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**EL RACISMO, LA DISCRIMINACIÓN RACIAL, LA XENOFOBIA Y
LAS FORMAS CONEXAS DE INTOLERANCIA - SEGUIMIENTO Y
APLICACIÓN DE LA DECLARACIÓN Y EL PROGRAMA DE
ACCIÓN DE DURBAN**

**Informe del Relator Especial sobre las formas contemporáneas de
racismo, discriminación racial, xenofobia y formas
conexas de intolerancia, Doudou Diène***

Adición

MISIÓN A LOS ESTADOS UNIDOS DE AMÉRICA**

* Documento presentado con retraso.

** El resumen del presente documento se distribuye en todos los idiomas oficiales. El informe propiamente dicho, que figura en el anexo del resumen, se distribuye únicamente en el idioma en que se presentó.

Resumen

Por invitación del Gobierno, el Relator Especial visitó los Estados Unidos de América del 19 de mayo al 6 de junio de 2008. Durante la misión, el Relator Especial visitó Washington D.C., Nueva York, Chicago, Omaha, Los Ángeles, Nueva Orleans y la Costa del Golfo en Louisiana y Mississippi, Miami y San Juan de Puerto Rico.

El Relator Especial mantuvo amplias reuniones con instituciones estatales, en particular la Corte Suprema, organizaciones de la sociedad civil que trabajan en la esfera de la lucha contra el racismo, comunidades minoritarias y víctimas del racismo.

El Relator Especial formula varias recomendaciones, entre ellas que:

- a) El Congreso establezca una comisión bipartidista para evaluar los progresos y las deficiencias en la lucha contra el racismo y el actual proceso de resegregación, en particular en materia de vivienda y educación, y para encontrar formas de rectificar estas tendencias;
- b) El Gobierno vuelva a evaluar la legislación existente sobre el racismo, la discriminación racial, la xenofobia y las formas conexas de intolerancia teniendo presentes dos grandes directrices: hacer frente al carácter redundante de la pobreza y la raza o la pertenencia étnica; y vincular la lucha contra el racismo a la construcción de un multiculturalismo democrático, igualitario e interactivo, a fin de fortalecer las relaciones entre las comunidades;
- c) El Gobierno redoble sus esfuerzos por hacer cumplir las leyes federales en materia de derechos civiles;
- d) El Gobierno aclare a los funcionarios encargados de la aplicación de la ley que están obligados a dar un trato igualitario y, en particular, que la discriminación por establecimiento de perfiles raciales está prohibida.

Anexo

**REPORT SUBMITTED BY THE SPECIAL RAPPORTEUR
 ON CONTEMPORARY FORMS OF RACISM, RACIAL
 DISCRIMINATION, XENOPHOBIA AND RELATED
 INTOLERANCE, DOUDOU DIÈNE, ON HIS MISSION TO
 THE UNITED STATES OF AMERICA (19 May-6 June 2008)**

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Introduction

1. At the invitation of the Government, the Special Rapporteur visited the United States of America from 19 May to 6 June 2008 ((Washington, D.C., New York, Chicago, Omaha, Los Angeles, New Orleans and the Louisiana and Mississippi Gulf Coast, Miami and San Juan, Puerto Rico). He held extensive meetings with federal authorities at the executive, legislative and judicial branches as well as with local authorities (see appendix).

2. Apart from the agenda with state institutions, including the Supreme Court, the Special Rapporteur also had extensive meetings with civil society organizations active in the area of racism and xenophobia, minority communities as well as victims of racism and racial discrimination.

3. The Special Rapporteur wishes to express his gratitude to the Government of the United States for its full cooperation and openness throughout the visit as well as a particular appreciation to Justice Stephen Breyer at the Supreme Court. He also wishes to express his sincere thanks to all civil society organizations that actively participated and contributed to the success of his mission. In particular, he wishes to thank Global Rights for its support throughout the mission.

