

**Committee on the Elimination of Racial Discrimination (CERD)**  
**Committee on the Protection of the Rights of all Migrant Workers and Members of their Families**  
Human Rights Council and Treaty Mechanisms Division  
Office of the United Nations High Commissioner for Human Rights  
Palais Wilson, 52 Rue des Pâquis, 1201 Geneve, Switzerland

Washington, D.C., 30 March 2024

**Submission to the Committee on the Elimination of Racial Discrimination and the  
Committee on the Protection of the Rights of all Migrant Workers and Members of their  
Families**

Contributions for the First Draft

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**

Oscar A. Cabrera, Silvia Serrano Guzmán, and Ivonne Garza, Co-Directors and Senior Associate, respectively, at the Health and Human Rights Initiative of the O'Neill Institute for National and Global Health Law (O'Neill Institute) at Georgetown University Law Center, respectfully submit the following contributions for the elaboration of the first draft of the *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* (the "Joint General Comment / Recommendation").

The O'Neill Institute is a not-for-profit institution located at Georgetown University Law Center in Washington, D.C. Its mission is to conduct rigorous research to identify solutions to pressing national and international health concerns.

Acknowledging the considerable significance of CERD's and CMW's General Recommendations in interpreting international human rights law, we find it relevant to highlight specific topics that, we hope, will contribute to the Committees' efforts to draw attention to the different ways in which xenophobia and racial discrimination can undermine the enjoyment of the right to health and other related entitlements for all migrant persons, their families and other non-citizens.

Our submission is structured as follows. First, we briefly showcase general aspects of the right to health that must be considered when analyzing the impact that xenophobia and racial discrimination have on the effective enjoyment of the right to health of migrants, their families and other non-citizens, explaining how these elements can help clarify State obligations under such right. We then delve into specific topics that would benefit from more extensive discussion, analysis or clarification in the forthcoming draft. In the final section of this submission, we provide insights into how the aforementioned topics should be included in the First Draft of the Joint General Comment/Recommendation.

## 2 Salient Positive Aspects for the issuance of a Joint General Comment / Recommendation

### 2.1 The inclusion of a comprehensive understanding of the different dimensions and determinants of the right to health

Under international human rights law, the right to health has been understood as a complex right that includes different freedoms and entitlements.<sup>1</sup> Based on both the text of Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognizes a right to health, and the work of the United Nations Committee on Economic, Social and Cultural Rights (CESCR), these different freedoms and entitlements may be interpreted as falling into three distinct yet interrelated dimensions of this right: autonomy, prevention and health care.<sup>2</sup> The autonomy dimension includes those components that are linked to the right of individuals to control one's health and body, including sexual and reproductive freedom and the rights to informed consent, access to information, medical confidentiality and freedom from interference, to name a few. The prevention aspect relates to States' individual and joint obligations to prevent and control diseases and, in general, to create the conditions that allow people to lead a healthy life. Lastly, the health care dimension focuses on access to health goods and services and integrates palliative, curative and rehabilitative health.<sup>3</sup>

CESCR has also determined that everyone has the right to the enjoyment of the highest possible standard of health and that this includes both the essential biological and socioeconomic conditions of the person and the resources available to the State.<sup>4</sup> CESCR states that the right to health integrates four elements: availability, accessibility, acceptability and quality.<sup>5</sup> *Availability* refers to the obligation of States to have a sufficient number of public health establishments, goods and services and health care centers, as well as programs. *Accessibility* requires that health establishments, goods and services be accessible in law and in fact to all, without any discrimination, within the jurisdiction of the corresponding State. *Acceptability* implies that all health establishments, goods and services must be respectful of medical ethics and must be culturally appropriate. This standard requires that health establishments, goods and services be respectful of the culture of individuals, minorities, towns and communities, while being sensitive to gender and life cycle requirements, and should be designed to respect confidentiality and improve the health status of the individuals concerned. Finally, *quality* specifies that, in addition to being culturally acceptable, health establishments, goods and services must also be appropriate from a scientific and medical point of view and be of good quality. This requires, for example, trained medical personnel, scientifically approved medicines and hospital equipment that is in good condition, clean drinking water and adequate sanitary conditions.

