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REPORT OF THE ECONOMIC AND SOCIAL COUNCIL

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

Chairman: Mr. Antonio GONZALEZ DE LEON (Mexico)

INTRODUCTION

1. The Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, open to all Member States, was established under General Assembly resolution 34/172 of 17 December 1979.
2. By its resolution 1983/40 of 27 May 1983, the Economic and Social Council, inter alia, welcomed the progress made by the Working Group and expressed again its conviction that the drafting of that Convention would further facilitate the exchanges of views needed for protecting the human rights and improving the situation of migrant workers and their families. The Council also expressed the hope that substantial progress will be made by the Working Group during its two following meetings to be held in 1983 in accordance with General Assembly resolution 37/170 of 17 December 1982, with a view to completing the drafting of the convention during the thirty-eighth session of the General Assembly.
3. By its resolution 37/170 of 17 December 1982, the General Assembly, inter alia, took note of the report l/ of the Working Group and expressed its satisfaction with the substantial progress that the Working Group has so far made in the accomplishment of its mandate; decided that, in order to enable it to complete its task as soon as possible, the Working Group should again hold an inter-sessional meeting of two weeks' duration in New York, immediately after the

first regular session of 1983 of the Economic and Social Council; invited the Secretary-General to transmit to Governments the report of the Working Group so as to allow the members of the Group to continue their task during the inter-sessional meeting to be held in the spring of 1983, as well as to transmit the results obtained in that meeting in order that the General Assembly may consider them during its thirty-eighth session. The General Assembly also invited the Secretary-General to transmit the above-mentioned documents to the competent organs of the United Nations system and to international organizations concerned, for their information, so as to enable them to continue their co-operation with the Working Group. It decided that the Working Group should meet during the thirty-eighth session of the General Assembly, preferably at the beginning of the session, to continue and, if possible, to complete the elaboration of an international convention on the protection of the rights of all migrant workers and their families.

4. In accordance with paragraphs 3 and 4 of General Assembly resolution 37/170 and prior to the thirty-eighth session of the General Assembly, the Secretary-General transmitted the results obtained during the thirty-seventh session of the General Assembly to Governments, to competent organs of the United Nations system and to international organizations concerned.

5. Before its inter-sessional meeting of 1983, the Working Group held the following sessions at United Nations Headquarters: the first session from 8 October to 19 November 1980, during the thirty-fifth session of the General Assembly, an inter-sessional meeting from 11 to 22 May 1981, during the thirty-sixth session of the General Assembly from 12 October to 20 November 1981, an inter-sessional meeting from 10 to 21 May 1982 and in the course of the thirty-seventh session of the General Assembly from 18 October to 16 November 1982.

6. In pursuance of General Assembly resolution 37/170, the Working Group held an inter-sessional meeting at United Nations Headquarters from 31 May to 10 June 1983, under the chairmanship of Mr. Antonio González de León. It held _____ meetings with the participation of delegations from all regions. The observers for the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organization, the Food and Agriculture Organization and UNICEF also attended the meetings.

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

(a) Report of the Open-ended Working Group during the thirty-seventh session of the General Assembly (A/C.3/37/7 and Corr.1 and 2 (English only));

(b) Suggestions submitted by Finland, Italy, Norway, Portugal, Spain and Sweden (A/C.3/36/WG.1/CRP.1/Add.3-4).

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

(a) Report of the Chairman of the Open-ended Working Group (A/C.3/35/13);

(b) Letter dated 25 May 1981 from the Chairman of the Open-ended Working Group on the drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families to the Secretary-General (A/36/378);

(c) Communications submitted by the Governments of Denmark (on behalf of the Nordic countries), Italy, the Netherlands, Spain and the United States, relating to the draft report of the Chairman of the Working Group on its inter-sessional meetings (A/36/383 and annexes I to XIX);

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

(e) Report of the Open-ended Working Group to the Third Committee of the General Assembly at its thirty-sixth session (A/C.3/36/10);

(f) Report of the Open-ended Working Group on its inter-sessional meetings from 10 to 21 May 1982 (A/C.3/37/1).