I. GENERAL BACKGROUND

A. Historical and political context

4. The first inhabitants of North America are believed to have arrived crossing from the Bering Strait towards the end of the last Ice Age. Before the advent of European explorers in the late 15th century, a population of one to two million people is believed to have populated North America. Epidemic diseases brought by the Europeans and violence obliterated many Native American peoples.

5. The United States of America became an independent State after the American Revolutionary War (1775-1783). The three documents that emerged from independence – the Declaration of Independence (1776), the United States Constitution (1787) and the Bill of Rights (1791) – are among the first formal legally-binding documents recognizing inalienable individual rights such as freedom of religion, freedom of expression and freedom of assembly.

6. The contradictions between the agrarian and slave-based South and the manufacturing, liberalizing and generally anti-slavery North exploded when the Republican candidate, Abraham Lincoln, won the 1860 presidential election. By that time, 4 million slaves and 488,000 free blacks lived in the United States alongside 27 million whites. While the American Civil War (1861-1865) brought about the legal end of slavery and the adoption of the fourteenth amendment to the Constitution, including the equal protection clause, differential treatment to blacks living in the South would continue well into the twentieth century. Jim Crow laws were enacted in many States, legitimated by the “separate but equal” doctrine legitimated by the Supreme Court in *Plessy v Ferguson*.

7. The “separate but equal” doctrine remained until the emergence of the civil rights movement in the mid-twentieth century. Though the starting point of the movement is difficult to

trace, the landmark decision by the Supreme Court on *Brown v Board of Education* in 1954, striking down racial segregation in schools, certainly had a fundamental impact in unleashing the changes that took place in subsequent years. The movement culminated in the adoption of the Civil Rights Act of 1964, a milestone document that set the institutional framework for the protection of human rights in contemporary United States of America.¹

B. Demographic, ethnic and religious composition

8. According to the U.S. Census Bureau, in 2006 the United States had a population of around 299 million, composed as follows: 73.9 percent white, 12.4 percent black or African American, 4.4 percent Asian, 0.8 percent American Indian and Alaska Native, 0.1 percent Native Hawaiian and other Pacific Islander, 6.3 percent of other races and 2 percent of people with two or more races. The U.S. Census Bureau correctly does not define Hispanic or Latinos as a race, as individuals of South and Central American origin may be of any race. In 2006 Hispanics or Latinos composed 14.8 percent of the population.²

9. In 2007, the foreign-born population in the United States (those not U.S. citizens or U.S. nationals at birth) amounted to approximately 38 million people, or 12.6 percent of the total population.³ 42.5 percent of those foreign born residents were naturalized citizens. Out of the foreign born population, 47.5 percent are Hispanics, 23.4 percent are Asians, 20.3 percent are non-Hispanic whites and 7.8 percent are blacks.

C. International human rights instruments

10. The United States is party to the International Covenant on Civil and Political Rights (ICCPR),⁴ the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and other international human rights instruments. With respect to both the ICCPR and the ICERD, the United States has adopted a number of formal reservations, understandings and declarations. In the case of ICERD, with respect to Articles 4 and 7, and in the case of ICCPR, with respect to Article 20, the United States has taken treaty reservations to these provisions, explaining that their scope is at odds with the extensive protections contained in the U.S. Constitution and U.S. laws in the areas of individual freedom of speech, expression and association.

¹ Other relevant legislation adopted in this period also included the Voting Rights Act of 1965.

² U.S. Census Bureau, *2006 American Community Survey*.

³ U.S. Census Bureau, *Current Population Survey Annual Social and Economic Supplement*, 2003. For additional data, see the Government's responses to Questions Put By the Rapporteur in Connection with the Consideration of the Combined Fourth, Fifth and Sixth Periodic Reports of the United States of America (CERD/C/USA/6) (available at www2.ohchr.org/english/bodies/cerd/docs/AdvanceVersions/wrusa72.pdf); pp.1-6.

