

CHAPTER 2

ANATOMY OF A PROHIBITION: ILO STANDARDS IN RELATION TO NIGHT WORK OF WOMEN IN INDUSTRY

33. The most modern instruments dealing specifically with women's night work in industry are the Night Work (Women) Convention (Revised), 1948 (No. 89), and its Protocol of 1990; this Convention revised Convention No. 41 of 1934 which was itself a revised version of Convention No. 4 of 1919. All three revisions were designed to make the standards on night work by women more flexible. Convention No. 171, as has already been seen, lays down standards of protection for all night workers, but its provisions fall outside the purview of this survey.

I. Historical development

1. The origins: The 1906 Berne Convention

34. The origins of the international regulation of night work of women can be traced back to private initiatives such as those of Robert Owen in 1818 or of Daniel Le Grand in 1840. Both appealed for international regulation of the working day and international protection of labour. The first Socialist Internationale which took place at the Geneva Congress of 1866 passed a resolution against the employment of women at night, while the 1887 Vienna meeting of the International Congress of Hygiene and Demography endorsed a resolution to the effect that "the limitation of working hours, and above all the prohibition of night work must be demanded on grounds both of health and morals".¹ The rising protest of the working class and the movement for the need of international action on social issues eventually led to the Berlin International Labour Conference convened at the initiative of German Emperor Wilhelm II in 1890. Despite its ambitious programme, only a series of resolutions, among which was one against the night work of women, were issued during the Conference.

¹ Cited in M.D. Hopkins, *The employment of women at night*, US Department of Labor, Bulletin of the Women's Bureau, No. 64, 1928, p. 20.

35. Yet, the preparatory work for the elaboration of the first international and legally binding instrument abolishing night work for women in industry was laid by the International Association for Labour Legislation which was founded in Paris in 1900. At its constitutive assembly held in Basel in 1901, the Association instructed the International Labour Office² to undertake a study as to the actual state and effects of the night work of women in the various countries as well as to the results obtained in the industries in which it had been suppressed.³ Two years later, in 1903, the Association requested the Swiss Government to take steps for the summoning of an international conference for the purpose of reaching agreement and adopting uniform rules on the first two subjects which had been identified as most suitable for international regulation, i.e. the prohibition of the night employment of women in industry and the use of white phosphorus in the manufacture of matches. The two subjects appear to have been retained for both practical and political reasons. The principle of the prohibition of night work for women was already laid down in the national legislation of most European countries and therefore the acceptance of an international convention was expected to raise little or no difficulty.⁴ In the words of Raoul Jay, the question was chosen as “one of the most urgent, most important, and most easily solved” of industrial problems, ripe for solution.⁵ The principal motive, however, behind the prohibition of night employment of women was the desire to equalize the costs of production and make uniform the conditions of industrial competition between States by inducing those States which had not already prohibited night work for women to enact legislation to

² According to its statutes, the Association had for its object, among others, the organization of an international labour office which had for its mission the publication, in French, German and English, of a periodical collection of the labour legislation in all countries, or to lend its cooperation to such a publication.

³ The results of this inquiry were presented at the Association’s second general meeting held in Cologne in 1902 when the following resolution was carried: “the condition of legislation on women’s night work in most States with important industries, and as is proved by the reports published by the various sections, the influence of such legislation on the general conditions of industry, on the various special undertakings, and on workpeople, justify the abolition in full, on principle, of night work for women. The International Commission therefore instructs a committee to inquire into the means of introducing this general interdiction and how the exceptions still existing might be gradually suppressed”; cited in *Memorial explanatory of the reasons for an international prohibition of night work for women issued by the Board of the International Association for Labour Legislation*, 1904, p. 1.

⁴ Night employment of women in industry was first regulated in England in 1844, in Switzerland in 1877, in Austria in 1885, in Germany in 1891 and in France in 1892. For an overview of national legislation in certain European countries, see M. Ansiaux, *Travail de nuit des ouvrières de l’industrie dans les pays étrangers (France, Suisse, Grande-Bretagne, Autriche, Allemagne)*, 1898.

⁵ See R. Jay, *La protection légale des travailleurs*, 1909; cited in M.D. Hopkins, *The employment of women at night*, US Department of Labor, Bulletin of the Women’s Bureau, No. 64, 1928, p. 16.

this effect. It is known, for instance, that in matters of night employment of women, *Belgium* at that time lagged behind the neighbouring countries of *France* and *Germany*, and that both of those countries had a strong interest in equalizing the conditions between Belgian factories and their own.⁶ According to a memorandum prepared by the International Association for Labour Legislation, an international convention prohibiting night work for women irrespective of age was expected to provide protection for some 350,000 female employees in those countries where a prohibition of night work already existed but applied only to young persons (e.g. *Spain* prohibited the night work of females under the age of 14 only; *Luxembourg* and *Hungary* under 16; *Denmark*, *Finland*, *Norway* and *Sweden* under 18; *Portugal* and *Belgium* under 21). Furthermore, it was estimated that as many as 1 million women workers would be concerned if account was taken of the countries without any limitation to night work such as *Japan* and, to a certain extent, the *United States*.⁷

36. The prohibition of night work for women was justified as a measure of public health designed to decrease the mortality rate of women and children, and improve the physical and moral well-being of women as a result of longer night rest and more relaxed occupation with housekeeping tasks.⁸ Humanitarian considerations were also invoked in support of the need to protect women against exploitation and intolerable working conditions.⁹ Drawing upon medical studies and statistical evidence, it was argued that industrial work of women at night was linked to different pathologies and a general predisposition to chronic anaemia and tuberculosis due to deprivation of sunlight, malnutrition, inhalation of gases, poor ventilation or exposure to extreme temperatures, humidity, etc.¹⁰ Night work was considered as immoral and anti-social since it disrupted family

⁶ Quoted in M. Delevingne, "The pre-war history of international labor legislation" in J.T. Shotwell (ed.): *The origins of the International Labor Organization*, 1934, Vol. I, p. 34.

⁷ See *Memorial explanatory of the reasons for an international prohibition of night work for women issued by the Board of the International Association for Labour Legislation*, 1904, p. 6.

⁸ *ibid.*, p. 9.

⁹ In his opening address to the Conference, the Swiss Federal Councillor Deucher referred to the "codification des règles humanitaires destinées à adoucir le sort d'une partie des victimes des combats économiques" and invited the participants to "modifier par un arrangement entre pays la situation sanitaire et sociale de ceux-là que la guerre industrielle, souvent aussi impitoyable que la guerre armée, a blessés et affaiblis par l'excès des fatigues et l'insalubrité du travail, car ils ont besoin de ménagements et d'un traitement qui, grâce au repos et aux précautions hygiéniques, raffermissent leur santé physique et morale et par là celle de leurs proches"; see *Procès-verbal de la séance d'ouverture*, 17 Sep. 1906, p. 7.

¹⁰ For interesting accounts on the working conditions of women employed in industry at the turn of the century, see A.M. Anderson, *Women in the factory – An administrative adventure 1893 to 1921*, 1922, pp. 22-57; J. Mazel, *L'interdiction du travail de nuit des femmes dans la législation française*, 1899, pp. 1-32; A. Chazal, *L'interdiction du travail de nuit des femmes dans l'industrie française*, 1902, pp. 7-27; M. Hirsch, *L'interdiction du travail de nuit*, 1901, pp. 1-16; L. Bonneff, *La vie tragique des travailleurs*, 1907, pp. 3-33.

life and often induced workers to alcoholism. The economic necessity for industrial production at night was also questioned; in most cases, it was argued, night work was introduced for fear of competition and led inevitably to overproduction and hence to unemployment.¹¹

37. The work of the Berne Conference proceeded in two stages. A technical meeting of experts met in 1905 following which a set of draft provisions was adopted. These were to form the basis of the text of the two international conventions finalized and formally adopted a year later at a diplomatic conference.¹² In its first article, the draft agreement on night work of women introduced a sweeping prohibition of industrial night work for all women without exception. Article 1 further designated as subject to the prohibition all industrial enterprises employing more than ten workers while the use of power-driven machinery was not considered to be a satisfactory criterion to distinguish small or family enterprises from large industries. By “industrial enterprise”, the draft text was meant to cover mines, quarries and manufacturing establishments to the exclusion of purely agricultural or commercial undertakings. However, more specific delimitation of these categories was left to the legislation of each State. Article 2 set the legal notion of night rest for women. It was meant to be of 11 hours’ duration, including in all cases the interval between 10 p.m. and 5 a.m. Such flexible definition of the term “night” was a real novelty, designed to render the agreement acceptable to all countries independently from their respective climatic conditions. In the remaining articles, the draft agreement provided for several exceptions to the prohibition of women’s night work. In the case of signatories without national laws regulating night work of adult females, night rest could be limited to ten hours for a transitional period of three years. Moreover, the prohibition would not be applicable in cases of extreme necessity, when required to prevent the loss of perishable materials, while for certain industries influenced by seasons the length of nocturnal rest might be reduced to ten hours during 60 days in the year. Furthermore, a period of ten years’ grace was accorded to those industries which would be particularly affected by the application of the prohibition such as the Belgian wool-combing and weaving factories at Verviers where some 1,300 women were then employed. At the diplomatic conference of 1906, it was decided that the Convention on the prohibition of night work for women would be of an initial duration of ten years, and that, upon the expiration of the ten-year term, it could be denounced from year to year. Finally, the Convention was intended to be an “open treaty” allowing States non-signatories to adhere to it by depositing an instrument to that effect with the Swiss Government.

