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REPORT OF THE ECONOMIC AND SOCIAL COUNCIL

Technical review of the text of the preamble and articles of the
draft International Convention on the Protection of the Rights
of All Migrant Workers and Their Families (A/C.3/45/WG.1/WP.1):
comments and suggestions

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INTRODUCTION

1. The Working Group established by the General Assembly on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers, at its intersessional meeting, held from 31 May to 9 June 1989, decided to have a technical review of the text of the draft Convention undertaken prior to its submission to the General Assembly for adoption. The Working Group entrusted its Chairman with requesting the Under-Secretary-General for Human Rights to undertake the said technical review. The terms of the technical review were laid down in the Chairman's letter adopted by the Working Group as follows:

"At its spring session of 1989, the Working Group which I have the honour to chair entrusted me to request the Centre for Human Rights to prepare, bearing in mind resolution 41/120 of the General Assembly, a technical review of the draft of the International Convention on the Protection of the Rights of All Migrant Workers and Their Families, which the Group is preparing by mandate of the General Assembly. The text of the draft, as it so far stands, is attached hereto. The review should be made in accordance with United Nations technical standards and practices regarding multilateral human rights treaties and treaties on international humanitarian law.

"The Working Group has also agreed that such technical review can now be undertaken by the Centre for Human Rights in order to:

"(a) Identify overlap and repetition between and within draft articles;

"(b) Harmonize the different language versions;

"(c) Check for consistency in the text, including the use of key terms and the use of gender-neutral language;

"(d) Make textual and editorial suggestions and recommendations as to how any overlaps or inconsistencies identified might be corrected by the Working Group before the submission of the draft Convention to the General Assembly.

"The Working Group has asked me to draw your attention to the above guidelines, pointing out that the technical review should not enter into areas of substance but should be confined to the technical aspects of the draft.

"As you will see, there are still some provisions which have not been included in the attached text, since they have not been approved as yet by the Working Group on the second reading. As soon as pending provisions are decided upon, I shall immediately transmit them to you. Meanwhile, the Working Group would be most grateful if the technical review of already adopted provisions could be made available to the Group when it meets during the forty-fourth session of the General Assembly, in order to begin its consideration as soon as possible."

2. The General Assembly, by its resolution 44/155 of 15 December 1989, requested the Secretary-General to entrust to the Centre for Human Rights of the Secretariat with the technical revision of the text of the articles of the draft Convention that had been approved so far by the Working Group in second reading with a view to ensuring uniformity of terminology and gender and to harmonizing the versions in the official languages of the United Nations, bearing in mind General Assembly resolution 41/120 of 4 December 1986, and to transmit the results of this technical revision to Governments as soon as possible and at least one month before the next meeting of the Working Group to be held in 1990. The General Assembly decided that the Working Group should hold a meeting of two weeks' duration in New York, immediately after the first regular session of 1990 of the Economic and Social Council, with a view to completing the remaining articles and considering the results of the technical revision of the draft Convention; invited the Secretary-General to transmit to Governments the two most recent reports (A/C.3/44/1 and A/C.3/44/4) of the Working Group so as to enable the members of the Working Group to finish the drafting, in second reading, of the draft Convention during the meeting to be held in the spring of 1990, as well as to transmit the results obtained at that meeting to the General Assembly so that it might take a decision during its forty-fifth session. 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.

3. In pursuance of this request, the Secretary-General entrusted the United Nations Centre for Human Rights with the task of carrying out its own internal review of the text of the draft Convention as contained in document A/C.3/45/WG.1/WP.1. In addition, the Secretary-General requested the assistance and comments on the draft Convention of the Office of Legal Affairs, the Centre for Social Development and Humanitarian Affairs, the Department of Conference Services, the United Nations Children's Fund (UNICEF), the Office of the United Nations High Commissioner for Refugees (UNHCR), the relevant specialized agencies such as the International Labour Organisation (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Food and Agriculture Organization of the United Nations (FAO), the World Health Organization (WHO), and the International Organization for Migration and the International Committee of the Red Cross (ICRC) on matters within their areas of competence relating to the draft Convention. In this regard, the Department of Conference Services at United Nations Headquarters was asked to review the text of the draft Convention from the point of view of linguistic issues raised by the Working Group.

4. The present document contains the comments based on the draft Convention as contained in document A/C.3/45/WG.1/WP.1 received from the Office of Legal Affairs, the Division and Branch for the Advancement of Women, Centre for Social Development and Humanitarian Affairs, the Division of Narcotic Drugs, UNHCR, ILO, WHO and the International Organization for Migration.

5. For its part, the Department of Conference Services has revised the Arabic, Chinese, English, French, Russian and Spanish versions of the draft Convention to ensure standardization within each language as well as consistency between them. This revised version is available as document A/C.3/45/WG.1/WP.1/Rev.1.

I. GENERAL COMMENTS

A. Language

Gender-neutral language

6. The Department of Conference Services in harmonizing the different linguistic versions of the draft Convention has ensured the use of key terms and of gender-neutral language throughout the revised versions of the draft Convention (A/C.3/45/WG.1/WP.1/Rev.1). Therefore, most of the suggestions received relating to gender-neutral language have been already included in the revised text.

Comments by the Division for the Advancement of Women, Centre for Social and Humanitarian Affairs

7. While welcoming the use of gender-neutral language in the text of the draft convention, the Division for the Advancement of Women pointed out that some articles, however, lack consistency with the principle of equality embodied in the preamble and article 7 of the draft Convention. This concerns articles 2, 4, 16, 17, paragraph 4, 61, 42, paragraph 3, 43, paragraphs 1-3, 54 and 55. Articles 16, 17, paragraph 4, 54, paragraph 2, 56, paragraph 3 and 61 refer to the male sex only. In this regard, article 16, paragraph 7 should read "When a migrant worker or a member of his or her family ...". Paragraph 7 (a) should read "... of his or her State of origin or of a State representing the interests of that State shall, if he or she ...". Paragraph 7 (b) should read "He or she shall have the right ...". Article 17, paragraph 4, second line, should read "... or a member of his or her family ...". Article 54, paragraph 2 should read "if a migrant worker claims that the terms of his or her work contract, he or she shall have the right to address his or her case, ...". Article 56, paragraph 2, should read "... or a member of his or her family ..." and article 56, paragraph 3 "... a migrant worker or a member of his or her family ...". Article 61, paragraph 2 should read "... that the terms of his or her work contract have been violated by his or her employer, he or she shall have ...". Articles 42, paragraph 3 and 43, paragraphs 1 to 3, should also refer to family members.

8. Further, part III of the draft Convention should either start: "All migrant workers and members of their families shall ... or States Parties shall ensure ..." as in articles 26 and 31.

B. Reference to "State of employment"

Comments by the Division for the Advancement of Women

9. The term "state of employment", defined in article 5, should also be used in articles 18 and 25, instead of "State concerned" or "receiving State".

