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Report of the Director-General

First Supplementary Report: Opinions relative to the decisions of the International Labour Conference

(a) Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

(Article 9, paragraph 1 and Part I (Migration in abusive conditions))

Memorandum by the International Labour Office

1. In a letter dated 28 June 2002, the Government of Mexico sought the Office's official and formal opinion on the scope and content of the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and the Migrant Workers Recommendation, 1975 (No. 151) with respect to the situation of undocumented migrant workers. The Government raises the following questions:

(a) What is the meaning and scope of the reference in Article 9, paragraph 1, of Convention No. 143 to "*rights arising out of past employment in respect of remuneration, social security and other benefits*".

(b) Can a State, on the basis of Convention No. 143 and Recommendation No. 151, adopt differential treatment of foreign workers on the basis of their migrant status in such a manner that undocumented migrant workers have fewer rights than migrant workers who are lawfully residing in the country?

(c) Would it be correct to conclude that a legal provision, a migration-related measure or a judicial decision which impedes the enjoyment of labour rights by a migrant worker, on the sole basis of his or her undocumented status, is incompatible with the principles of Convention No. 143 and Recommendation No. 151?

(d) What is the practice of the supervisory bodies on this matter?

2. Subject to the customary reservation that the Constitution of the International Labour Organization confers no special competence upon the ILO to interpret the Conventions, the Office must limit itself to providing governments that so request with information enabling them to assess the appropriate scope of any given provision of a Convention, while taking into account any relevant elements that may have emerged from the ILO's preparatory work and the comments of its supervisory bodies. It is primarily up to the governments concerned to judge whether or not their national law and practice are or can be compatible with the standards laid down in the international labour Convention in question, subject – in the event of the latter's ratification – to the procedures established by the International Labour Organization for the review of reports relating to the application of ratified Conventions at international level.

3. Convention No. 143 is divided into three parts. Part I (Articles 1-9) of the Convention deals with international labour migration in abusive conditions and covers both documented and undocumented migrant workers. Part II (Articles 10-14) substantially widens the scope of equality between men and women migrant workers in a regular situation and nationals of the country of immigration. Part II applies only to regular status migrants. Lastly, Part III (Articles 15-24) contains the final provisions, in particular Article 16, under which any member State that ratifies the Convention, may exclude either Part I or Part II from its acceptance of the Convention at the time of ratification. [1]

4. Article 9, paragraph 1, of Convention No. 143 reads as follows:

> Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.

5. On the first point concerning the meaning and scope of "rights arising out of past employment" referred to in paragraph 1 of Article 9, it is appropriate to note that the meaning of "equality of treatment" in Article 9(1) should be understood as requiring irregularly employed migrant workers to enjoy equality of treatment with regularly admitted and lawfully employed migrants and *not* with nationals of the country of immigration. [2] This is particularly important for those States that are in a position to accept Part I but not Part II of the Convention because their legislation does not grant equality of treatment between regularly employed migrant workers and nationals. [3]

[1] Only one country (Norway) made a declaration under Article 16(1), excluding Part I. In 1989, however, Norway cancelled this declaration.

[2] ILO: *"Migrant Workers", Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part IB), International Labour Conference, 87th Session, Geneva, 1999 (referred to below as the "1999 General Survey on Migrant Workers"), para. 303; see also ILO: *"Migrant Workers", Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4B), International Labour Conference, 66th Session, Geneva, 1980 (referred to below as the "1980 General Survey on Migrant Workers"), para. 260.

[3] ILO, op. cit., 1999, para. 303. However, in so far as a member State that has ratified both Parts of Convention No. 143 has to guarantee equality of treatment between regular status migrants and nationals, Article 9(1) a fortiori may imply that with respect to their rights arising out of past

6. Paragraph 1 of Article 9 refers to equality of treatment with respect to "rights arising out of *past employment* as regards remuneration, social security and other benefits". The preparatory work for this provision is sparse as it was adopted through a vote without discussion on the record. However, it is clear that the purpose of this provision is to ensure that illegally employed migrant workers are not deprived, by the sole reference to their undocumented status, of their rights in respect of the work actually performed. [4] This seems to be understood as also including any period of legal employment that may have preceded the illegal employment, as well as past employment in another country which would normally be taken into consideration, on the basis of bilateral or multilateral international agreements, when calculating entitlement to benefits. [5]

