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REPORT OF THE ECONOMIC AND SOCIAL COUNCIL

Draft report of the open-ended Working Group on the elaboration
of the draft declaration on the human rights of individuals who
are not citizens of the country in which they live

Chairman/Rapporteur: Mrs. Halima Embarek WARZAZI (Morocco)

INTRODUCTION

1. The present Working Group, open to all Member States, was established under General Assembly resolution 39/103 for the purpose of concluding the elaboration of the draft declaration on the human rights of individuals who are not citizens of the country in which they live. The Working Group met during the fortieth session of the General Assembly from 7 October to _____ 1985. It held nine meetings on 7, 8, 15, 18, _____ October and _____ 1985, with the participation of delegations from all regions and observers of

2. The Working Group had before it the following documents:

(a) Revised draft declaration on the human rights of individuals who are not citizens of the country in which they live (A/35/363, annex);

(b) Report of the Chairman of the open-ended Working Group established during the thirty-fifth session of the General Assembly (A/C.3/35/14 and Corr.1 and 2 (Spanish only));

(c) Report of the open-ended Working Group established during the thirty-sixth session of the General Assembly (A/C.3/36/11);

(d) Report of the open-ended Working Group established during the thirty-seventh session of the General Assembly (A/C.3/37/8 and Corr.1 (French only));

(e) Report of the open-ended Working Group established during the thirty-eighth session of the General Assembly (A/38/11 and Corr.1 and Corr.2 (Russian only));

(f) Report of the open-ended Working Group established during the thirty-ninth session of the General Assembly (A/C.3/39/9 and Corr.1 (English and Russian only));

(g) Report of the Secretary-General containing comments received from Governments (A/40/638 and Add.1 and 2);

(h) Working paper submitted by the Chairman containing the text of provisions the consideration of which was pending before the Working Group (A/C.3/40/WG.2/CRP.1);

(i) Working paper submitted by the Chairman containing a compilation of proposals on article 1 of the draft declaration (A/C.3/40/WG.2/CRP.2).

3. At its first meeting on 7 October 1985, the Working Group re-elected Mrs. Halima Embarek Warzazi (Morocco) as Chairman/Rapporteur by acclamation.

SECOND READING OF THE OPERATIVE PART OF THE DRAFT DECLARATION ON
THE HUMAN RIGHTS OF INDIVIDUALS WHO ARE NOT CITIZENS OF THE
COUNTRY IN WHICH THEY LIVE

4. It may be recalled that, at its meetings held during the thirty-fifth to thirty-seventh sessions of the General Assembly, the Working Group provisionally agreed to articles 1 to 10 of the draft declaration. The texts of those articles appear in the annex to document A/C.3/37/8. Square brackets indicate proposals on which the Working Group did not reach agreement at the time.

5. At the thirty-eighth session, the Working Group continued its consideration of the draft declaration and adopted the preamble. The Working Group then proceeded to the second reading of the operative part of the draft declaration and adopted article 2; article 3; chapeau and subparagraphs (a), (b), (c), (e) and (f) of paragraph 1 and subparagraphs (a) to (f) of paragraph 2 of article 4; article 5 and article 6. It was understood that consideration of those articles was subject for some delegations to the elaboration of the part relating to definitions. During the thirty-ninth session, at the 9th meeting, held on 20 November 1984, the representative of France stated that his delegation reserved its position to revert to subparagraph (c) of paragraph 1 of article 4 at a later stage (A/C.3/39/9, para. 5).

6. At the thirty-ninth session, the Working Group continued its second reading of the operative part of the draft declaration and adopted subparagraph (d) of

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paragraph 1 and the chapeau of paragraph 2 of article 4; article 7; article 8; article 9; and article 10.

7. At the fortieth session, the Working Group continued its second reading of the operative part of the draft declaration and adopted _____.

Article 1

8. The Working Group discussed article 1, regarding the definition of the term "alien", at its 1st, 2nd _____ meetings held on 7, 8 _____ October and _____ 1985.

9. The text of article 1, as it had emerged from the first reading, reads as follows:

"For the purposes of this Declaration, the term 'alien' shall apply to any individual who [lawfully] [resides] [is present] in a State of which he is neither a national nor a citizen".

10. At the outset of the debate some delegations recalled their position expressed at the 1984 session that final adoption of certain provisions was subject to the elaboration of the part relating to definitions.

11. At the 2nd meeting on 8 October, the representation of Yugoslavia proposed to delete the words "is present" and the square brackets around the words "lawfully" and "resides", so that article 1 would read as follows:

"For the purposes of this Declaration, the term 'alien' shall apply to any individual who lawfully resides in a State of which he is neither a national nor a citizen".

12. At the same meeting, the representative of the Soviet Union reverted to his Government's proposal expressed at the thirty-eighth session (A/38/147/Add.1, para. 42). According to that proposal, article 1 should be worded as follows:

"For the purposes of this Declaration, the term 'alien' shall apply to a person who lawfully resides or is present in a State of which he is not a citizen".

