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REPORT OF THE ECONOMIC AND SOCIAL COUNCIL

Question of 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

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I. INTRODUCTION

1. By resolution 37/169 of 17 December 1982, the General Assembly, recalling Economic and Social Council resolution 1980/29 of 2 May 1980 and its resolutions 35/199 of 15 December 1980 and 36/165 of 16 December 1981, in which it requested the Secretary-General to transmit to Governments, competent organs of the United Nations system and international organizations concerned the reports of the open-ended working group established at its thirty-fifth (A/C.3/35/14 and Corr.1), thirty-sixth (A/C.3/36/11) and thirty-seventh (A/C.3/37/8 and Corr.1) sessions to elaborate a draft declaration on the human rights of individuals who are not citizens of the country in which they live. The Assembly invited the addressees to bring up to date the comments previously submitted in accordance with Economic and Social Council decision 1979/36 of 10 May 1979 or to submit new comments concerning the draft declaration on the basis of the above-mentioned reports, by 30 June 1983.

2. Accordingly, on 28 February 1983 the Secretary-General wrote to the Governments of States Members of the United Nations, members of the specialized agencies or parties to the Statute of the International Court of Justice, to the heads of competent organs of the United Nations system, of specialized agencies and other intergovernmental organizations concerned, forwarding the reports of the open-ended working group and inviting them to submit their comments thereon. The present report summarizes substantive replies received as at 30 July 1983 from: the Governments of Chile, Netherlands and Spain; the United Nations Centre for Social Development and Humanitarian Affairs and the United Nations High Commissioner for Refugees; the International Labour Organisation, the United Nations Industrial Development Organization and the World Health Organization. The Economic Commission for Latin America, the Food and Agricultural Organization of the United Nations, the World Bank and the Organisation for Economic Co-operation and Development stated that they had no comments to submit on the subject. In accordance with editorial directives endorsed by the General Assembly, the replies are not reproduced in extenso in the present report. The full texts are kept in the files of the Secretariat and may be consulted by delegations upon request.

II. COMMENTS RECEIVED FROM GOVERNMENTS

CHILE

[Original: Spanish]

[6 June 1983]

3. The Government of Chile wishes to report the following:

(a) The Constitution confers constitutional rights and duties on all individuals, regardless of their nationality;

/...

(b) In Chile, political rights are granted to aliens who have resided in the country for more than five years; such aliens may, on fulfilling certain requirements, exercise the right to vote in the cases and in the manner laid down by law (art. 14 of the Chilean Constitution).

NETHERLANDS

[Original: English]

[10 May 1983]

4. The Government of the Netherlands referred to its previous comments of 2 November 1979, which were embodied in document E/CN.4/1354, and stated that it did not consider it expedient to submit further comments.

SPAIN

[Original: Spanish]

[16 May 1983]

5. The Spanish Government has no specific comments to make on the draft declaration since the principles contained therein coincide with the provisions of article 13 of the Spanish Constitution.

III. COMMENTS RECEIVED FROM COMPETENT ORGANS OF THE UNITED NATIONS SYSTEM

CENTRE FOR SOCIAL DEVELOPMENT AND HUMANITARIAN AFFAIRS

[Original: English]

[1 July 1983]

6. The term "alien" defined in article 1 of the draft declaration should apply to migrants in an irregular situation. Otherwise, the declaration would have a limited effect because, except for migrant workers whose legal situation is regulated by international instruments, it would apply to very small groups of the population living abroad on short-term assignments. Inclusion of migrants in an irregular situation would make the declaration an important international instrument designed to ensure that this comparatively large and vulnerable group enjoys fundamental human rights.

7. In order for the declaration to make a contribution to improving the welfare of aliens, however this term is defined, this instrument should include the right of the alien to be joined by his or her family and the rights to health protection, medical care, social security, social service, education, vocational training, rest and leisure.

8. Without prejudice to the right of any country to expel aliens, the declaration should ensure that such expulsions shall occur in a way that preserves their dignity and does not infringe upon fundamental human rights. Mass expulsion of aliens should be prohibited, as it could result in violations of their fundamental human rights.