7. While highlighting the non-binding status of Recommendations, it may be noted that Paragraph 34 of Recommendation No. 151 may provide some further clarification and guidance with respect to the meaning of Article 9, paragraph 1, of Convention No. 143. Paragraph 34 contains greater specification of the rights of both regular and irregular migrants upon their departure from the host country. It provides that irregular migrants who are leaving the country of employment are entitled to "(…) any outstanding remuneration for work performed, including severance payments normally due". It also recommends that migrants whose stay has been irregular also be entitled to employment injury benefits and "in accordance with national practice: (i) to compensation in lieu of any holiday entitlement acquired but not used; and (ii) to reimbursement of any social security contributions which have not given and will not give rise to rights under national laws or regulations or international arrangements". [6] Further, Paragraph 8(2) of Recommendation

employment as regards remuneration, social security and other benefits, migrants in an irregular status could de facto enjoy the same rights as nationals of the country concerned. An interesting example is provided in the Memorandum by the International Labour Office published in *Official Bulletin*, 1977, No. 4, pp. 287-289: the Memorandum concerns an opinion requested by the Government of Sweden concerning the entitlements of "clandestine migrant workers" to old-age, invalidity and survivors' benefits payable under national supplementary pension schemes and daily sickness allowances under national health schemes. It should be noted that in this particular case, the Memorandum by the Office stated that Article 9(1) concerned the "question of equality of treatment between clandestine migrant workers and nationals of the country concerned as regards, inter alia, social security benefits arising out of past employment". Noting that already in its 1980 General Survey, the Committee of Experts considered that Article 9(1) should be understood as requiring equality of treatment between irregular migrant workers and migrant workers lawfully residing in the country of employment, the interpretation by the Office might seem contradictory. However, a reading of the text of the Memorandum suggests that the legislation concerned did apply to both nationals and non-nationals and did not deprive irregular status migrants from the benefits concerned based on their illegality of stay or work. Consequently, nationals and non-nationals, irrespective of their migrant status, were treated equally with respect to the social security benefits under the Swedish supplementary pension scheme. It seems therefore reasonable that the Memorandum by the Office addressed this particular request by the Government of Sweden as a question of "equality of treatment between clandestine migrant workers and nationals of the country concerned". It should be borne in mind that at the time of the Memorandum, Sweden had not yet ratified Convention No. 143 nor had the Committee of Experts expressed any views on this particular question. Since the 1980 and 1999 General Surveys on Migrant Workers, the Office has followed the views of the Committee of Experts as expressed in paragraphs 260 and 302 of the respective general surveys.

[4] ILO, op. cit., 1999, para. 302.

[5] This seems to be particularly important for the purpose of acquiring rights to long-term benefits, 1999 General Survey on Migrant Workers, para. 308.

[6] In the case of a dispute, the worker should "enjoy equality of treatment with national workers as regards legal assistance" (Paragraph 34(2) of Recommendation No. 151).

No. 151 also provides for equality of treatment for irregular status migrants and their families in respect of rights arising out of present and past employment as regards trade union membership and exercise of trade union rights.

8. As regards the second and the third questions raised by the Government of Mexico, the Office considers that Convention No. 143 and Recommendation No. 151 allow for distinctions to be made in the treatment between documented and undocumented migrant workers with respect to those rights that go beyond the basic protection that is provided by Articles 1 and 9 of Convention No. 143. For instance, there may be distinctions as regards rights to security of employment, relief work and retraining. [7] While permitting these distinctions to be made, the Convention (Articles 1 and 9) also establishes a basic level of protection for both documented and undocumented migrant workers. Article 1 of Convention No. 143 lays down the general obligation to respect "the basic human rights" of *all* migrant workers, irrespective of their legal status of immigration. The Convention does not, however, expressly mention which "basic human rights" should be protected for all migrant workers, whether documented or undocumented.

9. The considerations on the meaning and scope of paragraph 1 of Article 9 of the Convention referred to in paragraphs 5 to 8 of this opinion, indicate that at least with respect to certain rights arising out of past employment, undocumented migrant workers should enjoy equal treatment with migrant workers who are lawfully residing in the country. Moreover, in this context it is worth noting that pursuant to paragraph 2 of Article 9, in the event of a dispute an undocumented migrant worker can present his or her case to a competent body. Additional protection is also provided by Article 9, paragraph 3, which stipulates that "in case of expulsion of the worker or his [or her] family, the cost shall not be borne by them". [8] Finally, it also should be borne in mind that paragraph 4 of Article 9 allows for the regularization of the situation of men and women migrants who are illegally residing or working within the country. Once regularized, they should benefit from the same rights as those provided for migrant workers lawfully admitted within the territory of a member State.