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

9. The present report contains exclusive results of discussion during its inter-sessional meeting from 31 May to 10 June 1983 in the Working Group regarding specific provisions of the Convention, and does not contain statements of a general nature made during the debates. In the texts set forth throughout this report which were considered by the Working Group, the only language which has been provisionally agreed upon is that outside square brackets. Square brackets indicate that the Working Group has not reached agreement on the proposed language, which therefore remains as a proposal.

10. It may be recalled that, at its meetings held during the thirty-sixth session of the General Assembly, the Working Group had concluded its first reading of the preamble of the draft Convention. At its inter-sessional meetings in May 1982, the Working Group concluded its first reading of part II of the draft Convention on the understanding that the text which was provisionally agreed upon would be further examined at a later stage in order to harmonize it with the rest of the Convention and to adopt a text without brackets. At the same session the Working Group also concluded its preliminary consideration of part I of the Convention and agreed to postpone further consideration of articles 2 and 4, which were still pending, to a later stage. The text of the preamble, part I on the scope and definitions (arts. 1, 3, 5, 6), the text of part II on fundamental human rights of migrant workers and members of their families and part III on additional rights of migrant workers and members of their families in a regular situation/lawful status (arts. 35 to 45) appeared in document A/C.3/38/WG.1/CRP.2.

11. The Working Group decided to continue consideration of part III of the draft Convention and to conduct its deliberations on the basis of proposals included in document A/C.3/36/WG.1/CRP.1/Add.3 presented by Finland, Greece, Italy, Norway, Portugal, Spain and Sweden and other pertinent proposals submitted by delegations concerning the rights to be recognized only to migrant workers in a regular situation. After the conclusion of part III, the Working Group agreed to defer consideration of part IV on provisions applicable to particular categories of migrant workers and members of their families, to a later stage and to take up consideration of part V on promotion of sound and equitable conditions for international migration of workers and their families.

12. At the first meeting on 31 May 1983 of the Working Group, the representative of the United States placed his reservation on articles 44 and 45 provisionally agreed upon by the Working Group during his absence in the course of the thirty-seventh session of the General Assembly. The representative of the United States stated that if he had been present he would have proposed putting in brackets the words "equal to that" in paragraph 1 of article 44, as well as the words "enjoy equality of treatment with nationals" in paragraph 1 of article 45.

Part III. Additional rights of migrant workers and members of their families in a [regular situation] [lawful status]

Article 46

13. At its 1st, 4th and 5th meetings, the Working Group considered a text for article 46 on the basis of proposed article III.12 reading as follows:

"III. 12. At the time of their admission to the territory of the receiving country or of the regularization of their situation, migrant workers and members of their families in a regular situation shall enjoy exemption from customs duties in respect of their personal effects and in respect of portable hand-tools and portable equipment of the kind normally required for the carrying out of their trade or occupation."

14. During the consideration of this article, the representative of the United States supported by the representative of the Netherlands expressed their difficulties in not having reached agreement on the definitions. The representative of the United States felt that the words "portable tools" and "hand tools" were too specific for an international instrument and suggested that they should be replaced by words broader in terms such as "equipment necessary to perform their trade". In this connection, while replying to certain questions raised, the representative of the ILO referred to articles 2 and 3 of Annex III of the ILO Convention (No. 97) concerning Migration for Employment where "personal effects" and "portable hand tools and portable equipment owned by workers" are used. The representative of Italy proposed to use a wording closer to article 7 of the European Convention on the Legal Status of Migrant Workers, such as "personal effects and movable property". The representative of the United States proposed including in the article a clause stating "subject to the law in force in the States concerned". Various delegations felt that the words "subject to the law ..." would be too restrictive, and they expressed their preference for the terms "in accordance with applicable laws and regulations ...". After some discussion on the article the Chairman of the Working Group and some delegations held an informal consultation and submitted a new text for article 46 reading as follows:

"At the time of their admission to the State of employment, [or of regularization of their situation] migrant workers and members of their families shall, in accordance with the applicable laws and regulations, enjoy exemption from customs duties in respect of their personal effects and in respect of the equipment necessary to perform the trade or occupation for which they had been admitted to the State of employment."

