

# Protection of Refugees, Returnees, and Internally Displaced Persons against Racism and Discriminatory Practices

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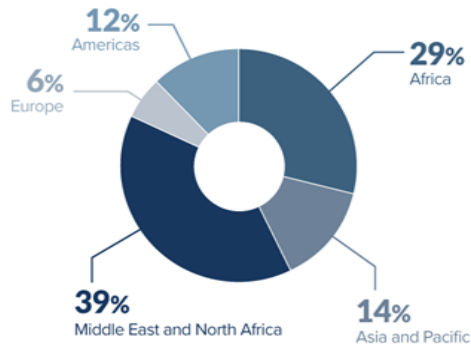
**65.3 million** forcibly displaced people worldwide

**Refugees 21.3 million**  
 16.1 million under UNHCR mandate  
 5.2 million Palestinian refugees registered by UNRWA

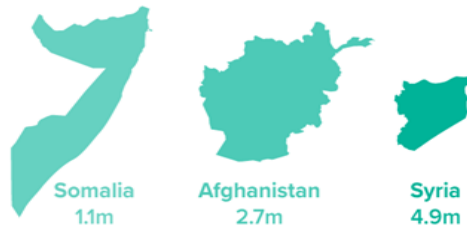
**Stateless people 10 million**

**Refugees resettled 107,100** in 2015

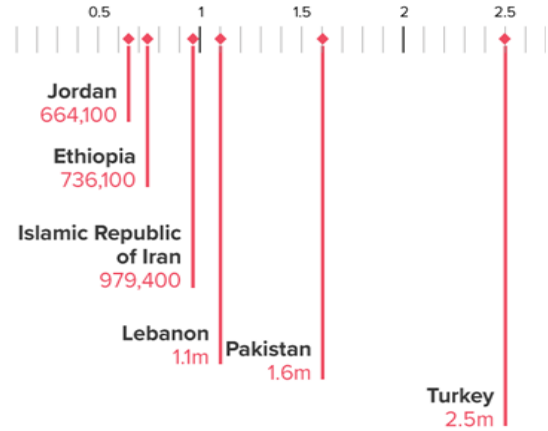
**Where the world's displaced people are being hosted**



**53%** of refugees worldwide came from three countries



**Top hosting countries**



**33,972 people**  
 a day forced to flee their homes because of conflict and persecution

**10,800 staff**  
 UNHCR employs 10,800 staff (as of 31 December 2016)

**128 countries**  
 We work in 128 countries (as of 31 December 2016)

We are funded almost entirely by voluntary contributions, with 86 per cent from governments and the European Union.