¹¹ See G. Alfassa, *Le travail de nuit des femmes*, 1904, p. 7.

¹² The work of the Berne Conference is summarized in B.E. Lowe, *The international protection of labor – International Labor Organization, history and law*, 1935, pp. 112-131, and L.-E. Troclet, *Législation sociale internationale*, 1952, pp. 218-244.

38. The signature of the first international labour treaty was hailed as a great historic event and “one of the most glorious pages in the social history of nations”.¹³ Its significance lay primarily in the fact that, for the first time, international law and diplomacy did not regulate issues related to war and commerce but focused on labour conditions and human welfare. It is interesting to note, however, that already, at the time of the Berne Conference, some voices were raised to question the acceptability of an international agreement limiting the access of women to night employment on grounds of sex-based discrimination; for instance, ratification of the 1906 Berne Convention was rejected the first time it was presented to the Swedish Parliament; *Denmark*, which had only signed with reservations, never ratified the Convention due to opposition by the women’s movement.¹⁴

39. The Convention which has been called the “first article of the International Labour Code” entered into force in January 1912, and at the time of the Washington Conference 11 States were bound by its provisions (*Austria, Belgium, France, Germany, Great Britain, Italy, Netherlands, Portugal, Spain, Sweden* and *Switzerland*). Following ratification, even countries that had earlier abolished the night work of women introduced changes to harmonize their legislation fully with the provisions of the Convention. The *Netherlands* and *Germany*, for instance, lengthened the period of night rest by one hour and required for the first time 11 hours of uninterrupted rest. *France* restricted the customary practice of “*veillées*”, or late overtime, to a single trade and set the limit of overtime to 10 instead of 11 p.m. Even in countries regulating women’s night work for the first time after the Berne Convention, there was a marked trend towards enactment of progressive legislation. *Belgium*, for instance, amended earlier legislation to apply the prohibition to all industrial undertakings irrespective of size. The Convention was also made applicable to numerous colonies, possessions or protectorates of signatory States, such as *Algeria, Ceylon, Madagascar, New Zealand, Nigeria* and *Tunisia*. Even though the prohibition of night work for women appeared hardly relevant for those non-industrialized territories, the extension of means of protection was expected to prevent industrial abuses.¹⁵

¹³ See M. Caté, *La Convention de Berne de 1906*, 1911, p. 96; cited in M.D. Hopkins, *The employment of women at night*, US Department of Labor, Bulletin of the Women’s Bureau, No. 64, 1928, p. 17.

¹⁴ Quoted in E. Mahaim, “The historical and social importance of international labor legislation”, in J.T. Shotwell (ed.): *The origins of the International Labor Organization*, 1934, Vol. I, p. 10. For a historical approach to the debate about the benefits or negative effects of special protective labour legislation to prohibit women from working at night, see U. Wikander, “Some kept the flag of feminist demands waving – Debates at international congresses on protecting women workers”, in Wikander et al. (eds.), *Protecting women – Labor legislation in Europe, the United States, and Australia, 1880-1920*, 1995, pp. 29-62.

¹⁵ As at 8 December 2000, the Berne Convention of 1906 was still in force for the following States: *Algeria, Austria, Belgium, Denmark, France, Hungary, Italy, Luxembourg, Morocco,*

2. The 1919 Washington Conference and ILO Convention No. 4

40. Pursuant to Article 424 of the Treaty of Versailles of 28 June 1919, the first meeting of the International Labour Conference was to take place in October 1919, while according to an annex to Part XIII of the Treaty, the Conference was to meet at Washington and its agenda was to include, inter alia, the following points: “4(3) Women’s employment: [...] (b) during the night; [...] (5) Extension and application of the international conventions adopted at Berne in 1906 on the prohibition of night work for women employed in industry and the prohibition of the use of white phosphorus in the manufacture of matches”. Although the original intention was to undertake a formal revision of the Convention of 1906, it was soon realized that, for constitutional and practical reasons, a new instrument concerning the employment of women at night had to be put forth to supersede the Berne Convention.¹⁶ The main provisions of the earlier text were left untouched; even though in most countries regulations prohibiting night work for women were relaxed during the First World War to allow female labour to work mainly in munitions factories, it was felt that the principle of the legal restriction of night hours in industrial work for women still enjoyed wide acceptance and had to be reaffirmed. As the reporter of the Commission on employment of women at night and the extension and application of the Berne Convention of 1906 told the Conference, “the point of view that night work for women is undesirable, that its prohibition should be as far as possible universal, has not been weakened by war experience, and we had no opposition in our committee to the request for support of the principle of the Convention of Berne”.¹⁷ Thus, only limited amendments were introduced to reflect the changes which had taken place in industry since the adoption of the Berne Convention, and the social conditions of workers in the aftermath of the First World War. The clause in Article 1 by which the Convention applied only to industrial undertakings of more than ten employees was found to be unwarranted and was removed. The special provisions of Article 8, which were exclusively designed to protect the interests of specific countries and secure their ratification, were also omitted. The definition of the term “industrial undertaking” was redrafted in a more detailed manner for the sake of consistency with other draft Conventions submitted to the Conference. Finally, new provisions on ratification, notification and denunciation were inserted in order to be used as standard clauses in future Conventions.

Poland, Portugal, Spain and Tunisia. It was denounced by Switzerland in 1972, by the Netherlands in 1973, and by Germany in 1992.

¹⁶ It should be noted that as initially proposed by the Organizing Committee, the Conference should recommend adhesion to the Convention to all States Members of the League; see ILC, First Session, 1919, *Record of Proceedings*, p. 246.

¹⁷ *ibid.*, p. 102.

41. In submitting the draft text to the Conference, the Commission on employment of women at night expressed the view that the new Convention “would constitute a valuable advance in the protection of the health of women workers, and, through them, of their children, and that of the general population in each country, by making the prohibition of night work for women engaged in industry more complete and more effective than it has ever yet been”.¹⁸ Much like *Denmark* and *Sweden*, which had objected to the adoption of the Berne Convention as contrary to the principle of equality between men and women, *Norway* voiced similar reservations at the Washington Conference with respect to Convention No. 4. As the representative of *Norway* put it, “I am against special protective laws for women except for pregnant women and women nursing children under 1 year of age, because I believe that we are furthering the cause of good labour laws most by working toward the prohibition of absolutely unnecessary night work for all”.¹⁹

42. The main principle of Convention No. 4 was extended to women employed in agriculture by a Recommendation adopted at the Third Session of the Conference in 1921. This Recommendation provides for a rest period for women of not less than nine hours during the night. It also provides that the rest period should be compatible with women’s physical necessities, and whenever it is possible the resting hours ought to be consecutive. This Recommendation is much less stringent than the 1919 Convention which provides for a nightly rest of 11 consecutive hours. The greater elasticity of this Recommendation was due in large part to consideration of the dependence of agricultural labour upon weather conditions, and the impossibility of working in the middle of the day in some countries.

43. Less than ten years after its adoption, the principle codified in the Washington Convention of 1919 had been endorsed by 36 countries and met with almost universal application. The nations which had abolished the night work of women in industry covered the entire European continent, with the exception of *Albania* and *Turkey*; *India* and *Japan* in Asia; and *South Africa* or such dependencies as *Algeria*, *Tunis*, *Uganda* and northern *Nigeria* in Africa. The prohibition also applied to the British dominions, *New Zealand*, all the Australian states, and all but two of the Canadian provinces. Moreover, it spread to *Argentina*, *Bolivia*, *Brazil*, *Chile* and *Mexico*, while in Central America, *Costa Rica*, *El Salvador*, *Guatemala*, *Honduras* and *Nicaragua* had adopted a regional instrument including the prohibition of women’s night work.

