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Night work of women in industry: Standards and sensibility

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In the course of the twentieth century, the ILO's Conventions concerning the prohibition of night work for women in industry were gradually relegated from the status of memorable achievements for the protection of female workers to being an embarrassment to the Organization's commitment to promote gender equality and non-discrimination at work. The instruments in question are the Night Work (Women) Convention, 1919 (No. 4), the Night Work (Women) Convention (Revised), 1934 (No. 41), the Night Work (Women) Convention (Revised), 1948 (No. 89) and the Protocol of 1990 to the Night Work (Women) Convention (Revised), 1948. Since their adoption, these four instruments have received a total of 165 ratifications, but also 72 denunciations – a clear sign that for numerous member States these instruments have fallen into obsolescence.

Against this background, the Governing Body of the ILO requested the Committee of Experts on the Application of Conventions and Recommendations to undertake the first General Survey on the application of the Conventions concerning women's night work in industry (ILO, 2001).[1] Specifically, the Committee was requested to take stock of ILO's standard-setting activities in this field over a span of 80 years and, also, to offer guidance on the unresolved question of whether the ILO instruments dealing with this matter are still relevant and suited to present needs, principles and values.

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[1] The General Survey draws principally on information provided by 109 member States in accordance with article 19 of the Constitution as well as on information contained in the regular reports submitted under articles 22 and 35 of the Constitution by those member States parties to one or more of the instruments in question. It also takes account of the observations and comments submitted by 18 employers' and workers' organizations.

The purpose of this article is to present a synthesis of the Committee's findings. The article opens with a presentation of the general background to the current controversy over the legal prohibition of women's night work, including relevant aspects of women's labour force participation and selected findings on the effects of night work. This is followed by a short history of ILO standards on the night work of women in industry and, in a third section, a review of national law and practice in this field. The discussion then turns to the conflict between legal "protection" of female workers and the principles of non-discrimination and equal treatment. The article ends with the Committee of Experts' main findings on this issue, followed by a recapitulatory concluding section and a "postscript" outlining the positions expressed by the ILO's constituents during the discussion of the General Survey at the International Labour Conference in June 2001.

Female labour, night work and sex equality

The rationale behind the first national measures on night-time work in factories, adopted during the last quarter of the nineteenth century, was that women together with children belonged to a specific category of factory workers needing special protection because they were physically weaker than men and more susceptible to exploitation.[2] The idea of protecting adult women and children against arduous working conditions also found expression in the Preamble to the ILO Constitution and later led to the adoption of several Conventions such as the Maternity Protection Convention, 1919 (No. 3), the Night Work of Young Persons (Industry) Convention, 1919 (No. 6) and the Night Work (Bakeries) Convention, 1925 (No. 20). The first ILO Convention on the night work of women thus embodied the convergence of two preoccupations – i.e. humanizing working conditions by limiting night work in general, while setting up women-specific protective rules principally on account of their reproductive role and traditional family responsibilities.

Nowadays, however, the basic premise underlying all three Conventions on women's night work in industry appears critically flawed. Indeed, there seems to be little justification for legal rules that seek to restrict access to night-time employment on the basis of sex rather than

[2] Early legislation addressed the questions of women's freedom to work underground in mines, working hours and conditions of work, especially women's safety around moving machinery. Later came measures on maternity protection such as maternity leave and prohibitions on work with toxic substances. The United Kingdom was the first country to prohibit women from working underground in 1842, and two years later, to restrict their work at night.

the worker's physical aptitude.[3] Particularly problematic is the compatibility of such rules with the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), or with the Workers with Family Responsibilities Convention, 1981 (No. 156), both of which seek to promote a completely different approach. The uneasy relationship between the current ILO standards on the night work of women in industry and such fundamental principles of non-discrimination and equality of opportunity and treatment between men and women is further confirmed by the 1979 United Nations Convention on the Elimination of All Forms of Discrimination Against Women, European Community laws and the jurisprudence of the European Court of Justice (see, for example, Heide, 1999; Ellis, 1998, pp. 190-260; ILO, 2000, pp. 6 and 78).

The ILO's delicate balancing act

Over the past 15 years, the Organization has made considerable efforts to evaluate the effectiveness and relevance of standards on women's night work in industry and, on that basis, to assess the willingness of its constituents to abandon protective legislation applying to women in favour of night-work regulations applicable to all workers. Most of these efforts, however, have remained inconclusive, at best confirming the persistence of profoundly differing opinions about the benefits or negative effects of special protective legislation prohibiting women's work at night. In 1984, the Office gave a legal opinion advising member States that they were bound to review their protective legislation in accordance with the United Nations Convention on the Elimination of All Forms of Discrimination Against Women and that, following this review, member States might need to denounce the relevant ILO Conventions at the appropriate time. The text concluded, however, that "there need not be any contradiction between the obligations arising under the UN Convention and those

[3] Convention No. 4, adopted in 1919, provided for an outright prohibition of night work for women of any age in any public or private industrial undertaking other than an undertaking in which only members of the same family were employed, it being understood that "night" should cover a period of at least eleven consecutive hours including the interval from 10 p.m. to 5 a.m. Convention No. 41, adopted in 1934, excluded from the scope of the night-work prohibition women holding responsible positions of management and also provided for a possible variation in the seven-hour interval specified in the definition of the term "night". Convention No. 89, adopted in 1948, laid down new exception and suspension possibilities and also made the definition of "night" more flexible. As for the Protocol to Convention No. 89, adopted in 1990, it allows for variations in the duration of the night period and exemptions from the prohibition of night work which may be introduced by governments after consulting the employers' and workers' organizations. It also provides for the protection of pregnant women and nursing mothers by prohibiting the application of such variations and exemptions during a period before and after childbirth of at least 16 weeks.

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" (ILO, 1984, p. 6, para. 17).

