

fidh

Fédération internationale des ligues des droits de l'Homme

ORGANISATION INTERNATIONALE NON GOUVERNEMENTALE AYANT STATUT CONSULTATIF AUPRES DES NATIONS UNIES, DE L'UNESCO,
DU CONSEIL DE L'EUROPE ET D'OBSERVATEUR AUPRES DE LA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

International Federation
for Human Rights

Federación Internacional
de los Derechos Humanos

الفدرالية الدولية لحقوق الإنسان

Durban Review Conference

POSITION PAPER

Guaranteeing the rights remains a challenge

Contacts:

FIDH delegation to the United Nations in Geneva, t. +41 22 700 12 88,
Julie Gromellon – Delegate to the UN – jgromellon@fidh.org, +41 79 331 24 50
Antoine Madelin – Director for IGOs – amadelin@fidh.org, +32 485 22 22 87

A few weeks ahead of the Durban Review Conference (DRC), to be held in Geneva on April 20-24 2009, The International Federation for Human rights publishes its position paper, to the attention of member States participating to the Review.

Racism and discrimination were referred at the UN World Conference Against Racism as a “scourge” of humanity. No country is immune from criticism in this respect. Whether it is a governmental policy directly discriminating or promoting hatred against a group, or a lack of integration of minority groups into society, racism and discrimination are witnessed in every society. The Conference, of an intergovernmental nature, will this require a frank though humble analysis by each State of their own performance, limits and challenges.

As the drafting of the Conference's final declaration progresses, FIDH is preoccupied that behind political and legal battles, little space remains for the recognition of victims of racism and discrimination. In particular, specific groups that were left out of the Durban Declaration and Plan of Action (DDPA) are likely to be ignored in the new text, following the absence of “consensus” to recognise these groups as victims of racism and racial discrimination. This is the case for victims of caste-based discrimination and those of discrimination based on sexual orientation and gender identity.

For these reasons, FIDH urges States to engage fully into the Durban Review process, and to reflect the following recommendations in the final document.

- **Maintaining a universal approach:** member States participating to the DRC should ensure that the universality of the problems to tackle and the universalism of the solutions to offer remain at the centre of their preoccupation. The DRC final declaration should indeed respond to all victims of racism and discrimination throughout the world. It should not attempt to measure victims against each other.
- **Recognising the principal international legal and jurisprudential developments:** Several international legal instruments have been adopted since the WCAR which constitute fundamental tools in combating racism and discrimination today¹. In addition, important non-binding legal instruments and jurisprudence have also been adopted which are as important in addressing contemporary scourges². The Final declaration of the DRC should recognise these important developments and urge for their full and prompt ratification and/or implementation.
- **Urging ratification and implementation:** Member States should sign and ratify, reserves-free, and implement all international human rights instruments related to the fight against racism and discrimination, and accede to protocols enabling individual complaints and country visits.
- **Prevent, sanction and provide reparation:** instruments to fight impunity have been developing since the Durban Conference, which enable notably the possibility for victims of major crimes to seek redress. The trial of the highest responsables, including former presidents, have constituted historical developments, both through international and national Courts. Should the courts in the home countries fail to prosecute, the mechanism of extraterritorial and universal jurisdiction has been efficiently used and providing important results. The DRC final declaration should recognise these developments and urge all countries to implement their obligation to prevent, investigate and prosecute crimes of racism, ensure protection for victims and witnesses engaged in the judicial proceedings and provide reparations to victims.

1 These include:

- the UN Convention on Enforced Disappearances,
- the UN Convention on Persons with Disabilities,
- the optional protocol to the International Covenant on Economic Social and Cultural Rights

2 They include

- the General Comments of the CERD on descent (29), on non-citizens (30), on Roma (27),
- the UN principles on reparation of 2005 (A/C.3/60/L.24)
- the UN Declaration on Indigenous Peoples,

The following chapters include key specific recommendations. They are not exclusive of others areas for which specific recommendations should be adopted as well.

FREEDOM OF RELIGION, FREEDOM OF EXPRESSION AND INCITEMENT TO RELIGIOUS HATRED

Since the last World Conference Against Racism, FIDH and its member organisations have witnessed an increase in acts of repression, violent hate crimes and hate speech against individuals on grounds of their religion, thought and belief.

