



**International Commission of Jurists**

**NON-CITIZENS AND THE ADMINISTRATION OF  
CRIMINAL JUSTICE**

Submission to the Committee on the Elimination of Racial  
Discrimination

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## **I. INTRODUCTION: GENERAL APPLICATION OF HUMAN RIGHTS TO NON-CITIZENS AND THE NEED FOR CLEAR STANDARDS OF EQUALITY, FAIR TRIAL AND PROTECTION IN THE CRIMINAL PROCESS**

The following written submission wishes to recall the basic rights of non-citizens in the criminal process. Indeed, non-citizens are in a particularly vulnerable situation in the criminal process as compared to citizens, and as Article 1 (2) excludes non-citizens *a priori* from the application of the Convention on the Elimination of Racial Discrimination, it is important to reaffirm their rights to non-discrimination and equality before the courts and tribunals guaranteed in the body of international human rights law.

Two factors contribute to the disadvantage of non-citizens - here understood both as foreign nationals or stateless persons - in the administration of criminal justice:<sup>1</sup> Firstly, some legal systems openly discriminate against non-citizens in their legislation, excluding them, for instance, from the right to free legal counsel, the right to an interpreter, the right to consular protection, or the right to reparation if they are victims of a crime. Secondly, non-citizens suffer factual disadvantages, due to racial prejudice, language barriers, *etc.* They suffer from discriminatory practice of law-enforcement personnel, the prosecution and the tribunals, be it through overt discrimination or be it to lack of sensitivity and awareness of their special position as non-citizens. This may lead to more frequent or longer pre-trial detention, unfair trials, or disproportionately harsh sentences, all infringements of the person's most basic human rights. Also, non-citizens often belong to a recognized or factual minority in the country in which they reside. As such, they are more likely than others to be victims of discrimination in the criminal justice system. As the British Home Office puts it, '[t]hey [ethnic minorities] are over represented as victims of crime and are generally under represented as employees of Criminal Justice System services and agencies, particularly at senior level'.<sup>2</sup>

This is, to a lesser or wider extent, true in all countries. It becomes an ever more virulent problem in difficult times, when the public authorities come under strain, such as in the current political situation, in which all countries adopt measures to fight terrorism. It is in these times that non-citizens, among the most vulnerable groups, are in particular need of protection against discrimination and abuse. Only the Joint Statement of the independent experts mandated by the United Nations shall be recalled as an illustration: '[...] under the pretext of combating terrorism [...] vulnerable groups are targeted and discriminated against on the basis of origin and socio-economic status, in particular migrants, refugees and asylum seekers [...].'<sup>3</sup>

This short submission cannot address all aspects of the criminal justice system which may affect non-citizens; its aim is merely to recall some basic principles of criminal

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<sup>1</sup> The administration of criminal justice comprises a wide array of institutions: the police, the judiciary, the prosecution, the probation service when there is one; in a wider understanding, it also involves the home office and justice department. A person is confronted to the criminal justice system from the period of suspicion or arrest to the period of detention and later rehabilitation.

<sup>2</sup> Home Office, 'Race and the Criminal Justice System', p. 2 [available at <http://www.homeoffice.gov.uk/justice/race.html>], viewed 10 January 2004].

<sup>3</sup> In the *Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, Effective Functioning of Human Rights Mechanisms*, E/CN.4/2004/4 of 5 August 2003, p. 22; see also the statement on 10 December 2001, '*Human Rights Day: Independent Experts Remind States of Obligation to Uphold Fundamental Freedoms*', Press Release of the United Nations.

justice that must apply to citizens and non-citizens alike, and to highlight some few areas of the criminal justice system raising issues peculiar to non-citizens and where international law sets a standard with which states have to comply. The areas which it seeks to address refer, on the one hand, to the difficulties faced by non-citizens when they are confronted to the criminal justice system as suspects or accused, and, on the other, to discrimination suffered by non-citizens who are victims of crime, in particular racist or xenophobic crime.

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Before analysing some specific areas concerning the position of non-citizens in the criminal justice system, it is worth recalling that non-citizens enjoy the right to equality and, with few exceptions such as rights of political participation, all other human rights, on an equal footing with citizens.

Although the International Convention against Racial Discrimination states in its Article 1 (2) that it shall not apply to distinctions, exclusions, restrictions or preferences made by a State party between citizens and non-citizens, it remains the case that non-citizens often find themselves in an underprivileged position as compared to citizens, and that clear standards are needed to protect them from unfair racial or other discrimination and violations of their human rights.

The Committee on the Elimination of Racial Discrimination has indeed held in its General Recommendation XI on non-citizens, that although article 1, paragraph 2, excludes from the definition of racial discrimination actions by a State party which differentiate between citizens and non-citizens, 'it must not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.'<sup>4</sup>

Equally, the Human Rights Committee, in its General Comment No. 15 on the position of aliens under the Covenant held that '[i]n general, the rights set forth in the Covenant apply to everyone [...] irrespective of his or her nationality or statelessness'.<sup>5</sup> It stated that aliens have, in particular, the full right to liberty and security of the person, as well as the right to be equal before the courts and tribunals, and the right 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, the right not to be subjected to retrospective penal legislation, the right to equal protection by the law and the prohibition of discrimination between aliens and citizens in the application of human rights. The Committee further stated that the rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.<sup>6</sup>

Similarly, the Special Rapporteur on the rights of non-citizens, Mr. David Weissbrodt, in his final report to the Sub-Commission concluded that 'all persons should by virtue of their essential humanity enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are

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<sup>4</sup> General Recommendation XI on non-citizens (1993), para. 3.

<sup>5</sup> General Comment 15, *The position of aliens under the Covenant* (1986), para. 1.

<sup>6</sup> *Ibid.*, para. 7.

proportional to the achievement of that objective.<sup>7</sup> Amongst others, he mentioned freedom from arbitrary arrest, the right to a fair trial, and equality.

## II. NON-CITIZENS CONFRONTED TO THE CRIMINAL JUSTICE SYSTEM AS SUSPECTS OR ACCUSED

Non-citizens are in particular need of measures to protect them against discrimination or other disadvantages that they face in the criminal justice system. As the Inter-American Court of Human Rights has put it:

‘To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one’s interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages. [...] This is why an interpreter is provided when someone does not speak the language of the court, and why the foreign national is accorded the right to be promptly advised that he may have consular assistance.’<sup>8</sup>

Human Rights in the criminal process are guaranteed in many international human rights instruments, both at the universal and at the regional level. The most universal standards are set out in the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights, and shall be the guiding principles for the purpose of this paper. For non-citizens before the criminal justice system, the most important rights are the **right to equality before the law and before the courts and tribunals**, the **right to liberty and security of the person**, the **right to a fair trial**, and the **right to consular protection**.

It is of utmost importance to note that in no human rights treaty or declaration is any of the aforementioned rights restricted to citizens. Indeed, it follows from the wording of the relevant provisions that they apply to citizens and non-citizens alike, and independently of the legal status of the non-citizen.<sup>9</sup> If a state wishes to afford distinctive treatment to citizens and non-citizens, such differentiation must serve a legitimate purpose and the restriction affecting the non-citizens be necessary and proportional to achieve the purpose.

### 1. The right to non-discrimination, to equality before the courts and tribunals and to equal protection of the law

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<sup>7</sup> E/CN.4/Sub.2/2003/23, executive summary.

<sup>8</sup> Advisory Opinion OC-16/99 of October 1 1999, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Series A No. 16, para. 119, 120.

<sup>9</sup> Inter-American Court on Human Rights, Advisory Opinion OC-18/03, *Legal Status and Rights of Undocumented Migrants*, 17 September 2003, para. 121.