In 1985, a resolution of the International Labour Conference on equal opportunities and equal treatment for men and women in employment called upon member States to "review all protective legislation applying to women in the light of up-to-date scientific knowledge and technological changes and to revise, supplement, extend, retain or repeal such legislation according to national circumstances" (ILO, 1985, p. 80). In 1989, the Meeting of Experts on Special Protective Measures for Women and Equality of Opportunity and Treatment came to the conclusion that "special protective measures for women alone in the case of dangerous, arduous and unhealthy work are incompatible with the principle of equality of opportunity and treatment unless they arise from women's biological condition"; the experts 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" (ILO, 1990a, pp. 79-80). In its conclusions, however, the Meeting of Experts made it clear that special protective measures for women concerning night work were expressly excluded from the scope of their recommendations, probably because of the well-known sensitivity of this issue and the upcoming Conference discussion of a draft instrument revising Convention No. 89.

In the framework of the ILO Governing Body's Working Party on Policy regarding the Revision of Standards, the Office put forward on two occasions the idea of shelving Conventions Nos. 4 and 41 but the proposal met with the strong opposition of the worker members who called for a detailed examination of all three night-work Conventions and emphasized the need to promote the ratification of Convention No. 89 (ILO, 1996b, paras. 47-49). It was finally agreed to promote the ratification of Convention No. 89 and its Protocol of 1990 or, where appropriate, of Convention No. 171, and to denounce, as appropriate, Conventions Nos. 4 and 41. In approving the proposals of the Working Party, the Governing Body considered that Conventions Nos. 4 and 41 "retain their value on an interim basis for States party" and that therefore the shelving of these instruments is not called for under present conditions (ILO, 1997, Appendix I, para. 21).

Apart from the evolving yet somewhat irresolute ILO position, the practice of member States in recent years is also of importance. Whereas the 1990 Protocol to Convention No. 89 has received only three ratifications since its adoption some eleven years ago, Convention No. 89 has been denounced in the same period by as many as

14 countries, thus confirming earlier evidence that the international labour Conventions on women's night work in industry have been among the most widely denounced ILO instruments (Widdows, 1984, p. 1062).

The hidden face of the "feminization" of labour

Although women's participation in the labour market has been increasing steadily, the male-female gap in relation to conditions of work persists (United Nations, 2000, pp. 109-137). Employment opportunities may be expanding – due to factors such as the growth of the services sector and, more recently, information and communications technologies and globalization – but women often have to cope with a "double burden" in striving to reconcile family responsibilities with market work. Women remain concentrated in atypical employment and spend much of their working time doing unpaid work. They continue to receive less pay than men, and they are disproportionately affected by unemployment, financial crises and migration. Seen from the perspective of growing flexibilization and casualization of employment, the term "feminization" of labour thus really means that "female labour is still available when needed and dispensable when it is not"(United Nations, 1999, p. xvii).

Women's employment in export-oriented industries in developing countries offers a good example of poor working conditions, including extensive use of irregular hours, overtime and night work. In addition, female labour in such industries is often synonymous with low wages, long commuting times, minimal job security and denial of basic maternity protection (ILO, 1998; ILO/UNCTC, 1988; United States Department of Labor, 1989; ICFTU, 1998). Under the circumstances, some countries find it difficult to abide by ILO standards, including those prohibiting night work for women, and decide either to denounce the relevant Conventions or to exclude export processing zones (EPZs) from the scope of restrictive labour legislation. In 1983, for instance, Sri Lanka denounced Convention No. 89 on the grounds that the prohibition against women's night work would discourage the establishment of foreign enterprises in its EPZ. In Mauritius, where night work is generally prohibited, EPZ workers are specifically exempted from the prohibition by virtue of the 1993 Industrial Expansion Act.

Night work and its effects

The number of permanent night workers has quadrupled in the past 15 years with shift workers now accounting for 20-25 per cent of the working population in most industrialized countries. Spurred by globalization and the new economy, businesses and individuals are

forging new working patterns, making increasing use of night hours and capitalizing on the economic potential of round-the-clock production and services. Today's information technology allows some workers to choose their hours and place of work. The growth of night work is thus the result of the 24-hour society and its unrelenting search for flexibility in working time. And as lifestyles change, there is growing acceptance of "night-time" as part of the working "day". Available figures for North America and Europe show that one in five people now works a non-traditional schedule, in which most of the working hours are outside the traditional "nine to five".

Although statistics are scarce, women appear to be particularly affected by the rising incidence of night work, especially in so far as it concerns lower skilled jobs such as data processing and jobs in credit card billing centres or call centres. Moreover, the "flexibilization" of working time leads to the development of atypical and precarious forms of employment which are frequently characterized by inferior conditions. As pointed out in an earlier ILO study, "destandardizing" the duration and arrangement of working time could have detrimental effects on the safety, health and well-being of workers while flexibility in working time should not be equated with the dismantling of social protection (ILO, 1995, p. 24). The health implications of rotating shift systems or extensive night-work arrangements are known to include over-fatigue, sleep disturbances, increased gastro-intestinal and cardiovascular problems and a weakened immune response because of the disruption of the body's circadian rhythms. Apart from such physical symptoms, studies have demonstrated that night work may also cause psychological disorders, such as stress and depression, and have adverse effects on family and social life.[4]

The antinomy between the ban on women's night work and gender equality advocacy

The promotion of women's rights, equality and non-discrimination between the sexes has gained significant momentum in the past twenty years and is now central to international discourse on policy-making relating to human rights and social development. The 1979 United Nations Convention on the Elimination of All Forms of Discrimination Against Women, the European Social Charter, as last revised in 1996 (see Council of Europe, 1995 and 1999), or the European Council's Equal

[4] See, for example, Harrington (1978), Maurice (1975), Taylor (1969, pp. 15-30), Härmä et al. (1998), *Ergonomics* (1993), Rosa and Tepas (1990), Helbig and Rohmert (1998), Kogi (1998), Knauth (1998) and Bunnage (1979). See also the following web sites:

www.matrices.com/Workplace/Research/shiftworkresearch.html;
www.members.tripod.com/~shiftworker/swlinks.html;
www.sleepfoundation.org/publications.html;
www.stmarys.ca/partners/iatur/index.htm;
www.workingnights.com/library.htm

Treatment Directive of 1976,[5] all endorsed the principle that restrictions on the employment of women for night work are justifiable only in the case of maternity. This principle echoes long-established scientific evidence that there are no physiological differences between women and men as regards tolerance of shift work or adaptation to night work: "from the medical point of view there is no justification for protecting only women workers except insofar as their function of reproduction is concerned because of the risks to the children" (Carpentier and Cazamian, 1977, p. 41; see also Hakola, Härmä and Laitinen, 1996; Nachreiner, 1998; Ogínska, Pokorski and Ogínski, 1993).