10. As to the fourth point raised by the Government of Mexico on the practice of the supervisory bodies concerning Article 9(1) of Convention No. 143, the Committee of Experts on the Application of Conventions and Recommendations (hereafter the "Committee of Experts") has not yet had the occasion to comment extensively on the application of this provision. However, with respect to benefits arising out of past employment, it has noted that national legislation and the principle of equality of treatment should determine the extent to which men and women migrant workers in an irregular situation are entitled to such benefits – which are not expressly mentioned in the Convention – always bearing in mind that an illegally employed migrant worker should in spite of his or her irregular situation, enjoy the same rights as a legally employed migrant. [9] In the view of the Committee of Experts, undocumented workers are entitled to those

[7] Article 8(2) of Convention No. 143.

[8] The Committee of Experts seems, however, to make a clear distinction between: (a) the case where the migrant worker is in an irregular situation for reasons which cannot be attributed to him or her in which case the cost of his or her return as well as the return of his or her family members should not fall upon the migrant; and (b) the case where the migrant worker is in an irregular situation for reasons which can be attributed to him or her, in which case, only the costs of expulsion may not fall upon the migrant (1999 General Survey on Migrant Workers, para. 310).

[9] 1999 General Survey on Migrant Workers, para. 306; see the example of termination of employment with or without a period of notice.

social security rights and benefits which they have acquired by virtue of their period of employment and by fulfilling the other qualifying conditions required in the case of migrants in a regular situation. [10] In any case, benefits the granting of which is made conditional upon being legally employed or resident in the country or holding a valid work permit would be in contravention with the provisions of the Convention and deprive Article 9(1) of its principal effect. [11]

11. As regards Article 1 of Convention No. 143, further clarification with respect to the meaning of "basic human rights" can be found in the 1999 General Survey on Migrant Workers by the Committee of Experts, according to which Article 1 "refers to the fundamental human rights contained in the international instruments adopted by the United Nations in this domain, which include some of the fundamental rights of workers". [12] Some of these fundamental rights and principles are embodied in the eight fundamental ILO Conventions[13] as well as in paragraph 2 of the ILO Declaration on Fundamental Principles and Rights at Work, the preamble of which explicitly refers to migrant workers as being especially in need of protection. They cover: (1) freedom of association and the effective recognition of the right to collective bargaining; (2) the elimination of all forms of forced labour; (3) the effective abolition of child labour; and (4) the elimination of discrimination in employment and occupation.

12. A review of the comments and conclusions by the supervisory bodies with respect to the application of fundamental ILO Conventions indicates that these fundamental rights and principles apply to all workers, whether nationals or non-nationals, without distinction. For example, the Committee on Freedom of Association (CFA) has examined a law on foreigners, denying the right to organize and strike, freedom of assembly and association, the right to demonstrate and collective bargaining rights to "irregular" foreign workers. The CFA concluded that "Article 2 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) recognize[d] the rights of all workers, *without distinction whatsoever*, to establish and join organizations of their own choosing without previous authorization. The only permissible exception to Convention No. 87 [was] that set out in Article 9 concerning the armed forces and the police". [14] Likewise, with respect to the principle of non-discrimination embodied in the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Committee of Experts has also indicated that the principle applies to both nationals and non-nationals without making

[10] See for example paragraphs 267 and 268 of the 1980 General Survey on Migrant Workers: see also Memorandum by the Office, op. cit., 1977, No. 4, pp. 287-289.

[11] 1999 General Survey on Migrant Workers, para. 307.

[12] ibid., para. 296.

[13] The Freedom of Association and Protection of Right to Organise Convention, 1948 (No. 87); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Forced Labour Convention, 1930 (No. 29); the Abolition of Forced Labour Convention, 1975 (No. 105); the Equal Remuneration Convention, 1951 (No. 100); the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); the Minimum Age Convention, 1973 (No. 138); and the Worst Forms of Child Labour Convention, 1999 (No. 182).

[14] Committee on Freedom of Association, Report No. 327 (Vol. LXXXV, 2002, Series B, No. 1), Spain (Case No. 2121 of 23 March 2001): The General Trade Union of Workers in Spain (UGT) alleged that newly adopted legislation concerning the rights and freedom of foreigners restricted foreigners' trade union rights through a clause that foreigners may exercise such rights and freedoms only when "they obtain authorization of their stay or residence in the country".

any explicit distinction between them on the basis of their regular or irregular status. [15] For example, on one occasion, the Committee of Experts has expressed particular concern about the poor working conditions and the violence and abuse against irregular migrant workers employed in the agricultural sector and considered that the events "to the extent that they [had] an impact on employment and occupation opportunities and conditions of work, involve[d] acts of discrimination on the basis of race, colour, religion and national extraction". [16] Finally, on several occasions, the Committee of Experts has expressed increased concern about the illegal exaction of forced labour of men and women migrant workers as well as of migrant children. [17] The illegal exaction of forced labour usually implies an irregular status of the migrant worker concerned whether this is due to his or her irregular or undocumented entry or stay, or to the irregular employment situation of the worker. It thus seems clear that with respect to the basic human rights contained in Article 1 of the Convention, a ratifying State must, as a minimum, respect those fundamental rights of undocumented or irregular migrant workers that are enshrined in the fundamental Conventions of the International Labour Organization.