C. Reference to the term "the present Convention"

10. With a view to ensuring consistency throughout the draft Convention, the Department of Conference Services has replaced the term "this Convention" by the term "the present Convention" (see document A/C.3/45/WG.1/WP.1/Rev.1).

D. Duplication

Comments by the Division for the Advancement of Women

11. There seems to be a duplication between articles 32 and 47 and between articles 25 and 55.

E. Reference to the term "convictions"

Comments by the Office of Legal Affairs

12. Since the term "convictions" is unclear in the context in which it is used in the draft Convention and to be consistent with the accepted standards of international and human rights law, it is suggested to use the term "beliefs" instead. This suggestion is reflected throughout the revised text (A/C.3/45/WG.1/WP.1/Rev.1).

F. Reference to the term "national legislation"

Comments by the Office of Legal Affairs

13. It is suggested that the phrase "national legislation" and "applicable legislation" in the draft Convention should be amended to read "national laws" and "applicable laws".

G. Reference to the terms "normal residence" and "habitual residence"

Comments by the Office of Legal Affairs

14. With respect to the terms "normal residence" or "habitual residence", the Office of Legal Affairs suggested that the term "ordinary residence" be used instead.

H. Organization of the text of the Convention and order of the articles

Comments by the Centre for Human Rights

15. Consideration should be given to an eventual change of the order of some articles in the draft convention. In this regard, it is suggested that article 24,

because of its importance, should come immediately after article 10. The order of articles 29 and 30 should be reversed and follow the order in the Convention on the Rights of the Child. Articles 43 and 45 should come earlier in part IV of the draft Convention as they state important general principles that influence more specific articles.

16. Article 75 is located between an article on States Parties reports and another on inter-State complaints. It is suggested that a more appropriate position for the article should be immediately following article 72, which establishes the Committee. The current article 75 would then deal with matters concerning the organization of the Committee, before the substantive articles on States Parties' reports and complaints. This is the order adopted in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 18). The location of paragraph 1(e) of article 76 accords with the location of the equivalent provisions in the International Covenant on Civil and Political Rights (art. 41(1)(d)) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 21(1)(d)). However, a more appropriate location might be at the end of, rather than half way through, article 76 in this draft convention.

17. With respect to article 77, there are a number of suggestions concerning the rearrangement of its paragraphs. They are reflected in paragraphs 145 to 164 below.

I. Merging articles

18. The Office of Legal Affairs suggested that articles 22 and 56 dealing with expulsion be merged.

J. Inconsistency of standards

Comments by the Office of the United Nations High Commissioner for Refugees

19. Areas where there might be some inconsistency of standards include provisions on expulsion or detention (arts. 16, 17, 22 and 23) or those relating to employment rights (art. 32, para. 2).

K. Overlap with standards by the International Labour Organisation

Comments by the International Labour Organisation

20. Overlap is most pronounced in part IV of the draft Convention. Of its 19 substantive articles, 14 are covered by ILO Conventions and another three by ILO Recommendations. Overlap is also notable in part III, the part that reflects the initial impetus that has led up to the draft Convention. Of its 27 substantive articles, 10 are covered, at least in part, by ILO Conventions and a further five by ILO Recommendations. Overlap exists also in the other parts containing

substantive articles, such as part VI, where six of the eight articles concern matters dealt with by ILO standards.

L. Conflict between the draft Convention and the ILO Conventions

Comments by the International Labour Organisation

21. As regards conflict between the draft Convention and ILO Conventions, ILO sees this as a problem only where the new text falls below ILO standards. It would be in keeping with the logic of the development of human rights for later instruments to go further than earlier ones, and ILO welcomes this where it is the case.

22. Conflict is most marked in respect of article 27 concerning social security and article 52 on free choice of employment, when it became clear during the Working Group's discussions on article 52 that the two-year limit provided for in article 14 (a) of the ILO's Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), would be raised to five years in the draft Convention.

M. Health

Comments by the World Health Organization

23. The right to health and to equal access to health services should be specifically taken into account.

24. The right to information about public services and among them health services may need to be stressed in a more prominent way, as the lack of information, communication or understanding might be among the first barriers to the exercise of their rights that the migrant workers meet.

25. It might be appropriate to make a formal reference to the United Nations Convention on the Rights of the Child as part of the legal framework for this specific instrument.

II. COMMENTS RELATING TO THE PREAMBLE

Comments by the World Health Organization

26. The preamble is well formulated and the eleventh and fifteenth preambular paragraphs seem to be of particular importance. A reference to health of the migrant workers and their families in the preamble would be welcome, with particular reference to the importance of health for development.

Comments by the International Organization for Migration

27. The enumeration of the human rights of all migrant workers (part III) is echoed in the preamble to the Constitution of the International Organization for Migration, which seeks to ensure for the persons it assists "a life of dignity based on respect for the human person"; such a reference to respect for the inherent dignity of the human person could be included in the preamble of the draft, and not only in article 17, paragraph 1, dealing with migrant workers who are deprived of their liberty.

28. In the fifth preambular paragraph, in the French version, the term "son acte constitutif" used with reference to the International Labour Organisation should in fact be "sa Constitution", according to the official documents of that Organisation.

29. In the sixth preambular paragraph, reference is made to the work carried out in various organs of the United Nations system and in "various regional organizations"; such wording excludes the work of the International Organization for Migration, no doubt an accidental omission which should be corrected.

30. In the thirteenth preambular paragraph, it would be more appropriate to use the terms "to prevent and eliminate clandestine movements ...", as in article 68 (see also the Spanish version).

31. In the thirteenth and fifteenth preambular paragraphs, in the French version, the term "droits de l'homme fondamentaux" is used, while the more common usage is "droits fondamentaux de l'homme".

III. COMMENTS RELATING TO THE ARTICLES

PART I

Scope and definitions

Comments by the World Health Organization

Article 1

32. This section constitutes an important contribution from the Working Group, in particular the excellent definitions of article 2. Article 1 could be expanded or one could foresee an additional article in order to announce the distinctions introduced later on in the text by articles 36 and 57. It would be good to make it clear to the reader at the outset that the different parts of the Convention have a different scope and address migrant workers in different situations.

Comments by the Office of Legal Affairs

Article 1, paragraph 1

33. The word "convictions" is not clear in the context in which it is used in this paragraph. It is suggested that the word "beliefs" be employed in this instance as it has been used in a similar context in article 12. A similar amendment should be made in article 7.

Article 1, paragraph 2

34. For the terms "normal residence" and "habitual residence" used in these articles, it is suggested that the term "ordinary residence" be used instead. A similar amendment should be made in article 2, paragraph 2 (a) and article 46 (a).