They have targetted persons of muslim obedience, notably in the context of the fight against terrorism in European and North-American societies. As noted by the Commissioner for Human Rights of the Council of Europe : « *police actions – including repeated ID controls and intrusive searches – have to a large extent been targeted at Muslims or people looking as if they originate from Arab or South Asian countries. (...) Muslims have been physically attacked and mosques vandalised or burnt in a number of countries.* »³

The fight against terrorism has also conduced to the stigmatisation of Muslim and Jewish groups. Publications in Europe such as the « Danish cartoons » or the racist film « Fitna » created strong resentment amongst muslim groups, and increased the stigmatisation of muslim communitées in these countries. The wave of anger against the Israel government over its crimes in the Occupied Palestinian territories included clear antisemitic statements and attacks of synagogues.

Other individuals have been victims of repression on grounds of their religious beliefs. They include Baha'i practitioners, in the Islamic Republic of Iran, suffer vilification and repression orchestrated by the authorities, in spite of condemnations by the UN CERD and the Special rapporteur on freedom of religion or belief. Muslim minorities have also been the target of hindu fundamentalist groups and elected public officials in India, where mobbing against mosques, attacks on individuals and bombs have largely remained unpunished. Inter-muslim hatred has also sparked, notably in Irak, where Sunni and Chiite militant groups have been attacking Chiite or Sunni individuals, crowds at pilgrimages or religious sanctuaries, often resulting in a heavy toll of civilian casualties. Christian pastors and practitioners have been murdered in Turkey. Medias in Middle Eastern countries and North Africa have been developping harsh antisemitic statements which amount to hate speech and call for violence, in full impunity.

In light of these situations, FIDH urges the Durban Review Conference to acknowledge and regret the resurgence of hate crime and incitement to hatred and discrimination against individuals or groups on grounds of their religion or belief, and urge the following:

- ***All racist or discriminatory attacks require independent investigation and prosecution, and criminal sanctions against their authors;***
- ***All forms of discrimination against individuals on grounds of their religion or belief should be abolished;***
- ***Freedom of religion or belief should be fully guaranteed. This include the right to change one's religion and the obligation for States to decriminalise aposthasy. The work of the Independent expert on freedom of religion, thought or belief should be promotted, her recommendations implemented and requests for visits fully satisfied.***
- ***At the same time, further positive measures of integration of minorities, including religious minorities are required, to promote tolerant and hate-free societies. Policies promoting cultural diversity should be developed as should measures ensuring the right of every individual to practice its religion.***

3 Commissioner for Human Rights of the Council of Europe, Viewpoint, 22/01/2007, http://www.coe.int/t/commissioner/viewpoints/070122_EN.asp?

Yet, within this context, the reaction of a large number of member States of the Human Rights Council to the trends witnessed in Europe has been to attempt to criminalize the notion of « defamation of religions », notably in adopting resolutions and reports on this issue. FIDH wishes to reaffirm that this notion is not compatible with international human rights law.⁴

This was clearly stated in a joint declaration issued by UN and regional special rapporteurs on Freedom of Expression, on December 10 2008,⁵ as well as by all international experts gathered at a legal seminar hosted by the OHCHR in October 2008: the concept of ‘defamation of religions’ does not accord with international standards regarding defamation, which refer to the protection of reputation of individuals, while religions, like all beliefs, cannot be said to have a reputation of their own.⁶

In addition, FIDH is of the view that religions should not be protected from criticism or ridicule. This would be an undue restriction of Article 19 of the ICCPR which protects freedom of expression. According to this, blasphemy laws and laws on apostasy should be repealed.

At the same time, incitement to racial or religious hatred should be banned, as called for by Article 20-2 of ICCPR. This provision is aimed at preventing hatred against the *individuals or groups* who hold a particular religious belief (rather than safeguarding a religious sentiment).

Consequently, and in accordance with recommendations made by UN and regional human rights experts, FIDH recommends the Durban Review Conference to

- **move away from the politically motivated concept of « defamation of religions » in its final declaration and call upon the UN Human rights Council and the General Assembly to move away from it, and refer instead to the legal notion of incitement to hatred, a notion rooted in article 20 of the ICCPR, and reflect this change in the resolutions adopted on the matter.**
- **The DRC should also call upon governments to repeal blasphemy and apostasy laws, and adopt laws which condemn advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence, according to Article 20 (c) of the ICCPR.**

4 The first resolution on « defamation of religion » was adopted by the UN Commission on Human rights in 1999 (Resolution 1999/82 of 30 april 1999). The resolution was renewed every year since then, including at the Human rights Council.

5 Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression, and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, December 10 2008,

« The concept of ‘defamation of religions’ does not accord with international standards regarding defamation, which refer to the protection of reputation of individuals, while religions, like all beliefs, cannot be said to have a reputation of their own.

Restrictions on freedom of expression should be limited in scope to the protection of overriding individual rights and social interests, and should never be used to protect particular institutions, or abstract notions, concepts or beliefs, including religious ones.

Restrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

International organisations, including the United Nations General Assembly and Human Rights Council, should desist from the further adoption of statements supporting the idea of ‘defamation of religions’. »

6 For further legal analysis, FIDH wishes to highlight the Study of the European Commission For Democracy through Law (Venice Commission) of the Council of Europe, Report on the relationship between freedom of religion and freedom of expression, Study no. 406 / 2006, CDL-AD(2008)026, which three elements qualifying statements as constituting an insult or hate speech:

- the context in which it is made,
- the public to which it is addressed,
- whether the statement was made by a person in his or her official capacity, in particular if the person carries out particular functions (e.g. A politician).

RACISM AND DISCRIMINATION AGAINST MIGRANTS

Migrants, displaced persons, refugees and asylum seekers account for approximately 3 % of the world population. This numerical marginality encourages political exploiting of their differences or of the threat they would represent; and generally total ignorance of their fate. In most cases treated as sub-humans, migrants are the mirror in which humanity must assess its level of development.

While more than 40% of immigrants leave their country to seek work abroad, major flows are triggered by natural disasters, famine armed conflicts and civil wars. Often, irregular immigrants are recruited among exiles refugee communities.

The USA remain the prime magnet for migrants, followed by Western Europe and Australia. Since the 1970s, new poles of attraction have been emerging among oil producing countries (the Arabian Peninsula, Venezuela, Libya, Gabon, South Africa) and Asian industrialised countries. In these new countries of immigration, especially in the Middle East, the precariousness of the immigrants' legal status, and even the denial of any rights at all, is often the norm.

The factual knowledge of their situation is rarely shared and competent international institutions (IOM, UNHCR, the system of the international convention on the rights of migrant workers and their families) should be developed so as to answer efficiently to a situation which possible developments we only begin to fathom related to climate change or food security crisis. At the same time, a renewed world governance of migrations, with the objective of the realisation of migrant's universal rights, is necessary.

According to the OECD, 10 to 15% of the 56 million migrants living in Europe have an irregular administrative status. In comparison, the majority of migrants living in Subsaharan Africa, in India, the Maghreb and Latin America do not have any legal status. These migrants, in particular women and children, are vulnerable to many dangers and violations of fundamental rights during their lengthy and uncertain journey. Since the 1970s, migrants have been facing legislative and administrative measures that clearly reflect protectionist or selective policies.

Transfers of funds sent by immigrants to their families back home were estimated at more than 150 billion dollars in 2004, i.e. Three times the amount of public development aid. In addition, an estimated 300 billions dollars are transferred informally. For countries, these transfers are one of the main sources of currency.

Within this context, FIDH recommends the DRC to urge States to:

- ***ratify the International convention on the protection of migrant workers and implement its provisions, a text that non of the western recipient countries has ratified.***
- ***implement the policy and legal guidelines provided by the UN CERD General Recommendation XXX of 2004 on « discrimination against non-citizens »***
- ***develop intergovernmental institutions dealing with migrations, notably the Global Forum on Migrations and Development, towards the goal of realising the human rights of migrant persons and their families. In this respect, ensure the full participation of NGOs and civil society actors to the GFMD sessions, following the precedent of ILO or UN ECOSOC committees.***

DISCRIMINATION AGAINST WOMEN

Despite efforts from the international community and the commitment by the vast majority of States to combat discrimination against women, notably by means of the ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), women still remain victims

of violence and discrimination in all regions of the world.

Men's continued legal guardianship over adult women, the impossibility of filing for divorce and the continuance of the practice of repudiation, inequality of inheritance, unequal terms of pay for equal responsibility positions, low political participation and the near total exclusion from poles of power, and the continuing violence, the still widespread practice of genital mutilation in many countries, sexual slavery and gender specific crimes, are but some examples of the human rights violations and discrimination that women suffer particularly. During conflicts, women are targeted and victim of sexual violence, exacerbated when they belong to a particular ethnic, political or religious group. Today, no society is exempted from one or many of these violations of civil, political, economic, social and cultural rights. Women, who represent 52% of the world population remain the most important "vulnerable group" at the level of humanity: another paradox for the majority of the world population.

Moreover, if the CEDAW has been ratified by more than 90% of the United Nations Member States, its lack of implementation within national constitutions or laws, the reservations, and the upholding of discriminatory national laws, continue to stand in the way of respect for women's rights.

