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PREVENTION OF DISCRIMINATION

The rights of non-citizens

**Final report of the Special Rapporteur, Mr. David Weissbrodt,
submitted in accordance with Sub-Commission decision 2000/103,
Commission resolution 2000/104 and Economic and Social
Council decision 2000/283**

Addendum

Regional activities*

* This document is circulated as received in the language of submission only.

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I. INTRODUCTION

1. This addendum (E/CN.4/Sub.2/2003/23/Add.2) to the final report of the Special Rapporteur on the rights of non-citizens (E/CN.4/Sub.2/2003/23) supplements the 2002 addendum (E/CN.4/Sub.2/2002/25/Add.2) to the progress report of the Special Rapporteur (E/CN.4/Sub.2/2002/25) and the 2001 addendum (E/CN.4/Sub.2/2001/20/Add.1) to the preliminary report of the Special Rapporteur (E/CN.4/Sub.2/2001/20) by updating the expanded examination of the rights of non-citizens within regional human rights bodies. The addendum updates the jurisprudence of those regional bodies that have adopted recent decisions related to the rights of non-citizens, including the European Court of Human Rights and the Inter-American Commission on Human Rights. It also contains a new section on the European Social Committee. Finally, it again discusses the Framework Convention on National Minorities, adopted under the auspices of the Council of Europe, and include recent decision based on that instrument.

II. JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

2. The European Court of Human Rights has considered the rights of non-citizens under a number of Articles to the European Convention on Human Rights including in particular Articles 3, 5, 6, 8, 14 and 16. In late 2001 and 2002, the Court considered cases involving Articles 5 and 8 as well as Article 4 of Protocol 4.

A. Article 5

3. Article 5 (1) (f) states:

(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...

(f) 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.

4. The European Court considered Article 5 (1) (f) of the European Convention in the case of *Conka v. Belgium*¹ in 2002. *Conka* involved a family of four, two parents and two children, of Slovakian nationality of Roma descent. The four were violently assaulted by skinheads in Slovakia, resulting in hospitalisation of the father. The parents were subsequently threatened with further assault on numerous occasions and the police refused to intervene. The family fled Slovakia and sought asylum in Belgium. Their asylum request 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 Geneva Convention relating to the Status of Refugees. The decisions refusing permission to remain in Belgium were accompanied by a decision refusing permission to enter the territory itself endorsed with an order to leave the territory within five days.

5. The European Court noted that it was common ground that the applicants were arrested so that they could be deported from Belgium. Article 5 (1) (f) was therefore found to be applicable in the instant case. Admittedly, the applicants contest the necessity of their arrest for that purpose; however, Article 5 (1) (f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing. In this respect, the Court observed, Article 5 (1) (f) provides a different level of protection from Article 5 (1) (c): all that is required under sub-paragraph (f) is that “action is being taken with a view to deportation.”²

6. In *Conka*, the applicants received a written notice at the end of September 1999 inviting them to attend Ghent Police Station on 1 October to “enable the file concerning their application for asylum to be completed.” On their arrival at the police station they were served with an order to leave the territory dated 29 September 1999 and a decision for their removal to Slovakia and for their arrest for that purpose. A few hours later they were taken to a closed transit centre at Steenokkerzeel.

7. The Court observed that the Convention requires that any measure depriving an individual of her or his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrary detention. Although the Court by no means excluded its being legitimate for the police to use stratagems in order, for instance, to counter criminal activities more effectively, it concluded that acts whereby the authorities seek to gain the trust of asylum seekers with a view to arresting and subsequently deporting them may be found to contravene the general principles stated or implicit in the Convention. In that regard, the Court held that the language of the notice was chosen deliberately in order to secure the compliance of the largest possible number of recipients. At the hearing, counsel for the Government referred in that connection to a “little ruse,” which the authorities had knowingly used to ensure that the “collective repatriation” they had decided to arrange was successful.

8. The Court reiterated that the list of exceptions to the right to liberty secured in Article 5 (1) is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision. In the Court’s view, that requirement must also be reflected in the reliability of communications such as those sent to the applicants, irrespective of whether the recipients are lawfully present in the country or not. According to the Court, it follows that, even as regards overstayers, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading 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. Consequently, the Court held that there had been a violation of Article 5 (1) of the Convention.

B. Article 8

9. Article 8 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.

10. The following case continues the line of reasoning first established on 21 June 1988 in *Berrehab v. the Netherlands*,³ the seminal judgement regarding Article 8. In *Berrehab*, the Court defined the effect of Article 8 on the deportation of non-citizens. The substance of the decision was that where the non-citizen has real family ties in the territory of the State from which he is ordered deported, and the deportation measure is such as to jeopardize the maintenance of those ties, the deportation is justified with regard to Article 8 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 with respect to the public interest to be protected. The public interest often balanced against the right to respect for family life is the State's interest in maintaining public order and arises in the context of non-citizens convicted of criminal offences.

