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ELEMENTS FOR A GENERAL RECOMMENDATION ON RACIAL DISCRIMINATION IN THE ADMINISTRATION OF JUSTICE

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INTRODUCTION

Racial discrimination remains a pervasive problem in criminal justice systems. While some countries are starting to recognize the deeply rooted nature of the phenomenon and to compile data in order to counter it, there is still little awareness for it in many countries and Government reports are often incomplete.

The Durban Declaration takes up the issue and states:

“We express our profound repudiation of the racism, racial discrimination, xenophobia and related intolerance that persist in some States in the functioning of the penal systems and in the application of the law, as well as in the actions and attitudes of institutions and individuals responsible for law enforcement, especially where this has contributed to certain groups being over-represented among persons under detention or imprisoned.”¹

In order to give guidance to States on the issue, a General Recommendation by the Committee on the Elimination of Racial Discrimination is timely and useful.

This paper seeks to gather some ideas of recommendations from national reports, reports of UN Special Rapporteurs and experts, NGO reports and other material. The recommendations are organized according to the different existing areas of discrimination at different stages of the criminal justice system: police conduct, courts and prisons. It also gives some elements to be taken into account in more structural manner: access to justice, methods of structural, institutional change and data collection.

I. THE POLICE AND OTHER LAW ENFORCEMENT PERSONNEL

1. Racial profiling

In many states, racial prejudice is still a widespread phenomenon among police personnel, leading to stereotyping and assumptions that have a discriminatory effect on certain groups. This mainly translates into reactions of the police based on an individual's physical appearance: higher occurrences of stop and search, interrogation, imprisonment or more generally the assumption that this person engages in criminal activity.²

This phenomenon, often called “racial profiling”, has come to the attention of international bodies who have denounced it. The Durban Programme of Action “[u]rges

¹ Durban Declaration, 8 September 2001, para 25.

² See UK Home Office, *Statistics on Race and the Criminal Justice System* (2003), p 27 [available at www.homeoffice.gov.uk/rds/pdfs04/s95race2003.pdf, viewed 5 August 2004]; Amnesty International, *Crisis of Identity: Race-related Torture and Ill-treatment by State Agents*, AI Index: EUR 41/001/2002, 16 April 2002; Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Mexico, E/CN.4/2004/80/Add.2, 23 December 2003, para 30; European Commission against Racism and Intolerance, *Third Report on Switzerland*, CRI (2004) 5, para 29, *Second Report on the Russian Federation*, CRI (2001) 41, para 62.

States to design, implement and enforce effective measures to eliminate the phenomenon popularly known as 'racial profiling' and comprising the practice of police and other law enforcement officers 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.³

In the wake of 11 September 2001, many of the so called "counter-terrorism measures" of States have had a particularly severe effect on racial minorities and non-nationals. As the Joint Statement of the independent experts mandated by the United Nations noted: "[...] under the pretext of combating terrorism [...] vulnerable groups are targeted and discriminated against on the basis of origin and socio-economic status, in particular migrants, refugees and asylum seekers [...]."⁴ Foreign nationals have a much higher chance than citizens to be apprehended and detained on suspicion of terrorist activities.⁵ This is not only so in the countries of Western Europe or the United States, where it has been reasonably well documented, but also, for instance, in a region like the former Yugoslavia, where a very high number of arrests and detention concern men from the Middle East.⁶ The Commission on Human Rights has recognized the danger of this phenomenon and stressed that "States and international organizations have a responsibility to ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin, and urges all States to rescind or refrain from all forms of racial profiling".⁷ The Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights has considered that "[w]hen persons are arrested, detained and interrogated on grounds of their ethnic origin or religious persuasion and whenever it is stipulated in a legal measure derogating from rules of ordinary law and offering less safeguards to the accused that the measure concerned will be applied exclusively to aliens, it is hard to maintain that such rules or practices are not discriminatory".⁸

2. Arrests, searches and detention in police custody

Racial prejudice can lead to disproportionate numbers of arrests and searches of persons belonging to minorities.⁹ This can amount to a violation of the prohibition of discrimination, especially Article 5 (a) CERD, and of the right to liberty and security (Article 9 ICCPR) which prohibits arbitrary arrest and detention. Arbitrary is defined in the Concise Oxford Dictionary as "based on or derived from uninformed opinion or random choice; capricious". The nature of acts of racial discrimination is that they are based on irrational considerations. Arrests and detention are arbitrary if they are based on racial bias and uniformed prejudice.

³ Durban Programme of Action, 8 September 2001, para 72.

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

⁵ Report by the Helsinki Federation for Human Rights, *Anti-terrorism Measures, Security and Human Rights*, April 2003, pp 85 *et seq.*

⁶ *Ibid.*, pp 79 *et seq.*, 83 *et seq.*

⁷ Resolution 2000/68, 25 April 2002, para 44.

⁸ Report of the Special Rapporteur on Discrimination in the Criminal Justice System, E/CN.4/Sub.2/2002/5, 23 May 2002, para 23.

⁹ Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Mexico, E/CN.4/2004/80/Add.2, 23 December 2003, para 30.

As far as the right to liberty and security¹⁰ is concerned, it is important to recall that its fundamental requirements apply at all times, including in times of emergency. It applies to citizens and non-citizens alike.¹¹ The European Court of Human Rights has held that even in times of emergency, a state may only derogate from the requirements of Article 5 ECHR to the extent strictly required by the situation, and has supervised State's compliance with their obligation to guarantee prompt judicial intervention in cases of detention as well as safeguards against abuse in detention, such as access to a lawyer, the guarantee of *habeas corpus* proceedings and the right to contact family members.¹² The Inter-American Court of Human Rights has expressly held that 'the writs of *habeas corpus* and of 'amparo' are among those judicial guarantees that are essential for the protection of various rights whose derogation is prohibited by Article 27 (2) and that serve, moreover, to preserve legality in a democratic society',¹³ and that these guarantees "should be exercised within the framework and the principles of due process of law".¹⁴ And the Human Rights Committee has held that the remedy of *habeas corpus* is *per se* non-derogable.¹⁵

The arrested person must immediately be informed of the reason for the arrest and the charge against him or her. As this right must be effectively granted, the information has to be given in a language which the arrested person understands.¹⁶

As a limitation to the right to liberty and security of the person, arrests must be based on a reasonable ground such as a concrete suspicion of a criminal offence or a danger for public security. The arrest on the simple basis of a person's racial, ethnic, religious or other appearance constitutes not only a violation of racial discrimination but also of the prohibition of arbitrary deprivation of liberty. In order to avoid racial profiling, arrest cannot be based merely on a person's personal appearance. There must be additional objective, reliable and concrete evidence to support a reasonable suspicion that the arrested person has committed or is about to commit an offence or poses a threat to public security.

3. Torture, cruel, inhuman or degrading treatment and illegal use of force.

In many countries, there is an evident correlation between racial discrimination and torture or other forms of ill-treatment by the police.¹⁷ All torture involves the

¹⁰ The right to liberty and security of the person is guaranteed in Article 3 UDHR, Article 9 ICCPR, Article 16 (1) MWC, Article 55 of the Rome Statute of the International Criminal Court, Article 1 American Declaration on the Rights and Duties of Man, Article 7 ACHR, Article 5 ECHR, Article 6 African Charter on Human and People's Rights, and Article 5 Arab Charter of Human Rights

¹¹ General Comment 15, *The position of aliens under the Covenant*, 11 April 1986, HRI/GEN/1/Rev.1, para 7.

¹² *Brannigan and McBride v the United Kingdom*, Judgment of 26 May 1993, Series A No. 258-A, paras. 55 *et seq.* and 61 *et seq.*; *Aksoy v Turkey*, Judgment of, paras. 76 *et seq.* and 79 *et seq.*

¹³ Advisory Opinion OC-8/87, *Habeas Corpus in Emergency Situations*, 30 January 1987, Series A No. 8, para. 42; Advisory Opinion OC-9/87, *Judicial Guarantees in States of Emergency*, 6 October 1987, operative para. 2.

¹⁴ Advisory Opinion OC-9/87, *supra*, operative para. 3.

¹⁵ *General Comment 29 on derogations during states of emergency*, 18 April 2002, para. 16.

¹⁶ This is explicitly mentioned in Article 5 (2) ECHR, and similarly applies in the context of other treaties.