Comments by the International Organization for Migration

35. Article 1 of the draft Convention upholds the freedom of all migrant workers to leave any State, including their own, and to return to their State of origin. The recognition of this right is fully concordant with the fundamental principle of the International Organization for Migration, membership of which is open to any State that supports the principle of the free movement of persons. The last word of paragraph 2 should be "habituelle" and not "normale"; in this connection, see articles 46 (a) and 58, paragraph 1.

Article 2

Article 2, paragraph 1

Comments by the Division for the Advancement of Women

36. Under article 2, paragraph 1, a migrant worker is "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national". The term refers to a woman or a man. It does not refer to a woman and a man. There are several examples where both spouses are migrant workers, as for example in restaurants or other enterprises where both have been employed under individual contract. The present formulation of article 2 treats one spouse as dependent family member irrespective of an employment relationship. This is also shown in article 4 which states: ... the term "members of the family" refers to persons married to migrant workers "...". The present article 2 is not in conformity with article 53 which allows "members of a migrant worker's family" with authorized residence "freely to choose their remunerated activity "... For these reasons, it is suggested that paragraph 1 of article 2 should read: "The term 'migrant workers' refers to persons who are to be engaged, are engaged or have been engaged in a remunerated activity in a State of which they are not nationals."

Article 2, paragraph 2 (a)

Comments by the Office of Legal Affairs

37. The term "ordinary residence" should be used instead of "habitual residence".

Article 2, paragraph 2 (f)

Comments by the Office of Legal Affairs

38. It is not clear whose "enterprise" is being referred to in this paragraph: the migrant worker's or his employer's. As the term "employer" could mean an individual or an enterprise, it is suggested that the phrase "or enterprise" be deleted.

Article 2, paragraph 2 (h)

Comments by the International Organization for Migration

39. This paragraph could refer to an "employment relationship" and not merely to a "contract of employment". The latter term excludes contracts of service which also involve an employment relationship.

Article 3

Comments by the Office of the United Nations
High Commissioner for Refugees

40. Article 3 of the draft Convention expressly excludes refugees and stateless persons from its application. On the other hand, there is a possibility that in some instances these two groups might well come within its ambit, by virtue of article 3 (d), if "application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned".

41. Given this possibility, UNHCR believes it needs to be underlined that there are a number of articles of the Convention affecting rights or freedom which for refugees and stateless persons are specifically regulated in other international instruments, notably the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the 1954 Convention relating to the Status of Stateless Persons. It is the understanding of UNHCR that nothing in the Convention should affect or limit more favourable rights or freedoms granted to refugees and stateless persons by virtue of State law or practice or other international treaties. This interpretation is clearly consistent with the spirit and intent of article 81 of the draft Convention, which makes the same qualification in respect of migrant workers and their families.

Article 3 (b)

Comments by the Office of Legal Affairs

42. In lines 3 and 4 of this paragraph the expression "whose admission and status are regulated by agreement with the State of employment" should be amended to read "whose admission and status within the territory of the receiving State are regulated by agreement or arrangement between the States concerned."

Article 3 (c)

Comments by the Office of Legal Affairs

43. The phrase "as investors" would seem to limit the meaning of "persons" in this paragraph to only "investors". If that is not what is intended, it is suggested that the phrase be deleted.

Comments by the International Organization for Migration

44. If article 2, paragraph 2 (h) is retained, article 3 (c) raises a tricky problem with respect to interpretation: investors may sometimes be regarded as self-employed workers.

Article 3 (d)

Comments by the Office of Legal Affairs

45. The phrase "national legislation" and "applicable legislation" should be amended to read "national laws" and "applicable law" respectively. Similar amendments should be made in the following articles: 4, 32, 41, 47, 52, 56 and 69.

Article 4

Comments by the Division for the Advancement of Women

46. Article 4 should be brought in conformity with the suggestion concerning article 2 in paragraph 36 above. Consequently, it is suggested to insert after the term "members of the family refers to persons, "... the words "not employed".

Article 6

Comments by the International Organization for Migration

47. As in article 1, paragraph 2, the word "normale" in subparagraph (c) should be replaced by "habituelle".

PART II

Non-discrimination with respect to rights

Article 7

Comments by the International Organization for Migration

48. In the French text, the wording of the grounds on which discrimination is prohibited differs, for no different reason, from that used in article 1, paragraph 1.

PART III

Human rights of all migrant workers and members of their families

Article 8

Comments by the Centre for Human Rights

49. In paragraph 1, on the fifth line, the word "the" is omitted before the words "other rights recognized". However, it appears in paragraph 2 of article 39 of the present draft Convention and in paragraph 3 of article 12 of the International Covenant on Civil and Political Rights.

Article 10

Comments by the Centre for Human Rights

50. While the text of article 10 presents some similarity with the text of article 7 of the International Covenant on Civil and Political Rights, it does not maintain the full standard of protection of article 7 of the Covenant since it does not include the second sentence of article 7, the provision that "in particular, no one shall be subjected without his free consent to medical or scientific experimentation". Both texts should be as closely worded as possible to ensure consistency with accepted standards.

Article 13

Comments by the International Organization for Migration

51. In the second line of paragraph 3, the French version would read more elegantly if the words "devoirs spéciaux" were replaced by "obligations".

Article 15

Comments by the International Organization for Migration

52. The French version should not state that it is migrant workers who are expropriated; as the English and Spanish versions make clear, it is their assets which are expropriated. Compensation should be "prompt, effective and adequate" rather than "fair and adequate", as compensation paid 10 years after the fact in a non-convertible currency might be "fair and adequate" without being of benefit to the migrant worker, who might have returned to his country of origin.

Article 16

Comments by the Division of Narcotic Drugs

53. The comments of the Division of Narcotic Drugs are limited to areas of concern over possible non-compatibility of the draft Convention on the protection of the rights of all migrant workers and their families with the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Thus, it is clear at the outset that the two Conventions are quite different in their object and purpose. The draft Convention is aimed at ensuring certain rights to a broad class of persons; the 1988 drug Convention is intended to create certain international obligations to treat as serious crimes various drug offences and to establish an international régime for co-operation among States parties in the investigation and prosecution of those offences. Ultimately, the new drug Convention is intended to be a tool to eliminate the crime of illicit drug trafficking.

54. For the most part, this draft Convention poses no difficulties. The provisions, however, on criminal sanctions and the rights guaranteed to migrants accused of or prosecuted for criminal offences do have potential for philosophical conflict (see arts. 16 and 17). It is understood that many of the provisions of the draft Convention are intended to ensure that migrants enjoy the same rights and protections as nationals. Such a goal does not present a problem. Unfortunately, the provisions concerning criminal rights go further, often guaranteeing migrants' rights that may not be conferred on nationals and, therefore, appear to confer certain advantages vis-à-vis the person's status as a migrant. On the contrary, the new drug Convention obligates parties to take certain more onerous actions based on the fact that the offences involved are to be considered serious offences. Thus, it is the type of offence rather than the status of the offender that determines the action to be taken by States parties.