In the light of these developments and findings, the ILO has had a difficult time defending the continued relevance of standards which effectively perpetuate stereotypical assumptions about women's role in society and at the workplace. In the words of an ILO report, "the subject is complex. Its analysis involves conflicting values as well as competing legal doctrines and international labour standards on preventing discrimination in employment and ensuring the safety and health of workers. The ILO seeks to rationalize the various interests and doctrines into a coherent policy that ensures equal opportunity and at the same time prevents the deterioration of working conditions" (ILO, 1990a, p. 1). The crux of the matter comes down to an uncomfortable dilemma: is it preferable, in certain cases, to maintain special protective laws for women workers at the risk of preserving gender stereotypes about the place of women in society and the labour market, or should one rather push for the repeal of all laws and regulations inconsistent with the principle of equality of opportunity and treatment between men and women even when such action would accentuate the *de facto*

[5] 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" (see case C-345/1989, *Ministère public v. Stoeckel*, ECR 1991, p. I-4047, judgment of 25 July 1991; see also cases C-197/1996, *Commission of the European Communities v. French Republic*, ECR 1997, p. I-1489, judgment of 13 March 1997, and C-207/1996, *Commission of the European Communities v. Italian Republic*, ECR 1997, p. I-6869, judgment of 4 December 1997). The same finding was confirmed and further elaborated in the infringement proceedings initiated by the European Commission against France and Italy in 1999. However, in its judgment in the *Levy* case, the Court found that a national jurisdiction could set aside its obligation to ensure full compliance with article 5 of the Equal Treatment Directive if the national provisions incompatible with Community legislation were intended to implement an international agreement to which the Member concerned had become a party prior to the entry into force of the EEC Treaty – in this case ILO Convention No. 89. Reference should also be made to the European Parliament's resolution on night working and the denunciation of ILO Convention No. 89, dated 9 April 1992, which "deplores the carelessness of the Commission in permitting a situation to arise in which no night working legislation exists at Community level, since Member States are no longer required to respect minimum international standards" (Kilpatrick, 1996, p. 188).

inequalities and gender discrimination suffered by women at home and at the workplace?

For example, women employed in the construction industry in India are reported to carry out work of the same physical difficulty as men, meaning 32 tonnes of concrete mixture a day, or up to 21 tonnes of mud from an excavation site (Ramakrishnan, 1996, p. 169). Can this be viewed solely from an "equal treatment" perspective or does it call for public intervention, protective measures and stricter enforcement? The same goes for those Chinese women reportedly working up to 16 hours a day, often without a single day of rest in a month, or those female workers in Viet Nam's export processing zones who, according to some accounts, total 6,000 hours per year as compared to 2,000 stated by the law (Asia Monitor Resource Center, 1998, pp. 179 and 232). Here again, can one reason in terms of women's "empowerment" rather than shocking exploitation?[6]

Night work of women in industry: ILO standards in historical perspective

The origins of the first ILO Convention dealing with the night work of women in industrial undertakings can be traced to the pioneering work of the International Association for Labour Legislation (IALL) and to the 1906 Bern Convention on the prohibition of night work for women. The latter, together with the Convention on the prohibition of the use of white phosphorus in the manufacture of matches, were the first international legal instruments to focus on working conditions and human welfare.[7] The Bern Convention laid down a blanket prohibition of industrial night work for all women without exception. The prohibition applied to all industrial enterprises employing more than ten workers, while the notion of compulsory night rest for women referred to an 11-hour period, including the interval between 10 p.m. and 5 a.m. At the time of the Bern Conference the prohibition of night work for women was justified as a measure of public health designed to reduce the mortality of women and children, and to improve women's physical and moral well-being through longer periods of night rest and

[6] See also the following sources: www.un.org/womenwatch; www.unifem.undp.org; www1.umn.edu/humarts/links/women.html; www.library.yale.edu/wss/

[7] On the work of the Bern Conference, see Caté (1911), Hopkins (1928, pp. 16-26), Lowe (1935, pp. 112-131) and Troclet (1952, pp. 218-244). For an interesting account of the first efforts to cope with the "social question" in the late nineteenth century – i.e. the deterioration of workers' living standards and the lack of protective legislation for the working masses – as perceived by the women's movement, see Wikander (1995, pp. 29-62) and Bauer (1903).

more relaxed devotion to housekeeping tasks (IALL, 1904, p. 9; Collis and Greenwood, 1921, pp. 211-242).[8]

The provisions of the 1906 Bern Convention were left practically untouched at the first session of the International Labour Conference, which was held in Washington in 1919. The only substantial changes were to give a more detailed definition of the term "industrial undertaking" and to delete the provision limiting the application of the Convention to industrial undertakings of more than ten employees. In adopting Convention No. 4, member States generally shared 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" (ILO, 1919, p. 246).[9]

The first appeals for flexibility in the application of ILO Convention No. 4 were made in 1928 and concerned female engineers who were excluded from certain supervisory positions in electrical power undertakings. Beginning in 1931, the Office sought to amend Convention No. 4 by means of a clause to the effect that it "does not apply to persons holding positions of supervision or management". But the revision failed because of conflicting interpretations of the scope of Article 3 of the Convention, which finally gave rise to a formal request to the Permanent Court of International Justice for an advisory opinion.[10]

In the event, Convention No. 41, which was adopted in 1934, partially revised Convention No. 4 to allow, first, the substitution in exceptional 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" and, second, the exemption from the prohibition of night work of "women holding responsible positions of management who are not ordinarily engaged in manual work" (see ILO, 1934, pp. 650-654).

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[8] The Bern Convention entered into force in 1912, and by 1919 had received 11 ratifications. But some countries objected to the discriminatory nature of the agreement: the Convention was rejected the first time it was presented to the Swedish Parliament, while Denmark, which had only signed with reservations, never ratified it (see Ravn, 1995, pp. 210-234; Karlsson, 1995, pp. 235-266; Hagemann, 1995, pp. 267-289).