¹⁷ See *Report of the Special Rapporteur on torture on his visit to Spain*, E/CN.4/2004/56/Add.2, 6 February 2004, para 52; *Report of the Special Rapporteur on torture on his visit to Romania*, E/CN.4/2000/9/Add.3, 23 November 1999, para 10; *Concluding Observations of the Committee on the Elimination of Racial Discrimination: India*, 17 September 1996, CERD/C/304/Add.13; *Concluding Observations of the Human Rights Committee: India*, 4 August 1997, CCPR/C/79/Add.81, paras 5, 15; *Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Mexico*, E/CN.4/2004/80/Add.2, 23 December 2003, para 30.

dehumanisation of the victim, the severing of the bonds of human sympathy between the torturer and the tortured. This process of dehumanisation is made easier if the victim is from what is considered a despised social, political, ethnic or religious group.¹⁸ In some countries, there is also a disproportionate level of unlawful killings or disappearances of members of marginalized communities, such as indigenous communities, Roma or others.¹⁹ As the Committee on the Elimination of Racial Discrimination has noted, States may not use illegal force against members of certain groups.²⁰

Torture, ill-treatment, unlawful killings and other serious human rights violations entail a duty of the State authorities to investigate the incident, to bring the perpetrators to justice and to ensure adequate reparation. These obligations are addressed below.²¹

Elements for a General Recommendation:

- Racial profiling or arrests, searches or interrogations based simply on the personal appearance of individuals amount to a violation of the prohibition of racial discrimination, in particular Article 5 (a) CERD.
- All arrests and detention are governed by Article 9 ICCPR and Article 9 UDHR, which prohibit arbitrary arrests and detention. The prohibition of arbitrary arrest and detention is non-derogable. Arrest and detention based on racial prejudice is arbitrary. In order to avoid arbitrary arrest or detention, the conditions for the measures should be unequivocally set out in domestic law, such as the necessity for objective, reliable and concrete evidence to support a reasonable suspicion that the arrested person has committed or is about to commit an offence or poses a threat to public security.
- In order to guarantee the right to liberty and security of all arrested persons and their protection from discrimination or abuse, all its aspects must be respected: the prohibition of arbitrary arrest or detention; the requirement of legality of the detention; the right to be informed promptly of the reasons for the arrest and the charge; the right to be brought promptly before the judge or other officer authorized by law to exercise judicial power; the right to trial within a reasonable time; the presumption of release pending trial; the right to habeas corpus; the right to compensation for unlawful detention.
- States and international organizations have a responsibility to ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin, and urges all States to rescind or refrain from all forms of racial profiling
- Ill-treatment of persons belonging to racial minorities violates the prohibition of torture or other cruel, inhuman and degrading treatment or punishment, which is a non-derogable international human right. The use of illegal force against racial minorities also contravenes the UN Basic Principles on the Use of Force and

¹⁸ Amnesty International, *Combating torture: A manual for action* (2003), p 5.

¹⁹ See *Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Guatemala*, E/CN.4/2003/90/Add.2, 24 February 2003, para 39; *Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Mexico*, E/CN.4/2004/80/Add.2, 23 December 2003, para 30; European Court of Human Rights, *Nachova and others v Bulgaria*, Judgment of 26 February 2004.

²⁰ CERD, *General Recommendation XXVII on discrimination against Roma*, 16 August 2000, HRI/GEN/1/Rev.6, para 13.

²¹ See below at VI 2, 3.

Firearms by Law Enforcement Officials. Where it leads to unlawful killing it violates the non-derogable right to life.

II. PRE-TRIAL DETENTION

It appears that in many countries, persons belonging to certain racial, ethnic, religious, national or other communities are more likely to be detained pending trial than other citizens.²² However, pre-trial detention, according to Article 9 (3) ICCPR, should be the exception rather than the rule. For remanding an accused in custody pending trial, substantive reasons must exist, such as the likelihood that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the state party.

In some cases, the reason for a higher proportion of pre-trial detentions amongst a certain community may be linked to the fact that persons belonging to this community are economically disadvantaged, lack legal advice and are unaware of their rights, for example of the possibility of bail or other forms of conditional release. They may be unable to pay for the conditional release pending trial. Where this is the case, states should develop schemes of special legal or economic aid for these persons. Also, bail should not indirectly disadvantage certain sectors of society because of their economic situation: an alternative must be found to the requirement of monetary security in order to avoid discrimination.

Elements for a General Recommendation:

- Pre-trial detention may not be directly or indirectly discriminatory. Substantive reasons must exist to detain a person in pre-trial detention, such as the likelihood that the person would abscond, destroy evidence, influence witnesses or flee from the jurisdiction of the state party. The mere national, ethnic, racial or other origin of a person is no sufficient ground for pre-trial detention.
- Where the possibility of bail or other economic security exists to obtain conditional release, States must take positive action to ensure that economic disadvantages do not lead to a discrimination of certain groups.

III. RIGHT TO A FAIR TRIAL AND EQUALITY BEFORE THE LAW

1. Equality before the law

One of the fundamental conditions for fair treatment in the criminal justice system is respect for the right to equality before the law and before the courts and tribunals and to equal protection of the law. Both are aspects of the prohibition of discrimination. Article 14 ICCPR paradigmatically formulates the intrinsic relation between equality and fair trial:

²² *Report of the Special Rapporteur on Discrimination in the Criminal Justice System*, E/CN.4/Sub.2/2002/5, 23 May 2002, para 35.

1. All persons shall be *equal before the courts and tribunals*. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, *in full equality* [...].

It is important that the Committee should reaffirm the fundamental right to equality of all at all stages of the administration of criminal justice, from arrest by the police to trial and punishment. It is one of the most universal and fundamental rights,²³ and the prohibition of racial discrimination has been held by the Committee on Racial Discrimination to be a peremptory norm of international law, from which no derogation is permitted.²⁴ It should also be recalled that the right to equality before the law also applies to non-citizens, regardless of Article 2 (2) CERD. The Human Rights Committee has clearly stated that “[a]liens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law”.²⁵

2. Elements of the right to a fair trial

The Durban Programme of Action recognizes the correlation between discrimination and the violation of the right to fair trial. It “[u]rges States to pay specific attention to the negative impact of racism, racial discrimination, xenophobia and related intolerance in the administration of justice and fair trial”.²⁶ Areas in which discrimination frequently leads to violations of this right are the presumption of innocence, the right to legal counsel and the right to an interpreter.

²³ To cite but a few, it is enshrined in Article 1 (3) Charter of the United Nations, Articles 2 and 7 of the Universal Declaration of Human Rights (UDHR), Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR), Articles 2 (2) and 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 2 of the Convention on the Rights of the Child (CRC), Articles 2, 3, 5 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Articles 1, 7, 18 (1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC), Articles 5 of the Declaration on the Human Rights of Individuals who are not Nationals of the Countries in Which They Live, Articles 2 and 4 of the Declaration on the Elimination of all Forms of Intolerance and of based on Religion or Belief, Article 2 (1), 3 (1), and 4 Declaration on the Rights of Persons Belonging to National or Ethnic, religious and Linguistic Minorities, Articles 15, 19 to 27, 30 Vienna Declaration and Programme of Action, Paragraphs 1, 2, 7, 9, 10, 16, 25, 38, 47, 48, 51, 66 and 104 World Conference against Racism, Racial Discrimination, Xenophobia and other Related Forms of Intolerance, Declaration and Programme of Action

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

²⁴ CERD, *Statement on racial discrimination and measures to combat terrorism*, 11 November 2002, A/57/18 (Chapter XI)(C), para. 4.

²⁵ General Comment 15, *The position of aliens under the Covenant*, 11 April 1986, HRI/GEN/1/Rev.1, para 7.

²⁶ Durban Programme of Action, 6 September 2001, para 134.

The protection of the presumption of innocence is closely linked to the question of impartiality of the court. It also means that state authorities may not express any views in public prejudging the outcome of criminal proceedings. They also have, within their sphere of influence, the duty to prevent the media from disseminating views or propaganda which may have an adverse effect on the presumption of innocence, for example by blaming communities as a whole.²⁷

Although there is little data on this phenomenon, it appears that there is discrimination with regard to access to counsel. Many persons belonging to marginalized communities are indigent. These persons frequently suffer from a cycle of poverty and lack of access to justice and legal protection.²⁸ States should ensure that adequately funded offices are put in place to provide legal aid to persons in need. Advisory services should be coordinated with representatives from the concerned communities. Where advisory services are provided by the communities themselves, such as minorities or indigenous communities,²⁹ States should actively support such services where they conform to standards of human rights and the rule of law.

The right to an interpreter³⁰ is of particular importance for certain communities who may not speak the official language of the justice system. Authorities sometimes abuse this lack of comprehension to make suspects sign confessions which they do not understand,³¹ or to try persons without their being able to follow the proceedings.³² This is particularly so in criminal trials involving offences against immigration laws: often those brought to justice will not have resided in a country long enough to understand the language. It is important to note that - unlike the right to free legal assistance - the right to the free assistance of an interpreter is not conditional upon the economic means of the accused, and must be guaranteed regardless of the outcome of the trial.³³ The accused has an automatic right to an interpreter from the moment of arrest, if he or she does not understand the language of the authorities. It must be guaranteed at all stages of the criminal proceedings, including during police questioning. To be meaningful, the interpretation must be competent and accurate.³⁴ Yet, interpreters are frequently not trained or recruited in insufficient numbers.³⁵

²⁷ CERD, *General Recommendation XXVII on discrimination against Roma*, 16 August 2000, para 37; see also *General Recommendation XXIX on article 1, paragraph 1 of the Convention (Descent)*, 1 November 2002, para 4 (r).

²⁸ *Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Mexico*, E/CN.4/2004/80/Add.2, 23 December 2003, para 29.

²⁹ *Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Guatemala*, E/CN.4/2003/90/Add.2, 24 February 2003, para 40.