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

[Original: English]

[22 June 1983]

9. The United Nations High Commissioner for Refugees pointed out that the draft declaration was of direct relevance to the work of the High Commissioner as a refugee definition an alien in his country of refuge. While a United Nations Treaty and a Protocol were adopted for the protection of refugees, namely, the 1951 United Nations Refugee Convention and its 1967 Protocol, a further instrument dealing with aliens in general would naturally be of interest to the Office. Two considerations are adduced in this respect: first, certain standards in the 1951 Refugee Convention are related to the standards accorded aliens in general, and, secondly, certain classes of persons who are compelled to leave their country of origin and who require international protection may not be covered by existing refugee instruments.

10. As a general comment, UNHCR regards the elaboration of a new instrument useful in so far as it strengthens and develops the protection of aliens already provided for in various international instruments. It may be particularly useful to elaborate certain general principles in a progressive way. It is also important that no new instrument should have the effect of detracting in any way from what has already been achieved. It therefore noted with satisfaction the various draft provisions that have been proposed which will have the effect of "saving" existing standards.

11. With regard to questions of substance, the United Nations High Commissioner for Refugees supports the inclusion of helpful provisions on family reunion, as well as those regarding the prohibition of arbitrary or discriminatory expulsion whether collective or individual. It would be desirable if certain basic minimum standards could be included in the declaration for the protection of aliens generally, regardless of their status. UNHCR would also favour the inclusion of a provision on international solidarity and co-operation in securing the rights of aliens.

IV. COMMENTS RECEIVED FROM SPECIALIZED AGENCIES

INTERNATIONAL LABOUR ORGANISATION

[Original: English]

[10 June 1983]

Personal scope of the proposed declaration

12. The text of article 1 adopted by the Working Group at the thirty-fifth session of the General Assembly leaves open the question whether the declaration should apply to all aliens who are in a State of which they are not nationals or citizens or only those who are there lawfully. It also leaves open the question whether the applicability of the declaration is to be based on a person's presence or his residence in the State concerned. As is apparent from paragraphs 12 to 15 and 19 to 23 of the Working Group's report of 1982 (A/C.3/37/8), it is necessary to consider this question in the light of the substantive provisions of the declaration. Certain rights must be guaranteed to all individuals, even if their presence in the country is illegal. Others may be recognized only in favour of aliens lawfully in the country concerned. Others still may be limited to persons authorized to reside in the country. Attention is drawn, in this connection, to the fact that, under Part I of the ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), which deals with migration in abusive conditions, certain guarantees are laid down even for migrants in an irregular situation. The proposals for a draft convention on the rights of all migrant workers and their families which are under consideration in another working group of the General Assembly also include a series of provisions establishing guarantees to be enjoyed by all migrant workers and their families, whether in a regular situation or not.

Relation of the draft declaration to the proposed convention on the rights of all migrant workers and their families

13. While the proposed declaration on the human rights of aliens is not confined to migrant workers and their families, the latter constitute a major part of the persons who will be covered by the declaration and, in the case of certain economic and social rights, will constitute the entire group of beneficiaries of the declaration. It therefore seems essential that the drafting of the two texts be co-ordinated, so as to ensure consistency in the standards to be established.

Consistency of the draft declaration with existing international instruments

14. This question also calls for careful consideration. The Office of Legal Affairs, in the paper set out in annex I to the Working Group's report of 1980 (A/C.3/35/14), pointed out that the provisions of a number of instruments, such as the Universal Declaration of Human Rights and the International Covenants on Human Rights, applied to all individuals and, only in a few instances, limited the rights in question to citizens of the country concerned. It is important that the proposed declaration should not call into question rights already guaranteed by existing instruments, since this would go counter to the very aim of adopting it.