The right to equality before the law and before the courts and tribunals and to equal protection of the law are aspects of the prohibition of discrimination, both in its negative aspect (creating the duty to abstain from discrimination by the state) and its positive aspect (creating duties of positive action and protection by the state authorities and in particular the courts). It is one of the most universal and fundamental rights,<sup>10</sup> and the prohibition of racial discrimination has been held by the Committee on Racial Discrimination to be a peremptory norm of international law, from which no derogation is permitted.<sup>11</sup> The right to equality is guaranteed for non-citizens and citizens alike, and the Human Rights Committee has determined that distinctions made in legislation between citizens and aliens are contrary to the ICCPR articles 2, 3, 9, 12, 17 and 23.<sup>12</sup> Moreover, it is worth mentioning that the Committee on the Elimination of Racial Discrimination has expressly requested the inclusion of the ground of discrimination on the ground of nationality into national law as a way to combat discrimination.<sup>13</sup>

It is clear that not all distinctions between citizens and non-citizens automatically amount to a violation of the right to equality. As with all distinctions, they may be compatible with the right to equality if they are exceptional and ‘serve a legitimate State objective and are proportional to the achievement of that objective.’<sup>14</sup> This is the constant jurisprudence of all human rights bodies.<sup>15</sup>

However, non-citizens face discrimination in several ways that cannot be considered necessary and proportional to attain a State’s objective. Only one illustration of this is the recently adopted anti-terrorist legislation in many countries, which affects non-

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<sup>10</sup> To cite but a few, it is enshrined in Article 1 (3) Charter of the United Nations, Articles 2 and 7 of the Universal Declaration of Human Rights (UDHR), Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR), Articles 2 (2) and 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 2 of the Convention on the Rights of the Child (CRC), Articles 2, 3, 5 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Articles 1, 7, 18 (1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC), Articles 5 of the Declaration on the Human Rights of Individuals who are not Nationals of the Countries in Which They Live, Articles 2 and 4 of the Declaration on the Elimination of all Forms of Intolerance and of based on Religion or Belief, Article 2 (1), 3 (1), and 4 Declaration on the Rights of Persons Belonging to National or Ethnic, religious and Linguistic Minorities, Articles 15, 19 to 27, 30 Vienna Declaration and Programme of Action, Paragraphs 1, 2, 7, 9, 10, 16, 25, 38, 47, 48, 51, 66 and 104 World Conference against Racism, Racial Discrimination, Xenophobia and other Related Forms of Intolerance, Declaration and Programme of Action

At the regional level: Article 3 (1) Charter of the OAS, Article II of the American Declaration of the Rights and Duties of Man, Articles 1 and 24 of the American Convention on Human Rights (ACHR), Article 20 and 21 Charter of Fundamental Rights of the European Union, Articles 1 and 14 European Convention for the Protection of Fundamental Rights and Freedoms (ECHR) and Protocol 12 thereto, Article 19 European Social Charter, Articles 2 and 3 African Charter of Human and Peoples’ Rights and African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, paras. A (2)(a),(b),(c) and K, and Article 9 Arab Charter on Human Rights.

<sup>11</sup> CERD, *Statement on racial discrimination and measures to combat terrorism*, 11 November 2002, A/57/18 (Chapter XI)(C), para. 4.

<sup>12</sup> CERD, *Concluding Observations on Switzerland*, 12 November 2001, CCPR/CO/73/CH, para. 15.

<sup>13</sup> *Concluding Observations on the United Kingdom*, 10 December 2003, CERD/C/63/CO/11, para. 15.

<sup>14</sup> E/CN.4/Sub.2/2003/23, executive summary.

<sup>15</sup> Cf. Human Rights Committee, General Comment No. 15, *The position of aliens under the Covenant*, para. 7; General Comment No. 18, *Non-discrimination*, para. 13; European Court of Human Rights, *Belgian Linguistics Case*, CERD, *General Recommendation XIV on article 1, paragraph 1, of the Convention*, para. 2; Inter-American Court on Human Rights, *Advisory Opinion OC-18/03, Legal Status and Rights of Undocumented Migrants*, 17 September 2003, para. 119.

citizens disproportionately as compared to citizens.<sup>16</sup> The creation of ‘military commissions’ by the United States President on November 2001 only for non-U.S. citizens, which offer even less guarantees than the courts-martial, is also evidence of such discrimination.<sup>17</sup>

Racial bias plays a major role in patterns of sentencing. This is well documented for the death penalty in the United States.<sup>18</sup> As the Committee against Racial Discrimination itself has noted, a disproportionate number of foreigners face death penalty in Saudi Arabia.<sup>19</sup> Such discrimination constitutes a violation of the right to equal protection before the courts, which is granted to citizens and non-citizens alike.

It is also important to note that the rate of crime, which is sometimes high for non-citizens, is often due to the amount of convictions that concern the illegality of immigration and related offences. Indeed, in a considerable number of States violations of immigration regulations are criminalized and severely punished. As the Special Rapporteur on Migrant Workers has stated: ‘infractions of immigration laws and regulations should not be considered criminal offences under national legislation, [...] irregular migrants are not criminals *per se* and they should not be treated as such.’<sup>20</sup> Also it must be recognized that in countries which marginalize foreign nationals, it is this marginalization which leads to illicit conduct (for example illegal work, prostitution, etc).<sup>21</sup> This may even lead to double victimization, particular for victims of trafficking, who commit offences such as irregular entry, use of false documents, prostitution.<sup>22</sup>

Also, the right to equality, as mentioned above, is deeply affected by the anti-terrorism legislation, which targets non-citizens and is likely to affect their to equality with citizens in the criminal process.

## 2. The right to liberty and security of the person and the right to a fair trial

The right to liberty and security of the person is guaranteed in Article 3 UDHR, Article 9 ICCPR, Article 16 (1) MWC, Article 55 of the Rome Statute of the International Criminal Court, Article 1 American Declaration on the Rights and Duties of Man, Article

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<sup>16</sup> In the United Kingdom the anti-terrorist law adopted by parliament on 14 December 2001 allows the police to imprison foreigners without a warrant on grounds of mere suspicion without a judicial investigation. Similarly, in the United States the USA Patriot Act signed into law on 26 October 2001 has extended from 48 hours to seven days the period during which foreigners can be held in police custody if suspected of links with terrorist groups. (Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E/CN.4/2003/23, para. 45-51.

<sup>17</sup> Human Rights Watch, *A Comparison between the Proposed U.S. Military Commissions and U.S. General Courts-Martial*, 17 December 2001; Helsinki Federation for Human Rights, *Anti-terrorism Measures, Security and Human Rights*, April 2003, p. 97. While the guidelines for the military commissions were reviewed, they still offer less guarantees than other U.S. courts: Amnesty International, *USA – Military Commission: second class justice*, 22 March 2002; Human Rights Watch, *U.S.: Commission Rules Meet Some, Not All, Rights Requirements*, 21 March 2002; Lawyers Committee for Human Rights, *A Year of Loss*, pp. 51-53.

<sup>18</sup> See Amnesty International, *Killing with Prejudice: Race and the Death Penalty in the USA*, AI INDEX: AMR 51/052/1999.□□□□

<sup>19</sup> *Concluding Observations on Saudi Arabia*, 21 March 2003, CERD/C/62/CO/12, para. 18.

<sup>20</sup> Report of the Special Rapporteur on Migrant Workers, 30 December 2002, E/CN.4/2003/85, para. 73.

<sup>21</sup> See, State Report by Italy, CERD/C/SR.1466, 21 May 2003 (Italy), para. 43.

<sup>22</sup> Report of the Special Rapporteur on Migrant Workers, 30 December 2002, E/CN.4/2003/85, paras. 41, 42.

7 ACHR, Article 5 ECHR, Article 6 African Charter on Human and People's Rights,<sup>23</sup> and Article 5 Arab Charter of Human Rights.