11. In its judgement of 2 August 2001 in the case of *Boultif v. Switzerland*,⁴ the Court recalled that there was no right of an alien to enter or to reside in a particular country. It reaffirmed, however, that to remove a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8 (1) of the European Convention. In this particular case, the Applicant had committed a violent crime in 1994, just 16 months after entering Switzerland. The Court considered the extent to which the offence committed by the Applicant indicated a potential future danger to public order or security. The Court also weighed the severity of the sentence received and the fact that the Applicant committed no further criminal acts from the time of his release in 1996 until his removal in 2000. Furthermore, the Court took into consideration the fact that he had acquired professional training and conducted himself well while in prison. The Court was of the opinion that the Applicant posed little danger to public order or security and that his removal resulted in a serious impediment to his family life. Consequently, the Court found a breach of Article 8.

C. Article 4 of Protocol 4

12. Article 4 of Protocol 4 provides:

Collective expulsion of aliens is prohibited.

13. The case of *Conka v. Belgium*,⁵ see above paragraphs 4 - 8, also involved a violation of Article 4 of Protocol 4 to the European Convention. The Court reiterated its case-law whereby collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien in the group.⁶ The Court found that at no stage in the period between the service of the notice on the aliens to come to the police station and their expulsion did the procedure afford sufficient guarantees demonstrating that the personal circumstances of *each* of those concerned had been genuinely and *individually* taken into account. Consequently, the Court found a violation of Article 4 of Protocol No 4.

III. COUNCIL OF EUROPE COMMITTEE OF SOCIAL RIGHTS

14. The Committee of Social Rights (Committee) monitors compliance with the European Social Charter (Original Social Charter) and the [Revised] European Social Charter (Revised Social Charter). The Committee has had opportunity to consider the rights of non-citizens under both the Charter and Revised Charter on several occasions.

15. In its concluding observations on the Government of Austria (1999-2000) for instance, the Committee expressed concern that Government may be in violation of Article 16 of the Original Social Charter. The Government's report pointed out that the Austrian provinces continued to pursue a policy of promoting housing construction and providing housing assistance to families. In certain provinces, such as Carinthia, special measures were taken to assist young families. The Committee reiterated an earlier conclusion by noting that nationals of Contracting Parties to the Charter that are not members of the European Union or parties to the Agreement on the European Economic Area did not benefit from assistance for housing construction. According to the Committee, such a form of discrimination is not in conformity with the obligation to promote the social protection of the family as required under Article 16 of the Original Social Charter.

16. Article 16 of the Original Social Charter states:

The right of the family to social, legal and economic protection

With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means.

17. During the consideration of the periodic report of the Government of Belgium, the Committee inquired into Section 18 *bis* of the Act of 15 December 1980 on entry, residence, establishment and removal of aliens. Under Section 18 of the Act, certain foreigners may, in particular circumstances, be prohibited from staying or settling in certain municipalities. The Committee was concerned that the provision of Section 18 *bis* may contravene Article 19 of the Original Social Charter.

18. Article 19 of the Original Social Charter reads:

The right of migrant workers and their families to protection and assistance

With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Contracting Party, the Contracting Parties undertake:

1. To maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration;

2. To adopt appropriate measures within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their own jurisdiction, appropriate services for health, medical attention and good hygienic conditions during the journey;
3. To promote co-operation, as appropriate, between social services, public and private, in emigration and immigration countries;
4. To secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:
 - (a) remuneration and other employment and working conditions;
 - (b) membership of trade unions and enjoyment of the benefits of collective bargaining;
 - (c) accommodation;
5. To secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons;
6. To facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory;
7. To secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this article;
8. To secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality;
9. To permit, within legal limits, the transfer of such parts of the earnings and savings of such workers as they may desire;
10. To extend the protection and assistance provided for in this article to self-employed migrants insofar as such measures apply.

IV. EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE

19. The European Commission against Racism and Intolerance considered the human rights situations, with a particular focus on combating racism and intolerance, in countries of the Council of Europe. In these considerations, the ECRI includes an examination of the status of non-citizens. The ECRI considered the status of non-citizens in several countries, often with reference to Article 14 of the European Convention.

20. Article 14 of the European Convention prohibits discrimination, stating:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.⁷

21. Relevant summaries from ECRI country reports follow.

22. **Austria**⁸

With respect to immigration, the ECRI expressed concern that the Aliens Act and Asylum Law may be influenced by a guest worker approach, and that such an approach affects immigrants' possibilities to organise themselves to defend their common interests as well as the emergence of a social, intellectual and economic *élite* of immigrant background in the country. In this context, the ECRI noted that the participation of foreigners in public life at the local level, notably as concerns local elections, does not currently appear to be a subject of public debate and it encouraged the Austrian authorities to consider this question.

With respect to refugees and asylum seekers, the ECRI considered that the Austrian authorities should ensure that asylum-seekers are not left in a destitute condition while awaiting the examination of their asylum claims and stressed in this respect that such poor conditions may reinforce prejudice, stereotypes and hostility towards such individuals.

