

United Nations
ECONOMIC
AND
SOCIAL COUNCIL

Nations Unies
CONSEIL
ECONOMIQUE
ET SOCIAL

UNRESTRICTED

E/CN.4/82/Add.2
22 April 1948

ORIGINAL: ENGLISH

COMMISSION ON HUMAN RIGHTS

THIRD SESSION

COMMENTS FROM GOVERNMENTS ON THE DRAFT INTERNATIONAL DECLARATION
ON HUMAN RIGHTS, DRAFT INTERNATIONAL COVENANT ON HUMAN
RIGHTS AND THE QUESTION OF IMPLEMENTATION

Communication received from Brazil

The Brazilian delegation to the United Nations presents its compliments to the Secretary-General of the United Nations and, with reference to the Secretariat's note No. SOA/17/1/01, of January 9, 1948, has the honour to transmit the enclosed comments and observations of the Brazilian Government on the draft International Declaration, the draft International Covenant and the suggestions on implementation, prepared by the Commission on Human Rights at its Second Session.

New York, April 19, 1948

/COMMENTS

COMMENTS AND OBSERVATIONS OF THE BRAZILIAN GOVERNMENT
ON THE DRAFT "BILL OF RIGHTS"

DRAFT INTERNATIONAL DECLARATION ON HUMAN RIGHTS

1. The International Declaration on Human Rights should be as broad as possible. There would hardly be any point in making a declaration embodying only those principles already accepted by the States. The Declaration should constitute an ideal that the States would strive to reach, thereby fulfilling the deficiencies in their juridical organizations. It would thus become a stimulus to the progress of the legal organization of all States.
2. On the other hand, the text of the Declaration should be as concise as possible. Such conciseness, however, should not prevent an accurate definition of acknowledged rights.
3. Attention should be paid to the duties that correspond to the rights. This relation has been emphasized in juridical doctrine and in the most advanced legislations. It seems that, aside from the general reference in Article 2, it has not been always felicitously indicated in the draft Declaration.
4. In the draft there are references to duties of the State. It may be observed that such references would fit better in a specific Declaration of Rights and Duties of States than in the present one.
5. In certain instances the guarantees of the rights are presented as substantive rights. It is well known, furthermore, that guarantees are often as important as the corresponding rights, or even more so, for without guarantees such rights are void. For this reason, it would be better to replace the expression "rights and liberties", used in the draft, by "rights and guarantees".

COMMENTS ON THE ARTICLES OF THE INTERNATIONAL DRAFT DECLARATION

Article 1

It would seem that this article could be dropped as an independent provision. Only a part of it, namely the statement that all men "should act towards one another like brothers", might be retained and incorporated into Article 2 since it involves a duty which should go along with the other duties of the individual, stated in that article. The remainder of Article 1 has a certain philosophical and mystical quality. Unfortunately, it is not exactly true that all men are endowed by nature with reason and conscience.

/Article 2

Article 2

As mentioned in the foregoing comment, it should be added here that "all should act toward one another like brothers" - or, at least, in a fraternal spirit. The text would thus become complete, for the exercise of the rights of each one is limited not only by the rights of others but also by this duty of fraternity, which modern law recognizes in a revival of the old Roman precept: summum jus, summa injuria.

Instead of "just requirements" it would be better to say "legal requirements". The requirements of the State should not be motivated by a vague and subjective notion of justice, but by strict legality. The Commission on Human Rights was quite justified in adopting the form - democratic state - proposed by the representative of China.

The Brazilian Government is in accord with the view expressed by the representative of the United Kingdom that the State should not be regarded as "limiting" the rights of the individual. It would be preferable, however, to say that the exercise of these rights is "conditioned" by the rights of others, by the legal requirements of the State and by the duty of fraternity.

Finally, it is the view of the Brazilian Government that the proper position for this article reworded as suggested in the text should be after all others dealing with individual rights. The restriction contained in Article 16, No. 3, of the Covenant, should be included in this article.

Article 3

In accord with the preceding comments, this article would become No. 1. This would be, in fact, the proper position for it, in view of its text.

Article 4

In this article there should be included the restriction contained in Article 5 of the Covenant, also the amplification contained in Article 6 of the Covenant.

Article 5

Article 9 of the Covenant mentions in detail the cases in which arrest or detention may be effected. These exceptions indicate that the article under discussion should not be drafted in terms as broad as those appearing in the text submitted. It is also made evident that it should not be said "after due process" but rather "by due process".

Article 6

There might be added, after the last word: "and in which he can be understood". This would complete the guarantees given the accused in the matter of expression.

Article 7

No. 2 should be deleted from this article, since it involves an unacceptable derogation of the traditional precept - nullum crimen sine lege.

On the other hand, it is suggested that there might be added that no one can be compelled in any way to confess responsibility for an act or omission of which he be accused.