⁴ On ICCPR, the United States has a reservation on, inter alia, Article 20 on limitations on freedom of expression.

D. Methodology

11. The Special Rapporteur carried out extensive meetings with authorities at the executive, legislative and judiciary branches to collect their views and opinions as well as information concerning government programmes, legislation and judicial decisions. Additionally, an agenda with civil society organizations, communities and associations representing minority groups, victims of discrimination, journalists and student leaders was organized.

12. The Special Rapporteur structured his meetings around three questions: (i) Is there still racism, racial discrimination, xenophobia and related intolerance in the United States? (ii) If so, who are their main victims and what are their main manifestations and expressions? (iii) What are or should be the governmental policies and programmes to fight these phenomena at the political, legal and cultural levels?

II. LEGAL FRAMEWORK

13. The fourteenth amendment of the Constitution, adopted on the aftermath of the Civil War, contains an Equal Protection Clause that formally recognizes the principle of equality before the law. It provides that “[No State shall] *deny to any person within its jurisdiction the equal protection of the laws*”. The fifteenth amendment, ratified on 3 February 1870, further extends the right to vote to all races.

14. The civil rights movement in the 1960s led to the signature by President Lyndon B. Johnson of the Civil Rights Act in 1964. The Act constitutes a historic landmark in the elimination of *de jure* racial discrimination in the country and to set up the institutional and legal structure to combat discrimination. The Act also set up the Commission on Civil Rights, which was mandated to inter alia investigate denials of the right to vote, study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution and appraise the laws and policies of the Federal Government in this regard.⁵ The Act was further complemented by the Civil Rights Act of 1968, which prohibited discrimination in the sale, rental, and financing of housing.

15. The enforcement of non-discrimination provisions of the Constitution and federal legislation is primarily carried out by the Civil Rights Division at the Department of Justice, which is composed of over 700 staff. The Civil Rights Division carries out enforcement actions in areas that include criminal cases, disability rights, education, employment, housing and voting. Other Federal agencies are also involved in the enforcement of equal protection legislation, such as the Equal Employment Opportunity Commission and the Office of Fair Housing and Equal Opportunity at the Department of Housing and Urban Development.

⁵ See Title V, Section 504 of the Civil Rights Act.

III. PUBLIC POLICIES AND MEASURES TO FIGHT RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE

A. Law enforcement

16. Law enforcement in the United States involves agencies at the federal, state and local levels. While the Special Rapporteur met with several officials at the local level, his analysis is based primarily on agencies, and policies developed, at the Federal level.

17. Racial discrimination by law enforcement agencies is prohibited by the Constitution and federal statutes.⁶ These include the Violent Crime Control and Law Enforcement Act of 1994 and the Omnibus Crime Control and Safe Streets Act of 1968. Officials at the Civil Rights Division of the Department of Justice underscored the fundamental importance that it attaches to combating police misconduct, including racial discrimination by police officers, which amounts to approximately half of its Criminal Section's caseload.

18. Officials at the Civil Rights Division as well as at the Department of Homeland Security highlighted the importance of training of law enforcement officials. A Federal Law Enforcement Training Center exists since 1970 and currently provides law enforcement training to over 80 Federal agencies. Particular trainings focusing on cultural awareness and relations with minority communities have also been developed.

19. In what concerns overrepresentation of minorities in the criminal justice system, it was recognized that disparities in incarceration rates exist between minorities, particularly African Americans, and whites. However, as the United States affirmed in its latest periodic report to the Committee on the Elimination of Racial Discrimination (CERD), the reasons for such disparities are complex and do not necessarily indicate differential treatment of persons in the criminal justice system.⁷

Racial profiling

20. The Supreme Court has produced solid jurisprudence prohibiting racial profiling. For example, in *Wren v. United States* (1996), the Court stated that “the Constitution prohibits selective enforcement of the law based on considerations such as race”, making explicit reference to the Equal Protection Clause. In *United States v. Armstrong* (1996), repeating *Oyler v. Boles* (1962), the Court further affirmed that “the decision whether to prosecute may not be based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification’”. The ruling in *United States v. Montero-Camargo* (1996) further cautioned against the use of factors that are facially race-neutral but in effect can be discriminatorily used against minorities (e.g. searches against individuals living in “high-crime” areas that are also predominantly inhabited by minorities).

