) The International Convention on the Elimination of All Forms of Racial Discrimination, in part II, established a Committee on the Elimination of Racial Discrimination consisting of 18 experts of high moral standing and acknowledged impartiality, elected by States Parties from among their nationals who serve in their personal capacity. This Committee is in the first instance empowered to consider the reports to be submitted by States Parties on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of this Convention. Secondly, if a State Party considers that

another State Party is not giving effect to the provisions, it may bring the matter to the attention of the Committee; if the matter cannot be adjusted to the satisfaction of both parties, the Chairman of the Committee appoints an ad hoc five-member Conciliation Commission of persons who may or may not be members of the Committee, and the Commission's good offices are made available with a view to an amicable solution. Thirdly, a State Party may declare that it recognizes the competence of the Committee to consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any right set forth in this Convention; but a communication is not receivable if it concerns a State Party which has not made such a declaration. It is worth noting in passing that this Convention does not apply to distinctions made between citizens and non-citizens;

(d) The Convention on the Elimination of All Forms of Discrimination Against Women, in part V, set up a Committee on the Elimination of Discrimination against Women consisting of 18 experts when the Convention entered into force after 20 ratifications, and of 23 experts after 35 ratifications. The experts, of high moral standing and competence in relevant fields, are elected by States Parties from among their nationals and serve in their personal capacity. The Committee considers reports to be submitted by States Parties on the legislative, judicial, administrative or other measures which they have adopted to give effect to the Convention's provisions and on the progress made in this respect. The specialized agencies are entitled to be represented at the consideration of the implementation of such provisions of the Convention as fall within the scope of their activities. The Committee may invite specialized agencies to submit reports on the implementation of the Convention in areas of their competence. In article 29, arbitration is referred to as an optional means of dispute settlement between States Parties in respect of the interpretation or application of this Convention.

4. In the International Labour Organisation, a regular and diversified system of supervision exists which covers all conventions and extends even to unratified conventions and recommendations. Furthermore, there are regular as well as special procedures for the examination of complaints:

(a) The main supervisory body is the Committee of Experts on the Application of Conventions and Recommendations, which currently has 20 members and is composed of persons with the highest qualifications in the legal and social fields who are independent of Governments and appointed in their personal capacity. This independence is underlined by the fact that the experts are appointed by the Governing Body on the proposal of the Director-General of ILO. Every State has to report to ILO on the measures which it has taken to give effect to the provisions of conventions which it has ratified. Owing to the continuing increase in the number of reports, there is now a varying periodicity at which reports fall due at annual, two-year, three-year or even four-year intervals. The Committee of Experts appraises the application of conventions in the light of Governments' reports, laws and regulations and any other relevant information such as observations by employers' and workers' organizations. The Committee of Experts' reports are presented for examination to the International Labour Conference which, at each of its annual sessions, sets up a committee for that purpose consisting of representatives of Governments and of national organizations of employers and workers;

(b) The Constitution of ILO makes provision for two kinds of complaints procedures. First, a representation may be made by an employers' or workers' organization on the ground that a State has failed to secure the effective observance of a convention to which it is a party. Second, a complaint proper may be made by a State if it is not satisfied that another State effectively observes any convention which both have ratified. It is not required that the State filing the complaint, or any of its nationals, should have suffered direct prejudice. The Governing Body itself may initiate this procedure against a member State in the case of a ratified convention, either of its own motion or on receipt of a complaint from any delegate to the International Labour Conference, who may be from a ratifying or non-ratifying State. The Governing Body may appoint a Commission of Inquiry to make a thorough examination of the matter;

(c) In the field of freedom of association, special machinery was set up by ILO following Economic and Social Council resolution 277/10 of 17 February 1950. Complaints alleging infringements of freedom of association may be made even against States which have not ratified the ILO conventions of 1948 and 1949 on the subject. This is because the ILO Constitution, which the States members of the organization have accepted, lays down the principle of freedom of association, which should be observed by virtue of membership alone. The special machinery consists of the Governing Body Committee on Freedom of Association and the Fact-Finding and Conciliation Commission on Freedom of Association composed of qualified persons of independent status. The Fact-Finding and Conciliation Commission can in principle be seized of a case only with the consent of the Government against which the complaint is made.

5. If, then, there are reasons and precedents for international supervision of the application of the Convention concerned with all migrant workers and members of their families, three basic and interrelated questions have to be resolved:

(a) What kind of reports procedures would be suitable?

(b) What kind of procedures concerning allegations of non-observance by States Parties would be desirable?

(c) What kind of supervisory bodies could take responsibility for examining the reports and/or complaints effectively and in a spirit of international co-operation and friendship?