Within this context, FIDH urges the DRC to call upon states to

- ***ratify CEDAW and the optional protocol to the Convention, enabling individual complaints and investigations from the Committee;***
- ***Lift all reservations that are contrary to the objective and the purpose of the CEDAW, in conformity with the CEDAW's interpretation of these terms;***
- ***Establish a mandate of UN Special rapporteur on laws that discriminate against women.***

DISCRIMINATION ON GROUNDS OF CASTE AND OTHER INHERITED STATUS

Discrimination on grounds of caste and other unherited status takes multiple and vicious forms, including prohibition or limitations on ability to alter inherited status, socially enforced restrictions on marriage outside the community, public and private segregation, including in housing and education, and access to public spaces and places of worship and public sources of food and water, limitation of freedom to renounce inherited or degrading occupations or hazardous work, as well as subjection to debt and bondage.

Absent from the DDPA, this form of discrimination has nevertheless been recognised since the Durban conference by UN experts and treaty bodies as a global and widespread form of discrimination. The Special Rapporteur on racism, has indeed noted that an estimated 250 million people around the world are at risk of violations of civil, political, social, economic and cultural rights, including violence, marginalization and discrimination, on the grounds of caste and other systems based on inherited status. The Special Rapporteur on violence against women has also expressed concern at the numerous complaints about violence perpetuated against women on the grounds of caste, as highlighted in her communications with Governments, jointly with other Special Rapporteurs.⁷

An important recognition of the phenomenon and set of guidelines to combat the issue has been provided by the CERD in its General Comment number 29 on Article 1(1) regarding descent. The Committee clearly confirmed that caste-based discrimination falls within the scope of the ICERD and constitute a form of racial discrimination.⁸

In addition, the UN Sub-Commission on human rights has commissioned important reports that

⁷ See e.g. A/HRC/7/6/Add.1.

⁸ CERD/C/304/Add.13, para. 14.

have documented thoroughly the phenomenon and addressed specific recommendations to UN member States. The UN Commission on Human rights adopted consequently resolution E/CN.4/2005/L.109 deciding without a vote to approve the decision of the UN SubCommission to appoint Mr. Yozo Yokota and Ms. Chin-Sung Chung as Special Rapporteurs with the task of preparing a comprehensive study on discrimination based on work and descent.

FIDH thus recommends that the DRC

- ***acknowledges the widespread discrimination and heavy prejudices affecting individuals throughout the world on the ground of caste and other systems based on inherited status***
- ***while acknowledging the efforts of some states to combat the phenomenon, the DRC should urge states to implement the guidelines provided by CERD in its general comments 29, in particular in adopting laws that prohibit caste-based discrimination, in challenging long-entrenched perceptions of public opinion to move towards fairer societies based on the equality of all human beings.***

RACISM AND DISCRIMINATION FOLLOWING FOREIGN OCCUPATION

Foreign occupation creates an environment in which the occupied people are exposed to a wide range of systemic and gross violations of human rights and freedoms, amounting to racism and discrimination against the occupied populations on grounds of their national, cultural, ethnic, religious or other grounds.

Among other territories, the continued occupation of Tibet and of the Palestinian territories, have been at the centre of the international community's attention since the WCAR without any adequate solution being offered or implemented.

If some of the Israeli colonies in Palestine have been dismantled, notably in the Gaza Strip, the development of illegal settlements has been overall largely increasing. Whole sectors of the West bank are now invested by settlements, and large numbers of palestinian houses and large portions of palestinian land are today threatened of destruction or abduction. The construction of the illegal wall, built on part of Palestinian occupied land is almost achieved, against international law and in spite of an advisory opinion from the International Court of Justice. The blockade of the Gaza strip has lead to and continues to create severe violations of international human rights and humanitarian law.

Allegedly of 6 million, the Tibetan people continue to endure the occupation of their territory by the Chinese government, and suffer institutionalized forms of racial discrimination, forced integration and assimilation. Tibetan Women suffer discriminatory and coercive birth control in parallel of a global policy of transfer of Chinese settlers into Tibet. Tibetan have been suffering important violations of their cultural rights. In addition, severe repression has been targetted systematically against all those who attempted to voice their criticism of the Chinese policy.

FIDH therefore calls upon the DRC to

- ***deplore all forms of colonialism and foreign occupation and their consequences in the field of discrimination, including through the closure of territories, the seisure of land, the fast development of illegal settlements, the systematic violations of cultural rights and of the right to education.***

DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY

Throughout the world, individuals are victims of violence, harassment, discrimination, exclusion, stigmatisation, and prejudice based on sexual orientation and gender identity. Killings and executions, torture, arbitrary arrest, and deprivation of economic, social, and cultural rights are also

committed on those grounds. According to the International Lesbian and Gay Association (ILGA), dozens of countries still criminalize consensual homosexual conduct.