Xenophobia and racial discrimination have a significant impact on all three dimensions and elements of the right to health. We believe that the inclusion of a comprehensive understating of the right to health in the Joint General Comment / Recommendation will complement the notions of health contained in both the International Convention on the Elimination of All Forms of Racial Discrimination<sup>6</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>7</sup>

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<sup>1</sup> Committee on Economic, Social and Cultural Rights, "General Comment No. 14 (2000) on the Right to the Highest Attainable Standard of Health," August 11, 2000, para. 8, <https://digitallibrary.un.org/record/425041>.

<sup>2</sup> *Ibid.*, paras. 8, 44; For a further development of the three interrelated dimensions of the right to health, see Claudia Sarmiento Ramírez, Fernanda Umbach Montero, and Pascual Cortés Carrasco, eds., *¿Cómo Debe Incorporar Una Nueva Constitución El Derecho a La Salud? Oportunidades y Desafíos Del Proceso Constituyente*, 2020, 77.

<sup>3</sup> *¿Cómo Debe Incorporar Una Nueva Constitución El Derecho a La Salud? Oportunidades y Desafíos Del Proceso Constituyente*, 77–79.

<sup>4</sup> Committee on Economic, Social and Cultural Rights, "General Comment No. 14 (2000) on the Right to the Highest Attainable Standard of Health," August 11, 2000, para. 9, <https://digitallibrary.un.org/record/425041>.

<sup>5</sup> *Ibid.*, para. 12.

<sup>6</sup> International Convention on the Elimination of All Forms of Racial Discrimination, UN General Assembly Resolution 2106 (XX), 21 December 1965, Article 5 (e) (iv), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>.

<sup>7</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, General

Together, these instruments must serve as a valuable tool for States seeking to address and eradicate xenophobia that severely impacts the rights of migrants, their families and non-citizens through public policies and their implementation. Understanding the right to health through the three dimensions outlined above, the Committees will provide a comprehensive understanding of the right to health that goes beyond the mere provision of care, that will enable States to recognize xenophobia and racism as a key social determinant of health and provide a framework through which to analyze all aspects of the right.

### **3 Potential Areas for Further Consideration in the Joint General Comment / Recommendation**

#### **3.1 Ensuring equality and non-discrimination in the enjoyment of the right to health**

The Joint General Comment/Recommendation should embrace a comprehensive understanding of equality and non-discrimination, both as rights and guiding principles for the enjoyment of the right to health. It should acknowledge both formal and substantive equality and recognize the negative and positive dimensions of this right. Furthermore, it must (i) address the various forms in which xenophobia and racial discrimination hinders health; (ii) clarify how xenophobia and racial discrimination in health can be direct and indirect; (iii) provide insight into how it operates on micro and macro levels<sup>8</sup>.

In this regard, the Joint General Comment/Recommendation should also effectively convey the concepts of xenophobia and racism as forms of structural discrimination, emphasizing that this form of discrimination is not isolated or episodic, but rather deeply rooted in society and health systems as a result of colonialism, slavery and other historical power imbalances.<sup>9</sup>

The draft should encompass intersectionality as a guiding principle for determining State obligations. This approach helps explain how xenophobia and racial discrimination can be compounded by discrimination associated with other factors such as gender, age, disability, sexual orientation, gender identity, migration status, class, social status and income. The draft should emphasize how biases, the use of stereotypes, preconceived ideas or prejudices are a form of discrimination that affect different components of the right to health for migrants, their families and other non-citizens.

Furthermore, ensuring non-discrimination in the enjoyment of rights, including the right to health, is part of the immediate obligations of States. The CESCR has established that:

While the [International Covenant on Economic, Social and Cultural Rights] provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these (...) is the “undertaking to guarantee” that relevant rights “will be exercised without discrimination ...”<sup>10</sup>

The Joint General Comment / Recommendation should explicitly refer to the fact that eliminating racial discrimination in the enjoyment of the right to health is an obligation of immediate effect as part of the measures that must be taken to guarantee the exercise of the right without discrimination. In this sense, both CERD and CMW could leverage CESCR’s developments on non-discrimination as an immediate obligation to emphasize that the majority of measures to be adopted in public policies are of immediate effect and should not necessarily be contingent upon resource availability.