Article 8

No comment.

Article 9

The first part should be redrafted as follows: "Every one shall be entitled to protection under law not only from unreasonable interference with, but also from any offense against his reputation, his privacy and his family (additions are underlined).

It would be proper to mention freedom from threats, terror or oppression.

The inviolability of the home is subject to restrictions arising out of the necessity for repressing crime - and it should so be stated.

The inviolability of correspondence should figure in Article 17 which deals with freedom of expression.

Article 10

The statement of principle in No. 1 is followed immediately by the restriction applying thereto, while that in No. 2 is presented in absolute terms and its restriction appears in Article 11, No. 2, of the Covenant.

Reference should be made in this article to the guarantees of the alien against arbitrary expulsion, which appear in Article 12 of the Covenant.

Article 11

It is stated that asylum shall not be accorded to criminals. Exception should be made of persons accused of crimes having a merely political nature.

Article 12

Because of its broadness, the precept contained in this article should be incorporated into Article 3 of the draft, which, in accord with previous comments, would become Article 1.

Article 13

There is, perhaps, a small flaw in drafting technique in this article. It is evident, and as such it has been expressly stated in the General Comments on the Draft Declaration, No. 1, that the word "men" comprises both men and women. In this article, however, it has been used in a restrictive sense. This and No. 2 of Article 24 are the only instances of specification in the matter appearing in the Declaration. It would be preferable to use

/here a generic

here a generic expression, such as "every one" or "every person" which appear repeatedly throughout the Declaration.

The Brazilian Government considers acceptable the additional wording proposed by the Representative of the United Kingdom, "married persons shall have the right to reside together in any country from which they cannot be lawfully excluded", or at least the first nine words of the foregoing.

The following item, from the draft on the same subject prepared by the Inter-American Juridical Commission, should be added:

"The parents have the right of paternal power over their children during the minority of the latter and the essential obligation to maintain and support them."

It might be possible to improve the text, to read as follows:

"Parents shall have paternal power over their minor or non-emancipated children, involving the obligation to provide them with sustenance and education."

Article 14

It is not enough to say that "no one shall be arbitrarily deprived of his property." It should be said also "or without prior and fair indemnity."

Article 15

The Brazilian Government recommends the following disposition:

"No State shall deny its nationality to a person having right thereto by birth, in accord with local legislation, nor deprive of such nationality any person who may have acquired it by birth, except by motive of an act declared by law to be incompatible with subsistence of nationality."

It would be advisable to include also the following item proposed by the Inter-American Juridical Commission in drafting a similar document:

"Every person shall be entitled to renounce his nationality, whether such nationality be native or acquired, and to adopt the nationality of another State."

It might be convenient to add: "...in accordance with the laws of the latter and without detriment to prior obligations".

Article 16

In No. 1 of this article, it would be better to say "unrestricted" instead of "absolute and sacred".

The manifestation of beliefs, in public or in private, as mentioned in No. 2, is subject to restrictions arising out of requirements of public order and it should so be stated therein, as is done, perhaps in somewhat too broad a manner, in Article 16 of the Covenant.

Articles 17 and 18

The Brazilian Government would prefer that the text of the Declaration follow the draft text proposed by the Commission on Human Rights for Article 17 of the Covenant.

In further connection with these Articles, attention is drawn to the comments to follow, under Article No. 19.

Article 19

The principle embodied in this article is presented without the restrictions which are mentioned in Article 18 of the draft covenant. The right to establish associations is regulated by Article 19 of the Covenant. In the comments on Article 19 of the Draft Declaration, which appear in Annex A, Part II, of the Report of the 2nd Session of the Human Rights Commission, the remark is found that "it is understood that no individual or association that aims to destroy the fundamental rights and freedoms set forth in this Declaration can claim protection under this article". It is recommended that a disposition to that effect be included both in the text of the Declaration and in that of the Covenant and extended so as to apply to associations aiming at the violent destruction of social or political order.

The right to constitute associations in the manner prescribed by law should be added to that of "participating" therein.

The constitutions and the legislation of some countries contain justifiable restrictions to the participation of aliens in certain associations. An example of such restrictions is found in the Brazilian Constitution, Articles 155 and 160. Domestic regulations of this nature should be admissible under the International Bill of Rights.

Article 20

No remarks.

Article 21

The right set forth in this article should be subject to restrictions in political capacity through legal incompetence (minority, criminality, etc.).

Article 22

No. 2 appears unnecessary in view of the comprehensiveness of No. 1.

Article 23

As pointed out by the United States representative, it would be best not to mention positive duties of the State. However, if it is decided that such mention is to be made, No. 3, which appears redundant in view of No. 2, might be worded as proposed by the representative of Byelorussia: "The State is obliged to take all necessary measures against unemployment."