# Dilemmas

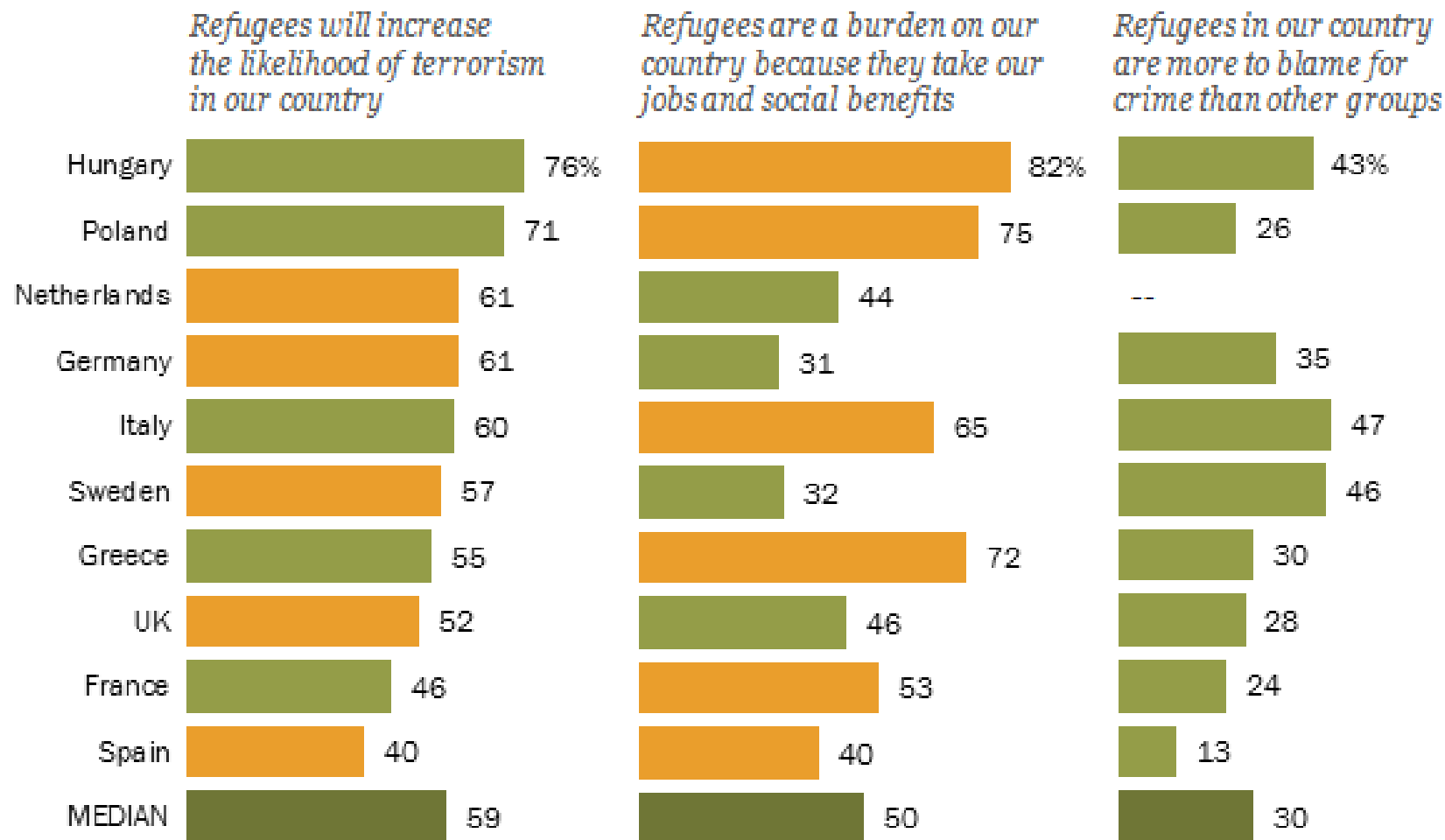
- Asylum seekers flee state failure, armed conflict, terrorism, natural disasters
- Flee to neighboring states which have own challenges
- 1% resettlement rate- lack of burden sharing
- States strengthen mechanisms to prevent physical entry and to deny lawful presence or stay, as well as residence (visa requirements)
- Asylum Seekers treated as irregular migrants
- Impact of Counter-Terrorism upon Refugee Law- Priority to screen for link to terrorism-trend towards containment and deportation
- Discrimination linked to concern for link to terrorism, religious stereotyping, fear of lack of assimilation, concern for job scarcity

# IDPs 2017

<b>Country</b>	<b>New</b>	<b>Total</b>
• Syrian Arab Republic	900,000	6,100,000
• Yemen, Rep.	478,000	2,205,000
• Turkey	355,000	1,300,000
• Congo, Dem. Rep.	292,000	1,700,000
• Afghanistan	260,000	1,475,000
• Iraq	234,000	3,344,000
• Sudan	192,000	3,374,000
• Ukraine	106,000	1,714,000
• South Sudan	96,000	1,793,000
• Colombia	89,000	6,360,000

# Many Europeans concerned with security, economic repercussions of refugee crisis

■ Top choice



Note: Netherlands excluded on question about crime (Q51b) due to administrative error.

Source: Spring 2016 Global Attitudes Survey, Q51a-c.

**Would you say your feelings are positive negative or neutral towards the following groups: Refugees in Australia (%)**

Very Positive/Somewhat Positive	34.2
Neutral	44.3
Somewhat Negative/Very Negative	19.4
<b>Total</b>	<b>100</b>

Source: 2015 Challenging Racism Project Survey, online survey, July-August 2015 + November 2016

	<b>All boats carrying asylum seekers should be turned back (%)</b>	<b>Australia should help refugees fleeing persecution in their homeland (%)</b>
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Strongly Agree/Agree	43.3	54.5
Neither agree/disagree	28.0	31.7
Strongly Disagree/Disagree	28.7	13.8
<b>Total</b>	<b>100</b>	<b>100</b>

Source: 2015 Challenging Racism Project Survey, online survey, July-August 2015 + November 2016

	<b>Australia should help refugees<sup>1</sup></b>			
	Agree	Neither	Disagree	Total

