

# The Rights of Non-citizens





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# Introduction<sup>1</sup>

All persons should, by virtue of their essential humanity, enjoy all human rights. Exceptional distinctions, for example between citizens and non-citizens, can be made only if they serve a legitimate State objective and are proportional to the achievement of that objective.

Citizens are persons who have been recognized by a State as having an effective link with it.<sup>2</sup> International law generally leaves to each State the authority to determine who qualifies as a citizen. Citizenship can ordinarily be acquired by being born in the country (known as *jus soli* or the law of the place), being born to a parent who is a citizen of the country (known as *jus sanguinis* or the law of blood), naturalization or a combination of these approaches.

A non-citizen is a person who has not been recognized as having these effective links to the country where he or she is located. There are different groups of non-citizens, including permanent residents, migrants, refugees, asylum-seekers, victims of trafficking, foreign students, temporary visitors, other kinds of non-immigrants and stateless people. While each of these groups may have rights based on separate legal regimes, the problems faced by most, if not all, non-citizens are very similar. These common concerns affect approximately 175 million individuals worldwide—or 3 per cent of the world's population.<sup>3</sup>

Non-citizens should have freedom from arbitrary killing, inhuman treatment, slavery, arbitrary arrest, unfair trial, invasions of privacy, refoulement, forced labour, child labour and violations of humanitarian law. They also have the right to marry; protection as minors; peaceful association and assembly; equality; freedom of religion and belief; social, cultural and economic rights; labour rights (for example, as to collective bargaining, workers' compensation, healthy and safe working conditions); and consular protection. While all human beings are entitled to equality in dignity and rights, States may narrowly draw distinctions between citizens and non-citizens with respect to political rights explicitly guaranteed to citizens and freedom of movement.

For non-citizens, there is, nevertheless, a large gap between the rights that international human rights law guarantees to them and the realities that they face. In many countries, there are institutional and pervasive problems confronting non-citizens. Nearly all categories of non-citizens face official and non-official discrimination. While in some countries there may be legal guarantees of equal treatment and recognition of the importance of non-citizens in achieving economic prosperity, non-citizens face hostile social and practical realities. They experience xenophobia, racism and sexism; language barriers and unfamiliar customs; lack of political representation; difficulty realizing their economic, social and cultural rights—particularly the right to work, the right to education and the right to health care; difficulty obtaining identity documents; and lack of means to

challenge violations of their human rights effectively or to have them remedied. Some non-citizens are subjected to arbitrary and often indefinite detention. They may have been traumatized by experiences of persecution or abuse in their countries of origin, but are detained side by side with criminals in prisons, which are frequently overcrowded, unhygienic and dangerous. In addition, detained non-citizens may be denied contact with their families, access to legal assistance and the opportunity to challenge their detention. Official hostility—often expressed in national legislation—has been especially flagrant during periods of war, racial animosity and high unemployment. For example, the situation has worsened since 11 September 2001, as some Governments have detained non-citizens in response to fears of terrorism. The narrow exceptions to the principle of non-discrimination that are permitted by international human rights law do not justify such pervasive violations of non-citizens' rights.

The principal objective of this publication is to highlight all the diverse sources of international law and emerging international standards protecting the rights of non-citizens, especially:

- The relevant provisions of the International Convention on the Elimination of All Forms of Racial Discrimination and other human rights treaties;
- The general comments, country conclusions and adjudications by the Committee on the Elimination of Racial Discrimination and other treaty bodies;
- The reports of the United Nations Commission on Human Rights thematic procedures on the human rights of migrants and racism;
- The relevant work of such other global institutions as the International Labour Organization and the Office of the United Nations High Commissioner for Refugees; and
- The reports of regional institutions, such as the European Commission against Racism and Intolerance.

Chapter I examines the general principle of equality for non-citizens. Chapter II explains in greater detail the sources and extent of specific non-citizen rights, including universal rights and freedoms; civil and political rights; and economic, social and cultural rights. Chapter III discusses the application of these rights to particular groups of non-citizens, such as stateless persons, refugees and asylum-seekers, non-citizen workers, and children.

# I. THE GENERAL PRINCIPLE OF EQUALITY FOR NON-CITIZENS

International human rights law is founded on the premise that all persons, by virtue of their essential humanity, should enjoy all human rights without discrimination<sup>4</sup> unless exceptional distinctions—for example between citizens and non-citizens—serve a legitimate State objective<sup>5</sup> and are proportional to the achievement of that objective.<sup>6</sup> Any approach to combating discrimination against non-citizens should take into account:

- (a) The interest of the State in specific rights (e.g., political rights, right to education, social security, other economic rights);
- (b) The different non-citizens and their relationship to that State (e.g., permanent residents, migrant workers, asylum-seekers, temporary residents, tourists, undocumented workers); and
- (c) Whether the State's interest or reason for distinguishing between citizens and non-citizens or among non-citizens (e.g., reciprocity, promoting development) is legitimate and proportionate.

**“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”**

*[International Covenant on Civil and Political Rights, art. 26]*

## A. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights provides an example of the general principle of equality that underlies international human rights law as it relates to non-citizens, and the narrow nature of exceptions to that principle. According to its article 2 (1), each State party:

*“undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*



Moreover, article 26 states that:

*“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour... national or social origin... or other status.”*

The Human Rights Committee has explained that:

*“the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”<sup>7</sup>*

**Human Rights Committee: “the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”**

The Human Rights Committee has also observed that the rights of non-citizens may be qualified only by such limitations as may be lawfully imposed under the International Covenant on Civil and Political Rights. Specifically, the Covenant permits States to draw distinctions between citizens and non-citizens with respect to two categories of rights: political rights explicitly guaranteed to citizens and freedom of movement. With regard to political rights, article 25 establishes that “every citizen” shall have the right to participate in public affairs, to vote and hold office, and to have access to public service.<sup>8</sup>

Regarding freedom of movement, article 12 (1) grants “the right to liberty of movement and freedom to choose [one’s] residence” only to persons who are “lawfully within the territory of a State”—that is, apparently permitting restrictions on undocumented migrants.

## **B. International Convention on the Elimination of All Forms of Racial Discrimination**

The International Convention on the Elimination of All Forms of Racial Discrimination also illustrates the narrow nature of exceptions to the general principle of equality. It indicates that States may make distinctions between citizens and non-citizens, but—unlike the International Covenant on Civil and Political Rights—it requires all non-citizens to be treated similarly. It defines racial discrimination in article 1 (1):

*“the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”*

Article 1 (2) and (3) of the Convention, however, seems at first to limit its application with regard to discrimination against non-citizens. Article 1 (2) states: “This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.” Article 1 (3) refines article 1 (2) by stating that: “Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, *provided that such provisions do not discriminate against any particular nationality.*” (emphasis added)

The Committee on the Elimination of Racial Discrimination indicated in its general recommendation XI, however, that these provisions need to be read in the light of the totality of human rights law:

*“Article 1, paragraph 2, must not be interpreted to 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.”<sup>9</sup>*

In its concluding observations regarding States’ reports as well as its opinions on individual communications, the Committee has further underscored the need for States parties to:

- Publicly condemn any acts of intolerance or hatred against persons belonging to particular racial, ethnic, national or religious groups,<sup>10</sup> and promote a better understanding of the principle of non-discrimination and of the situation of non-citizens;
- Make sure that non-citizens enjoy equal protection and recognition before the law;<sup>11</sup>
- Focus on the problems faced by non-citizens with regard to economic, social and cultural rights, notably in areas such as housing, education and employment;
- Guarantee the equal enjoyment of the right to adequate housing for both citizens and non-citizens,<sup>12</sup> as well as guarantee that non-citizens have equal access to social services that ensure a minimum standard of living;<sup>13</sup>

- Take measures to eliminate discrimination against non-citizens in relation to working conditions and language requirements,<sup>14</sup> including rules and practices in employment that may be discriminatory in effect;<sup>15</sup> and
- Apply international and regional standards pertaining to refugees equally, regardless of the nationality of the asylum-seeker,<sup>16</sup> and use all available means, including international cooperation, to address the situation of refugees and displaced persons, especially regarding their access to education, housing and employment.<sup>17</sup>

In August 2004, the Committee adopted general recommendation XXX on discrimination against non-citizens. Some of its main principles are summarized here and the recommendation is reproduced in full in the annex below.

- States are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of their civil, political, economic, social and cultural rights to the extent recognized under international law and enunciated especially in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights;
- Differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation are not applied pursuant to a legitimate aim and are not proportional to the achievement of this aim;
- States must abstain from applying different standards of treatment to different categories of non-citizens, such as female non-citizen spouses of citizens and male non-citizen spouses of citizens;
- Immigration policies and any measures taken in the struggle against terrorism must not discriminate, in purpose or effect, on grounds of race, colour, descent, or national or ethnic origin;
- States have a duty to protect non-citizens from xenophobic attitudes and behaviour;
- States are obliged to ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization and that all non-citizens enjoy equal treatment in the administration of justice;
- Deportation or other removal proceedings must not discriminate among non-citizens on the basis of race or national origin and should not result in disproportionate interference with the right to family life;
- Non-citizens must not be returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses;
- Obstacles to non-citizens' enjoyment of economic, social and cultural rights, notably in education, housing, employment and health, must be removed.

**Committee on the Elimination of Racial Discrimination:**  
“States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of [their civil, political, economic, social and cultural] rights...”

General recommendation XXX builds upon all the previous protections for non-citizens and their interpretations not only by the Committee on the Elimination of Racial Discrimination, but also by the Human Rights Committee and other human rights institutions. Accordingly, general recommendation XXX provides a comprehensive elaboration of the human rights of non-citizens as a guide to all countries and particularly those that have ratified the Convention. The more detailed implications of each paragraph of this recommendation are discussed in chapter II below.

The Committee on the Elimination of Racial Discrimination has indicated that States may draw distinctions between citizens and non-citizens only if such distinctions do not have the effect of limiting the enjoyment by non-citizens of the rights enshrined in other instruments. For example, in *A (FC) and Others v. Secretary of State for the Home Department*, nine terrorism suspects successfully challenged their detention, alleging that the United Kingdom of Great Britain and Northern Ireland had violated article 5 (the right to liberty and security) of the European Convention on Human Rights.<sup>18</sup> Differential treatment based on citizenship or immigration status will constitute forbidden discrimination if the criteria for such differentiation are inconsistent with the objectives and purposes of the International Convention on the Elimination of All Forms of Racial Discrimination; are not proportional to the achievement of those objectives and purposes; or do not fall within the scope of article 1 (4) of the Convention, which relates to special measures.<sup>19</sup> For example, a Tunisian permanent resident married to a Danish citizen was denied a loan by a Danish bank because he was not a Danish citizen. The Committee noted that the Tunisian was denied the loan “on the sole ground of his non-Danish nationality and was told that the nationality requirement was motivated by the need to ensure that the loan was repaid. In the opinion of the Committee, however, nationality is not the most appropriate requisite when investigating a person’s will or capacity to reimburse a loan. The applicant’s permanent residence or the place where his employment, property or family ties are to be found may be more relevant in this context. A citizen may move abroad or have all his property in another country and thus evade all attempts to enforce a claim of repayment.”<sup>20</sup> Accordingly, the Committee found that the Tunisian had suffered discrimination.

### **C. International Covenant on Economic, Social and Cultural Rights**

Like article 2 (1) of the International Covenant on Civil and Political Rights, article 2 (2) of the International Covenant on Economic, Social and Cultural Rights declares that States parties guarantee the rights enunciated in the Covenant “without discrimination of any kind as to race, colour... national or social origin... or other status.” Article 2 (3), however, creates an exception to this rule of equality for developing countries: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.” As an exception to the rule of equality, article 2 (3) must be narrowly construed, may be relied upon only by developing countries and only with respect to economic rights.<sup>21</sup> States may not draw distinctions between citizens and non-citizens as to social and cultural rights.