⁶ See CERD/C/USA/6, para. 153.

⁷ CERD/C/USA/6, para. 165.

21. In June 2003, responding to a call made by President Bush in his State of the Union address in 2001, the Department of Justice issued a *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* prohibiting the use of race or ethnicity in law enforcement practices, the first time such guidelines have been issued. The guidance was formally adopted by the Department of Homeland Security in June 2004. Officials at the Civil Rights Division highlighted that the guidelines were also incorporated in the training modules that all law enforcement officials have to undergo. While officials recognized that the guidelines do not create rights that can be affirmed in court, they highlighted that racial profiling violates the equal protection clause of the Constitution, which therefore offers overarching protection against this practice.

B. Hate crimes

22. According to the U.S. Criminal Code, crimes motivated by race, color, religion or national origin can be investigated and prosecuted by federal authorities only when the crime occurs because of the victim's participation in a federally protected activity (e.g. public education, employment, etc).⁸ In cases that do not meet the latter requirement, the jurisdiction lies at the state level. Apart from federal regulations, 47 states have laws on hate crimes.

23. The number of hate crimes reported in the United States has decreased from 8,063 reported incidents in 2000 to 7,624 reported incidents in 2007, a fact that was highlighted by officials at the Civil Rights Division. The trend in the past two years is however the opposite, with a 6 percent increase from 2005 to 2007. In 2001, a peak of 9,730 such incidents was reached (a 20 percent increase in comparison to 2000), which the FBI Hate Crimes Statistics relates to the aftermath of 9/11. The number of yearly reported incidents fell back to its normal trend from 2002.

24. In 2007, 3,642 incidents (48.8 percent of total) were motivated by race (68 percent of which were anti-Black); 1,426 incidents (19.1 percent of total) were motivated by religion (65.2 percent of which were anti-Jewish and 10.8 percent anti-Islamic); and 1,102 incidents (14.7 percent of total) were related to ethnicity or national origin (43.5 percent of which were anti-Hispanic).⁹

25. Officials highlighted the prompt and decisive action of the Civil Rights Division in the aftermath of 9/11 by quickly bringing a number of cases against perpetrators of hate crimes. In particular, 32 "9/11 backlash" cases were brought, involving 42 offenders, 35 of whom were convicted. This response, which involved cooperation with state and local officials, is considered as a key factor in explaining the rapid drop in the number of hate crimes after the peak reached in the aftermath of 9/11.

⁸ See 18 U.S.C. 245. Other statutes related to hate crimes include conspiracy against rights (18 U.S.C. 241), damage to religious property (18 U.S.C. 247c), criminal interference with the right to fair housing (18 U.S.C. 3631) and criminal interference with voting rights (42 U.S.C. 1973).

⁹ Federal Bureau of Investigation, *Hate Crime Statistics* (2000-2007).

C. Education

26. Educational policy at the federal level is carried out by the Department of Education. An Office for Civil Rights within the Department is mandated “to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights”. This Office enforces several federal laws that prohibit discrimination, including Titles VI of the Civil Rights Act of 1964 (discrimination on the basis of race, color and national origin). The Office for Civil Rights enforces this law in all institutions, including elementary and secondary schools, colleges and universities that receive funds from the Department of Education.