55. An example of this potential discrepancy is to be found by comparing the respective articles on pre-trial release of accused offenders. The second sentence of article 16, paragraph 6, of the draft Convention states: "It shall not be a general rule that while awaiting trial they shall be detained in custody ...". Article 3, paragraph 9, of the 1988 drug Convention states: "Each Party shall take appropriate measures, consistent with its legal systems, to ensure that a person charged with or convicted of an offence established in accordance with paragraph 1 of this article, who is found within its territory, is present at the necessary criminal proceedings."

56. This underlying difference in objects is present also in the provisions concerning conviction and incarceration. The 1988 drug Convention obligates parties to make the commission of the offences covered by the Convention liable to sanctions that reflect the grave nature of the offences (art. 3, para. 4), recognize certain aggravating factual circumstances (art. 3, para. 5) and ensure that discretionary measures are exercised to maximize the effectiveness of law enforcement measures and act to deter commission of such offences. The draft migrant Convention stresses the rehabilitative aspect of criminal sanctions and ignores the social protection and deterrence functions.

Comments by the International Organization for Migration

57. In the last line of article 16, paragraph 6, in the French version, the word "pour" in the phrase "pour l'exécution du jugement" is superfluous (see also the Spanish version in this connection).

Article 17

Comments by the Division of Narcotic Drugs

58. The second sentence of paragraph 2 of article 17 is confusing. It states: "Accused juvenile migrant workers and members of their families shall be separated from adults and brought as speedily as possible for adjudication". Clearly, this is an error. It would require accused adult family members to be separated from other adults.

59. Paragraph 4 of article 17 states "During ... imprisonment ..., the treatment of ... shall be aimed at their reformation and social rehabilitation". Paragraph 6 states that when a migrant worker is incarcerated, the State shall pay attention to problems posed for members of his family. Similarly, article 19, paragraph 2, states that "humanitarian considerations related to the status of a migrant worker, in particular with respect to his or her right to residence or work, should be considered in imposing a sentence for a criminal offence committed by a migrant worker or a member of his family". The focus of these provisions, recognition of a humanitarian consideration based solely on migrant status, conflicts with the 1988 drug Convention's focus on the severity of drug offences. Many States make deportation of convicted alien drug traffickers automatic and may find considerable difficulty with the latter provision.

60. Although not obvious in the comparison of the two Conventions there are areas in criminal law where States have traditionally treated nationals differently from non-nationals. Many States exempt their nationals from extradition, but will prosecute them for offences committed in other countries. To the extent that the draft migrant Convention might conflict with bilateral extradition treaties that in fact treat nationals differently from non-nationals, serious difficulties might arise, preventing many States from becoming Parties.

Comments by the International Organization for Migration

61. In the French version of article 17, paragraph 4, the words "amendement" and "reclassement" are not very felicitous. The word "reclassement" could be replaced by "réinsertion".

Article 18

Comments by the Office of Legal Affairs

62. As regards paragraph 1 of article 18, it is not clear what is meant by the clause "In the determination of any criminal charge against them or of their rights and obligations in a suit of law ...". The clause should be amended to read "If a criminal charge is brought against migrant workers or members of their families ...".

Comments by the Centre for Human Rights

63. Paragraph 3 of article 18, which is apparently taken from paragraph 3 of article 14 of the International Covenant on Civil and Political Rights, should be consistent with the standard provided in the Covenant which includes the words "in full equality" at the end of that paragraph.

Comments by the Division of Narcotic Drugs

64. The word "rehabilitation", which is used in the English version of article 17, paragraph 4, and article 18, paragraph 4, is translated differently in the French version of article 18, paragraph 4. The term "rééducation" does not seem appropriate; "réinsertion" might be a suitable translation.

Comments by the International Organization for Migration

65. Article 18, paragraph 6, requires compensation according to law if a conviction is reversed or there is a pardon based on newly discovered evidence. If the phrase "compensation according to law" means simply that the migrant should have the same right to compensation as a national, then this presents no problem. If, however, it confers on a migrant a definite right to compensation, it confers a right many States do not presently guarantee to their citizens, especially if it cannot be shown that there was some governmental misconduct in suppressing evidence.

Article 19

Comments by the International Organization for Migration

66. With regard to the last line of paragraph 1 in the French version, the word "délinquant" does not appear in either the Spanish or French text. A more neutral term, such as "interesado" in the Spanish, might be selected.

Article 22

Comments by the International Organization for Migration

67. With regard to the French version of article 22, paragraph 4, the phrase generally used is "raisons impérieuses", rather than "raisons impératives"; in the same line, the second negation is redundant.

Comments by the United Nations High Commissioner for Refugees

68. Another set of specific safeguards relating to expulsion are contained, on behalf of refugees, in article 32 of the 1951 Convention, and on behalf of stateless persons in article 31 of the 1954 Convention on Stateless Persons. According to these articles, refugees and stateless persons, in cases of expulsion, should be granted, inter alia, "a reasonable period within which to seek legal admission into another country."

Article 23

Comments by the International Organization for Migration

69. In paragraph 1 of this article, the wording should follow that of article 16, paragraph 7 (a), which mentions the protection afforded not only by the State of origin, but also by "a State representing the interests of that State".

Article 24

Comments by the International Organization for Migration

70. Although it is difficult to rank various rights in order of importance, the right recognized in article 24 is of fundamental significance and could be mentioned earlier, for example, after article 10.

Article 25

Comments by the Office of Legal Affairs

71. The phrase "receiving State" in the second line should be replaced by the term "State of employment".

Comments by the International Organization for Migration

72. In article 25, paragraph 1 (a) and (b), reference is made to "les lois et la pratique" and to "la législation et les usages". It would be preferable to refer in each case to "Lois et usages", in order to bring the text into conformity with the English and Spanish versions.

Article 28

Comments by the World Health Organization

73. Article 28 contrasts with article 27 in the fact that it foresees only the right to receive medical care in emergency situations. This is too narrow on two grounds: first, because an emergency situation is one where the rights of the patients suffer exceptions so it should not be referred to as the norm. A good therapeutic process needs time and envisaging emergency care only could be misinterpreted.

74. The text of the Convention should embody the rights already recognized by the International Covenant on Economic, Social and Cultural Rights (art. 12) which recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health". Reference could be made in particular to the following points:

- (a) The healthy development of the child;
- (b) The improvement of all aspects of industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) Access for all to medical services and medical attention in the event of sickness.

The WHO Constitution states that:

"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition".

75. Reference could also be made to the right to obtain information about health services as nowadays health services involve a complex bureaucracy, comprising a number of sectors, and migrant workers do meet a problem of competence in the use of health services. The lack of knowledge may mean that efficacious treatment begins too late, not to mention the human misery in the family and the cost of medical care.