### **D. Regional bodies**

Regional human rights law is largely consistent with the protections provided by global standards, but reveals several important elaborations on those standards as well as particular exceptions to the general principle of equality. Article 5 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), for example, reiterates the global principle of the right to liberty and security of person, but elaborates upon that standard by providing that “[n]o one shall be deprived of his liberty” except in certain specified cases and only “in accordance with a procedure prescribed by law.” The list of exceptions to the right to liberty in article 5 (1) is exhaustive and only a narrow interpretation of those exceptions is consistent with the aim of article 5, namely to protect the individual from arbitrary detention.<sup>22</sup>

The European Court of Human Rights has found a distinction between European “citizens” and individuals of non-European nationality with regard to deportation permissible. In *C. v. Belgium*, a Moroccan citizen who had lived in Belgium for 37 years was ordered to be deported owing to convictions for criminal damage, possession of drugs and conspiracy. He claimed discrimination on grounds of race and nationality in violation of article 14 of the European Convention because “his deportation amounted to less favourable treatment than was accorded to criminals who, as nationals of a member State of the European Union, were protected against such a measure in Belgium.” The Court found no violation of article 14 of the European Convention because such preferential treatment was “based on an objective and reasonable justification, given that the member States of the European Union form a special legal order, which has... established its own citizenship.”<sup>23</sup> This distinction is similar to the declaration of the Human Rights Committee that, although an international agreement that confers preferential treatment to nationals of a State party “might constitute an objective and reasonable ground for differentiation, no general rule can be drawn therefrom...”<sup>24</sup> “to the effect that such an agreement in itself constitutes a sufficient ground with regard to the

requirements of article 26 of the [International] Covenant [on Civil and Political Rights].”<sup>25</sup> Every case must be judged on its own merits.

Adopting an approach similar to that of the European Court of Human Rights,<sup>26</sup> the Inter-American Court of Human Rights found non-discriminatory a proposed amendment to the naturalization provisions of the Costa Rican Constitution that established preferential naturalization rules for nationals of the other Central American countries, Spaniards and Ibero-Americans, because they “share much closer historical, cultural and spiritual bonds with the people of Costa Rica” and will be “more easily and more rapidly assimilated within the national community.” The Court explained that “no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things.”<sup>27</sup>

## **E. National constitutions**

Some national constitutions guarantee rights to “citizens”, whereas international human rights law would—with the exception of the rights of public participation and of movement and economic rights in developing countries—provide rights to all persons.<sup>28</sup> For example, the Constitution of Viet Nam guarantees human rights only to citizens. Other constitutions, such as the Constitution of Nigeria, distinguish between the rights granted to persons who obtained their citizenship by birth and other citizens.<sup>29</sup> By contrast, the Constitution of Azerbaijan guarantees the enjoyment, without discrimination, of most of the rights mentioned in the International Convention on the Elimination of All Forms of Racial Discrimination, but the Committee has expressed concern about the effective enjoyment of these rights by persons belonging to ethnic groups, in particular the Armenian, Russian and Kurdish minorities, when seeking employment, housing and education.<sup>30</sup> Furthermore, merely mentioning the general principle of non-discrimination in a constitution is not a sufficient response to the equality requirements of human rights law.<sup>31</sup> States are obliged to have in place effective legislation to fight against all forms of discrimination, as well as effective remedies to obtain compensation for violations of such legislation.<sup>32</sup>



## II. SPECIFIC RIGHTS OF NON-CITIZENS

### A. Fundamental rights and freedoms

#### 1. *Right to life, liberty and security of the person*

*Protection from arbitrary detention; freedom from torture and cruel, inhuman or degrading treatment or punishment; right of detained non-citizens to contact consular officials*

Non-citizens have an inherent right to life, protected by law, and may not be arbitrarily deprived of life.<sup>33</sup> They also have the right to liberty and security of the person. All individuals, including non-citizens, must be protected from arbitrary detention.<sup>34</sup> If non-citizens are lawfully deprived of their liberty, they must be treated with humanity and with respect for the inherent dignity of their person. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and may not be held in slavery or servitude. Detained non-citizens have the right to contact consular officials and the receiving State must notify them of this right.<sup>35</sup>

States are obliged to respect the human rights of detainees, including legal protections, irrespective of whether they are in the territory of the State in question.<sup>36</sup> Where persons find themselves within the authority and control of a State and where a circumstance of armed conflict may be involved, their fundamental rights may be determined in part by reference to international humanitarian law as well as international human rights law. States must allow a competent tribunal to determine the legal status of each detainee pursuant to international humanitarian law, in particular article 5 of the Geneva Convention relative to the Treatment of Prisoners of War. Where it may be considered that the protections of international humanitarian law do not apply, however, such persons remain the beneficiaries at least of the non-derogable protections under international human rights law.

In short, no person under the authority and control of a State, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights. If the legal status of detainees is not clarified, the rights and protections to which they may be entitled under international or domestic law cannot be said to be the subject of effective legal protection by the State. So-called international zones administered by States to detain non-citizens, and where such non-citizens are denied legal or social assistance, are a legal fiction and a State cannot avoid its international human rights responsibilities by claiming that such areas have extraterritorial status.<sup>37</sup>

States and international organizations must also ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race or national or ethnic origin.<sup>38</sup>



States may nonetheless arrest or detain non-citizens against whom action is being taken with a view to deportation or extradition, regardless of whether such detention is reasonably considered necessary, for example, to prevent those non-citizens from committing offences or fleeing.<sup>39</sup>

## **2. Protection from refoulement**

Non-citizens enjoy the right to be protected from refoulement, or deportation to a country in which they may be subjected to persecution or abuse. This principle of non-refoulement exists in a number of international instruments with slightly varying coverage.<sup>40</sup> Expulsions of non-citizens should not be carried out without taking into account possible risks to their lives and physical integrity in the countries of destination.<sup>41</sup> With regard to non-refoulement, article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides:

*"1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*

*"2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."*

In assessing whether an expulsion order violates article 3, it must be determined whether the individual concerned would be exposed to a real and personal risk of being subjected to torture in the country to which he or she would be returned.<sup>42</sup> All relevant considerations—including the existence of a consistent pattern of gross, flagrant or mass violations of human rights—must be taken into account pursuant to article 3 (2), but the lack of such a pattern does not mean that a person might not be subjected to torture in his or her specific circumstances.<sup>43</sup> The risk of torture must be assessed on grounds that go beyond mere theory or suspicion. It does not, however, have to meet the test of being highly probable. A person subject to an expulsion order is required to establish that he or she would be in danger of being tortured and that the grounds for so believing are substantial in the way described above, and that such danger is personal and present. The following information, while not exhaustive, would also be pertinent to determining whether an expulsion order violates article 3 of the Convention:

- (a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights (see art. 3, para. 2)?
- (b) Has the person claiming a violation of article 3 been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past? If so, was this in the recent past?

- (c) Is there medical or other independent evidence to support a claim by the person that he or she has been tortured or maltreated in the past? Has the torture had after-effects?
- (d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?
- (e) Has the person engaged in political or other activity within or outside the State concerned which would appear to make him or her particularly vulnerable to the risk of being placed in danger of torture were he or she to be expelled, returned or extradited to the State in question?
- (f) Is there any evidence as to the credibility of the person?<sup>44</sup>

This analysis was used by the European Court of Human Rights in *Chahal v. The United Kingdom* in determining whether a Sikh leader of Indian nationality would be at risk of ill-treatment if he were deported from the United Kingdom to India.<sup>45</sup>

The wording of article 3 (1) of the Convention against Torture is similar to, but not entirely congruent with, that of article 33 (1) of the Convention relating to the Status of Refugees. Whereas the former provides protection from refoulement only to persons who are in danger of becoming victims of torture, the latter provides protection against refoulement for persons in danger of falling victim to various kinds of persecution.

Torture victims cannot be expected to recall entirely consistent facts relating to events of extreme trauma, but they must be prepared to advance such evidence as there is in support of such a claim.<sup>46</sup>

### **3. Liberty of movement and the right to enter one's own country**

Persons do not have the right to enter or to reside in countries of which they are not citizens.<sup>47</sup> However, non-citizens who are lawfully within the territory of a State have the right to liberty of movement and free choice of residence.<sup>48</sup> Restrictions and other quotas on where such non-citizens can settle in a State—especially those restrictions and quotas that might involve an element of compulsion—may violate their right to liberty of movement.<sup>49</sup> States are encouraged to ensure that the geographical distribution of non-citizens within their territory is made according to the principle of equity and does not lead to the violation of their rights as recognized under the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>50</sup> Asylum-seekers should be guaranteed freedom of movement wherever possible.<sup>51</sup> All non-citizens shall be free to leave a State.<sup>52</sup>

Article 12 (4) of the International Covenant on Civil and Political Rights provides that “[n]o one shall be arbitrarily deprived of the right to enter his own country.” The Human Rights Committee has broadly interpreted this provision to give rights to stateless persons who are resident in a particular State and others with a long-term relationship with the country, but who are not citizens.<sup>53</sup> States are urged to

ensure that the residence permits of non-citizens who are long-term residents are withdrawn only under exceptional and clearly defined circumstances, and that adequate recourse to appeal against such decisions is made available.<sup>54</sup> Requiring lawfully permanent residents of a State to obtain return visas to re-enter that State may not comply with article 12 (4). Any State with such a provision should review its legislation to ensure compliance with article 12 (4).<sup>55</sup>

#### **4. Protection from arbitrary expulsion**

A non-citizen may be expelled only to a country that agrees to accept him or her and shall be allowed to leave for that country.<sup>56</sup>

Instruments such as the United Nations Declaration on the Rights of Individuals who are not Nationals of the Country in which They Live, which is non-binding, and Protocol No. 4 to the European Convention on Human Rights prohibit the collective expulsion of non-citizens. Any measure that compels non-citizens, as a group, to leave a country is prohibited except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual non-citizen in the group.<sup>57</sup> In other words, the procedure for the expulsion of a group of non-citizens must afford sufficient guarantees demonstrating that the personal circumstances of *each* of those non-citizens concerned has been genuinely and *individually* taken into account.<sup>58</sup> Hence, for example, if one member of a group of non-citizens is found not to qualify for refugee status because there is a safe country of origin and is ordered to be deported, the other members of the group cannot be ordered to be deported unless they too are individually deemed not to qualify for refugee status.<sup>59</sup>

States may not consciously facilitate the detention of non-citizens in a planned operation to expel them by encouraging them to report to the authorities on the basis of a pretext.<sup>60</sup> The case of *Conka v. Belgium* involved a family of four—two parents and two children—of Slovak nationality and Roma descent. After falling victim to a violent attack by skinheads in Slovakia that resulted in the hospitalization of the father, the family fled Slovakia and entered Belgium, where they sought asylum. Their request, however, was denied, on the ground that they had not produced sufficient evidence to show that their lives were at risk in Slovakia for the purposes of the Convention relating to the Status of Refugees. The decision denying the family permission to remain in Belgium was accompanied by a decision refusing them permission to enter the territory, itself endorsed with an order to leave the territory within five days. The family received a written notice at the end of September 1999 inviting them to present themselves at Ghent police station, in Belgium, on 1 October to “enable the file concerning their application for asylum to be completed.” Upon their arrival at the police station, the family was served with the order to leave the territory, dated 29 September 1999, along with a decision for their removal to Slovakia and for their arrest for that purpose. They were then detained and, a few hours later, were taken to a closed transit centre at Steenokkerzeel (Belgium).

The European Court of Human Rights held that, while law enforcement officials may use stratagems in order, for instance, to counter criminal activities more effectively, acts whereby the authorities seek to gain the trust of non-citizens—and asylum-seekers in particular—with a view to arresting and subsequently deporting them may be found to contravene the general principles stated or implicit in the European Convention on Human Rights. It follows that, even as regards persons who overstay their visas, a conscious decision by the authorities to mislead them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with article 5 of the Convention, which guarantees the right of everyone to liberty and security of the person but permits “the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.” Communications sent to asylum-seekers—irrespective of whether they are lawfully in the country—must not, therefore, be misleading or deceptive.

There is, nonetheless, significant scope for States to enforce their immigration policies and to require departure of unlawfully present persons, such as those who remain in a State longer than the time allowed by limited-duration permits.<sup>61</sup> Yet that discretion is not unlimited and may not be exercised arbitrarily. The case of *Winata and Lan Li v. Australia*, for example, concerned a stateless married couple from Indonesia who had lost their Indonesian citizenship and had been residing in Australia for many years. After overstaying their visas, the couple faced deportation, but petitioned both on their own behalf and on behalf of their 13-year-old son, who was an Australian citizen. The Human Rights Committee found that deportation of the couple would amount to a violation of their rights under article 17 of the International Covenant on Civil and Political Rights<sup>62</sup> in conjunction with article 23,<sup>63</sup> and a violation of the rights of their son under article 24 (1).<sup>64</sup> It also found that, while the mere fact that non-citizen parents have a child who is a citizen does not by itself make the proposed deportation of the parents arbitrary, the fact that the child in this case had grown up in Australia since his birth 13 years before, “attending Australian schools as an ordinary child would and developing the social relationships inherent in that,” the State had the burden of showing additional factors justifying the deportation of both parents that went “beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness.”

