OBLIGATIONS OF STATE PARTIES ON ADDRESSING AND ERADICATING XENOPHOBIA AND ITS IMPACT ON THE RIGHTS OF MIGRANTS, THEIR FAMILIES, AND OTHER NON-CITIZENS AFFECTED BY RACIAL DISCRIMINATION

SUBMISSION TO THE UN CERD-CMW JOINT GENERAL COMMENT/RECOMMENDATION
Amnesty International welcomes the opportunity to contribute to the concept paper for the Committee on the Elimination of Racial Discrimination and the Committee for the Protection of the Rights of Migrants Workers and their Families Joint General Comment/Recommendation on Obligations of State Parties on public policies for addressing and eradicating xenophobia and its impact on the rights of migrants, their families, and other non-citizens affected by racial discrimination.
1. INTRODUCTION

Amnesty International welcomes the opportunity to contribute to the concept paper for the Committee on the Elimination of Racial Discrimination and the Committee for the Protection of the Rights of Migrants Workers and their Families Joint General Comment/Recommendation. The submission is structured around some of the questions and outline laid out by the CERD and CMW, focusing on questions 1, 2 and 5. It is not an exhaustive analysis.

2. XENOPHOBIA AND SYSTEMIC RACISM

The Durban Declaration and Programme of Action (DDPA) recognizes that xenophobia is one of the main contemporary sources and forms of discrimination. However, the lack of international recognized legal definition continues to pose obstacles to effectively addressing it. At the international level, there have been attempts not only to define xenophobia but also to differentiate it from racism.

Xenophobia must be understood as an intersectional form of discrimination that is not limited to a sole protected ground of discrimination under international law. Xenophobia has often been defined as discrimination based on the perception of being a foreigner and non-citizen, but it also involves an intersection between racial and other grounds such as religion or language. Instead of differentiating xenophobia from racism, recognizing their inextricable link provides a clearer understanding of their roots and manifestations. People on the move face heightened contexts of racialization that perpetuate prejudices and biases which favour racial exclusion and discrimination. Religion, language, and culture are often racialized categories. Race, ethnicity, religion, language, and other characteristics are used to determining someone’s migration status and nationality. Amnesty International has documented increasing xenophobic discrimination linked to systemic racism.

In the Americas, Haitians on the move have faced intersectional discrimination based on their race, skin colour, national origin, and language. In Mexico, they faced racial profiling and arbitrary detention by officials who did not speak their language and without interpreters, being forced to sign documents in Spanish and without information about the possibility of claiming asylum. In Peru and Chile, Haitians and Venezuelans have been subjected to racial and ethnic profiling based on their skin colour, language, and other factors during identity checks at borders. In the Dominican Republic, Haitians have faced expulsions and Dominicans of Haitian descent denationalization as the result of racist policies historically implemented.

In the United States of America (USA), Haitian migrants and asylum seekers have been subjected to arbitrary detention and race-based torture at the US-Mexico border. Amnesty International found that

---

1 UN Committee Against Racial Discrimination (CERD) and UN Committee for the Protection of the Rights of Migrant Workers and Their Families (CMW), “Call for submissions on concept paper for the CERD-CMW Joint General Comment/Recommendation on obligations of state parties on public policies for addressing and eradicating xenophobia and its impact on the rights of migrants, their families, and other non-citizens affected by racial discrimination”, 31 March 2023, https://www.ohchr.org/en/calls-for-input/2024/call-submissions-concept-paper-cerd-cmw-joint-general-commentrecommendation

OBLIGATIONS OF STATE PARTIES ON ADDRESSING AND ERADICATING XENOPHOBIA AND ITS IMPACT ON THE RIGHTS OF MIGRANTS, THEIR FAMILIES, AND OTHER NON-CITIZENS AFFECTED BY RACIAL DISCRIMINATION

SUBMISSION TO THE UN CERD-CMW JOINT GENERAL COMMENT/RECOMMENDATION

Amnesty International
Haitians were subjected to anti-Black racism based on their race, national origin, migration status, and other grounds, including higher evidentiary burden for Haitians asylum seekers over other nationalities.7