<b>Turn back the boats<sup>2</sup></b>	Agree	34.4	37.8	27.8	100
	Neither	49.3	46.6	4.1	100
	Disagree	89.9	8.0	2.0	100
	<b>Total</b>	<b>54.5</b>	<b>31.7</b>	<b>13.8</b>	<b>100</b>

Chi-square test: p<.000

<sup>1</sup>Question wording: Australia should help refugees fleeing persecution in their homeland

<sup>2</sup>Question wording: All boats carrying asylum seekers should be turned back

Source: 2015 Challenging Racism Project Survey, online survey, July-August 2015 + November 2016

# Warehousing of Refugees/IDPs in Camps



# Primary Violations in Protracted Settled Camps- Warehousing

- Lack of security
- Overcrowding
- High rate of diseases
- Malnutrition and dehydration
- Lack of proper sanitation, lack of potable water,
- Sexual violence, sexual exploitation, gender based violence,
- Denial of right to work or education
- Corruption
- Separation from host society
- Increased risk of radicalization
- Lack of transparency



# Need for Accountability

- Host State- over or under security
- IOs- UNHCR, WFP, etc.
- NGOs, Faith-based institutions
- Private Companies
- Lack of mechanisms for redress and lack of transparency

# Urbanized Displacement



# Violations

- Denial of work permit
- Lack of access to education
- Dependence on faith based institutions and NGOs
- Lack of legal aid, legal status, recognition of residency or property rights, denial of documentation, eviction, exploitation, discrimination in finding accommodation, humiliation at work, house raids, curfews
- Participate in informal economy, isolation from host society
- Risk of arrest, harassment by police, and deportation
- Physical Attacks, Racist assaults

# Containment of Asylum Seekers in Detention Centres



# Primary Violations

- Denial of Legal Aid
- Accelerated Procedures for many, Excessive Delays in processing for access to asylum interview, delay in receiving decision, delay in residency and access to education, frequent transfers
- Reduced Right of Appeal, due process violations, denial of judicial protection
- Temporary protection of minors from Afghanistan- forced return upon 18th birthday
- Non-suspension of deportation pending appeal
- Disguised collective expulsion
- Overreliance on age testing- bones, teeth & Language Testing, humiliating comments on facial hair, size of hands, distrust of parents when age questioned
- Restriction on freedom of movement, Isolation
- Conditions for family reunification (age, time, financial requirement)
- Denial of right to education, work & social security, limited recreational activities
- Limit access to health care (asylum seekers subject to emergency care- dentists pull teeth as emergency measure, state cannot provide regular care)
- Depression, cutting, suicidal thoughts among minors
- Humiliation and degrading experiences in processing- requirement of discussion of traumatic experiences and detention/reception conditions
- Separation from Host Society
- Vague accountability of corporate actors linked to detention and transport facilities
- Lack of transparency

# Normative Gaps within International Law

- 1951 Convention on the Status of Refugees grants rights on the basis of **an incremental system, based on legal status and passage of time**
- 1951 Convention **does not articulate many duties, and does not address procedural rights**
- UN Guiding Principles on Internal Displacement are soft law and have variable implementation, lack of centralized compliance mechanism

# UN HRC General Comment 15

- The general rule is that each one of the rights must be guaranteed without discrimination between citizens and aliens. Refugees enjoy ICCPR rights. Distinctions must be based on a “reasonable and objective” standard- consistent application, not arbitrary, in pursuit of legitimate aim.

# UN Committee on Economic, Social and Cultural Rights

## General Comment 19

- Refugees, stateless persons and asylum-seekers, and other disadvantaged and marginalized individuals and groups should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards



# UN Committee Economic, Social and Cultural Rights General Comment 20

- The ground of nationality should not bar access to Covenant rights, e.g., all children within a State, including those with an undocumented status, have a right to receive education and access adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status or documentation

UN Committee on Economic, Social, and Cultural Rights Statement on Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights

- 6. The Committee has made it clear that protection from discrimination cannot be made conditional upon an individual having a regular status in the host country. . . The Committee notes in this regard that access to education and to employment are important channels for integration within the host country and will reduce the dependence of refugees or migrants on public support or private charity.
- 7. Consistent with the requirement of non-discrimination, States parties should pay specific attention to the practical obstacles that certain groups of the population may encounter in the enjoyment of their rights under the Covenant. Due to their precarious situation, asylum seekers and undocumented migrants are at particular risk of facing discrimination in the enjoyment of Covenant rights.