¹⁸ *ibid.*, p. 246.

¹⁹ *ibid.*, p. 103.

3. The partial revision in 1934: ILO Convention No. 41

44. In its 1928 report on the application of Convention No. 4, the Government of the *United Kingdom* referred to Article 3 of the Convention and considered that this clause must have the effect of debarring women altogether from entering upon certain employments in which continuous working was necessary. In this connection was cited the case of female engineers who were precluded from holding certain posts in electrical power undertakings because they were prohibited from working at night. Based on the observations of the British Government, the Governing Body decided in June 1930 to hold consultations with other governments on the desirability of undertaking the revision of Article 3 of Convention No. 4. As a result of these consultations, and despite the greatly diverging views expressed as to the meaning and scope of the prohibition in Article 3, the Governing Body decided in January 1931 to place on the agenda of the Conference the revision of the Convention by means of the insertion of a clause to the effect that it “does not apply to persons holding positions of supervision or management”. A revised text of the Convention was considered at the 15th Session of the Conference in May 1931 but failed to secure the necessary two-thirds majority for adoption.

45. On a more general level, the very principle of special protection being accorded to women workers had come under attack by women’s organizations on the ground that it was not in harmony with the principle of absolute equality between men and women. At its Congress in Paris in 1926, for instance, the *International Alliance of Women for Suffrage and Equal Citizenship* adopted a resolution to the effect that no regulations different from those applying to men should be imposed on women.²⁰ Several publicists argued along the same lines. Writing in 1928, Blainey noted: “... although the average woman worker is young, and has by this fact, and by her helplessness and lack of organisation, needed special protection in the past, it does not appear that under modern conditions so much of that special protection is now required. Again and again inquiry shows that it is the juvenile and adolescent who requires protection, while what the adult woman wants is opportunity to show what she can do, and above all adequate wages to keep her fit to do it. The tendency to continue to class ‘women and young persons’ together is thus a mistake. However it may have been justified in the past, it is based on too great a disregard of real facts to be of value at present”.²¹ Within the ranks of the women’s movement, however, there were also those who recognized the usefulness of special protective legislation for female workers. Refuting the arguments put forward by an association entitled *Open Door International*, one author maintained that “to

²⁰ See *International regulation of women’s work – History of the work for women accomplished by the International Labour Organisation*, 1930, pp. 12-13.

²¹ See J. Blainey, *The woman worker and restrictive legislation*, 1928, p. 83.

combat special legislation for the protection of female workers is not opening doors, but tearing a safety net. This net has been woven by dint of long and painful toil, and the meshes should rather be made smaller, and not wider, in order to protect female workers from the prodigal exploitation of their womanhood and motherhood”.²²

46. In view of the situation, the British Government proposed to the Governing Body that an authoritative ruling should be obtained from the Permanent Court of International Justice on the question as to whether Convention No. 4 applied to women employed in industrial undertakings covered by the Convention who held positions of supervision or management and were not ordinarily engaged in manual work. In the event, the Governing Body decided to follow this course and in April 1932 requested the Council of the League of Nations to submit to the Court a request for an advisory opinion. The question upon which the Court was asked to advise was worded as follows: “Does the Convention concerning employment of women during the night, adopted in 1919 by the International Labour Conference, apply in the industrial undertakings covered by the said Convention, to women who hold positions of supervision or management and are not ordinarily engaged in manual work?”.

47. The Court answered this question in the affirmative basing its reasoning principally on the natural sense and ordinary meaning of the terms of the Convention. More concretely, the Court found that “the wording of Article 3, considered by itself, gives rise to no difficulty: it is general in its terms and free from ambiguity or obscurity. It prohibits the employment during the night in industrial establishments of women without distinction of age. Taken by itself, it necessarily applies to the categories of women contemplated by the question submitted to the Court”.²³ The Court also observed that if the intention was to exclude women holding positions of supervision or management from the operation of the Convention, a specific clause to that effect would have been inserted as in the very similar case of the Hours of Work (Industry) Convention, 1919 (No. 1), which specifically provides in Article 2(a) that “the provisions of this Convention shall not apply to persons holding positions of supervision or management, nor to persons employed in a confidential capacity”.

48. Furthermore, the Court gave some consideration to the argument that, Convention No. 4 being a labour Convention adopted in the framework of Part XIII of the Treaty of Versailles, it was intended to apply only to manual workers since it was the improvement of the lot of manual workers which was the principal objective of Part XIII. The Court noted, in this respect, that it was not “disposed to regard the sphere of activity of the International Labour

²² See E. Lüders, “The effects of German labour legislation on employment possibilities for women”, in *International Labour Review*, Vol. 20, 1929, p. 396.

²³ See *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night*, Advisory Opinion, P.C.I.J. Series A/B, Fasc. No. 50, 15 Nov. 1932, p. 373.

Organisation as circumscribed so closely, in respect of the persons with which it was to concern itself, as to raise any presumption that a labour Convention must be interpreted as being restricted in its operation to manual workers, unless a contrary intention appears”.²⁴ In response to another argument, according to which at the time of the adoption of the Convention very few women actually held positions of supervision or management in industrial undertakings and that therefore the application of the Convention to women occupying such posts was never considered, the Court pointed out that “the mere fact that, at the time when the Convention on night work of women was concluded, certain facts or situations, which the terms of the Convention in their ordinary meaning are wide enough to cover, were not thought of, does not justify interpreting those of its provisions which are general in scope otherwise than in accordance with their terms”.²⁵

49. Following the advisory opinion of the Permanent Court of International Justice confirming the all-inclusive character of the prohibition of night work for women as contained in Article 3 of Convention No. 4, the Governing Body, after consulting the governments, placed on the agenda of the 18th Session the question of revising the Convention in respect of two points: first, the exclusion from the prohibition of night work of “persons holding responsible posts of management who are not ordinarily engaged in manual work”, and secondly, the substitution, in certain specially defined circumstances, of the period 11 p.m. to 6 a.m. for the period 10 p.m. to 5 a.m. in the definition of the term “night” included in the Convention.

50. As regards the first point, most Government representatives and the Employer members supported the Office’s draft stressing that, following the advisory opinion of the Permanent Court but also recognizing the increasing number of women with university degrees or professional training qualifying them for managerial posts, the revision of the Convention had been rendered still more necessary than before. In the view of the Danish Government representative, if it was desirable to prohibit night work, the prohibition should apply equally and without discrimination to both sexes. A similar view was expressed by the Worker members in whose opinion the progress of social legislation should be in the direction of the complete prohibition of night work in industry for both sexes.²⁶

51. The second point related to the definition of the period to be regarded as night. According to Article 2 of Convention No. 4, night signified “a period of at least eleven consecutive hours, including the interval between eleven o’clock

²⁴ *ibid.*, p. 374.

²⁵ *ibid.*, p. 377.

²⁶ A summary of the Committee discussions is in ILC, 18th Session, 1934, *Record of Proceedings*, pp. 650-654. See also “The Eighteenth Session of the Conference”, in *International Labour Review*, Vol. 30 (Sep. 1934), p. 311.

in the evening and five o'clock in the morning". The proposal for revision placed on the agenda by the Governing Body was the addition of a provision to the effect that "the competent authorities may, in view of exceptional circumstances affecting the workers in a particular industry or area and after consultation with the employers' and workers' organisations concerned, decide that for those workers the interval between eleven o'clock in the evening and six o'clock in the morning shall be substituted for the interval between ten o'clock in the evening and five o'clock in the morning".²⁷ This proposal originated with the Belgian Government which referred to the case of women workers in the textile industry at Verviers preferring to work later at night than starting work at such an early hour, when means of transport were lacking. It was argued that more flexibility was needed to facilitate the application of the Convention in different countries without however affecting the principle of the prohibition of night work as such or the overall length of the night period. The problem of workers living at some distance from their place of employment and for whom it would be generally impossible owing to transport conditions to begin the morning shift in two-shift undertakings earlier than 6 a.m. was also raised by the Austrian and Finnish Governments in almost identical terms.²⁸ Several other Government representatives (*Italy, Japan, Poland*) and the Employer members were also in favour of the proposed amendment. Only the Worker members opposed the Office's draft arguing that the circumstances invoked by the Belgian Government were only of a local character and were not sufficient grounds for modifying an international Convention.