In Europe, systemic racism and rising Islamophobia continue to affect racialized migrants, refugees and other non-citizens disproportionately.8 In Cyprus, migrants and refugees faced racist attacks. In the context of racist rhetoric and abuses, migrant-owned shops were destroyed, and several people were attacked based on racial and other grounds of discrimination as religion or language, such as targeting shops with signs in other languages and racialized people.9

In Qatar, Black migrant workers were discriminated based on their race, skin colour and lack of language proficiency in Arabic with lower wages and less opportunities to promotions.10

3. RACIAL PROFILING

CERD has defined racial profiling as “the practice of law enforcement relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity.”11 Racial and ethnic profiling constitutes a violation of the right to equality that paves the way for additional human rights violations, such as excessive use of force or unlawful detention.12 People subjected to xenophobia experience racial profiling in different law enforcement operations, including at borders.

Racial and ethnic profiling affects migrants, refugees, and other non-citizens based on factors such as phenotype, cultural markers or actual or perceived irregular migration status. Amnesty International has called attention to the need to recognize that profiling normally occurs as a form of direct discrimination on the part of authorities and has documented several instances in which xenophobia intertwines with racial profiling.13

In the EU, Amnesty International and other civil society organizations warned about the potential extension of screening procedures to all undocumented migrants, and not just to those apprehended at the border, as consequence of the retention of article 5 of the proposed EU screening regulation.14

5 UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation 36: Preventing and combating racial profiling by law enforcement officials, 17 December 2020, UN Doc. CERD/GC/36, para. 72.
6 UN Human Rights Council, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General on its Forty-Seven Session, "Racism, racial discrimination, xenophobia and related forms of intolerance follow-up to and implementation of the Durban Declaration and Programme of Action", 28 June 2021, UN Doc. A/HRC/47/CRP.1, para. 84.
In the Netherlands, the judicial system has proscribed the Royal Netherlands Marechaussee from using racial or ethnic identity for selecting individuals perceived to be non-citizens for border checks since this practice was commonly used.\textsuperscript{15}

In Switzerland, in the Wa Baile case, the European Court of Human Rights condemned Switzerland for its failure to examine whether racial discrimination played a role in the police search Wa Baile was subjected to and for failure by the police to provide any valid justification for the identity check. European authorities, like in this case, often attempt to justify discriminatory identity checks with immigration control policies. However, using only the perceived race or ethnicity as a proxy for an individual’s nationality and migration status constitutes racial discrimination.\textsuperscript{16}

In Chile and Peru, Amnesty International has warned of the increased risk of racial profiling affecting migrants and refugees, particularly from Venezuela and Haiti, due to the introduction of new emergency rules that strengthen policing, identity checks, registrations, and potential arrests at borders.\textsuperscript{17}

Artificial intelligence and technology have created new avenues for racial discrimination to operate. In the Netherlands, tax authorities have engaged in racial profiling by using algorithmic decision-making systems, which relied partially on nationality for creating risk profiles of individual with the purpose of detecting potential fraudulent applications for childcare benefits.\textsuperscript{18}

Amnesty International has also warned of the risks of artificial intelligence-based predictive policing practices and the flaws of facial recognition used in law enforcement operation given their propensity to human rights violations and their introspection of racial profiling in law enforcement contexts.\textsuperscript{19} Similarly, Amnesty International have warned of the risks of failing to protect migrants and refugees in European Parliament’s ban on facial recognition included in the Artificial Intelligence Act.\textsuperscript{20}

4. APPROACHES TO PUBLIC POLICY: DISCRIMINATORY OUTCOMES OF “RACE-NEUTRAL” POLICIES

Xenophobia manifests in direct and indirect forms of discrimination. Direct xenophobia can manifest in advocacy of hatred, violence, or overly discriminatory policies, while indirect xenophobia includes disproportionate and negative impacts of seemingly “neutral” laws, policies and practices against non-citizens and others perceived as non-citizens. Both forms of discrimination are prohibited under international law. Distinctions, exclusions, restrictions, or preferences made between citizens and non-citizens cannot be applied as pretext for xenophobic and racial discrimination.