27. An important piece of federal legislation in the domain of education is the No Child Left Behind Act, which was enacted by Congress in 2002. One of its key objectives is to promote more accountability in public schools and to improve the performance of students. In this regard, it also explicitly addresses the need to close the achievement gap between white and minority students.¹⁰ Recent data indicates that although the achievement gap is still large, it has narrowed in recent years.¹¹

D. Housing

28. Extensive legislation to prevent discrimination on housing and lending has been set up over the past decades. This includes the Fair Housing Act (Title VIII of the Civil Rights Act of 1968), which prohibits discrimination in the sale, rental or financing of housing on the basis of race, color, religion, sex, familial status or national origin. The Act expanded the protections offered by the Civil Rights Act of 1964 (Title VI), which prohibited discrimination in programs and activities receiving federal financial assistance but refrained from regulating private conduct in the domain of housing.

29. Federal laws on fair housing are administered and enforced by the Office of Fair Housing and Equal Opportunity (FHEO) at the Department of Housing and Urban Development (HUD). The number of complaints filed with HUD and the Fair Housing Assistance Program (which provides grants to State and local fair housing enforcement agencies) has increased substantially in the last ten years, from 5,818 complaints in 1998 to 10,154 in 2007. However, it is not evident whether this reflects an increase in housing discrimination or better knowledge of fair housing laws and willingness to report cases of discrimination. In 2007, 43 percent of complaints were based on disability, 37 percent on race, 14 percent on family status and 14 percent on national origin.¹²

30. The Special Rapporteur was informed of a number of programs carried out by HUD to promote equal housing opportunity, including financial assistance to public and private

¹⁰ Department of Education, *How No Child Left Behind Benefits African Americans, Hispanics and American Indians*, <http://www.ed.gov/nclb/accountability/achieve/edpicks.jhtml?src=az>.

¹¹ Source: National Center for Educational Statistics.

¹² Department of Housing and Urban Development, *The State of Fair Housing 2007*, pp. 4-5.

institutions carrying out monitoring and enforcement activities of fair housing laws. HUD also has a constant output of relevant research and advocacy materials, which are used not only to raise awareness regarding existing legislation, but also to monitor and inform relevant stakeholders regarding emerging trends and challenges.

31. The Civil Rights Division at the Department of Justice also carries out enforcement of fair housing laws. As an example of the role played by the Division, the Special Rapporteur was informed of two initiatives. The Fair Housing Testing Program uses paired testing techniques to detect cases of discrimination in the housing market. In addition, by launching operation *Home Sweet Home* in 2006, the Department of Justice committed to conduct a record number of tests to expose and combat discriminatory practices in housing.

E. Employment

32. Discrimination related to employment on the basis of race, color, religion, sex, or national origin is prohibited under the Civil Rights Act of 1964 (Title VII). The enforcement of these provisions, along with other legislation prohibiting employment discrimination is conducted by the Equal Employment Opportunity Commission (EEOC). The EEOC has a total staff of some 2200 employees in 52 offices throughout the country and a budget of around US\$ 330 million, which allows it to file around 80,000 charges per year. In 2007, charges related to employment discrimination based on race were 37 percent of the total whereas national origin represented 11.4 percent of all charges.

33. In his meeting with the Vice-Chair of EEOC, the Special Rapporteur was informed about the E-RACE Initiative (Eradicating Racism and Colorism from Employment). The Initiative has some clearly defined goals, including to improve data collection in order to better identify, investigate and prosecute allegations of discrimination, improve the quality of EEOC's litigation, develop strategies to tackle emerging issues of race and color discrimination, promote voluntary compliance to eradicate race and color discrimination.

34. The EEOC also shared with the Special Rapporteur some of the issues of concern for the Commission. Particular emphasis was placed on the emergence of subtle forms of discrimination, which are harder to identify and to act upon. Reference was also made to the persistence of discrimination and the consistency in the number of racial discrimination charges filed every year since 1964.

35. The Special Rapporteur also met, at the Department of Labor, with the Assistant Secretary for Employment Standards and the Civil Rights Enforcement Division. The Department enforces compliance of federal contractors to laws that prohibit discrimination. The Special Rapporteur was informed that the Department plays an active role in investigating federal contractors rather than simply responding to complaints. It also develops partnerships with the EEOC and other bodies to improve enforcement actions.