Non-citizens—even non-citizens suspected of terrorism—should not be expelled without allowing them a legal opportunity to challenge their expulsion.<sup>65</sup> The International Covenant on Civil and Political Rights, however, provides the right to certain procedural protections in expulsion proceedings (art. 13) only to non-citizens “lawfully in the territory of a State party”.<sup>66</sup>

## **5. Freedom of thought and conscience**

*Right to hold and express opinions; right of peaceful assembly; freedom of association*

Non-citizens have the right to freedom of thought and conscience, as well as the right to hold and express opinions.<sup>67</sup> They also have the right to peaceful assembly and freedom of association. Membership in political parties, for example, should be open to non-citizens.<sup>68</sup>

## **6. Protection from arbitrary interference with privacy, family, home or correspondence**

Non-citizens may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence.<sup>69</sup> Article 8 of the European Convention on Human Rights, for example, states:

*"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

*"2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

Where a non-citizen has real family ties in the territory of a State from which he or she is ordered to be deported and the deportation would jeopardize those ties, the deportation is justified with regard to article 8 only if it is proportionate to the legitimate aim pursued. In other words, the deportation is justified only if the interference with family life is not excessive compared to the public interest to be protected.<sup>70</sup> The public interest often balanced against the right to respect for family life is the State's interest in maintaining public order. It arises in the context of non-citizens convicted of criminal offences. There is no right of a migrant non-citizen to enter or to remain in a particular country after having committed a serious criminal offence, but to remove a person from a country where close members of his or her family are living may amount to an infringement of the right to respect for family life as guaranteed in article 8 (1) of the Convention, especially where the individual concerned poses little danger to public order or security.<sup>71</sup>

The case of *Berrehab v. The Netherlands* is an example where no criminal conviction was involved. Mr. Berrehab was a Moroccan citizen who was a resident of the Netherlands on the basis of his marriage to a Dutch citizen. He and his wife divorced in 1979. Mr. Berrehab was appointed as the auxiliary guardian of his daughter by the marriage, and was granted frequent and regular visits with her. In 1983, Mr. Berrehab's residency permit was not renewed on account of the divorce, and he

was subsequently arrested and ordered to be deported. The European Court of Human Rights applied the balancing test above and found that deportation would violate Mr. Berrehab's rights under article 8 of the Convention.

In some instances, deportation may violate a non-citizen's right to be free from interference in family life even where that non-citizen has been guilty of a criminal offence. In the case of *Beldjoudi v. France*,<sup>72</sup> for instance, Mr. Beldjoudi, who was considered an Algerian citizen, had been convicted of a number of criminal offences in France—assault and battery, theft, aggravated theft, driving a vehicle without a licence, and possession of weapons—and was ordered to be deported. Mr. Beldjoudi, however, was born in France and lost his French citizenship while a juvenile only because his parents failed to affirm their French nationality pursuant to the Evian Agreements of 19 March 1962 and subsequent legislation. Upon reaching adulthood, he tried to re-establish his French nationality, served in the French military, married a French citizen and his close relatives had resided in France for several decades. Upon consideration of these factors, the European Court of Human Rights held that the deportation order was not proportionate to the legitimate aim pursued by article 8 of the Convention and thus violated the rights of both Mr. Beldjoudi and his spouse.

## **B. Civil and political rights**

### **1. Right to recognition and equal protection before the law**

*Equality before courts and tribunals; entitlement to a fair and public hearing; freedom from subjection to retrospective penal legislation*

Non-citizens are entitled to equal protection and recognition before the law. They shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge against them or of their rights and obligations in a suit at law. Non-citizens shall not be subjected to retrospective penal legislation and may not be imprisoned for failure to fulfil a contractual obligation.<sup>73</sup>

### **2. Right to acquire, maintain and transmit citizenship**

States should take effective measures to ensure that all non-citizens enjoy the right to acquire citizenship without discrimination.<sup>74</sup> Hence, States should not discriminate against particular groups of non-citizens on the basis of race or ethnic or national origin with regard to naturalization or the registration of births,<sup>75</sup> and should eliminate from their legislation all discrimination between men and women with regard to the acquisition and transmission of nationality.<sup>76</sup> Non-citizen spouses of citizens should be able to acquire citizenship in the same manner regardless of their sex.<sup>77</sup> Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women provides that:

*"1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.*

*"2. States Parties shall grant women equal rights with men with respect to the nationality of their children."*

A number of States, however, continue to discriminate with regard to the capacity of women to pass on their nationality to their children<sup>78</sup> and several have made reservations to article 9 of the Convention.<sup>79</sup> Such States may allow women to pass on their nationality to their children only if they are unmarried or their husbands are stateless.

Parents should be able to transmit their nationality to their children regardless of their sex and of whether they are married to the other parent.<sup>80</sup> At the same time, the principle of *jus soli* (citizenship based on the place of birth) has become the international norm governing the nationality of children born to non-citizen parents, especially if they would otherwise be stateless.<sup>81</sup> Children of non-citizens whose legal status has not yet been determined should be protected from any difficulties in acquiring citizenship.<sup>82</sup> States might be encouraged to ease the naturalization process for children and disabled persons.

Governments should pay greater attention to immigration policies that have a discriminatory effect on persons of a particular national or ethnic origin,<sup>83</sup> and are encouraged to investigate possible barriers to naturalization, in terms of both the procedure and the lack of motivation to apply for citizenship.<sup>84</sup>

States should also regularize the status of former citizens of their predecessor States who now reside within their jurisdiction.<sup>85</sup> States are urged to ensure that such persons are given residence registration and enjoy the rights and benefits of citizenship. They are also urged to ensure that authorities do not force such persons to resettle outside of the State. Furthermore, States should ensure that former citizens of predecessor States do not experience administrative difficulties in complying with the specific legal requirements for the acquisition of citizenship, and should ensure that citizenship legislation is applied without discrimination.<sup>86</sup> Stateless persons and former citizens of predecessor States who have taken the citizenship of another State during the successor State's period of transition should be able to acquire citizenship of the successor State.<sup>87</sup> In Estonia, for example, former Soviet military personnel based in the country have been denied Estonian citizenship.<sup>88</sup> Applications for citizenship of successor States by former military personnel of a predecessor State should be considered case by case. With regard to citizenship and State succession, States are urged to follow the provisions set forth in the articles on the nationality of natural persons in relation to the succession of States.<sup>89</sup> According to the articles, for example, every national of a

predecessor State has the right to the nationality of at least one successor State and States shall "take all appropriate measures to prevent persons who, on the date of the succession of States, had the nationality of the predecessor State from becoming stateless as a result of such succession."

In the context of State succession, Council of Europe standards would appear to permit language requirements as well as distinctions drawn according to ethnic origin, insofar as consideration of ethnicity serves to identify an ability to integrate into a society.<sup>90</sup> This approach is consistent with rulings of the European and Inter-American Courts of Human Rights.<sup>91</sup> Where a State is itself responsible for a former citizen's loss of citizenship, it would be incompatible with the International Covenant on Civil and Political Rights for the State party to require the former citizen to acquire citizenship as a prerequisite for the restitution of property.<sup>92</sup>

Although neither the acquisition nor the loss of citizenship is directly regulated by the European Convention on Human Rights, decisions to confer and revoke citizenship are subject to both its substantive and procedural requirements. For example, an arbitrary deprivation of citizenship may rise to the level of inhuman or degrading treatment prohibited under its article 3, or violate the right to respect for private and family life guaranteed under its article 8.<sup>93</sup> A State's denial of citizenship combined with the issuance of an expulsion order may create a presumption that the purpose of the denial was to achieve the expulsion of a citizen, which is prohibited under article 3 of Protocol No. 4 to the Convention.<sup>94</sup>

### **3. Protection from discrimination on the basis of sex**

States should eliminate from their legislation all discrimination between men and women with regard to the acquisition and transmission of nationality.<sup>95</sup>

The nationality and immigration laws of several countries discriminate between the capacity of male and female citizens to marry and live with their non-citizen spouses. For example, Mauritius adopted an immigration law which provided that, if a Mauritian woman married a man from another country, the husband must apply for residence in Mauritius and that permission may be refused. If, however, a Mauritian man married a foreign woman, the foreign woman was automatically entitled to residence in Mauritius. The Human Rights Committee held that Mauritius had violated the International Covenant on Civil and Political Rights by discriminating between men and women without adequate justification and by failing to respect the family's right to live together.<sup>96</sup> Non-citizen spouses of citizens should be able to acquire citizenship in the same manner regardless of their sex, in keeping with article 5 (d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>97</sup>



## **C. Economic, social and cultural rights**

### **1. Rights of non-citizens as members of minorities**

*Right to enjoy one's culture, profess and practise one's religion, and use one's language*

Since non-citizens are often of a different national or racial origin than citizens, States are encouraged to consider non-citizens as belonging to national minorities,<sup>98</sup> and to ensure that they enjoy the rights that arise from such status.

Examples of the rights that non-citizens enjoy as members of minorities can be found in several legal instruments and in the jurisprudence of their monitoring bodies. For example, the Human Rights Committee has stated that “where aliens constitute a minority within the meaning of article 27 of the [International] Covenant on Civil and Political Rights, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language.”<sup>99</sup> The rights of national and racial minorities to enjoy such rights, therefore, cannot be restricted to citizens.

In addition, the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, although not legally binding, elaborates upon the rights of national and ethnic minorities, which has been interpreted to include migrant communities.<sup>100</sup>

Under the Rome Statute of the International Criminal Court, the Court apparently has jurisdiction to protect non-citizens from persecution and abuses committed with intent to cause annihilation of their national group. Article 5 of the Rome Statute lists the four crimes that fall within the Court's jurisdiction: the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Article 6 defines genocide as certain acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. These acts are, therefore, crimes within the jurisdiction of the Court. In addition, under article 7, “persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender... or other grounds that are universally recognized as impermissible under international law” are also considered crimes against humanity.

Furthermore, the Advisory Committee and the Committee of Ministers, bodies whose task it is to supervise the implementation of the European Framework Convention for the Protection of National Minorities, have both indicated that that Convention applies to non-citizens.<sup>101</sup>

The Roma (Gypsies), on the other hand, are not non-citizens per se, but their citizenship rights often go unrecognized. The Roma face discrimination in education, work, social benefits and access to land. In some countries, they do not enjoy the status of members of an ethnic minority.<sup>102</sup> Further complicating the issue surrounding their rights is the concept of Roma as a “national minority”—a term

which does imply citizenship. However, the international community has begun to consider the special concerns of the Roma seriously. For example, since 1991, the Congress of Local and Regional Authorities of Europe of the Council of Europe has organized hearings to address the situation of the Roma in Europe. In addition, the Committee on the Elimination of Racial Discrimination has recommended that States “ensure that legislation regarding citizenship and naturalization does not discriminate against members of Roma communities.”<sup>103</sup>

Non-citizens enjoy the right to freedom of religion.<sup>104</sup> Furthermore, States are urged to take measures necessary to prevent practices that deny non-citizens their cultural and ethnic identity, such as requirements that non-citizens change their name in order to be naturalized.<sup>105</sup> Article 15 of the International Covenant on Economic, Social and Cultural Rights obliges States to take steps to ensure that everyone, regardless of citizenship, enjoys the right to take part in cultural life. Non-citizens have the right to marry when at marriageable age.<sup>106</sup>

## ***2. Right to health, education, housing, a minimum standard of living and social security***

States must avoid different standards of treatment with regard to citizens and non-citizens that might lead to the unequal enjoyment of economic, social and cultural rights.<sup>107</sup> Governments shall take progressive measures to the extent of their available resources to protect the rights of everyone—regardless of citizenship—to: social security; an adequate standard of living including adequate food, clothing, housing, and the continuous improvement of living conditions; the enjoyment of the highest attainable standard of physical and mental health; and education.

