



**Economic and Social
Council**

Distr.
GENERAL

E/CN.4/Sub.2/1988/NGO/25
1 September 1988

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Fortieth Session
Agenda item 15 (e)

PROMOTION, PROTECTION AND RESTORATION OF HUMAN RIGHTS
AT NATIONAL, REGIONAL AND INTERNATIONAL LEVEL

THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING
HIS OWN, AND TO RETURN TO HIS COUNTRY

Written statement submitted by International League for Human Rights,
a non-governmental organization in consultative status (category II)

The Secretary-General has received the following communication which is
circulated in accordance with Economic and Social Council
resolution 1296 (XLIV).

[30 August 1988]

On behalf of the International League for Human Rights, we express our appreciation for the comprehensive and forward-looking final report and preliminary draft declaration on the right of everyone to leave any country and to return to one's country, submitted by Special Rapporteur Mubanga-Chipoya pursuant to his mandate from the Sub-Commission. In this important report, he has returned to a field of inquiry in which there has been much distinguished historical, socio-economic and jurisprudential scholarship, including the pioneering study and draft principles presented by another Special Rapporteur, Jose Ingles of the Philippines, and approved by the Sub-Commission a full quarter-century ago. He has also taken into account the declarations formulated by eminent legal scholars and NGO representatives at two important international conferences: the Uppsala and Strasbourg declarations, adopted in those cities in 1972 and 1986, respectively. All three sets of principles, together with Mubanga-Chipoya's draft declaration, are included in Addendum 1 to the latter's final report. (E/CN.4/Sub.2/1988/35 and Add.1). The observations we offer on this occasion centre on the principles in this draft. We look forward to a subsequent opportunity to offer our views on the report itself.

Right to leave

With regard to the four drafts in the Addendum, we are impressed with the fact that, with few exceptions, the standards set forth in them correspond substantially, which confirms the existence of a clear consensus on the essential elements of the right to leave and return. These elements include, inter alia, the following: States are obligated to enact relevant implementing legislation or other measures, and to publish and make them easily accessible; they are prohibited from penalizing or harassing persons seeking to exercise the right to leave, including depriving them of their nationality in retaliation; and States may restrict the exercise of the right only when "necessary" to respond - in a proportionate manner - to a pressing public and social need in pursuit of a legitimate aim. Of course, the restrictions must be clear, specific and not arbitrarily applied.

The four drafts reflect the consensus that a restriction based on "national security" may be invoked only where the exercise of the right poses a clear, imminent and serious danger to the State, and that when invoked on the ground that the individual acquired military secrets, the restriction may be applied only for a limited time. The consensus also extends to the view that an application to leave should not be rejected because relatives (other than parents regarding minors sui juris) or employers have withheld their consent, and that persons prevented from emigrating should have the right to appeal to a higher administrative or judicial authority, including counsel of their choice in any such proceeding.

Brain drain

On two issues, the Special Rapporteur's draft apparently diverges from the earlier texts: the brain drain and the right to return. Article 4 of his draft would impose an obligation on "every" State to "prevent adverse economic consequences through the 'brain drain'". It is unclear which States are the object of this obligation - the developing countries incurring the claimed brain drain, the industrialized countries purportedly benefiting from it, or the international community as a whole - or all these categories. The word "prevent" in this context is also vague. For example, it is recommended that,

to prevent adverse consequences, the developing countries concerned may, indeed must, impose wholesale closures on departure of skilled or professional citizens, and/or that, to the same end, industrialized countries may or must enact exclusionary immigration laws? Clearly, either of such policies would be unwise.

Also uncertain is the meaning of the second half of Article 4, obligating every State to make "bilateral and multilateral arrangements for the benefit of the developing countries concerned". In short, Article 4 as a whole needs clarification. In discussing it, the Sub-Commission may find helpful the findings and views of academic specialists who have studied the brain drain question from various socio-economic as well as jurisprudential perspectives.

We begin with Special Rapporteur Ingles who, it will be recalled, stated that while restrictions on the departure of skilled and professional persons sometimes may be justified in developing countries, they are normally never justified in highly industrialized countries, and never justified in either category of countries in cases of temporary departure. He also maintained that even in developing countries, exit restrictions based on the brain drain should be limited to cases in which a contractual understanding exists, as when the skilled or professional person has agreed to a specified period of service in the home country in exchange for government-financed training.