[9] Nordic countries expressed their opposition to special protective measures for women except for pregnant women and nursing mothers and favoured the prohibition of absolutely unnecessary night work for all workers. Within ten years of its adoption, Convention No. 4 had been ratified by 36 countries and had met with almost universal application.

[10] The Court found that the wording of Article 3 of Convention No. 4 was unambiguous so that the prohibition applied to all women workers without exception and 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 into the text (see PCIJ, 1932, p. 373).

Further appeals for revision were voiced after the Second World War. What was most urgently needed, in the opinion of certain governments, was a more flexible definition of the term "night" in order to facilitate the operation of the double day-shift system (an important feature of the post-war economy). Attention was also drawn to the possibility of broadening the exception applying to women in managerial positions and adding a clause to provide for the suspension of the prohibition in cases of serious national emergency. As finally adopted, Convention No. 89 provided for a night rest period of at least 11 consecutive hours, including an interval of at least seven consecutive hours falling between 10 p.m. and 7 a.m. The "competent authority" could prescribe different intervals for different areas, industries, undertakings or branches of industries but had to consult the employers' and workers' organizations concerned before prescribing an interval beginning after 11 p.m. The scope of the Convention was also revised to exclude from the prohibition of night work not only women holding responsible positions of management but also of a technical character, as well as "women employed in health and welfare services who are not ordinarily engaged in manual work". Furthermore, a new article was inserted in the Convention to provide for the possibility of suspending the prohibition of night work for women "when in case of serious emergency the national interest demands it" (see ILO, 1948, pp. 494-499).

The idea of a critical appraisal of Convention No. 89 started to take shape in the early 1970s, the Swiss Government being the first to argue that the Convention was outdated and that the prohibition of night work in its current form could lead to discrimination against women. In subsequent years, the Organization sought without success to design a consensual policy on the revision of the 1948 Convention. Most of its initiatives ended in a helpless acknowledgment of the irreconcilable positions of its constituents as to the advisability of adopting new standards on night work. In his reports on the night work Conventions, submitted to the Governing Body in 1973 and 1975, the Director-General of the ILO confined himself to describing the different schools of thought and to confirming the persistence of diametrically opposed opinions as to the purpose and scope of a revision exercise or the scope of any new standards (ILO, 1973, p. 30, and 1975, p. 7). The Tripartite Advisory Meeting on Night Work, held in 1978, failed to formulate any recommendations on future ILO action because of the considerable diversity of views among participants and their apparent unwillingness to seek agreement on a middle-ground solution (ILO, 1978). In its 1986 General Report, the Committee of Experts on the Application of Conventions and Recommendations expressed concern over the application of the Convention in certain countries and drew the Governing Body's attention to the importance of seeking a rapid solution.

By 1989, when the International Labour Conference held its first discussion on a draft Protocol revising Convention No. 89, the prohibition of night work for women had become such a divisive and polemical issue that no single instrument could possibly satisfy the conflicting expectations of governments, employers and workers. For the representatives of workers' organizations, Convention No. 89 still had an important role to play because the problem which had prompted its adoption persisted. To the employers' organizations, the Convention was inherently discriminatory and an impediment to economic and social progress. As for the government representatives, many of them expressed strong views to the effect that there was no reason for differential treatment between men and women, except in respect of maternity protection.

The compromise solution favoured at the time was a two-pronged approach that consisted in adopting, on the one hand, a Protocol to Convention No. 89 allowing for exemptions from the prohibition of night work and variations in the duration of the night period by agreement between employers and workers, and, on the other, a new Convention setting out protective standards for all night workers, irrespective of their sex, in all industries and occupations (ILO, 1989a, p. 69; Kogi and Thurman, 1993).[11] It was thus hoped that a generous dose of substantive flexibility (which under certain circumstances could practically mean a waiver of the prohibition) would accommodate the concerns of those countries seeking greater sensitivity to women's rights and consensual solutions to the problems of shift work organization, while allowing Convention No. 89 to remain open to further ratifications. The futility of the Office's efforts to "square the circle" is illustrated by yet another inconsistency: the draft Protocol and the new night work Convention were not designed as mutually exclusive instruments so that member States could, in theory at least, apply sex-specific prohibitions on night work and, at the same time, enforce regulations regarding the safety and health of *all* night workers, both men and women.[12]

Today, the approach taken in 1990 calls for some critical assessment. The fact that two of the three States (Czech Republic, Cyprus) which had accepted the Protocol have already proceeded to denounce

[11] For the Conference discussions, see also ILO (1989b, pp. 30/30-30/35; 1990b, pp. 26/21-26/26).

[12] In this respect, an analogy could be drawn between the evolution of ILO standards concerning night work and those concerning underground work in mines; much like the new Night Work Convention, 1990 (No. 171) reflects a new approach to the problems of night and shift work in that it is designed to protect the health and rights of all night workers without distinction, the Safety and Health in Mines Convention, 1995 (No. 176) shifts emphasis from the protection of women, as provided for in the Underground Work (Women) Convention, 1935 (No. 45), to the protection of mine workers irrespective of their sex.

it betrays an uncomfortable sense of failure.[13] Moreover, only two of the States parties to Convention No. 89 (Bangladesh, Slovenia) have indicated that they are favourably considering ratification of the Protocol. This would seem to contradict the Committee of Experts' finding that "Convention No. 89, as amended by the 1990 Protocol, remains the most pertinent legal instrument for those member States which would not yet be prepared to dismantle all protective regimes for women in the name of gender equality, while at the same time seeking flexibility in the application of such protective legislation and of course giving full consideration to the ratification of the Night Work Convention, 1990 (No. 171)" (ILO, 2001, p. 134, para. 179). Yet, there are still no signs of Convention No. 171 being widely accepted either. More than ten years after its adoption, the number of ratifications it has received remains surprisingly low. Some governments openly question its very ratifiability because of what they see as the excessively regulatory character of some of its provisions. So far, only Brazil has reported that the Bill ratifying Convention No. 171 is being processed by its parliamentary machinery. A further two countries have reaffirmed their intention to ratify the Convention, and four others have simply indicated that consultations with the social partners have been initiated without giving further details as to ratification.