(b) Safety and Health in Agriculture Convention, 2001 (No. 184)

Memorandum by the International Labour Office

13. In a letter dated 21 March 2002, the Director of the State Secretariat for Economic Affairs (SECO) of Switzerland, which comes under the Federal Department of Economic Affairs, sought the Office's official and formal opinion on the legal consequences, with regard to the scope of the Safety and Health in Agriculture Convention, 2001 (No. 184), of moving provisions relating to self-employed workers from the proposed Convention on safety and health in agriculture to its accompanying proposed Recommendation.

14. Subject to the customary reservation that the Constitution of the International Labour Organization confers no special competence upon the ILO to interpret the Conventions, the Office must limit itself to providing governments that so request with information enabling them to assess the appropriate scope of any given provision of a Convention, while taking into account any relevant elements that may have emerged from the ILO's preparatory work and the comments of its supervisory bodies. It is primarily up to the governments concerned to judge whether or not their national law and practice are or can be compatible with the standards laid down in the international labour Convention in question, subject – in the event of the latter's ratification – to the procedures established by the International Labour Organization for the review of reports relating to the application of ratified Conventions at international level.

[15] See for example: CEACR, individual direct request concerning Convention No. 111, Poland, 1992; CEACR, individual observation concerning Convention No. 111, Denmark, 1991; CEACR, individual direct request concerning Convention No. 111, Antigua and Barbuda, 2000; CEACR, individual direct request concerning Convention No. 111, Germany, 2000.

[16] CEACR, individual observation concerning Convention No. 111, Spain, 2001; see also CEACR, individual observation concerning Convention No. 97, Spain, 2001.

[17] See, for example: CEACR, individual observation concerning Convention No. 29, Saudi Arabia, 2001; CEACR, individual observation concerning Convention No. 29, Côte d'Ivoire, 2002; CEACR, individual observation concerning Convention No. 29, United Kingdom, 2002; CEACR, individual observation concerning Convention No. 138, Costa Rica, 2001.

15. In its first question, the Government asks whether a country that is unable to apply the provisions of the Convention to self-employed workers in the agricultural sector must exclude this category of workers by virtue of the provisions of Article 3.1(a) of the Convention, in other words, whether the absence of such an exclusion means: (a) that this category of workers is covered by the Convention; or whether (b) this category may be covered by the Convention under the terms of paragraph 12(1) of the Safety and Health in Agriculture Recommendation, 2001 (No. 192).

16. Before providing a reply to this question, the scope of the Convention must be reviewed. This scope is delimited by the provisions of Articles 1 and 2 of the instrument, which are not directed at individuals, namely agricultural workers, but at a sector of activity, that of agriculture. Article 2 excludes three categories from this sector: subsistence farming, industrial procedures for processing agricultural products and the industrial exploitation of forests. The Convention does not provide for the exclusion of self-employed workers as defined by their legal status. The aim of the Convention, as indicated in Article 4, is the application of a national policy on safety and health in this sector of activity, without reference to the legal status of workers who must be protected by the measures taken to implement this policy in accordance with the provisions of the Convention.

17. Nevertheless, some of the provisions of the Convention apply to agricultural wage earners only. This applies to those provisions referring to the employer, such as Article 6, paragraph 1, Articles 7 and 8 or indeed subparagraph (b) of the second paragraph of Article 4, which specifies that national laws shall "specify the rights and duties of employers and workers with respect to occupational safety and health in agriculture". Other articles have general scope and apply to the whole of the sector of activity delimited by Articles 1 and 2 of the Convention, such as Articles 12-15 for the application of which it is not possible to establish a distinction based on the legal status of agricultural workers. Other articles contain general provisions, the application of which does not depend on the legal status of the worker, such as the first two paragraphs of Article 9 relating to the measures to be taken by the competent authority to ensure machinery safety.

18. Article 3, paragraph 1(a), reads as follows:

> The competent authority of a Member which ratifies the Convention, after consulting the representative organizations of employers and workers concerned:
>
> (a) may exclude certain agricultural undertakings or limited categories of workers from the application of this Convention or certain provisions thereof, when special problems of a substantial nature arise.

