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PREVENTION OF DISCRIMINATION

The rights of non-citizens

Progress report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decisions 2000/103 and 2001/108, as well as Commission decision 2002/107

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I. INTRODUCTION

1. In March 1997, at its fiftieth session, the Committee on the Elimination of Racial Discrimination (CERD) discussed and decided to propose to the Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Sub-Commission) nine topics for the preparation of studies, including the "[r]ights of non-citizens" which had been suggested by Mr. Theo van Boven (see CERD/C/SR.1189). Mr. Michael Banton, Chairman of CERD, in a letter dated 19 March 1997 (E/CN.4/Sub.2/1997/31), communicated these proposals to the Chairman of the Sub-Commission and requested that he present these proposals to the Sub-Commission at its forty-ninth session.

2. On 21 August 1997, at its forty-ninth session, the Sub-Commission, in resolution 1997/5, expressed its gratitude to CERD for recommending future Sub-Commission studies that could usefully contribute to the work of the Committee. Furthermore, the Sub-Commission, in its decision 1997/112 of 27 August 1997, decided to devote special attention to such subjects proposed by United Nations treaty-monitoring bodies when choosing new subjects for study.

3. Accordingly, on 20 August 1998, at its fiftieth session, the Sub-Commission, in decision 1998/103, decided "to entrust Mr. David Weissbrodt with the preparation, without financial implications, of a working paper on the rights of persons who are not citizens of the country in which they live, … in order to enable it to take a decision at its fifty-first session on the feasibility of a study on that subject".

4. On 31 May 1999, at the fifty-first session of the Sub-Commission, Mr. David Weissbrodt presented his working paper entitled "The rights of non-citizens." (E/CN.4/Sub.2/1997/7 and Add.1). The Sub-Commission then decided, in its resolution 1999/7 of 25 August 1999, to recommend that the Economic and Social Council authorize the Sub-Commission to appoint a special rapporteur to focus on the rights of non-citizens. It was also decided that the special rapporteur's mandate was to consist primarily of reporting on the status of non-citizens, but also to take into account the different categories of citizens regarding different categories of rights in countries of different levels of development with different rationales to be offered for such distinctions.

5. On 25 April 2000, the Commission on Human Rights, in its decision 2000/104, requested the Economic and Social Council to authorize the Sub-Commission to appoint one of its members as special rapporteur with the task of preparing a comprehensive study of the rights of non-citizens, based on the working paper prepared by Mr. David Weissbrodt as well as the comments made and the discussions that took place at the fifty-first session of the Sub-Commission and might take place at the fifty-sixth session of the Commission, and of submitting a preliminary report to the Sub-Commission at its fifty-third session in 2001, a progress report at its fifty-fourth session in 2002, and a final report at its fifty-fifth session in 2003.

6. On 1 August 2000 the Sub-Commission, in its decision 2000/103, decided to appoint Mr. David Weissbrodt as Special Rapporteur with the task of preparing a comprehensive

study of the rights of non-citizens and requested that he submit a preliminary report to the Sub-Commission at its fifty-third session, a progress report at its fifty-fourth session, and a final report at its fifty-fifth session.

7. The Special Rapporteur prepared a preliminary report (E/CN.4/Sub.2/2001/20 and E/CN.4/Sub.2/2001/20/Add.1) that was discussed during the fifty-third session of the Sub-Commission. The preliminary report provided a summary of the international legal standards and a recitation of the jurisprudence relevant to the rights of non-citizens under the International Convention on the Elimination of All Forms of Racial Discrimination, which gave rise to the study, as well as the Charter of the United Nations; the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child; the International Convention on the Rights of All Migrant Workers and Members of Their Families; the International Law Commission's draft articles on the nationality of natural persons in relation to the succession of States; the Rome Statute of the International Criminal Court; the 1985 Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live; the Human Rights Committee's General Comment 15 on the position of aliens under the Covenant; General Comment 13 of the Committee on Economic, Social and Cultural Rights on non-discrimination in regard to education; General Recommendation 21 of the Committee on the Elimination of Discrimination against Women; the European Convention on Human Rights; the European Social Charter; the European Charter for Regional or Minority Languages; the European Convention on Nationality; the European Convention on the Participation of Foreigners in Public Life at Local Level; and the European Charter of Fundamental Rights.

