



International Catholic
Migration Commission

Quaker United Nations Office



The rights of non-citizens

Joint Statement addressed to the Committee on the Elimination of Racial Discrimination

Geneva, 1 March 2004

Dear Members of the Committee on Racial Discrimination

We, the undersigned organisations, would like to express our appreciation for the opportunity that the Committee offers to non-governmental organisations to present submissions concerning the thematic questions discussed by it. Such cooperation between the Committee and NGOs is highly valued.

We welcome the thematic discussion of the Committee on the Elimination of Racial Discrimination on non-citizens and discrimination and the initiative to adopt an updated general recommendation on the rights of non-citizens. Indeed, although international law protects non-citizens from violations of their human rights and prohibits discrimination against them, considerable discrepancy prevails between the human rights guaranteed to non-citizens under international law and the reality with which they are confronted everywhere in the world. And while this is not a new phenomenon, there is a danger that such discriminatory practices are becoming increasingly entrenched in national laws and policies. Indeed, the measures taken by many countries to combat terrorism have had a particularly discriminatory effect on non-citizens, who have been arbitrarily detained, have suffered racially motivated violence, have been extradited or expelled to countries where they faced torture or other ill-treatment, and suffered other serious violations of their human rights.

It is clear from the status of international human rights law and the jurisprudence of various international human rights bodies that non-citizens enjoy human rights – both civil and political as well as economic, social and cultural - on the same footing as citizens, with very few and narrow exceptions. Indeed, as stated by the Special Rapporteur of the Sub-Commission on non-citizens, ‘all persons should by virtue of their essential humanity enjoy all human rights [...]’.¹ In a similar sense, the Committee on the Elimination of Racial Discrimination has held in its General Recommendation XI on the rights of non-citizens (1993) that ‘article 1 paragraph 2 must not detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights’. Equally, the Committee stated in its General Recommendation XX on article 5 (1996), ‘[m]any of the rights and freedoms mentioned in article 5, such as the right to equal treatment before tribunals, are to be enjoyed by all persons living in a given State’.

The general application of all rights to non-citizens can equally be deduced from other international human rights treaties and has been affirmed by other Committees. For example, it is clear from the wording of the International Covenant on Civil and Political Rights that the rights guaranteed in it apply to citizens and non-citizens alike, except where specifically provided in a particular provision.² In this sense, the Human Rights Committee has held that ‘[t]here shall be no discrimination between aliens and citizens in the application of these rights’.³ Likewise, as far as political rights are concerned, Article 42, paragraph 2 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which entered into force on 1st July 2003, provides that ‘States of employment shall facilitate, in accordance with their national legislation, the consultation and participation of migrant workers and members of their families in decisions concerning the life and administration of local communities.’ This provision clearly encourages the political participation of migrant workers. Article 6 (1) of the Convention on the Participation of Foreigners in Public Life at Local Level, adopted by the Council of Europe in 1992 and which entered into force in 1997, reads: ‘Each Party undertakes, subject to the provisions of Article 9, paragraph 1, [restrictions in time of war or other public emergency] to grant to every foreign resident the right to vote and to stand for election in local authority elections, provided that he fulfils the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the 5 years preceding the elections.’ A number of States grant such voting rights to migrants, including at times to stateless persons, in other world regions including South America, Africa and the Pacific. In the same sense, the International Covenant on Economic, Social and Cultural Rights is not limited to nationals, but applies to citizens and non-citizens alike.⁴

Thus, States have a duty to respect, protect, ensure and promote the civil and political as well as the economic, social and cultural rights of non-citizens. However, as stated above, the reality is often otherwise, and it is against this background that we wish to recall some basic principles of non-discrimination which seem to us to be of particular importance to non-citizens.

¹ E/CN.4/Sub.2/2003/23, 26 May 2003, executive summary.

² There are only two exceptions to the application of the rights of the Covenant to citizens and non-citizens alike: Article 25 ICCPR concerning political rights and Article 12 ICCPR concerning freedom of movement and choice of residence, which applies only to persons lawfully within the territory of a State.