It comprises:

- The right to security of the person
- The prohibition of arbitrary arrest or detention;
- The requirement of legality of the detention;
- The right to be informed promptly of the reasons for the arrest and the charge;
- The right to be brought promptly before the judge or other officer authorized by law to exercise judicial power;
- The right to trial within a reasonable time;
- The presumption of release pending trial;
- The right to habeas corpus;
- The right to compensation for unlawful detention.

The right to a fair trial applies to all proceedings, be they civil, administrative or criminal. For criminal trials, further, more detailed standards have developed in international human rights law, such as are guaranteed in Articles 10 and 11 of the Universal Declaration on Human Rights, Article 14 ICCPR, Articles 55, 66 and 67 of the Rome Statute of the International Criminal Court, Article 18 of the Migrant Workers' Convention, Article XXVI of the American Declaration of the Rights and Duties of Man, Article 8 of the American Convention on Human Rights, Article 6 of the European Convention on Human Rights, and Article 7 of the African Charter on Human and People's Rights. Among the minimum guarantees pertaining to the right of fair trial in criminal justice are:

- The right to be equal before the courts and tribunals;
- The right to be tried in a tribunal which offers the essential guarantees of independence and impartiality;
- The right to a fair hearing;
- The right to a public hearing;
- The presumption of innocence;
- The right to be informed promptly and in detail of the nature and cause of the charge;
- The right to have adequate time and facilities for the preparation of his defence;
- The right to communicate with counsel of one's own choosing;
- The right to be tried without undue delay;
- The right to be tried in one's presence;
- The right to legal representation and to free legal representation if the accused cannot afford counsel and the interests of justice so require;
- To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf;
- To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- Not to be compelled to testify against himself or to confess guilt;
- The right to appeal;
- The principle of non-retroactivity of criminal laws;
- The principle of *ne bis in idem*.

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<sup>23</sup> In conjunction with African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, para. M.

As far as the right to liberty and security is concerned, it is important to recall that its fundamental requirements apply at all times, including in times of emergency. Indeed, the European Court of Human Rights has held that even in times of emergency, a state may only derogate from the requirements of Article 5 ECHR to the extent strictly required by the situation, and has supervised state's compliance with their obligation to guarantee prompt judicial intervention in cases of detention as well as safeguards against abuse in detention, such as access to a lawyer, the guarantee of *habeas corpus* proceedings and the right to contact family members.<sup>24</sup> The Inter-American Court of Human Rights has expressly held that 'the writs of habeas corpus and of 'amparo' are among those judicial guarantees that are essential for the protection of various rights whose derogation is prohibited by Article 27 (2) and that serve, moreover, to preserve legality in a democratic society',<sup>25</sup> and that these guarantees 'should be exercised within the framework and the principles of due process of law'.<sup>26</sup> And the Human Rights Committee has held that that the remedy of *habeas corpus* is *per se* inderogable.<sup>27</sup>

With respect to the right to a fair trial, the Human Rights Committee has held that the fundamental requirements of fair trial are non-derogable; it has stated that 'the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant'.<sup>28</sup> Similarly the Inter-American Court of Human Rights has held that the fundamental guarantees of due process of Article 8 of the American Convention on Human Rights pertain to the judicial guarantees, from which the state cannot derogate even during a state of emergency, insofar as they are essential for the protection of non-derogable rights.<sup>29</sup> The Inter-American Commission on Human Rights has recently made clear that 'the most fundamental fair trial requirements cannot justifiably be suspended under either international human rights law or international humanitarian law'.<sup>30</sup> And the African Commission on Human and Peoples' Rights has held that 'no circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial'.<sup>31</sup>

It is also worth mentioning that that the principle of non-retroactivity<sup>32</sup> is a non-derogable right under international law.<sup>33</sup> This principle has been interpreted by the

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<sup>24</sup> *Brannigan and McBride v the United Kingdom*, Judgment of 26 May 1993, Series A No. 258-A, paras. 55 *et seq.* and 61 *et seq.*; *Aksoy v Turkey*, Judgment of , paras. 76 *et seq.* and 79 *et seq.*

<sup>25</sup> Advisory Opinion OC-8/87, *Habeas Corpus in Emergency Situations*, 30 January 1987, Series A No. 8, para. 42; Advisory Opinion OC-9/87, *Judicial Guarantees in States of Emergency*, 6 October 1987, operative para. 2.

<sup>26</sup> Advisory Opinion OC-9/87, *supra*, operative para. 3.

<sup>27</sup> General Comment 29 on Article 4 (2002), para. 16.

<sup>28</sup> *Ibid.*, para. 16.

<sup>29</sup> Advisory Opinion OC-9/87, *supra*, Series A No. 9, para. 30.

<sup>30</sup> Report on terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 261.

<sup>31</sup> African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, para. R.

<sup>32</sup> Guaranteed in Article 15(1) of the ICCPR; Article 11 (2) UDHR; Article 40 (2) (a) CRC; Article 19 (1) MWC; Article 9 ACHR; Article 7 ECHR; Article (2) African Charter on Human and People's Rights; Article 6 Arab Charter on Human Rights.

<sup>33</sup> Article 4 (2) ICCPR; Article 28 (2) ACHR; Article 15 (2) ECHR.

Human Rights Committee as meaning that ‘the requirement of both criminal liability and punishment [must be] limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty’.

It follows from these findings of the international human rights bodies, that the rights to judicial review, the basic procedural safeguards against abuse in detention, and the basic requirements of fair trial are part of the non-derogable guarantees of international human rights law; this rank as non-derogable rights may be of particular importance for non-citizens, as they are often the target of especially discriminatory measures in times of war or emergency. As stated above, some countries have recently adopted anti-terrorist legislation which is clearly discriminatory against non-citizens.<sup>34</sup>

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In the following, some of the procedural rights of a particular interest for non-citizens shall be mentioned. It must be stressed, however, that **all** rights of due process are of importance for non-citizens, and that a recommendation recalling their rights in the administration of criminal justice, should make this clear.

*a) The right to security of the person*

The right to security of the person should be especially mentioned here, as it is a right linked to many other human rights, particularly the right to physical and mental integrity and the right to life. This becomes very clear from the formulation of Article 3 of the Universal Declaration of Human Rights, which reads: ‘Everyone has the right to life, liberty and security of the person’. It is important to note that the right to security not only applies to detained persons, but to all persons within the jurisdiction of the state; also, it not only imposes a negative obligation of the States to respect the security of the person but also a positive obligation to protect persons; thus, the Human Rights Committee has held that it obligates State to protect persons from threats to their personal security.<sup>35</sup> It is an important right for non-citizens as it offers them protection from arbitrary detention, but also from threats to their physical integrity, life, etc.

*b) The right to be informed of the reasons for the arrest and the charge*

The arrested or detained suspect must immediately be informed of the reason for his arrest and the charge against him. As this right must be effectively granted, the information has to be given in a language which he understands.<sup>36</sup>

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<sup>34</sup> In the United Kingdom the anti-terrorist law adopted by parliament on 14 December 2001 allows the police to imprison foreigners without a warrant on grounds of mere suspicion without a judicial investigation. Similarly, in the United States the USA Patriot Act signed into law on 26 October 2001 has extended from 48 hours to seven days the period during which foreigners can be held in police custody if suspected of links with terrorist groups. (Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E/CN.4/2003/23, para. 45-51.

<sup>35</sup> *Delgado Páez v. Colombia*, 23 August 1990, CCPR/C/39/D/195/1985, para. 5.5; see also the cases *Dias v. Angola*, 18 April 2000, CCPR/C/68/D/711/1996, para 8.3.; *Chongwe v. Zambia*, 9 November 2000, CCPR/C/70/D/821/1998, para. 5.3.;

<sup>36</sup> This is explicitly mentioned in Article 5 (2) ECHR, and similarly applies in the context of other treaties.