8. This progress report responds to the suggestions and comments at the fifty-third session. First, the progress report attempts to synthesize the main international principles relating to the rights of non-citizens. Second, addendum 1 provides an update of the relevant jurisprudence concerning the rights of non-citizens similar to the recitation provided in the preliminary report. It also considers the work of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance as it pertains to the situation of non-citizens. In addition, it reflects the Global Consultations process launched by The Office of the United Nations High Commissioner for Refugees (UNHCR) in 2000 to enhance the protection of refugees, a particular group of non-citizens. Third, addendum 2 provides more complete materials relevant to European jurisprudence that had been missing from the preliminary report and includes new material on the Framework Convention on National Minorities, adopted under the auspices of the Council of Europe. It also covers recent developments relating to non-citizens within the African and Inter-American systems. The preliminary report of 2001 had already reviewed the other regional treaties and jurisprudence. Fourth, addendum 3 responds to the requests from Sub-Commission members for some information about practical situations and concerns that have arisen around the world as to the rights of non-citizens. In its decision 2001/108 the Sub-Commission requested the Commission's authority to request the Secretary-General to disseminate a questionnaire to Governments, intergovernmental organizations, human rights treaty bodies and non-governmental organizations for their comments and to solicit any information they may wish to submit in connection with the study. The Commission adopted

decision 2002/107 of 25 April 2002 approving this request and the questionnaire was promptly transmitted by the Office of the High Commissioner for Human Rights. No responses were, of course, received before the date of submission of this progress report in early May 2002. The questionnaire is reproduced as an annex to this progress report. The Special Rapporteur would welcome responses to the questionnaire as well as additional information, comments, and suggestions. Accordingly, the information in addendum 3 must be considered quite provisional.

9. The Special Rapporteur would like to thank all those who offered suggestions, comments, and critiques on this preliminary study. In particular, I offer my gratitude to my colleagues on the Sub-Commission (particularly Ms. Marília Sardenberg), to NGO and government representatives who addressed this body at its previous session, UNHCR, the International Committee of the Red Cross (ICRC), the International Catholic Migration Commission and Migrant Rights International. The Special Rapporteur would also like to express his sincere appreciation to Mr. Clark Goebel, Mr. Igor Kornev, Ms. Mary Rumsey, Mr. Bret Thiele and Mr. Mark Thieroff for their assistance in preparing this report.

10. The remainder of this report attempts to identify (i) the precise scope of the rights currently granted to non-citizens under international human rights law and (ii) the extent to which States may differentiate, in exceptional circumstances, between citizens and non-citizens in the protection of human rights. The emphasis of the analysis that follows is on *permissible forms of differential treatment*, if any, rather than on the myriad forms of discrimination experienced by non-citizens. The addenda provide examples of actual practice in the treatment of non-citizens.

II. GENERAL INTERNATIONAL PRINCIPLES AS TO THE RIGHTS OF NON-CITIZENS

11. The architecture of international human rights is built on the premise that all persons, by virtue of their essential humanity, enjoy certain rights. The Universal Declaration of Human Rights recognizes this principle in article 2 (1), which states:

> "*[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).

12. Similarly, article 2 (1) of the International Covenant on Civil and Political Rights makes no distinction as to the rights of citizens and non-citizens:

> "Each State Party to the present Covenant 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" (emphasis added).

13. The same approach appears in article 4 of the International Covenant on Civil and Political Rights which recognizes a set of core rights that States parties must guarantee to all persons at all times, irrespective of citizenship status. These non-derogable rights include: the right to life (art. 6); the right to humane treatment (art. 7); the freedom from slavery (art. 8); the right not to be imprisoned for failure to fulfil a contractual obligation (art. 11); the freedom from ex post facto laws (art. 15); the right to recognition before the law (art. 16); and the freedom of thought, conscience, and religion (art. 18).