15. During the consideration of the text, the representative of the United States suggested the words "in accordance with" in brackets. The representative of Italy suggested replacing the words "the applicable laws and regulations" by the words "the modalities" in brackets.

16. The Chairman and other delegations suggested including a second paragraph reading as follows:

"The same exemption to migrant workers and members of their families shall be accorded by the State of return at the time of their return."

17. In the course of the discussion various delegations raised doubts as to whether questions pertaining to exemption from customs duties in respect of personal effects and household goods should be maintained in part III of the Convention which is dealing with the fundamental human rights of migrant workers and members of their families. While some delegations felt that it would be more appropriate to include these matters in part II or part V of the Convention, others expressed the need to have a definition of the words "personal effects" and "household goods" in the State of employment.

18. The representative of Argentina stated that there should be a general safeguard clause whereby States would provide legislation or regulation to this end.

19. At its 5th meeting, after a lengthy discussion, the Working Group provisionally agreed to retain the new text for article 46 and the alternative proposal by the United States in brackets. The two texts proposed for article 46 read as follows:

Article 46

[At the time of their admission to the territory of the receiving country or of the regularization of their situation, migrant workers and members of their families in a regular situation shall enjoy exemption from customs duties in respect of their personal effects and in respect of portable hand-tools and portable equipment of the kind normally required for the carrying out of their trade or occupation.] [The same exemption to migrant workers and members of their families shall be accorded by the State of return at the time of their final return.]

[At the time of their initial admission to the territory of the State of employment, migrant workers and members of their families shall, subject to the applicable laws and regulations of the State of employment as well as relevant international agreements, enjoy exemption from customs duties in respect of the equipment necessary to perform the trade or occupation for which they are admitted to the State of employment.]

Article 47

20. At its 1st, 4th and 5th meetings, the Working Group considered a text for article 47 of the draft Convention on the basis of proposed article III.13, which read as follows:

"III. 13. The States Parties to the present Convention shall, as far as possible and in accordance with the arrangements laid down in their legislation and applicable agreements, authorize and provide facilities for the transfer to the country of origin or the country of normal residence of migrant workers and members of their families of such parts of their earnings and savings as they may wish to transfer. The transfer of sums required for the maintenance of members of the migrant worker's family shall on no account be prevented or restricted."

21. During the consideration of the article most delegations recognized the crucial importance of the article as it constitutes the cornerstone of the draft Convention. The representative of Argentina and some delegations felt that the proposed text by entitling migrant workers the right to transfer funds from the country of employment to another country might give certain privileges to migrant workers over the nationals of the State of employment. In this connection, the representative of the United States and the representative of Turkey pointed out that currency flowing from one country into another is a complex matter which is constantly changing and is subject to specific currency regulations. The representative of the United States proposed to begin the article by the following:

"Subject to their applicable currency laws and regulations and in accordance with relevant international agreements, the States Parties to the present Convention shall facilitate the transfer of earnings and savings of migrant workers in a regular situation from the State of employment to other States, in particular the transfer of the sums necessary for the basic sustenance of the migrant worker's family."

22. Various delegations expressed their objection to such a proposal because of the restrictions it put upon the right of migrant workers to transfer their earnings or savings and expressed their preference for the term "in accordance with existing regulations". The representative of Greece felt that clarification should be made on who will determine the amount of funds that will be necessary for the support of migrant workers families. The representative of Morocco formally proposed that the notion of the right of migrant workers to freely dispose of their earnings and savings should be introduced in the provision of article 47. The representative of Morocco, supported by the representatives of Jamaica, Algeria, India and the Philippines, suggested starting the article with a chapeau, recognizing, on the one hand, the right of migrant workers to dispose of their earnings and savings and, on the other hand, that States should facilitate the transfer of their earnings and savings.