With regard to the general climate concerning immigrants, the ECRI expressed concern at a negative climate in Austria concerning non-EU citizens, notably immigrants, asylum-seekers and refugees and opined that this situation appeared to be at least in part connected to the use of racist and xenophobic propaganda by parties active in the Austrian political arena.

23. **Belgium**⁹

ECRI stressed that the Belgian authorities should ensure that immigrants and asylum-seekers, even when deemed to be sejourning illegally in Belgium, should not be treated as criminals, and that any measures taken with regard to such persons should reflect this approach. Additionally, the Commission urged the Government of Belgium, which recently extended the right to vote and stand for election at local level to all EU nationals, in conformity with European Directive 94/80/EC, to consider extending such rights to all long-term non-citizen residents.

24. **Bulgaria**¹⁰

Regarding Bulgaria, the ECRI noted that the asylum procedure is reported to be slow, and although asylum-seekers do have the right to work after 3 months, it is reported that regulations of the national employment service might make this difficult in practice. Free legal advice is at present only provided by non-governmental organisations rather than by the State. Consequently, the ECRI encouraged the Bulgarian authorities to address such gaps in the infrastructure for dealing with asylum-seekers and refugees.

25. **Croatia**¹¹

ECRI stressed the importance of ensuring that different categories of illegal migrants - economic migrants, asylum seekers and women being trafficked into prostitution - are each dealt with in a manner appropriate to their particular situation. The Commission also stated that the Croatian authorities should ensure that all officials dealing with so-called illegal migrants receive special training, including training in human rights, and that individuals caught in an illegal situation are not treated as criminals.

26. **Cyprus**¹²

The ECRI expressed serious concern at reported episodes of ill-treatment of rejected asylum seekers. This issue is addressed below in more detail. The Commission, however, underlined here the need to raise the awareness of refugee issues among officials coming into contact with asylum seekers and in civil society generally.

27. **Czech Republic**¹³

Some concern was expressed about the denial of employment and housing to recognised refugees in integration programmes on grounds of their ethnicity. It is also reported that some local government employees display a lack of knowledge or even unwillingness to assist the "foreigners." ECRI therefore urged the authorities to ensure a more rigorous supervision of the application of measures aimed at facilitating integration of refugees, particularly at the local level. Training of officials who deal with refugees, asylum applicants and other such vulnerable groups should expressly include awareness programmes about other cultures and human rights education. In addition, given reports of intolerant statements on the side of some public figures circulated via the media, ECRI stressed that such statements contribute to creating a climate of tension which can ultimately encourage the development of intolerant behaviour and ideas.

28. **Denmark**¹⁴

On 26 June 1998, the Danish Parliament passed the Act on Integration of Aliens in Denmark, which completely reformed Danish integration policies. The new legislation, which came into effect on 1 January 1999, provides a comprehensive set of rules and measures applying to all aliens lawfully residing in Denmark, including refugees and immigrants united with refugees or other immigrants through family reunification ("new Danes"). The ECRI welcomed the efforts of the Danish authorities to create a comprehensive integration plan for new arrivals and offer them tools they will need for success in Danish society, but was concerned with the manner in which new arrivals are to be dispersed throughout the country may involve restrictions on the right to freedom of movement. In particular, the system of quotas, the lack of an adequate possibility to appeal the allocation decision to another body and the need for approval to change municipalities without risking a reduction or termination in social assistance, might, in individual cases, involve an element of compulsion.

With respect to the Danish Aliens Act, the ECRI was concerned about the legislation governing the conditions for expulsion of non-citizens, including long-term or life-long residents of Denmark. The Act permits the expulsion of an alien for certain criminal offences, linking the possibility of such action for a given sentence to the length of the alien's lawful stay in Denmark.

In July of 1998 the Act was amended in a manner that expanded the list of crimes and decreased the severity of the sentence for which expulsion is possible. A number of cases involving expulsion orders have reached the Danish Supreme Court over the last few years, and in 13 out of 15 cases the Court has overturned expulsion decisions basing its judgement upon the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Article 8 (right to respect for private and family life). The ECRI opined that the Danish authorities should reconsider legislation in this area in the light of these Supreme Court decisions and European and international norms and standards, recognising the message that legislation in this area may send to the general population and non-citizens residing in Denmark.

29. **Estonia**¹⁵

A large proportion of the Estonian population are non-citizens of Estonia. Around 285 000 persons hold permanent or temporary residence permits, from a total population of around 1.5 million persons. Many of these non-citizens hold Russian citizenship; a large group (175 000 persons) are stateless (see areas of particular concern below). There is also a sizeable group (estimated at between 30 000 - 40 000 persons) of non-citizens living in Estonia with no legal residence status (see below).

ECRI noted with satisfaction that non-citizens legally resident in Estonia have the opportunity to vote in local elections, and that in the 1999 local elections the requirement that such persons register as voters in advance of the elections was dropped. Around 50% of these non-citizens voted in the local elections of 1999, which was similar to the proportion of Estonian citizens voting.