14. In its General Comment 15, adopted in 1994, the Human Rights Committee explained that:

> "the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness … The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens" (para. 1).

15. Hence, in addition to the non-derogable rights guaranteed to non-citizens under article 4 of the Covenant, as a general rule aliens enjoy:

> "the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens 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 or of rights and obligations in a suit at law … They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to … hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of [the Covenant], 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. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant" (para. 7).

16. The non-citizen also enjoys the right not to be deported to a country where he or she may be subjected to abuse. This principle of non-refoulement exists in a number of international instruments (with slightly varying coverage), including the Convention relating to the Status of Refugees; the Protocol Relating to the Status of Refugees; the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; the International Covenant on Civil and Political Rights; and the European Convention on Human Rights; among others.

III. EXCEPTIONS TO THE GENERAL APPROACH OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

17. The Covenant permits States to draw distinctions between citizens and non-citizens with respect to two categories of rights: rights explicitly guaranteed to citizens only and rights that may be denied to non-citizens in times of public emergency.

A. Covenant rights extended to "citizens"

18. With respect to two rights, differential treatment of non-citizens is sanctioned by the text of the Covenant itself. Article 25 of the Covenant 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. Similarly, article 12 (4) states that no one shall be arbitrarily deprived of the right to enter "his own country".

B. Covenant rights derogable in times of public emergency

19. The text of the Covenant also permits differential treatment of non-citizens during times of public emergency. The Covenant generally prohibits States from adopting discriminatory measures in times of public emergency in article 4 (1):

> "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

20. Unlike the general anti-discrimination clause found in article 2 (1), the derogation clause does not include "national origin" among the impermissible grounds for discrimination. This omission, according to the *travaux préparatoires*, reflects the drafters' recognition that States often find it necessary to discriminate against non-citizens in time of national emergency.[1]

IV. THE POSITION OF THE NON-CITIZEN UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

21. The International Covenant on Economic, Social, and Cultural Rights establishes rights that apply to everyone, regardless of citizenship. Article 6 grants everyone the right to work.

Article 7 grants everyone just and favourable working conditions. Article 8 ensures everyone the right to establish trade unions. Article 9 guarantees the right to social security for everyone. Article 11 ensures the right of everyone to an adequate standard of living including adequate food, clothing, housing, and the continuous improvement of living conditions. Article 12 grants the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health". Article 13 requires States parties to recognize the right of everyone to education, and article 15 grants everyone the right to take part in cultural life.

22. The International Covenant on Economic, Social and Cultural Rights also can be construed to forbid discrimination on the basis of nationality. Article 2 (2) states:

> "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

23. Article 2 (3), however, creates a specific exception to this rule only 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."

24. It should be noted that article 2 (3) may be relied upon only by developing countries, and only with respect to economic rights.[2] States may not draw distinctions between citizens and non-citizens as to social and cultural rights.

V. DIFFERENTIAL TREATMENT AMONG NON-CITIZENS

25. In addition to the distinctions States draw between citizens and non-citizens, in certain limited circumstances States may be permitted to distinguish *among* non-citizens, for example on the basis of nationality or immigration status.

A. Differentiating on the basis of nationality

26. As noted above, non-citizens enjoy protection from discrimination on grounds of national origin under both of the Covenants. In addition, article 1 (3) of the International Convention on the Elimination of All Forms of Racial Discrimination establishes 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).

27. Not every difference in treatment constitutes discrimination, however. As the Committee on the Elimination of Racial Discrimination (CERD) observed in its General Recommendation XIV, adopted in 1993:

> "a differentiation of treatment will not constitute discrimination if the criteria for such discrimination, judged against the objectives and purposes of the Convention, are legitimate … 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" (para. 2).

28. The Human Rights Committee has similarly observed in General Comment 18 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" (para. 13).

29. In practice, States are increasingly drawing distinctions among non-citizens, particularly within the context of supranational economic or political unions. Several of these distinctions have been reviewed by international human rights bodies in recent years.