In 1994, in its decision in *Toonen v. Australia*, the UN Human Rights Committee held that human rights law prohibits discrimination based on sexual orientation. Since then, the United Nations' human rights mechanisms have condemned violations based on sexual orientation and gender identity, including killings, torture, rape, violence, disappearances, and discrimination in many areas of life. UN treaty bodies and special procedures have called on states to end discrimination in law and policy.

Following this international jurisprudence, initiatives are multiplying at the political level to condemn discrimination on grounds of sexual orientation or gender identity. Recently, in a statement to the 2008 General Assembly, a group of 55 countries condemned the violence, harassment, discrimination, exclusion, stigmatization, and prejudice based on sexual orientation and gender identity. It also condemned killings and executions, torture, arbitrary arrest, and deprivation of economic, social, and cultural rights on those grounds. This statement was preceded in 2004 by a similar declaration made at the UN Human rights Council and endorsed by 54 countries. In 2008 also, all 34 member States of the Organisation of American States adopted unanimously a resolution on “Human Rights, Sexual Orientation, and Gender Identity”⁹

FIDH thus urges the DRC to

- ***Acknowledge and condemn all forms of violations of human rights and discrimination against individuals on grounds of their sexual orientation or gender identity.***
- ***Calls upon States to take all the necessary measures to ensure that sexual orientation or gender identity may under no circumstances be the basis for criminal penalties, in particular executions, arrests or detention.***
- ***Urges States to ensure that human rights violations based on sexual orientation or gender identity are investigated and perpetrators held accountable and brought to justice;***
- ***Urges States to ensure adequate protection of human rights defenders, and remove obstacles which prevent them from carrying out their work on issues of human rights and sexual orientation and gender identity.***

REPARATIONS FOR VICTIMS OF RACISM AND DISCRIMINATION

A major issue of the WCAR was the past and contemporary forms of slavery. Groups of African descent have justly been claiming for the recognition of the transatlantic slavery as a crime against humanity and the recognition of the inherited discrimination derived from it.

Since 2001, the UN have accomplished an important and specific step in addressing this situation, in adopting, at the UN General Assembly in 2005, a set of Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

The text addresses the plight of victims and their survivors. It emphasises the obligations incumbent upon all States to investigate and prosecute all gross violations of human rights law. It reaffirms the right of victims' to equal and effective access to justice, and to adequate, effective and prompt reparation for the harm suffered, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

The DRC should recognise the right of victims of serious human rights violations to reparations and refer to the UN principles as a key document to be implemented in addressing this issue.

⁹Resolution AG/RES. 2435 (XXXVIII-O/08), of 3rd June 2008

RACISM AND DISCRIMINATION AGAINST ROMA AND NOMADIC GROUPS

8 to 10 million of Roma, Gypsies, Sinti, traveller and nomadic groups would be living in the world today. Their situation overall remain particularly preoccupying and dire. 2008 has witnessed racist riots against Roma in Russia, Spain, Italy, Hungary, and the Czech Republic. Policies criminalising Romas have also been developing around European countries.

Policies addressing the nomadic groups in an attempt to provide education to children and young people have often led to segregated schools of low quality, failing to integrate the children and young people. Whole communities have been kicked out of their housing in Russia.

Since the WCAR, the CERD adopted a landmark document in the General comments on the rights of Roma and Nomadic Groups.

FIDH urges the DRC to recognise the dire situation of Roma and nomadic groups, and in particular

- ***condemn all forms of violence against these groups and prosecute their authors***
- ***urge states to fully implement the UN CERD General Recommendation number 27 Discrimination against Roma, in particular in providing housing, health services and education, and facilitate their intergation into the labour force.***

RACISM AND DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Estimates account more than 350 million indigenous individuals around the world. Their situation has little if not improved at all since the last WCAR. Today, they continue to suffer political and economic marginalisation, cultural annihilation, limited access to governmental services. In several countries, the mere existence of these groups is denied.

In Septembre 2007, the adoption by the UN General Assembly of the UN Declaration on the Rights of Indigenous Peoples constituted a fundamental and important recognition of these groups. It should today serve as a key instrument on which dialogues between indigenous communities and their governments should base themselves.

The DCR should thus urge states to

- ***Recognise, if they have not done so, the existence of indigenous groups in their countries and their right to self determination.***
- ***Engage to this end in discussion with their representatives on their status based on the 2007 UN Declaration on the Rights of Indigenous Peoples. Recognise in particular the principle of free and prior informed consent of indigenous peoples before any development can take place on their lands and territories.***