52. As a result, the Conference adopted Convention No. 41 which revises Convention No. 4 in the following two respects: first, in accordance with its Article 2, paragraph 2, "where there are exceptional circumstances affecting the workers employed in a particular industry or area, the competent authority may, after consultation with the employers' and workers' organisations concerned, decide that in the case of women employed in that industry or area, the interval between eleven o'clock in the evening and six o'clock in the morning may be substituted for the interval between ten o'clock in the evening and five o'clock in the morning". Secondly, under the terms of Article 8, "this Convention does not apply to women holding responsible positions of management who are not ordinarily engaged in manual work".

4. The quest for flexibility: ILO Convention No. 89

53. The question of the partial revision of Conventions Nos. 4 and 41 concerning employment of women during the night had been placed by the

²⁷ See Partial Revision of the Convention Concerning Employment of Women During the Night, ILC, 18th Session, 1934, Report VII, p. 5.

²⁸ *ibid.*, pp. 10, 14.

Governing Body on the agenda of the 31st Session of the Conference on the basis of a ten-yearly report on the working of these Conventions prepared by the Office in accordance with a decision taken by the Governing Body in March 1947. The principal aim of the revision as proposed by the British Government was to render more flexible the term “night” in order to facilitate the working of the double day-shift system as an important feature in the post-war economy of numerous countries. Other possible points of amendment included the broadening of the exception applying to women in managerial positions and the addition of a clause permitting the suspension of the prohibition of night work for women when in cases of serious emergency the national interest demands it.

54. In their observations on the question of placing the revision of Conventions Nos. 4 and 41 on the agenda of the Conference, several governments including those of *Canada*, *France* and the *United States* had pointed out that the present-day tendency was to start work later in the morning (7 or 8 a.m.) and stop later in the evening (11 p.m. or 12 a.m.).²⁹ The discussions in the Conference Committee confirmed the general agreement in principle that it was necessary to allow for a greater flexibility in the application of the Convention and to safeguard the principle of consultation of employers’ and workers’ organizations where exceptions were considered. As the Worker member of the *United States* pointed out, experience had proved that in certain countries such as the *United Kingdom* and the *United States*, whenever employed women could choose between an early morning start and a late evening finish, they preferred in general the latter alternative for reasons of transport and of procurement of meals.³⁰ A few governments, however, including *Argentina*, *India* and *Uruguay* expressed their dissatisfaction with the proposed revision as it lowered in their view the level of protection offered to women and did not take adequately into account the social and economic conditions prevailing in the non-industrialized world.³¹ The new Convention, as finally adopted by the Conference, provides for a night rest period of at least 11 consecutive hours falling between 10 p.m. and 7 a.m. The competent authority may prescribe different intervals for different areas, industries, undertakings or branches of industries or undertakings but has to consult the employers’ and workers’ organizations concerned before prescribing an interval beginning after 11 p.m. Thus, while maintaining the length of the night rest (11 hours) as well as that of the barred period (seven hours), the Convention allows more flexibility in the arrangement of the latter.

²⁹ See Partial Revision of the Convention (No. 4) Concerning Employment of Women During the Night (1919) and of the Convention (No. 41) Concerning Employment of Women During the Night (revised 1934), ILC, 31st Session, 1948, Report IX, pp. 9-15.

³⁰ A summary of the Committee discussions is in ILC, 31st Session, 1948, *Record of Proceedings*, pp. 494-499. See also “The Thirty-First Session of the Conference”, in *International Labour Review*, Vol. 58 (Oct. 1948), p. 465.

³¹ See ILC, 31st Session, 1948, *Record of Proceedings*, pp. 218-219.

55. In its new Article 5, the Convention further provides for the possibility of suspension of the prohibition of night work for women “after consultation with the employers’ and workers’ organisations concerned when in case of serious emergency the national interest demands it”, it being understood that a serious emergency could only be invoked in exceptional circumstances, such as in time of war, and that it should in no case allow for an export drive. The rationale for the suspension clause was found in the experience during the Second World War when prohibitions as regards the night work of women were relaxed in several belligerent and neutral countries. The revised Convention provides that any “such suspension shall be notified by the government concerned to the Director-General of the International Labour Office in its annual report on the application of the Convention”. The scope of application of the Convention was also revised, Article 8 now excluding from the prohibition of night work not only women holding responsible positions of a managerial but also of a technical character as well as “women employed in health and welfare services who are not ordinarily engaged in manual work”. Finally, one of the issues the Conference failed to resolve was the revision of the definition of “industrial undertakings” to include the transport industry in the Convention. After prolonged discussions it was decided that no sufficient information was available as to the extent and nature of the employment of women in transport and, as a result, the Conference adopted a resolution referring the question to the Governing Body “for examination with a view to appropriate action”.³²

5. Reconciling special protection with equality of treatment: The 1990 Protocol to Convention No. 89

56. The question of a possible revision of Convention No. 89, in order to adapt the protection enjoyed by women workers to changed conditions, was first raised in 1971. In fact, a proposal to this effect was made by the Government of *Switzerland* which argued that Convention No. 89 “is now out of date, if only because – like all the earlier instruments – it applies solely to industrial undertakings, whereas there is no corresponding instrument forbidding night work by women in non-industrial undertakings, with the exception of agriculture”.³³ The Swiss Government also pointed out that “nowadays women are better suited than men for certain types of industrial work, e.g. in the textiles, electronic and watchmaking industries” and that “in practice the prohibition of night work can lead to discrimination against women”. Following the Swiss proposal, the Governing Body instructed the Director-General to prepare a report on the working of the Convention with a view to examining in due course the desirability of placing the question of its revision in whole or in part on the

³² *ibid.*, p. 545.

³³ See GB.185/SC/3/2, p. 3.

agenda of a forthcoming Conference session. The report, which contained an international comparative analysis reviewing the extent of application of the provisions of Conventions Nos. 4, 41 and 89, concluded as follows: "... while the question of the advisability of the reconsideration of national and international standards relating to the employment of women at night has been the subject of considerable discussion, no generally agreed conclusions have yet emerged as to the solution which should be adopted. One school of thought would seem to favour a general removal of restrictions on the employment of women, including the prohibition of night work, as a means of eliminating obstacles in the way of equal employment opportunities. In other quarters, more limited relaxation of existing restrictions appears to be regarded as sufficient. A further approach, which has already been adopted in several countries, would consist of a general regulation of night work, applicable without distinction to men and women workers. It is among workers' organisations that the greatest concern has been expressed lest changes in existing standards should carry with them undesirable social consequences".³⁴

57. The report was subsequently communicated to all member States for observations and the replies received were submitted to the Governing Body at its 191st (November 1973) Session.³⁵ At the same session, the Governing Body asked the Director-General "to explore more fully the various issues raised by the replies received" so as to permit the formulation of proposals for future action.³⁶ The new report, submitted to the Governing Body at its 198th Session (November 1975), confirmed the considerable diversity of the views of governments, and employers' and workers' organizations on the action to be taken with respect to Convention No. 89 and concluded that "although there is support for revision of the present standards there is not sufficiently broad agreement on either the purpose or scope of such revision or on the scope of any possible new standards, since opinions range from one extreme to another".³⁷ In view of the complexity of the issue, it was decided to convene a tripartite

³⁴ See *Draft report of the Governing Body of the International Labour Office on the working of the Convention concerning Night Work of Women Employed in Industry (Revised 1948) (No. 89) and of the corresponding Conventions of 1934 and 1919 (Nos. 41 and 4)*, D.5., 1973, p. 30.

³⁵ See GB.191/SC/1/1.

³⁶ See GB.191/16/25, para. 10.

³⁷ See GB.198/SC/1/1, p. 7. The report summarized the findings of two studies on the economic, social, physical, psychological and medical aspects of night work and listed the most common criticisms of existing standards on night work of women as being their discriminatory character and incompatibility with the principle of equality of opportunity for male and female workers; the inapplicability of the distinction between branches of economic activity as work in industry has in many cases ceased to be arduous and may even be less arduous than in other branches; the failure of present standards to reflect modern conditions and their tendency to hamper industrialization; and the lack of evidence showing that night work is any more harmful to women than to men.

advisory meeting (a) to examine all aspects of the question of night work in the light of the work already carried out and other available information, and (b) to formulate suggestions as to future ILO action in this regard.