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Assembly Resolution 45/158, 18 December 1990, Articles 8, 12, 13, 25, 28, 39, 43, 45, 70, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers>.

<sup>8</sup> Committee on Economic, Social and Cultural Rights, “General Comment No. 14 (2000) on the Right to the Highest Attainable Standard of Health,” August 11, 2000, paras. 7, 9.

<sup>9</sup> *Ibid.*, paras. 4, 5.

<sup>10</sup> Committee on Economic, Social and Cultural Rights, “General Comment No. 3 (1990) The Nature of States Parties’ Obligations,” December 14, 1990, para. 1, <https://digitallibrary.un.org/record/425041>.

### 3.2 Identifying explicit and implicit racial biases that affect the enjoyment of the right to health

Explicit and implicit racial biases within health systems can serve as both institutional and individual barriers that hinder the enjoyment of the right to health. Biases also exemplify intersectional discrimination in the context of health care, demonstrating, that different vulnerable groups may encounter distinct sets of biases in health care. As a result, biases can overlap, compounding health disparities for specific individuals or groups. For this reason, the issue of biases and their linkages with xenophobia and racial discrimination in health warrant further development, highlighting how preconceptions on what and who is to be considered “national” and “foreign” directly and indirectly impact migrants, their families and non-citizens.

The draft should also emphasize that implicit biases can be more widespread within the health sector, precisely because they operate unconsciously. It would be important for CERD and CMW to draw a more direct link between racial biases and the interrelated and essential elements of the right to health, reinforcing that biases affect at least *accessibility*, *quality* and *acceptability* of health facilities, goods and services specifically because they have a significant impact on the attitudes, diagnoses, and treatment decisions of health professionals.

### 3.3 Universal Health Coverage as a means to address xenophobia and racial discrimination in health care facilities, goods and services

We believe that it would be valuable for this General Recommendation to provide a more detailed explanation of how Universal Health Coverage (UHC) can play a pivotal role in addressing xenophobia and racial discrimination in the enjoyment of the right to health, regardless of migration status.

UHC can be a means to break down systemic xenophobia and racism within health systems and address the many ways in which they impact migrants, their families and non-citizens. UHC is meant to ensure that everyone has access to the full range of quality health services they need, when and where they need them, on a non-discriminatory basis and without financial hardship.<sup>11</sup> By extending coverage of health goods and services to anyone who needs it regardless of race, color, descent, migration status, national or ethnic origin, UHC can help solve the disproportionately unequal coverage of persons belonging to these groups<sup>12</sup>. It can also improve the overall availability, accessibility, acceptability and quality of health care for these groups, including for those who are in migration detention facilities.<sup>13</sup> Ensuring UHC is particularly relevant in the case of non-citizens who are stateless persons and generally lack access to health systems as a result of their status.

### 3.4 Racial discrimination in sexual and reproductive health

On sexual and reproductive health, discussing abortion is important to underline that restrictive abortion policies are likely to disproportionately affect migrants, their families and non-citizens, and potentially exacerbate adverse birth outcomes and mortality rates. It is relevant to include an explanation of how migrant women, girls and persons with capacity to gestate experience greater vulnerability with regards to their sexual and reproductive rights in the migration context, together with how the criminalization of abortion may increase pre-existing xenophobic and racial disparities in incarceration rates, a higher likelihood of poverty years after birth, and lower access to health care for these groups.<sup>14</sup> It should also be noted that restrictive sexual and reproductive health policies, together with migration policies, generate a chilling effect on access to health systems and in the open exchange of health information and data

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<sup>11</sup> World Health Organization, “Universal Health Coverage (UHC),” accessed September 7, 2023, [https://www.who.int/news-room/fact-sheets/detail/universal-health-coverage-\(uhc\)](https://www.who.int/news-room/fact-sheets/detail/universal-health-coverage-(uhc)).

<sup>12</sup> Committee on the Elimination of Racial Discrimination, “Draft General Recommendation No. 37,” para. 12.b.