In concluding the chapter of the General Survey tracing the history of ILO standards on women's night work in industry, the Committee of Experts states that "rarely have standards given rise to such prolonged controversy", adding that the issue "epitomizes a century-long debate over sensitive questions which have divided policy-makers, trade unionists and even women's organizations themselves" (ILO, 2001, p. 51, para. 85).

Review of national law and practice

National laws and practice make up an extremely diversified picture, even though in most countries there would seem to exist some form of legislative or regulatory provision restricting the employment of women workers during the night. On the one hand, 50 countries effectively apply a general prohibition against the night work of women, without distinction of age, in all industrial undertakings. In contrast, two countries are in the process of introducing legislative amendments lifting all restrictions on women's night work; five countries have introduced such broad exceptions that they practically nullify the comprehensive prohibition which continues to apply only in

[13] Even though these denunciations appear to be dictated by reasons of political expediency rather than by problems connected with the practical application of the Protocol.

theory; and in three countries the provisions proscribing women's night work are not legally enforced (see ILO, 2001, pp. 53-56). There are also some 18 countries which have ceased to apply the provisions of the relevant ILO Conventions even though they are still parties to one or more of those instruments. The Committee of Experts has expressed concern about the extent of this practice:

> the significance and implications of the growing tendency among States parties to Conventions Nos. 4, 41 and 89 to no longer give them effect cannot be underestimated; yet, the Committee considers it of critical importance to recall that it is not sufficient to invoke the principle of non-discrimination in employment and occupation or the principle of equality of treatment to nullify the obligations incumbent upon a member State by virtue of its formal acceptance of an international Convention (ILO, 2001, p. 61, para. 93).

This wording may be seen as a tactful way of suggesting that national law should be brought into conformity with national practice and that, where the reintroduction of a prohibition on women's night work was not envisaged, the ILO Convention(s) on night work should be denounced in accordance with established procedures.

On the other hand, there are 36 countries whose legislation does not provide for any sex-specific regulations on night work in order to ensure respect for the principle of non-discrimination between men and women at work and in employment. Among these countries, five have enacted legislation providing for a general ban on night work for all workers, while the remaining 31 countries do not prohibit the employment of women at night either because their legislation does not distinguish between night work and day work or because it does not apply different standards to male and female workers.

Irrespective of where they stand on women's access to night employment in general, almost all of the countries whose legislation was reviewed in the General Survey apply specific regulatory regimes to night work for two categories of workers with special needs, namely expectant or breastfeeding mothers and minors. With respect to pregnant workers and nursing mothers, many countries apply a blanket prohibition on night work covering the entire period of pregnancy as well as a specified period after childbirth which may vary from three months to three years. In some countries the period during which night rest is compulsory does not exceed the duration of maternity leave, while in other cases the prohibition is not absolute and applies only at the worker's request. Finally, a few industrialized countries have adopted a new occupational safety and health approach to the protection of pregnant workers whereby new or expectant mothers are not, in principle, prohibited from working on night shifts, though the employer is under obligation to assess the possible hazards of night work in each individual case and take mandatory action as appropriate. Generally speaking, the special protection afforded to pregnant women and nursing

mothers is not limited to those employed in industrial undertakings, but applies to all sectors of economic activity.

The review of national law and practice reveals that the term "night", used in connection with the employment of female workers, is construed to cover a period which may vary from six to 12-and-a-half hours, though most States opt for a compulsory night rest period between seven and nine hours. However, the legislation of most of the States parties to the Conventions under review provides for an 11-hour ban period including either the interval between 10 p.m. and 5 a.m. in accordance with the provisions of Conventions Nos. 4 and 41, or a seven-hour interval between 10 p.m. and 7 a.m. pursuant to the terms of Convention No. 89.

There is also remarkable diversity in the legal prescriptions setting the grounds for exemptions from the prohibition of night work. In numerous countries the prohibition does not apply to family undertakings, undertakings processing perishable materials, or in case of *force majeure*; and women in managerial positions or employed in health services are also excluded from the scope of any prohibition or restriction on night work. In many cases, however, national laws and regulations provide for far-reaching exceptions bearing little relevance to the provisions of the Conventions. For example, the general ban on women's night work does not apply to economic sectors with "special needs" or to such work or occupations as may be designated by Ministerial decision, or yet to undertakings that meet certain requirements (typically in relation to health, security and transport). Further grounds for exemption include the attainment of production targets, compensation for an interruption of work due to a strike, the nature of certain work requiring dexterity, speed and attention, or the location of a factory within an export processing zone. Moreover, the notion of "national interest in case of serious emergency" – as a permissible ground for the suspension of the prohibition of night work for women under Convention No. 89 – is often construed broadly to cover situations of serious economic crisis, threats to national security, grave danger, or urgent interests of society, all of which have little in common with the relevant provision of the Convention.

The stigma of discrimination: Night work and the principle of equal treatment

An omnipresent concern of ILO member States is the uneasy relationship between the ILO Conventions concerning the night work of women in industry and the fundamental principle of non-discrimination and equality of opportunity and treatment between men and women. For the great majority of governments which provided replies for the purposes of the General Survey, all Conventions on night work of

women are synonymous with sex discrimination (ILO, 2001, p. 123, para. 156). Several states invoked principles enshrined in national constitutional law, while some referred to recent supreme court or constitutional court judgments explicitly declaring the unconstitutionality of any legislative provision prohibiting the access of women workers to night employment. Many governments also expressed the view that the mere intention to regulate women's employment during night hours differently from men's was evidently discriminatory and unjustifiable. Others, while qualifying the prohibition as an obstacle to equal employment opportunities, linked the problem to that of promoting full employment. Significantly, all of the 19 member States that have so far denounced Convention No. 89 have invariably invoked the principle of gender equality and non-discrimination as being the principal motive for their decision.