On the other hand, some aspects of participation in political and civic life are not available to non-citizens. Non-citizens cannot participate in the national elections and cannot stand as candidates in local elections or be members of political parties. As regards the rights foreseen for minority groups, only citizens of Estonia can be considered as belonging to national minorities in accordance with the declaration made by Estonia when ratifying the Framework Convention for the Protection of National Minorities, and only citizens can vote or be elected to the leadership of cultural self-governments. Finally, only citizens can occupy posts as civil servants under the Civil Service Act.

An estimated population of around 30,000 - 40,000 persons are currently residing in Estonia without a legal residence status. This group comprises mainly those who for one reason or another were not able to apply for residence permits before the deadline prescribed by the Law on Aliens. Such persons are in a very vulnerable situation as regards their ability to travel outside the country, and as regards their access to social and health benefits. The ECRI considers that the authorities should take steps to regularise the situation of such persons, including for example further simplification of the procedures for applying for residence permits, and campaigns to make it clear that they will not risk expulsion from the country when identifying themselves to the authorities.

30. **Finland**¹⁶

The ECRI noted that serious concerns have been voiced as to whether the Aliens Act as amended is in compliance with the requirements of an effective remedy as required by Article 13 of the European Convention on Human Rights. Moreover, concerns have been expressed that the safe country of origin concept has in practice led to “group decisions” being taken on asylum applications rather than individual decisions based on the specific circumstances and experiences of each asylum seeker. For example, it has been noted that in several instances, interviewers have failed to ask asylum seekers during their initial interview why the country in question is not safe for them personally. It has also been commented that four out of five asylum applications are now submitted to the accelerated procedure, and that the more complicated procedures for the various forms of accelerated procedure and the shorter time limits may hinder asylum seekers from accessing sufficient legal assistance. Generally, it has been commented that the new system represents a weakening of the rights and position of asylum seekers in Finland. A further area for concern is the issue of the detention of asylum seekers on the grounds of a lack of identity papers or a lack of certainty about the travel route to Finland. Although the Aliens Act provides that asylum seekers who are detained should be kept in separate detention facilities, at present they are held in police or prisons alongside convicted prisoners. The ECRI also considered that careful attention should be paid to the issue of the accommodation and facilities provided for the families, particularly the children, of asylum seekers held in detention.

31. **France**¹⁷

As concerns the right of non-EU citizens to vote in local elections, ECRI recalled that certain instruments established within the Council of Europe provide for the granting of voting rights in local elections to non-citizens who are long-term residents. The ECRI considers that integration and participation in society of non-citizens who are long-term residents would be improved by granting this category of people the right to vote in local elections. This would also encourage an engagement on the part of political parties to take the interests of non-citizens fully into account.

32. **Italy**¹⁸

ECRI is concerned at the rather negative climate in Italy concerning non-EU citizens. Opinion polls suggest that non-EU immigration features increasingly high in the list of concerns of the Italian population. The ECRI believes that this situation is closely connected to the widespread presence in public debate of stereotypes, misrepresentations and, in some cases, inflammatory speech targeting non-EU citizens. The ECRI believes that exponents of certain political parties bear a particular responsibility in this respect. Other public figures and leaders, however, have made regrettable statements, which contribute, in the ECRI’s view, to the creation of this climate. ECRI considers that this trend runs counter to efforts to develop a culture of tolerance and respect for difference in Italy.

33. **Latvia**¹⁹

In 1995 there were approximately 740,000 persons living in Latvia who did not hold Latvian citizenship. The law “on the Status of Former Soviet Union Citizens who are not citizens of Latvia or any other State” provided that this group of persons could exchange their

former USSR passports or other personal documents containing the personal code of resident of Latvia, for Latvian “non-citizen passports.” The Law therefore created a special legal status, that of “non-citizen,” and defined the basic rights and obligations attached to such status, which include many fundamental social and economic rights, the right of exit and entry and the right to family reunification. The number of “non citizens” is currently approximately 536,000 or 23% of the total registered population.

“Non-citizens” do not enjoy eligibility and voting rights in neither national nor local elections. Noting that most non-citizens have resided in the country for most or all of their lives, the ECRI recommended to the Government of Latvia to confer eligibility and voting rights to resident non-citizens in local elections.

34. **Malta**²⁰

With respect to Malta, the ECRI emphasised its opinion that the holding of asylum seekers in detention should be avoided to the greatest extent possible, particularly in the case of persons arriving with families, and that efforts should be made to guarantee freedom of movement to asylum seekers wherever possible. The ECRI stressed in this respect its opinion that asylum seekers, even if their claims are not considered to be valid by the authorities, should not be treated as criminals, and that any measures taken with regard to such persons should reflect this approach.

35. **Norway**²¹

Asylum seekers who cannot produce any identity documents or who are considered likely to evade a deportation order, may be held in detention until their identity is confirmed. This process can last for up to a year. The ECRI stressed that asylum seekers, even if their claims are not considered to be valid by the authorities, should not be treated as criminals and that any measures taken with regard to such persons should reflect this approach.