1. Nationality-based immigration quotas

30. In 2000, CERD considered an Estonian immigration law that imposed a strict immigration quota on citizens of all countries except member States of the European Union and several other selected countries.[3] The Committee expressed "particular concern" over the legislation and recommended that "the quota system be applied without discrimination based on race or ethnic or national origin". The Committee did not identify a particular provision of the Convention as the basis for its concern.

2. Nationality-based distinctions in eligibility for deportation

31. In 1996, the European Court of Human Rights considered a nationality-based discrimination claim in *C. v. Belgium*. The applicant, a Moroccan citizen, lived in Belgium from 1955 until his deportation was ordered in 1992 because of convictions for criminal damage, unlawful possession of drugs, and conspiracy. He claimed to be a victim of discrimination on the 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".[4] The Court found there was no violation of article 14 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".[5]

3. Nationality-based naturalization requirements

32. In 1984, the Inter-American Court of Human Rights issued an advisory opinion in relation to a proposed amendment to the naturalization provisions of the Costa Rican constitution.[6] The amendment established preferential naturalization rules for "nationals of the other Central American countries, Spaniards and Ibero-Americans". The Government of Costa Rica asked the Court to determine the compatibility of the amendment with several provisions of the American Convention on Human Rights, including article 24 which states:

> "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."

33. After observing the traditional margin of appreciation reserved to States in the determination of naturalization conditions, 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". Adopting an approach towards discrimination taken earlier by the European Court of Human Rights,[7] the Court further explained that differential treatment is only discriminatory when it lacks an objective and reasonable justification. Applying these standards to the proposed naturalization provisions, the Court stated that:

> "[i]t would not appear to be inconsistent with the nature and purpose of the grant of nationality to expedite the naturalization procedures for those who, viewed objectively, share much closer historical, cultural and spiritual bonds with the people of Costa Rica. The existence of these bonds permits the assumption that these individuals will be more easily and more rapidly assimilated within the national community and identify more readily with the traditional beliefs, values and institutions of Costa Rica, which the State has the right and duty to preserve."[8]

34. The Inter-American Court did not consider the Costa Rican provisions in light of the International Convention on the Elimination of All Forms of Racial Discrimination.

4. Differentiating among aliens as to freedom of expression and political participation.

35. In *Piermont v. France*,[9] decided in 1995, the European Court of Human Rights considered the case of a German national who had been expelled from a French Overseas Territory in order to prevent her from participating in a political rally there. The applicant, a sitting member of the European Parliament at the time of her expulsion, complained, inter alia, that her expulsion violated the freedom of expression guaranteed under article 10 of the European Convention. In defending the expulsion, the French Government invoked article 16 of the European Convention which states that:

> "Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."

36. The European Court rejected that argument, explaining simply that:

> "… Mrs Piermont's possession of the nationality of a member State of the European Union and, in addition to that, her status as a member of the European Parliament do not allow Article 16 of the Convention to be raised against her, especially as the people of the [Overseas Territories] take part in the European Parliament elections."

5. Observations

37. Although sparse, jurisprudence in the area of nationality-based distinctions suggests three tentative principles. First, States appear to enjoy greater discretion in establishing citizenship requirements than in regulating entry and residence, provided that no particular nationality is singled out for discriminatory treatment. Second, States may extend reciprocal nationality-based immigration and residence preferences if necessitated by their participation in a transnational legal or political order. Third, States belonging to an international organization possessing a parliamentary organ may[10] extend greater political participation rights to citizens of other member States than they would otherwise grant to aliens in general.[11]

B. Differentiating on the basis of immigration status

38. The International Covenant on Civil and Political Rights explicitly permits States parties to deny certain rights to undocumented non-citizens, such as the freedom of movement (art. 12), the right to choose one's residence (art. 12), and the right to certain procedural protections in expulsion proceedings (art. 13), which apply only to aliens "lawfully within the territory" of a State party.[12]

