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REPORT OF THE ECONOMIC AND SOCIAL COUNCIL

Draft International convention on the protection of the rights
of all migrant workers and their families

Observations by the International Labour Office (ILO) on the
text provisionally agreed upon during the first reading
(A/C.3/39/WG.1/WP.1)

1. Following General Assembly resolution 34/172 which created a working group and invited the international organizations concerned to participate in the elaboration of an international convention on the protection of the rights of all migrant workers and their families, the Governing Body of the International Labour Office considered that, in view of the constitutional responsibilities and the experience of ILO regarding the protection of migrant workers, it should participate actively in the deliberations of the Working Group. Two papers were submitted by ILO at the beginning of the Group's work 1/ and an information note on ILO standards and activities. Now that the first reading of the convention has been concluded it is appropriate to take stock of the main lines of the provisional agreements reached and of the key points still awaiting a consensus resolution, which this paper sets out to do in the light of ILO standards, 2/ experience 3/ and Governing Body guidance. 4/

2. Since the proposed convention was conceived as a global instrument to safeguard the rights of all migrant workers and their families, looked at from a human rights perspective, it seems desirable that the convention should apply not only to migrant workers who enter an employment relationship, but also to self-employed or own-account workers and their families. Indeed, while some provisions in the existing draft refer to conditions applicable to wage or salary earners, most provisions are relevant to the protection of all persons working in a country other than their own, whatever the nature of their activity or contractual status;

the same holds true for the provisions dealing with the rights and guarantees to be accorded to family members. The exclusion of self-employed persons (or of any particular categories of self-employed persons) would result in the introduction of an arbitrary distinction, inconsistent with the protection already provided for in United Nations human rights instruments and in a number of important international labour conventions.

3. For the reasons stated in the preceding paragraph, it would also appear inappropriate to exclude the categories of persons listed in article 2, paragraphs 3 (d), (e), (f) and (g). ^{5/} The exclusions listed in article 2, paragraph 3 (c) and (d), might, moreover, have the effect of making the convention inapplicable to seafarers, workers on offshore installations, itinerant workers and project-tied workers as defined in article 2, paragraph 2. Neither refugees and stateless persons (art. 2, para. 3 (f)) nor students and trainees (art. 2, para. 3 (g)) should be deprived of the protection of the proposed convention if, being economically active, they fall within the definition of "migrant worker". The foregoing remarks are without prejudice to the possibility of excluding such persons from the application of particular provisions, where that is deemed appropriate, having regard to the nature of the right in question. Attention is drawn to the fact that certain limitations in the application of the convention to persons of the kind referred to in the aforementioned subparagraphs will result from the special clauses in part IV of the draft convention, regulating its applicability to particular categories of workers, such as seafarers, workers on offshore installations, itinerant workers and project-tied workers.

4. The principle of the generality of scope of the rights and guarantees to be accorded by the proposed convention would be endangered by the sweeping power to exclude particular categories of migrant workers from all or part of the convention, provided for in the reservations clause (art. 89). The unrestricted power to withdraw protection from any category of migrants, including workers or members of their families who are undocumented or in an irregular situation, runs counter to the idea of a comprehensive global instrument. Any limitations which may be considered appropriate on the enjoyment of particular rights by certain categories should be defined in the convention itself, having regard to any special considerations which would justify them. Distinctions of this nature are already to be found in the draft, for example in part IV, and also in particular provisions such as the right to free choice of employment (art. 52).

5. The reciprocity clause (art. 86) would permit ratifying States to confine the application of parts III and IV (or, in alternative proposals, several important articles of part III) to nationals of other States parties. Such a limitation would considerably reduce the potential effectiveness of the convention, and would contrast with the situation under the International Covenants on Human Rights and ILO Conventions dealing with corresponding matters which do not make their application to migrant workers subject to any condition of ratification by the State of their nationality. A reciprocity condition is found in ILO Conventions only in the special context of social security.

6. The general undertaking to respect the convention, without any discrimination, in article 7 at the beginning of part II, should not be limited to the rights recognized in part II, but should extend to all substantive provisions of the

convention. For that reason consideration might be given to placing it in part I (Scope and definitions) or making it a separate part II and renumbering the subsequent parts accordingly. The latter course would be similar to the approach adopted in the International Covenants on Human Rights.

7. The provisions contained in the draft proposals submitted to the Working Group were frequently drawn from the International Covenants on Human Rights and ILO Conventions. It appears important, in the further consideration of the draft, to seek to follow as closely as possible the wording of the existing instruments which have been used as sources, in order to avoid modifications which would have the effect of laying down lesser rights and thus calling into question protection already enjoyed under United Nations or ILO instruments. For example, some of the suggestions made during the first reading concerning article 65 would permit recruitment of migrant workers by employers and private agencies without safeguards required by ILO Convention No. 97. Similarly, certain suggestions regarding measures for the preservation of cultural identity (art. 31) and the effect of loss of employment on current work permits (art. 51) appear more limited or restrictive than the provisions on these matters in ILO Convention No. 143. The same appears to be the case, in relation to the International Covenant on Civil and Political Rights, of certain formulations suggested for articles 12 (freedom of thought), 16 (liberty and security of person), 19 (non-retroactivity of criminal law) and 40 (freedom of residence).