The analysis of the Committee of Experts offers a balanced mix of progressive interpretation and pragmatism. First, the Committee appears to be restating established rules while adapting them to contemporary conditions, in that it considers special protective measures to be justifiable only when they aim at restoring a balance, as part of a broader effort to eliminate inequalities. To quote from the General Survey:

> differences in treatment between men and women can only be permitted on an exceptional basis, that is when they promote effective equality in society between the sexes, thereby correcting previous discriminatory practices, or where they are justified by the existence, and therefore the persistence, of overriding biological or physiological reasons, as in the case in particular of pregnancy and maternity. This requires a critical re-examination of provisions which are assumed to be "protective" towards women, but which in fact have the effect of hindering the achievement of effective equality by perpetuating or consolidating their disadvantaged employment situation (ILO, 2001, pp. 125-126, para. 161).

In this connection, the Committee of Experts recalls the conclusions of its 1996 *Special Survey on equality in employment and occupation in respect of Convention No. 111* (ILO, 1996a), which expressed the same idea, i.e. that practices which create advantages or disadvantages on the basis of sex are permissible only if they are designed to compensate for existing discrimination with the aim of ensuring equality of opportunity and treatment in practice. On this criterion, any rule restricting or prohibiting night work for women would clearly fail to qualify as a justifiable special protective measure.[14]

[14] In contrast, the Committee of Experts makes no reference to the 1988 General Survey on Convention No. 111 (ILO, 1988), or to the comments made then about special protective measures, especially with regard to Article 5(1) of Convention No. 111. It will be recalled that the Committee in its 1988 General Survey (para. 140) expressly included Conventions Nos. 4, 41 and 89 among the ILO instruments which provide for special measures of protection or assistance and whose application might result in distinction or preferences not deemed to be discriminatory in terms of Article 5 of the Convention. Moreover, the Committee clearly stated that "rules adopted in application of the principles established in international Conventions concerning the night work of women in industry come under the provisions contained in Article 5, paragraph 1, of the Convention" (ILO, 1988, para. 142).

But the Committee also recognizes the need for pragmatism and that, depending on the needs and priorities of each country, a phased approach may be called for:

> the Committee is aware that, as a long-term goal, the full application of this principle will only be attained progressively through appropriate legal reforms and varying periods of adaptation, depending on the stage of economic and social development or the influence of cultural traditions in a given society. The Committee believes that, for some parts of the world, progress towards full implementation of the principle of non-discrimination will proceed at a more gradual pace. The Committee cannot be expected to identify at which stage a country or a particular part of a country will be able to determine the actual impact of any existing special protective measures prohibiting or restricting night work for women and to take appropriate action. Nor should it substitute its own view for the view of those best placed to decide this issue, not least the women themselves. The protections afforded by Convention No. 89 and its Protocol should therefore be available to those women who need them, but they should not be used as a basis for denying all women equal opportunity in the labour market (ILO, 2001, p. 128, paras. 168-169).

Indeed, the Committee cautions against the risk of swift or premature action in conditions which might adversely affect women workers:

> it would be unwise to believe that eliminating at a stroke all protective measures for women would accelerate the effective attainment of equality of opportunity and treatment in employment and occupation in countries at different stages of development. Before repealing existing protective legislation, therefore, member States should ensure that women workers will not be exposed to additional risks and dangers as a result of such repeal (ILO, 2001, p. 126, para. 163).

The Committee of Experts concludes its discussion of the relationship between the prohibition of night work for women and the principle of equality of opportunity and treatment on an unequivocal note: "a blanket prohibition on women's night work, such as that reflected in Conventions Nos. 4 and 41, now appears objectionable and cannot be defended from the viewpoint of the principle of non-discrimination" (ILO, 2001, p. 126, para. 162). As regards Convention No. 89, the Committee's conclusion is somewhat more qualified:

> in those countries where technological progress has removed or reduced the hazards involved in industrial occupations and where the evolution of ideas about women's role in society has led to effective measures being put in place to eradicate discrimination and removed the need for special protective measures, Convention No. 89 may appear to be an anachronism (ILO, 2001, p. 128, para. 169).

Ratification prospects and problems

Based on the replies of member States, the Committee considers the ratification prospects[15] of Convention No. 89 and its Protocol to be

[15] By ratification prospects, reference is made only to Convention No. 89 because Convention No. 41 has been closed to ratification since the adoption of Convention No. 89, and the 1990 Protocol cannot be ratified on its own, while Convention No. 4, adopted some 82 years ago, is highly unlikely to attract any new ratifications.

thin (ILO, 2001, p. 131, para. 173). In fact, only one State (Papua New Guinea) indicated that there are good prospects of its ratifying Convention No. 89 and its Protocol in the context of a major review of labour laws, while two States parties to Convention No. 89 (Bangladesh, Slovenia) have reported that they are favourably considering the possibility of ratifying the 1990 Protocol. In contrast, eight countries[16] have announced their decision to denounce Convention No. 41 or Convention No. 89 and its Protocol, as the case may be, while another three Members (Brazil, Ghana, Malawi) have stated that Convention No. 89 had ceased to apply following the recent enactment of new legislation. In addition, more than 20 governments have indicated that they did not envisage ratifying any of the instruments under review. Most of these countries firmly objected to the idea of denying women access to night employment as a form of direct discrimination, while others expressed concern about the implications that prohibitions or restrictions on women's night work would have on unemployment.

The Committee concludes that the outlook for acceptance of the Protocol in the coming years appears uncertain: the fact that the 1990 Protocol cannot be ratified separately from Convention No. 89 seems to constitute a disincentive to ratification for those countries which, although interested in the flexibility afforded by the Protocol, still have serious objections to the basic premise of banning night work for women in general as set forth in Convention No. 89 (ILO, 2001, p. 134, para. 179).

With Convention No. 89 currently open to denunciation (27 February 2001-27 February 2002), it may be reasonably expected that it will be the subject of a large number of denunciations, probably as numerous as those registered in 1991-92 following the ruling of the Court of Justice of the European Communities in the *Stoeckel* case, according to which Convention No. 89 was found to contradict Community law.[17]

The Committee's findings: Where do we stand?