39. The 1951 Convention relating to the Status of Refugees ("the 1951 Convention") does not contain specific provisions on the treatment of asylum-seekers.[13] It remains, nonetheless, an important point of departure for considering standards of treatment for the reception of asylum-seekers, not least because asylum-seekers may be refugees.[14] Important elements of the Convention - notably the non-refoulement provision in article 33 and the prohibition on punishment for illegal entry in article 31 - are applicable to refugees before they receive formal recognition of their status. Furthermore, the gradations of treatment allowed by the Convention depend on notions such as lawfully staying, or merely being present in the territory, which in themselves serve as a useful yardstick in the context of defining reception standards for asylum-seekers. At a minimum, the 1951 Convention provisions that are not linked to lawful presence or residence would apply to asylum-seekers insofar as those provisions relate to humane treatment and respect for basic rights. The 1951 Convention provides that refugees should be entitled to greater protection than other aliens with regard to some rights and the same treatment as aliens generally with regard to other rights: The Convention and Protocol accord to refugees within their territories treatment at least as favourable as that accorded to their nationals 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

taxes and charges (art. 29). The Convention and Protocol require that States parties accord to refugees treatment no less favourable than that accorded to aliens 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); professions (art. 19); housing (art. 21); post-elementary education (art. 22 (2)); and freedom of movement (art. 26). There is a further discussion of the rights extended to refugees in the preliminary report of the Special Rapporteur (E/CN.4/Sub.2/2001/20, paras. 85-94).

40. International human rights law is also relevant in the context of defining adequate reception standards for asylum-seekers.[15] The minimum core content of human rights applies to everyone in all situations. The Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (art. 11 (1)) recognize the right of all individuals to an adequate standard of living, which includes the provision of food, clothing and accommodation to those asylum-seekers who are unable to secure these economic rights. Rights under the International Covenant are to be achieved progressively, taking into account available resources. The Covenant on Civil and Political Rights (arts. 7, 9, 10, 14) establishes standards for the exercise of civil rights, including protection against arbitrary detention and torture, as well as the right to recognition everywhere as a person before the law. Both Covenants - the ICESCR in article 2 (2) and the ICCPR in article 2 (1) - prohibit discrimination on the grounds, inter alia, of national origin. Additionally, any differential treatment between asylum-seekers with respect to the minimum core rights of the International Covenant on Economic and Social Rights is acceptable only when it is based on reasonable grounds. The Convention on the Elimination of All Forms of Discrimination Against Women applies to discrimination against women and promotes gender equality in the context of the reception of asylum-seekers. As regards children, the Convention on the Rights of the Child provides important guidance for designing and implementing reception policies under the “best interest” principle.

41. The human rights of asylum-seekers may also be protected by regional human rights instruments that apply to all persons residing in the respective States parties, regardless of their legal status in the country of asylum. Regional instruments in force in Africa,[16] Europe,[17] and Latin America[18] therefore provide important standards of treatment applicable to asylum-seekers.

42. Regional human rights instruments draw similar distinctions for all 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)) to aliens “lawfully in the territory of a State Party.” Article 2 (1) of Protocol No. 4 to the European Convention 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. Protocol No. 7 to the European Convention extends procedural safeguards in expulsion proceedings to aliens “lawfully resident” within the territory of a State party (art. 1).

VI. CITIZENSHIP REGULATIONS THAT DISCRIMINATE IN EFFECT

43. A final category of discrimination experienced by non-citizens arises through the application of racially neutral naturalization procedures. Unlike the instances of discrimination described above, the concern here is not with naturalization laws that distinguish among different nationalities, but rather with citizenship laws of general applicability that have either the purpose or effect of discriminating on the basis of race, ethnicity, national origin or other prohibited criteria.[19]

44. In recent years, concerns over possible discrimination in the conferral of citizenship have arisen in particular in situations of State succession. During the 1990s, international human rights bodies examined the citizenship laws of several newly independent States with a view to assessing their compliance with the non-discrimination requirement. The observations of these bodies suggest an increasing concern for preventing persons from *becoming* non-citizens.

45. In 1995, the Human Rights Committee considered citizenship laws that had been adopted in Estonia and Latvia shortly after each State had regained its independence.[20] As a preliminary matter, the Committee noted that a large proportion of the population of each State consisted of persons belonging to minorities. With respect to the Estonian citizenship law, the Committee first observed that the law established a "plethora of criteria" and a stringent language criterion, that prevented a "significantly large segment of the population" from enjoying Estonian citizenship. (CCPR/C/79/Add.59, para. 12). As a result, the Committee noted, "permanent residents who are non-citizens are … deprived of a number of rights under the Covenant" (ibid., para. 13).