/The question

The question of compulsory labour, which is clearly set forth in Nos. 2 and 3 of Article 8 of the Covenant, has not been taken into consideration in the article under review.

Article 24

No. 2 seems unnecessary in view of Article 3, which assures all rights and freedoms set forth in the Declaration, without distinction of sex.

Article 25

The Brazilian Government endorses the additional wording suggested by the delegate of Uruguay: "Every one has the duty to preserve his health". Here, likewise, the observation of the United States representative as to the declaration of positive duties for the State should be taken into account.

Article 26

The remarks under Articles 24 and 25 also apply to this article.

Articles 27 and 28

No remarks.

Article 29

This article would be better placed immediately following Article 24, thus bringing together the dispositions relating to labour. This would result in the further advantage that the present Article 30 would be located immediately following Articles 27 and 28 which deal with education.

Article 30

Add: without detriment to literary, scientific and artistic property rights.

Article 31

The Brazilian Government would prefer the text proposed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. It would seem advisable, however, to add that such provisions do not refer to groups formed by immigration, whether spontaneous or officially fostered, into independent States already in existence at the time of immigration.

Article 32

Besides the Charter, reference might be made to the Bill of Rights.

Article 33

No remarks.

The Brazilian Government is in agreement with the article suggested in Annex A, Part 2, No. 2 of the Report of the Commission on Human Rights:

"When a Government, group, or individual seriously or systematically tramples the fundamental human rights and freedoms, individuals and peoples have the right to resist oppression and tyranny."

Such right to resist should be recognized, not only as against

/oppression

oppression and tyranny, but always against illegality, and it should be manifested through adequate judicial recourse, through non-co-operation and even, in extremis, by force.

It should be made evident that the enumeration of rights in the Declaration is not exhaustive but merely exemplary and that it does not preclude the consideration of implied rights; a statement to this effect should be included in the Declaration.

DRAFT INTERNATIONAL COVENANT ON HUMAN RIGHTS

Article 1.

The Brazilian Government is of the opinion that attention should be given at the proper moment to the advisability of referring to the International Declaration either in this Article or in the Preamble to precede the Covenant.

Article 2

Section (b) seems unnecessary. Section (e) should come before sections (c) (d). These two last sections could be combined, thus ensuring not only an "effective remedy", but also recourse to an independent judiciary for enforcement.

Article 3

In the recess between two sessions of the Assembly, the request could be made under authority of a resolution of the Economic and Social Council.

Article 4

It should be said, after "a State may take measures" - "in accordance with its own political Constitution."

The restrictions of a general character set forth in Article 16, No. 3, of the Covenant, in relation to freedom of religion, should also be mentioned here.

Article 5

It would be preferable to say "by law in force at the time when the offense was committed", precisely as mentioned in Article 7 of the Declaration. Instead of the periphrase "it shall be unlawful" it would be better to say "no one shall be deprived of his life", following the form adopted for Article 7 and the subsequent articles.

The representative of Uruguay suggested an additional article for the Covenant which would ban the death penalty for political offenses; - it would be convenient to say "merely political." The Brazilian Government endorses this suggestion, which could be incorporated in the article under review.

Article 6

The comments made under the preceding article as to the expression "it" shall be unlawful" are applicable also to the present article.

Article 7

No remarks.

Article 8

It is suggested that the word "crime" in No. 2 of this article be substituted by "offense", inasmuch as there are cases, such as vagrancy, in which legal punishment often takes the shape of compulsory work.

The provisions of section 3 (a) should include not only conscientious objections but women also, since the latter may be subject to compulsory services of a non-military nature, as exemplified in the case of the Brazilian Constitution, Article 181, paragraph 1.

The Brazilian Government suggests a provision, which could perhaps be inserted as item (d) in this Article:

"the duty which every person has of contributing to the welfare of the community to which he belongs and of co-operating with the state in measures for the preservation of social order."

This is consequent upon the fact that it is not only through work that every one can and should contribute to the common welfare; there are many who, although unable to work, can still render an efficient contribution through other means.

Article 9

No mention is made of flagrante delicto, although item (a) would seem to cover this case.

Article 10

The case of servitude has been mentioned in Article 8 and there is no need to restate it here. The prohibition of imprisonment in consequence of breach of contractual obligation would fit better under Article 9.

Article 11

No remarks.

Article 12

The expression "arbitrarily expelled" is rather vague. The following wording is suggested:

"No alien legally admitted to the territory of a State shall be expelled therefrom without judicial homologation of the order of expulsion."

Article 13

In connection with No. 1 of the article, it might be appropriate to add a provision along similar lines to that in the final part of Article 6

/of the

of the Declaration, which reads "and if he appears in person to have the procedure explained to him in a manner in which he can understand it and to use a language which he can speak." Attention is drawn to the remarks of the Brazilian Government under Article 6 of the Declaration.