## CEDAW General Recommendation on Core Obligations under Article 2 in relation to non-discrimination

- States obligations apply irrespective of citizenship status and therefore the Convention applies to refugees, asylum seekers and stateless persons, including those under its effective control or jurisdiction, even if not within the territory.

# CERD General Comment 30

- Differential treatment based on citizenship or immigration status must be judged in light of the objectives and purposes of the CERD, applied pursuant to a **legitimate aim and proportional to that aim**.
- Reinforces guarantees for non-citizens against expulsion and deportation.

# IACommHR Test for Distinction

- Assess whether distinction pursues an **objective and reasonable justification, furthers a legitimate objective, regard for principles of a democratic society, and use of reasonable and proportionate means** to the end sought
- Measures taken against asylum seekers may run counter to democratic principles and may be disproportionate

# Legitimate Aims for Distinction within EU

- European Court of Human Rights accepts **protection of country's economic system** as legitimate aim for treating aliens differently from nationals and the **need to reverse illegal immigration** as a legitimate aim for distinguishing between nationals and aliens in public benefits

# European Court of Human Rights and European Court of Justice

- Grand Chamber of the ECtHR in **M.S.S. v. Belgium and Greece** concluded that transfer of an asylum-seeker to Greece would amount to a breach of Article 3 of the ECHR, given the comprehensive inadequacy of conditions in reception and detention for asylum-seekers in Greece, and the lack of a functioning asylum system, under which asylum-seekers were not able to gain access to a fair and effective determination of their claims, creating the risk of refoulement. Violation of right to an effective remedy under Article 13 of the ECHR, in conjunction with Article 3, due the absence of a realistic opportunity to challenge the transfer decision.
- Two joined cases of **N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner and others**. CJEU concluded that Member States may not transfer asylum-seekers to the “responsible” State under the Dublin system where they “cannot be unaware” that “systemic deficiencies” exist in the asylum procedure and in the reception conditions in the responsible State. This prohibition arises where those deficiencies amount to substantial grounds for believing that the asylum-seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the EU Charter, on the prohibition of torture and inhuman or degrading treatment or punishment.

# CJEU: CIMADE and GISTI71

- The Court also concluded that a Member State which has received an asylum claim is obliged to grant **minimum conditions** as defined under the Directive for the reception of asylum-seekers, even in the case of an asylum-seeker in respect of whom it considers another Member State bound to take charge or take back, based on its putative responsibility under Dublin. The obligation to guarantee the minimum reception conditions for asylum-seekers applies from the time the application is lodged and throughout the procedure for determining the responsible State until the actual transfer of the applicant by the requesting State.



# Concluding Observations of Treaty Bodies on Refugees, Returnees, and IDPs

- Sexual and Gender-Based Violence in Camps
- Denial of Education
- Lack of access to clean water, medicine, food, shelter, clean sanitation
- Forced recruitment, radicalization
- Treat asylum seekers as irregular migrants, arrest, detention, and deportation
- Denial of appeal, non-suspension of deportation, collective expulsion, refoulement
- Denial of access to labour market, discrimination in employment, housing, health care
- Bone testing
- Lack of legal aid
- Discrimination per religion of refugees
- Tendency to advise State to follow up with UNHCR

# Limits to UNHCR's lawmaking & compliance function

- Dependence on Voluntary Funding
- Reduced Legal Staff
- Focus on Operational Fieldwork
- Dependency on Access to Territory to Remain Operational

## Inter-American Court of Human Rights, Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrant Workers 2003

- The regular situation of a person in a State is not a prerequisite for that State to respect and ensure the principle of equality and non-discrimination, because this principle is of a fundamental nature and all States must guarantee it to their citizens and to all aliens who are in their territory.
- Equality before the Law, Equal Protection of the Law and Non-Discrimination are Jus Cogens

# IACTHR Rights Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration 2014

- States are expected to guarantee due process and pursue “the best interest of the child” as a paramount consideration in decisions.
- Duty to respect the prohibition of deprivation of liberty as a precautionary measure, the principle of family unity, the prohibition on refoulement, and the duty refrain from expelling the parents of child nationals for administrative immigration offenses.
- The Inter-American Commission of Human Rights has followed up these advisory opinions by visits to the US and monitoring the situation of migrants, including children.