58. The Tripartite Advisory Meeting on Night Work was held in October 1978 but marked little progress as the views expressed by the Worker and Employer participants remained irreconcilable and no unanimity could be reached on the desirability of adopting new standards on night work. For the Worker participants, existing restrictions should not be lifted in the name of equality between men and women but rather the protection enjoyed by women should be extended to men, while an active policy was needed for humanizing night work wherever it remained indispensable. In contrast, the Employer participants strongly opposed the idea of new standard-setting action and emphasized that night work remained in both industrialized and developing countries an effective instrument for promoting employment, increasing the productivity of capital investments and accelerating economic growth. As regards Government participants, their majority expressed a preference for the adoption of new international standards on night work although there were differences of opinion about the form and scope of application of the new standards.³⁸

59. In 1986, in its General Report on the application of the Conventions on the night work of women, the Committee “noted a trend of opinion among a number of governments to the effect that the prohibition of night work for women would be a discrimination against them and would also be contrary to present-day thinking on the role of women in society, and found that the application of the Conventions in question was running into difficulties in a certain number of countries”.³⁹ Noting also that the Conventions on the night work of women are among those for which there have been the greatest number of denunciations not accompanied by the ratification of a revising instrument, the Committee drew the attention of the Governing Body to the importance of seeking a rapid solution, following which the Governing Body decided in

³⁸ The discussions are summarized in the Report of the Tripartite Advisory Meeting to the Governing Body, GB.208/8/4. The same divergence of opinion is reflected in a series of articles reviewing special protective legislation for women in specific countries; see, for instance, R. Nielson, “Special protective legislation for women in the Nordic countries”, in *International Labour Review*, Vol. 119 (1980), pp. 39-49; A.P. Biryukova, “Special protective legislation and equality of opportunity for women workers in the USSR”, *ibid.*, pp. 51-65; E. Gömöri, “Special protective legislation and equality of opportunity for women in Hungary”, *ibid.*, pp. 67-77; R.S. Ratner, “The paradox of protection: Maximum hours legislation in the United States”, *ibid.*, pp. 185-198; H.B. Connell, “Special protective legislation and equality of employment opportunity for women in Australia”, *ibid.*, pp. 199-216; M. Jiménez Butraguena, “Protective legislation and equal opportunity and treatment for women in Spain”, in *International Labour Review*, Vol. 121 (1982), pp. 185-198; T. Nakanishi, “Equality or protection? Protective legislation for women in Japan”, in *International Labour Review*, Vol. 122 (1983), pp. 609-621.

³⁹ See ILC, 72nd Session, 1986, Report III (Part 4A), p. 24.

November 1987 to place on the agenda of the 76th Session (1989) of the Conference the question of night work with a view to partly revising Convention No. 89 on the one hand, and on the other to adopt new standards for night work in general. The prohibition of night work of women in industry had become increasingly controversial, especially in light of the growing awareness that such a prohibition was not easy to reconcile with the principle of equality of treatment and non-discrimination between men and women in employment.

60. Indeed, since 1975, there had been a marked shift in emphasis from special protection to the promotion of equality in the standard-setting activities of the ILO regarding women. Standards which set special protective measures, for reasons not connected with maternity and women's reproductive function, underwent a critical review since they were increasingly seen as an obstacle to the full integration of women in economic life and as a means to perpetuate traditional notions about women's role and abilities. The *Declaration on Equality of Opportunity and Treatment for Women Workers*, for instance, which was adopted by the International Labour Conference in 1975 on the occasion of the International Women's Year, called for such a review. Article 9 of the Declaration, after recalling that the protection of women at work should be an integral part of the efforts aimed at continuous promotion and improvement of living and working conditions of all employees, provided that women should be protected "on the same basis and with the same standards of protection as men".⁴⁰ Similarly, the *resolution on equal opportunities and equal treatment for men and women in employment*, adopted by the Conference in 1985, recommended that all protective legislation applying to women should be reviewed in the light of up-to-date scientific knowledge and technical changes and that it should be revised, supplemented, extended, retained or repealed, according to national circumstances. As for ILO standards, it requested that protective instruments, such as Convention No. 89, be reviewed periodically to determine whether their provisions were still adequate and appropriate in the light of experience acquired since their adoption and of scientific and technical information and social progress.⁴¹

61. Following the adoption of the resolution on equal opportunities and equal treatment for men and women in employment, the Governing Body decided at its 242nd Session (March 1989) to convene a *Meeting of Experts on Special Protective Measures for Women and Equality of Opportunity and Treatment* in order to review the situation and trends at the national level concerning protective measures for women workers, assess such measures in the light of the objective of promoting equal opportunities and treatment in employment for men and women workers, as well as to review ILO activities in the field and make proposals for future action. The Meeting of Experts, which

⁴⁰ See ILC, 60th Session, 1975, *Record of Proceedings*, p. 991.

⁴¹ See ILC, 71st Session, 1985, *Record of Proceedings*, pp. LXXX, LXXXIV.

was held in October 1989, reviewed all ILO standards aimed either at protecting women's reproductive and maternal functions or at protecting women generally because of their sex, with the exception of the prohibition of night work for women, in view of the Conference discussions in June 1989 on the question of a possible revision of Convention No. 89. The technical background paper which was submitted to the Meeting of Experts as a basis for its discussion defined protective measures as including "legislation and regulations in the field of working conditions and occupational safety and health which exclude women from certain occupations or activities, ostensibly for their protection, or which stipulate that women are entitled to special working conditions or facilities not required for men" and put forward the view that "the ILO policy with respect to these provisions seeks a justifiable balance between the ILO's strong commitment to equality of opportunity and treatment, as evidenced in the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the 1975 resolution and Declaration, and the 1985 resolution, and, on the other hand, the mandate to ensure that the health and safety of all workers is protected, taking into account the reproductive function of both men and women".⁴²

62. In adopting its conclusions and recommendations, the Meeting of Experts stressed that measures should be taken in each country to review all protective legislation applying to women and that "this review should aim at establishing a coherent policy that would ensure equal opportunities for women while not adversely affecting their working conditions and environment and quality of life". The Meeting cautioned, however, that "the review of protective measures for women is but one means of action to ensure equal opportunity and treatment between men and women in employment". It further emphasized that, in deciding whether to repeal or revise protective measures, account should be taken of existing working conditions, the existence of effective enforcement authority, the availability of appropriate training and control measures and the importance of cultural and religious patterns. As regards future ILO action, the Meeting recommended that "there should be a periodic review of protective instruments in order to determine whether their provisions are still adequate in the light of experience acquired since their adoption and to keep them up to date in the light of scientific and technical knowledge and social progress".⁴³

63. The Office's approach was to propose the adoption of a Protocol revising Convention No. 89 by allowing exemptions from the prohibition of night work and variations in the duration of the night period through agreements between the employers and workers. This solution, it was hoped, would satisfy those countries seeking greater flexibility while allowing Convention No. 89 to

⁴² See *Special protective measures for women and equality of opportunity and treatment*, Documents considered at the Meeting of Experts on Special Protective Measures for Women and Equality of Opportunity and Treatment, MEPMW/1989/7, pp. 1 and 55.

⁴³ *ibid.*, pp. 78-80.

continue to receive ratifications. The Conference discussions confirmed, however, that the issue of the prohibition of night work for women had grown divisive and polemical to such a point that the idea of a partial revision of Convention No. 89 could hardly match the conflicting expectations of governments and employers' and workers' organizations. Many Government members expressed the view that Convention No. 89 was contrary to the principle of equality between men and women, that the prohibition of night work could only hamper the professional and career prospects of women and thus it violated Convention No. 111 concerning discrimination in respect of employment and occupation. Announcing their intention to abstain from the Conference Committee discussion and the vote for the adoption of a Protocol, some other Government members stated that, with the exception of maternity protection, there was no reason for differential treatment between men and women. In the opinion of the Employer members, Convention No. 89 could no longer be justified on any grounds and had to be repealed or otherwise disposed of; as for the prohibition of night work, they thought it was inherently discriminatory and an impediment to economic and social progress. In contrast, the Worker members considered that women still needed protection as they continued to suffer from discrimination and that therefore Convention No. 89 had still an important role to play as the problems which had prompted its adoption persisted. In this connection, it was necessary to draft the Protocol so as to give new vigour to the Convention rather than weakening its protective function. Concerning the apparent contradiction between Convention No. 89 and Convention No. 111, the Worker members argued that the prohibition of night work helped to prevent the exploitation of women as cheap labour and to ease their double load due to work and family responsibilities. Thus, it might not be considered discriminatory except in the very few countries where the principle of equality of opportunity and treatment was fully applied.⁴⁴