In drawing its conclusions as to the continued relevance of the instruments on women's night work, the Committee of Experts was guided by two clear, yet conflicting indicators. On the one hand, there is ample evidence that the impact of Conventions Nos. 4, 41 and 89 on national law and practice is weakening. In fact, according to the replies

[16] Austria, Cyprus, Czech Republic, Dominican Republic, Estonia, South Africa, Suriname and Zambia.

[17] As at 8 October 2001, four instruments of denunciation had been registered (Austria, Cyprus, Czech Republic, Zambia). Moreover, Convention No. 4 was denounced by Austria and Italy on 26 July and 6 August 2001 respectively.

of member States, no less than 19 countries formally bound by the Conventions have ceased to apply them. Many of these countries have legislation in conflict with their provisions, while others are in the process of introducing legislative amendments lifting all restrictions on women's night work; others still have announced their intention to proceed with their denunciation. On the other hand, 66 States are formally bound by the provisions of Convention No. 89 or Convention No. 41; a further 12 States enforce prohibitions or restrictions on women's night work without being parties to any of the relevant instruments, thus obliging the Committee to admit that the number of member States whose national legislation continues to conform to the provisions of Conventions Nos. 4, 41 or 89 is still significant.

The Committee concludes that Convention No. 4 is "manifestly of historical importance only" and that it "no longer makes a useful current contribution to attaining the objectives of the Organization" (ILO, 2001, pp. 139-140, para. 193). The Committee therefore recommends that this instrument should be "shelved" and join those Conventions which will be eventually considered for abrogation. As regards Convention No. 41, the Committee notes that it is "poorly ratified and its relevance is diminishing" (ILO, 2001, p. 140, para. 194) and suggests that it would be in the interest of the States parties to this Convention to ratify Convention No. 89 and its Protocol instead. Finally, with respect to Convention No. 89, as revised by the 1990 Protocol, the Committee considers that it "retains its relevance for some countries as a means of protecting those women who need protection from the harmful effects and risks of night work in certain industries, while acknowledging the need for flexible and consensual solutions to specific problems and for consistency with modern thinking and principles on maternity protection" (ILO, 2001, p. 143, para. 201).

In sum, the Committee sees little reason for retaining protective standards for female workers only. At most, such standards should serve to respond to specific situations or sources of exploitation and abuse, they should be limited in time and scope, kept under regular review, and above all they should be maintained only for as long as the women workers themselves recognize their usefulness:

> 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, for the time being and on a limited basis, subject to regular review, be legitimately considered by some constituents to be justified (ILO, 2001, pp. 47-48, para. 75).

The General Survey ends by offering some guidance with respect to ILO's future action in matters of night work as well as a subtle word of caution addressed to member States. As regards the Organization's standards policy in the field of night work, the Committee advises that its aims should to be to promote ratification of the Night Work Convention, 1990 (No. 171) and to assist those constituents still bound by Convention No. 89, but not yet ready to ratify Convention No. 171, in realizing the advantages of modernizing their legislation in line with the provisions of the Protocol. As a result of the low number of ratifications of Convention No. 171 thus far – coupled with the growing tendency among member States to denounce or no longer to give effect to Conventions Nos. 4, 41 or 89 – "there is risk of a complete deregulation of night work through the removal of all protective measures for women and the failure to replace them with a legislation offering appropriate protection to all night workers" (ILO, 2001, p. 143, para. 202).

Concluding remarks

The first General Survey on the night work of women in industry, conducted by the ILO Committee of Experts on the Application of Conventions and Recommendations, has been an opportunity for fresh inquiry and some expert advice on persistent questions concerning both the advisability of regulating night work in general and the acceptability of special protective measures for women having regard to the principles of non-discrimination and gender equality. The essence of the Committee's analysis may be captured in the following propositions.

The detrimental effects of night work on the health and on the social and family life of *all* workers are largely acknowledged. More generally, the introduction of new working-time patterns, flexible work schedules and complex rotating shift arrangements, which typically imply irregular hours of work, calls for increased occupational health awareness and protective measures adapted to new needs. The factors affecting tolerance of night work are unrelated to sex. Yet, biological conditions such as pregnancy or deep-rooted social traditions such as the uneven sharing of family and household responsibilities between men and women may leave female workers more exposed to the adverse effects of night work.

The impact of the Conventions in question is weakening rapidly. Their current relevance is extremely limited, being largely confined to the possible ratification of the 1990 Protocol by those countries which are still bound by the provisions of Convention No. 89 but which are

not yet prepared to ratify Convention No. 171. There is overwhelming evidence that, in most national legal systems, prohibitions on women's night work have either been struck out or ceased to be enforced. Even among those countries which continue to give effect to the provisions of the relevant ILO Conventions there seems to be general recognition of their transitional nature and the need ultimately to create such conditions as would permit them to move away from sex-specific legislation, with the sole exception of laws aimed at protecting maternity.

Whatever their residual value, the ILO standards on women's night work in industry are in a state of flux due to the advancement of the overriding principles of non-discrimination and equality of opportunity and treatment between men and women. The two sets of ideas interact: the more the action in furtherance of equality bears its fruits, the more sex-specific protection retreats. The international obligation to conduct periodic reviews of all protective legislation applying to women only – as set out in the 1979 Convention on the Elimination of Discrimination Against Women or the 1985 ILO resolution on equal opportunities – is a clear manifestation of the continuous action required for the promotion of equality of opportunity and treatment. Ever-changing social conditions call for well-adjusted policies: night-work protection for women is therefore set to vanish as rapidly, or as sluggishly, as the goals of non-discrimination and gender equality in employment and occupation are attained.

Each of the four instruments on women's night work was drawn up in response to specific needs at a given point in time and thus necessarily reflects the ideas prevailing at the time of its adoption. These instruments are therefore to be evaluated on their merit of giving expression to constantly evolving priorities and expectations in the world of work, not as embodying timeless standards. Faced with a hard choice between protection *or* equality, the ILO has always endeavoured to achieve protection *and* equality. The following passage, quoted from a 1921 report prepared for the third Session of the International Labour Conference, testifies to the remarkable consistency of ILO's action and objectives:

> the principal importance of the Conference which is about to be held lies not in the special measures that it may adopt for the protection of women workers, so much as in the proposal to put men and women on a footing of almost complete equality in all protective measures contemplated. It is in this direction that women desire to see the development of protection for women workers. They no longer ask for privileges – they demand absolute equality. Most of the draft Conventions submitted to the Conference ought, in the view of the Governing Body of the International Labour Organisation, to apply equally to women and men. They are a step towards the complete unification of social legislation which is the real object of the whole movement of working women (ILO, 1921, p. 11).