Second, scholars are not at all agreed on the extent of the brain-drain problem, or of its causes, effects or remedies. For example, the distinguished Notre Dame University political scientist, Alan Dowty, in his important 1987 book Closed Borders, concludes that the brain-drain problem exists only in a limited number of middle level developing countries. The least developed countries have not yet produced skilled or professional persons and, in any event, lack ways to employ them in significant numbers. Moreover, the brain drain does not exist in the more fully developed countries, which have sufficient openings in which to employ their skills and talents at home. Dowty also points out that high brain drain is often found side-by-side with strong economic growth. Also significant is the fact that a high proportion of professionals leave some developing countries for non-economic reasons, because they are members of disadvantaged minority groups or are troubled by the political policies of the régime, rather than for economic opportunities abroad.

In order to cope with such real brain drain as may exist, most experts do not counsel exit restrictions, but rather call for positive measures - for example, programmes for exchange of skills among developing States, or the UNDP's programme to assist the return of expatriates as visiting consultants.

As to the proposal in Article 4 obligating "every" State to make bilateral and multilateral arrangements for the benefit of the developing country concerned, we suggest that need alone is sufficient justification for assisting needy developing countries without having to base assistance on compensation for non-measurable brain drain or corresponding gains by receiving countries.

From the legal standpoint, we endorse the view of Hurst Hannum in his illuminating study, The Right to Leave and Return in International Law and Practice, Nijhof, 1987, that under the Covenant, "vague assertions" of brain drain or other economic factors are not a sufficient basis for limiting

emigration, that these factors must rise to the level of a threat to the "public order" of the country, must be "necessary" to cope with this threat, and proportional and temporary, and that general de jure or de facto denial of the human right to leave is prohibited.

Relevant to the philosophical premises of brain drain theoreticians is the view of some States that their citizens have no reason to want to leave the society to which purportedly they owe their skills and all else that they possess, and that when their wish to do so conflicts with the State's interest, the latter must always prevail. This view can no longer be defended, now that most States espousing it are parties to the Covenant and other human rights treaties, for a cardinal rule of international law is that States are bound to fulfil their treaty obligations in good faith.

Right to return

The other issue on which we wish to comment briefly, is the right to return. In general, we suggest that it is preferable to address this right with a view to formulating principles which all States are expected to apply in their respective laws, policies and practices. As explained by the Swedish legal scholar Stig Jagerskjold in his study of "Freedom of Movement" in Professor Henkin's 1981 book, The International Bill of Rights, specific mass refugee situations resulting from wars or boundary changes are more effectively resolved through political negotiations rather than the pursuit of individual claims to return, especially - we would add - when linked to competing claims to territories.

As we know, the Ingles draft principles, like the European and American conventions and most national legislations, limit the right to return to nationals. The present Special Rapporteur's draft declaration, in Article 10 (b), would extend the right to "permanent legal residents" as well. The Sub-Commission may wish to consider the variant in the Strasbourg Declaration's Article 7, which limits the right to return to "permanent legal residents who temporarily leave their country of residence".

Gorbachev proposal

Finally, we recall General Secretary Gorbachev's recommendation, in September of last year, for an enhanced role for the United Nations in world affairs. He gave us an example, "co-ordinating unified legal criteria for handling in a humanitarian spirit issues of the reunification of families, marriages, contacts between people and organizations, visa regulations, and so on"; and he proposed that, "What has been achieved on this account within the framework of the all-European process" - that is, the Helsinki Final Act Process - "should be accepted as a starting point".

The General Secretary's proposal is surely relevant to the Sub-Commission's present project. As to his suggestion to take the Helsinki process as a starting point, the Sub-Commission will recall that the Final Act, in principle VII of the Declaration on Principles Guiding Relations Between Participating States, provides that these States "will fulfil their obligations by which they are bound under international declarations and agreements in this field, including the International Covenants on Human Rights".

Mr. Chairman, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the regional human rights instruments all affirm the status of the right to leave and return as an inherent right - subject only to specified restrictions - not as a favour, privilege or "humanitarian" offering bestowed by the State. Thus, although the Final Act emphasizes family reunification, it also affirms the broader, fundamental human right to leave any country - which is especially critical for ethnic and religious minorities subject to various forms of discrimination.

* * *

The International League for Human Rights earnestly hopes that the Sub-Commission, bearing in mind our observations, will approve with appropriate emendations the draft declaration proposed by the Special Rapporteur and forward it to the Commission on Human Rights, which, we hope, will approve it in turn.