36. **Switzerland**²²

The granting of residence and work permits to non-citizens is closely linked to the needs of the labour market. Until recently, the so-called “three circle system” applied, under which work permits were granted preferentially to citizens of EU and EFTA countries, then to citizens of certain other countries - considered to be traditional partners in the labour field - and only rarely to citizens from the rest of the world. The philosophy behind this system was based on “capacity for integration”, and while the Swiss authorities state that there was no intention to discriminate on racial grounds, they did admit that the system might make admission more difficult for persons belonging to other ethnic groups or “races” because of their “limited capacity for integration.” It is noteworthy that during the war in former Yugoslavia, for example, citizens of former Yugoslavia were removed from the second circle and considered to fall within the third circle.

When ratifying CERD, Switzerland made a reservation allowing this “three-circle” policy to continue. The system, however, was the subject of much criticism both within Switzerland and abroad, and it has now been withdrawn and replaced by a “two-circle” system, which makes a distinction between EU/EFTA countries and the rest of the world. Concerns have been

expressed that even if the new system is intended to respond to the concerns expressed above, in practice the underlying philosophy of “capacity for integration” remains unchanged, and this may mean that possible discrimination continues against certain non-citizens. Similar strict restrictions apply to residency permits and family unification procedures.

The ECRI considers that under conditions such as those described above, non-citizens who may have been living in Switzerland for many years and have strong family and other ties in the country, remain in a vulnerable position. It urged the Swiss authorities to ensure that the residence permits of non-citizens having resided for some time in Switzerland are only withdrawn under exceptional and clearly-defined circumstances, and that adequate recourse to appeal against such decisions is made available.

37. **Turkey**²³

Turkey is party to the 1951 Geneva Convention relating to the Status of Refugees. In conformity with Article 1 B of this Convention, however, Turkey has opted for maintaining the restriction limiting recognition of refugee status only to persons coming from Europe. Due to this restriction, non-European asylum seekers cannot be recognised as refugees and are required to register with the police within 10 days of entering the country. Those of them who are considered by the authorities to have genuine cases are granted residence permits and their applications are referred to the United Nations High Commissioner for Refugees (UNHCR). Applicants whose requests are not passed onto the UNHCR are subject to deportation. UNHCR is responsible for determining these cases and for resettling those who have been recognised as refugees. Only limited first asylum opportunities designed to allow non-European applicants time to be processed for onward resettlement are possible.

The ECRI is concerned at the very short time limit for registration which must be met to lodge an asylum claim. It is concerned that the strict and mechanical application of this time limit may deprive some persons of the protection they are entitled to under international law. It therefore urged the Turkish authorities to take immediate steps to ensure that such protection is available in practice.

The ECRI is furthermore seriously concerned at the precarious situation of asylum seekers pending determination of their cases. The ECRI noted that these persons are not allowed to work nor are they entitled to any form of social assistance, although asylum seekers' health and children's education expenses are covered.

Turkey is also a destination and transit country for trafficking in women and girls for the purpose of prostitution. There have been complaints that victims of trafficking remain without assistance: no formal protection, aid or education to victims of trafficking is provided. The ECRI encouraged the Turkish authorities to take steps to counter the phenomenon of trafficking in women and girls and to provide those who are found to be victims of such trafficking with adequate assistance and support.

38. **United Kingdom**²⁴

The ECRI is concerned at the use of detention for asylum-seekers in the United Kingdom. Although most detained asylum seekers are not charged with any criminal

offence, many are reportedly held in prisons. The Immigration and Asylum Act (1999) introduces some improvement in this respect. Refugee organisations, however, complain that, at present, asylum seekers can be detained at any time, for any reason and with no time limits. Consequently, the ECRI stressed that asylum seekers, even if their claims are not considered to be valid by the authorities, should not be treated as criminals and that any measures taken with regard to such persons should reflect this approach.

The Immigration and Asylum Act (1999) also provides for the extension of the powers of immigration officers to enter premises, search and arrest people suspected of immigration offences. These powers may be used in some cases without a warrant, and sometimes without the approval of a senior immigration officer. The ECRI is aware that the immigration officers are bound by the legal safeguards within the Police and Criminal Evidence Act and the relative codes of practice. There have been reports, however, of discriminatory behaviour among officials responsible for immigration control at borders and within the country. The ECRI urged the British authorities to ensure that all complaints made against the Immigration Service, and notably those concerning discriminatory or racist behaviour, are subject to independent and effective scrutiny. It furthermore urged the authorities to provide immigration officers with specialist training to ensure that their work, including under the new powers, is carried out in a manner which is non discriminatory and respectful of human rights.

V. EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES

39. The European Framework Convention for the Protection of National Minorities was adopted by the Council of Europe on 1 February 1995 and entered into force on 2 January 1998. The Framework Convention does not define the term “national minorities” because the member States of the Council of Europe failed to agree on any such definition.²⁵

40. The *travaux préparatoires* provide little guidance, as the Governments expressed varying views on the definition generally.

A. Framework Convention interpretation

41. The rules of treaty interpretation provided by the Vienna Convention of the Law of Treaties offer some guidance, however, and the application of those rules leads to the conclusion that the Framework Convention does apply to non-citizens.