³⁰ Guaranteed in Article 14 (3) (f) ICCPR, Article 16 18 (3) (f) MWC, Article 55 (1) (c) and 67 (f) of the Rome Statute of the International Criminal Court, Article 40 (2) (b) (vi) CRC, Article 8 (2) (a) ACHR, Article 6 (3) (e) ECHR, African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, DOC/OS(XXX)247, para. N (4) (a).

³¹ Amnesty International, *State Injustice: Unfair Trials in the Middle East and North Africa*, 16 April 1998, AI Index MDE 01/02/98, Chapter 2.

³² *Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Guatemala*, E/CN.4/2003/90/Add.2, 24 February 2003, para 36.

³³ Human Rights Committee, *General Comment 13 on Article 14*, 13 April 1984, para. 13; European Court of Human Rights, *Luedicke, Belkacem and Koc*, 28 November 1978, Series A No. 29, paras. 17-19.

³⁴ See the explicit standard of a 'competent interpreter' in Article 67 (1) (f) of the Rome Statute of the International Criminal Court.

³⁵ *Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Guatemala*, E/CN.4/2003/90/Add.2, 24 February 2003, para 36; *Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Mexico*, E/CN.4/2004/80/Add.2, 23 December 2003, para 29.

It would therefore be important that the Committee reaffirm that the right to a fair trial without discrimination is a fundamental human right guaranteed not only by international treaties³⁶ but also in customary law. It should also recall that the fundamental aspects of the right to a fair trial are non-derogable right under international law.³⁷ Particularly, an explicit reference could be made to the guarantees of Article 14 ICCPR, which reflect the customary international law with regard to fair trial guarantees. The Committee could also give some guidance as to how to make the right to a fair trial real and effective.

3. Independent and impartial tribunal

There is an intrinsic link between the right to equality and non-discrimination and the right to an independent and impartial tribunal. Only an impartial tribunal, i.e. a tribunal without preconceived ideas, can be free of racial bias. The General Assembly has affirmed its conviction “that the independence and impartiality of the judiciary are essential prerequisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice and should therefore be respected in all circumstances”.³⁸ Yet, prejudice is still existent among the judiciary in some countries. For instance, it is reported that sometimes judges work in indigenous areas without speaking the language or being familiar with the customs of the communities and lacking proper respect for indigenous authorities.³⁹

The Committee on the Elimination of Racial Discrimination has held that in order to prevent and eradicate racial bias in courts and court decisions, judicial authorities must investigate any possible bias by a member of the court of jury and disqualify this person if there is a suspicion that he or she might be biased.⁴⁰ Due attention should be given in general to the impartiality of juries and courts, in line with the principles underlying article 5 (a) of the Convention.

The right to an independent and impartial tribunal established by law⁴¹ also implies “that the tribunal must be, and be seen to be, independent and impartial”,⁴² i.e. “be subjectively

³⁶ See Articles 10 and 11 of the Universal Declaration on Human Rights, Article 14 ICCPR, Articles 55, 66 and 67 of the Rome Statute of the International Criminal Court, Article 18 of the Migrant Workers’ Convention, Article XXVI of the American Declaration of the Rights and Duties of Man, Article 8 of the American Convention on Human Rights, Article 6 of the European Convention on Human Rights, and Article 7 of the African Charter on Human and People’s Rights.

³⁷ Human Rights Committee, *General Comment 29 on derogations during a state of emergency*, 18 April 2002, para 16; Inter-American Court on Human Rights, Advisory Opinion OC-9/87, *Judicial Guarantees in States of Emergency*, 6 October 1987, operative para 30; Inter-American Commission on Human Rights, *Report on terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para 261; African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, para R.

³⁸ General Assembly Resolution 58/183 of 22 December 2003, preambular paragraph 4.

³⁹ *Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Guatemala*, E/CN.4/2003/90/Add.2, 24 February 2003, para 34.

⁴⁰ Michel L.N. Narrainen, 15 March 1994, CERD/C/44/D/3/1991, para. 9.3.

⁴¹ Article 10 UDHR; Article 40 (2) (b) (iii) CRC; the UN Basic Principles on the Independence of the Judiciary; Article 18 (1) MWC; Article XXVI American Declaration on the Rights and Duties of Man; Article 8 (1) ACHR; Article 6 (1) ECHR; Article 47 of the Charter of Fundamental Rights of the European Union; Recommendation R (94) 12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges, 13 October 1994; African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, paras. 4 and 5.

free from personal prejudice or bias” and “offer sufficient guarantees to exclude any legitimate doubt in this respect”.⁴³ The Human Rights Committee has held that it is for the tribunal to decide *ex officio* whether there are motives to replace a member of the tribunal.⁴⁴

Important guidelines to achieve independence and impartiality of courts and respect for equality are given in the *Bangalore Principles of Judicial Conduct* of 2002:⁴⁵

“Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application:

5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes (“irrelevant grounds”).

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

5.4 A judge shall not knowingly permit court staff or others subject to the judge’s influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.”

4. Criminalization and sentencing

Unfair criminalization can occur when certain acts are criminalized which will specifically, directly or indirectly only affect certain racial communities. This is the case, for instance, if certain persons are prevented access to certain public facilities, like public transport, restaurants or other institutions (in violation of Article 5 (f) CERD) under threat of being criminally prosecuted. Such criminalization clearly violates the principle of non-discrimination if it only targets certain minorities or communities. While certain criminal laws must target specific groups because crimes can only be committed by members of this group (such as, for instance, military offences), there can be no justification for enforcing laws that are discriminatory as such through criminal sanctions.

⁴² *Polay Campos v. Peru*, 6 November 1997, CCPR/C/61/D/577/1994, para. 8.8.

⁴³ European Court of Human Rights, *Lawrence v. the United Kingdom*, Decision as to the Admissibility of Application no. 74660/01, p. 8, *Findlay v. the United Kingdom*, Judgment of 25 February 1997, *Reports* 1997-I, para. 73, *Pullar v. the United Kingdom*, Judgment of 10 June 1996, *Reports* 1996-III, para. 30.

⁴⁴ *Arvo O. Karttunen v. Finland*, 23 October 1992, CCPR/C/46/387/1989, para. 7.2.

⁴⁵ The *Bangalore Draft Code of Judicial Conduct 2001*, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.

It is also important to note that the rate of crime, which is sometimes high for non-nationals, is often due to the amount of convictions that concern the illegality of immigration and related offences.⁴⁶ Indeed, in a considerable number of States violations of immigration regulations are criminalized and severely punished. As the Special Rapporteur on Migrant Workers has stated: 'infractions of immigration laws and regulations should not be considered criminal offences under national legislation, [...] irregular migrants are not criminals *per se* and they should not be treated as such.'⁴⁷ It must be recognized that in some countries, it is the marginalization of foreigners which leads to illicit conduct (for example illegal work, prostitution, etc).⁴⁸ This may even lead to double victimization, particular for victims of trafficking, who commit offences such as irregular entry, use of false documents, prostitution.⁴⁹

More often, however, criminal legislation which is neutral on its face affects certain sectors of society disproportionately. For instance, the Commission on Human Rights noted in its Resolution on the question of the death penalty, "in some countries [...] persons belonging to national or ethnic, religious and linguistic minorities appear to be disproportionately subject to the death penalty".⁵⁰ Racial bias plays a major role in patterns of sentencing. This is well documented for the death penalty in the United States.⁵¹ The Committee against Racial Discrimination has also noted a disproportionate number of foreigners face death penalty in Saudi Arabia.⁵² Similarly, it noted a disproportionate level of incarceration of persons of African-American and Hispanic origin and the 'disturbing correlation between race, both of the victim and the defendant, and the imposition of the death penalty' in the United States.⁵³

Such indirect discrimination can have several causes. Unfair patterns of punishment discriminating against racial or other communities is sometimes due to higher levels of confessions obtained under duress, sometimes to the fact that they more commonly lack access to legal counsel or a translator,⁵⁴ or simply to purely discriminatory reasons and prejudice in courts.⁵⁵ Frequently, it is due to the fact that certain criminal legislation has a higher impact on poorer communities, for instance criminal legislation against so-called poverty offences. As racial minorities often belong to the poorer sectors of society, these persons suffer double discrimination: for being poor and for belonging to a racial minority or group. States should therefore always monitor the possible disparate impact that legislation may have on different groups.

Where it is practiced, states should also revise the policy to expel all foreigners convicted of crimes. While states have the sovereign right to regulate the admission of non-

⁴⁶ *Report of the Special Rapporteur on Discrimination in the Criminal Justice System*, E/CN.4/Sub.2/2002/5, 23 May 2002, para 36.

⁴⁷ *Report of the Special Rapporteur on Migrant Workers*, 30 December 2002, E/CN.4/2003/85, para. 73.

⁴⁸ See, State Report by Italy, CERD/C/SR.1466, 21 May 2003 (Italy), para. 43.

⁴⁹ *Report of the Special Rapporteur on Migrant Workers*, 30 December 2002, E/CN.4/2003/85, paras. 41, 42.

⁵⁰ Resolution 2002/77, 25 April 2002, preambular para 5; Resolution 2003/67, 24 April 2002, preambular para 5.

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

⁵² *Concluding Observations on Saudi Arabia*, 21 March 2003, CERD/C/62/CO/12, para 18.