States should take effective measures to ensure that housing agencies and private landlords refrain from engaging in discriminatory practices. For example, in *F.A. v. Norway*<sup>108</sup> the Committee on the Elimination of Racial Discrimination was made aware of housing advertisements in Norway that contained discriminatory requirements such as “no foreigners desired,” “whites only” and “Norwegians with permanent jobs.” In response, the Committee urged Norway to take effective measures to ensure that housing agencies refrain from engaging in discriminatory practices and “recommended that Norway give full effect to its obligations under article 5 (e) (iii) of the [International] Convention [on the Elimination of All Forms of Racial Discrimination.]” States must guarantee the right to adequate housing to both citizens and non-citizens.<sup>109</sup>

States must ensure that social services provide a minimum standard of living for non-citizens.<sup>110</sup> Initiatives taken to include non-citizens in national health insurance systems have been welcomed.<sup>111</sup>

Educational institutions must be accessible to everyone, without discrimination, within the jurisdiction of a State party. This “principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status.” Furthermore, “the

prohibition against discrimination enshrined in article 2 (2) of the [International] Covenant [on Economic, Social and Cultural Rights] is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.”<sup>112</sup>

Non-citizens who are former citizens of the predecessor State of the State in which they reside may not be deprived of pensions, housing, health care and other rights.<sup>113</sup>

### III. RIGHTS OF SELECTED NON-CITIZEN GROUPS

Different categories of undocumented non-citizens, such as stateless persons, refugees and asylum-seekers, undocumented economic migrants, women being trafficked into prostitution, and children, must each be dealt with in a manner appropriate to their particular situation.<sup>114</sup>

#### A. Stateless persons

Some non-citizens are stateless. They either never acquired citizenship of the country of their birth or lost their citizenship, and have no claim to the citizenship of another State.<sup>115</sup> Such persons include individuals native to the country of their residence who failed to register for citizenship during a specified period and have been denied it since then;<sup>116</sup> and children born in States that recognize only the *jus sanguinis* principle of acquiring citizenship to non-citizen parents of States that recognize only the *jus soli* principle.<sup>117</sup> The rights of stateless persons are enunciated in a number of international instruments, including the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness.

**The rights of stateless persons are enunciated in a number of international instruments, including the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness.**

The status of stateless persons—especially stateless persons who have been precluded from applying for residence permits or citizenship—should be regularized by, for example, simplifying procedures for applying for residence permits and through campaigns to make it clear that stateless persons would not risk expulsion when identifying themselves to the authorities.<sup>118</sup> States should also seek to reduce the number of stateless persons, with priority for children, inter alia by encouraging parents to apply for citizenship on their behalf.<sup>119</sup> Stateless persons should not be involuntarily repatriated to the countries of origin of their ancestors.<sup>120</sup> Individuals who have taken the citizenship of a country other than their native country should be able to acquire citizenship of their native country.<sup>121</sup>

Under article 12 (4) of the International Covenant on Civil and Political Rights, stateless persons should not be arbitrarily deprived of their right to enter their country of residence or a country with which they have a long-term relationship.

## **B. Refugees and asylum-seekers**

Five United Nations instruments form the basis of the rights of refugees in international human rights law:<sup>122</sup> the 1951 Convention relating to the Status of Refugees and its 1967 Protocol; the Statute of the Office of the High Commissioner for Refugees; the Declaration on Territorial Asylum; and the Handbook on Procedures and Criteria for Determining Refugee Status.

International standards pertaining to refugees and asylum-seekers should be applied equally, regardless of the nationality of the asylum-seeker or refugee.<sup>123</sup> Conditions in refugee shelters and conditions of detention faced by undocumented migrants and asylum-seekers should meet international standards.<sup>124</sup> States should ensure that individuals caught in an illegal situation, such as asylum-seekers who are in a country unlawfully and whose claims are not considered valid by the authorities, are not treated as criminals.<sup>125</sup>

The 2003 report of the Special Rapporteur on the human rights of migrants<sup>126</sup> focused particularly on the detention of migrants and the conditions of their detention. Concerns included detention of asylum-seekers; prolonged detention periods; the arbitrary nature of detention decisions; detention on the basis of unspecified allegations related to terrorism or national security; detention of trafficking victims; detention of migrant children; absence of legal assistance and judicial review procedures; detention with ordinary criminals; solitary confinement; methods of restraint threatening physical integrity;<sup>127</sup> detention in inappropriate facilities; overcrowding and poor hygienic conditions; lack of medical care; lack of education for young detainees; and other problems.

### **1. Refugees**

The 1951 Convention relating to the Status of Refugees and its 1967 Protocol provide that refugees should be entitled to treatment at least as favourable as that accorded to citizens with respect to: religion (art. 4); protection of intellectual property (art. 14); access to courts and legal assistance (art. 16); rationing measures (art. 20); elementary education (art. 22 (1)); public relief and assistance (art. 23); labour legislation and social security (art. 24); as well as fiscal charges (art. 29). The Convention and its Protocol also require that States parties accord to refugees treatment no less favourable than that accorded to non-citizens generally with respect to exemption from legislative reciprocity (art. 7 (1)); acquisition of property (art. 13); non-political and non-profit-making associations and trade unions (art. 15); wage-earning employment (art. 17); self-employment (art. 18); liberal professions (art. 19); housing (art. 21); post-elementary education (art. 22 (2)); and freedom of movement (art. 26). Employment, housing and social assistance should not be denied to recognized refugees, especially on grounds of their ethnicity.<sup>128</sup>

States must ensure a more rigorous supervision of the application of measures aimed at facilitating the integration of refugees, particularly at the local level.<sup>129</sup>

Some States have made positive efforts to create a comprehensive integration plan for new arrivals and offer them tools they will need for success in the society of the State.<sup>130</sup>

## **2. Asylum-seekers**

Certain rights apply particularly to asylum-seekers. Eligibility for asylum should not depend on the ethnic or national origin of applicants.<sup>131</sup> Asylum-seekers should not be left in a destitute condition while awaiting examination of their asylum claims,<sup>132</sup> since such poor conditions could reinforce prejudice, stereotypes and hostility towards asylum applicants. The procedure for determining eligibility for asylum should not be slow and States should ensure that applicants are given access to sufficient legal assistance.<sup>133</sup> States should be encouraged to provide free legal advice to applicants.<sup>134</sup> Time limits for registration to lodge asylum claims should not be so short as to deprive persons of the protection to which they are entitled under international law.<sup>135</sup> International human rights law is also relevant in the context of defining adequate reception standards for asylum-seekers.<sup>136</sup> Asylum-seekers should be granted the right to work.<sup>137</sup> The human rights of asylum-seekers are also protected by regional human rights instruments in Africa,<sup>138</sup> Europe<sup>139</sup> and the Americas<sup>140</sup> that apply to all persons residing within the jurisdiction of their respective States parties, regardless of their legal status in the country of asylum.

The holding of asylum-seekers in detention should be avoided to the greatest extent possible, particularly in the cases of persons arriving with families.<sup>141</sup> Where detention does occur, it should not be for an indefinite period,<sup>142</sup> and careful attention should be paid to the accommodation and facilities provided for the families—particularly the children—of asylum-seekers held in detention.<sup>143</sup> Asylum-seekers and refugees should not be detained alongside convicted criminals,<sup>144</sup> nor should they be detained for lack of identity papers or their uncertainty about travel routes into the receiving State.<sup>145</sup> Wherever possible, asylum-seekers should be guaranteed freedom of movement.<sup>146</sup>

## **C. Non-citizen workers and their families**

Everyone—regardless of citizenship—has the right to work and Governments are obliged to take progressive measures to safeguard this right.<sup>147</sup> Non-citizens who are lawfully present in a State are entitled to treatment equal to that enjoyed by citizens in the realm of employment and work.<sup>148</sup> Everyone, including non-citizens, has the right to just and favourable conditions of work,<sup>149</sup> and international standards that provide protection in treatment and conditions at work in areas such as safety, health, hours of work and remuneration apply to all workers regardless of citizenship or status. States must ensure the right of everyone to establish and join trade unions. Non-citizen workers should not be barred from holding trade union office and their right to strike should not be restricted.<sup>150</sup>

## **1. International Labour Organization (ILO)**

International Labour Organization (ILO) conventions and recommendations (for example, on collective bargaining, discrimination, workers' compensation, social security, working conditions and environment, abolition of forced labour and child labour) generally protect the rights of all workers irrespective of citizenship. The eight fundamental ILO conventions<sup>151</sup> and the recommendations that accompany them apply to all workers regardless of citizenship. Several ILO instruments specifically protect migrant workers and their families. The most significant are: Convention No. 97 concerning migration for employment; Convention No. 143 concerning working conditions and equal treatment of migrant workers; and Convention No. 118 concerning equality of treatment in social security. In many instances, the conventions guarantee certain rights—e.g., equal remuneration and minimum wage with respect to past employment and maintenance of social security benefits<sup>152</sup>—to non-citizens regardless of the legality of the migrant's presence in the territory. Other rights are extended only to those persons lawfully within a territory, e.g., rights to equal opportunities and vocational training.<sup>153</sup>

ILO Convention No. 143 provides specific guidance as to the treatment of irregular migrants and those migrants who are employed unlawfully. In laying out the minimum norms applicable to such persons, article 1, for example, establishes that States parties must “respect the basic human rights of all migrant workers”<sup>154</sup> regardless of their migratory status or legal situation. The Committee of Experts on the Application of Conventions and Recommendations has interpreted these rights to be the fundamental human rights enshrined in the International Bill of Human Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the ILO Declaration on Fundamental Principles and Rights at Work.<sup>155</sup>

## **2. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, of which ILO Conventions Nos. 97 and 143 formed the basis, protects all migrant workers and their families, but does not generally include international organization employees, foreign development staff, refugees, stateless persons, students and trainees (arts. 1 and 3).

The Convention provides for:

- Non-discrimination (art. 7);
- Freedom for migrants to leave any country and to enter their country of origin (art. 8);
- The right to life (art. 9);
- Freedom from torture and ill-treatment (art. 10);
- Freedom from slavery or forced labour (art. 11);

- Freedom of thought, conscience and religion (art. 12);
- Freedom of opinion and expression (art. 13);
- Freedom from arbitrary or unlawful interference with privacy, family, home, correspondence or other communications (art. 14);
- Property rights (art. 15);
- Liberty and security of person (art. 16);
- The right of migrants deprived of their liberty to be treated with humanity (art. 17);
- A fair and public hearing by a competent, independent and impartial tribunal (art. 18);
- The prohibition of retroactive application of criminal laws (art. 19);
- The prohibition of imprisonment for failure to fulfil a contract (art. 20);
- The prohibition of the destruction of travel or identity documents (art. 21);
- The prohibition of expulsion on a collective basis or without fair procedures (art. 22);
- The right to consular or diplomatic assistance (art. 23);
- The right to recognition as a person before the law (art. 24);
- Equality of treatment between nationals and migrant workers as to work conditions and pay (art. 25);
- The right to participate in trade unions (art. 26);
- Equal access to social security (art. 27);
- The right to emergency medical care (art. 28);
- The right of a child to a name, birth registration and nationality (art. 29); and
- Equality of access to public education (art. 30).

In addition, States parties must ensure respect for migrants' cultural identity (art. 31); the right to repatriate earnings, savings and belongings (art. 32); and information about rights under the Convention (art. 33).