23. The representative of Jamaica proposed formulating the text as follows:

"States Parties recognize the right of migrant workers to transfer to any country their earnings or parts of their earnings for the maintenance of members of the migrant worker's family and shall, in accordance with relevant rules and regulations and applicable agreements, authorize the transfer of such earnings or parts thereof."

24. The representative of Algeria suggested replacing the proposed text for the article by the following:

"States Parties to this Convention recognize the right of migrant workers to have full control of all income from their work, including the right to transfer any part of their earnings and savings to the countries of origin and of habitual residence. To the extent possible, States Parties shall, under their national legislation and taking into account any applicable agreements, facilitate such transfers and the transfer of the sums needed for the maintenance of members of the families of migrant workers."

25. The representative of Greece submitted a text reading as follows:

"The States Parties to the present Convention shall, in accordance with the arrangements stated in their legislation and those applicable to agreements, authorize and facilitate the transfer, to their country of origin or to the country of normal residence of migrant workers and members of their families, parts of their earnings and savings as they may be necessary for the maintenance of members of the migrant worker's family. Provided that no outstanding legal reasons exist, no other restrictions whatsoever shall be placed on the transfer of the migrant worker's earnings and savings to the country of destination at the time when he leaves the country of employment."

26. Prior to its 5th meeting, informal consultations were held between the Chairman and other delegations. As a result of those consultations and in an attempt to reach a compromise text, a revised text for article 47 was circulated to the Working Group. The revised text read as follows:

"Migrant workers shall have the right to transfer outside of the State of employment their earnings and savings, in particular those funds which are necessary for the support of their families in their State of origin or normal residence. States of employment shall facilitate such transfer in accordance with modalities established by law."

27. At its 5th meeting, the Working Group provisionally agreed to retain the initial proposed text for article 47 and to place it in brackets together with an alternative proposal by the representative of the United States, also in brackets as follows:

Article 47

[The States Parties to the present Convention, shall, as far as possible and in accordance with the arrangements laid down in their legislation and applicable agreements, authorize and provide facilities for the transfer to the country of origin or the country of normal residence of migrant workers and members of their families of such parts of their earnings and savings as they may wish to transfer. The transfer of sums required for the maintenance of members of the migrant worker's family shall on no account be prevented or restricted.]

[Migrant workers shall have the right, subject to applicable currency laws and regulations, to transfer their earnings and savings from the State of employment to other States, in particular those funds necessary for the support of their families, and States of employment shall take appropriate measures to facilitate such transfers in accordance with procedures established by law.]

Article 48

28. The Working Group considered a text for article 48 of the draft Convention at its 2nd meeting on 31 May, on the proposed article III.14 reading as follows:

"III. 14. Subject to agreements on double taxation, migrant workers and members of their families shall not be liable to taxes, duties or charges of any description whatsoever higher or more onerous than those imposed on nationals in similar circumstances. They shall be entitled, under conditions no less favourable than those applicable to nationals, to deductions or exemptions from taxes or charges and to all allowances, including allowances for dependants."

29. During the consideration of the article, various delegations raised their concern about the double taxation which migrant workers may face. In view of the complexity of the question of taxation, the representative of the United States, supported by the representative of the Federal Republic of Germany, proposed deleting the second paragraph of the article, as its provisions may raise further complications since they may be applied in some countries and not in others. In the course of the debate reference was made to article 23 of the European Convention on the Legal Status of Migrant Workers, which contains provisions on taxation on earnings.

30. At the same meeting, the Working Group decided to keep the second sentence of the proposed article in brackets and provisionally agreed at the first reading on the following text for article 48 as follows:

"III. 14. Subject to agreements on double taxation, migrant workers and members of their families shall not be liable to taxes, duties or charges of any description whatsoever higher or more onerous than those imposed on nationals in similar circumstances. [They shall

be entitled, under conditions no less favourable than those applicable to nationals, to deductions or exemptions from taxes or charges and to all allowances, including allowances for dependants.]"