⁵³ *Concluding observations: United States of America*, 14 August 2001, A/56/18, paras 380-407, at 395 and 396.

⁵⁴ *Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Mexico*, E/CN.4/2004/80/Add.2, 23 December 2003, para 30.

⁵⁵ *Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Guatemala*, E/CN.4/2003/90/Add.2, 24 February 2003, para 34.

nationals to their territory, the automatic expulsion of convicted foreigners may amount to double-jeopardy as it punishes persons twice for the same crime. The Special Rapporteur of the Sub-Commission on discrimination in the criminal justice system has considered that expulsion following a criminal conviction subjects the convicted to "double punishment when they are convicted because after serving their sentence they are generally expelled to their country of origin even though family, social and sometimes cultural links with the country no longer exist or never did exist".⁵⁶ States have a duty to respect the right to family life of convicted persons and their families. Where the expulsion is disproportionate, it will amount to a violation of the right to respect for family life, protected in Article 17 ICCPR.⁵⁷ Also, any measure of expulsion is subject to the prohibition to expel someone to a country where he or she is at risk of torture or other cruel, inhuman or degrading treatment or punishment.

Elements for a General Recommendation:

- The right to equality before the law and the courts and tribunals and the right to equal protection of the law must be respected and ensured for everyone at all stages of the criminal justice system. The prohibition of discrimination is a peremptory norm of international law.
- States must ensure the right to a fair trial to all persons, as enshrined in Article 14 ICCPR and the equivalent rights in other human rights treaties which reflect customary international law.
- In particular, the presumption of innocence forbids State authorities to express any views in public prejudging the outcome of criminal proceedings, especially by blaming communities as whole. They also have, within their sphere of influence, the duty to prevent the media from disseminating views or propaganda which may have an adverse effect on the presumption of innocence, for example by blaming communities as a whole.
- States should respect the right to counsel and provide assistance to persons who cannot afford counsel. States should also have institutions which provide advisory services to members of marginalized communities and encourage and support such services by the communities themselves.
- The right to an interpreter is of particular importance for persons who do not speak the official language. The right must be guaranteed from the moment of arrest and at all stages of the criminal proceedings. Interpretation must be competent and accurate.
- States should ensure that in areas with a majority of minorities, indigenous peoples or other populations, legal advice and interpretation is available in sufficient numbers.
- States must ensure the independence and impartiality of their tribunals, including absence of bias by any members of the court or jury. States should refer to the *Bangalore Principles of Judicial Conduct* of 2002 to practically implement this principle.

⁵⁶ Report of the Special Rapporteur on Discrimination in the Criminal Justice System, E/CN.4/Sub.2/2002/5, 23 May 2002, para 34.

⁵⁷ See also European Court of Human Rights, *Moustaquim v Belgium*, Judgment of 18 February 1991, Series A No 193; *Djeroud v France*, Judgment of 23 January 1991, Series A No 191-B; *Beljoudi v France*, Judgment of 26 March 1992, Series A No 234-A; *Mehemi v France*, Judgment of 26 November 1997, Reports 1997-VI, p 1959; *Bagbli v France*, Judgment of 30 November 1999, Reports 1999-VIII; *Ciliz v the Netherlands*, Judgment of 11 June 2000, Reports 2000-VIII.

- States must ensure that their criminal laws do not criminalize acts committed by members of a particular community without any objective justification.
- Indirect discrimination must be avoided by reviewed and monitoring the disparate impact of criminal laws on different sectors of society, particularly where laws may have a discriminatory effect on poorer communities.
- State policies to expel foreigners convicted of crime should be confined to the strictly necessary to preserve national security and the rights of others. Any measure of removal of a person from the territory is subject to the person's human rights, in particular the right to family life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

IV. RELIGIOUS, CUSTOMARY OR INDIGENOUS JUSTICE

A particular issue that must be addressed in this respect, albeit succinctly, is that of proceedings before traditional or customary tribunals or bodies. Indeed, in some countries local tribunals or councils based on tradition or custom operate in parallel to the official court system.⁵⁸ In some countries, indigenous peoples follow their traditional and customary justice and lament the lack of understanding by ordinary courts of their laws or the punishment of those who exercise customary justice,⁵⁹ even where indigenous customary law is recognized by and incorporated into the domestic legal system.⁶⁰

This right to abide by the customary rules of minorities or other communities is part of the right of persons belonging to minorities to enjoy their own culture, provided in Article 27 ICCPR and Article 30 of the Convention on the Rights of the Child. While the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries has not been universally ratified, it nevertheless gives a good guideline on customary laws in its Article 9, which prescribes that "[t]o the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected" and that "[t]he customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases". Such recognition has been granted to indigenous criminal justice systems in some national constitutions or laws, such as Bolivia,⁶¹ Colombia,⁶² Ecuador,⁶³ Peru⁶⁴ or Venezuela⁶⁵.

⁵⁸ See, *inter alia*, Report of the Special Rapporteur on violence against Women on Afghanistan, A/58/421, 6 October 2003, para 16; Report of the Special Rapporteur on violence against women on International, regional and national developments in the area of violence against women (1994-2003), Addendum 1, E/CN.4/2003/75/Add.1, 27 February 2003, para 1017 (Israel); Amnesty International, *Pakistan: The tribal justice system*, 1 August 2002, AI INDEX: ASA 33/024/2002; Amnesty International, *Pakistan: A welcome ban on trial by jirga*, The High Court of Sindh province issued a ban on trials by jirga on 23 April 2004, Press Release, 7 May 2004.

⁵⁹ Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Guatemala, E/CN.4/2003/90/Add.2, 24 February 2003, para 36; Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Mexico, E/CN.4/2004/80/Add.2, 23 December 2003, para 31.

⁶⁰ Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to the Philippines, E/CN.4/2003/90/Add.3, 5 March 2003, paras 24, 25.

⁶¹ Article 171 of the Constitution of Bolivia.

⁶² Article 246 of the Constitution of Colombia.

⁶³ Article Title VIII, Chapter I of the Constitution of Ecuador

The Special Rapporteur on indigenous peoples has recommended that “[i]ndigenous law (legal custom) should be acknowledged and respected in all judicial bodies where indigenous people or communities are involved and should be incorporated into a new conception of indigenous justice”.⁶⁶ Special training programmes should be designed for judges, prosecutors and legal defenders regarding indigenous peoples’ rights and cultures.⁶⁷ States should try to accommodate the customs of indigenous peoples in their judicial system, whenever they are compatible with international law. Indigenous peoples should not be criminalized for exercising their customary justice if it respects human rights.

At the same time, the State has a duty to protect all persons under its jurisdiction from acts impairing their enjoyment of human rights. Thus, if traditional courts or similar bodies exist in a State, the State must enact laws to ensure that these bodies will comply with international human rights standards. The Special Rapporteur on indigenous peoples has considered that “[i]ndigenous communities and peoples that apply traditional legal customs should do so in strict compliance with the universal individual human rights established in international and national legislation, with special attention to the rights of women”.⁶⁸

In this regard, Principle 5 of the UN Basic Principles on the Independence of the Judiciary states that ‘everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.’ Even though the background of this provision rather reflects the practice of special tribunals, it must also be understood to prevent a parallel justice system not complying with human rights. The African Commission on Human and Peoples’ Rights has given some guidelines on the requirements for traditional courts. These encompass all the rights to liberty and security of the person, to an independent and impartial court, to fair trial and to equality.⁶⁹ The African Commission also specifically mentions ‘respect for the equality of women and men in all proceedings’ and ‘respect for the inherent dignity of women, and their right not to be subjected to cruel, inhuman or degrading treatment or punishment’.⁷⁰

To ensure that all persons are tried by an independent and impartial tribunal, they everyone should have the right to choose whether he or she wants to be tried in religious or secular courts. This choice should not only be given in law, but should be ensured in fact. If individuals choose a secular public court and face pressure from their community, States must protect them from any risk to their well-being. Further, the possibility to choose between public or traditional tribunals does not absolve the State from its duty to ensure that traditional tribunals respect the rights of the parties. If a

⁶⁴ Article 149 of the Constitution of Peru.

⁶⁵ Article 260 of the Constitution of Venezuela.

⁶⁶ *Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Mexico*, E/CN.4/2004/80/Add.2, 23 December 2003, para 93.

⁶⁷ *Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to the Philippines*, E/CN.4/2003/90/Add.3, 5 March 2003, para 67 (c).

⁶⁸ *Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Mexico*, E/CN.4/2004/80/Add.2, 23 December 2003, para 94.

⁶⁹ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, para Q.

⁷⁰ *Ibid*, para Q (b) 4 and 5.

secular court has criminal competence, religious and traditional courts should not have any appeal competence.

Elements for a General Recommendation:

- States should acknowledge and respect the legal tradition of indigenous peoples or other minorities and provide for the exercise of traditional criminal jurisdiction by these communities, as long as these comply with fundamental human rights. States have a positive obligation to ensure that any system of justice exercised in this manner is compatible with fundamental human rights. Everyone should be able to choose to be tried by either jurisdiction and States should ensure that this choice can be made without any risk for the individual. Religious or traditional courts should not have any appeal competence over State courts.
- Special training programmes should be designed for judges, prosecutors and legal defenders regarding indigenous peoples' rights and cultures.