### **3. *Inter-American Court of Human Rights***

The Inter-American Court of Human Rights has confirmed the applicability of international labour standards to non-citizens, and particularly to non-citizens in irregular status. In an opinion issued in September 2003, the Court held that non-discrimination and the right to equality are *jus cogens* that are applicable to all residents regardless of immigration status. Hence, Governments cannot use immigration status as a justification for restricting the employment or labour rights of unauthorized workers, such as rights to social security. The Court found that Governments do have the right to deport individuals and refuse to offer



jobs to people who do not possess employment documents, but held that, once an employment relationship has been initiated, unauthorized workers become entitled to all the employment and labour rights that are available to authorized workers.<sup>156</sup> The Court stated:

*"...the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labour-related nature. When assuming an employment relationship, the migrant acquires rights that must be recognized and ensured because he is an employee, irrespective of his regular or irregular status in the State where he is employed. These rights are a result of the employment relationship."<sup>157</sup>*

**Inter-American Court of Human Rights: "Non-discrimination and the right to equality are *jus cogens* that are applicable to all residents regardless of immigration status."**

#### **4. Committee on the Elimination of Racial Discrimination**

The Committee on the Elimination of Racial Discrimination has frequently expressed concern that non-citizens who serve as domestic workers are subjected to debt bondage, other illegal employment practices, passport deprivation, illegal confinement, rape and physical assault.<sup>158</sup> States are urged to put an end to the practice of employers retaining the passports of their foreign employees, in particular domestic workers.<sup>159</sup>

#### **D. Victims of trafficking**

Non-citizens are often the target of trafficking. Persons who emigrate through irregular channels, such as smuggling and trafficking networks, risk suffocating in containers or drowning when an overloaded ship sinks.<sup>160</sup> Adequate assistance and support, including formal protection, aid and education, should be provided to victims of trafficking.<sup>161</sup>

#### **E. Non-citizen children**

Article 2 of the Convention on the Rights of the Child provides that "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind..." The Committee on the Rights of the Child encourages States to continue and strengthen their efforts to integrate the right to non-discrimination that is enshrined in article 2 fully in all relevant legislation, and to ensure that this right is effectively applied in all political, judicial and administrative decisions and in projects, programmes and

services which have an impact on all children, including non-citizen children and children belonging to minority groups.<sup>162</sup> The Committee recommends that States should develop comprehensive and coordinated policies to address the developing phenomenon of immigration, including public information campaigns to promote tolerance; monitor and collect data on racially motivated acts; and study the situation of non-citizen children, especially in the school system, and the effectiveness of measures taken to facilitate their integration.<sup>163</sup> States should also take effective measures to address discriminatory attitudes or prejudices, in particular towards non-citizen children, fully and effectively implement legal measures to prevent discrimination that are already adopted, and ensure that their legislation is in full compliance with article 2 of the Convention on the Rights of the Child.<sup>164</sup>

**Citizenship based on the place of birth has emerged as the overriding international norm governing the nationality of children born to non-citizen parents, in particular if they would otherwise be stateless.**

Children of non-citizens have the right to a name and the right to acquire a nationality. Under article 7 of the Convention on the Rights of the Child, a child “shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality... States Parties shall ensure the implementation of these rights... in particular where the child would otherwise be stateless.” In view of the nearly universal ratification of the Convention, the principle of *jus soli* (citizenship based on the place of birth) has emerged as the overriding international norm governing the nationality of children born to non-citizen parents, in particular if they would otherwise be stateless.<sup>165</sup> The right of parents to transmit their citizenship to their children must be enforced without discrimination as to the sex of the parent.<sup>166</sup> Article 7 of the Convention also requires transmittal of citizenship from a parent to his or her adopted child.<sup>167</sup> Article 7 should be read in conjunction with article 8 (preservation of identity, including nationality, name and family relations), article 9 (avoiding separation from parents), article 10 (family reunification) and article 20 (continuity of upbringing of children deprived of their family environment).<sup>168</sup> Within the holistic approach recommended by the Committee on the Rights of the Child for the interpretation of the Convention, those articles should be understood according to the general principles of the Convention as reflected in articles 2 (right to non-discrimination), 3 (principle of the best interests of the child), 6 (right to life and development) and 12 (right to respect for the child’s views in all matters affecting the child and opportunity to be heard in any judicial or administrative proceedings affecting the child).

Children of non-citizens are entitled to those measures of protection required by their status as minors.<sup>169</sup> Children of non-citizens without legal status should

not be excluded from schools,<sup>170</sup> and schools that allow children of non-citizens to be educated in programmes designed in their country of origin should be encouraged.<sup>171</sup>

With specific regard to asylum-seekers who are children, the Convention on the Rights of the Child provides important guidance for designing and implementing reception policies under the “best interest” principle. States must guarantee: special protection and care to child asylum-seekers with respect to their special needs; avoidance of detention for asylum-seekers under 18 years of age; and access of children to legal and psychological assistance, including by enabling contact with non-governmental organizations offering such assistance.<sup>172</sup> Asylum-seekers and refugees who are children should not be placed in institutions that are not equipped to provide the special care they require.<sup>173</sup> Such children should not be the subject of discrimination in the enjoyment of economic, social and cultural rights such as access to education, health care and social services.<sup>174</sup> States should ensure the full economic, social and cultural rights of all non-citizen children in detention without discrimination—especially the right to education—and ensure their right to integration into society.<sup>175</sup>

## Conclusions and recommendations

Almost all advocacy for non-citizens has focused on the rights of discrete groups, such as asylum-seekers, refugees, stateless persons, trafficked persons, etc. Unfortunately, however, little has been done to identify the common plights, needs and approaches for redress of the various non-citizen groups. Indeed, diverse groups of non-citizens—and their respective advocacy and interest groups—have traditionally seen themselves as separate and their problems as unique, despite similar goals and common circumstances. In addition, international law and mechanisms relating to non-citizens have, until recently, focused on non-citizen subgroups while neglecting broader protections for non-citizens as a whole. For example, various United Nations institutions have designated special rapporteurs on such themes as trafficking, migrants, indigenous people, refugees, and racial discrimination and xenophobia. Similarly, several treaties have been designed to protect trafficked persons, migrant workers, indigenous and tribal peoples, refugees, and stateless persons. While all of these measures are essential and do not overlap so much as to be rendered unnecessary, a unified effort for the protection of non-citizens is nonetheless needed.

A primary objective of any international effort to protect the rights of non-citizens begins by demonstrating, as indicated by this publication, that without clear, comprehensive standards governing the rights of non-citizens, their implementation by States and more effective monitoring of compliance, the discriminatory treatment of non-citizens in contravention of relevant international human rights instruments will continue.

Furthermore, since the seven principal human rights treaties deal with many of the problems encountered by non-citizens, States should pursue universal ratification and implementation of those treaties, particularly the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. States, as appropriate, should also ratify and implement such other relevant treaties as the Protocol relating to the Status of Refugees; ILO Conventions Nos. 97, 118, 143, etc.; the Conventions on the Reduction of Statelessness and relating to the Status of Stateless Persons; the Vienna Convention on Consular Relations and its Optional Protocols; Protocols Nos. 4 and 7 to the European Convention on Human Rights; and the European Framework Convention for the Protection of National Minorities. States should be encouraged to abide by the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.

Since problems relating to the treatment of non-citizens arise under each of the seven principal human rights treaties, it would be desirable for the treaty bodies to coordinate their work more effectively. One approach would be for the treaty bodies to prepare joint general comments/recommendations that would establish a consistent, structured approach to the protection of the rights of non-citizens. At a minimum, treaty bodies that have adopted specific standards should consider updating them and those bodies that have yet to issue interpretive guidance relating to non-citizens should do so.<sup>176</sup> In addition, treaty bodies should intensify

their dialogues with States parties with regard to the rights accorded to, and the actual situation faced by, non-citizens within their respective spheres of concern.

## Notes

<sup>1</sup> This publication has been prepared by the Special Rapporteur on the rights of non-citizens, Professor David Weissbrodt, who submitted his final report to the Sub-Commission on the Promotion and Protection of Human Rights in August 2003 (E/CN.4/Sub.2/2003/23 and Add.1–3). The author would particularly like to thank the John D. and Catherine T. MacArthur Foundation for its support of this project, as well as Shervon Cassim, Marta Baró i Vilà, Chantal Bostock, Christopher Chinn, Clay Collins, Noriko Kurotsu, Sasha Mackin, Rosalyn Park, Nandana Perera, Virginie Roux, Mary Rumsey, Bret Thiele, Mark Thieroff, Erik Williamsen and Zemeny Wondesen for their research assistance.

<sup>2</sup> See the judgment of the International Court of Justice of 6 April 1955 in the *Nottebohm* case (*Liechtenstein v. Guatemala*).

<sup>3</sup> “World demographic trends: report of the Secretary-General” (E/CN.9/2003/5, para. 53). This figure of 175 million is indicative of the number of individuals who currently reside in a country other than the one where they were born. It may include persons who have become naturalized citizens of their new countries, but may not include individuals whose nationalities have not been recognized in their countries of origin.

<sup>4</sup> The 1948 Universal Declaration of Human Rights recognizes this principle in its article 2 (1): “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, *without distinction of any kind*, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (emphasis added). This provision applies to “everyone” and thus includes non-citizens. The use of the words “such as” indicates that this list is not exhaustive and makes clear that the operative phrase is: “without distinction of *any kind*” (emphasis added). Although this list omits nationality, according to Professor Lillich, “this omission is not fatal... because the list clearly is intended to be illustrative and not comprehensive.” He also noted that “nationality would appear to fall into the category of ‘distinction of any kind’.” Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press, 1984), p. 43. Similar non-discrimination principles with respect to non-citizens can be found in the Charter of the United Nations; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the African Charter on Human and Peoples’ Rights; the American Convention on Human Rights; the [European] Convention for the Protection of Human Rights and Fundamental Freedoms; the [European] Framework Convention for the Protection of National Minorities; and many other instruments as well as authoritative interpretations of those instruments.

<sup>5</sup> See general recommendation XIV (1993) of the Committee on the Elimination of Racial Discrimination on article 1, paragraph 1, of the Convention: “The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4 [relating to special measures], of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.” In its general comment No. 18 (1989) on non-discrimination, the Human Rights Committee similarly observed that differences in treatment may be permissible under the Covenant “if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”

<sup>6</sup> See Joan Fitzpatrick, “The human rights of migrants”, Conference on International Legal Norms and Migration (Geneva, 23–25 May 2002). See, e.g., European Court of Human Rights, *Berrehab v. the Netherlands*, No. 10730/84, judgement of 21 June 1988.

<sup>7</sup> See general comment No. 15 (1986) of the Human Rights Committee on the position of aliens under the Covenant.

<sup>8</sup> The use of a “guest worker” approach, however, to immigration by States that affects the ability of non-citizens to organize themselves and defend their common interests and affects the emergence of a social, intellectual and economic elite of immigrant background should be of concern. See European Commission against Racism and Intolerance, Second report on Austria (CRI (2001) 3, paras. 16–21). States should consider granting the right to participate in public life at the local level, including the right to vote in local elections, to long-term non-citizen residents. See European Commission against Racism and Intolerance, Second report on Austria (paras. 16–21), Second report on Belgium (CRI (2000) 2, paras. 11–15) and Second report on France (CRI (2000) 31, paras. 15–19).

<sup>9</sup> General recommendation XI (1993) of the Committee on the Elimination of Racial Discrimination on non-citizens. This recommendation was replaced by general recommendation XXX (2004). However, its paragraph 2 repeats essentially the same principle: “Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights”.

<sup>10</sup> Committee on the Elimination of Racial Discrimination, concluding observations on the 13<sup>th</sup> and 14<sup>th</sup> periodic reports of Canada (A/57/18, para. 338).

<sup>11</sup> See general comment No. 15 of the Human Rights Committee (para. 1).

<sup>12</sup> See general comment No. 4 (1991) of the Committee on Economic, Social and Cultural Rights on the right to adequate housing. The need for such protections is illustrated by the situation in France; the Committee on the Elimination of Racial Discrimination has expressed concern about the “unfavourable situation faced by immigrants and population groups of immigrant origin in the field of housing..., employment and education, despite the State party’s substantial efforts in this area...” (A/60/18, paras. 106–117).

<sup>13</sup> See Committee on Economic, Social and Cultural Rights, concluding observations on the third periodic report of Ukraine (E/1996/22, para. 266).

<sup>14</sup> See Committee on the Elimination of Racial Discrimination, concluding observations on the 16<sup>th</sup> periodic report of Costa Rica (A/57/18, paras. 64–86) and on the fifth periodic report of Estonia (ibid., paras. 344–366). For example, the Committee received a complaint from a Turkish woman residing in the Netherlands who was fired from her job because she was pregnant, see opinion concerning communication No. 1/1984, *Yilmaz-Dogan v. the Netherlands*, 10 August 1988 (A/43/18, annex IV).

<sup>15</sup> See Committee on the Elimination of Racial Discrimination, concluding observations on the eighth and ninth periodic reports of China (A/56/18, para. 248).

<sup>16</sup> See Committee on the Elimination of Racial Discrimination, concluding observations on the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> periodic reports of the Sudan (A/56/18, para. 215). An example of such discrimination based on nationality occurred when the United States systematically refused to consider asylum claims from Guatemalans and Salvadorans on the same footing as other claimants. See *American Baptist Church v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

<sup>17</sup> See Committee on the Elimination of Racial Discrimination, concluding observations on the initial and second periodic reports of Azerbaijan (A/54/18, para. 497).