### c) Detention

Non-citizens are more likely to be detained at the pre-trial stage.<sup>37</sup> However, pre-trial detention, according to Article 9 (3) ICCPR, should be the exception rather than the rule. For remanding an accused in custody pending trial, substantive reasons must exist, such as the likelihood that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the state party. The Human Rights Committee has held that the fact that an accused is a foreigner does not of itself constitute a reason for detention pending trial.<sup>38</sup>

Also, State may abuse of their power to hold persons in administrative detention, even if there is criminal evidence against them. The objective of administrative detention is to guarantee that another measure, such as deportation or expulsion, can be implemented. Nonetheless, it is sometimes used by certain States as a way to extend the detention of a non-citizen *prior to a criminal procedure*. In the United States there have been cases reported where non-citizens of interest to the September 11<sup>th</sup> investigation have been arrested on immigration charges that has allowed the Department of Justice to continue investigating and interrogating them avoiding the greater safeguards of the criminal procedure.<sup>39</sup> The practice of administrative detention is all the more problematic as in most cases those held in administrative detention enjoy far less guarantees than those detained under judicial proceedings.<sup>40</sup> The basic guarantees related to the arrest or detention of individuals contained in the body of international human rights law should be applied to all deprivations of liberties, including administrative detention.<sup>41</sup> The Human Rights Committee has manifested its concern about the use of various forms of administrative detention entailing restrictions on access to counsel and to information about the reasons of detention.<sup>42</sup>

The measures against terrorism have not improved the detention situation for non-citizens, as they are, more often than citizens, apprehended and detained on suspicion of terrorist activities.<sup>43</sup> This is not only so in the countries of Western Europe or the United States, where it has been reasonably well documented, but also, for instance, in a region like the former Yugoslavia, where a very high number of arrests and detention concern men from the Middle East.<sup>44</sup>

### d) The right to be tried by an independent and impartial court, previously established by law

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<sup>37</sup> Home Office, 'Race and the Criminal Justice System' (*supra* at note 2), p. 5.

<sup>38</sup> *Michael and Brian Hill v. Spain*, 2 April 1997, CCPR/C/59/D/526/1993, para. 12.3.

<sup>39</sup> Human Rights Watch Report, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, Reports Vol. 14, No. 4 (G) – August 2002, p. 5.

<sup>40</sup> Report of the Special Rapporteur on Migrant Workers, 30 December 2002, E/CN.4/2003/85, para. 19 and 20.

<sup>41</sup> Article 9 ICCPR; Human Rights Committee, General Comment No. 8 Article 9 (1982), 4; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

<sup>42</sup> *Concluding Observations on Israel*, 21 August 2003, CCPR/CO/78/ISR, para. 12.

<sup>43</sup> Report by the Helsinki Federation for Human Rights, *Anti-terrorism Measures, Security and Human Rights*, April 2003, pp. 85 *et seq.*

<sup>44</sup> *Ibid.*, pp. 79 *et seq.*, 83 *et seq.*

The right to an independent and impartial tribunal established by law is protected by many provisions of international law.<sup>45</sup> Article 14(1) of the ICCPR states that proceedings in any criminal case are to be conducted by a competent, independent and impartial tribunal established by law. This principle is reiterated in the Basic Principles on the Independence of the Judiciary. The Human Rights Committee has held that ‘the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception’.<sup>46</sup> This right implies ‘that the tribunal must be, and be seen to be, independent and impartial’,<sup>47</sup> i.e. ‘be subjectively free from personal prejudice or bias’ and ‘offer sufficient guarantees to exclude any legitimate doubt in this respect’.<sup>48</sup> It means that the judge or jury members must not have preconceived ideas about the matter before them or the accused. The Human Rights Committee has held that it is for the tribunal to decide *ex officio* whether there are motives to replace a member of the tribunal.<sup>49</sup>

With regard to non-citizens, racial bias or prejudice against foreigners may impede the impartiality of the tribunal. The Committee on the Elimination of Racial Discrimination stated in the case of *Narrainen v. Norway* that ‘[i]f members of a jury are suspected of displaying or voicing racial bias against the accused it is incumbent upon the national judicial authorities to investigate the issue and to disqualify the juror if there is a suspicion that the juror might be biased’.<sup>50</sup> Although the Committee did not find a violation in that particular instance, it recommended that ‘(...) every effort should be made to prevent any form of racial bias from entering into judicial proceedings which might result in adversely affecting the administration of justice on the basis of equality and non-discrimination. (...) due attention [should] be given to the impartiality of juries, in line with the principles underlying article 5 (a) of the Convention’.

*e) The presumption of innocence*

The presumption of innocence is spelt out in Article 11(1) of the UDHR,<sup>51</sup> Article 14 paragraph 2 ICCPR, and many other universal and regional instruments.<sup>52</sup> The presumption of innocence applies from the moment of suspicion until the last instance of trial. It means that ‘[...] the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has

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<sup>45</sup> Article 10 UDHR; Article 40 (2) (b) (iii) CRC; the UN Basic Principles on the Independence of the Judiciary; Article 18 (1) MWC; Article XXVI American Declaration on the Rights and Duties of Man; Article 8 (1) ACHR; Article 6 (1) ECHR; Article 47 of the Charter of Fundamental Rights of the European Union; Recommendation R (94) 12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges, 13 October 1994; African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, paras. 4 and 5.

<sup>46</sup> *Miguel González del Río v. Peru*, 28 October 1992, CCPR/C/46/263/1987, para. 5.2.

<sup>47</sup> *Polay Campos v. Peru*, 6 November 1997, CCPR/C/61/D/577/1994, para. 8.8.

<sup>48</sup> ECtHR, *Lawrence v. the United Kingdom*, Decision as to the Admissibility of Application no. 74660/01, p. 8, *Findlay v. the United Kingdom*, Judgment of 25 February 1997, *Reports* 1997-I, para. 73, *Pullar v. the United Kingdom*, Judgment of 10 June 1996, *Reports* 1996-III, para. 30.

<sup>49</sup> *Arvo O. Karttunen v. Finland*, 23 October 1992, CCPR/C/46/387/1989, para. 7.2.

<sup>50</sup> *Michel L.N. Narrainen*, 15 March 1994, CERD/C/44/D/3/1991, para. 9.3.

<sup>51</sup> Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

<sup>52</sup> Principle 36(1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Article 40 (2) (b) (i) CRC; Article 18 (2) MWC; Article XXVI (2) American Declaration of the Rights and Duties of Man; Article 8 (2) ACHR; Article 6 (2) ECHR; Article 7 (1) (b) African Charter of Human and Peoples’ Rights; Article 7 Arab Charter on Human Rights.

been proved beyond reasonable doubt.<sup>53</sup> It is also important to recall that the Human Rights Committee has considered that the presumption of innocence is one of the fundamental principles of fair trial that constitutes a peremptory norm of international law, from which no derogation is permitted under any circumstances.<sup>54</sup> The presumption of innocence must also be respected if an accused uses his or her right to silence. Again, it is worth mentioning that this is of particular importance in trials for terrorism or other offences, for example if courts should draw adverse inferences from the silence of the accused.<sup>55</sup>

*f) The right to counsel*

The right to counsel, enshrined in Article 14 paragraph 3 (d) and other provisions of international human rights law<sup>56</sup> applies not only at the trial hearing but already at the pre-trial stage,<sup>57</sup> particularly in case of detention,<sup>58</sup> and during investigation, trial and appeal proceedings.<sup>59</sup> It also embodies the right to communicate confidentially with counsel.<sup>60</sup> It is intrinsically linked to the right to have adequate time and facilities for the defence. Also, the right to silence and the prohibition against self-incrimination may be violated if a person makes a statement without having been informed of the right to counsel.