F. Measures to prevent discrimination in the aftermath of the events of 11 September 2001

36. Many officials have noted symbolic and concrete actions taken to prevent discrimination against people of Arab and Muslim descent in the aftermath of 9/11, starting with the remarks

made by President Bush during a visit to the Islamic Center on 17 September 2001.¹³ These community outreach efforts were described as a best practice in the fight against terrorism by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in his report on the United States.¹⁴

37. The Special Rapporteur was briefed on the *Initiative to Combat Post 9/11 Discriminatory Backlash*, designed by the Department of Justice to combat violations of civil rights against Arab, Muslim, Sikh and South-Asian Americans.¹⁵ Key strategies within this programme include measures to ensure that cases of discrimination are reported and handled promptly, identifying policies that might involve bias crimes and discrimination and reaching out to affected communities to inform them of existing mechanisms. Two special positions were created at the Civil Rights Division: a Special Counsel for Post 9/11 National Origin Discrimination and a Special Counsel for Religious Discrimination.

38. Experts from the Department of Homeland Security also highlighted some initiatives developed after 9/11 to prevent discrimination against people of Arab and Muslim descent. Reference was made to the *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*, in particular its provision that “in investigating or preventing threats to national security or other catastrophic events [...] Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States”. The Special Rapporteur was also informed of the Traveller Redress Inquiry Program, which allows the public to clarify problems of misidentifications with individuals placed on watch lists.¹⁶

G. Measures taken in the aftermath of Hurricane Katrina

39. Since the Special Rapporteur received allegations concerning possible racial bias in reconstruction efforts in the aftermath of Hurricane Katrina, he raised the issue with several Government authorities in order to collect additional information from some of the federal agencies and visited affected areas.

40. The Civil Rights Division of the Department of Justice highlighted its proactive role in the aftermath of Katrina, reflected in the launching of Operation Home Sweet Home in February 2006. While the initiative had a nationwide focus, it initially concentrated on the areas where Katrina victims were relocated, increasing the reach of its testing programme to identify

¹³ President Bush stated that “Islam is peace. [...] When we think of Islam we think of a faith that brings comfort to a billion people around the world. [...] Women who cover their heads in this country must feel comfortable going outside their homes”. <http://www.usdoj.gov/crt/legalinfo/bushremarks.php>.

¹⁴ See A/HRC/6/17/Add.3.

¹⁵ http://www.usdoj.gov/crt/legalinfo/nordwg_mission.php.

¹⁶ http://www.dhs.gov/xtrvlsec/programs/gc_1169676919316.shtm.

cases of housing discrimination. Emphasis was also placed in areas where a surge of hate crimes had occurred, as these crimes are often correlated with housing discrimination.¹⁷

41. The Department of Housing and Urban Development noted actions developed to provide adequate housing to those displaced by Katrina. These include additional disaster-relief funding for the affected areas; limited extensions of a foreclosure moratorium; grants for home-owners whose houses were damaged or destroyed; and funding to local public housing projects. The Office of Fair Housing and Equal Opportunity at HUD also developed proactive actions to raise awareness in the Gulf coast region about fair housing obligations, in cooperation with the Federal Emergency Management Agency (FEMA), which leads relief efforts.