These questions will now be elucidated in turn.

6. Compliance with the obligations flowing from the Convention can be ascertained by documentary evidence submitted by States Parties that indicates the position of their law and practice in regard to the matters dealt with in the Convention and shows the extent to which effect has been given to its various provisions or the difficulties encountered which affect the degree of fulfillment of the obligations incurred. In view of the interwoven and cumulative nature of parts II, III, IV, and V of the proposed Convention, it would be impracticable to report in stages as in the case of the International Covenant on Economic, Social and Cultural Rights. To report on the whole of the Convention doubtlessly represents a considerable

amount of work for the States concerned as well as for the supervisory body which is to examine these reports. Therefore, it is proposed that reports cover the implementation of the whole of the Convention but that a reasonably long periodicity be fixed (see art. VI - 2)

7. The supervisory body could not fulfil its functions if it were merely to study the reports. It must be able to appraise and comment on the conformity of national law or practice with the international Convention. Specific comments should be addressed to whichever State Party may be concerned. General observations on, for example, important discrepancies found in several countries should be furnished to the Economic and Social Council and the General Assembly to inform them of the state of law and practice in this field. In that context there would be advantage in calling on the experience of specialized agencies of the United Nations. The proposed reporting procedure follows in a general way the precedents of the two Covenants but draws particularly on the latest relevant United Nations human rights instrument, the Convention on the Elimination of All Forms of Discrimination Against Women (see art. VI - 4).

8. Allegations of non-observance of the Convention by States Parties can, of course, be settled outside its framework by negotiation, and States remain free to agree on any arbitration procedure or to refer a dispute to the International Court of Justice. However, the co-sponsoring countries feel that the Working Group should provide for complaints procedures within the Convention itself, as has been judged necessary and useful under the Covenant on Civil and Political Rights, the two United Nations Conventions on the elimination of discrimination and in the International Labour Organisation generally. Concern for economy of means and effectiveness of results, particularly with a view to amicable settlement of disputes, leads the co-sponsoring countries to propose a procedure under which complaints can be handled by the supervisory body that has responsibility for the examination of reports. In effect, this is the solution characteristic of United Nations human rights instruments. For this new Convention, it appears appropriate to provide for an inter-State complaints procedure applicable to all States Parties. In view of the broad range of the Convention's stipulations and having regard to the state of law in the field, it would seem difficult to go as far as setting up an individual complaints procedure, even on an optional basis. The wording proposed draws on the Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination (see art. VI - 5).

9. As regards the supervisory body or bodies needed, one can opt for a new one or seek to utilize a body that already exists. It might be possible to assign to the Human Rights Committee mentioned in paragraph 3 above additional functions under the Convention concerned with all migrant workers and their families. Reactions to a similar suggestion made in the context of the pending Convention on torture make it highly doubtful that this solution would be acceptable. The co-sponsoring countries, which appreciate the scope of supervision possible under ILO procedures and the thoroughness and effectiveness with which they are performed, also considered the possibility of giving the ILO Committee of Experts mentioned in paragraph 4 above a major share of responsibility in supervising the application of this United Nations Convention. A number of problems stand in the way of this

solution. In the end, a distinct body seemed the only reasonable option. This body, because its members undertake a critical examination of reports and assist in the solution of conflict situations, should be composed of independent experts.

10. How are the experts to be chosen? In the United Nations the current practice is to elect them from among nominees of States Parties to a particular instrument. In ILO the Director-General nominates candidates who require endorsement by the Governing Body to be selected. The Convention being considered could best be supervised if elements of the practice of both the United Nations and International Labour Organisation were combined. Therefore, it is proposed to establish an 18-member committee of independent experts, 12 of whom are to be elected by States Parties from among their nominees, while 6 are to be appointed by the Governing Body of ILO. The participation of ILO in the appointment of experts is, of course, subject to the agreement of the organization. The actual language of the proposal reflects the formulations and the experiences of the two Covenants and the United Nations Convention of the Elimination of All Forms of Racial Discrimination, and is also inspired by the recent United Nations Convention on the Elimination of All Forms of Discrimination Against Women (see art. VI - 1).