V. PRISONS

In many countries, the persons of marginalized groups and foreigners are over-represented in the prison population.⁷¹ There is a risk that racial discrimination may be perpetrated during incarceration.⁷² Also, members of racial, ethnic, religious indigenous or other communities may be more vulnerable to torture or other forms of ill-treatment in prison.⁷³ Frequently, language barriers impede minorities or other groups from asserting their rights in the prison environment. The Committee on the Elimination of Racial Discrimination has expressed concern at measure of political disenfranchisement of criminal offenders which affected mainly members of certain racial communities and has recalled the right of everyone to vote on a non-discriminatory basis in accordance with Article 5 of the Convention.⁷⁴ Members of minorities sometimes suffer from the impossibility to exercise their religion, by being denied to use certain ceremonial tools, religious texts, or by being obligated to conform to certain dietary or dress codes in the prison which violate the dictates of their religion. While it is evident that certain restrictions are inherent to the limitations of any prison regime and affect all prisoners, States nevertheless have a negative duty to respect prisoners right to freedom of culture, belief and religion and a positive obligation to ensure the minimum guarantees to be able to enjoy these freedoms on practice.⁷⁵

⁷¹ See only the *Report of the Special Rapporteur on Discrimination in the Criminal Justice System*, E/CN.4/Sub.2/2002/5, 23 May 2002, para 48; statistics on foreigners in prisons in the world can be found on the internet site of the International Centre for Prison Studies at [http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/highest to lowest rates.php](http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/highest%20to%20lowest%20rates.php), [viewed 5 August 2004]

⁷² *Final Report of the Royal Commission onto aboriginal death in custody – a summary*, Chapter 25 [available at <http://www.austlii.edu.au>, viewed 4 August 2004].

⁷³ *Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Mexico*, E/CN.4/2004/80/Add.2, 23 December 2003, para 37.

⁷⁴ *Concluding observations: United States of America*, 14 August 2001, A/56/18, paras 380-407, at 397.

⁷⁵ See European Commission of Human Rights, *X v Germany*, application No 2413/65, Decision of 16 December 1966, CD 23, p 1, at 8; *X v the United Kingdom*, application No 5947/72, Decision of 5 March 1976, DR 5, p 8, at 9; European Court of Human Rights, *Keenan v the United Kingdom*, Judgment of 3 April 2001, Reports 2001-III, para 110.

It is therefore important that the Committee recall the right to equality of all prisoners, particularly with regard to access to adequate health care, hygiene and food, in accordance with the Standard Minimum Rules for the Treatment of Prisoners the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Basic Principles for the Treatment of Prisoners. Also, the right of all persons deprived of their liberty to be treated with humanity and with respect for their dignity (Article 10 ICCPR) must be stressed. As the Human Rights Committee has stated in its General Comment, "[t]reating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. *This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*".⁷⁶

It is important to note that international human rights law is based on the assumption that the criminal justice system should have a reformative, restorative, and rehabilitative function.⁷⁷ Members of minorities may find it particularly difficult to reintegrate society after their conviction. Stigmatization may lead to difficulties in finding support services, employment or accommodation. Since they are eligible to expulsion, foreign prisoners very rarely benefit from measures of social resettlement.⁷⁸ Authorities should ensure through appropriately trained staff at the respective offices to support the efforts of reintegration and assistance during imprisonment and also after release.⁷⁹

While it is evident that certain restrictions are inherent to the limitations of any prison regime and affect all prisoners, States nevertheless have a negative duty to respect prisoners right to freedom of culture, belief and religion and a positive obligation to ensure the minimum guarantees to be able to enjoy these freedoms on practice.

Often, prisoners experience frustration with the complaints mechanisms in prison.⁸⁰ It is important to recall that accountability and proper management of the prison regime must be ensured in two ways. Firstly, the right to an individual effective remedy for every person who alleges a violation of his or her human rights must be ensured. This right is addressed below.⁸¹

Secondly, there should be an external, independent monitoring mechanism to supervise prisons. This mechanism should have full access to all places of detention and have extensive visiting rights, especially for unannounced visits.⁸² Members of the visiting team should be able to speak privately with the detainees. Their findings should be made public. In order to guarantee adequate monitoring against racial discrimination, the

⁷⁶ General Comment No 21, *The treatment of persons deprived of their liberty (article 10)*, 10 April 1992, HRI/GEN/1/Rev.6, para 4, emphasis added.

⁷⁷ Article 10 ICCPR; Principle 10 of the Basic Principles for the Treatment of Prisoners; Rule 58 of the Standard Minimum Rules for the Treatment of Prisoners; Rule 79 of the Rules for the Protection of Juveniles Deprived of their Liberty; and Article 5 (6) of the American Convention on Human Rights.

⁷⁸ *Report of the Special Rapporteur on Discrimination in the Criminal Justice System*, E/CN.4/Sub.2/2002/5, 23 May 2002, para 35.

⁷⁹ Human Rights Committee, General Comment 21, *The treatment of persons deprived of their liberty (article 10)*, 10 April 1992, HRI/GEN/1/Rev.6, paras 10, 11.

⁸⁰ *Final Report of the Royal Commission onto aboriginal death in custody – a summary*, Chapter 25 [available at <http://www.austlii.edu.au>, viewed 4 August 2004].

⁸¹ See below at VI 1.

⁸² See a proposal for monitoring of detention to prevent torture by the Special Rapporteur on torture in his Report E/CN.4/2003/68, 17 December 2002, para 26 (f).

monitoring mechanism should have a team of qualified members with a specialisation in racial issues. Its membership should reflect adequate racial, ethnic, national diversity. Strong and effective participation of detainees of racial minorities and other communities should be guaranteed. The monitoring body should be provided with a strong complaints mechanism giving real protection to the complainants.

Elements for a General Recommendation:

- States must respect the fundamental rights and the right to equality of prisoners, and should especially observe the Standard Minimum Rules for the Treatment of Prisoners the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Basic Principles for the Treatment of Prisoners. All prisoners must be treated with humanity and respect for their human dignity.
- Criminal justice systems should have a reformatory, restorative, and rehabilitative function and, in accordance with their positive obligation arising out of Article 10 ICCPR and customary law, States should provide assistance for reintegration during and after imprisonment specifically designed for members of marginalized communities and their particular problems. The participation of detainees of racial and other minorities should be guaranteed.
- Any prison system must operate under strict scrutiny, supervision and monitoring of an independent body. This body should include members with expertise in racial discrimination, minority or indigenous issues and foreigners issues and its membership should reflect racial diversity. The monitoring body should have a strong complaints mechanism, allowing it to order binding and effective remedies. It should have extensive visiting rights, including the right to unannounced visits.
- All prisoners who make a reasonable allegation that their human rights have been violated have a right to an effective remedy before an independent and impartial body (Article 2 (3)(a) ICCPR).
- In the long term, States in which marginalized communities are over-represented among the prison population must develop strategies to diminish their numbers.

VI. ACCESS TO JUSTICE AND REMEDIES FOR VICTIMS OF RACIAL DISCRIMINATION

1. The right to a remedy

Human rights violations entail the right of the victim to an effective remedy,⁸³ which in case of gross human rights violations must be a legal remedy before an independent and

⁸³ Article 8 Universal Declaration of Human Rights; Article 2 (3), 9 (5) and 14 (6) ICCPR; Article 6 CERD; Article 39 CRC; Article 14 CAT; Article 75 Rome Statute of the International Criminal Court; Article 5 (5) and 13 ECHR; Article 25 ACHR; Article 7 AfCHPR; Article 47 Charter of Fundamental Rights of the European Union; Article 19 Declaration on the Protection of all Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992; Principle 20 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; Article 4 (d) of the Declaration on the Elimination of Violence against Women.

impartial court,⁸⁴ to which access must be guaranteed without discrimination. All persons have a right to a remedy and compensation for arbitrary detention.⁸⁵ The right to a remedy has frequently been qualified as one of the most fundamental and essential rights for the effective protection of all other human rights⁸⁶ and it constitutes a non-derogable right under international law.⁸⁷ For victims of racial discrimination, the right to a remedy is specifically enshrined in Article 6 CERD.