<sup>13</sup> Inter-American Court of Human Rights, Case of Vélez Loor v. Panama, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 23, 2010, Series C, No. 218, paras. 198, 204.

<sup>14</sup> “Abortion Bans Prove yet Again There Is No Race-Neutral Policy,” Economic Policy Institute, accessed March 21, 2024, <https://www.epi.org/blog/abortion-bans-prove-yet-again-there-is-no-race-neutral-policy/>.

collection. Additionally, criminalization further exacerbates the underreporting of important health indicators which can impede monitoring xenophobic and racial inequities in health.<sup>15</sup>

Finally, the Joint General Comment/Recommendation should include a reference to the principle of non-retrogression in laws providing access to safe, legal and effective abortion as a way to prevent the reintroduction of restrictive policies that disproportionately impact groups and that are, therefore, indirectly discriminatory. It would be relevant for CERD and CMW to express concern regarding attempts to overturn abortion laws, considering that other UN Bodies and Mechanisms have already expressed similar concerns in other contexts.<sup>16</sup>

### 3.5 Other xenophobic and racial disparities in mental health care

The Joint General Comment/Recommendation should cover the effect of racism and racial discrimination on physical and mental health at the micro and macro levels, together with the dimensions of institutional xenophobia and racism in health care. Furthermore, the draft should include an analysis on the impacts of migration systems and mechanisms to access international protection and their impact on the mental wellbeing of migrants, their families and non-citizens.

### 3.6 The preventive dimension of the right to health and the commercial determinants of health framework

Different State obligations fall under the preventive component of the right to health. This Joint General Comment / Recommendation should include:

- i. The role of evidence in policies with proven potential to prevent diseases that disproportionately affect individuals and groups, especially migrants, their families and non-citizens; and
- ii. The notion of commercial determinants of health (“CDoH”) as a lens through which to interpret State obligations to eliminate xenophobia and racial discrimination in the enjoyment of the right to health.

On the subject of the CDoH, CERD’s and CMW’s analysis can benefit from making express reference to this theoretical framework. According to the World Health Organization (WHO), CDoH “are a key social determinant, and refer to the conditions, actions and omissions by commercial actors that affect health”.<sup>17</sup> This framework complements the social determinants approach, and specifically refers to the different ways in which commercial activities may contribute to direct or indirect racial discrimination in health.

## 4 Conclusion

Throughout this document, we have highlighted areas for development within the forthcoming draft, emphasizing the need for further exploration of crucial issues that are at the intersection of xenophobia, racial discrimination and the right to health when addressing migrants, their families and non-citizens.

We express our gratitude for the opportunity to comment on this important Joint General Comment / Recommendation. We hope our suggestions will help strengthen it and ultimately lead to more tailored standards and recommendations to State Parties.

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<sup>15</sup> Anand Grover, “Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health,” August 3, 2011, <https://digitallibrary.un.org/record/710175>.

<sup>16</sup> The UN Working Group on discrimination against women and girls, UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and UN Special Rapporteur on violence against women, its causes and consequences, “Joint web statement by UN Human rights experts on Supreme Court decision to strike down Roe v. Wade,” June 24, 2022, <https://www.ohchr.org/en/statements/2022/06/joint-web-statement-un-human-rights-experts-supreme-court-decision-strike-down>.

<sup>17</sup> World Health Organization, “Commercial Determinants of Health,” accessed September 7, 2023, <https://www.who.int/news-room/fact-sheets/detail/commercial-determinants-of-health>.

We remain available to answer any questions the Committees might have in regards to this document. In the meantime, please accept our highest appreciation and regard,



**Silvia Serrano Guzmán**  
Co-Director, Health and Human Rights Initiative  
O’Neill Institute for National and Global Health  
Law, Georgetown University Law Center



**Oscar A. Cabrera**  
Co-Director, Health and Human Rights Initiative  
O’Neill Institute for National and Global Health  
Law, Georgetown University Law Center



**Ivonne Garza**  
Senior Associate, Health and Human Rights  
Initiative  
O’Neill Institute for National and Global Health  
Law, Georgetown University Law Center

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