42. First, the Framework Convention is silent as to its scope vis-à-vis non-citizens. Its express terms do not include or exclude non-citizens from its protections.

43. Second, the express wording and ordinary meaning of the provisions of the Framework Convention refer to “persons” or “every person” belonging to a national minority. As the Framework Convention is a human rights instrument, the terms “persons” and “every persons” should be interpreted to mean every human being without discrimination.

B. Application of the Framework Convention

44. General practice also indicates that the Framework Convention does apply to non-citizens. For instance, several States parties provided interpretive declarations with their respective instruments of ratification that expressly stated that the State party would not apply the Convention to non-citizens. Such interpretive declarations, essentially reservations, indicate that in the absence of such declarations the States parties interpret the Framework Convention as applying to non-citizens.

45. The Advisory Committee and the Committee of Ministers, established as responsible bodies under the Framework Convention to supervise its implementation, have both offered views indicating that the Convention applies to non-citizens.

46. In its Opinion on Estonia, the Advisory Committee noted “that in its dialogue with the Government on the implementation of the Framework Convention, the Government agreed to examine also the protection of persons not covered by the said declaration, including non-citizens.”²⁶ The Committee went on to voice its “opinion that Estonia should re-examine its approach reflected in the declaration [limiting the protection of the Convention to citizens] in consultation with those concerned and consider the inclusion of additional persons belonging to minorities, in particular non-citizens, in the application of the Framework Convention.”²⁷ Finally, with respect to Article 15 (creation of effective participation of minorities in public affairs) of the Convention, the Committee, “bearing in mind the substantial powers vested with local government bodies in Estonia, ... [found] that the implementation of the right of persons belonging to national minorities to participate in public affairs is greatly advanced by the possibility of non-citizens to vote in local government council elections.”²⁸

47. With respect to its Opinion on Italy, the Advisory Committee expressed its concern “that a large number of Roma are meeting with severe difficulties in their attempts to acquire Italian citizenship” and that “these difficulties also seem to affect individuals who have resided in Italy for some decades or were even born there.”²⁹ The Advisory Committee opined “that the Italian authorities should ensure that the legislation on granting of citizenship is applied in a fair and non-discriminatory manner to all applicants and especially to the Roma living in camps.”

48. In its Opinion on Germany, the Advisory Committee reiterated its “opinion that it would be possible to consider the inclusion of persons belonging to other groups, including citizens and non-citizens as appropriate, in the application of the Framework Convention on an article-by-article basis.”³⁰ The Committee also expressed concern that non-citizens, including migrant workers, disproportionately suffer discrimination with respect to remuneration for employment and that such discrimination contravenes Article 4 (right of equality before the law and of equal protection of the law, obligation to adopt measures to promote equality) the Convention.³¹ Consequently, the Committee pointed out the necessity to “set up a complete legislative framework to fight against all forms of discrimination, as well as effective remedies to obtain compensation for damages.”³²

49. The Council of Ministers, in its respective resolutions on the above mentioned Advisory Committee opinions, recommended to the respective States that they “take appropriate account of the ... various comments in the Advisory Committee’s opinion[s]”.

VI. EUROPEAN COURT OF JUSTICE

50. The European Court of Justice (Court of Justice) has considered cases regarding the right of non-citizens under the Treaty establishing the European Economic Community (Treaty of Rome) and several European Council Directives. The Court of Justice has also considered several cases with respect to the interpretation of the Association Agreement between the EEC and Turkey (Turkey Agreement) as well as Decisions of the EEC-Turkey Council of Association, the body established with monitoring the implementation of the Turkey Agreement.

51. In *Yvonne van Duyn v. Home Office*, the European Court of Justice considered the scope and definition of Article 48 of the Treaty of Rome. Article 48 states:

1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - (a) To accept offers of employment actually made;
 - (b) To move freely within the territory of Member States for this purpose;
 - (c) To stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - (d) To remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

52. In *Yvonne van Duyn*, the European Court of Justice held that Article 48 was directly applicable so as to confer on individuals rights enforceable by them in the courts of a Member State of the European Economic Community. The Court went on to say that the provisions of Article 48 “impose on Member States a precise obligation which does not require the adoption of any further measure on the part of either of the community institutions or of the Member States and which leaves them, in relation to its implementation, no discretionary power.”³³

53. In the same case, the Court considered the interpretation of European Council Directive No. 64/221 of 25 February 1964. Directive No. 64/221 addresses the coordination of special measures concerning the movement and residence of foreign national which are justified on grounds of public policy, public security or public health. According to Article 3(1) of Directive

No. 64/221, “measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned.” Based on this clause, the Court held that Directive No. 64/221 confers upon individuals rights which are enforceable by them in the courts of a Member State and which the national courts must protect.³⁴

54. In *Yvonne van Duyn*, however, the Court limited the scope of Article 48 of the Treaty of Rome and Article 3 (1) of Directive No. 54/221 by holding that it must be interpreted as meaning that:

A Member State, in imposing restriction justified on grounds of public policy, is entitled to take into account, as a matter of personal conduct of the individual concerned, the fact that the individual is associated with some body or organisation the activities of which the Member State considers socially harmful but which are not unlawful in that State, despite the fact that no restriction is placed upon national of the said Member State who wish to take similar employment with these same bodies or organisations.³⁵

55. With respect to the Turkey Agreement, the Court of Justice considered several cases. In *Meryem Demirel v. Stadt Schwäbisch Gmünd*,³⁶ the Court considered the interpretation of Article 12 of the Turkey Agreement. Article 12 of the Turkey Agreement provides that Contracting Parties agree to be guided by Article 48 of the Treaty of Rome with the aim of progressively securing freedom of movement for workers. The specific issue in *Meryem Demirel* is whether or not Article 12 constituted rules of Community Law which are directly applicable in the internal legal order of the Member States. Specifically, could the respondent State amend its domestic laws so as to limit family reunification.

56. The Court of Justice held that the Turkey Agreement merely imposes on Contracting Parties a general obligation to cooperate in order to achieve the aims of the Agreement and that it does not directly confer on individuals additional rights. Article 12, therefore, did not restrict a Contracting State’s power to amend its domestic laws to limit family reunification and did not provide an individual cause of action. In *dicta*, however, the Court hinted that such a limitation may violate Article 8 of the European Convention on Human Rights.

57. The Court of Justice has been called upon to interpret the meaning of Article 2(1)(b) of Decision No. 2/76 and Article 6(1) and Article 13 of Decision 1/80 of the EEC-Turkey Council of Association. These Articles provide that a Turkish worker, who has “legal employment” in a Contracting State for a minimum of five years, can quit their employment and seek other employment in the Contracting State. In *S.Z. Sevince v. Staatssecretaris van Justitie*,³⁷ the Court was presented with an issue regarding the interpretation of “legal employment” in the above context. The petitioner was granted a work permit on 19 February 1979. His permit was not renewed on 11 September 1980 as the original grounds for the permit, a family relationship, no longer existed. The petitioner, however, appealed this decision and was allowed to work during the course of the appeal. The Appellant Tribunal ultimately affirmed the original decision to deny the renewal of the working permit on 12 June 1986.

58. The petitioner, because he had been working in the Contracting State from 19 February 1979 to 12 June 1986, or more than the minimum five year period, sought to remain in the Contracting States to seek further employment. The issue before the Court of

Justice was whether or not the time the Petitioner was allowed to work during his appeal constituted “legal employment” within the meaning of the above-mentioned Decisions of the EEC-Turkey Council of Association.

59. The Court opined that it is inconceivable to think that a Turkish worker could establish a right of residence by counting the time he was allowed to work while waiting the outcome of the appeal of his original denial of continued residence. Consequently, the Court of Justice held that the term “legal employment” in the above context does not cover the situation of a Turkish worker authorised to engage in employment for such time as the effect of a decision refusing him a right of residence, against which he has lodged an appeal with has been dismissed, is suspended.

60. *Recep Tetik v. Land Berlin*³⁸ dealt with Article 6(1) of Decision No. 1/80 of the EEC-Turkey Council of Association. Article 6(1) of Decision No. 1/80 states in relevant part:

A Turkish worker duly registered as belonging to the labour force of a Member State:

- shall be entitled in that Member State, after one year’s legal employment, to the renewal of his [or her] permit to work for the same employer, if a job is available;
- shall be entitled in that Member State, after three years of legal employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his [or her] choice, made under normal conditions and registered with the employment services of that State, for the same occupation;
- shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment.

61. Specifically, the issue presented to the Court of Justice in *Tetik* involved the interpretation of the third indent of Article 6 (1) as to whether or not, after four years of legal employment, a Turkish worker could quit that employment and remain in the Member State while seeking other employment.

62. The Court read Article 6 (1) of Decision No. 1/80 in the context of Article 48 of the Treaty of Rome. While acknowledging that Article 48 dealt mainly with the freedom of movement of national of Member States, the Court reasoned that the principles enshrined in Article 48 also informed the treatment of Turkish workers who enjoy the rights conferred by Decision No. 1/80. Indeed, such an interpretation was necessarily to give full effect to the third indent of Article 6(1), otherwise the worker’s right of free access to any paid employment of his or her choice within the meaning of that provision would otherwise be deprived of its substance.

63. Consequently, the Court held that a Turkish worker could voluntarily leave his or her employment in order to seek new work in the same Member State and enjoys in that State, for a reasonable period, a right of residence for the purpose of seeking new paid employment there, provided that he or she continues to be duly registered as belonging to the labour force of the Member State concerned, complying where appropriate with the requirements of the legislation in force in that State, for instance by registering as a person seeking employment and making

him or herself available to the employment authorities. The Court went on to state that “a reasonable period” should be defined by legislations and in the absence of such legislation, should be fixed by the national court before which the matter has been brought. The period should, however, be sufficient not to jeopardise in fact the prospects of finding new employment.