The right to free legal counsel may be of particular importance for non-citizens, for whom the justice system is difficult to understand, who are often unable to afford a lawyer. The European Court of Human Rights has held in the case of *Quaranta v. Switzerland* that the applicant, who was Italian, should have been granted free legal assistance, especially on account of the fact that he was ‘a young adult of foreign origin from an underprivileged background.’<sup>61</sup> Similarly, the Inter-American Court of Human Rights has held that the guarantees of a fair trial encompass the right to free legal counsel, since the right to access to justice would otherwise be formal and not real, and that this requirement applied all the more to migrants.<sup>62</sup>

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<sup>53</sup> Human Rights Committee, General Comment 13 on Article 14 ((1984), para. 7.

<sup>54</sup> General Comment 29 on Article 4, para. 11.

<sup>55</sup> See Human Rights Committee, *Concluding Observations of the Human Rights Committee: United Kingdom*, 6 December 2001, CCPR/CO/73/UKOT, para. 17.

<sup>56</sup> See Article 18 (3) (d) MWC, Article 55 (5) (d), 67 (d) of the Rome Statute of the International Criminal Court, Article 8 (2) (d) ACHR, Article 6 (3) (c) ECHR, Principles 1, 5 and 6 of the Basic Principles on the Role of Lawyers; African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, para. H.

<sup>57</sup> Human Rights Committee, *Borisenko v. Hungary*, 6 December 2002, CCPR/C/76/D/852/1999, para. 7.5; African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, para. M (2) (b), (e), (f) and N (2).

<sup>58</sup> Principles 10, 17 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Principle 7 of the Basic Principles on the Role of Lawyers; Human Rights Committee, *Concluding Observations on Israel*, 12 August 2003, CCPR/CO/78/ISR, para. 13.

<sup>59</sup> Principles 1 and 7 of the Basic Principles on the Role of Lawyers.

<sup>60</sup> See Human Rights Committee, General Comment 13 on Article 14 (1984), para. 9, explicitly Article 8 (2) (d) ACHR; Article 18 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

<sup>61</sup> *Quaranta v. Switzerland*, Judgment of 24 May 1991, Series A No. 205, para. 35.

<sup>62</sup> Advisory Opinion OC-18/03, *Legal Status and Rights of Undocumented Migrants*, 17 September 2003, para. 126.

The Human Rights Committee has stated that where the State provides legal representation, it is incumbent upon it to ensure the effectiveness of legal representation.<sup>63</sup>

*g) Right to have the assistance of an interpreter free of charge*

As the non-citizen may not speak the official court language of a particular country, the right to an interpreter<sup>64</sup> becomes of particular importance for non-citizens. This is particularly so in criminal trials involving immigration offences: often non-citizens will not have resided in a country long enough to understand the language. Authorities sometimes abuse this lack of comprehension to make suspects sign confessions which they do not understand,<sup>65</sup> or to try persons without their being able to follow the proceedings. Not surprisingly, the right to an interpreter, regardless of the legal status of the person, is therefore one of the rights expressly guaranteed in the United Nations Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live. It is important to note that - unlike the right to free legal assistance - the right to the free assistance of an interpreter is not conditional upon the economic means of the accused, and must be guaranteed regardless of the outcome of the trial.<sup>66</sup> The accused has an automatic right to an interpreter from the moment of detention, if he does not understand the language of the authorities. It must be guaranteed at all stages of the criminal proceedings, including during police questioning. To be meaningful, the interpretation must be competent and accurate.<sup>67</sup> Here again, it should be mentioned that this right is intrinsically linked with the right to adequate time and facilities to prepare the defence, and that, if the right to an interpreter is violated, then this will usually amount to a violation of the right to adequate facilities to prepare the defence too.

### 3. The right to consular protection

Article 16 of the Vienna Convention on Consular Relations provides that detained non-citizens shall have the right to consular protection.<sup>68</sup> The right to consular protection is

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<sup>63</sup> *Borisenko v. Hungary*, 6 December 2002, CCPR/C/76/D/852/1999, para. 7.5; see also African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, para. H (f).

<sup>64</sup> Guaranteed in Article 14 (3) (f) ICCPR, Article 16 18 (3) (f) MWC, Article 55 (1) (c) and 67 (f) of the Rome Statute of the International Criminal Court, Article 40 (2) (b) (vi) CRC, Article 8 (2) (a) ACHR, Article 6 (3) (e) ECHR, African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, para. N (4) (a).

<sup>65</sup> Amnesty International, *State Injustice: Unfair Trials in the Middle East and North Africa*, 16 April 1998, AI Index MDE 01/02/98, Chapter 2.

<sup>66</sup> Human Rights Committee, General Comment 13 on Article 14 (1984), para. 13; ECtHR, *Luedicke, Belkacem and Koc*, 28 November 1978, Series A No. 29, paras. 17-19.

<sup>67</sup> See the explicit standard of a 'competent interpreter' in Article 67 (1) (f) of the Rome Statute of the International Criminal Court.

<sup>68</sup> Article 36 of the Vienna Convention on Consular Relations reads:

Communication and Contact with Nationals of the Sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication

equally enshrined in Article 16.2 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and in Article 16 (7) of the Migrant Workers Convention.<sup>69</sup> A right to communicate freely with the consular authority is also guaranteed by Article 10 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live. Consular protection encompasses the right of the national of the sending state to **request** that the competent authorities of the host State notify the consular post of the sending State without delay, the right of the consular authorities of the sending State **to provide assistance** to their nationals, the right of the national and the authorities of the sending State to **communicate with each other freely** and the right of the national of the sending State **to be informed** of his rights. Yet, it is often the case that non-citizens are not notified of this right, which is of particular relevance when they face the death penalty.<sup>70</sup>

It clearly follows from the wording of Article 36 (1) of the Vienna Convention on Consular Relations that this provisions confer individual rights to the detained non-national, particularly since Article 36 (1) (b) speaks of ‘*his* rights under this subparagraph’ and since, under Article 36 (1) (c), consular assistance should not be granted if the detainee ‘expressly opposes such action’. This has been confirmed by recent jurisprudence of international courts and bodies on Article 36. Indeed, the International Court of Justice has held that ‘Article 36, paragraph 1, creates individuals rights’.<sup>71</sup> The United Nations Commission on Human Rights has reaffirmed the rights of the accused under Article 36 in its Resolutions on the question of the death penalty,<sup>72</sup> the General Assembly of the Organization of American States has recalled them in its Resolutions on the Rights of Migrant Workers,<sup>73</sup> and the African Commission on Human Rights has stated them in its Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa.<sup>74</sup>

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addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

<sup>69</sup> See also Article 16 (5) of the Protocol against the Smuggling Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (not yet in force).

<sup>70</sup> See, e.g., the pending case before the International Court of Justice concerning 52 Mexican nationals facing the death penalty, I.C.J. Press Release 2003/45, 23 December 2003 [[http://www.icj-cij.org/icjwww/ipresscom/ipress2003/ipresscom2003-45\\_mus\\_20031223.htm](http://www.icj-cij.org/icjwww/ipresscom/ipress2003/ipresscom2003-45_mus_20031223.htm), viewed 8 January 2004].

<sup>71</sup> I.C.J., *LaGrand Case (Germany v United States of America)*, 27 June 2001, para. 77 [to be found at...]; the Court did not pronounce itself, however, on the question whether Article 36 of the Vienna Convention constitutes a human right.

<sup>72</sup> Resolution 2003/67 of 24 April 2003, para. 4 (f); Resolution 2002/77 of 25 April 2002, para. 4 (e); Resolution 2001/68 of 25 April 2001, para. 4 (d).

<sup>73</sup> General Assembly Resolution 1928, AG/RES. 1928 (XXXIII-O/03), The Human Rights of All Migrant Workers and Their Families, para. 2; Resolution 1898, AG/RES. 1898 (XXXII-O/02), para. 2; Resolution 1775 AG/RES. 1775 (XXXI-O/01), para. 4; Resolution 1717, AG/RES. 1717 (XX-O/00), para. 4.