64. Besides the Protocol to Convention No. 89, the Conference went on to adopt a new night work Convention (No. 171) and Recommendation (No. 178) broadening the scope of regulatory measures to apply to both genders and to nearly all occupations. Contrary to traditional definitions of night work linked to a minimum period of specific night hours, the new standards focus on night workers who perform a substantial number of hours of night work exceeding a specified limit. According to Convention No. 171, the range of measures required for improving the quality of working life of night workers include shorter hours of work, sufficient rest periods, occupational safety and health, including health assessment, first-aid facilities and appropriate medical advice, appropriate social services, transfer to day work, maternity protection, and

⁴⁴ The Conference discussions are summarized in ILC, 76th Session, 1989, *Record of Proceedings*, pp. 30/1-30/5, 30/30-30/35, and ILC, 77th Session, 1990, *Record of Proceedings*, pp. 26/21-26/26, 31/1-31/9.

consultation about shift schedules. The new night work Convention is intended to apply to all employed persons, both men and women, except those employed in agriculture, stock raising, fishing, maritime transport, and inland navigation. By shifting the emphasis from a specific category of workers and sector of economic activity to the safety and health protection of night workers irrespective of gender in all branches and occupations, Convention No. 171 was designed to reflect the changing perceptions as to the hazards of night work and a new flexible approach to the problems of shift work organization.⁴⁵

6. Criticism of ILO standards on night work of women: The role of the United Nations and the European Union

65. At this juncture, reference should be made to the actions of international organizations such as the United Nations or the European Union in support of equality of opportunity and treatment between men and women, in so far as this action influenced decisively the law and practice of States parties to Convention No. 89. By resolution 2263 (XXII) of 7 November 1967, the UN General Assembly proclaimed the *Declaration on the Elimination of Discrimination against Women*, spelling out the principle that “discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity” (article 1) and urging all States to “abolish existing laws, customs, regulations and practices which are discriminatory against women” (article 2). The Declaration also reaffirmed the obligation to ensure to women the right “to receive vocational training, to work, to free choice of profession and employment, and to professional and vocational advancement” (article 10, paragraph 1(a)) specifying however that “measures taken to protect women in certain types of work, for reasons inherent in their physical nature, shall not be regarded as discriminatory” (article 10, paragraph 3).⁴⁶

66. The *European Social Charter*, which was opened for signature in October 1961 and came into force in February 1965, lays down standards governing the main human rights in working life as well as social protection and the protection of particular groups such as working women. As the counterpart of the European Convention on Human Rights which secures civil and political rights, the Charter secures social and economic rights. It provides for 19 fundamental rights to which the Additional Protocol of 1988, which came into

⁴⁵ For more, see K. Kogi and J.E. Thurman, “Trends in approaches to night and shift work and new international standards”, in *Ergonomics*, Vol. 36, 1993, pp. 3-13; K. Kogi, “International regulations on the organization of shift work”, in *Scandinavian Journal of Work, Environment & Health*, Vol. 24, 1998, pp. 7-12.

⁴⁶ For a historical and documentary account of the UN campaign to promote women’s rights, see *The United Nations and the Advancement of Women 1945-1995*, UN Blue Books Series, Vol. VI, 1995.

force in September 1992, added another four. Article 8 of the Charter refers to the right of employed women to protection and reads in part: “With a view to ensuring the effective exercise to the right of employed women to protection, the Contracting Parties undertake: [...] 4. (a) to regulate the employment of women workers on night work in industrial employment; (b) to prohibit the employment of women workers in underground mining, and, as appropriate, on all other work which is unsuitable for them by reason of its dangerous, unhealthy, or arduous nature”.⁴⁷ Even though Article 8, paragraph 4(a), does not formally prohibit night work for women but only requires that States regulate the employment of women at night, it was criticized by some as discriminatory in view of the growing tendency to make no distinction between women and men and to offer special protection to women only as expectant or nursing mothers.

67. As a result, Article 8 was redrafted in the revised European Social Charter, which was opened for signature in May 1996 and entered into force in July 1999. It reads as follows: “With a view to ensuring the effective exercise of the right to the protection of maternity, the Parties undertake: [...] 4. To regulate the employment in night work of pregnant women, women who have recently given birth and women nursing their infants. 5. To prohibit the employment of pregnant women, women who have recently given birth or who are nursing their infants in underground mining and all other work which is unsuitable by reason of its dangerous, unhealthy or arduous nature and to take appropriate measures to protect the employment rights of these women.” The basic idea behind the new provision, which has been taken from ILO Convention No. 171 and from European Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, is that regulations on the employment of women for night work are needed only in the case of maternity.⁴⁸ It is also worth noting that the Committee of Independent Experts, which is responsible for assessing the compliance of national laws with the obligations arising from the Charter, has commented extensively on the alleged incompatibility between the two principles (equality between men and women and special protection for women at work) and has “redefined” through

⁴⁷ Art. 8, para. 4, has been accepted by ten of the 21 Contracting Parties. Spain denounced para. 4(b) in 1991, while the United Kingdom denounced paras. 4(a) and 4(b) in 1988 and 1990 respectively.

⁴⁸ Reference should also be made to Art. 2, para. 7, of the revised Charter which refers to measures on night work for workers of both sexes laying down the obligation for the Contracting Parties to “ensure that workers performing night work benefit from measures which take account of the special nature of the work”. For more, see *Equality between women and men in the European Social Charter – Study compiled on the basis of the case law of the Committee of Independent Experts*, Council of Europe, 1999, and *Women in the working world – Study prepared on the basis of the case law of the Committee of Independent Experts*, 1995.

its case law the provision of Article 8 to better reflect the jurisprudence of the European Court of Justice and the European Council Directive 92/85/EEC.

68. By its resolution 34/180 of 18 December 1979, the United Nations General Assembly adopted the *Convention on the Elimination of All Forms of Discrimination Against Women*. The Convention sets out in legally binding form internationally accepted principles on the rights of women and focuses on the prohibition of all forms of discrimination against women.⁴⁹ According to Article 1, the term “discrimination against women” is defined as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil and any other field”. In the terms of Article 2, “States parties agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and undertake: [...] (f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”. Most importantly, Article 11 refers to discrimination against women in the field of employment and lays down the obligation for States parties to take all appropriate measures “in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) the right to work as an inalienable right of all human beings; (b) the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment; (c) the right of free choice of profession and employment”. It has to be noted, however, that the Convention expressly provides for the adoption of measures offering “special protection to women during pregnancy in types of work proved to be harmful to them” (Article 11, paragraph 2(d)) and further specifies that “adoption by States parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory” (Article 4, paragraph 2).⁵⁰

69. Following the adoption of the UN Convention, the ILO received several requests for clarification on the relationship between the UN Convention and ILO Conventions on the protection of women. The concern of most

⁴⁹ The Convention was opened for signature, ratification and accession in March 1980. It entered into force in September 1981 and, as at 16 November 2000, it had been ratified by 166 States.

⁵⁰ Under the terms of the Convention, the Committee on the Elimination of Discrimination Against Women (CEDAW) was established. The Committee, composed of 23 experts, supervises the application of the Convention on the basis of reports submitted by States parties and formulates suggestions and general recommendations on the issues covered by the Convention. In its resolution A/Res/54/4 of October 1999, the General Assembly adopted the Optional Protocol to the Convention providing for the possibility of filing individual complaints directly with the Committee subject to prior exhaustion of local remedies.

governments was a possible incompatibility between the UN Convention and ILO instruments which might result in the inability to ratify the UN Convention without previous denunciation of conflicting ILO instruments such as the Night Work (Women) Convention (Revised), 1948 (No. 89), and the Underground Work (Women) Convention, 1935 (No. 45). The Note prepared by the Office on the subject and brought to the attention of the Governing Body in November 1984 concluded that there need not be any contradiction between the obligations arising under the UN Convention and those assumed by a State having ratified ILO Conventions providing for special protection for women for reasons unconnected with maternity, namely Convention No. 45 and Conventions Nos. 4, 41 and 89. As it was stated, "... while protective legislation unconnected with maternity has clearly been viewed with an increasing severity, the most radical position, i.e. the requirement that such legislation should be repealed immediately, did not prevail in the final text. The Convention does not expressly ask for such a step to be taken. While paragraph 1 of Article 11 clearly favours the adoption of the same standards of protection for men and women, Article 11, paragraph 3, leaves to ratifying States which already have different standards the possibility of keeping them in force for a certain time, provided that they periodically review them in the light of the considerations mentioned there".⁵¹

70. In February 1976 the Council of the European Communities adopted *Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*. Under article 2 of the Council Directive, the principle of equal treatment was defined as meaning that "there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status", whereas according to the terms of article 3, paragraph 2(c), and article 5, paragraph 2(c), member States are under the obligation to take the necessary measures to ensure that "those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision". The obligation to revise, however, would be without prejudice to "provisions concerning the protection of women, particularly as regards pregnancy and maternity" which according to article 2, paragraph 3, did not fall within the Directive's scope of application.⁵² Following

⁵¹ See GB.228/24/1.