³ See Human Rights Committee, General Comment No. 15 on the position of aliens under the Covenant (1986), para. 7.

⁴ See *Concluding observations of the Committee on Economic, Social and Cultural Rights on Israel*, E/C.12/1/Add.90, 26 June 2003, par. 15, in which the Committee expresses concern at the State Party’s position that the Covenant is not applicable to populations other than the Israelis in the occupied territories. The exception of Article 2 (3) is confined to very specific situations and must be interpreted narrowly.

Duty of States to guarantee the prohibition of discrimination against non-citizens

- *• All non-citizens, regardless of their legal status, have a right not to be subjected to racial discrimination, either in purpose or in effect. The prohibition of racial discrimination is a peremptory norm of international law and must be respected at all times.⁵
- *• In order to comply with their obligation of non-discrimination, States have a duty to adopt effective measures to combat racism and xenophobia against non-citizens by State actors as well as by any person or organisation. This comprises, amongst others, the duty to review or enact or amend national legislation, as appropriate, to eliminate all forms of racial discrimination against non-citizens (Article 2 of the Convention).
- *• Any distinction between citizens and non-citizens must rest on objective, rational, necessary and justified criteria, in order to avoid the arbitrary misuse by States of Article 1, paragraph 2 of the Convention.
- *• States have a duty to adopt adequate measures to eliminate, including through the enactment of appropriate legislation, the promotion of and incitement to racist violence against non-citizens, including by the media.

Discrimination among non-citizens

- *• The International Convention on the Elimination of all Forms of Racial Discrimination prohibits discrimination against any particular nationality among non-citizens.⁶ Distinctions among non-citizens on the basis of religion or against particular religious communities should be considered to constitute prohibited discrimination when religious communities are closely identified with particular countries, ethnic groups, or races.⁷
- *• Legal provisions of States concerning nationality, citizenship or naturalization may not discriminate against any particular nationality or national or ethnic group. Especially, States must ensure that the right to a nationality⁸ is guaranteed without discrimination based on race, colour, descent, or national or ethnic origin, according to Article 5 (d) (iii) of the Convention.⁹

⁵ Committee on the Elimination of Racial Discrimination, Statement on racial discrimination and measures to combat terrorism, 1 November 2002, UN Doc A/57/16, para. 4.

⁶ It should be noted that Article 1, paragraph 2, of the Convention on the Elimination of all Forms of Racial Discrimination contains one single and narrow exception to the application to the Convention, which concerns exclusions, restrictions or preferences made by a State Party to the Convention between citizens and non-citizens. It does not exclude from the scope of application of the Convention differentiations among non-citizens. Indeed, distinctions made between different categories of non-citizens are subject to the prohibition of racial discrimination and may only be justified if they serve a legitimate purpose and are proportionate to that purpose.

⁷ See *Concluding observations of the Committee on the Elimination of Racial Discrimination on the Islamic Republic of Iran*, 10 December 2003, CERD/C/63/CO/6, para. 14; *Concluding observations on Poland*, 21 March 2003, CERD/C/62/CO/6, para. 10, which refer to discrimination against religious communities.

⁸ Guaranteed, e.g., in Article 15 of the Universal Declaration on Human Rights, Article 24 ICCPR, Article 7 CRC, Article 9 of the Convention on the Reduction of Statelessness, Article 5 (d) (iii) CERD.

⁹ See Article 4 of the Convention; see also *Concluding Observations by the Committee on the Elimination of Racial Discrimination on Switzerland*, 21 May 2002, CERD/C/60/CO/14, para. 10; *Concluding Observations on Yemen*, 1 November 2002, A/57/18, para. 464; *Concluding observations on Croatia*, 21 May 2002, CERD/C/60/CO/4, para. 14; *Concluding observations on Qatar*, 20 March 2002, CERD/C/60/CO/11, para. 11.

- *• Counter-terrorist or other measures that distinguish, exclude, restrict or create preferences between particular groups of non-citizens on the basis of the country of their citizenship or origin constitute violations of Article 2 and Article 5 of the Convention, unless they are justified under the narrow conditions set by international law.