<sup>18</sup> *A. (FC) and Others (FC) v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 W.L.R. 87. The House of Lords also found that indefinite detention constituted a disproportionate derogation under art. 15 from the right to liberty and security of person in art. 5 of the European Convention on Human Rights.

<sup>19</sup> According to article 1 (4), special measures are “taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms...”. See also general comment No. 18 of the Human Rights Committee, para. 13.

<sup>20</sup> Decision on communication No. 10/1997, *Ziad Ben Ahmed Habassi v. Denmark*, 17 March 1999 (A/54/18, annex III).

<sup>21</sup> Measures taken by States to protect their citizens and economies from non-citizens should not be applied to the detriment of the enjoyment of human rights. African Commission on Human and Peoples' Rights, *Union Inter Africaine des Droits de l'Homme and others v. Angola*, communication No. 159/96, para. 16 (11 November 1997); see Carmen Tiburcio, *The Human Rights of Aliens under International and Comparative Law*, International Studies in Human Rights, vol. 65 (The Hague, Martinus Nijhoff Publishers, 2001), pp. 145–147.

<sup>22</sup> European Court of Human Rights, *Conka v. Belgium*, No. 51564/99, judgement of 5 May 2002. Article 5 of the European Convention on Human Rights provides: "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: a. the lawful detention of a person after conviction by a competent court; b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

<sup>23</sup> European Court of Human Rights, *C. v. Belgium*, No. 21794/93, judgement of 7 August 1996, paras. 37–38.

<sup>24</sup> See, e.g., Human Rights Committee, views on communication No. 965/2000, *Karakurt v. Austria*, 4 April 2002 (A/57/40 (vol. II), annex IX, sect. II, para. 8.4).

<sup>25</sup> *Ibid.*, citing Human Rights Committee, decision on communication No. 658/1995, *van Oord v. the Netherlands*. However, it is "not reasonable to base a distinction between aliens concerning their capacity to stand for election for a work council solely on their different nationality." States have an obligation to provide non-citizens who have been subjected to such discrimination with an effective remedy pursuant to article 2 (3) (a) of the Covenant. (*Ibid.*, paras. 8.4 and 10.)

<sup>26</sup> European Court of Human Rights, Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (Belgian Linguistic Case), Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, judgement of 23 July 1968.

<sup>27</sup> Inter-American Court of Human Rights, Advisory Opinion OC–4/84 on the proposed amendments to the naturalization provision of the Constitution of Costa Rica, 19 January 1984.

<sup>28</sup> Committee on the Elimination of Racial Discrimination, concluding observations on the initial report and the special report of Croatia (A/48/18, paras. 474–508).

<sup>29</sup> Committee on the Elimination of Racial Discrimination, concluding observations on the 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> periodic reports of Nigeria (*ibid.*, paras. 306–329).

<sup>30</sup> Committee on the Elimination of Racial Discrimination, concluding observations on the initial and second reports of Azerbaijan (*ibid.*, para. 491).

<sup>31</sup> See, e.g., Committee on the Elimination of Racial Discrimination, concluding observations on the 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> periodic reports of Qatar (A/57/18, para. 191).

<sup>32</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Germany, 1 March 2002, paras. 18 and 37.

<sup>33</sup> See general comment No. 15 of the Human Rights Committee.

<sup>34</sup> *Conka v. Belgium*, *op. cit.*

<sup>35</sup> Vienna Convention on Consular Relations, art. 36. This procedure is not always followed – even in death penalty cases and even after the International Court of Justice has given provisional remedies. See the orders of the International Court of Justice of 9 April 1998 in the Case concerning the Vienna Convention on Consular Relations (*Paraguay v. United States of America*) and of 3 March 1999 in the *LaGrand* Case

(*Germany v. United States of America*), the decisions of the United States Supreme Court of 17 April 1998 in *Breard v. Greene* and of 3 March 1999 in *Federal Republic of Germany v. United States of America*, and Advisory Opinion OC–16/99 of the Inter-American Court of Human Rights on the right to information on consular assistance in the framework of the guarantees of the due process of law of 1 October 1999.

<sup>36</sup> Decision of the Inter-American Commission on Human Rights of 12 March 2002 on the request for precautionary measures (Detainees at Guantanamo Bay, Cuba).

<sup>37</sup> European Court of Human Rights, *Amuur v. France*, No. 19776/92, judgement of 25 June 1996, para. 43.

<sup>38</sup> Committee on the Elimination of Racial Discrimination, Statement on racial discrimination and measures to combat terrorism (A/57/18, para. 514); Committee on the Elimination of Racial Discrimination, concluding observations on the 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> periodic reports of Morocco (A/58/18, para. 147).

<sup>39</sup> *Conka v. Belgium*; European Court of Human Rights, *Chahal v. the United Kingdom*, No. 22414/93, judgement of 15 November 1996, para. 112.

<sup>40</sup> See, e.g., Convention relating to the Status of Refugees; Protocol relating to the Status of Refugees; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; International Covenant on Civil and Political Rights; European Convention on Human Rights. See also United Nations, *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism* (HR/PUB/03/1).

<sup>41</sup> Human Rights Committee, concluding observations on the third periodic report of Yemen (A/57/40 (vol. I), para. 83 (18)); see European Court of Human Rights, *Ahmed v. Austria*, No. 25964/94, judgement of 17 December 1996.

<sup>42</sup> See Committee against Torture, decision on communication No. 144/1999, *A.M. v. Switzerland*, 14 November 2000 (A/56/44, annex VII) and decision on communication No. 180/2001, *F.F.Z. v. Denmark*, 30 April 2002 (A/57/44, annex VII).

<sup>43</sup> See *A.M. v. Switzerland*.

<sup>44</sup> See general comment No. 1 (1997) of the Committee against Torture on the implementation of article 3 of the Convention in the context of article 22.

<sup>45</sup> *Chahal v. the United Kingdom*.

<sup>46</sup> Committee against Torture, decision on communication No. 146/1999, *E.T.B. v. Denmark*, 30 April 2002 (A/57/44, annex VII).

<sup>47</sup> European Court of Human Rights, *Boultif v. Switzerland*, No. 54273/00, judgement of 2 November 2001.

<sup>48</sup> See chap. I, sect. B above. Regional human rights instruments draw similar distinctions for non-citizens. The American Convention on Human Rights extends the freedom of movement and residence (art. 22 (1)) and procedural protections in expulsion proceedings (art. 22 (6)). Protocol No. 4 to the European Convention on Human Rights guarantees the right to liberty of movement and freedom to choose a place of residence to “everyone lawfully within the territory” of a State Party (art. 2 (1)). Protocol No. 7 to the European Convention on Human Rights extends procedural safeguards in expulsion proceedings to aliens “lawfully resident” within the territory of a State party (art. 1 (1)).

<sup>49</sup> European Commission against Racism and Intolerance, Second report on Denmark (CRI (2001) 4, paras. 18–25).

<sup>50</sup> Committee on the Elimination of Racial Discrimination, concluding observations on the 14<sup>th</sup> periodic report of Denmark (A/55/183, para. 63).

<sup>51</sup> European Commission against Racism and Intolerance, Second report on Malta (CRI (2002) 22, para. 19) and chap. III, sect. B 2, below.

<sup>52</sup> General comment No. 15 of the Human Rights Committee.

<sup>53</sup> See Human Rights Committee, concluding observations on the fourth periodic report of New Zealand (A/57/40 (vol. I), para. 81 (12)).



<sup>54</sup> European Commission against Racism and Intolerance, Second report on Switzerland (CRI (2000) 6, paras. 35–39).

<sup>55</sup> Human Rights Committee, concluding observations on the fourth periodic report of New Zealand.

<sup>56</sup> See general comment No. 15 of the Human Rights Committee (para. 9).

<sup>57</sup> *Conka v. Belgium*. Mass expulsions on the basis of nationality, religion, ethnic, racial or other considerations constitute human rights violations, see African Commission on Human and Peoples' Rights, *Union Inter Africaine des Droits de l'Homme and others v. Angola*.

<sup>58</sup> *Conka v. Belgium*; European Commission against Racism and Intolerance, Second report on Finland (CRI (2002) 20, paras. 46–57).

<sup>59</sup> See European Court of Human Rights, *Andric v. Sweden*, No. 45917/99, decision of 23 February 1999; see also African Commission on Human and Peoples' Rights, *World Organization against Torture and others v. Rwanda*, communications Nos. 27/89, 46/91, 49/91, 99/93 (October 1996).

<sup>60</sup> *Conka v. Belgium*.

<sup>61</sup> Human Rights Committee, views on communication No. 930/2000, *Winata v. Australia*, 26 July 2001 (A/56/40 (vol. II), annex X, sect. T, para. 7.3).

<sup>62</sup> Article 17 (1) states that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”

<sup>63</sup> Article 23 (1) states that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

<sup>64</sup> Article 24 (1) states that “[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”

<sup>65</sup> Human Rights Committee, concluding observations on the third periodic report of Yemen. Indeed, before expelling a non-citizen, States should provide effective safeguards and remedies. Human Rights Committee, concluding observations on the second periodic report of the Syrian Arab Republic (A/56/40 (vol. I), para. 81 (22)).

<sup>66</sup> Residence permits of long-term resident non-citizens should be withdrawn only under exceptional and clearly defined circumstances, and adequate recourse to appeal such decisions should be made available. European Commission against Racism and Intolerance, Second report on Switzerland (para. 39). Undocumented juvenile non-citizens may enjoy greater protection under the Convention on the Rights of the Child; its article 2 extends guarantees to each child within the jurisdiction of a State party.

<sup>67</sup> See general comment No. 15 of the Human Rights Committee.

<sup>68</sup> See Committee on the Elimination of Racial Discrimination, concluding observations on the fifth periodic report of Estonia (para. 359), and Human Rights Committee, concluding observations on the second periodic report of Estonia (A/58/40 (vol. I), para. 79 (17)).

<sup>69</sup> See general comment No. 15 of the Human Rights Committee.

<sup>70</sup> *Berrehab v. the Netherlands*; see also European Court of Human Rights, *Beldjoudi v. France*, No. 12083/86, judgement of 26 March 1992, *Mehemi v. France*, No. 25017/94, judgement of 26 September 1997 and *El Boujaïdi v. France*, No. 25613/94, judgement of 26 September 1997.

<sup>71</sup> *Boultif v. Switzerland*, para. 55.

<sup>72</sup> *Beldjoudi v. France*.

<sup>73</sup> See general comment No. 15 of the Human Rights Committee.

<sup>74</sup> See Committee on the Elimination of Racial Discrimination, concluding observations on the 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> periodic reports of Yemen (A/57/18, para. 464).

<sup>75</sup> Committee on Economic, Social and Cultural Rights, concluding observations on the second periodic report of the Dominican Republic (E/1997/22, para. 225); Committee on the Elimination of Racial Discrimination, concluding observations on the 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> periodic reports of Yemen.

<sup>76</sup> Human Rights Committee, concluding observations on the third periodic report of Yemen (para. 83 (11)); Report of the Committee on the Elimination of Discrimination against Women on its twenty-seventh session, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 38 (A/57/38, Part II, para. 254)*.

<sup>77</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (d) (iii). See Committee on the Elimination of Racial Discrimination, concluding observations on the initial and second reports of Saudi Arabia (A/58/18, para. 214).

<sup>78</sup> United Nations, Department of Economic and Social Affairs, Division for the Advancement of Women, *Women 2000 and beyond: Women, nationality and citizenship* (June 2003); see also sect. 3 and chap. III, sect. E below.

<sup>79</sup> For up-to-date information on ratifications and reservations, see <http://untreaty.un.org> ("access to databases").

<sup>80</sup> See Committee on the Elimination of Racial Discrimination, concluding observations on the initial and second reports of Saudi Arabia; Committee on the Rights of the Child, concluding observations on the second periodic report of the United Kingdom of Great Britain and Northern Ireland (CRC/C/15/Add.188, para. 23 (d)).

<sup>81</sup> See chap. III, sect. E below.

<sup>82</sup> Committee on the Elimination of Racial Discrimination, concluding observations on the fifth periodic report of Estonia (para. 353).

<sup>83</sup> Committee on the Elimination of Racial Discrimination, concluding observations on the 13<sup>th</sup> and 14<sup>th</sup> periodic reports of Canada (para. 336).

<sup>84</sup> Committee on the Elimination of Racial Discrimination, concluding observations on the fifth periodic report of Estonia.