46. In its consideration of the Latvian law, the Committee similarly noted that "a significant segment of the population will not enjoy Latvian citizenship owing to the stringent criteria established by the law, and the policy deliberately chosen to consider each case on an individual basis and pursuant to a timetable calculated to delay the naturalization process for many years." (CCPR/C/79/Add. 53, para. 17). The Committee took the position that the law "contains criteria of exclusion which give room to discrimination under articles 2 and 26 of the Covenant …" (ibid). The Committee therefore recommended that the Latvian Government "take all necessary measures to guarantee that the citizenship and naturalization legislation facilitate the full integration of all permanent residents of Latvia, with a view to ensuring compliance with the rights guaranteed under the Covenant, in particular with articles 2 and 26" (para. 27).

47. Similar concerns have emerged over laws that differentiate in access to citizenship by birth. In 1996, for example, the Committee on Economic, Social and Cultural Rights considered the naturalization laws of the Dominican Republic and, specifically, their effect on the Haitian minority living in the country. The Committee recommended that the Dominican Republic "adopt clear legislation on nationality, which would procure legal security to persons of Haitian origin born in the Dominican Republic and to their children; which would require the authorities to register births without discrimination; and which would allow Haitians to obtain Dominican nationality through naturalization under the same conditions as other foreigners" (E/C.12/1/Add. 6, para. 14).

48. The situation of children born to non-citizen parents is addressed in the Convention on the Rights of the Child. Under article 7 of that convention, a child born in those circumstances "shall be registered immediately after birth and shall have the right from birth to a name, [and] the right to acquire a nationality … States parties shall ensure the implementation of these rights in accordance with their national instruments in this field, in particular where the child would otherwise be stateless". In view of the near universal ratification of the Convention on the Rights of the Child, the principle of *jus soli* has emerged as the default international norm governing the conferral of nationality on children born to non-citizen parents.[21] This right must be enforced without discrimination as to the gender of the parent.[22] Furthermore, article 7 of the Convention on the Rights of the Child requires transmittal of citizenship from a parent to his or her adopted child.[23] Article 7 should not be considered in isolation but should be read in conjunction with article 8 (preservation of identity, including nationality, name and family relations), article 9 (separation from parents), article 10 (family reunification) and article 20 (continuity of upbringing of children deprived of their family environment). Within the holistic approach recommended by the Committee on the Rights of the Child for the interpretation of the text 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).[24]

49. European human rights institutions have recognized and expanded upon these principles. Although neither the acquisition or loss of citizenship is directly regulated by the European Convention on Human Rights, decisions to confer and revoke citizenship are subject to both the substantive and procedural requirements of the Convention. For example, an arbitrary deprivation of citizenship may rise to the level of inhuman or degrading treatment prohibited under article 3, or violate the right to respect for private and family life guaranteed under article 8 of the Convention.[25] 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,[26] which is prohibited under article 3 of Protocol No. 4 to the European Convention.[27] 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.[28]

VII. OVERALL APPROACH

50. In general, international human rights law requires equal treatment of citizens and non-citizens. The exceptions to that non-discrimination principle are narrow and must be strictly construed. In general, differential treatment of non-citizens may be acceptable only if based on reasonable and objective criteria and designed to achieve a legitimate purpose. With respect to civil and political rights, in times of domestic stability States may distinguish between citizens and non-citizens only as to political participation rights and certain rights of entry and residence. Developing countries may, to the extent necessary, differentiate between citizens and non-citizens in the area of economic rights; however, no State may draw such distinctions with respect to social and cultural rights.

51. The extent of permissible differential treatment among non-citizens is somewhat broader. Instances of differentiation of this type arise primarily in the regulation of entry, residence and naturalization of aliens - areas in which States have traditionally exercised substantial discretion. Permissible distinctions among non-citizens would appear to be limited to preferences extended to the nationals of certain countries, such as other members of a supranational political or economic entity, rather than the imposition of more onerous conditions on citizens of selected countries.