Protection from discriminatory abuse and violence

- *• States have a duty to protect non-citizens from discriminatory and unlawful practices and human rights abuses perpetrated by State agents, including arbitrary detention¹⁰ or race-related ill treatment or torture¹¹.
- *• States have a duty to investigate and punish violent crimes of a racist or xenophobic nature committed against non-citizens.¹² To this end, such acts must be made punishable in national law; the particular racist or xenophobic motivation or quality of offences must be recognised in the investigation and at trial;¹³ victims and families must be treated without discrimination, have participatory rights at all stages of the investigation and trial and be afforded, if necessary, free legal aid and representation.

Administration of justice

- *• In the administration of justice, non-citizens, regardless of their legal status, benefit from the same rights as citizens, namely the right to equality before the courts and tribunals and equal protection of the law, the right to liberty and security of the person, the right to a fair trial, and the right to an effective remedy. The rights to judicial review, the basic procedural safeguards against abuse in detention, and the basic requirements of fair trial are part of the non-derogable guarantees of international human rights law and must be respected at all times and without discrimination.
- *• Non-citizens who are detained have the right to consular protection as enshrined in Article 36 of the Vienna Convention on Consular Relations, in particular the right that

¹⁰ See the concern expressed in *Concluding Observations of the Committee on the Elimination of Racial Discrimination on New Zealand*, 1 November 2002, A/57/18, para. 429. See also Deliberation No. 5 of the Working Group on Arbitrary Detention entitled "Situation regarding immigrants and asylum-seekers" in Annex II, Report of the Working Group on Arbitrary Detention to the Fifty-Sixth Session of the Commission on Human Rights, 28 December 1999, UN Index: E/CN.4/2000/4

¹¹ *Concluding observations of the Committee on the Elimination of Racial Discrimination on Hungary*, 1 November 2002, A/57/18, paras. 378-379; *Concluding Observations on Switzerland*, 21 May 2002, CERD/C/60/CO/14, para. 12.

¹² See the *Concluding observations of the Committee on the Elimination of Racial Discrimination on Italy*, CERD/C/304/Add.68, 7 April 1999, paras. 9 and 14, *Concluding Observations on Hungary*, 1 November 2002, A/57/18, para. 379, *Concluding Observations on the Russian Federation*, 21 March 2003, para. 27, where the Committee calls for investigations and sanctions against perpetrators racist violence of ill-treatment against non-citizens by state agents and non-state actors.

¹³ With regard to the importance to investigate the specifically racist or discriminatory nature of a violent crime, the European Court of Human Rights, in a landmark judgment of 26 February 2004 in the case *Nachova and others v. Bulgaria*, held that whenever there is suspicion that a killing was motivated by racist attitudes, the investigation had to unmask any racist motive, as "[f]ailing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive to fundamental rights". It also considered that where the enquiry disregards evidence that shows that discrimination may have taken place "the **burden of proof shifts to the respondent Government**, which must satisfy the Court, on the basis of additional evidence or a convincing explanation of the facts, that the events complained of were not shaped by any prohibited discriminatory attitude on the part of State agents" (emphasis added) and found that the State had violated both the right to life (Article 2 ECHR) as well as the prohibition of discrimination (Article 14 ECHR).

the authorities of the host state inform the consular authorities of the country of which they are a national without delay, the right to freely communicate with the consular authorities of the country of which they are a national, the right to consular assistance, and the right to be informed of the right to consular assistance, whether the authorities of the host state are aware of the nationality of the non-citizen or not.¹⁴

- *• In accordance with Article 6 of the Convention States shall guarantee access to effective remedies, including equal access to national courts and the judicial system, for non-citizens who have been subject to discriminatory practices and shall grant reparation to non-citizens victims of discrimination on an equal basis as it is granted to citizens.