No. 2 might be amplified with a guarantee of full defense as set forth in the second period of Article 7, No. 1, of the Declaration: "at which he has been given all guarantees necessary for his defense."

Article 14

Attention is called to the comments of the Brazilian Government under Article 7 of the Declaration.

Article 15

The Brazilian Government endorses the suggestion of the representative of Uruguay, that the expression "no human being" be used instead of "no person", thus excluding juridical persons.

Article 16

The Brazilian Government is of the opinion that No. 1 in this Article should be divided into two parts along the lines of Article 16 of the Declaration, the first part to set forth the right to freedom of religion, conscience and belief and the second part the right to manifest such religious or other beliefs and to practice the forms of worship and observance pertaining thereto.

The restrictions set forth in No. 3 of this Article should apply to all the rights embraced by the Covenant and it should therefore be reworded and located under Article 20 of the Covenant.

Article 17

The Brazilian Government prefers the text proposed by the Drafting Committee. Instead of "ideas" it would be less emphatic to say "concepts" or "opinions". Prior censorship of the press should also be explicitly banned.

Article 18

No remarks.

Article 19

This article refers to Article 17 which sets forth, in its No. 3, restrictions to the dissemination of information including publications intended or likely to incite persons to alter by violence the system of government or to promote disorder or crime. The Brazilian Government feels that associations which implicitly aim at the dissemination of such information should be banned, even when apparently constituted for the promotion of permissible objectives.

Article 20

Attention is called to the comments on No. 3 of Article 16 of the Covenant.

Article 21

No remarks.

Article 22

This provision appears to be a truism. If, however, it is decided to place it on record, it would be better to insert it under Article 20 which deals with general restrictions of rights.

Article 23

The Brazilian Government believes that it should be permissible for every State Member of the United Nations to accede to the Covenant, with reservations as to one or more provisions, a faculty which is already recognized in Article 24 in the case of Federal States.

Articles 24, 25 and 26

No remarks.

Article 27

This article is an unnecessary repetition of a principle of treaty interpretation which is generally recognized in international law.

IMPLEMENTATION

(Annex C to the Report of the 2nd Session of
the Commission on Human Rights)

Question A

The Brazilian Government is in accord with the negative answer to this question, given by the Working Group on Implementation.

Question B

The Group has rightly recognized that, since the States enter into international agreements to regulate certain matters, such matters are thereby excluded from the domestic jurisdiction of the States and therefore the disposition envisaged in this question is unnecessary.

Question C

The Brazilian Government is in agreement with the draft proposal presented by the Australian Delegate.

Question D

The Brazilian Government is in general agreement with the solutions advanced by the Group, with the exception of the recommendation that "wherever this is not precluded by the constitutional law of the ratifying State, the foregoing measures should preferably be taken prior to ratification," since, as observed by the United States representative, it is not possible to demand full implementation before ratification. This is

all the more so since it is only after ratification that the treaties become part of internal legislation and if a treaty modifies previous internal legislation the measures of implementation cannot be established before the corresponding law comes into force.

INTERNATIONAL MACHINERY FOR THE EFFECTIVE SUPERVISION
AND ENFORCEMENT OF THE CONVENTION ON HUMAN RIGHTS

Suggestion (a)

The Brazilian Government is in accord with the conclusions arrived at in regard to this suggestion.

Suggestion (b)

The Brazilian Government endorses the considerations presented by the Working Group, and notes with satisfaction the growing recognition of the importance of the individual in International Law.

The Brazilian Government realizes that the second basic conclusion, particularly, is essential to ensure the efficiency of the Convention.

Suggestions (c) and (d)

No special remarks at this stage.

Suggestion (e)

The Brazilian Government concurs in the views manifested by several Delegates, that the setting up of the agencies envisaged in this suggestion is premature. However, a possibility should be left open for the creation of such agencies at the proper time.

INTERNATIONAL COURT OF HUMAN RIGHTS

Recognition of the right to recourse to an international tribunal is a desirable objective. The controversy appears to be only as to whether a new tribunal is to be created or the services of the present International Court of Justice adapted to the new objective.

It is questioned also if the International Court of Justice should give compulsory decisions or merely advisory opinions.

The Brazilian Government favours a broadening of the jurisdiction of the Court through a Convention whereby States would recognize the compulsory nature of such jurisdiction. In this way, additional expenditure and other inconveniences would be avoided. At least, during the initial stages, while the agenda of the Court does not yet absorb the full time of its members and until the cases dealing with Human Rights assume a considerable volume, the creation of a new tribunal appears to be avoidable.

SPECIAL COMMENT

The Brazilian Government favours the inclusion, in the International Bill of Rights, of Articles 5, 6 and 7, proposed by the United Kingdom and mentioned in the Report of the Commission, Annex C, Part 2, No.4.