42. The Special Rapporteur also makes reference to the United States latest periodic report to CERD, which analyzed concerns about the disparate effects of Katrina on racial or ethnic minorities. In the report, the United States stated that “recognizing the overlap between race and poverty in the United States, many commentators conclude nonetheless that the post-Katrina issues were the result of poverty (i.e., the inability of many of the poor to evacuate) rather than racial discrimination *per se*”.¹⁸

H. Immigration

43. The Special Rapporteur met with the Office of Citizenship at the U.S. Citizenship and Immigration Service (CIS), and was briefed concerning CIS’s policy to reinvigorate assimilation efforts, particularly in what concerns English proficiency of migrants. Officials pointed out that they viewed assimilation of migrants into the United States as a key element for integration into the labor market, the educational system and social life more broadly, but this did not imply the abandonment of cultural or religious diversity, upon which the United States was founded. The Special Rapporteur was informed that CIS had intensified its efforts to diminish the backlog in citizenship applications and thus respond more rapidly to applicants.¹⁹

44. CIS officials referred to the naturalization exam, which has been recently reformed in order to become more uniform nationwide. The naturalization test contains an English reading and writing section as well as questions on U.S. history and government. CIS produces and distributes study materials to help immigrants prepare for the test. Information guides are also

¹⁷ See speech by Principal Deputy Assistant Attorney-General Rena Comisac in Jackson, Mississippi on 12 July 2006. Available at http://www.usdoj.gov/crt/speeches/rc_speech_july_12_2006.php.

¹⁸ CERD/C/USA/6, para. 255.

¹⁹ See, for example, U.S. Citizenship and Immigration Services, *Backlog Elimination Plan: Fiscal Year 2006, 3rd Quarter Update*. Available at http://www.uscis.gov/files/article/backlog_FY06Q3.pdf.

available to new immigrants with information on rights and responsibilities as well as practical help on issues such as employment education and taxes.²⁰

45. Immigrants are entitled to some constitutionally-protected rights regardless of their immigration status. In *Plyler v. Doe*, the Supreme Court established that denying free public education to children on the basis of immigration status is unlawful. Furthermore, although the Immigration and Nationality Act protects only documented migrants from employment discrimination, unfair documentary practices and retaliation, EEOC noted several judicial decisions that prevent courts from disclosing the immigration status of plaintiffs in employment discrimination cases.

IV. VIEWS OF CIVIL SOCIETY AND COMMUNITIES CONCERNED

A. Law enforcement

46. One of the key issues mentioned by civil society was the weak record of civil rights enforcement by the Federal Government. In particular, reference was made to the limited number of cases filed by the Civil Rights Division of the Department of Justice, especially when compared to previous administrations. This has led to a growing perception of discredit by civil society organizations in the Division's commitment to enforce civil rights laws.

Racial disparities in the criminal justice system

47. The most critical issue of concern raised by civil society organizations, minority communities and victims themselves was related to racial disparities in the criminal justice system. Interlocutors pointed to an overrepresentation of individuals belonging to racial and ethnic minorities in the criminal justice system. While in mid-2007 black males constituted around 12.5 percent of the population, they comprised 38.9 percent of the number of people in U.S. prisons and jails.²¹ Black males are therefore 6.5 more likely to be incarcerated than white, non-Hispanic males. While many civil society organizations agreed that part of the explanation to these disparities is related to social factors, particularly the overlap of poverty and race, it was pointed out that racial discrimination also plays a key role in explaining this phenomenon.

48. Studies have identified racial disparities at several stages of law enforcement activities. A key example is traffic stops. A report by the Department of Justice recently found that whereas white, black and Hispanic drivers were stopped by the police at similar rates, black and Hispanic drivers were approximately 2.5 times more likely to be searched; the rate of arrests was two times higher for blacks and 50 percent higher for Hispanics; blacks were 3.5 times more likely

²⁰ See U.S. Citizenship and Immigration Services. *Welcome to the United States: A Guide for New Immigrants*. Available at <http://www.uscis.gov/files/nativedocuments/M-618.pdf>.