Measures of removal from the territory

- *• All non-citizens, regardless of their legal status, have a fundamental right without discrimination not to be returned or removed to a country or territory where they are at risk of being subject to torture and cruel, inhuman or degrading treatment (principle of non-refoulement).¹⁵ Asylum seekers and refugees should not be returned (refouled) to a country or territory where their lives or freedoms are at risk, or where they would face persecution.¹⁶
- *• States shall not expel persons collectively or massively.¹⁷

Particularly vulnerable groups

The broad category of ‘non-citizens’ must not detract from the different groups of persons covered by it: it indeed covers such diverse groups and communities as migrant workers with or without documents, refugees, asylum seekers and stateless persons. Many persons belonging to these groups face discrimination on several grounds.¹⁸ Moreover, non-citizen women and

¹⁴ See United Nations Commission on Human Rights, Resolution 2003/67 of 24 April 2003, para. 4 (f); Resolution 2002/77 of 25 April 2002, para. 4 (e); Resolution 2001/68 of 25 April 2001, para. 4 (d); Inter-American Court on Human Rights, Advisory Opinion OC-16/99 of October 1 1999, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Series A No. 16, para. 84; Inter-American Commission on Human Rights, Report No. 52/02, Merits, Case 11.753, *Ramón Martínez Villareal v United States*, 10 October 2002, para. 84; OAS General Assembly Resolution 1928, AG/RES. 1928 (XXXIII-O/03), *The Human Rights of All Migrant Workers and Their Families*, para. 2; Resolution 1898, AG/RES. 1898 (XXXII-O/02), para. 2; Resolution 1775 AG/RES. 1775 (XXXI-O/01), para. 4; Resolution 1717, AG/RES. 1717 (XX-0/00), para. 4; African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, DOC/OS(XXX)247, para. M (2) (d) and (e).

¹⁵ See, Article 3 of the Convention against Torture and Other cruel, Inhuman or Degrading Treatment or Punishment; Article 13 of the Inter-American Convention to Prevent and Punish Torture; Report of the Special Rapporteur on Torture, 26 February 2002, E/CN.4/2002/137, para. 14; Human Rights Committee, General Comment 20 on Article 7 (1992), para. 9; European Court of Human Rights, *Soering v. The United Kingdom*, Judgment of 7 July 1989, Series A No. 161, para. 111.

¹⁶ Article 33 of the 1951 Convention relating to the Status of Refugees. The principle of non-refoulement, under both Article 3 of the Torture Convention and Article 33 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol is considered to be a norm of customary international law.

¹⁷ See Article 13 of the International Covenant on Civil and Political Rights; Human Rights Committee, General Comment No. 15 on the position of aliens under the Covenant (1986), para. 10; see also Articles 22 and 56 of the Migrant Workers Convention. It is important to note that according to Article 22 of the Migrant Workers Convention, the prohibition of collective expulsion and the right to an individual decision by a competent authority in accordance with law is not dependent on the legal status of the migrant.

¹⁸ See World Conference against Racism Programme of Action: paragraphs 24 to 33 on migrants, and paragraphs 34 to 36 on refugees and asylum-seekers.

children may face multiple discrimination because they are non-citizens but also because of their age and/or gender. It is therefore important that States expressly recognise the particular risks for these persons and groups, in order to effectively eradicate racial discrimination against them. In particular, we wish to recall the prohibition of racial discrimination concerning the following groups:

- *• **Migrant workers:** The prohibition of racial discrimination applies to all migrant workers regardless of their legal status. Any distinction between citizens and migrant workers or between documented and undocumented migrant workers with regard to work relations and labour legislation is subject to the general prohibition of racial discrimination.¹⁹
- *• **Stateless persons:** States have an obligation to end racial discrimination against stateless persons, in particular by observing the non-discrimination obligations under the 1954 Convention relating to the Status of Stateless Persons and the objective of reducing statelessness under the 1961 Convention on the Reduction of Statelessness and should ratify these treaties where they have not done so.²⁰
- *• **Refugees and asylum seekers:** All refugees and asylum seekers have the right to seek and enjoy asylum without racial discrimination.²¹ State Parties to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol have a duty to apply provisions without discrimination as to race, religion or country of origin.²² Moreover, the 1951 Convention and its Protocol provide that refugees should be entitled to treatment at least as favourable as that accorded to citizens with respect to religion, protection of intellectual property, rationing measures, elementary education, public relief and assistance, labour legislation and social security, as well as fiscal taxes and charges.²³ The Convention and Protocol also require that States Parties accord refugees treatment no less favourable than that accorded to non-citizens generally with respect to exemption from legislative reciprocity, acquisition of property, non-political and non-profit making associations and trade unions, wage-earning employment, self-employment, professions, housing, post-elementary education and freedom of movement.²⁴ It should be noted that nothing in the Convention or Protocol shall impair any rights or benefits granted to refugees apart from this Convention.²⁵
- *• **Women:** States must take into account the multiple discrimination that non-citizen women often face, and eradicate racial discrimination against non-citizen women with particular regard to the discrimination that non-citizen women face because of their gender.²⁶ Particularly, women who are employed as migrant workers in the informal