<sup>74</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, para. M (2) (d) and (e).

The most extensive analysis has been provided by the Inter-American Court of Human Rights, which has held that ‘Article 36 of the Vienna Convention on Consular Relations endows a detained foreign person with individual rights that are counterpart to the host State’s correlative duties’.<sup>75</sup> It has held that it is incumbent upon the State to identify individuals whom it detains or subjects to a criminal trial, and that where it may be difficult to the State to ascertain the nationality of the individual, it should nevertheless advise the detainee of his rights.<sup>76</sup> As far as the requirement ‘without delay’ is concerned, the Inter-American Court of Human Rights has held that notification, whose purpose is that the accused has an effective defense, must be prompt, i.e. it ‘must be made at the time the accused is deprived of his freedom, or at least before he makes his first statement before the authorities’.<sup>77</sup> The Court has held that the right to consular protection pertains to ‘the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive fair trial’,<sup>78</sup> and is therefore part of the minimum guarantees of Article 14 ICCPR. As a consequence, the Court concluded that ‘the nonobservance of a detained foreign national’s right to information, recognized in Article 36 (1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law; in such circumstances imposition of the death penalty is a violation of the right not to be ‘arbitrarily’ deprived of one’s life.’<sup>79</sup>

The Inter-American Commission on Human Rights has followed a similar approach and held that the ‘right to information under Article 36(1)(b) of the Vienna Convention on Consular Relations constitute[s] a fundamental component of the due process standards to which [the accused] is entitled under Articles XVIII and XXVI of the American Declaration [on the Rights and Duties of Man] and that the failure to respect and ensure this obligation constitute[s] serious violations of (...) the right to due process and to a fair trial under these provisions of the Declaration’.<sup>80</sup> It also held that the execution of the applicant based upon such flawed criminal proceedings would constitute an arbitrary deprivation of the applicant’s life, contrary to Article I of the Declaration.<sup>81</sup>

It is thus clear from the wording of Article 36 (2) of the Vienna Convention on Consular Relations and the current status of international law, that the right to consular assistance and protection is an individual right of the non-national detainee. It has been accepted both by the United Nations Commission on Human Rights and regional human rights bodies as pertaining to the body of international human rights law. As such, it is important that the Committee on the Elimination of Racial Discrimination explicitly and comprehensively reaffirm this right in its General Recommendation on non-citizens.

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<sup>75</sup> Advisory Opinion OC-16/99 of October 1 1999, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Series A No. 16, para. 84.

<sup>76</sup> *Ibid*, para. 96.

<sup>77</sup> *Ibid*, para. 106.

<sup>78</sup> *Ibid*, para. 122.

<sup>79</sup> *Ibid*, para. 137.

<sup>80</sup> Report No. 52/02, Merits, Case 11.753, *Ramón Martínez Villareal v United States*, 10 October 2002, para. 84.

<sup>81</sup> *Ibid*, para. 85.

### III. NON-CITIZENS VICTIMS OF HUMAN RIGHTS VIOLATIONS OR CRIME

As it is established in the International Covenant on Civil and Political Rights, each State party to the Covenant has the obligation to respect and to ensure to all individuals within its territory and subject to its jurisdiction, regardless of their national origin, all the rights recognized in the Covenant.<sup>82</sup> Article 2 (3) of the ICCPR requires a State party to the Covenant to provide effective remedies for any violation of the provisions of the Covenant, and this must include the determination of the right to remedy by a competent authority (judicial, administrative or legislative) and to ensure the enforcement of such remedies when granted. This constitutes a fundamental obligation that cannot be derogated during a state of emergency.<sup>83</sup>

As the Committee on the Elimination of Racial Discrimination has noted, discrimination is aggravated when combined with insufficient possibilities to bring complaints and obtain reparation.<sup>84</sup> However, non-citizens who are victims of crime are at a disproportionate risk to be unsatisfied with the protection afforded by the criminal justice system, since crime is often inadequately investigated or punished, and they are sometimes excluded from the possibility to obtain reparation when they are victims of crime.<sup>85</sup> This is a particular problem when they are victims of crimes with a racial motivation, as they are twice victimised, as victims of crime and as victims of discrimination.

Again, it should be recalled that the terrorist attacks of 11 September 2001 triggered a wave of criminal attacks against Muslims, Arabs, or people mistakenly identified with these groups. The highly discriminatory measures taken by the State authorities under the guise of national security have sometimes exploited and aggravated the intolerance of the public.<sup>86</sup>

#### 1. The duty of the state to investigate and punish racist or xenophobic crime

It is often the case that crime is more likely to be punished when it is perpetrated against citizens, or citizens belonging to the religious or ethnic majority in the country rather than minorities or non-citizens.<sup>87</sup> Indeed, non-citizens are more likely than citizens to confront inaction by state authorities when they are victims of crime. Where non-citizens are victims of crime, they are less likely to be satisfied with the police response rate and suspects are less likely to be identified.<sup>88</sup> Therefore, the Committee on the Elimination of Racial Discrimination has found in its Concluding observations on country reports

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<sup>82</sup> Art. 2. (1) ICCPR.

<sup>83</sup> Human Rights Committee, General Comment No. 29 on States of Emergency (Article 4) (2002), para. 14.

<sup>84</sup> CERD, Response to the Questionnaire sent by the Special Rapporteur on the rights of non-citizens, 20 March 2003, CERD/C/62/Misc.17.Rev.3, response to question 2.

<sup>85</sup> The Committee on the Elimination of Racial Discrimination has expressed concern that certain categories of foreigners were not entitled to redress for acts of racial discrimination committed against them, *Concluding Observations on Germany*, CERD/C/304/Add.24, 23 April 1997, paras. 18, 22.

<sup>86</sup> Lawyers Committee for Human Rights, *A Year of Loss*, 2002, pp. 22-24; See the Report by the Helsinki Federation for Human Rights, *Anti-terrorism Measures, Security and Human Rights*, April 2003, pp. 101 et seq. describing the backlash in violent attacks occurred in many countries.

<sup>87</sup> See Amnesty International, *Racism and the Administration of Justice*, Amnesty International Publications, London 2001, AI Index: Act 40/020/2001, Chapter 3 'Impunity and lack of State protection'.

<sup>88</sup> *Concluding Observations on Finland*, 10 December 2003, CERD/C/63/CO/5, para. 17; see also Home Office, 'Race and the Criminal Justice System', p. 3.

that racial incidents against foreigners were not sufficiently prosecuted and has recommended the prevention and prosecution of racial incidents against foreign nationals.<sup>89</sup> Similarly, in its decision in the case No. 4/1991 (*L.K. v. The Netherlands*) the Committee emphasized that States parties to the Convention on the Elimination of all forms of Racial Discrimination have a positive obligation to take effective action against reported incidents of racial discrimination. Indeed, the duty to punish racist crime follows from Article 4 (a) CERD, which reads:

‘States Parties [...] shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.’

The application of this provision to non-citizens may not be excluded through Article 1 (2) CERD, this article only refers to distinctions, exclusions, restrictions or preferences made by a State and cannot, therefore, be understood to apply to violent crime committed by private persons. In this sense, the Committee on the Elimination of Racial Discrimination comments, as a matter of consistent practice, on racist incidents concerning non-citizens.<sup>90</sup>

The duty to punish perpetrators of racist or xenophobic crimes also follows from the general duty of states to guarantee the human rights of all, and to protect individuals from any act or omission, by state or non-state actors, that impairs the enjoyment of their human rights. Indeed, crime against non-citizens, particularly violent crime and crime of a racist or xenophobic nature, affects non-citizens’ human rights to non-discrimination, to human dignity, to physical and mental well-being, including the right to life. For crimes of such nature, the duty to punish perpetrators has been recognized by international human rights jurisprudence, in particular the Human Rights Committee,<sup>91</sup> the Inter-American Court on Human Rights,<sup>92</sup> and the European Court on Human Rights.<sup>93</sup> Similarly, states have a duty to promptly, effectively and impartially investigate such acts that may impair non-citizens enjoyment of their human rights.<sup>94</sup> It

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<sup>89</sup> CERD, *Concluding observations on Italy*, CERD/C/304/Add.68, 7 April 1999, paras. 9 and 14; see also *Concluding Observations on Germany*, CERD/C/304/Add.115, 27 April 2001, para. 14 (c); *Concluding Observations on France*, 19 April 2000, CERD/C/304/Add.91, para. 11.