For example, it has been suggested, in relation to article 4, paragraph 2, adopted by the Working Group at the thirty-sixth session of the General Assembly, that the rights therein enumerated might be subject to restrictions, inter alia, in the interests of national development. This would introduce very extensive possibilities of limiting the enjoyment of the rights in question, which are not authorized by existing instruments. To take another example, in a field of direct concern to ILO, the economic and social rights enumerated in article 8 would be subject to a number of limitations. Their enjoyment would be "in accordance with national law" and would be subject to the obligation under article 2 to observe the laws of the State concerned. In addition, it has been suggested that the rights of aliens to join trade unions and to participate in their activities be made subject not only to the rules of the organizations concerned but also to national laws in force. All these limitations would permit restrictions going beyond those permitted by the ILO Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87). Article 2 of that Convention provides that workers and employers, without distinction whatsoever (and therefore also without any distinction of nationality) shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without prior authorization. Other provisions deal with the rights of organizations to function freely without interference from the public authorities. Article 8 of the Convention states that, in exercising the rights provided for in the Convention, workers and employers and their respective organizations, like other persons or organized collectivities, shall respect the law of the land, but then goes on to provide that the law of the land shall not be such as to impair, nor be so applied as to impair, the guarantees provided for in the Convention. Apart from the substantial differences between the draft provisions of the proposed declaration and the ILO Convention as regards limitations on trade union rights, it should also be noted that, unlike the ILO Convention, the draft declaration would not recognize the right of aliens to establish trade unions.

15. Reference should also be made to the right to health protection, medical care and social security, likewise mentioned in article 8 of the draft declaration, in respect of which it has been suggested that it should be granted to aliens only on the condition that undue strain was not placed on the resources of the State. The same limitation would apply to the right of aliens to rest and leisure. Such limitations would be consistent neither with the International Covenant on Economic, Social and Cultural Rights (arts. 7 and 9) nor with relevant ILO Conventions.

Distinction between nationals and aliens

16. During the discussions of the Working Group at the thirty-seventh session of the General Assembly, as indicated in paragraphs 29 and 30 of its report (A/C.3/37/8), a new article was provisionally adopted with a view to permitting a State to establish differences between nationals and aliens, provided that they are not incompatible with the specific provisions of applicable international legal instruments in force for that State. Consideration needs to be given not only to possible conflicts between such distinctions and other international instruments, but also to conflicts between this article and other provisions of the draft declaration itself. It would therefore be desirable to expand the second sentence

of the article in question to provide also that such differences shall not be incompatible with the rights of aliens under other provisions of the declaration.

Saving clause

17. Apart from measures which may be taken in the further consideration of the existing draft with a view to avoiding inconsistencies between the proposed declaration and other international instruments, an appropriate saving clause should be inserted. Consideration has already been given to this matter in the Working Group, as indicated in paragraphs 74 to 77 of its report of 1982 (A/C.3/37/8).

UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION

[Original: English]

[6 May 1983]

18. The United Nations Industrial Development Organization expressed full support for the work of the open-ended Working Group regarding its examination of the draft declaration with regard to General Assembly resolution 37/169. However, since the subject of the draft declaration does not fall within its terms of reference and mandate as defined in Assembly resolution 2152 (XXI) UNIDO has no comments to make on the reports of the open-ended Working Group.

WORLD HEALTH ORGANIZATION

[Original: English]

[26 May 1983]

19. Article 6 of the draft declaration (A/C.3/37/8, p. 20) provides that "no alien shall be subjected without his free consent to medical or scientific experimentation". This wording does not represent modern thinking on the question of consent in that it is not now considered sufficient alone that the consent be free or voluntary; the consent must also be informed in that the subject must be made fully aware of the nature of the experiment, whether it will be of any benefit to him or her and of the degree of risk involved. Therefore, to bring the text into line with the Helsinki Declaration and the WHO/CIOMS guidelines on Research involving Human Subjects we suggest that the words "and informed" be inserted in the text of the draft article between "free" and "consent", so that this would read "No alien shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and, in particular, no alien shall be subjected without his free and informed consent to medical or scientific experimentation".