# Inter American Commission of Human Rights Statement on US Executive Orders

- The measures envisaged in these executive orders reflect a high degree of discrimination of migrant communities and minority groups, particularly Latinos and Muslims or those perceived as such. The implementation of these executive orders puts migrants and refugees at grave risk of violation of their rights to non-discrimination, personal liberty, due process, judicial protection, special protection for families and children, the right to seek and receive asylum, the principle of non-refoulement, the prohibition of cruel, inhuman and degrading treatment, and the right to freedom of movement, among others. In particular, the IACHR is concerned over the serious risk that these orders pose to unaccompanied children, families and women who may be returned to the countries from which they fled, where their life and integrity were under threat.

# OAU Convention on Refugees

- Signed & Ratified 45 countries
- Signed but not ratified
  - Djibouti 15/11/2005
  - Madagascar 10/09/1969
  - Mauritius 10/09/1969
  - Somalia 10/09/1969
- Not signed and ratified
  - Eritrea
  - Namibia
  - Sahrawi Arab Democratic Republic
  - Sao Tome and Principe
  - South Sudan

# Kampala Convention on IDPs

- 23 States that have ratified: Angola, Benin, Burkina Faso, Central African Republic, Chad, Côte d'Ivoire, Republic of Congo, Gabon, Guinea-Bissau, Lesotho, Malawi, Mali, Niger, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, Sierra Leone, Swaziland, The Gambia, Togo, Uganda, Zambia and Zimbabwe.
- States that have signed but are yet to ratify the Kampala Convention: Burundi, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Ghana, Guinea-Conakry, Liberia, Mauritania, Mozambique, Namibia, Sao Tomé and Príncipe, Senegal, Somalia, South Sudan, Tanzania and Tunisia.

# Compliance with Kampala

- Need States to set up credible mechanisms to monitor and verify the compliance of states' policies and practices with the convention's provisions
- Need to Remind states of their obligation to report on implementation, indicating the legislative and other measures taken, in accordance with article 14 of the convention and article 62 of the African Charter on Human and Peoples' Rights



Constitutional Court of South Africa: Khosa & Ors v Minister of Social Development & Ors. 2004(6) BCLR 569 (CC)

- The Constitution gave “everyone” the right to have access to social security – not merely citizens – and that “everyone” would include those residing in the country legally.

# Colombia Constitutional Court T-025/04 in January 2004

- IDPs' inhumane living conditions needed to be addressed by all of the competent authorities. It noted that "due to action or omission by the authorities in providing displaced population with optimum and effective protection, thousands of people suffer multiple and continuous violations of their human rights." The Court took into account that the displaced population included a high number of persons to whom the constitution affords special protection - elderly persons, female heads of household, pregnant women, children, members of indigenous and Afro-Colombian communities and persons with disabilities. Housing, education, health care, etc.

R. (Adam and Limbuela) v. Secretary of State for the Home Department, 2005, House of Lords, UK

- Failure by the state to provide social support to asylum seekers which exposes an individual to a real risk of becoming destitute will in certain circumstances constitute 'inhuman and degrading treatment', and therefore will be contrary to Article 3 of the ECHR.

# CERD Conclusions Norway 2011

- The Committee is concerned about racist views expressed by extremist groups, some representatives of political parties, in the media, including the internet, which constitute hate speech and may lead to acts of hostility against certain minority groups . . .

22 July 2011



**Our Response is more democracy, more openness,  
and more humanity. We will answer hatred with love,  
Prime Minister Jens Stoltenberg**



# CERD Conclusions Norway 2015

- While noting the position of the State party on approaches to combat hate speech, the Committee is concerned about the increase in such speech and xenophobic discourse by politicians, in the media and in other public platforms, including the internet, which contribute to fuelling racist hatred, intolerance, stereotypes, prejudices and stigmatization of ethnic and national minorities and indigenous people, including Sami, non-western European migrants, Roma and asylum seekers.

# Norway the Happiest Country in the World 2017





# Case Study: Slippery Slope of Structural Discrimination affecting Refugees in Norway

- Removal of Independence of Immigration Appeals Board, now subject to instruction by the Ministry of Justice
- Significant increase of hiring of immigration police to facilitate deportation (from 135 to 950 police) (7,825 deportations conducted)
- Marked decrease in asylum appeals, in part based on substantial increase in deportations (230 in 2014 to 156 in 2015), 3400 less appeals
- Hiring of extra case workers to process an expected influx of asylum seekers which never arrived resulted in reassignment of caseworkers to screen persons granted citizenship for grounds for cancellation going back 20 years in order to withdraw citizenship
- Restrictions on family reunification, ongoing discrimination regarding access to housing, education, workplace, etc.
- Weakening of the ombudsman addressing discrimination cases
- Continued use of detention, including children, solitary confinement

