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REPORT OF THE ECONOMIC AND SOCIAL COUNCIL

Question of the international legal protection of the human
rights of individuals who are not citizens of the country
in which they live

Report of the Secretary-General

Addendum

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REPLIES RECEIVED FROM GOVERNMENTS

VENEZUELA

[Original: Spanish]

[10 September 1985]

1. Before an analysis is made of the draft declaration, it would be appropriate to make some brief observations, from the point of view of constitutional law, on the legal system applicable to aliens in Venezuela.
2. The preamble of the National Constitution sets forth, as a principle of constitutional philosophy, the objective of "co-operating with all other nations and especially with the sister Republics of the Hemisphere, in the aims of the international community, on the basis of mutual respect for sovereignties, the self-determination of peoples, the universal guarantee of the individual and social rights of the human person ...".
3. Article 45 of the Constitution provides that:

"Aliens shall have the same duties and rights as Venezuelans, with those limitations and exceptions established by this Constitution and the laws.

"Political rights are reserved to Venezuelans, except as provided in article 111.

"Venezuelans by naturalization who entered the country before reaching seven years of age and resided therein permanently until attaining majority shall enjoy the same rights as Venezuelans by birth."
4. This provision indicates that the rights of aliens in relation to those of nationals may be restricted only by a specific constitutional or legislative provision (not by regulation); in other words, the question exclusively is within the legislative domain.
5. The legal distinctions between nationals and aliens do not constitute discrimination, but reflect a pre-established legal situation which provides for equality of treatment for persons who meet the same requirements.
6. Since the Venezuelan State is a State based on the rule of law, the rights and duties of the inhabitants (nationals and aliens) are laid down in legal norms. The Constitution contains a specific title concerning the "duties, rights and guarantees" of the human person (inhabitant of the Republic) and, in this connection, defines individual, social, economic and political rights (articles 51 to 116).
7. In spite of the existence of constitutional and legislative norms and of regulations relating to these rights, the Constitution contains a norm of jus naturale (article 50) which provides that:

"The enunciation of rights and guarantees contained in this Constitution shall not be construed as a denial of others which, being inherent in the human person, are not expressly mentioned herein."

8. This norm demonstrates that the Venezuelan State will provide legal protection to all persons without distinction as to their nationality, in all matters relating to the rights inherent in the human person, even if some of these rights are not specifically laid down.

9. The combination of the legal precept and the article based on jus naturale delimits the rights and duties of aliens in Venezuela and ensures their effectiveness.

10. Furthermore, on the basis of such international instruments as the Universal Declaration of Human Rights (art. 6), the International Covenant on Civil and Political Rights (art. 2), the International Covenant on Economic, Social and Cultural Rights (part II, art. 2), and the International Convention on the Elimination of All Forms of Racial Discrimination, regional conventions, treaties and so forth, Venezuela is a country in which non-citizens are assured of effective implementation of the legal norms and principles governing the protection of their rights and freedoms.

11. Therefore, in the legal context, we find not humanitarian gestures and good will (which in themselves are highly commendable), but a legal framework of pre-established rights and duties, with full imperium, which confers on aliens a recognized juridical status.

12. The foregoing considerations constitute the basis for an analysis of the "draft declaration of the human rights of individuals who are not citizens of the country in which they live".

13. Since they will be set forth in a declaration, the norms will not constitute a binding instrument. Nevertheless, it is understood that their authority and observance is limited to international and internal relations based on civilized coexistence and recognition of the human rights of all human beings without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, the declaration has legal support in domestic and international legislation; accordingly, the document is analysed on the basis of legal interpretation.

Article 1 (draft declaration)

"For the purposes of this Declaration, the term 'non-citizen' shall apply to any individual who lawfully resides in a State of which he is not a national."

14. Three aspects of this norm give rise to some difficulties of application and interpretation:

(a) "Non-citizen": Under the domestic legal norm in Venezuela, the "Act concerning aliens and its Regulations", there are two categories of aliens: residents and non-residents (tourists, travellers in transit, local visitors or visitors in border areas and transients per se). The legal scope of the rights under each category depends on its nature and on the length of the alien's stay in Venezuela.

From the legal point of view, it is deemed more appropriate to consider as a "non-citizen" a person who is not a national of the State in which he is present and who is an alien under the domestic legislation of that country.

(b) "Resides": In Venezuelan law, this term refers to an extended authorized stay and in this instance the person qualifies as a resident.