13. The representative of Italy stated that he could not accept the inclusion of the word "lawfully" before the word "resides", as proposed by Yugoslavia. He could agree with the Soviet proposal with the understanding that the word "lawfully" did not apply to the words "is present".

14. The representative of France pointed out that the Working Group was faced with a question of methodology with regard to article 1, namely, whether to adopt a restrictive or a broad definition of the term "alien". His delegation opted for a broad definition which would make no reference to the legality of the alien's presence in the territory of a State. It would then be specified in each article which rights would be applicable to lawful aliens only and which ones to all aliens. Such a broad definition would follow the practice established in other international instruments, such as the Universal Declaration of Human Rights. At the 2nd meeting on 8 October, the representative of France proposed the following definition:

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"For the purposes of this Declaration, the term 'alien' shall apply to any individual who is present in a State of which he is neither a national nor a citizen".

15. The Chairman pointed out that it appeared to be the feeling of the Working Group that unlawful aliens should be protected and thus enjoy some rights under the draft Declaration; certain rights, on the other hand, should be reserved only for aliens lawfully present or lawfully residing in the territory of a State. In light of the debate, the Chairman invited comments on the issue of whether a restrictive or a broad definition of the term 'alien' should be adopted.

16. The representatives of Ecuador, Egypt, Greece, Italy, Senegal, Sweden and the Netherlands expressed their preference for a broad definition of the term "alien" in article 1.

17. The representative of Italy pointed out that such an approach would be in keeping with the thrust of other human rights instruments which first provided for rights for all and then stipulated exceptions. Most of the articles of the draft Declaration adopted at first reading pertained to all aliens and it would thus be a simpler task for the Working Group to specify which provisions applied to lawful aliens only.

18. The representative of the Netherlands stated that human rights instruments such as the Declaration had to take into account and protect unlawful aliens who were particularly weak and vulnerable to improper behaviour on the part of Governments.

19. The representative of Senegal expressed the opinion that a restrictive definition would go against the rationale of having such a declaration. It appeared to his delegation that references to domestic law included in the draft declaration made acceptable a broad definition in article 1.

20. The representative of Sweden recalled her delegation's proposal made at the thirty-seventh session which read as follows (A/C.3/37/8, para. 13):

"For the purposes of this Declaration, the term 'alien' shall apply to any individual who is present in a State of which he is neither a national nor a citizen". Articles shall only apply to aliens who lawfully reside in a State of which they are neither nationals nor citizens".

The representative of the Netherlands supported the Swedish proposal.

21. The representatives of Canada, the Federal Republic of Germany and the United States expressed their preference for a definition in article 1 which would refer to lawful aliens only.

22. The representative of the United States recalled that article 1, as originally proposed (A/35/363, annex), limited the scope of the draft declaration to "any individual who lawfully resides in a State of which he is not a national". Her delegation wished to see such a definition complemented, however, with a clearly worded savings clause along the lines of a relevant proposal of the United States, at the thirty-eighth session (A/C.3/38/11, para. 29) as follows:

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"However, all individuals present within a State of which they are neither nationals nor citizens shall enjoy all those human rights and fundamental freedoms ensured under relevant existing international instruments, customary international law or applicable domestic law".

23. The representative of the Federal Republic of Germany stated that his delegation had a problem with encompassing unlawful residents in the definition. In his country social rights were reserved only for persons lawfully present. He agreed that unlawful aliens should be granted all fundamental human rights under the International Covenant on Civil and Political Rights. A list of those rights was included in a recent submission of his Government (A/40/638).

24. The representative of Canada supported the view that a restrictive definition in article 1 should be complemented with a savings clause providing that all individuals should enjoy the rights recognized under other human rights instruments.

25. In light of the discussions held, the representatives of France and Italy presented, at the 3rd meeting on 15 October, an informal working paper containing a proposed consolidation of the articles of the draft declaration. In introducing the informal working paper, the representative of France stated that the definition suggested therein was, as a matter of principle in such a human rights instrument, a broad definition. Corresponding changes had been made in articles 4, 7 and 8. Article 4 contained the rights which should apply to all aliens; article 7 the rights which should apply to aliens lawfully present in the territory of a State; and article 8 the rights which should apply to aliens lawfully residing in the territory of a State. Articles 1, 4, 7, 8 and one of the two new articles as reformulated in the informal working paper, read as follows:

"Article 1

"For the purposes of this Declaration, the term 'alien' shall apply to any individual who is present in a State of which he is neither a national nor a citizen."