Comments by the Office of Legal Affairs

76. The expression "on the basis of equivalence with the nationals" in paragraph 1 of article 28 should be amended to refer, mutatis mutandis, to "equality of treatment with nationals" used appropriately in article 43, paragraph 1. The same comments apply to article 29.

Comments by the International Organization for Migration

77. In articles 28 and 29, in the French version, the International Organization for Migration suggested that the terms "sur la base de l'équivalence" and "sur la base d'une équivalence" should be reconsidered.

Articles 29 and 30

Comments by the Centre for Human Rights

78. The order of articles 29 and 30 should be reversed and follow the order of the Convention on the Rights of the Child recently adopted by the General Assembly by its resolution 44/25. The provisions should be taken into account and, for consistency with already accepted standards, article 29 should be brought in line with article 7 of the Convention on the Rights of the Child which reads as follows:

"Article 7

"1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

"2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."

Comments by the World Health Organization

79. Articles 29 and 30 could possibly be further developed with reference to the Convention on the Rights of the Child. Since there is a reference to children, WHO wonders if the Working Group has given sufficient attention to protection for the elderly as the Convention also covers members of the family of migrant workers.

Article 31

Comments by the Office of Legal Affairs

80. The term "country of origin" at the end of paragraph 1 should be amended to read "State of origin."

Comments by the International Organization for Migration

81. The phrase "as appropriate" does not appear in the English and Spanish versions of article 31, paragraph 1.

Article 33

Comments by the Office of Legal Affairs

82. In the third line of paragraph 1, a comma should be inserted after the phrase "the case may be".

Comments by the World Health Organization

83. Article 33 is a very important provision. The right to information depends so much on the enjoyment of other rights that it might be given a more prominent place in the text of part III, for instance as article 37 is given a prominent place in part IV.

Comments by the International Organization for Migration

84. In order to bring the French version of article 33, paragraph 1 (b) into conformity with the English and Spanish versions, it would be preferable to use the words "lois et pratiques" instead of "législation et usage". In paragraph 2, the word "shall" is translated into French once by the present tense and once by the future tense. This difference does not appear in the Spanish version. This comment also applies to article 38, paragraph 1.

PART IV

Other rights of migrant workers and their families in a regular situation

Article 39

Comments by the United Nations High Commissioner for Refugees

85. Areas where there might be some inconsistency of standards include also provisions relating to employment when the State of employment may impose certain restrictions on migrant workers, for instance as in paragraph 2 of article 39. In relation to refugees and asylum-seekers unlawfully in the country of refuge, the 1951 Convention relating to the Status of Refugees in its article 31 states that penalties shall not be imposed on refugees and asylum-seekers "on account of their illegal entry or presence", and article 17 of the 1951 Convention states that refugees should not be subjected to measures imposed on aliens if they fulfil the conditions indicated in the same article, paragraphs 2 (a), (b) and (c), such as completion of three years' residence in the country.

Article 40

Comments by the International Organization for Migration

86. The wording of article 40, paragraph 2 should match that of article 26, paragraph 2.

Articles 43 and 45

Comments by the World Health Organization

87. Articles 43 and 45 foresee access to social and health services but only in the scope of part IV, not for all migrant workers. Articles 43 and 45 might have come earlier in part IV as they state important general principles that influence more specific articles.

Article 44

Comments by the International Organization for Migration

88. Article 44 of the draft deals with a major concern of the International Organization for Migration, namely, family reunification. The International Organization for Migration promotes family migration, and, where that is not possible, seeks to bring about reunification. There is no clear reference to family migration in article 44. Similarly, paragraph 2 of the article could stipulate that States Parties should facilitate the reunification of migrant workers with their families "as soon as possible".

Article 56

Comments by the Office of Legal Affairs

89. As articles 22 and 56 deal with the question of individual and collective expulsion of migrant workers and members of their families, it is suggested that the articles be merged.

Comments by the International Organization for Migration

90. In article 56, paragraph 3, the wording is not binding and merely expresses a wish. In this regard, the Spanish text is preferable.

PART V

Provisions applicable to particular categories of migrant
workers and members of their families

Article 61

Comments by the International Organization for Migration

91. In the French version of the first line of article 61, the phrase "définis à l'article" should be used instead of "définis dans".

PART VI

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

Article 64

Comments by the International Organization for Migration

92. Article 64, paragraph 1 of the draft emphasizes the need to promote sound, equitable and humane conditions with respect to international migration. The International Organization for Migration shares this concern and, as its aim is to ensure the orderly and planned migration of persons, would like these two adjectives to be included in the draft; its experience, extending over nearly 40 years, has demonstrated the importance of orderly and planned migration and the necessity of a dialogue between the States concerned.

Article 66

Comments by the International Organization for Migration

93. In the French version of article 66, paragraph 2, it would be preferable to refer to "usages" rather than "pratiques".

Article 68

Comments by the International Organization for Migration

94. Should not the term "jurisdiction" be replaced by "competence"?

Article 71

Comments by the International Organization for Migration

95. In the French version of article 71, paragraph 2, the English phrase "as appropriate", which is translated in article 67, paragraph 2, as "selon qu'il conviendra", is rendered as "selon que de besoin" which is further from the English.

PART VII

Application of the Convention

Comments by the Centre for Human Rights

96. Part VII of the draft Convention omits two major provisions which are found in other international instruments in the field of human rights. In this respect, it should be pointed out that the draft Convention under review does not include a provision equivalent to article 38 of the International Covenant on Civil and Political Rights which stipulates that:

"Every member of the Committee shall, before taking up his duties, make a solemn declaration in open Committee that he will perform his functions impartially and conscientiously."

97. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has no equivalent provision but its Committee provides for the matter in rule 14 of its rules of procedures.

98. In relation to States parties' reporting obligations, the present draft Convention does not contain a provision similar to article 44, paragraph 6 of the Convention on the Rights of the Child which provides that:

"States Parties shall make their reports widely available to the public in their own countries."

99. In view of the importance attached to the reports, it appears appropriate that States Parties should be required to make them widely available to their own countries.

Article 72

Paragraph 1 (b)

Comments by the Centre for Human Rights

100. Regarding the Committee membership of 10, rising to 14 when the Convention enters into force for the forty-first State Party, it may be pointed out that the size of the membership is different from that provided in other human rights instruments. For instance, paragraph 1 of article 28 of the International Covenant on Civil and Political Rights provides for a Human Rights Committee consisting of 18 members and paragraph 1 of article 8 of the Convention on the Elimination of All Forms of Racial Discrimination also provides for a Committee of 18 experts. Nevertheless, the wording of the draft Convention is closer to the wording of paragraph 1 of article 17 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Paragraph 3

101. Regarding elections, the draft Convention anticipates that, when the Convention enters into force, the initial elections will take place within six months; not later than three months before the election, States parties will be invited to submit nominations and States parties have two months to submit nominations. Not later than one month before the election, the Secretary-General has to submit a list of nominees to States Parties.