In using the word "resides", does the article refer only to residents or also to other categories of aliens? If it is used in the broad sense, it would be better to say "who resides or is present" or simply "who is present". The wording with the broader sense - that is, "who is present" - seems more in keeping with the objective of the declaration.

(c) "Lawfully": At first view, the declaration should apply to any individual who is not a national of the State in which he is present and another article, depending on its content, should also apply to non-citizens who are lawfully present in the country. In this respect, articles 4, 5, 6, 7 (paras. 1 and 2) and 10 would certainly apply (see below the content of these norms).

15. Nevertheless, it is felt that the declaration should mention, as indeed it does, the lawfulness of the presence of the non-citizen in the country, without prejudice to any rights which a person violating the law may enjoy as a human being, because a civilized State based on the rule of law does not react and respond to unlawful acts with unlawful measures.

16. It is therefore suggested that the requirement of lawfulness should be retained, without prejudice to the rights of the human being who violates the law through his presence in the country of which he is not a national.

Article 2

"1. Non-citizens shall observe the laws in force in the State in which they reside and refrain from illegal activities prejudicial to the State.

"2. Every State is entitled to expect that non-citizens will respect the customs and traditions of the people of the State."

17. Article 2, paragraph 1: It would suffice to retain the first part: "Non-citizens shall observe the laws in force in the State in which they reside"; the second part seems redundant.

18. With regard to the word "reside", see the observations above.

19. Article 2, paragraph 2: It is suggested that this paragraph should be reworded. In this regard it is felt that, in a civilized and democratic society, respect for customs and traditions should be mutual without this implying reciprocity in the strict sense. The principle of majority rule does not apply with regard to customs and traditions. For example, with respect to religious matters and freedom of worship, external pressure is inadmissible, as it is also in the field of cultural traditions and folklore. It is obvious that coexistence means the free circulation of ideas and exposure to the influences of lifestyles; nevertheless, respect for customs and traditions must be considered in all aspects in conjunction with the objective of social peace and protection of human dignity.

20. It is proposed that the following text should replace the text in question:

"Non-citizens and nationals shall respect each other's customs and traditions in order to safeguard public order and the rights and freedoms inherent in the human person."

21. In this proposal, respect for customs and traditions refers not to observance of or compliance with customs and traditions but rather, as stated earlier, to conduct which is not prejudicial to public order or the rights inherent in the human person.

Article 3

"Every State shall make public any laws, regulations or administrative measures which distinguish between citizens and non-citizens or affect the rights of non-citizens."

22. Does this norm apply to any kind of publication other than that which generally occurs when official texts are made public?

23. From the legal point of view, the answer to that question is negative and, in any case, any other kind of publication is unnecessary.

Article 4

"Notwithstanding any distinction which a State is entitled to make between its citizens and non-citizens, every non-citizen shall enjoy at least the following rights, always respecting the obligations imposed upon a non-citizen by article 2, and subject to the limitations provided for in article 29 of the Universal Declaration of Human Rights:

"(i) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution;

"(ii) The right to equal access to and equal treatment before the tribunals and all other organs administering justice, and to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

- "(iii) The right to freedom of movement and to choice of residence within the borders of the State, subject to such restrictions as are provided by law and are absolutely necessary for compelling reasons of public policy, public order, national security, public health or morals;
- "(iv) The right to leave the country and return to his own country;
- "(v) The right to marriage and choice of spouse;
- "(vi) The right to own property alone as well as in association with others;
- "(vii) The right to freedom of thought, conscience and religion;
- "(viii) The right to freedom of opinion and expression;
- "(ix) The right to freedom of peaceful assembly and association;
- "(x) The right to retain his own language, culture and traditions."

24. Article 4, chapeau: It is suggested that the words "at least" be deleted. In the context they are superfluous and are not in conformity with normative usage.

25. Article 4, subparagraphs (i) and (ii): These rights would also be enjoyed by persons who are unlawfully in the country.

26. Article 4, subparagraph (iii): This is applicable only to persons who are lawfully in the country.

27. Article 4, subparagraph (iv): The addition of the following phrase is suggested: "with due protection against reprisals, sanctions or punishment".

28. Article 4, subparagraph (v): See above, article 4, subparagraph (iii). It is suggested that the norm contained in the text should be replaced by the Venezuelan proposal contained in paragraph 46 of document A/C.3/38/11 of 30 November 1983, as follows:

"The right to choose a spouse, to marry, to found a family and to be reunited with his or her spouse, unmarried minor children, upon conditions provided for by national legislation, and if permitted by domestic law, other family members."