"Article 4

"1. Aliens shall enjoy, in accordance with domestic law, in particular the following rights:

(a) The right to life, liberty and security of person;

(b) The right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence;

(c) The right to equal access to, and equal treatment before courts, tribunals and all other organs and authorities administering justice and, when necessary, to free assistance of an interpreter in criminal proceedings and, when prescribed by law, other proceedings;

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- (d) The right to choose a spouse, to marry, to found a family;
- (e) The right to freedom of thought, opinion, conscience and religion;
- (f) The right to retain their own language, culture and tradition;
- (g) The right to leave the country;
- (h) The right to freedom of expression;
- (i) The right to manifest one's religion or whatever belief;
- (j) The right to own property alone as well as in association with others in accordance with domestic law."

"Article 7

"1. An alien lawfully in the territory of a State may be expelled therefrom 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 the 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 specially designated by the competent authority. Individual or collective expulsion of such aliens on grounds of race, colour, religion, culture, descent or national or ethnic origin is prohibited.

"2. An alien lawfully in the territory of a State shall also enjoy the right to liberty of movement and freedom to choose his residence within the borders of the State."

"Article 8

"1. Aliens lawfully residing in the territory of a State shall enjoy, subject to such restrictions as are prescribed by law and which are necessary in a democratic society in the interests of national security, public safety, public order, public health or morals or the protection of the rights and freedoms of others, and which are consistent with the other rights recognized in the relevant international instruments and those set forth in the present Declaration the following rights:

"(a) The right to peaceful assembly and the right to freedom of association;

"(b) Subject to national legislation and due authorization, the spouse and minor or dependent children of an alien shall be admitted to accompany, join and stay with the alien.

"2. They shall also enjoy in accordance with the national laws, the following economic and social rights, subject to their obligations referred to in article 2:

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"(a) The right to safe and healthy working conditions, to fair wages and equal remuneration for work of equal value without distinction of any kind, in particular, women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

"(b) The right to transfer abroad earnings, savings or other personal monetary assets, in accordance with existing currency regulations;

"(c) The right to join trade unions and other organizations or associations of their choice and to participate in their activities. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

"(d) The right to health protection, medical care, social security, social service, education, rest and leisure, provided that they fulfil the requirements under the relevant regulations for the participation of citizens and that undue strain is not placed on the resources of the State.

"3. With a view to protecting the rights of aliens carrying on lawful paid activities in the country in which they find themselves, such rights may be specified by the Governments concerned in multilateral or bilateral conventions."

"New article

"No provision of this Declaration shall be interpreted as restricting the right of any State to establish differences between nationals and aliens. However, such differences shall not be incompatible with the specific provisions of the Universal Declaration of Human Rights and of applicable international legal instruments in force for that State."

26. At the same meeting, the representative of the United Kingdom suggested to amend article 1, as contained in their informal working paper, by adding the phrase "unless otherwise stated" after the words "the term 'alien' shall". The text of article 1 as amended by the representative of the United Kingdom and accepted by the representatives of France and Italy, read as follows:

"Article 1

"For the purposes of this Declaration, the term 'alien' shall, unless otherwise stated, apply to any individual who is present in a State of which he is neither a national nor a citizen."

27. All the delegations which commented on the informal working paper expressed their appreciation to the representatives of France and Italy for their contribution to the Working Group.

28. Commenting on the amendment of the United Kingdom, the representative of the Netherlands said that in his understanding the proviso "unless otherwise stated" applied to the words "is present".

29. The representative of Canada suggested that the safeguard clause contained in one of the new articles should be placed at the beginning of the draft declaration. The text of that new article, as formulated at the thirty-eighth session (A/C.3/38/11, para. 79), read as follows:

"New article

"This Declaration shall not prejudice the enjoyment of rights accorded by conventional and customary international law to all individuals present within a State of which they are not nationals or citizens, even where the present Declaration does not recognize such rights or recognizes them to a lesser extent."

30. Some delegations expressed doubts on the suggested reorganization of articles 4 and 8 in the informal working paper. It was pointed out, in particular, that the texts mirrored somewhat inexactly the language of the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights and that it would be desirable to align the texts to the Covenants.

31. The representative of the Soviet Union stated that the difficulties that his delegation had expressed previously had not been resolved. The text of the draft declaration had been so rearranged in the informal working paper that the thrust of the articles and the balance of the text as a whole had been altered. His delegation would, therefore, prefer to work on the definition of the term "alien" and perhaps add new articles, while leaving unchanged the texts of the articles on which a certain consensus had already been achieved. A provision could perhaps be added in article 1 stating that the declaration would not affect foreigners illegally in the territory of a State for purposes contrary to the Charter of the United Nations. He recalled, in that connection, the concerns expressed by his delegation at the thirty-eighth session (A/C.3/38/11, para. 23).

32. A suggestion was made by the representative of Greece to reorganize article 4 by grouping in one paragraph the fundamental rights applicable to all aliens and in another paragraph the rights applicable to lawful aliens only.

33. In view of the debate and at the suggestion of the Chairman, it was agreed to hold informal consultations before the 4th meeting of the Working Group.