VIII. TENTATIVE RECOMMENDATIONS

52. Continued discriminatory treatment of non-citizens demonstrates the need for clear, comprehensive standards governing the rights of non-citizens and their implementation by States. Problems relating to the treatment of non-citizens arise under each of the international human rights instruments. As a consequence, it would be desirable for the treaty bodies jointly to prepare 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. In addition, treaty bodies should intensify their dialogues with States parties in regard to the rights accorded to, and the actual situation faced by, non-citizens within their respective spheres of concern. For example, the Committee on the Rights of the Child should intensify its dialogue with States parties to the Convention on the Rights of the Child in regard to the rights accorded to, and the actual situation faced by, non-citizen children as well as the special relevance of this issue for the life of children

53. The Special Rapporteur would welcome comments on the overall approach and direction of this initial effort to provide an analytical overview of the existing international standards and jurisprudence.

Notes

[1] See Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (Kehl am Main and Arlington, Va.: Engel, 1993), p. 86.

[2] See Carmen Tiburcio, The Human Rights of Aliens under International and Comparative Law (The Hague and Boston: M. Nijhoff, 2001), pp. 145-147.

[3] Concluding observations of the Committee on the initial, second, third and fourth periodic report of Estonia submitted in one document (CERD/C/304/Add.98), para. 11. This example and others are cited because they reflect international legal perspectives and not because they necessarily reveal the current situation in the countries identified.

[4] Eur. Ct. H.R., Reports 1996-III (7 August 1996), para. 37.

[5] Ibid. para. 38.

[6] Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (OC-4/84), para. 57.

[7] *Belgian Linguistic Case*, 6 Eur. Ct. H.R. (Ser. A) (1968).

[8] Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Political Constitution of Cost Rica (OC-4/84), para. 60.

[9] 314 Eur. Ct. H.R. (Ser. A) (1995).

[10] *Piermont v. France* suggests that the European Convention may actually *require* this differential treatment of citizens of member States of the European Union.

[11] See J. Hoppler Bello, J. Kokott and B. Rudolf, "European Convention on Human Rights - Conditions for Modified Applicability in Overseas Territories - Restrictions on Political Activities of Aliens - Lawful Entry by Air", American Journal of International Law, vol. 90, 1996, p. 459.

[12] Undocumented juvenile non-citizens may enjoy greater protection under the Convention on the Rights of the Child, article 2 of which extends guarantees to every child "within the jurisdiction" of a State party.

[13] See UNHCR Global Consultations on International Protection, "Reception of Asylum-Seekers, including Standards of Treatment, in the Context of Individual Asylum Systems" (EC/GC/01/17).

[14] See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees 1992, para. 28.

[15] See also Executive Committee Conclusion No. 82 (XLVIII) on safeguarding asylum, 1997.

[16] The 1981 African Charter on Human and Peoples' Rights and the 1990 African Charter on the Rights and Welfare of the Child.

[17] The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Protocols Nos. 1, 2, 3, 4 and 5, and the 1996 European Social Charter.

[18] The 1969 American Convention on Human Rights ("Pact of San José") and the 1954 Conventions on Territorial Asylum and on Diplomatic Asylum.

[19] With respect of measures that discriminate *in effect,* see *Josef Frank Adam v. Czech Republic*, communication No. 586/1994, CCPR/C/57/D/586/1994, where the Human Rights Committee expressed the view that "the intent of the legislature is not dispositive in determining a breach of article 26 of the Covenant, but rather the consequences of the enacted legislation. Whatever the motivation or intent of the legislature, a law may still contravene article 26 of the Covenant if its effects are discriminatory" (para. 12.7).

[20] The following views of the Human Rights Committee are cited because they reflect international legal perspectives and not because they necessarily reveal the current situation in the countries identified.

[21] See Asbjørn Eide, "Citizenship and international law with specific reference to human rights law: status, evolution and challenges", 2001. See also addendum 1, paras. 55 and 58.

[22] See addendum 1, paras. 14, 50, 51, 63 and 66.