<sup>90</sup> See *Concluding observations on Italy*, CERD/C/304/Add.68, 7 April 1999, para. 9; CERD, *Concluding Observations on Germany*, 27 April 2001, para. 10. Also, Article 5 (b) CERD enshrines the right of all persons to ‘security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution’

<sup>91</sup> See, for instance, Human Rights Committee, *Concluding Observations on Slovakia*, 22 August 2003, CCPR/CO/78/SVK, para. 17; *Concluding Observations on the Czech Republic*, 27 August 2001, CCPR/CO/72/CZE, para. 10; *Concluding Observations on the Russian Federation*, 6 November 2003, CCPR/CO/79/RUS, para. 24; *Concluding observations: Hungary*, 19 April 2002, CCPR/CO/74/HUN, para. 12; see also the above mentioned decision in *Delgado Páez v. Colombia*, 23 August 1990, CCPR/C/39/D/195/1985, para. 5.5., in which the Committee held that the right to security imposes an obligation on States to protect persons against threats to their personal security.

<sup>92</sup> Since the judgment of *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, Series C No. 4, paras 147, 187.

<sup>93</sup> Since *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A No. 91, para. 27.

<sup>94</sup> Committee on the Elimination of Racial Discrimination: *L.K. v. the Netherlands*, 16 March 1993, CERD/C/42/D/4/1991, para. 6.9; *Habasi v. Denmark*, 6 April 1999, CERD/C/54/D/10/1997, para. 9.3-10 [investigation as part of the remedy pursuant to Art. 6]; *Kashif Ahmad v. Denmark*, 8 May 2000, CERD/C/56/D/16/1999, para. 6.4.

has also been held explicitly by the European Commission on Racism and Intolerance that racist offences must be penalised, investigated, prosecuted, and punished.<sup>95</sup>

The duty to punish racist or xenophobic crime implies, as expressed in Article 4 (a) that an offence of this nature must be enshrined in the domestic criminal code, and that such offence should specifically refer to the racist or xenophobic nature of the crime.<sup>96</sup> The tribunals have to acknowledge the racist nature of offences.<sup>97</sup> The Committee on the Elimination of Racial Discrimination has also welcomed measures of States who considered racial motivation as an aggravating circumstance of a crime.<sup>98</sup> Nonetheless, it has also held that the enactment of legislation making racial discrimination a criminal offence does not in itself represent full compliance with the obligations of States parties under the Convention. It is incumbent upon States to investigate with due diligence and expedition.<sup>99</sup> The duty to investigate a racist or xenophobic crime effectively may imply the need to recognize the crime as being of such racist or xenophobic nature at the investigation, for disregard of the particular motivation of the perpetrator of the crime may lead to an ineffective investigation and prosecution.<sup>100</sup>

The duty to investigate will only be complied with effectively if trust is established between non-citizens and the actors involved in the criminal justice system, i.e. the prosecution and the courts, but first and foremost the police, who is the primary addressee of complaints on crime. When referring to the importance of the role of the police, the Committee on the Elimination of Racial Discrimination in the *M.B. v. Denmark* case stated: ‘[...] the Committee wishes to emphasize the importance it attaches to the duty of the state party and, for that matter, of all States parties, to remain vigilant, in particular by prompt and effective police investigations of complaints, that the rights established under article 5, paragraph f, is enjoyed without discrimination by all persons, national or foreigners, under the jurisdiction of the state party.’<sup>101</sup> As the European Court of Human Rights has held, ‘[w]here [an] attack is racially motivated, it is particularly important that the investigation is pursued with vigour and impartiality,

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For other human rights bodies, see only: Human Rights Committee *Concluding Observations: Peru*, 25 July 1995, CCPR/C/79/Add.67, para. 22; *Concluding observations: Hungary*, 19 April 2002, CCPR/CO/74/HUN, para. 12; *Concluding observations: Ukraine*, 12 November 2001, CCPR/CO/73/UKR, para. 13; Inter-American Court of Human Rights, *Velásquez Rodríguez Case. Compensatory damages* (Art. 63(1) American Convention on Human Rights), Judgment of July 21, 1989. Series C No.7, paras 34, 35; European Court of Human Rights, *Finucane v the United Kingdom*, Judgment of 1 July 2003, para. 89; African Commission on Human and Peoples’ Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96 (30<sup>th</sup> Ordinary Session, Oct 2001), paras 57, 61.

<sup>95</sup> ECRI, General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, 13 December 2002, CRI (2003) 8, paras. 5-7, 1-23, 28.

<sup>96</sup> See also *Report on the Stephen Lawrence Inquiry* by Sir William MacPherson of Cluny, February 1999, Chapter 6, published by HMSO [<http://www.archive.official-documents.co.uk/documents/cm42/4262/4262.htm>, viewed 8 January 2004], para. 12.

<sup>97</sup> *Concluding Observations on the Czech Republic*, 10 December 2003, CERD/C/63/CO/4, para. 15; Human Rights Committee, *Concluding Observations on the Russian Federation*, 6 November 2003, CCPR/CO/79/RUS, para. 24.

<sup>98</sup> *Concluding Observations on Finland*, 10 December 2003, CERD/C/63/CO/5, para. 9; the same has been recommended by ECRI, General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, 13 December 2002, CRI (2003) 8, para. 21.

<sup>99</sup> *L.K. v. the Netherlands*, Communication No. 4/1991: Netherlands, 16 March 1993, para. 6.4 and 6.6.

<sup>100</sup> See the account of the link between the failure to effectively investigate and the lack of a particular approach to the investigation of a racial attack because of the failure to place race at the centre of the crime in the *Report on the Stephen Lawrence Inquiry* (*supra* note 96), para. 9.

<sup>101</sup> *M.B. v. Denmark*, Communication No. 20/2000: Denmark, 15 March 2002, para. 10.

having regard to the need to reassert continuously society's condemnation of racism and to maintain confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.<sup>102</sup> This implies training to achieve sensitivity concerning racial discrimination and non-citizens in the police force, a request that is constantly made by studies on discrimination in the Criminal Justice System.<sup>103</sup> It has also been specifically recommended by the Human Rights Committee.<sup>104</sup>

Also, victims and their families have an effective right of participation and be treated without discrimination or prejudice. The investigation authority must be independent from those implicated in the event and be seen to be independent - which means not only a hierarchical, personal or institutional independence, but also a practical independence. Such an inquiry calls for reasonable steps to secure the evidence, including witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. A requirement of promptness and reasonable expedition is implicit in this context. The next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests. Their concerns about specific actions or the identity of persons must be addressed.<sup>105</sup> Whenever necessary, victims and their families should be provided with **legal aid** in order to be able to effectively defend their interests.<sup>106</sup>

## **2. The duty to provide reparation to non-citizens who are victims of racist or xenophobic crime**

Article 6 CERD provides for the right to a remedy and reparation against acts of racial discrimination. The Committee on the Elimination of Racial Discrimination has recognized that 'the degree to which acts of racial discrimination damage the injured party's perception of his/her own worth and reputation is often underestimated' and that 'the right to seek just and adequate reparation or satisfaction (...) is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate'.<sup>107</sup> In the *L.K. v. The Netherlands case*, the Committee recommended to the Netherlands to provide the applicant with relief commensurate with the moral damage he had suffered.<sup>108</sup> Similar measures have been recommended by the Human Rights Committee for victims of discrimination.<sup>109</sup> It is, moreover, generally recognized in international law, that victims of crime should be guaranteed access to justice and fair

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<sup>102</sup> *Menson v the United Kingdom, Decision as to the admissibility of Application no. 47916/99*, 6 May 2003, p. 14.