<sup>85</sup> *Ibid.*; Committee on the Elimination of Racial Discrimination, concluding observations on the 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> periodic reports of the Russian Federation (A/58/18, paras. 169–200).

<sup>86</sup> Committee on the Elimination of Racial Discrimination, concluding observations on the fifth periodic report of Slovenia (*ibid.*, para. 240).

<sup>87</sup> Human Rights Committee, concluding observations on the second periodic report of Estonia (para. 79 (14)) and General Assembly resolution 55/153 of 12 December 2000 on the nationality of natural persons in relation to the succession of States, annex.

<sup>88</sup> Committee on the Elimination of Racial Discrimination, concluding observations on the fifth periodic report of Estonia (para. 354).

<sup>89</sup> General Assembly resolution 55/153.

<sup>90</sup> See Report of the experts of the Council of Europe on the citizenship laws of the Czech Republic and Slovakia and their implementation, and replies of the Governments of the Czech Republic and Slovakia, 2 April 1996 (DIR/JUR (96) 4, para. 164); see also European Framework Convention for the Protection of National Minorities.

<sup>91</sup> See chap. I, sect. D.

<sup>92</sup> See Human Rights Committee, decision on communication No. 586/1994, *Josef Frank Adam v. the Czech Republic*, 16 March 1995 (A/51/40 (vol. II), annex VIII, sect. V, para. 12.6).

<sup>93</sup> See Report of the experts of the Council of Europe on the citizenship laws..., para. 164.

<sup>94</sup> See P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention*, 3<sup>rd</sup> ed. (The Hague, Kluwer, 1998), p. 674.

<sup>95</sup> Human Rights Committee, concluding observations on the third periodic report of Yemen; Report of the Committee on the Elimination of Discrimination against Women.

<sup>96</sup> Human Rights Committee, views on communication No. R.9/35, *Shirin Aumeeruddy-Cziffra and others v. Mauritius*, 9 April 1981 (A/36/40, annex XIII). Changes of residency requirements and revocation of temporary residence permits of non-citizen women who experience domestic violence should not be undertaken without a full assessment of the impact on these women. See Report of the Committee on the Elimination of Discrimination against Women (para. 348). The Convention on the Elimination of All Forms of Discrimination against Women, art. 2 (b), also promotes sex equality as to legislative and other measures, which would include the reception of asylum-seekers.

<sup>97</sup> See Committee on the Elimination of Racial Discrimination, concluding observations on the initial and second periodic reports of Saudi Arabia.

<sup>98</sup> See, e.g., Committee on the Elimination of Racial Discrimination, concluding observations on the initial, second, third and fourth periodic reports of Estonia (A/55/18, para. 79).

<sup>99</sup> See general comment No. 15 of the Human Rights Committee (para. 7). The European Charter for Regional or Minority Languages, however, clearly differentiates between “minorities” and “non-citizens” in its definition of “regional or minority languages.” Its article 1 states that the term “‘regional or minority languages’ ... does not include... the languages of migrants.” The Council of Europe nonetheless considers “Community Relations” to include “all aspects of the relations between migrants or ethnic groups of immigrant origin and the host society.” See Council of Europe, *Tackling Racism and Xenophobia: Practical Action at the Local Level* (Strasbourg, Council of Europe Press, 1995), pp. 17–18.

<sup>100</sup> Minority Rights Group International, *Public Participation and Minorities* (London, 2001), p. 10.

<sup>101</sup> See, e.g., Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Estonia (ACFC/INF/OP/I(2002)005, para. 17).

<sup>102</sup> See, e.g., Committee on the Rights of the Child, concluding observations on the initial report of Austria (CRC/C/15/Add.98, para. 30).

<sup>103</sup> See general recommendation XXVII (2000) of the Committee on the Elimination of Racial Discrimination on discrimination against Roma.

<sup>104</sup> See general comment No. 15 of the Human Rights Committee.

<sup>105</sup> See Committee on the Elimination of Racial Discrimination, concluding observations on the initial and second periodic reports of Japan (A/56/18, para. 176).

<sup>106</sup> See general comment No. 15 of the Human Rights Committee.

<sup>107</sup> See, e.g., Committee on the Elimination of Racial Discrimination, concluding observations on the initial and second periodic reports of Japan (para. 173).

<sup>108</sup> Committee on the Elimination of Racial Discrimination, decision on communication No. 18/2000, *F.A. v. Norway*, 21 March 2001 (A/56/18, annex III).

<sup>109</sup> See general comment No. 4 of the Committee on Economic, Social and Cultural Rights; International Covenant on Economic, Social and Cultural Rights, art. 2 (2).

<sup>110</sup> See Committee on Economic, Social and Cultural Rights, concluding observations on the third periodic report of Ukraine.

<sup>111</sup> Committee on the Elimination of Racial Discrimination, concluding observations on the initial and second periodic reports of Saudi Arabia (para. 206).

<sup>112</sup> See general comment No. 13 (1999) of the Committee on Economic, Social and Cultural Rights on the right to education (paras. 6 (b), 34 and 31).

<sup>113</sup> Committee on the Elimination of Racial Discrimination, concluding observations on the fifth periodic report of Slovenia (para. 241); see also *Yearbook of the International Law Commission, 1999*, vol. II (Part Two), Draft articles on nationality of natural persons in relation to the succession of States (art. 6, commentary 4).

<sup>114</sup> European Commission against Racism and Intolerance, Second report on Croatia (CRI (2001) 34,

para. 31).

<sup>115</sup> See, e.g., Office of the United Nations High Commissioner for Refugees, “The international legal framework concerning statelessness and access for stateless persons”, Contribution by Carol A. Batchelor to the European Union Seminar on the content and scope of international protection organized by the Ministry of Internal Affairs of Spain (Madrid, 8–9 January 2002).

<sup>116</sup> See, e.g., Human Rights Watch, *The Bedoons of Kuwait: Citizens Without Citizenship* (1995); *Beldjoudi v. France*.

<sup>117</sup> See, e.g., Committee on the Elimination of Discrimination against Women, concluding observations on the initial, second and third periodic reports of Guinea (A/56/38, paras. 97–144); European Convention on Nationality, art. 6, para. 2: “Each State Party shall provide in its internal law for its nationality to be acquired by children born on its territory who do not acquire at birth another nationality...” The prevailing approach to citizenship is *jus soli*, i.e., citizenship based on the place of birth, but some States provide for *jus sanguinis*, i.e., citizenship based upon the nationality of the child’s parents. Some States apply both approaches.

<sup>118</sup> European Commission against Racism and Intolerance, Second report on Estonia (CRI (2002) 1, paras. 38–42).

<sup>119</sup> See Committee on the Rights of the Child, concluding observations on the initial report of Lithuania (CRC/C/15/Add.146, para. 24); Human Rights Committee, concluding observations on the second periodic report of Estonia.

<sup>120</sup> Committee on the Elimination of Racial Discrimination, concluding observations on the seventh, eighth and ninth periodic reports of Sri Lanka (A/56/18, paras. 321–342).

<sup>121</sup> Human Rights Committee, concluding observations on the second periodic report of Estonia. See also chap. II, sect. B 2 above.

<sup>122</sup> Ralph G. Steinhardt, “The United Nations and refugees: 1945–1988,” *Human Rights, the United Nations and Amnesty International* (New York, Amnesty International, 1988).

<sup>123</sup> Committee on the Elimination of Racial Discrimination, concluding observations on the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> periodic reports of the Sudan.

<sup>124</sup> See Committee on the Elimination of Racial Discrimination, concluding observations on the 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> periodic reports of Hungary (A/57/18, para. 380).

<sup>125</sup> European Commission against Racism and Intolerance, Second report on Croatia (para. 31) and Second report on Belgium (paras. 11–15).

<sup>126</sup> Specific groups and individuals: migrant workers (E/CN.4/2003/85).

<sup>127</sup> See, e.g., Human Rights Committee, concluding observations on the second periodic report of Switzerland (A/57/40 (vol. I), para. 76 (13)).

<sup>128</sup> See, e.g., European Commission against Racism and Intolerance, Second report on the Czech Republic (CRI (2000) 4, para. 14).

<sup>129</sup> *Ibid.*

<sup>130</sup> European Commission against Racism and Intolerance, Second report on Denmark (paras. 18–25).

<sup>131</sup> See, e.g., African Charter on Human and Peoples’ Rights, art. 12; Convention relating to the Status of Refugees, art. 3.

<sup>132</sup> European Commission against Racism and Intolerance, Second report on Austria (paras. 16–21).

<sup>133</sup> See, e.g., Human Rights Committee, views on communication No. 560/1993, *A v. Australia*, 4 April 1995 (A/52/40 (vol. II), annex VI).

<sup>134</sup> European Commission against Racism and Intolerance, Second report on Bulgaria (CRI (2000) 3, para. 20).

<sup>135</sup> European Commission against Racism and Intolerance, Second report on Turkey (CRI (2001) 37, para. 44).

<sup>136</sup> See, e.g., Office of the United Nations High Commissioner for Refugees, Executive Committee conclusion No. 82 (XLVIII) on safeguarding asylum (17 October 1997).

<sup>137</sup> See, e.g., European Commission against Racism and Intolerance, Second report on Turkey (para. 45).

<sup>138</sup> African Charter on Human and Peoples' Rights and African Charter on the Rights and Welfare of the Child.

<sup>139</sup> European Convention on Human Rights; Protocols Nos. 1, 2, 3, 4 and 5; and European Social Charter.

<sup>140</sup> American Convention on Human Rights; Convention on Territorial Asylum and Convention on Diplomatic Asylum of the Organization of American States; General Assembly resolution 2312 (XXII) of 14 December 1967 on the Declaration on Territorial Asylum.

<sup>141</sup> European Commission against Racism and Intolerance, Second report on Malta (para. 19).

<sup>142</sup> See, e.g., European Commission against Racism and Intolerance, Second report on the United Kingdom (CRI (2001) 6, para. 63).

<sup>143</sup> European Commission against Racism and Intolerance, Second report on Finland (paras. 21, 46–57).

<sup>144</sup> See, e.g., European Commission against Racism and Intolerance, Second report on the United Kingdom (para. 63).

<sup>145</sup> European Commission against Racism and Intolerance, Second report on Finland (paras. 21, 46–57).

<sup>146</sup> European Commission against Racism and Intolerance, Second report on Malta (para. 19). See chap. II, sect. A 3 above.

<sup>147</sup> International Covenant on Economic, Social and Cultural Rights, art. 6.

<sup>148</sup> See International Labour Office, "The key role of international labour standards in defending rights of non-nationals", statement by Patrick A. Taran to the Expert Meeting on clarifying and expanding the rights of non-nationals organized by the Open Society Justice Initiative (New York, 9–10 November 2003).

<sup>149</sup> International Covenant on Economic, Social and Cultural Rights, art. 7.

<sup>150</sup> Committee on Economic, Social and Cultural Rights, concluding observations on the initial report of Senegal (E/1994/23).

<sup>151</sup> Forced Labour Convention (No. 29), Freedom of Association and Right to Organize Convention (No. 87), Right to Organize and Collective Bargaining Convention (No. 98), Equal Remuneration Convention (No. 100), Abolition of Forced Labour Convention (No. 105), Discrimination (Employment and Occupation) Convention (No. 111), Convention on Minimum Age (No. 138) and Elimination of Worst Forms of Child Labour Convention (No. 182).

<sup>152</sup> Migrant Workers (Supplementary Provisions) Convention (No. 143), art. 9.

<sup>153</sup> Migrant Workers Recommendation (No. 151), para. 2 (b).

<sup>154</sup> Migrant Workers (Supplementary Provisions) Convention (No. 143).

<sup>155</sup> Taran, op. cit. According to the 1998 ILO Declaration on Fundamental Principles and Rights at Work, all ILO members have an obligation arising from the very fact of their membership in the Organization "to respect, to promote and to realize... the principles concerning the fundamental rights" set out in its eight fundamental conventions even if they have not ratified them.

<sup>156</sup> Taran, op. cit.

<sup>157</sup> Inter-American Court of Human Rights, Advisory Opinion OC–18/03 on the juridical condition and rights of undocumented migrants, 17 September 2003.

<sup>158</sup> Committee on the Elimination of Racial Discrimination, concluding observations on the 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> periodic reports of Kuwait (A/48/18, paras. 359–381).