102. This schedule could result in the Secretary-General having one day to prepare and submit a list of nominees to States parties. In this respect, the schedule follows the equivalent provisions contained in paragraphs 2 and 3 of article 30 of the International Covenant on Civil and Political Rights, where, technically, the same problem could arise.

103. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, in its article 17, paragraph 4, has avoided the difficulty by not requiring the Secretary-General to submit a list of nominees to the States parties at least a month before the election.

104. It is suggested that the draft might follow the equivalent provisions in the Convention against Torture, rather than the Covenant.

105. It is also suggested that three months (line 2) and two months (line 5) are replaced by four and three months respectively, following the Covenant (art. 30(2)) and the Convention against Torture (art. 17(4)). Practice suggests States Parties require no less than three months to choose a nominee and notify the Secretary-General of the nomination. At present the draft Convention provides them with only two months for this exercise.

106. The draft Convention provides a procedure for the initial and subsequent elections, but it does not expressly state how often the subsequent elections should take place. In the Convention on the Rights of the Child, the equivalent provision contained in paragraph 4 of article 43 adds the words "and thereafter every second year". The text of paragraph 4 of article 43 reads as follows:

"4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention."

107. Therefore, it is suggested it would be appropriate to add the same phrase at the equivalent place to the draft under review.

Paragraph 5 (b)

108. With respect to the election of the four additional members, the question is raised as to whether the word "three" in the phrase "... the term of three additional" should not read "the term of two additional".

Paragraph 6

109. The phrase "if an expert has ceased to function as a member of the Committee before the expiry of his term ..." is not used in the equivalent provisions of other human rights instruments. In the International Covenant on Civil and Political Rights, paragraph 2 of article 33 provides: "In the event of the death or the resignation of a member of the Committee ...". In paragraph 5 (b) of article 8 of the Convention on the Elimination of All Forms of Racial Discrimination and in paragraph 7 of article 17 of the International Convention on the Elimination of All Forms of Discrimination against Women. The terms "For the filling of casual vacancies ..." is used. In paragraph 6 of article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the words "If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties ..." are used. In paragraph 7 of article 43 of the Convention on the Rights of the Child, the following terms are used: "If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee ..."

110. In order to ensure consistency, it is suggested that it would be preferable if one of the precedents from the other instruments is followed.

111. The wording "... the State Party that nominated the expert shall appoint another expert for the remaining part of the term. The new appointment is subject to the approval of the Committee" provides, with only one difference, a mechanism similar to that found in paragraph 5 (b) of article 8 of the Convention on the Elimination of All Forms of Racial Discrimination, paragraph 7 of article 17 of the Convention on the Elimination of All Forms of Discrimination against Women and paragraph 7 of article 43 of the Convention on the Rights of the Child. The difference is that, unlike those three instruments, the draft Convention does not stipulate that the relevant State Party shall appoint another expert "from among its nationals".

112. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in paragraph 6 of its article 17, provides a different mechanism: the proposed appointment of the new expert is not subject to the approval of the Committee, but to the approval of "the majority of the States parties" which "shall be considered given unless half or more of the States parties respond negatively within six weeks" of notification of the proposed appointment.

113. The International Covenant on Civil and Political Rights, in its article 34, provides a third mechanism: provided the seat is to remain vacant for more than six months, there shall be a re-election in accordance with the general provisions of the Covenant and all States parties may submit nominations and vote.

114. In summary, comparable United Nations human rights instruments provide three different model mechanisms for filling a "casual vacancy" in the Committee. Whichever device may be considered most appropriate for the draft under review, it should promote the genuine independence of the expert concerned.

Article 73

Comments by the Centre for Human Rights

115. Regarding paragraph 1, the phrase "... measures they have taken to give effect to the provisions of the Convention ..." differs from the equivalent provisions in paragraph 1 of article 40 of the International Covenant on Civil and Political Rights and in paragraph 1 of article 44 of the Convention on the Rights of the Child, which read "... measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights ...".

116. It is suggested the wording in the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, both of which improve upon the provision in the draft under review, might be followed. Firstly, the phraseology of the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child indicates there may be a difference between recognized rights and their enjoyment and it invites States parties to report on both matters. Secondly, the draft Convention is open to the interpretation that States parties are required to report only on relevant measures introduced since the Convention was promulgated. The International Covenant on Civil and Political Rights and the Convention on the Rights of the Child are not susceptible to this restrictive interpretation.

Article 74

Paragraph 5

Comments by the Office of Legal Affairs

117. If the term "consultative capacity" is not intended to mean more than "observer capacity" in the normal sense of that term, it is suggested that the latter term be used instead of "consultative capacity".

Paragraph 6

Comments by the Centre for Human Rights

118. There seems to be a discrepancy between paragraphs 4 and 6 of article 74. The word "intergovernmental organizations" is used in paragraph 4 whereas the word "international organizations" is used in paragraph 6. The difficulty could be avoided if the list of organizations found in article 74 (4) is duplicated in article 74 (6), so the latter becomes:

"The Committee may invite representatives of specialized agencies and other organs of the United Nations, as well as of intergovernmental organizations and other concerned bodies, to be heard in its meetings whenever matters falling within their field of competence are considered".

Paragraph 7

Comments by the Office of Legal Affairs

119. The presentation of an annual report of the proposed Committee on the Protection of the Rights of All Migrant Workers and Their Families to the General Assembly has implications with respect to the agenda of the regular sessions of the General Assembly. The Assembly may not find it desirable to consider the report of the Committee on an annual basis. It may wish to consider such reports every two years. The views of the Division of General Assembly Affairs should be sought on this matter.

Paragraphs 7 and 8

Comments by the Centre for Human Rights

120. These two provisions relate to the presentation and transmission of the Committee's annual report. The equivalent provisions in article 45 of the International Covenant on Civil and Political Rights and article 24 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment are located at the end of the part of the Convention dealing with, inter alia, the submission of periodic reports by States parties. It is suggested this is a more appropriate location than the one employed in the draft Convention.

Comments by the International Organization for Migration

121. Article 74 of the draft specifies the areas of competence of the Committee responsible for reviewing the application of the Convention. The International Organization for Migration, as an intergovernmental organization, is ready to co-operate closely with this Committee, within the framework of paragraphs 3, 4 and 6 of this article.

Article 75

Comments by the Centre for Human Rights

Paragraph 1

122. Article 75 should follow article 72 (see comments in para. 16 above). As regards the phrase, "The Committee shall adopt its own rules of procedure", some comparable human rights instruments, such as the International Covenant on Civil and Political Rights, in paragraph 2 of its article 39, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in its

paragraph 2 of its article 18, stipulate that the Committee shall provide, inter alia, a rule in relation to a quorum and another on decision-making by majority vote.

Paragraph 2

123. With respect to the phrase "The Committee shall elect its officers for a term of two years", some comparable human rights instruments, such as the International Covenant on Civil and Political Rights, in paragraph 1 of article 39, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in paragraph 1 of article 18, add to their equivalent provisions the phrase: "They may be re-elected".