Article 49

31. The Working Group considered a text for article 49 of the draft Convention at its 2nd, 4th, 5th and 6th meetings on 31 May, 2-3 June, on the basis of article III.15 which read as follows:

"III.15. If a work permit or an authorization to engage in economic activity is granted only for a given period, authorization of residence shall be granted for at least the same duration. If a worker loses his employment, this shall not in itself imply the withdrawal of his authorization of residence, or, as the case may be, his work permit. He shall be allowed sufficient time to find alternative employment, at least for a period corresponding to that during which he may be entitled to unemployment benefits."

32. Following a general discussion on the proposed article, various delegations expressed their dissatisfaction with the wording of the article. Some delegations felt that the article should be discussed in the light of the provisions of article 50 as it appeared in document A/C.3/37/7. After informal consultations, the co-sponsors and other interested delegations, taking into account some suggestions to improve the wording of the text, circulated a revised text for article 49 reading as follows:

(1) Where a separate authorization to reside is required by national legislation, the States of employment shall issue to migrant workers authorization to reside for at least the same period of time as their authorization to engage in employment [or other economic activity].

(2) Without prejudice to article 36 of the present Convention, migrant workers shall neither be regarded as in an irregular situation, nor shall they lose their authorization to reside, by the mere fact of the loss of employment [or the termination of their economic activity] prior to the expiry of their working permits or similar authorizations.

(3) In order to allow migrant workers sufficient time to find alternative employment, the authorization of residence shall not be withdrawn, at least for a period corresponding to that during which they may be entitled to unemployment benefits.

33. During the consideration of the article, the representative of the United States suggested including in the first paragraph a clause specifying that "This provision does not apply to frontier workers." The representative of Sweden and other delegations objected to the proposal by the United States because this part of the draft Convention is exclusively dealing with migrant workers in a regular situation or lawful status. They suggested putting it in brackets. The

representative of France proposed replacing the words "where a separate authorization to reside is required" by the words "where and when a separate authorization to reside is required".

34. Regarding paragraph (2) of the article, the representative of the United States, supported by the representative of the Federal Republic of Germany, proposed putting the whole paragraph in brackets or starting the sentence as follows: "In a State of employment where migrant workers are admitted for an indefinite period of time and are free to choose any type of employment for any employer ...". The representative of the Federal Republic of Germany suggested inserting the words "as a rule" after the word "nor", in the second line of paragraph (2). The representatives of Sweden, Norway and Spain objected to the proposal of the United States which they found regressive in steps and stated that the provisions of the article do not concern the freedom to choose or change of employment. In replying to some questions raised in relation to the provisions of the article, the representative of the International Labour Organisation referred to similar provisions in paragraph (1) of article 8 of ILO Convention 143, whereby it is stated that "On condition that he has resided legally in the territory for the purpose of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere loss of his employment, which shall not in itself imply the withdrawal of his authorization of residence, or as the case may be, work permit".

35. As concerns paragraph (3) of the article, the representative of the United States suggested inserting the words in paragraph (2) above after the words "migrant workers" on the first line. The representative of India placed his reservation on record and stated that in those countries where employment benefits schemes are not available, it would be useful to indicate a reasonable time-limit so as not to give the impression that migrant workers will not be entitled to such facilities as envisaged in the paragraph.

36. At its 6th meeting on 6 June, after considerable discussion, the Working Group provisionally agreed to retain the entire article in brackets together with an alternative proposal by the United States also in brackets. The text for article 49 read as follows:

[(1) Where a separate authorization to reside is required by national legislation, the States of employment shall issue to migrant workers authorization of residence for at least the same period of time as their authorization to engage in employment [or other economic activity].

(2) Without prejudice to article 36 of the present Convention, migrant workers shall neither be regarded as in an irregular situation, nor shall they lose their authorization of residence, by the mere fact of the loss of employment prior to the expiry of their working permits or similar authorizations [or the termination of their economic activity].

(3) In order to allow migrant workers sufficient time to find alternative employment, the authorization of residence shall not be withdrawn, at least for a period corresponding to that during which they may be entitled to unemployment benefits.]