VII. JURISPRUDENCE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

64. In early 2002, the Inter-American Commission on Human Rights received a petition on behalf of persons arrested or otherwise seized in Afghanistan and now detained by United States authorities at Guantanamo Bay, Cuba. The petition alleged violations by the U.S. of Articles I (right to life), II (right to equality before law), III (right to religious freedom and worship), IV (right to freedom of investigation, opinion, expression and dissemination), XVIII (right to a fair trial), XXV (right to protection from arbitrary arrest), and XXVI (right to due process of law) of the American Declaration on the Rights and Duties of Man.

65. While the Commission has yet to consider the merits of this case, on 13 March 2002 it pronounced, as a precautionary measure, that the Government of the United States must allow a competent tribunal to determine the legal status of each detainee pursuant to international humanitarian law and in particular pursuant to Article 5 of the Geneva Convention relative to the Treatment of Prisoners of War.

66. With respect to the above petition, the Commission also proclaimed that:

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. 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.

Absent clarification of the legal status of the detainees, the Commission considers that 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.³⁹

67. Therefore, according to the Inter-American Commission on Human Rights, States are obligated to respect the human rights of detainees, including legal protections, whether or not they are in the territory of the State in question.

Notes

- ¹ *Conka v. Belgium*, App. No. 00051564/99, Eur. Ct. H.R. (5 February 2002).
- ² *See Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1862, § 112 (1996).
- ³ 138 Eur. Ct. H.R. (Ser. A) (1988).
- ⁴ *Boultif v. Switzerland*, App. No. 00054273/00, Eur. Ct. H.R. (2 August 2002).
- ⁵ *Conka v. Belgium*, App. No. 00051564/99, Eur. Ct. H.R. (5 February 2002).
- ⁶ *See, Andric v. Sweden*, App. No. 00045917/99, Eur. Ct. H.R. (23 February 1999).
- ⁷ [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 14, (ETS No. 5), 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.
- ⁸ ECRI, Second Report on Austria, paras. 16-21, *adopted on* 16 June 2000.
- ⁹ ECRI, Second Report on Belgium, paras. 11-15, *adopted on* 18 June 1999.
- ¹⁰ ECRI, Second Report on Bulgaria, Paras. 19-20, *adopted on* 18 June 1999.
- ¹¹ ECRI, Second Report on Croatia, para. 31, *adopted on* 15 December 2000.
- ¹² ECRI, Second Report on Cyprus, paras. 22-26, *adopted on* 15 December 2000.
- ¹³ ECRI, Second Report on the Czech Republic, para. 14, *adopted on* 18 June 1999.
- ¹⁴ ECRI, Second Report on Denmark, paras. 18-25, *adopted on* 16 June 2000.
- ¹⁵ ECRI, Second Report on Estonia, paras. 38-42, *adopted on* 22 June 2001.
- ¹⁶ ECRI, Second Report on Finland, paras. 21 and 46-57, *adopted on* 14 December 2001.
- ¹⁷ ECRI, Second Report on France, paras. 15-19, *adopted on* 10 December 1999.
- ¹⁸ ECRI, Second Report on Italy, *adopted on* 22 June 2001.
- ¹⁹ ECRI, Second Report on Latvia, *adopted on* 14 December 2001.
- ²⁰ ECRI, Second Report on Malta, *adopted on* 14 December 2001.
- ²¹ ECRI, Second Report on Norway, *adopted on* 10 December 1999.
- ²² ECRI, Second Report on Switzerland, *adopted on* 18 June 1999.

- ²³ ECRI, Second Report on Turkey, *adopted on 15 December 2000*.
- ²⁴ ECRI, Second Report on the United Kingdom, *adopted on 16 June 2000*.
- ²⁵ The Explanatory Report to the Framework Convention observes that the drafters “decided to adopt a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States” (para. 12). Available at <http://www.humanrights.coe.int/Minorities/Eng/FrameworkConvention/Explanatory%20report/explreport.htm>.
- ²⁶ Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Estonia, para. 17, adopted on 14 September 2001.
- ²⁷ *Ibid.* at para. 18.
- ²⁸ *Ibid.* at para.
- ²⁹ Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Italy, para. 26, adopted on 14 September 2001.
- ³⁰ Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Germany, para. 18, adopted on 1 March 2002.
- ³¹ *Ibid.* at para. 37.
- ³² *Ibid.*
- ³³ European Court of Justice, *Yvonne van Duyn v. Home Office*, para. 8 (4 December 1974).
- ³⁴ *Ibid.* at para. 15.
- ³⁵ *Ibid.* at para. 24.
- ³⁶ European Court of Justice, *Meryem Demirel v. Stadt Schwäbisch Gmünd* (30 September 1987).
- ³⁷ European Court of Justice, *S.Z. Sevince v. Staatssecretaris van Justitie* (20 September 1990).
- ³⁸ European Court of Justice, *Recep Tetik v. Land Berlin* (23 January 1997).
- ³⁹ Letter from the Inter-American Commission on Human Rights regarding detainees in Guantanamo Bay, Cuba (13 March 2002).