8. Article 37 of the existing draft contains a saving clause for the rights of States with respect to the admission, stay [and] employment [or other economic activity] of migrant workers and their families. One of the formulations retained for further consideration ("Nothing in the present convention shall affect the right of each State Party to establish in its national legislation the legal criteria governing ... all ... matters relating to the immigration and employment status of migrant workers and members of their families") appears to be expressed in such sweeping terms that it could be regarded as calling into question the binding nature of a number of guarantees embodied in the proposed convention. The more specific wording, based on the draft originally submitted to the working group, appears to express in more precise language the balance to be established between the general right of States to determine the criteria for admission, etc. and their application in individual cases, on the one hand, and the observance of the specific rights and guarantees provided for in the convention, on the other.

9. The draft text of the convention would associate ILO with the arrangements for supervising its implementation, but no agreement has yet been reached on the form which this should take. One proposal envisages the appointment by the Governing Body of the International Labour Office of a number of members of the supervisory body to be established under the convention. Another would, instead, empower the Secretary-General to transmit information relevant to the application of the convention, including reports from States parties, to ILO, which would have the possibility of submitting technical comments on matters covered by a number of specifically enumerated provisions of the convention; in addition, the advice of ILO might be requested by the supervisory committee. In the view of the International Labour Office, both these proposals have certain weaknesses. The appointment of some members of the supervisory body by the ILO Governing Body would

still leave open the question of the technical contribution which might be made by the International Labour Office to the implementation of the convention on the basis of its knowledge and experience of legislation, policies, practices and problems. The alternative proposal, besides making the transmission of information to ILO discretionary and not a matter of course, would unduly restrict the possibility for ILO to bring information in its possession which is of relevance to the work of the supervisory committee to the attention of that committee. The absence of any provision for attendance by a representative of ILO at the meetings of the committee would also deprive the committee of the opportunity of receiving, in the course of its discussions, clarifications and advice from an organization which - alone among United Nations agencies - has a specific responsibility under its constitution for "the protection of the interests of workers when employed in countries other than their own" and which, in pursuance of that mandate, has adopted a series of international instruments and developed programmes of activities for the benefit of such workers.

10. The above-mentioned concerns might be met by arrangements of a slightly different nature from those so far envisaged. For example, provision could be made, in addition to a requirement of transmission to ILO of copies of reports from States parties, for the participation of a special representative of the Director-General of ILO, without the right to vote, in the meetings of the proposed supervisory committee concerned with the consideration of reports from States parties. Precedents for such a formula can be found in the practice of the United Nations. It would reflect the specific constitutional responsibility of ILO, as mentioned above. Where it would be helpful to the committee to have indications on particular questions in writing, the ILO representative would be able to transmit them to it, but without the need to provide for the systematic supply of written information (which would tend to be far more costly for both organizations in terms of preparation, processing and circulation).

Notes

1/ Possible contents of a United Nations convention on protection of the rights of all migrant workers and their families (A/C.3/35/WG.1/CRP.2); Measures to improve the situation and ensure the human rights and dignity of all migrant workers (A/C.3/35/WG.1/CRP.8).

2/ A separate working document, available in English, French and Spanish for reference, contains the texts of the draft United Nations convention, on one side of the page, and of relevant provisions of ILO Conventions and references to ILO Recommendations, on the other. This is an updated version of appendix 1 to ILO Governing Body document GB.225/IO/1/1. Also available in English and French is a compilation of ILO Conventions and Recommendations concerning migrant workers, excluding social security instruments.

3/ Readers interested in a characterization and quantification of contemporary international migration movements may wish to consult chapter 4 of "International migration for employment", in ILO: World Labour Report, vol. 1 (Geneva, 1984), pp. 99-116.

Notes (continued)

4/ In particular, the Director-General's guidelines for participation in the framing of the United Nations convention, as endorsed by the International Organizations Committee of the Governing Body. See ILO documents GB.212/IO/1/8 and GB.212/15/28. These included the following: "... every effort should be made to avoid conflict or duplication of standards and to ensure co-ordination of any arrangements for supervising their implementation".

5/ That is to say, "persons whose labour relations with an employer were not established in the State of employment [receiving State]" (art. 2, para. 3 (c)); "persons whose main earnings do not originate from the State of employment [receiving State]" (art. 2, para. 3 (d)); "persons taking up residence in a country different from their State of origin as investors [or who establish upon arrival in that country an economic activity in which they act as employers] (art. 2, para. 3 (e)); "[refugees and stateless persons]" (art. 2, para. 3 (f)); and "[students and trainees]" (art. 2, para. 3 (g)).