11. It would be helpful to associate ILO with the supervision of this Convention. The ILO's special competence in the field of labour covers the protection of workers when employed in countries other than their own, the regulation of the labour supply and the extension of social security measures. The two ILO Conventions most specifically concerned with migrant workers, one dating back to 1949 and the other one to 1975, have received 35 and 12 ratifications, respectively, which has yielded a great deal of experience for the ILO staff and experts. In 1980 the Committee of Experts undertook an in-depth survey of these two Conventions and the supplementary recommendations in relation to national laws and practices. (Its report has been quoted on a number of occasions in the United Nations Working Group.) Moreover, co-operation of this kind is by no means unusual in the United Nations system. Reference has already been made to the complaints procedure alleging infringements of trade union rights, where allegations received by the United Nations are forwarded by the Economic and Social Council to the Governing Body of ILO. The reports procedure under the Covenant on Economic, Social and Cultural Rights also involves ILO importantly; and the reports procedure under the Convention on the Elimination of All Forms of Discrimination Against Women similarly provides room for fruitful co-operation. Other examples are the Ad Hoc Committee on Forced Labour established by Economic and Social Council resolution 350/12 of 19 March 1951, under which three experts were appointed jointly by the Secretary-General of the United Nations and the Director-General of ILO, and the 12-member Joint ILO/UNESCO Committee of Experts on the Application of the Recommendation concerning the Status of Teachers, half of whom are appointed by the Executive Board of UNESCO on the nomination of the Director-General of UNESCO and the other half by the Governing Body of ILO on nomination of the Director-General of ILO.

Annex

PART VI

Part VI - 1

Application of the Convention

1. For the purpose of reviewing the application of the present Convention, there shall be established a Committee on the Protection of the Rights of All Migrant Workers and Their Families (hereinafter referred to as the Committee) consisting of 18 experts of competence in the field covered by the Convention.
2. (a) Twelve members of the Committee shall be elected by secret ballot by the States Parties from a list of persons nominated by the States Parties, consideration being given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems. Each State Party may nominate one person.

(b) The remaining six members shall be appointed by the Governing Body of the International Labour Organisation.

(c) All members shall serve in their personal capacity.
3. The initial election shall be held no later than six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties not later than one month before the date of each election.
4. Elections of members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of votes of the States Parties present and voting.
5. The Secretary-General shall inform the Director-General of the International Labour Organisation of the result of the elections and shall invite the Governing Body of the International Labour Organisation to appoint the remaining members.
6. The members of the Committee shall serve for a term of four years. However, the terms of six of the elected members and three of the appointed members shall expire at the end of two years; the names of these nine members shall be chosen by lot by the Chairman of the Committee.

7. If an expert has ceased to function as a member of the Committee before the expiry of his term, the State Party which nominated the expert, or the Governing Body of the International Labour Organisation which appointed the expert, shall appoint another expert for the remaining part of the term. In cases where the new expert is appointed by the State Party the appointment is subject to the approval of the Committee.
8. The members of the Committee shall receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.
9. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.
10. The Secretary-General shall provide the necessary staff and facilities for the effective performance of the functions of the Committee.

Part VI - 2

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the position of their law and practice in regard to the rights recognized in the Convention and to other provisions included herein:
 - (a) Within one year after the entry into force for the State Party concerned;
 - (b) Thereafter every four years.
2. Reports shall indicate factors and difficulties, if any, affecting the implementation of the present Convention.

Part VI - 3

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.
3. The Committee shall normally meet annually in order to consider the reports submitted in accordance with article 71 of the present Convention.
4. The meetings of the Committee shall be held at United Nations Headquarters or at any other convenient place as determined by the Committee.

Part VI - 4

1. The Committee shall examine the reports submitted by each State Party to the present Convention and shall transmit such comments as it may consider appropriate to the States Parties concerned. This State Party may submit to the Committee observations on any comments made by the Committee in accordance with this article.
2. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.
3. The Secretary-General shall transmit the reports of the Committee to the Commission on Human Rights of the United Nations and to the Governing Body of the International Labour Organisation.
4. The Committee may invite the specialized agencies of the United Nations to submit information on such matters dealt with in the Convention as fall within their field of competence. The specialized agencies may participate, in an advisory capacity, in the consideration by the Committee of such matters.

Part VI - 5

1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. This State shall, within three months, submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
2. 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.
3. 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.
4. The Committee shall hold closed meetings when examining communications under this article.
5. In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in paragraph 2, to supply any relevant information.

6. The States Parties concerned, referred to in paragraph 2, shall have the right to be heard by the Committee and to make submissions in writing.

7. The Committee shall, within 12 months after the transmission of the initial communication under paragraph 2, submit a report:

(a) If a solution within the terms of paragraph 5 is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached.

(b) If a solution within the terms of paragraph 5 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.

The report shall be communicated to the States Parties concerned.

Part VI - 6

The provisions of this 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 this 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.

Part VI - 7

Nothing in the present Convention shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Convention.