The CERD, in its general recommendation No. 30, stated that distinctions based on nationality must be applied pursuant a legitimate aim and must be proportional to the achievement of that aim and States must ensure “the implementation of legislation does not have a discriminatory effect on non-citizens”.\textsuperscript{21} As


\textsuperscript{21} UN Committee Against Racial Discrimination (CERD), General Recommendation 30: Discrimination against non-citizens, 12 March 2004, UN Doc. CERD/C/64/Misc.11/rev.3, para. 7.

OBLIGATIONS OF STATE PARTIES ON ADDRESSING AND ERADICATING XENOFOBIA AND ITS IMPACT ON THE RIGHTS OF MIGRANTS, THEIR FAMILIES, AND OTHER NON-CITIZENS AFFECTED BY RACIAL DISCRIMINATION

SUBMISSION TO THE UN CERD-CMW JOINT GENERAL COMMENT/RECOMMENDATION

Amnesty International
xenophobia and racism are entangled, xenophobic outcomes are exacerbated by seemingly “race-neutral” provisions and practices.

Preventing and eradicating xenophobia requires the implementation of race-conscious approaches to public policy at every government level. “Race-neutral” approaches fail to address systemic racism and xenophobia deeply ingrained in law, policies, and institutions that affect racialized migrants, refugees, and other non-citizens. These approaches overlook systemic inequalities, discrimination, and their root causes. A “race-conscious” approach actively confronts racism and intersectional discrimination, such as xenophobia. It includes ensuring accountability, transparency, and collection of disaggregated data to address systemic discrimination.

Amnesty International has documented xenophobia and racial discrimination resulting from the implementation of facially “race-neutral” laws, policies, and practices.

In the Netherlands, racial profiling in unregulated algorithmic decision-making used in the Dutch childcare benefits scheme led to racial discrimination and erroneous fraud allegations against non-Dutch nationals.22

In Europe, although the EU Temporary Protection Directive (TPD) granted protection to people fleeing the conflict in Ukraine, its “race-neutral” approach resulted in racial discrimination against some categories of people fleeing Ukraine such as Black people and non-nationals with temporary residency permits.23 Such approach is riddled with racist double standards.24

5. DISCRIMINATORY OUTCOMES OF MIGRATION POLICIES

Seemly “race-neutral” migration policies operate under the premise of equal treatment. This approach overlooks systemic racism and xenophobia that disproportionately impact certain racialized groups of non-citizens. Amnesty International has increasingly documented discriminatory outcomes of “race-neutral” migration policies.

In Italy, the government adopted measures affecting search and rescue provided by NGOs in the Mediterranean Sea putting at further risk racialized people in distress at sea.25 Italy’s legislation undermines search and rescue and contributes to the death and suffering of mostly Black Africans on the move.26

In Lithuania, the government’s pushback policies increased the risk of torture targeting refugees and migrants, particularly from the Middle East and Africa who faced abusive treatment and discrimination.27 Similarly, in Greece, the government implemented a de facto pushback policy targeting racialized migrants and refugees who faced arbitrary detentions, violence, abuses and discrimination.28

Amnesty International has found that “race-neutral” visa schemes that tie migrant workers to a specific employer increase the risk of labour exploitation, xenophobia and racial discrimination in the United...

---

Kingdom, Qatar, Saudi Arabia, China/Hong Kong, and Canada. For example, in Qatar, migrant workers with tied visas across the private sector were subjected to serious labour exploitation and reported unequal treatment based on their nationality, race, and language, including in terms of their rate of pay, working conditions and locations. Migrant workers from Africa and South Asia were deployed to locations with harsher working conditions compared to other foreign workers. In Canada, racialized migrant workers with tied visas are subjected to labour exploitation without means of immediate relief from abusive employment and discrimination, experiencing language barriers and complex bureaucracy.

In Japan, repeated attempts to pass legislation allowing for indefinite detention of migrants have drawn human rights concerns.

Migration policies in Europe, Australia, and the USA, including child separation and offshore processing, have exacerbated human rights challenges faced by people on the move, subjecting them to severe mental anguish and other abuses amounting to torture.

Regarding the deployment of digital technologies for asylum and migration management in the United Kingdom, EU, and USA Amnesty calls for their uses to be carefully considered in relation to human rights and discrimination.