Paragraph 3

124. Concerning the phrase, "The Committee shall normally meet annually", the Convention on the Elimination of All Forms of Discrimination against Women (art. 20, para. 1) and the Convention on the Rights of the Child (art. 43, para. 10) have an equivalent provision. There is no equivalent provision in the International Covenant on Civil and Political Rights or the Convention on the Elimination of All Forms of Racial Discrimination. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that "the Committee shall meet at such times as shall be provided in its rules of procedure" (art. 18, para. 4).

125. It would appear that the Committee must meet at least once each year to adopt its annual report to the General Assembly, in accordance with paragraph 7 of article 74. Subject to this minimum requirement, it would appear that the Committee must assess, on consideration of its work-load, how often it needs to meet. If its work-load becomes considerable, it might not be appropriate for it to "normally meet annually" as anticipated by the draft.

126. It is suggested it may be more appropriate to follow the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, whereby the Committee is expressly empowered to deal with this matter in its rules.

Paragraph 4

127. With respect to the phrase, "The meetings of the Committee shall normally be held at United Nations Headquarters, "the Convention on the Elimination of All Forms of Racial Discrimination has an equivalent provision (art. 10, para. 4).

128. The Convention on the Elimination of All Forms of Discrimination against Women (art. 20, para. 2) and the Convention on the Rights of the Child (art. 43, para. 10) state: "The meetings of the Committee shall normally be held at United Nations Headquarters or any other convenient place as determined by the Committee".

129. The International Covenant on Civil and Political Rights (art. 37, para. 3) states: "The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

130. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is silent on the point; the Committee deals with the matter in its rules.

131. Since the Centre for Human Rights, located at the United Nations Office at Geneva, is most likely to provide the secretariat for the Committee, it may appear appropriate to follow the formula used in the International Covenant on Civil and Political Rights.

Article 76

Comments by the Centre for Human Rights

Subparagraph 1 (a)

132. Except for one particular, this provision follows the International Covenant on Civil and Political Rights (art. 41, para. 1 (a)) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 21, para. 1 (a)). The Convention on the Elimination of All Forms of Racial Discrimination, however, is different: it requires the communication to be brought to the attention of the Committee, not the State party (art. 11, para. 1). It would appear the provisions in the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment are more appropriate than those in the Convention on the Elimination of All Forms of Racial Discrimination.

133. The draft Convention differs from the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in that its lines 3 and 4 stipulate: "The State Party may also inform the Committee of the matter". This is an appropriate innovation.

Subparagraph 1 (c)

134. The last sentence reading: "This shall not be the rule where, in the view of the Committee, the application of the remedies is unreasonably prolonged", is also found in article 77, paragraph 5 (b) of the draft Convention. The following comments apply equally to articles 76, paragraph 1 (c) and 77, paragraph 5 (b).

135. The equivalent provisions are found in comparable United Nations treaties, such as the Optional Protocol to the International Covenant on Civil and Political Rights (art. 5, para. 2 (b)), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 21, para. 1, (c)), the Convention on the Elimination of All Forms of Racial Discrimination (art. 11(3)), without the phrase "in the view of the Committee". This addition, however, reflects the practice of comparable United Nations human rights committees.

136. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adds the following words to its equivalent provision: "... or is

unlikely to bring effective relief to the person who is the victim of the violation of this Convention (art. 21, para. 1, (c)). This innovation is appropriate as it constitutes an improvement over provisions drafted earlier by reflecting the growing jurisprudence of committees, such as the Human Rights Committee. If this sentence was not added to the draft under review, the provision would tend to establish a lower standard than previously provided by a comparable United Nations human rights treaty, namely, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Therefore, it is suggested that it would be appropriate to add to the draft the last phrase contained at the end of subparagraph 1 (c) of article 21 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment reading: ... "or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention."

Subparagraph 1 (d)

137. The equivalent provisions in comparable United Nations human rights treaties provide for the creation of an "ad hoc conciliation commission", such as the International Covenant on Civil and Political Rights (art. 42) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 21, para. 1 (e)).

138. The draft under review does not expressly provide for the creation of such a commission. If it wished, however, the Committee could provide for the creation of an ad hoc conciliation commission in its rules. In these circumstances, the omission of the relevant provisions from the draft appears appropriate.

Subparagraph 1 (e)

139. Although this accords with the location of equivalent provisions in the International Covenant on Civil and Political Rights (art. 41, para. 1 (d)) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 21, para. 1 (d)), a more appropriate location in this draft Convention would be at the end of article 76.

Subparagraph 1 (h) (i)

140. The reference to subparagraph "(f)" should be a reference to subparagraph (d). It will be noted that the verb "to confine" is used in line 2. It is also used in the equivalent provisions of the International Covenant on Civil and Political Rights (art. 41, para. 1h(i)) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 21, para. 1h(i)). The use of the word appears appropriate given the context of the resolution of an inter-State complaint.

Paragraph 1 (h) (ii)

141. In line 2, the term "set forth" is used, whereas the equivalent provisions of the International Covenant on Civil and Political Rights (art. 41, para. 1h(ii)) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment

or Punishment (art. 21 lh(ii)) use the word "confine". It is suggested that the verb "set forth", as used in the draft, is more appropriate given the context of the failure to resolve an inter-State complaint.

142. Regarding the sentence at the end of subparagraph h (ii): "The Committee may also communicate only to the States Parties concerned any views that it may consider relevant to the issue between them", there is no equivalent provision in the International Covenant on Civil and Political Rights or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Its justification in the draft under review is unclear.

143. By virtue of the introductory phrase of subparagraph (h), the Committee "shall ... submit a report". The last sentence of subparagraph (h) states: "In every matter, the report shall be communicated to the States Parties concerned". The clauses quoted are identical to equivalent provisions in the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. None the less, from the introductory phrase to subparagraph (h), it is not clear to whom the report is to be submitted. It would be helpful if the text clarified this matter.

Suggestion for a new paragraph 3

144. It is suggested that article 78 of the draft Convention, which relates only to article 76, be moved to become paragraph 3 of article 76. If this suggestion is accepted, the opening words of article 78: "The provisions of article 76 ...", would be deleted and replaced with, "The provisions of this article ...".

Article 77

Comments by the Centre for Human Rights

145. This article sets out the complaints procedure for individuals. Except in respect of relatively minor matters, which are indicated below, the article follows the equivalent provisions of the Optional Protocol (arts. 1-5) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 22).

146. Since the Optional Protocol and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment were drafted, the Human Rights Committee and Committee against Torture have considered many communications from individuals. In the light of this experience it is possible to identify refinements to the Optional Protocol and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which would eliminate procedural and other difficulties not foreseen by the original drafters.