In order to make the right to a remedy effective, states must ensure that any person claiming a violation is heard by an impartial body, free from racial bias. Thus, States should ensure that these bodies are integrated by personnel trained in questions of racial discrimination. For some communities, as indigenous communities, it is sometimes difficult to access justice because they are literally located too far away.⁸⁸ Complaints procedures should be located in all relevant areas and adequately staffed and funded. Where necessary, States should ensure that legal counsel and other advisory services are guaranteed to persons who cannot afford them.⁸⁹

In the context of racial discrimination, persons belonging to minorities, indigenous communities or other group may suffer harm collectively.⁹⁰ In such cases, States should facilitate group claims, so as to provide access to justice commensurate to the violation.⁹¹ Also, States should facilitate claims by non-governmental organisations to defend community rights.⁹²

As the Committee has stated in an earlier General Recommendation, women may be discriminated against in a double manner: for their condition as women and for belonging to a certain racial community. Women may be hindered by access to remedies and complaint mechanisms.⁹³ Authorities should be particularly attentive to the risk of discrimination and lack of access faced by women. Personnel of the criminal

⁸⁴ Human Rights Committee, *F. Birindwa ci Bithashwiwa, E. Tshisekedi wa Mulumba v. Zaire*, 29 November 1989, CCPR/C/37/D/241/1987, para. 14; *Nydia Erika Bautista v. Colombia*, 13 November 1993, CCPR/C/55/D/563/1993, para. 8.2; *José Vicente and Amado Villafañe Chaparro et al v Colombia*, 29 July 1997, CCPR/C/60/D/612/1995, para. 8.2; Inter-American Court of Human Rights, *Advisory Opinion OC-9/87 of 6 October 1987, Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)*, Series A: Judgments and Opinions No 9, paragraph 24; African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96 (30th Ordinary Session, Oct 2001), paras 57, 61; European Court of Justice, Judgment of 15 May 1986, *Johnston Case*, No 222/84.

⁸⁵ Article 9 (5) ICCPR, Article 5 (5) ECHR.

⁸⁶ *Report of the Special Representative on Human Rights Defenders*, UN Doc A/56/341, 10 September 2001, para 9; *Report of the Special Rapporteur on violence against women on cultural practices in the family that are violent towards women*, UN Doc E/CN.4/2002/83, 31 January 2002, para 116.

⁸⁷ *General Comment 29 on derogations during a state of emergency*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 14.

⁸⁸ *Report of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people on his mission to Guatemala*, E/CN.4/2003/90/Add.2, 24 February 2003, para 34.

⁸⁹ *General Recommendation XXIX on article 1, paragraph 1 of the Convention (Descent)*, 1 November 2002, para 5 (u).

⁹⁰ See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 1.

⁹¹ *General Recommendation XXIX on article 1, paragraph 1 of the Convention (Descent)*, 1 November 2002, para 5 (u).

⁹² *Ibidem*; see also Article 19 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180/3, 19 July 2000 (adopted by the Council of the European Union).

⁹³ CERD, *General Recommendation XXV on gender-related dimensions of racial discrimination*, 20 March 2000, para 2.

justice system must be sensitized, trained and provided with clear guidelines to eradicate this double discrimination.

2. The duty of states to prosecute and punish

As the Committee on the Elimination of Racial Discrimination has noted, discrimination is aggravated when combined with insufficient possibilities to bring complaints and obtain reparation.⁹⁴ However, the Committee on the Elimination of Racial Discrimination has noted that members of marginalized communities, often foreign nationals,⁹⁵ are more likely than citizens to be confronted to inaction by State authorities when they are victims of crime.⁹⁶ They are less likely to be satisfied with the police response rate and suspects are less likely to be identified.⁹⁷ This is a particular problem when they are victims of racist or xenophobic crimes as they are twice victimised, as victims of crime and as victims of discrimination.

Against this background, the Committee has emphasized the positive obligation of States to take effective action against reported incidents of racial discrimination.⁹⁸ Perpetrators, be they public officials or other persons, must not enjoy any degree of impunity.⁹⁹ The duty to punish violent racist crime follows from Article 4 (a) CERD. The duty to punish perpetrators of racist or xenophobic crimes also follows from the general duty of states to guarantee the human rights of all, and to protect individuals from any act or omission, by state or non-state actors, that impairs the enjoyment of their human rights. Violent crime and crime of a racist or xenophobic nature affects the victim's human rights to non-discrimination, to human dignity and to physical and mental well-being, including the right to life. For crimes of such nature, the duty to punish perpetrators has been recognized by international human rights jurisprudence.¹⁰⁰

⁹⁴ CERD, *Response to the Questionnaire sent by the Special Rapporteur on the rights of non-citizens*, 20 March 2003, CERD/C/62/Misc.17.Rev.3, response to question 2.

⁹⁵ CERD, *Concluding observations on Italy*, CERD/C/304/Add.68, 7 April 1999, paras. 9 and 14; see also *Concluding Observations on Germany*, CERD/C/304/Add.115, 27 April 2001, para. 14 (c); *Concluding Observations on France*, 19 April 2000, CERD/C/304/Add.91, para. 11; The Committee on the Elimination of Racial Discrimination has expressed concern that certain categories of foreigners were not entitled to redress for acts of racial discrimination committed against them, *Concluding Observations on Germany*, CERD/C/304/Add.24, 23 April 1997, paras. 18, 22.

⁹⁶ See *Concluding observations: United States of America*, 14 August 2001, A/56/18, paras 380-407, at 396; Amnesty International, *Racism and the Administration of Justice*, Amnesty International Publications, London 2001, AI Index: Act 40/020/2001, Chapter 3 "Impunity and lack of State protection".

⁹⁷ *Concluding Observations on Finland*, 10 December 2003, CERD/C/63/CO/5, para. 17; see also Home Office, *Race and the Criminal Justice System*, p. 3.

⁹⁸ *L.K. v. the Netherlands*, 16 March 1993, CERD/C/42/D/4/1991, para. 6.5.

⁹⁹ CERD, *General Recommendation XXVII on discrimination against Roma*, 16 August 2000, para 12; *General Recommendation XXIX on article 1, paragraph 1 of the Convention (Descent)*, 1 November 2002, para 5 (w).

¹⁰⁰ See, for instance, Human Rights Committee, *Concluding Observations on Slovakia*, 22 August 2003, CCPR/CO/78/SVK, para. 17; *Concluding Observations on the Czech Republic*, 27 August 2001, CCPR/CO/72/CZE, para. 10; *Concluding Observations on the Russian Federation*, 6 November 2003, CCPR/CO/79/RUS, para. 24; *Concluding observations: Hungary*, 19 April 2002, CCPR/CO/74/HUN, para. 12; Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, Series C No. 4, paras 147, 187; European Court of Human Rights, *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A No. 91, para. 27; European Commission on Racism and Intolerance, *General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination*, 13 December 2002, CRI (2003) 8, paras. 5-7, 1-23, 28.

The duty to punish racist or xenophobic crime implies, as expressed in Article 4 (a) that an offence of this nature must be enshrined in the domestic criminal code.¹⁰¹ The courts have to acknowledge the racist nature of offences.¹⁰² Judicial decisions should take the prohibition of racial discrimination fully into account.¹⁰³ At all stages of the investigation and prosecution, evidence about racism should be explicitly referred to and addressed at trial. The Committee on the Elimination of Racial Discrimination has also welcomed measures of States who considered racial motivation as an aggravating circumstance of a crime.¹⁰⁴

While there is a strong argument in favour of an inversion of the burden of proof in other areas of law such a labour law or administrative law, the burden of proof for criminal offences of a discriminatory nature shall remain with the prosecution, in accordance with the presumption of innocence.¹⁰⁵

Victims of suspected racist crimes and their families should always be informed personally of a decision to discontinue the prosecution.¹⁰⁶ The rights and participation of victims and their families are discussed in further detail below in the context of the right to an investigation.

In order to monitor the effective observation of this duty, the police should keep all records in relation to incidents and crimes. Authorities should maintain a data bank with precise information on reports of all forms of ill-treatment, illegal use of force and extrajudicial killings. It should include the conclusion drawn in each case and the profile of the victim or deceased. These statistics should be made available to the public.

3. Right to a prompt, effective, independent and impartial investigation

States have a duty to carry out a prompt, effective and impartial investigation into human rights violations by an independent body.¹⁰⁷

¹⁰¹ See also *Report on the Stephen Lawrence Inquiry* by Sir William MacPherson of Cluny, February 1999, Chapter 6, published by HMSO [<http://www.archive.official-documents.co.uk/documents/cm42/4262/4262.htm>, viewed 4 August 2004], para. 12.

¹⁰² *Concluding Observations on the Czech Republic*, 10 December 2003, CERD/C/63/CO/4, para. 15; Human Rights Committee, *Concluding Observations on the Russian Federation*, 6 November 2003, CCPR/CO/79/RUS, para. 24.

¹⁰³ *General Recommendation XXIX on article 1, paragraph 1 of the Convention (Descent)*, 1 November 2002, para 5 (v).

¹⁰⁴ *Concluding Observations on Finland*, 10 December 2003, CERD/C/63/CO/5, para. 9; the same has been recommended by European Commission against Racism and Intolerance, *General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination*, 13 December 2002, CRI (2003) 8, para. 21.

¹⁰⁵ Human Rights Committee, *General Comment 13 on Article 14*, 13 April 1984, para. 7.

¹⁰⁶ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 6 (a).