<sup>159</sup> Committee on the Elimination of Racial Discrimination, concluding observations on the initial and second periodic reports of Saudi Arabia.

<sup>160</sup> Prevention of discrimination: examples of practices in regard to non-citizens (E/CN.4/Sub.2/2002/25/Add.3).

<sup>161</sup> European Commission against Racism and Intolerance, Second report on Turkey (para. 52); see Recommended principles and guidelines on human rights and human trafficking (E/2002/68/Add.1).

<sup>162</sup> Committee on the Rights of the Child, concluding observations on the second periodic report of the Czech Republic (CRC/C/15/Add.201, para. 29).

<sup>163</sup> Committee on the Rights of the Child, concluding observations on the second periodic report of Iceland (CRC/C/15/Add.203, para. 23).

<sup>164</sup> Committee on the Rights of the Child, concluding observations on the second periodic report of Romania (CRC/C/15/Add.199, para. 26).

<sup>165</sup> See Asbjørn Eide, “Citizenship and international law with specific reference to human rights law: status, evolution and challenges” (2001); Working paper on citizenship and the minority rights of non-citizens (E/CN.4/Sub.2/AC.5/1999/WP.3); see also Committee on the Rights of the Child, concluding observations on the initial report of Latvia (CRC/C/15/Add.142, para. 26) and on the initial report of Lithuania (paras. 23–24). Efforts by States to end discrimination in their nationality laws between children born in and out of wedlock should be encouraged. Committee on the Rights of the Child, concluding observations on the second periodic report of the United Kingdom of Great Britain and Northern Ireland (para. 22); see chap. II, sect. B 2 above.

<sup>166</sup> See Committee on the Elimination of Racial Discrimination, concluding observations on the 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> periodic reports of Egypt (A/56/18, paras. 278–297); Committee on the Elimination of Discrimination against Women, concluding observations on the initial and second periodic reports of Singapore (A/56/38, paras. 54–96) and on the initial, second and third periodic reports of Guinea; Committee on the Rights of the Child, concluding observations on the initial report of Monaco (CRC/C/15/Add.158, para. 21) and on the second periodic report of Lebanon (CRC/C/15/Add.169, para. 32).

<sup>167</sup> See, e.g., Committee on the Rights of the Child, concluding observations on the initial report of Palau (CRC/C/15/Add.149, para. 40): in intercountry adoptions the adopting parents must be allowed to transfer their nationality to their adopted children, who must be allowed to own or inherit land and benefit from health, education and social service subsidies.

<sup>168</sup> See Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (fully revised edition) (United Nations Children’s Fund, New York, 2002) Sales No. E.02.XX.6.

<sup>169</sup> See general comment No. 15 of the Human Rights Committee.

<sup>170</sup> The Convention on the Rights of the Child calls upon States Parties to “recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all...” (art. 28). It further provides that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s ... status” (art. 2 (1)), which would include unlawful status. See also Committee on the Rights of the Child, concluding observations on the initial report of Latvia (para. 23).

<sup>171</sup> Committee on the Elimination of Racial Discrimination, concluding observations on the initial and second periodic reports of Saudi Arabia.

<sup>172</sup> Committee on the Rights of the Child, concluding observations on the second periodic report of the Czech Republic (para. 57) and on the second periodic report of the Netherlands (CRC/C/15/Add.227, paras. 30–31 and 53–54). As a minimum, children of asylum-seekers should not be separated from their

parents during detention. Committee on the Rights of the Child, concluding observations on the second periodic report of Lebanon (para. 52).

<sup>173</sup> Committee on the Rights of the Child, concluding observations on the second periodic report of the Czech Republic (para. 56).

<sup>174</sup> Committee on the Rights of the Child, concluding observations on the initial report of Israel (CRC/C/15/Add.195, para. 26) and on the second periodic report of the United Kingdom of Great Britain and Northern Ireland.

<sup>175</sup> Committee on the Rights of the Child, concluding observations on the second periodic report of Italy (CRC/C/15/Add.198, para. 21).

<sup>176</sup> The Committee on the Elimination of Racial Discrimination has already followed this suggestion, see annex below.

# Annex

## **Committee on the Elimination of Racial Discrimination, general recommendation XXX (2004) on discrimination against non-citizens**

*The Committee on the Elimination of Racial Discrimination,*

*Recalling* the Charter of the United Nations and the Universal Declaration of Human Rights, according to which all human beings are born free and equal in dignity and rights and are entitled to the rights and freedoms enshrined therein without distinction of any kind, and the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination,

*Recalling* the Durban Declaration in which the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance recognized that xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices,

*Noting that,* based on the International Convention on the Elimination of All Forms of Racial Discrimination and general recommendations XI and XX, it has become evident from the examination of the reports of States parties to the Convention that groups other than migrants, refugees and asylum-seekers are also of concern, including undocumented non-citizens and persons who cannot establish the nationality of the State on whose territory they live, even where such persons have lived all their lives on the same territory,

*Having organized* a thematic discussion on the issue of discrimination against non-citizens and received the contributions of members of the Committee and States parties, as well as contributions from experts of other United Nations organs and specialized agencies and from non-governmental organizations,

*Recognizing* the need to clarify the responsibilities of States parties to the International Convention on the Elimination of All Forms of Racial Discrimination with regard to non-citizens,

*Basing* its action on the provisions of the Convention, in particular article 5, which requires States parties to prohibit and eliminate discrimination based on race, colour, descent, and national or ethnic origin in the enjoyment by all persons of civil, political, economic, social and cultural rights and freedoms,



*Affirms that:*

## **1. RESPONSIBILITIES OF STATES PARTIES TO THE CONVENTION**

1. Article 1, paragraph 1, of the Convention defines racial discrimination. Article 1, paragraph 2, provides for the possibility of differentiating between citizens and non-citizens. Article 1, paragraph 3, declares that, concerning nationality, citizenship or naturalization, the legal provisions of States parties must not discriminate against any particular nationality;
2. Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights;
3. Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;
4. Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim. Differentiation within the scope of article 1, paragraph 4, of the Convention relating to special measures is not considered discriminatory;
5. States parties are under an obligation to report fully upon legislation on non-citizens and its implementation. Furthermore, States parties should include in their periodic reports, in an appropriate form, socio-economic data on the non-citizen population within their jurisdiction, including data disaggregated by gender and national or ethnic origin;

*Recommends,*

Based on these general principles, that the States parties to the Convention, as appropriate to their specific circumstances, adopt the following measures:

## **2. MEASURES OF A GENERAL NATURE**

6. Review and revise legislation, as appropriate, in order to guarantee that such legislation is in full compliance with the Convention, in particular regarding the effective enjoyment of the rights mentioned in article 5, without discrimination;
7. Ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens;
8. Pay greater attention to the issue of multiple discrimination faced by non-citizens, in particular concerning the children and spouses of non-citizen workers, to refrain from applying different standards of treatment to female non-citizen spouses of citizens and male non-citizen spouses of citizens, to report on any such practices and to take all necessary steps to address them;
9. Ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin;
10. Ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping;

## **3. PROTECTION AGAINST HATE SPEECH AND RACIAL VIOLENCE**

11. Take steps to address xenophobic attitudes and behaviour towards non-citizens, in particular hate speech and racial violence, and to promote a better understanding of the principle of non-discrimination in respect of the situation of non-citizens;
12. Take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of “non-citizen” population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large;

## **4. ACCESS TO CITIZENSHIP**

13. Ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents;
14. Recognize that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States parties’ obligations to ensure non-discriminatory enjoyment of the right to nationality;

15. Take into consideration that in some cases denial of citizenship for long-term or permanent residents could result in creating disadvantage for them in access to employment and social benefits, in violation of the Convention's anti-discrimination principles;
16. Reduce statelessness, in particular statelessness among children, by, for example, encouraging their parents to apply for citizenship on their behalf and allowing both parents to transmit their citizenship to their children;
17. Regularize the status of former citizens of predecessor States who now reside within the jurisdiction of the State party;

## **5. ADMINISTRATION OF JUSTICE**

18. Ensure that non-citizens enjoy equal protection and recognition before the law and in this context, to take action against racially motivated violence and to ensure the access of victims to effective legal remedies and the right to seek just and adequate reparation for any damage suffered as a result of such violence;
19. Ensure the security of non-citizens, in particular with regard to arbitrary detention, as well as ensure that conditions in centres for refugees and asylum-seekers meet international standards;
20. Ensure that non-citizens detained or arrested in the fight against terrorism are properly protected by domestic law that complies with international human rights, refugee and humanitarian law;
21. Combat ill-treatment of and discrimination against non-citizens by police and other law enforcement agencies and civil servants by strictly applying relevant legislation and regulations providing for sanctions and by ensuring that all officials dealing with non-citizens receive special training, including training in human rights;
22. Introduce in criminal law the provision that committing an offence with racist motivation or aim constitutes an aggravating circumstance allowing for a more severe punishment;
23. Ensure that claims of racial discrimination brought by non-citizens are investigated thoroughly and that claims made against officials, notably those concerning discriminatory or racist behaviour, are subject to independent and effective scrutiny;
24. Regulate the burden of proof in civil proceedings involving discrimination based on race, colour, descent, and national or ethnic origin so that once a non-citizen has established a prima facie case that he or she has been a victim of such discrimination, it shall be for the respondent to provide evidence of an objective and reasonable justification for the differential treatment;

## **6. EXPULSION AND DEPORTATION OF NON-CITIZENS**

25. Ensure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin, and that non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies;
26. Ensure that non-citizens are not subject to collective expulsion in particular in situations where there are insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account;
27. Ensure that non-citizens are not returned or removed to a country or territory where they are at risk of being subject to serious human rights abuses, including torture and cruel, inhuman or degrading treatment or punishment;
28. Avoid expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life;

## **7. ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

29. Remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health;
30. Ensure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State party;
31. Avoid segregated schooling and different standards of treatment being applied to non-citizens on grounds of race, colour, descent, and national or ethnic origin in elementary and secondary school and with respect to access to higher education;
32. Guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory practices;
33. Take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects;
34. Take effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault;

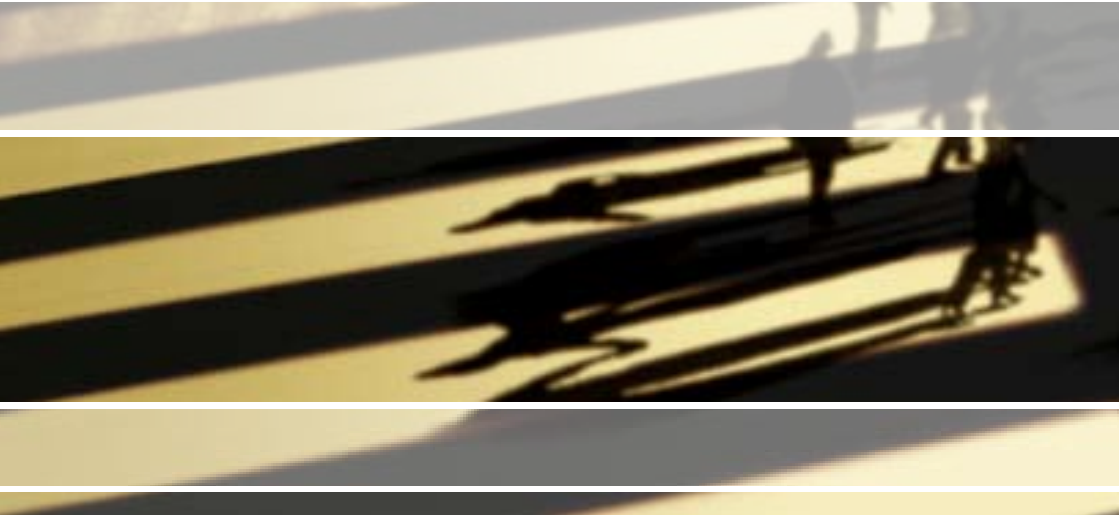
35. Recognize that, while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated;
36. Ensure that States parties respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services;
37. Take the necessary measures to prevent practices that deny non-citizens their cultural identity, such as legal or de facto requirements that non-citizens change their name in order to obtain citizenship, and to take measures to enable non-citizens to preserve and develop their culture;
38. Ensure the right of non-citizens, without discrimination based on race, colour, descent, and national or ethnic origin, to have access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks;
39. The present general recommendation replaces general recommendation XI (1993).

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