[23] See addendum 1, para. 60.

[24] See Rachel Hodgkin and Peter Newell, Implementation Handbook for the Convention on the Rights of the Child, 1988, p. 97.

[25] See Report of the Experts of the Council of Europe on the Citizenship Laws of the Czech Republic and Slovakia and their Implementation, 2 April 1996, DIR/JUR (96) 4, para. 164.

[26] See P. van Dijk and G. J. H. van Hoof, Theory and Practice of the European Convention (2nd ed.), pp. 496-497.

[27] See X. v. Federal Republic of Germany, Appl. No. 3745/68, Coll. 31 (1970).

[28] See Report of the Experts of the Council of Europe, op. cit.

Annex

QUESTIONNAIRES ON THE RIGHTS OF NON-CITIZENS

On 25 April 2002, the Commission on Human Rights adopted decision 2002/107 approving the Sub-Commission's request to the Secretary-General contained in decision 2001/108 to "transmit a questionnaire of the Special Rapporteur on the rights of non-citizens to Governments, intergovernmental organizations, the human rights treaty bodies, in particular the Committee on the Elimination of Racial Discrimination, and non-governmental organizations to solicit any information they may wish to submit in connection with the study, in order that the Special Rapporteur may take them fully into account …".

In accordance with the above, the following questionnaires were prepared for sending to States Members of the United Nations, to non-member States with permanent observer missions at United Nations Headquarters or the United Nations Office at Geneva, and intergovernmental organizations, the human rights treaty bodies, in particular the Committee on the Elimination of Racial Discrimination, and non-governmental organizations.

A. Questionnaire for States

1. Does your Government have any comments on the collection of international norms found in the Special Rapporteur's preliminary report, (E/CN.4/Sub. 2/2001/20) (available at http://www.unhchr.ch) or the analysis found in the present progress report, (E/CN.4/Sub. 2/2002/25) (particularly the conclusions as to the general principles and specific exceptions on the rights of non-citizens)?

2. What are the minimum core rights accorded by your Government to all non-citizens irrespective of their legal status in your country? Are these core rights accorded to non-citizens who are undocumented?

3. Does your Government accord to non-citizens the rights of all persons as provided in the International Covenant on Civil and Political Rights?

4. What exceptions, if any, to those rights does your legal system provide?

5. Does your Government accord to non-citizens the rights of all persons as provided in the International Covenant on Economic, Social and Cultural Rights?

6. What exceptions, if any, to those rights does your Government's legal system provide?

7. Does your Government accord to refugees the rights as defined in the 1951 Convention relating to the Status of Refugees, including economic and social rights?

8. Does your Government accord to asylum-seekers (that is, persons applying for asylum but not yet formally recognized as refugees) the same rights as those accorded to other non-citizens?

9. Does your Government accord to stateless persons the rights defined in the 1954 Convention relating to the Status of Stateless Persons, including economic and social rights?

10. What are the most significant problems faced by refugees, asylum-seekers, undocumented persons, stateless persons, or other non-citizens in your country?

11. Can your Government provide references or copies of any reports or studies that relate to the situation of refugees, asylum-seekers, undocumented persons, stateless persons, or other non-citizens in your country?

B. Questionnaire for relevant intergovernmental and non-governmental organizations

1. Does your organization have any comments on the collection of international norms found in the Special Rapporteur's preliminary report, (E/CN.4/Sub.2/2001/20) (available at http://www.unhchr.ch) or the analysis found in this progress report, (E/CN.4/Sub. 2/2002/25) (particularly the conclusions as to the general principles and specific exceptions on the rights of non-citizens)?

2. What are the rights (including economic and social rights) accorded to, and most significant problems faced by, non-citizens in countries concerning which you have information?

3. What are the rights accorded to, and most significant problems faced by refugees, asylum-seekers (that is, persons applying for asylum but not yet formally recognized as refugees), undocumented persons and stateless persons in countries concerning which your organization has information?

4. Can your organization provide references or copies of any reports or studies that relate to the situation of refugees, asylum-seekers, undocumented persons, stateless persons, or other non-citizens in any country?