¹⁰⁷ Human Rights Committee *Concluding Observations: Peru*, 25 July 1995, CCPR/C/79/Add.67, para. 22; *Concluding observations: Hungary*, 19 April 2002, CCPR/CO/74/HUN, para. 12; *Concluding observations: Ukraine*, 12 November 2001, CCPR/CO/73/UKR, para. 13; Committee on the Elimination of Racial Discrimination: *L.K. v. the Netherlands*, 16 March 1993, CERD/C/42/D/4/1991, para. 6.9; *Habassi v. Denmark*, 6 April 1999, CERD/C/54/D/10/1997, para. 9.3-10; *Kashif Ahmad v. Denmark*, 8 May 2000, CERD/C/56/D/16/1999, para. 6.4; Inter-American Court of Human Rights, *Velásquez Rodríguez Case. Compensatory damages* (Art. 63(1) American Convention on Human Rights), Judgment of July 21, 1989. Series C No.7, paras 34, 35; European Court of Human Rights, *Finucane v the United Kingdom*, Judgment of 1 July 2003, para. 89; African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96 (30th Ordinary Session, Oct 2001), paras 57, 61.

For the investigation to be meaningful, the institution conducting the investigation must be absolutely independent of the suspected perpetrators or the agency they serve (including if the allegation is made against police personnel)¹⁰⁸ - which means not only a hierarchical, personal or institutional independence, but also a practical independence. To prevent measures of reprisal, confidentiality of the complaint procedure may sometimes have to be ensured, including through protective measures.

The investigation must be conducted *ex officio*, i.e. without the victim having to launch a formal complaint.¹⁰⁹ The duty to conduct an investigation *ex officio* means that States may not abdicate their obligation because of shortcomings in the complainants allegations and that the investigation cannot depend on formal criteria, such as a written complaint, which many complainants cannot meet, because they lack the information, are poor, illiterate, or face other obstacles to access the justice system. Complaints against police or other officials must be immediately registered and processed and the investigation conducted with due diligence and expedition.¹¹⁰ Swift action in the first hours following a crime is often critical for the further investigation and it is important in these moments that police officers fulfil their tasks without racial bias. In case of alleged unlawful killing or torture or ill-treatment, the inquiry should follow the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* and the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*.

It is also important that the victim and relatives must be involved in the procedure to the extent necessary to safeguard their legitimate interests.¹¹¹ They should be given all the information concerning the inquiry except when compelling security measures prevent the revelation of certain information. They should have access to hearings and be able to present evidence.¹¹² Whenever necessary, victims and their families should be provided with legal aid in order to be able to effectively defend their interests.¹¹³ Victims and witnesses must be protected from intimidation and retaliation.¹¹⁴ Bail for suspected criminal should be made conditional upon the safety of families from intimidation and retaliation.

Victims and their relatives have a right to be treated without discrimination or prejudice and with respect for their dignity. Questioning should be sensitive to the nature of racist or xenophobic crime. Interviewers must receive special training in this regard. This can only be achieved if trust is established between members of the affected communities and the actors involved in the criminal justice system. Police personnel, prison personnel,

¹⁰⁸ See Principle 11 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions and Principle 2 of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.

¹⁰⁹ See General Assembly Resolution 52/86 of 12 December 1997 on *Crime prevention and criminal justice measures to eliminate violence against women*, Annex para 7 (b); European Court of Human Rights, *Finucane v the United Kingdom*, Judgment of 1 July 2003, paras 67-71; Inter-American Court of Human Rights, *Velásquez Rodríguez v Honduras*, Judgment of 29 July 1988, Series C No. 4, paragraph 177.

¹¹⁰ *L.K. v. the Netherlands*, CERD/C/42/D/4/1991, 16 March 1993, para. 6.4 and 6.6.

¹¹¹ *Finucane v the United Kingdom*, Judgment of 1 July 2003, paras 68-71 [citations omitted].

¹¹² See Principle 12 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions and Principle 4 of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.

¹¹³ *Menson v the United Kingdom*, Decision as to the admissibility of Application no. 47916/99, 6 May 2003, p.13; European Commission on Racism and Intolerance, *General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination*, 13 December 2002, CRI (2003) 8, para. 26.

¹¹⁴ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 6 (d).

prosecutors, judges, social workers should receive thorough training in awareness for racial discrimination and cultural diversity.¹¹⁵ States should consider establishing a unit or a person in each police service with responsibility for this subject, as the police is the first instance in which complaints are handled.

The duty to investigate a racist or xenophobic crime effectively may imply the need to recognize the crime as being of such racist or xenophobic nature at the investigation, since disregard of the particular motivation of the perpetrator of the crime may lead to an ineffective investigation and prosecution.¹¹⁶ As the European Court of Human Rights has held, “[w]here [an] attack is racially motivated, it is particularly important that the investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society’s condemnation of racism and to maintain confidence of minorities in the ability of the authorities to protect them from the threat of racist violence”.¹¹⁷ Whenever there is suspicion that a crime was motivated by racist attitudes, the investigation should unmask any racist motive, as “[f]ailing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive to fundamental rights”.¹¹⁸

4. Reparation

Victims of racially motivated crimes must receive adequate reparation¹¹⁹ including compensation, satisfaction, restitution and rehabilitation and guarantees of non-repetition.¹²⁰ It is, moreover, generally recognized in international law that victims of crime, whether committed by public or private actors, should be guaranteed adequate restitution, compensation and assistance.¹²¹

¹¹⁵ Human Rights Committee, *Concluding Observations on Slovakia*, 22 August 2003, CCPR/CO/78/SVK, para. 11.

¹¹⁶ See the account of the link between the failure to effectively investigate and the lack of a particular approach to the investigation of a racial attack because of the failure to place race at the centre of the crime in the *Report on the Stephen Lawrence Inquiry* (*supra* note 101), para. 9.

¹¹⁷ *Menson v the United Kingdom*, Decision as to the admissibility of Application no. 47916/99, 6 May 2003, p. 14.

¹¹⁸ *Nachova and others v Bulgaria*, Judgment of 26 February 2004, para 158.

¹¹⁹ CERD, *Concluding observations: United States of America*, 14 August 2001, A/56/18, paras 380-407, at 394.

¹²⁰ See Article 2 (3), ICCPR; Article 14 CAT; Art. 6 CERD; Article 85 Rome Statute of the International Criminal Court; Article 41 ECHR; Article 63 ACHR; Article 9 Inter-American Convention to Prevent and Punish Torture; Article 27 (1) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights; Principles 4 and 16 Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary or Summary Executions; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; see also Recommendation No. R (85) on the position of victims in criminal law and criminal procedure, adopted by the Committee of Ministers of the Council of Europe, 28 June 1985; and African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, para. P (5)(k),(l),(m); see also an elaboration of the meaning of the right to a remedy and reparation in the Principles on the right to a remedy and reparation for victims of violations of international human rights and international humanitarian law, revised version of 24 October 2003, E/CN.4/2004/57, 10 November 2003, Appendix I.

¹²¹ See the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; see also Recommendation No. R (85) on the position of victims in criminal law and criminal procedure, adopted by the Committee of Ministers of the Council of Europe, 28 June 1985; and African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, para. P (5)(k),(l),(m).

Article 6 CERD provides for the right to a remedy and reparation against acts of racial discrimination. The Committee on the Elimination of Racial Discrimination has recognized that “the degree to which acts of racial discrimination damage the injured party’s perception of his/her own worth and reputation is often underestimated” and that “the right to seek just and adequate reparation or satisfaction (...) is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate”.¹²² Relief must be commensurate to the damage suffered.¹²³

When compensation is claimed through civil remedies, the police or other authority should be vicariously liable for violations of the prohibition of discrimination committed by its officials. There should be no immunity of public institutions in proceedings on compensation or reparation.

Elements for a General Recommendation:

- All persons have a right to an effective remedy against acts of racial discrimination, be they committed by public officials or private actors (Article 6 CERD).
- Complaints procedures should be located in all areas of the country and adequately staffed and funded. Where necessary, States should ensure that legal counsel and other advisory services are guaranteed to persons who cannot afford them, particularly women belonging to marginalized communities.
- States should facilitate group claims, so as to provide access to justice commensurate to the violation. States should also facilitate claims by non-governmental organisations to defend community rights.
- States have a duty to prosecute and punish violent racist crimes (Article 4 (a) CERD). This duty implies the need to incorporate these crimes into domestic criminal law. States should consider making racist motivation and aggravating circumstance for crimes. Courts should acknowledge and address the racist nature of a crime at all stages of the proceedings and in the sentence.
- Any racist incident by a police officer, be it verbal or in act, should lead to proceedings and to disciplinary sanctions and to criminal sanction in case of a gross human rights violation.
- The police should keep all records in relation to incidents and crimes. Authorities should maintain a data bank with precise information on reports of all forms of ill-treatment, illegal use of force and extrajudicial killings. It should include the conclusion drawn in each case and the profile of the victim or deceased. These statistics should be made available to the public.
- States have a duty to investigate allegations of the violation of racial discrimination. The investigatory body must be absolutely independent of the suspected perpetrators or the agency they serve. The investigation must be conducted *ex officio*. Complaints against police or other officials must be immediately registered and processed and the investigation conducted with due

¹²² *General Recommendation XXVI on article 6 of the Convention*, 24 March 2000, HRI/GEN/1/Rev.6.

¹²³ *L.K. v. the Netherlands*, 16 March 1993, CERD/C/42/D/4/1991, para. 6.9; see also Human Rights Committee *Concluding Observations on Slovakia*, 22 August 2003, CCPR/CO/78/SVK, para. 11.

diligence and expedition, including by swift action in the first hours following a crime. In case of alleged unlawful killing or torture or ill-treatment, the inquiry should follow the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* and the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*.