Postscript

In accordance with usual practice, the Conference Committee on the Application of Standards at the 89th Session (June 2001) of the International Labour Conference devoted part of its general discussion to the examination of the Committee of Experts' General Survey.[18] Practically all the 30 members of the Committee who took part in the discussion addressed the central question of whether or not special protective measures for women, with the exception of standards and benefits related to maternity protection, were contrary to the principle of equal opportunity and treatment between men and women. Most speakers acknowledged the challenging nature of the subject pointing out the specificity of the General Survey which, instead of limiting itself to a technical evaluation of the practical application of standards relating to women's night work, addressed first and foremost the very relevance of those standards. The discussion confirmed the existence of two well-entrenched lines of argument and – after 25 years of intense debate – the persistent sensitivity of the issue.

The Employer members saw the maintenance of sex-biased restrictions on night work as a test for the Organization's credibility and authority, stressing that the protection seen as social progress 100 years ago could now represent a social impediment and a disadvantage. The time had finally come, they argued, to consign to history all ILO instruments on women's night work. In their opinion, the Organization now needs courage to move forward in a spirit of realism lest it should be overtaken by modern developments. The perpetuation of outdated instruments which are not applied in practice, even by countries which have ratified them, could not be beneficial either to the ILO or to workers. Several government representatives (Canada, Denmark, Japan, Portugal, South Africa, Sweden, Zimbabwe) also supported the view that singling out women for special protection under the night work Conventions was anachronistic, blatantly discriminatory and scientifically unfounded.

The Worker members, for their part, deplored the use of equality arguments to lower standards on working conditions, particularly with regard to night work, and pointed out that the dilemma was not what to choose between equality and protection but how to best guarantee both. They emphasized that there was a real risk of complete deregulation, given the current tendency to erode protection in the name of equality and render employment precarious for all night workers. Other Worker members (France, India, Pakistan, Senegal) noted that, although the situation might be different in the industrialized world,

[18] See International Labour Conference, 89th Session, 2001, *Provisional Record No. 19*, paras. 159-207 and *Provisional Record No. 22*, pp. 22/2-22/10.

there was still great need to protect female workers in developing countries. It was surprising, they felt, that despite the rampant discrimination against women workers throughout the world, especially in relation to wages and career prospects, so many people championed the cause of equality only where it related to lifting the ban on women's night work.

Several specific references were made to export processing zones (EPZs), with the argument that poor working conditions and a total lack of social protection tended to be endemic in EPZ workplaces: in certain EPZs where labour law was not generally observed, it was already difficult to ensure adequate protection of women by day, and the situation would clearly be much more critical at night. It was therefore suggested that the supervisory bodies of the ILO should specifically address the question of the application of ILO standards in EPZs, while the Office should consider ways of improving the conditions of millions of EPZ workers.

As regards the prospects for ratification of the instruments concerning women's night work, the government representatives of Egypt and Lebanon indicated that ratification of the 1990 Protocol was under consideration, while the government representatives of Slovakia and South Africa confirmed that their countries intended to proceed with the denunciation of Convention No. 89 by the end of 2001.

With reference to the Night Work Convention, 1990 (No. 171), most speakers regretted that this instrument had been left outside the purview of the General Survey and expressed interest in shifting emphasis away from a specific category of workers and sector of economic activity to the safety and health protection of all night workers, irrespective of sex, in all sectors and occupations. Several Worker members (Argentina, France, Italy) and government representatives (Denmark, Italy, Portugal) considered that Convention No. 171 reflected current thinking with regard to the problems of night work and shift work and endorsed the conclusion of the Committee of Experts that the ratification of that instrument should be encouraged. In contrast, other Government members (Canada, Sweden, Switzerland), while recognizing that Convention No. 171 generally represented a step forward, indicated that ratification was not envisaged at this stage.

In sum, the key points of the Conference Committee discussion included wide acknowledgement of the adverse effects of night work on workers' health and social and family life; diminishing support for instruments endorsing a general prohibition of night work for women; growing awareness of the need for regulations covering all night workers, both male and female, coupled with widespread approval of the standards set out in Convention No. 171; broad acceptance of the prohibition/restriction of night work for young workers and pregnant or nursing mothers; the persistent inequality and vulnerability of female

workers which, in some circumstances, called for carefully designed protective measures along with the pursuit of genuine conditions of equality and non-discrimination.

With respect to the issue of compatibility between the prohibition of night work for women and the principle of equality of opportunity and treatment at the workplace, both the General Survey and the Conference discussion have helped to clarify the dialectics of a balanced approach combining a sustained effort for the eradication of all forms of discrimination against women with circumscribed provision of protection, especially where women themselves demand it. Even though some of the views expressed appear to be unbridgeable, some common ground could be found, say, the fundamental nature of the principle of equality of opportunity and treatment as codified in the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, or ILO Convention No. 111; the existence of situations – distinct from the health risks to pregnant women or nursing mothers – which might justify concrete protective measures of limited scope and/or of temporary duration; and recognition that, in certain parts of the world, the implementation of the principle of non-discrimination might need to be phased in according to local conditions, given the widely varying socio-economic circumstances of different countries.

The thorough analysis undertaken by the Committee of Experts in its General Survey, coupled with the rich debate at the ILO Conference Committee on the Application of Standards, is expected to allow the Governing Body's Working Party on Policy regarding the Revision of Standards to draw definitive conclusions on the standard-setting policy to be followed in matters of night work regulation.[19]

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[19] The question of the deferred examination of Conventions concerning night work of women was placed on the agenda of the Working Party for the November 2001 Session of the Governing Body (see GB.282/LILS/WP/PRS/2 at www.ilo.org/public/english/standards/relm/gb/index.htm).

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