⁵² The provision of art. 2(3) of the Directive has been interpreted narrowly by the Court of Justice of the European Communities to include those protective measures referring exclusively to pregnancy, confinement and a post-childbirth period. As the Court reasoned in the *Hoffman* case, "Directive 76/207 recognizes the legitimacy of protecting a woman's needs in two respects. First, it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after

the adoption of Directive 76/207/EEC, two EEC Member States (*Ireland* and *Luxembourg*) proceeded in 1982 to the denunciation of Convention No. 89 on the grounds that it was discriminatory rather than protective in nature.

71. In July 1991, the Court of Justice of the European Communities delivered its ruling in the *Stoeckel* case by which it affirmed that the Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions was “sufficiently precise to impose on the Member States the obligation not to lay down by legislation the principle that night work by women is prohibited, even if that obligation is subject to exceptions, where night work by men is not prohibited”. In the terms of the Court’s decision, “the concern to provide protection, by which the general prohibition of night work by women was originally inspired, no longer appears to be well founded and the maintenance of that prohibition, by reason of risks that are not peculiar to women or preoccupations unconnected with the purpose of Directive 76/207/EEC, cannot be justified by the provisions of article 2(3) of the Directive”.⁵³ By ruling that the French laws on night work of women, which by and large reflected the provisions of Convention No. 89, were in violation of Community legislation, the Court raised delicate questions for EU Member States about the hierarchy of Community principles as opposed to international legal obligations arising out of the acceptance of other international agreements and directly challenged the relevance of ILO standards in matters of night work of women.⁵⁴ It is interesting to note that two years later, in August 1993, the

childbirth. Secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment”; see Case 184/1983, judgement of 12 July 1984.

⁵³ See Case C-345/1989, judgement of 25 July 1991. On the legal implications of the Council Directive 76/207/EEC read in conjunction with the *Stoeckel* judgement, see Ch. Pettiti, “Le travail de nuit des femmes – Aspects nationaux et internationaux”, in *Droit Social* (Apr. 1988), pp. 302-310; J. Savatier, “Travail de nuit des femmes et droit communautaire”, in *Droit Social* (May 1990), pp. 466-470; M.-A. Moreau, “Travail de nuit des femmes, observations sur l’arrêt de la CJCE du 25 juillet 1991”, in *Droit Social* (Feb. 1992), pp. 174-185; A. Supiot, “Principe d’égalité et limites du droit du travail (en marge de l’arrêt *Stoeckel*)”, in *Droit Social* (Apr. 1992), pp. 382-385; C. Kilpatrick, “Production and circulation of EC night work jurisprudence”, in *Industrial Law Journal* (Sep. 1996), Vol. 25, pp. 169-190; J.-Ph. Lhernould, “Un employeur peut-il s’opposer à la demande d’une de ses salariées de travailler la nuit?”, in *Droit Social* (Feb. 1999), pp. 129-133; H. Masse-Dessen, “A propos du travail de nuit des femmes: nouvelle contribution sur l’application des directives européennes”, in *Droit Social* (Apr. 1999), pp. 391-394.

⁵⁴ In November 2000, facing the threat of sanctions for non-compliance, France finally decided to remove the contentious provision from its Labour Code, that is article L.213-1 prohibiting the employment of women in industrial work during the night (see cases C-197/1996, judgement of 13 March 1997 and C-207/1996, judgement of 4 December 1997). In fact, in April 1999, the European Commission had asked the Court of Justice to impose a daily fine of 142,425 euros on France for non-implementation of its earlier judgement. A similar case was successfully

European Court in its judgement in the *Levy* case, while reaffirming that equal treatment of men and women constitutes a fundamental right recognized by the Community legal order, held that a “national court is under an obligation to ensure that Article 5 of Directive 76/207/EEC of 9 February 1976 is fully complied with by refraining from applying any conflicting provision of national legislation, unless the application of such a provision is necessary in order to ensure the performance by the Member State concerned of obligations arising under an agreement concluded with non-member countries prior to the entry into force of the EEC Treaty”.⁵⁵

72. In December 1991, following the *Stoeckel* judgement, the European Commission wrote to the six EEC Member States which were still parties to Convention No. 89 (*Belgium, France, Greece, Italy, Portugal, Spain*) inviting them to proceed to the denunciation of the Convention while recommending the ratification of the Night Work Convention, 1990 (No. 171). By February 1992, when Convention No. 89 was again open to denunciation, all those States had deposited their instruments of denunciation, justifying their decision as flowing from the need to bring national laws and regulations into line with Community legislation.⁵⁶

73. In the early nineties, three more ILO member States (*Cuba, Malta and Switzerland*) decided to denounce Convention No. 89, claiming it was no longer compatible with the principle of non-discrimination and equal rights of men and women as enshrined in their Constitutions. In one case (*Malta*) reference was also made to the European Convention on Human Rights as prohibiting the discrimination on grounds of sex.

brought against Italy. The Court has also dealt with infringement cases concerning the transposition of Directive 76/207/EEC against Belgium and the United Kingdom. On the application and enforcement of European equality law, see I. Heide, “Supranational action against sex discrimination: Equal pay and equal treatment in the European Union”, in *International Labour Review*, Vol. 138, 1999, pp. 381-410.

⁵⁵ See Case C-158/1991, judgement of 2 August 1993. The question before the Court was whether a national jurisdiction could set aside its obligation to ensure full compliance with article 5 of the equal treatment directive if the national provisions that were incompatible with the Community legislation were intended to implement ILO Convention No. 89, that is an international agreement to which the Member concerned had become party prior to the entry into force of the EEC Treaty. The Court also pointed out that the implementation of the principle of equal treatment “even at Community level, has been gradual, requiring the Council to take action by means of directives, and that those directives allow, temporarily, certain derogations from the principle of equal treatment”.

⁵⁶ See “Women’s night work Convention denounced across the EC”, in *European Industrial Relations Review* (Apr. 1992), pp. 16-17. The Netherlands had denounced the Convention in 1972 as inconsistent with the principle of equal treatment in employment, with Ireland and Luxembourg following suit in 1982. Another three EC Member States, i.e. Denmark, Germany and the United Kingdom, never ratified it.

74. Some brief comments are in order here. The Committee is of the opinion that the European Union's policy on the issue of night employment of women and the apparent clash with relevant international labour standards should be kept within its specific context. The European Union, as an organization of regional integration bringing together some of the world's most economically and socially advanced nations, seeks to establish high labour standards for European workers in a basically uniform political and socio-economic environment.⁵⁷ In contrast, the ILO, is a universal organization mandated to elaborate minimum standards designed to fit the extraordinarily dissimilar conditions in all its member States. It has to keep in sight the special needs of certain countries, while recognizing that human rights standards and principles are of universal application. The mandate, composition and means of action of the two organizations being radically different, it is only natural that their normative output appears at times disparate or even contradictory. As it has been pointed out in an Office paper in this regard, "... naturally, the need for standards in the same field is felt both internationally and within the Community, but this unavoidable overlapping should not mean that ILO standards should be modelled on Community standards. This practice results in standards that are highly detailed, which paradoxically does not guarantee that they can be ratified by Member States of the Union, and which moreover can prove a serious obstacle to their ratification outside the Union".⁵⁸

75. The Committee considers that international labour legislation should not be divested of all regulatory provisions on night work of women, on condition and to the extent that such regulation still serves a meaningful purpose in protecting women workers from abuse. In particular situations where women night workers are subject to severe exploitation and discrimination, the need for protective legislation may still prevail, especially where the women themselves are anxious to retain such protective measures. The Committee will therefore have to consider whether prohibitions on night work for women in certain situations serve to protect those women from abuses of their rights, in relation in particular to security and transport issues, quite apart from and in addition to health risks for pregnant women or nursing mothers caused by their working at night. In such situations the protective function of the night work standards may,

⁵⁷ For an overview of the main developments in gender equality at the European level in 1999, see *Equal Opportunities for Women and Men in the European Union – 1999*, Report from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Mar. 2000.

⁵⁸ See GB.262/LILS/2/2, para. 9. This comment was made with reference to ILO Convention No. 170 on safety in the use of chemicals at work which covers a subject already dealt with in several Community directives. The question was thus raised as to the Community's exclusive competence to conclude this Convention, i.e. to decide on its ratification; see also GB.256/SC/1/3 and GB.259/LILS/4/7.

for the time being and on a limited basis, subject to regular review, be legitimately considered by some constituents to be justified.