¹⁹ See Article 25 of the Migrant Workers Convention; see also Inter-American Court of Human Rights, *Advisory Opinion OC-18 on the legal status and rights of undocumented migrants*, 17 September 2003, operative paragraphs 8-10; Article 6 ILO Migration for Employment Convention (Revised), 1949 (No.197) and Migrant Workers (Supplementary Provisions) Convention, 1975 (No.143).

²⁰ In this sense, the Committee has appealed to States to reduce statelessness, see for example *Concluding Observations on Switzerland*, 21 May 2002, CERD/C/60/CO/14, para. 10.

²¹ *Concluding observations of the Committee on the Elimination of Racial Discrimination on Sudan*, 27 April 2001, CERD/C/304/add.116, para. 15; *Concluding observations on China*, 9 August 2001, A/56/18, para. 246; *Concluding observations on Japan*, 27 April 2001, CERD/C/304/Add.114, para. 19; *Concluding observations on Costa Rica*, 20 March 2002, CERD/C/60/CO/3, para. 16.

²² Article 3 of the 1951 Convention.

²³ See in particular Articles 4, 16, 20, 22(1), 23, 24 and 29 of the 1951 Convention.

²⁴ See in particular Articles 7(1), 13, 15, 17, 18, 19, 21, 22(2), 26 of the 1951 Convention.

²⁵ Article 5 of the 1951 Convention.

²⁶ Cf. General Recommendation XXV (2000) on gender-related dimensions of racial discrimination. See also World Conference Against Racism Programme of Action, paragraphs 31 and 50.

or domestic sectors must be protected against discrimination, abuse and violence.²⁷ Also, States have a duty to protect, assist, and offer redress to non-citizens who may be victims of trafficking (frequently women and children) without racial discrimination.²⁸

- *• **Children:** Beyond the rights guaranteed by international treaties and customary law, non-citizen children, in accordance with Article 2 of the Convention on the Rights of the Child, enjoy the rights guaranteed in that Convention without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. In particular, children non-citizens have a right to education without discrimination and irrespective of their legal status.²⁹ Article 22 provides that states shall take appropriate measures to ensure that asylum seeking and refugee children receive protection and humanitarian assistance in the enjoyment of the applicable rights set out in the Convention and in other international instruments. Also, as Article 7 of the Convention on the Rights of the Child provides, a child 'shall be registered immediately after birth and shall have the right from birth to a name [...] [and] the right to acquire a nationality'.³⁰ Likewise, Article 29 of the Migrant Workers Convention provides that '[e]ach child of a migrant worker shall have the right to a name, to registration of birth and to a nationality.' States Parties shall ensure the implementation of these rights, 'in particular where the child would otherwise be stateless'. In all decisions concerning children, the best interest of the child must be the primary consideration.

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²⁷ See *Concluding observations of the Committee on the Elimination of Racial Discrimination on Kuwait*, 7 April 1999, CERD/C/304/Add.72, para. 15; *Concluding observations on Saudi Arabia*, 21 March 2003, CERD/C/62/CO/8, para. 17. See World Conference against Racism Programme of Action, paragraphs 67 and 105.

²⁸ See World Conference Against Racism Programme of Action, paragraph 38.

²⁹ See Committee on Economic, Social and Cultural Rights, General Comment No. 13 on the right to education (1999), para. 34.

³⁰ See also World Conference against Racism Programme of Action, paragraph 56.