147. It is suggested that it would be appropriate to take the opportunity to make the equivalent improvements to the draft under review. These suggested refinements are set out below.

Paragraph 1

148. This phrase "...or on behalf of ..." is not in the equivalent provisions of the Optional Protocol (art. 1) or the Convention on the Elimination of All Forms of Racial Discrimination (art. 14, para. 1). However, it is found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 22, para. 1) and it would appear to be an appropriate improvement. The word "... individual" before the word "rights" is not found in this context in any of the equivalent provisions of United Nations human rights instruments. The absence of the word, however, has caused some difficulties in the jurisprudence of the Human Rights Committee. Therefore, its appearance in the draft under review is helpful.

Paragraph 2

149. This clause is found in the Optional Protocol (art. 3) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 22, para. 2). Based on the practice of the Human Rights Committee in the application of the individual complaint procedure under the Optional Protocol, an additional ground of inadmissibility, namely, the phrase "manifestly ill-founded", would be highly desirable. The phrase "enables the relevant body to dismiss an application" which, although technically compatible with the treaty provisions, is patently frivolous or vexatious. By including the phrase, time-consuming but non-productive work is avoided, without weakening the protection available to victims.

150. In these circumstances, it is suggested that the phrase "manifestly ill-founded" should be added to article 77, para. 2) as a further ground of inadmissibility.

Paragraph 3

151. Before a communication is declared admissible, it is reasonable to provide the relevant State Party with the opportunity to comment on the question of admissibility. The equivalent provision is found in the rules of procedure of the Human Rights Committee (rule 91, para. 2) and the Committee against Torture (rule 13/22/3). There is evidence, however, that the absence of the provision from the instruments has generated some confusion among individuals and their advisers. Therefore, it would appear preferable if the provision is enshrined after paragraph 3 of article 77 of the draft Convention as follows:

"A communication may not be declared admissible unless the State Party concerned has received the text of the communication and has been given an opportunity to comment on the question of admissibility, within a time-limit to be established by the Committee."

152. If this suggestion is accepted, then the following consequential revision would be required. The first sentence of paragraph 3 of article 77 would be deleted. In the second sentence of paragraph 3, the words "Within 6 months, the receiving State ..." would be replaced by the words "Within six months of being informed that a communication has been declared admissible, the State Party ...".

153. In addition, it is suggested that, even if this addition and its consequential revisions are not accepted, the second sentence of paragraph 3 of Article 77 should be revised by deleting the phrase "... clarifying the matter and the remedy, if any, that may have been taken by that State" and replacing it by "... on the substance of the matter under consideration and indicate any measures of redress that may have been taken by it".

154. The jurisprudence of the Human Rights Committee indicates that there are difficulties with the meaning of the word "remedy" in the above context; the suggested revision eliminates these difficulties.

155. If the above suggestions are accepted, the paragraphs then would then be renumbered as paragraph 5 reading:

"5. Within six months of being informed that a communication has been declared admissible, the State Party shall submit to the Committee written explanations or statements on the substance of the matter under consideration and indicate any measures of redress that may have been taken by it."

Paragraph 4

156. If the suggested changes relating to paragraph 3 are accepted, paragraph 4 of the draft Convention would become paragraph 6.

Paragraph 5

157. Paragraph 5 of the draft Convention, like paragraph 2, sets out the grounds for inadmissibility for communications. Therefore, it is more logical for it to come immediately after paragraph 2. Thus to ensure consistency, its introductory phrase should follow the wording of paragraph 2 reading:

"The Committee shall consider inadmissible any communication under this article if ...".

158. With respect to subparagraph 5 (b), in order to ensure grammatical consistency with article 76, paragraph 1 (c), it is suggested that the the phrase "... in the view of the Committee" should follow "where" and be placed between commas.

159. To be consistent with accepted standards, it is suggested that paragraph 5 include the phrase already embodied in article 21, paragraph 1 (c) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: "... or is unlikely to bring effective relief to the person who is the victim of the violation of the present Convention."

160. With the suggested changes, if accepted, paragraph 5 would become paragraph 3 of article 77 reading as follows:

"3. The Committee shall consider inadmissible any communication under this article if:

"(a) The same matter has been, or is being, examined under another procedure of international investigation or settlement;

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

Paragraph 6

161. The practice of the Human Rights Committee and the Committee against Torture suggest the need to merge paragraphs 6 and 7 of the draft Convention and to include in the paragraph a clause stipulating "Decisions of a final nature on the inadmissibility of communications, and the Committee's view on the merits, shall be made public." With these suggested revisions, paragraph 6 becomes paragraph 7 reading:

"The Committee shall hold closed meetings when examining communications under this article. Decisions of a final nature on the inadmissibility of communications, and the Committee's views on the merits, shall be made public after they have been forwarded to the State Party and to the individual concerned."

162. Further, to ensure the maintenance of accepted standards, it is suggested that a provision similar to that contained in article 6 of the Optional Protocol be added to article 77 of the draft Convention as paragraph 8, which would read:

"8. The Committee shall include in its annual report under article 74 a summary of its activities under the present article."

163. In these circumstances, paragraph 8 becomes paragraph 9.

164. Article 77, with the suggested revisions and changes in the order of the paragraphs would read as follows:

"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, incompatible with the provisions of the present Convention, or manifestly ill-founded.

"3. The Committee shall consider inadmissible any communication under this article if:

"(a) The same matter has been, or is being, examined under another procedure of international investigation or settlement;

"(b) The individual has not exhausted all available domestic remedies; this shall not be the rule where, in the view of the Committee, 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 the present Convention.

"4. A communication may not be declared admissible unless the State Party concerned has received the text of the communication and has been given an opportunity to comment on the question of admissibility, within a time-limit to be established by the Committee.

"5. Within six months of being informed that a communication has been declared admissible, the State Party shall submit to the Committee written explanations of statements on the substance of the matter under consideration and indicate any measures of redress that may have been taken by it.

"6. 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.

"7. The Committee shall hold closed meetings when examining communications under this article. Decisions of a final nature on the inadmissibility of communications, and the Committee's views on the merits, shall be made public after they have been forwarded to the State Party and to the individual concerned.

"8. The Committee shall include in its annual report under article 74 a summary of its activities under the present article.

"9. The provision 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 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 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 78

165. Article 78 should become paragraph 3 of article 76 with consequential amendments (see comments on art. 76, paras. 131-152 above).

PART VIII

General provisions

Article 79

Comments by the International Organization for Migration

166. Article 79 of the draft states that nothing in the Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. This provision of customary law also appears in article 1, paragraph 3 of the Constitution of the International Organization for Migration.

PART IX

Final provisions

Article 90

Comments by the International Organization for Migration

167. Paragraph 2 of article 90 should become paragraph 1. Existing paragraph 1 could be worded more elegantly in the French version: "le texte des réserves formulées au moment ..." instead of "le texte des réserves qui auront été faites au moment".