II. Scope of application

1. Substantive scope of application

76. All three Conventions under review apply only to industry. To date, with the exception of two international labour Recommendations, there is no international labour instrument dealing specifically with night work for women in non-industrial sectors. In fact, the Night Work of Women (Agriculture) Recommendation, 1921 (No. 13), recommends “that each Member take steps to regulate the employment of women wage-earners in agricultural undertakings during the night in such a way as to ensure to them a period of rest compatible with their physical necessities and consisting of not less than nine hours, which shall, when possible, be consecutive”, while the Maternity Protection Recommendation, 1952 (No. 95), provides in Paragraph 5(1) that “night work and overtime work should be prohibited for pregnant and nursing women and their working hours should be planned so as to ensure adequate rest periods”.

77. More specifically, the scope of application of Conventions Nos. 4, 41 and 89 covers “any public or private industrial undertaking, or any branch thereof, other than an undertaking in which only members of the same family are employed”. Article 1 of the three Conventions reads in practically identical terms and defines the term “industrial undertaking” as including: “(a) mines, quarries, and other works for the extraction of minerals from the earth; (b) industries in which articles are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale, broken up or demolished, or in which materials are transformed; including shipbuilding, and the generation, transformation, electrical undertaking, gas work, waterwork, or other work of construction, as well as the preparation for or laying the foundations of any such work or structure”.⁵⁹ Given, however, the difficulty of setting with precision the exact limits of industrial activity, the three Conventions stipulate in Article 1, paragraph 2, that “the competent authority in each country shall define the line of division which separates industry from commerce and agriculture”.⁶⁰

⁵⁹ In order to accord with more recent definitions of industrial undertakings, such as the one contained in the Medical Examination of Young Persons (Industry) Convention, 1946 (No. 77), Art. 1, para. 1(c), of Convention No. 89 was revised to read: “undertakings engaged in building and civil engineering work, including constructional, repair, maintenance, alteration and demolition work”.

⁶⁰ To better reflect the distinction between “industrial” and “non-industrial” occupations in the light of the Conference discussions prior to the adoption of the Medical Examination of Young Persons (Industry) Convention, 1946 (No. 77), and the Medical Examination of Young Persons

78. The three Conventions under review expressly exclude from their scope of application certain exceptional situations. The common Article 4 of Conventions Nos. 4, 41 and 89 provides that the prohibition of night work for women shall not apply “(a) in cases of *force majeure*, when in any undertaking there occurs an interruption of work which it was impossible to foresee, and which is not of a recurring character; (b) in cases where the work has to do with raw materials or materials in course of treatment which are subject to rapid deterioration, when such night work is necessary to preserve the said materials from certain loss”.

79. Article 5 of Convention No. 89 further provides for the possibility of temporarily suspending the application of the prohibition of night work for women “after consultation with the employers’ and workers’ organisations concerned, when in case of serious emergency the national interest demands it”. By “serious emergency”, the intention was to refer to a war situation based on the experience of the two world wars.⁶¹ However, there has been a clear tendency in subsequent practice to interpret this proviso far more extensively.

80. Under the growing pressure for further relaxation of the prohibition of night work for women, far-reaching exceptions were introduced by the 1990 Protocol to Convention No. 89. According to Article 1, paragraph 1(1), of the Protocol, the competent authority may authorize “variations in the duration of the night period as defined in Article 2 of the Convention and exemptions from the prohibition of night work contained in Article 3 thereof”. The variations and exemptions may be introduced with respect to entire branches of activity or specific establishments subject to the following conditions:

- “(a) in a specific branch of activity or occupation, provided that the organizations representative of the employers and the workers concerned have concluded an agreement or have given their agreement;
- (b) in one or more specific establishments not covered by a decision taken pursuant to clause (a) above provided that:
- (i) an agreement has been concluded in the establishment or enterprise concerned between the employer and the workers’ representatives concerned; and
 - (ii) the organizations representative of the employers and the workers of the branch of activity or occupation concerned or the most

(Non-Industrial Occupations) Convention, 1946 (No. 78), Art. 1, para. 2, of Convention No. 89 was slightly revised to read: “the competent authority shall define the line of division which separates industry from agriculture, commerce and other non-industrial occupations”.

⁶¹ For some background information on this, see D. Thom, “A revolution in the workplace? Women’s work in munitions factories and technological change 1914-1918”, in G. de Groot and M. Schrover (eds.): *Women workers and technological change in Europe in the nineteenth and twentieth centuries*, 1995, pp. 97-118.

representative organizations of employers and workers have been consulted;

- (c) in a specific establishment not covered by a decision taken pursuant to clause (a) above, and where no agreement has been reached in accordance with clause (b)(i) above, provided that:
- (i) the workers' representatives in the establishment or enterprise as well as the organizations representative of the employers and the workers of the branch of activity or occupation concerned or the most representative organizations of employers and workers have been consulted;
 - (ii) the competent authority has satisfied itself that adequate safeguards exist in the establishment as regards occupational safety and health, social services and equality of opportunity and treatment for women workers; and
 - (iii) the decision of the competent authority shall apply for specified period of time, which may be renewed by means of the procedure under sub-clauses (i) and (ii) above".

81. The Protocol further provides in its Article 1, paragraph 2, that "the circumstances in which such variations and exemptions may be permitted and the conditions to which they shall be subject" shall be determined by national laws or regulations to be adopted after consulting the most representative organizations of employers and workers.

2. Scope of application with regard to time

82. The instruments which are the subject of this survey are intended to limit the employment of women in industrial undertakings during the night. Even though the definition of the term "night" reads practically the same in all three instruments, the range of exceptions accompanying such definition varies considerably. All three Conventions prescribe a night rest period of at least 11 consecutive hours which must include a shorter interval during which the employment of women is strictly forbidden. Under Article 2 of Convention No. 4, "the term 'night' signifies a period of at least eleven consecutive hours, including the interval between ten o'clock in the evening and five o'clock in the morning". For its part, Convention No. 41, while sharing the same definition of the term "night", authorizes in Article 2, paragraph 2, the competent authority under exceptional circumstances affecting the workers employed in a particular industry or area and upon prior consultation with the employers' and workers' organizations to "decide that in the case of women employed in that industry or area, the interval between eleven o'clock in the evening and six o'clock in the morning may be substituted for the interval between ten o'clock in the evening and five o'clock in the morning". As for Convention No. 89, it recast the

definition in more flexible terms to signify “a period of at least eleven consecutive hours, including an interval prescribed by the competent authority of at least seven consecutive hours falling between ten o’clock in the evening and seven o’clock in the morning”. It further provides that “the competent authority may prescribe different intervals for different areas, industries, undertakings or branches of industries or undertakings, but shall consult the employers’ and workers’ organisations concerned before prescribing an interval beginning after eleven o’clock in the evening”. Finally, as already mentioned above, the 1990 Protocol allows for “variations in the duration of the night period” to be introduced by the competent authority in accordance with national laws or regulations.

83. Under common Article 6, all three Conventions permit the shortening of the night period to ten hours for no more than 60 days each year “in industrial undertakings which are influenced by the seasons and in all cases where exceptional circumstances demand it”. They also stipulate in common Article 7 that the night period may be shorter than 11 consecutive hours “in countries where the climate renders work by day particularly trying to the health, provided that compensatory rest is accorded during the day”.

3. Scope of application with respect to persons

84. According to common Article 3 of Conventions Nos. 4, 41 and 89, the prohibition of night work in industry applies to “women without distinction of age”. An exception to this rule was first introduced by Convention No. 41, Article 8 of which states that the prohibition does not apply “to women holding responsible positions of management who are not ordinarily engaged in manual work”. Under Article 8 of Convention No. 89, are also excluded from the prohibition of night work: “(a) women holding responsible positions of a managerial or technical character, and (b) women employed in health and welfare services who are not ordinarily engaged in manual work”.

* * *

85. Rarely have ILO standards given rise to such prolonged controversy as the instruments applying to women’s night work in industry. The question of prohibiting or restricting the employment of women in industrial undertakings during the night epitomizes a century-long debate over sensitive questions which have divided policy-makers, trade unionists and even women’s organizations themselves. Bridging the differences between the two contrasting trends, one defending the need to ensure special protection for women workers and the other seeking to implement the principle of equality between men and women, has proved an enduring challenge for the ILO’s standard-setting machinery.

Additional references

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