29. Article 4, subparagraphs (vi)-(x): The rights considered here will apply only to persons who are lawfully in the country, in conformity with the legislation in force.

Article 5

"No non-citizen shall be subjected to arbitrary arrest or detention."

/...

30. This is acceptable in its present wording. This norm will apply regardless of whether the non-citizen is in the country lawfully or unlawfully.

Article 6

"No non-citizen shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

31. See remark on article 5 above.

Article 7

"1. No non-citizen shall be subjected to arbitrary expulsion or deportation.

"2. A non-citizen may be expelled from the territory of a State only in pursuance of a decision reached in accordance with law, and shall, except where compelling reasons of national security otherwise require, be allowed to submit reasons against his expulsion and to have his case reviewed by and be represented for the purpose before the competent authority or a person or persons especially designated by the competent authority.

"3. Collective expulsion of non-citizens is prohibited."

32. Article 7, paragraph 1: Regardless of whether the presence is lawful or unlawful (see article 1 above).

33. Article 7, paragraph 2: Same comments as for article 7, paragraph 1. It is suggested that only the first part of the paragraph be retained, i.e. "A non-citizen may be expelled from the territory of a State only in pursuance of a decision reached in accordance with law".

34. The second part of the provision is out of keeping with the Declaration and its spirit and should be deleted.

35. Indeed, the right of any persons to be heard, with the proper guarantees, cannot be refused, since such a position would be a denial of justice.

36. Article 7, paragraph 3: This text is acceptable.

Article 8

"Notwithstanding any distinction which a State is entitled to make between its citizens and non-citizens, every non-citizen shall enjoy at least the following economic and social rights, always respecting the obligations imposed on a non-citizen by article 2:

"(i) The right to just and favourable conditions of work, to equal pay for equal work, and to just and fair remuneration;

- "(ii) The right to repatriate earnings and savings, in accordance with national laws in force;
- "(iii) The right to join trade unions and participate in their activities, subject to national laws in force;
- "(iv) The right to public health, medical care, social security, social service and education, provided that the minimum requirements for participation in national schemes are met and that undue strain is not placed on the resources of the State."

37. The norm should be applied only to persons lawfully resident (domiciled) in the country.

38. Article 8, subparagraphs (i) and (ii): This text is acceptable.

39. Article 8, subparagraph (iii): The text of this subparagraph should be replaced by the proposal of the United Nations Educational, Scientific and Cultural Organization (UNESCO) dated 23 August 1983, as follows:

"The right to join trade unions and other organizations or associations, and to participate in their activities to the same extent and under the same conditions as nationals of the State."

40. Article 8, subparagraph (iv): The text should be replaced by the UNESCO proposal, as follows:

"The right to health protection, medical care, social security, social service, education, professional training and rest and leisure to the same extent and under the same conditions as nationals of the State."

The rest of the text should be deleted.

Article 9

"1. Non non-citizen shall be subjected to arbitrary confiscation of his lawful acquired assets.

"2. Any non-citizen whose assets are expropriated in whole or in part in accordance with national laws in force shall have the right to just compensation."

41. This text is acceptable.

Article 10

"Any non-citizen shall be free to communicate with the consulate or diplomatic mission of his country, or in their absence, with the consulate or diplomatic mission or any other State entrusted with the protection of his own country's interests in the State where he resides."

42. This text is acceptable. See article 1 (c) above.

Conclusion

43. The comments on the text in question reflect its legal nature and its relationship with international legal instruments and national law.

44. With regard to international jurisdiction, it was considered that "the individual as such, regardless of nationality, has become the subject of international law and receives direct protection of his rights and freedoms through legally enforceable international provisions" (see the Study prepared by the Baroness Elles, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/392/Rev.1, para. 20).

45. With regard to national jurisdiction, State sovereignty and the principle of legality were borne in mind.

46. The first three preambular paragraphs of the Declaration were considered as implicit premises: respect for and observance and guarantee of the human rights of all human beings, without discrimination; the axiom that all human beings are born free and equal in dignity and rights; respect for the human being as a person before the law; equality before the law and the legal protection of all human beings; and protection against any discrimination. Those premises constitute the spirit of the draft declaration on the rights of non-citizens.

47. Finally, it is advisable that, irrespective of the legal security which a legal instrument may provide, the universal declaration on the rights of non-citizens should be considered in the light of the fact that the "alien" or "non-citizen" is not a strange being, but our neighbour and fellow man.