- Victim and relatives must be involved in the procedure to the extent necessary to safeguard their legitimate interests. They have the right to have access to access information, to have access to hearings, to present and challenge evidence. Where necessary, victims and their families should be provided with legal aid in order to be able to effectively defend their interests. Victims, their relatives and witnesses must be protected from intimidation and retaliation. They must be informed of the decision to discontinue proceedings and be able to appeal against this decision. They have a right to be treated without discrimination or prejudice and with respect for their dignity. Questioning should be sensitive to the nature of racist or xenophobic crime. Interviewers must receive special training in this regard.
- The duty to investigate a racist or xenophobic crime effectively may imply the need to recognize the crime as being of such racist or xenophobic nature at the investigation. Whenever there is suspicion that a crime was motivated by racist attitudes, the investigation should unmask any racist motive.
- Victims of racially motivated crimes must receive adequate reparation including compensation, satisfaction, restitution and rehabilitation and guarantees of non-repetition.

VII. DIVERSIFICATION OF POLICE FORCES, PROSECUTION OFFICES, AND THE JUDICIARY

The Durban Programme of Action urges States “[t]o create and implement policies that promote a high-quality and diverse police force free from racism, racial discrimination, xenophobia and related intolerance, and recruit actively all groups, including minorities, into public employment, including the police force and other agencies within the criminal justice system (such as prosecutors).”¹²⁴ This may directly or indirectly constitute a violation of Article 5 (c) CERD, which provides that everyone shall have a the right to equality in the access to public service. Recruitment of members of racial minorities into the police and other law enforcement agencies has also been recommended by the Committee itself.¹²⁵

Elements for a General Recommendation:

- In accordance with Article 5 (c) CERD, States should adopt affirmative recruitment policies to ensure adequate representation of all communities in all sectors of the criminal justice system, including police forces and other law enforcement agencies, but also social workers, prosecution agencies and courts.

¹²⁴ Durban Programme of Action, 8 September 2001, para 74.

¹²⁵ CERD, *General Recommendation XXVII on discrimination against Roma*, 16 August 2000, para 15; *General Recommendation XXIX on article 1, paragraph 1 of the Convention (Descent)*, 1 November 2002, para 5 (x).

VIII. ERADICATION OF STRUCTURAL/INSTITUTIONAL DISCRIMINATION

Many judicial systems suffer from so-called **institutional racism**. This can be described as “the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people”.¹²⁶ In order to eradicate this impediment to a proper dispatch of criminal justice, States should, as a first step, acknowledge this phenomenon and begin serious public discussions on it, including a wide range of actors and experts.

1. Training programmes

As has been repeatedly made clear throughout this paper, training programmes on effective methods to eradicate racial discrimination should be made available at all levels of the criminal justice system. Personnel involved in the criminal justice administration must be adequately trained on the particular difficulties faced by racial or other minorities in the administration of criminal justice. Generally, diversity training should underline the value of a diversified society, be aimed at eradicating pre-conceived ideas against any racial or other group, and train all actors to avoid the use of inappropriate or offensive language. It should make clear that a racist officer is an incompetent officer.¹²⁷

Local community representatives, representatives of marginalized communities and NGOs should be involved in the preparation and the implementation of training programmes. However, States may not circumvent or diminish their own duty to carry out training by delegating it to non-state actors.

2. National Plans of action, directives, guidelines

States should implement national plans of action, strategies or similar procedures, in order to eradicate discrimination in a structural manner. These long term strategies should include setting goals, performance areas, and indicators so as to assess progress. Guidelines should include the areas mentioned below in the elements for a General Recommendation.¹²⁸

3. Independent monitoring mechanism

An independent monitoring agency should be set in place to supervise and assess progress of national plans of actions, guidelines and directives against racial discrimination, as well as to detect undisclosed phenomena of racial discrimination and make recommendations for improvement and change.

The mechanism should be composed of independent experts on racial discrimination, xenophobia, minority, indigenous or other related issues, as the case may be. Such a mechanism would not replace the right to a remedy before courts. It should follow a more regular system of supervision, including *ad hoc* and unannounced inspections of all

¹²⁶ *Report on the Stephen Lawrence Inquiry* (above note 101), para 6.34.

¹²⁷ *Ibid*, Recommendation 48 (b).

¹²⁸ See also *ibid*, Recommendation 2.

places of detention (police stations, prisons, or other relevant institutions). It should have the power to make recommendations, and the power to submit cases to courts on behalf of persons concerned.

It is difficult to conceive of a supervision of the judiciary in terms of racial discrimination, as the judiciary enjoys full independence from the other state powers. However, judges are subject to the law and states should enact laws which encourage/obligate the judiciary to pay heed to the imperative of avoiding discriminatory behaviour. The judiciary could have focal points or similar mechanisms to pay attention to the question of discrimination.

Elements for a General Recommendation:

- Where it exists, States should acknowledge the phenomenon of institutional racism or xenophobia and begin serious public discussion to eradicate it.
- Appropriate arrangements for communication and constructive dialogue must be found between the authorities of the criminal justice system (especially the police) and associations of different communities with a view to combating racial prejudice and racially motivated violence and to building trust.
- Training programmes should exist at all levels of the criminal justice system, from the law enforcement forces to the judiciary. Representatives of marginalized communities and NGOs should participate in the development and implementation of training programmes, without prejudice to the States duty to take positive action.
- In particular, police officers must be adequately trained to avoid police arrests and custody or any other treatment based on racial bias. They must be provided with clear directives and guidelines prohibiting acts of racial discrimination. It should be made clear in the guidelines and directives on the prohibition of discrimination that such acts constitute, as a rule, a cause for dismissal.
- States should implement national plans of action, strategies or similar procedures, in order to eradicate discrimination in a structural manner. These long term strategies should include setting goals, performance areas, and indicators so as to assess progress. They should provide for guidelines on areas including:
 - Strategies for the prevention, recording, investigation and prosecution of racist or xenophobic incidents;
 - Measures to encourage reporting of racist or xenophobic incidents;
 - The number of recorded racist incidents and related detection levels;
 - The number of arrest and searches concerning different communities;
 - The level of satisfaction of all communities with the services provided by the administration of justice;
 - Victims and witness protection measures;
 - Recruitment and promotion of persons belonging to discriminated communities.
- An independent monitoring agency should be set in place to supervise and assess progress of national plans of actions, guidelines and directives against racial discrimination, as well as to detect undisclosed phenomena of racial discrimination and make recommendations for improvement and change.

- Moreover, all authorities of the criminal justice system should be subject to systematic monitoring by an independent body. The mechanism must be adapted to the specific authority (police, prosecution officers, judiciary, *etc.*).

IX. COLLECTION OF INFORMATION

One of the major problems of discrimination in the administration of justice is the lack of information, and the difficulty in proving racist or xenophobic motivation in the action of authorities. Discrimination cannot be fought without such basic information on patterns of discrimination in the procedures of arrest, custody, prosecution, conviction and sentencing. It is important that States collect such data in order to begin the process of eradicating racial discrimination.¹²⁹ It must be insisted, however, that data on racial and ethnic factors must be used in a non-discriminatory way. It may not be used to reinforce racial prejudice.¹³⁰

Elements for a General Recommendation:

Quantitatively and qualitatively meaningful data should be collected on:

- Patterns of offences committed by persons belonging to different communities and the root causes for these patterns.
- Attitudes of the police, both security and investigating police with regard to different communities.
- The needs of prisoners of different communities, including foreign prisons.
- State-induced deterrents to report racist or xenophobic crimes committed by police officers or other state actors.
- Multiple discrimination faced by women of racial or other minorities.
- Customary justice and traditional tribunals, their recognition and implementation in domestic legal system and their compliance with international human rights.
- Racial, ethnic, national and other diversity in legal professions.
- The number and nature of reports on police abuse and the results of investigations and disciplinary or criminal measures.

¹²⁹ The Committee regularly asks for data on racial discrimination in the criminal justice system: *Conclusions on Côte d'Ivoire*, 3 June 2003, CERD/C/62/CO/1, para 17; *Conclusions on Ecuador*, 2 June 2003, CERD/C/62/CO/2, para 17; *Conclusions on Morocco*, 5 June 2003, CERD/C/CO/5, para 13; *Conclusions on Tunisia*, 2 June 2003, CERD/C/62/CO/10, para 10; *Conclusions on Albania*, 10 December 2003, CERD/C/63/CO/1, para 26; *Conclusions on Bolivia*, 10 December 2003, CERD/63/CO/2, para 17; *Conclusions on Cape Verde*, 10 December 2003, CERD/C/63/CO/3, para 16; *Conclusions on Iran*, 10 December 2003, CERD/C/63/CO/6, para 16; *Conclusions on Latvia*, 10 December 2003, CERD/C/63/CO/7, para 11; *Conclusions on Republic of Korea*, 10 December 2003, CERD/C/63/CO/9, para 8; *Conclusions on Finland*, 10 December 2003, CERD/C/63/CO/5, para 17.

¹³⁰ See Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E/CN.4/2000/16, 10 February 2000, para 37.