<sup>103</sup> See *below* at point IV.2.

<sup>104</sup> *Concluding Observations on Slovakia*, 22 August 2003, CCPR/CO/78/SVK, para. 11.

<sup>105</sup> Criteria taken from the jurisprudence of the European Court of Human Rights, in particular *Menson v the United Kingdom, Decision as to the admissibility of Application no. 47916/99*, 6 May 2003, p.13; see also *Concluding Observations on the Czech Republic*, 10 December 2003, CERD/C/63/CO/4, para. 15; *Joint Submission by NGOs to the UN committee for the Elimination of all Forms of Racial Discrimination with regard to the UK Government's Sixteenth Periodic Review*, August 2003, Recommendations 35-37; *Report on the Stephen Lawrence Inquiry (supra note 96)*, Recommendations Nos 48 *et seq.* Recommendations 18, 29 *et seq.*, 35 and 36.

<sup>106</sup> *Menson v the United Kingdom, Decision as to the admissibility of Application no. 47916/99*, 6 May 2003, p.13; ECRI, General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination, 13 December 2002, CRI (2003) 8, para. 26.

<sup>107</sup> General Recommendation XXVI on article 6 of the Convention, 24 March 2000.

<sup>108</sup> *L.K. v. the Netherlands*, Communication No. 4/1991: Netherlands, 16 March 1993, para. 6.9.

<sup>109</sup> *Concluding Observations on Slovakia*, 22 August 2003, CCPR/CO/78/SVK, para. 11.

treatment, as well as adequate restitution, compensation and assistance.<sup>110</sup> This is particularly true for victims of trafficking, who are among the most vulnerable group of persons.<sup>111</sup> It is important, therefore, that non-citizens be able to obtain redress when they are victims of crime.<sup>112</sup>

#### **IV. THE DUTY TO COLLECT INFORMATION ON NON-CITIZENS IN THE ADMINISTRATION OF CRIMINAL JUSTICE AND TO ENSURE ADEQUATE TRAINING**

##### **1. Collection of information**

One of the major problems of discrimination in the administration of justice is the lack of information, and the difficulty in proving racist motivation in the action of authorities. While there is now more information and statistical data in some countries on discrimination in the criminal justice system against ethnic minorities, there is, as yet, little data on the specific discrimination suffered by non-citizens. Discrimination cannot be fought without such basic information on patterns of discrimination in the procedures of arrest, custody, prosecution, conviction and sentencing. It is the duty of states to collect such data in order to begin the process of eradicating discrimination against non-citizens.<sup>113</sup>

##### **2. Training**

Whether discrimination, racism or xenophobia are intentional and overt or result from a lack of sensitivity, it can only be eradicated through raising awareness and through training. Personnel involved in the criminal justice administration must be adequately trained on the particular difficulties faced by non-citizens in the administration of criminal justice.<sup>114</sup>

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<sup>110</sup> See the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; see also Recommendation No. R (85) on the position of victims in criminal law and criminal procedure, adopted by the Committee of Ministers of the Council of Europe, 28 June 1985; and African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, para. P (5)(k),(l),(m).

<sup>111</sup> Article 6 Protocol to Prevent, Suppress and Punish Trafficking in persons, Especially Women and Children, Supplementing the United Nations against Transnational Organized Crime (not yet in force).

<sup>112</sup> *Concluding Observations on the Czech Republic*, 10 December 2003, CERD/C/63/CO/4, para. 15; *Concluding Observations on Latvia*, 10 December 2003, CERD/C/63/CO/7, para. 11;

<sup>113</sup> Cf. CERD, *Concluding Observations on Italy*, 7 April 1999, CERD/C/304/Add.68, paras. 16 and 17; *Concluding Observations on France*, 19 April 2000, CERD/C/304/Add.91, para. 11; *Concluding Observations on Germany*, CERD/D/304/Add.115, 27 April 2001, para. 10; *Concluding Observations on the United Kingdom*, 10 December 2003, CERD/C/63/CO/11, paras. 13, 19; *Concluding Observations on the Czech Republic*, 10 December 2003, CERD/C/63/CO/4, para. 11; *Concluding Observations on Latvia*, 10 December 2003, CERD/C/63/CO/7, para. 11; *Concluding Observations on Iran*, 10 December 2003, CERD/C/63/CO/6, para. 16; *Concluding Observations on the Russian Federation*, 21 March 2003, CERD/C/62/CO/7, para. 13. *Joint Submission by NGOs (supra note 105)*, Recommendations 33 and 34.

<sup>114</sup> CERD, *Concluding Observations on Germany*, CERD/D/304/Add.115, 27 April 2001, para. 11; *Concluding Observations on Italy*, 7 April 1999, CERD/C/304/Add.68, paras. 13 and 18, *Concluding Observations on Hungary*, CERD/C/431/Add.1, para. 379; Human Rights Committee, *Concluding Observations on the Russian Federation*, 6 November 2003, CCPR/CO/79/RUS, para. 24; African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, paras. B(c), F(i), P (5)(m); *Joint Submission by NGOs to the UN committee for the Elimination of all Forms of Racial Discrimination with regard to the UK Government's Sixteenth Periodic Review*, August 2003, Recommendation 32; *Report on the Stephen Lawrence Inquiry (supra note 96)*, Recommendations Nos 1 *et seq* and 48 *et seq*.

## **SUBMISSIONS**

Therefore, the International Commission of Jurist respectfully submits that clear standards on the human rights and protection from racial discrimination of non-citizens in the administration of criminal justice are necessary, and that a General Recommendation on non-citizens should refer to the following rights:

### **With regard to non-citizens confronted to the criminal justice system:**

1. In the administration of criminal justice, non-citizens benefit from the same rights as citizens, namely the right to equality before the courts and tribunals and equal protection of the law, the right to liberty and security of the person as guaranteed in Article 9 ICCPR and similar human rights provisions and the right to a fair trial as guaranteed in Article 14 ICCPR and similar human rights provisions. These rights must be guaranteed to non-citizens without regard to their legal status. They must be guaranteed at all times, whether in times of peace or of public emergency or war. They must also be complied with in all legislation, measures and proceedings relating to terrorism.
2. Non-citizens who are detained have a human right to consular protection as enshrined in Article 36 of the Vienna Convention on Consular Relations, in particular the right that the authorities of the host state inform the consular authorities of the country of which they are a national without delay, the right to freely communicate with the consular authorities of the country of which they are a national, the right to consular assistance, and the right to be informed of the right to consular assistance, whether the authorities of the host state are aware of the nationality of the non-citizen or not.

### **With regard to non-citizens who are victims of crime:**

3. States have a duty to investigate and punish crime of a racist or xenophobic nature committed against non-citizens. To this end, acts of racism and xenophobia must be made punishable in national law; the particular racist or xenophobic motivation or quality of crimes must be recognised in the investigation and at trial; victims and families must be treated without discrimination, have participatory rights at all stages of the criminal investigation and trial and be afforded, if necessary, free legal aid and representation.
4. With regard to Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination, States should grant reparation to non-citizens victims of crime on an equal basis as it is granted to citizens.

### **Information and Training:**

5. States should collect information on non-citizens in the criminal justice system.
6. States should ensure the adequate training of all actors involved in the criminal justice system in order to create sensitivity for the specific vulnerability and the rights of non-citizens.