# Norway- Report to Parliament 2017

- Cost of Persons to the State- calculated in relation to benefits received compared to taxes paid
- Non-Western Men: 6 million kroner
- Ethnic Norwegian Men: 1,9 million kroner
- Ethnic Norwegian Women: 12,3 million kroner
- Non-Western Women: 11, 3 millionkroner

# Recommended Measures

- Create a new instrument: **Protocol to CERD** to address discrimination against refugees, returnees, and IDPs as a contemporary form of racism. Nationality should not be used as a shield against the charge of racism- recognition that there is often inter-sectoral discrimination (race, religion, nationality, gender, age, etc.)-
- UNHCR Guidance Note or CERD General Recommendation may be useful as source to cite in legal cases but may have limited political impact
- Create an Independent Authority to conduct compliance follow up
- Explore model similar to Optional Protocol to the Convention Against Torture which established a Sub-Committee and national mechanism to address prevention of torture; or set up a system similar to the Convention on Disabilities which established a national monitoring mechanism (it combines government focal points and independent human rights institutions, ombudsman, or other entities); or a model similar to the EU Committee for the Prevention Against Torture mechanism for visitation and publication of reports

# Recommended Measures

- Compliance Mechanism should call upon States Parties to review their legislation reforms on terrorism, immigration, nationality, and deportation to examine whether there are discriminatory effects and/or are disproportional
- Create Working Group/Special Rapporteur or Cooperate with the UN Special Rapporteur on Racism, AU Rapporteur on Refugees, & EU Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to publish best practices reports to review positive jurisprudence from national courts, including constitutional courts, to map case law addressing discrimination against refugees, returnees, and IDPs- Identify and articulate adequate and effective remedies to address structural discrimination

# Recommended Measures

- Strengthen and Expand UNHCR Department of International Protection- reorient UNHCR to lawmaking/compliance function, diminish operational capacity- set timetable for ending warehousing
- **Create Accountability mechanism for IOs and NGOs in charge of refugees and IDPs in camps**
- Cooperate with local authorities, faith institutions, and NGOs to address protection needs of urbanized displaced and campaign against discrimination
- Help Refugees, Returnees, and IDPs organize into associations to place demands upon the State and IOs/NGOs
- **Outreach to National Ombudsman, law associations, pro bono firms, law schools, etc. to bring cases addressing discrimination against refugees, returnees, and IDPs- strengthen requirements for legal aid to made available (not just legal information)**
- Launch Campaign to dismantle myths about the costs of refugee protection and security risks

# New Instrument to Articulate Duties to Asylum Seekers, Refugees, Returnees, and IDPs

- Transparency of process and adherence to rule of law
- Duty of Non-Discrimination from border interdiction to case processing,
- Prohibition of racial/religious/national profiling, denial of fair asylum processing based on country of origin (fast-track, manifestly unfounded)
- Prohibition of bone testing
- Guarantee of Equal Protection of the Law
- Duty to guarantee participation- right to present and respond to claims in person (credibility, application of Internal Flight Alternative, exclusion or cessation clauses)
- Duty to offer procedural fairness- guarantee independent, non-biased decision-making body
- **Duty to provide legal aid to ensure access to judicial review- appeal**
- Duty to respect the principle of legality- fundamental rights should not be overridden by immigration considerations (for example imperative to respect the best interests of the child principle)

# CERD Statement on the Occasion of the UN Summit on Refugees and Migrants 26 August 2016

- A) ensure that **immigration policies do not have the effect of discriminating against persons on the grounds of race, colour, descent or national or ethnic origin.**
- B) take concrete steps to address xenophobic attitudes and behavior towards non-citizens, in particular racist hate speech, violence and hate crimes, including by promptly investigating allegations and, where appropriate, prosecuting and punishing the perpetrators with sanctions commensurate with the gravity of the offense;
- C) **ensure that non-citizens enjoy equal protection and recognition before the law, including access to effective legal remedies and the right of victims to seek just and adequate reparation for any damage suffered as a result of discriminatory behavior.**
- D) take resolute action to counter any tendency to target, stigmatize, stereotype or profile on the grounds of race, colour, descent, and national or ethnic origin , members of “non-citizen” population groups, especially by politicians, public officials, educators, and the media, including on the internet and in society at large.
- G) remove obstacles that prevent **enjoyment of economic, social and cultural rights** by non-citizens, notably in the areas of education, housing, employment, and health.