6. DISCRIMINATORY OUTCOMES OF SECURITY AND LAW ENFORCEMENT MEASURES

Security policies often become vehicles for xenophobia and racism, as measures intended to address crime or secure national borders may encroach upon the human rights of migrants, refugees, and other non-citizens without a reasonable justification. Proactive policing and selective border checks, rhetorically justified in the need to combat crime or guarantee national security, can easily morph into instruments of discrimination. Amnesty International has documented instances where facially neutral security and border policies, both domestic and external, have resulted in human rights violations steeped in racism and xenophobia.

In the USA, border enforcement agents have subjected Black Haitian asylum seekers to egregious human rights abuses, including torture, arbitrary detention, and collective expulsions. These actions occur within a context where xenophobia and anti-black racism converge, exacerbating the already dire human rights situation. Also, Amnesty has also warned about the arbitrary detentions and ill-treatment of asylum seekers.

Similarly, in Saudi Arabia, Ethiopian migrants have faced discriminatory treatment in migration enforcement campaigns aimed at curbing irregular migration. This has resulted in hundreds of thousands of arrests, prolonged or indefinite detentions in inhumane conditions, torture, and forced removal from the country. Security policies advocating for harsher security measures, such as militarizing police, loosening the requirements for firearms purchase or use, or authorizing the use of dangerous weapons in protests’ control, have led to additional human rights violations. For instance, in Spain, security forces have employed kinetic impact projectiles against migrants and refugees, resulting in several fatalities. Amnesty warned about the severe human rights violations that migrants and refugees suffer in the Ceuta-Melilla border, which included violence, destruction of personal belongings, torture and other ill-treatment, and enforced disappearances. At this border at least 37 Black people on the move were killed and 77 others went missing after prolonged and unlawful use of force by Moroccan and Spanish security forces.

In Brazil, Amnesty International has documented homicides against people of African descent, including refugees, in the wake of relaxed firearms acquisition regulations, heightening the risk of deadly violence.

In Latvia, legal reforms which would enable the use of torture by empowering border guards with the use of force have raised concerns about potential human rights abuses.

Pandemic-control policies have also disproportionally affected migrants, refugees, and other non-citizens, leading to human rights violations. In Europe, enforcement measures such as stay-at-home orders and mandatory face-mask usage have exposed migrants and refugees to violence, fines, and discriminatory identity checks.

7. ADVOCACY OF RACIAL AND XENOPHOBIC HATRED THAT CONSTITUTES INCITEMENT TO DISCRIMINATION, HOSTILITY OR VIOLENCE

The need to balance the rights of non-discrimination and freedom of expression in accordance with international law is crucial. While art. 20 of the ICCPR requires states that “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law,” art. 4 (a) of the ICERD requires state parties to “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.”

45 International Covenant on Civil and Political Rights, art. 20.
and calls to condemn propaganda, ideas or theories of racial superior or promote racial hatred and discrimination.46

Despite that under international law, advocacy of racial or xenophobic hatred leading to discrimination, hostility, or violence is prohibited, migrants, refugees, and other non-citizens have often been subjected to such advocacy including from high-ranking State officials, resulting in severe human rights violations.

In Tunisia, Amnesty International documented how racist and xenophobic remarks by President Kais catalysed attacks against black African migrants, resulting in police arrests and forced returns.47

Similarly, in Cyprus, Amnesty International reported violent attacks against racialized individuals, including migrants and refugees, involving racist slogans, the use of Molotov cocktails, and assaults on their shops.48

In South Africa, Amnesty urged the government to address xenophobic attacks on African migrants, which public officials have publicly called criminals and blamed for security issues.49

The dissemination of hatred is particularly concerning in online environments. In Myanmar and Ethiopia,51 Amnesty warned about Meta’s algorithm contributing to the spread of hateful content, exacerbating the risk of violence against marginalized groups, including in offline settings.52

46 International Convention for the Elimination of All Forms of Racial Discrimination, art. 4.
Amnesty International is a movement of 10 million people which mobilizes the humanity in everyone and campaigns for change so we can all enjoy our human rights. Our vision is of a world where those in power keep their promises, respect international law and are held to account. We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and individual donations. We believe that acting in solidarity and compassion with people everywhere can change our societies for the better.