19. Initially, the conclusions adopted by the International Labour Conference following a review of the proposed text provided that the exclusion of limited categories of workers from the application of the Convention could be decided upon "taking into consideration the views of the representative organizations of the self-employed farmers concerned, as appropriate". This reference to the views of organizations of self-employed farmers was repeated in several points of the conclusions.[18]

[18] ILO: *Record of Proceedings*, International Labour Conference, 88th Session, Geneva 2000, 24/63-73 (7(1) General provisions; 14(1) Handling and transport of materials; 19(3) Young workers; 22 Welfare and accommodation facilities).

20. Subsequently, in view of the observations received,[19] in accordance with article 39, paragraph 6, of the Standing Orders of the Conference, certain changes which had the effect of moving the main provisions relating to self-employed workers to the proposed Recommendation, with the proviso that the definition of self-employment would occur at the national level, were made to the text of the proposed Convention submitted during the second discussion.

21. Therefore, apart from one reference to self-employed workers which was kept in the text of the Convention, [20] the other references which appeared in the adopted conclusions have been deleted, except one which has been transferred to the Recommendation under the heading "Self-employed farmers".[21] Therefore, it is important to examine the legal consequences.

22. The Recommendation contains a part entitled "Self-employed farmers", of which Paragraph 12(1) states that "Members should make plans to extend progressively to self-employed farmers the protection afforded by the Convention, as appropriate". Paragraphs 12-15 of the Recommendation, which relate to self-employed workers, extend its scope of *ratione personae* and specify the scope of protection which should be provided, including through the progressive extension of the protection provided by the Convention to such workers. It appears that the intention of the Conference was that the provisions of the Convention which implicitly apply only to employees (by virtue of the reference to relations with one or more employers) be extended progressively (to the extent that such an extension would be pertinent) and voluntarily (to the extent that this extension is provided for in a Recommendation that does not create obligations for ratifying Members) to self-employed workers.

23. In view of the above, it would neither be necessary nor useful for Members that are unable to apply to self-employed workers the provisions of the Convention which refer implicitly or explicitly to agricultural wage earners, to exclude self-employed workers from the application of the Convention by invoking Article 3, paragraph 1(a). As indicated above (paragraph 5), the provisions which have general scope and apply to the sector of activity delimited without distinction based on the legal status of the worker therefore apply to self-employed workers if the instrument is ratified.

24. The second question relates to the possible existence of different categories of self-employed workers, such as self-employed farmers or craftsmen carrying out

[19] ILO: *Safety and health in agriculture*, Report IV(2A), International Labour Conference, 89th Session, Geneva, 2001, pp. 9-16.

[20] Article 6, paragraph 2, reads as follows:

"National laws and regulations or the competent authority shall provide that whenever in an agricultural workplace two or more employers undertake activities, or whenever one or more employers and one or more self-employed persons undertake activities, they shall cooperate in applying the safety and health requirements [...]". This provision outlines the measures to be taken to ensure cooperation for the application of safety and health measures between employers of agricultural workers and self-employed workers in the same agricultural workplace.

[21] With regard to the conditions for keeping this reference, see International Labour Conference, 89th Session, Geneva, 2001, Report of the Committee on Safety and Health in Agriculture, *Provisional Record* No. 15, paras. 138-147. Paragraph 15 of the Recommendation lists the categories covered by this heading: small tenants and sharecroppers; small owner-operators; members of farmers' cooperatives; members of the family of the farmer; subsistence farmers; and other self-employed workers in agriculture, according to national law and practice.

agricultural work under terms of a contract, with regard to the possibility of applying the Convention to self-employed workers.

25. It should be recalled that, during the preparatory work, the issue of the definition of self-employed workers and the distinction between different categories of self-employed workers was left to members. The list of different categories of self-employed workers established in Paragraph 15 of the Recommendation is not exhaustive since the final subparagraph enables very wide coverage, provided however that this is specified in national law and practice.

26. Certain types of relationship between contractors and self-employed workers in agriculture (for example, certain types of sharecropping or commission work) may more closely resemble relations between employers and employees. In this case, and unless the provisions of Article 3, paragraph 1(a) are applied, to explicitly exclude the workers or undertakings in question, there will be uncertainty as to the application of certain provisions of the Convention to the extent that one party to the contractual relationship could be considered as an employer, rather than as a contractor or client. Those Members that have ratified the Convention are responsible for ending such uncertainty by specifying, as suggested in Paragraph 12(2) of the Recommendation on safety and health in agriculture, the rights and duties of these self-employed workers, whose special situation should be taken into account.

Geneva, 12 November 2002.