²¹ See U.S. Census Bureau, *Annual Estimates of the Population by Sex, Race, and Hispanic Origin for the United States: April 1, 2000 to July 1, 2007* and Bureau of Justice Statistics, *Prison Inmates at Midyear 2007*.

and Hispanics were almost 2 times more likely to experience use of police force.²² Another example concerns sentencing outcomes. A majority of studies show evidence of racially discriminatory sentencing; in particular, that individuals belonging to minorities tend to be disadvantaged in terms of the decision to incarcerate or not and in receiving harsher sentences than white individuals with comparable social and economic status.²³

49. Mandatory minimum penalties have been pointed out as an important factor that promotes racial bias. A striking example refers to mandatory minimum sentences for possession of crack and powder cocaine. These sentences establish more severe penalties for persons arrested for possessing or selling crack cocaine, 81 percent of whom are African American, than for those in possession of or selling powder cocaine, 71.8 percent of whom are white or Hispanic.²⁴

50. Civil society also pointed to evidences of racial bias in the application of the death penalty. In 2005, African Americans comprised nearly 42 percent of the number of death row inmates but only around 12 percent of the general population.²⁵ The key factor that shows evidence of racial bias in the death penalty, according to many organizations, is the race of the victim. Nationwide, even though the absolute number of murders of blacks and whites is similar, some 80 percent of people on death row have been convicted of crimes against white victims.²⁶ Interlocutors pointed to the critical situation in some states. In Alabama, for example, whereas 65 percent of all murders involve black victims, 80 percent of people currently awaiting execution in the state were convicted of crimes in which the victims were white.

²² Bureau of Justice Statistics, *Contacts between Police and the Public, 2005*, published in April 2007. Available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp05.pdf>.

²³ Sentencing Project, *Racial Disparity in Sentencing: A Review of the Literature*. Published in January 2005. Available at http://www.sentencingproject.org/Admin/Documents/publications/rd_sentencing_review.pdf.

²⁴ The average sentence for possession of less than 25 grams of powder cocaine is 14 months whereas the average sentence for the possession of less than 25 grams of crack cocaine is 65 months. See The Sentencing Project, *Federal Crack Cocaine Sentencing*, p.2, available at http://www.sentencingproject.org/Admin/Documents/publications/dp_cracksentencing.pdf. See also Amnesty International, *USA: Amnesty International's briefing to the Committee on the Elimination of Racial Discrimination*, p. 6.

²⁵ Bureau of Justice Statistics, *Capital Punishment Statistics*. Available at <http://www.ojp.usdoj.gov/bjs/cp.htm>.

²⁶ Amnesty International, *Death by discrimination – the continuing role of race in capital cases*, pp. 5-6.

51. Juvenile justice was an issue of concern for civil society organizations, particularly when it represents an entry point into criminal justice (see subsection III.C). The rate of detention of youth in 2003 was five times higher for African Americans and two times higher for Hispanics than for whites.²⁷ The Special Rapporteur was also presented with data concerning the disproportional representation of African American youth in several stages of the juvenile justice process, including arrests, detentions, petitions and prison.²⁸ Reference was made to the issue of sentencing of youth to life without parole, which is applied in 39 states, as well as on reported racial bias in these practices, particularly in certain states. In the 25 states for which data is available the rate of African Americans serving life without parole sentences is on average 10 times higher than whites, relative to the state population. In California, the rate is 18 times that of white youth. Even after controlling for differences in murder arrest rates, racial disparities remain.²⁹

Racial profiling

52. Civil society generally refers to two main forms of racial profiling. First, a particular form of the practice targets predominantly African-American or Hispanic minorities, generally but not exclusively in stops and searches by local and state police.³⁰ Second, in the context of counter-terrorism policies, racial profiling practices have reportedly targeted primarily people of Arab, Muslim, South Asian or Middle-Eastern descent, particularly in air travel and border control.

53. Some civil society accounts point to widespread existence of racial profiling. It has been suggested that approximately 32 million people in the United States report having been victims of this practice.³¹ While exact numbers may be difficult to assert, it was a common recognition among virtually all interlocutors that the practice of racial profiling continues to exist. Numerous

²⁷ Sickmund, Melissa, Sladky, T.J., and Kang, Wei, 2005, *Census of Juveniles in Residential Placement Databook*. Quoted in USHRN Working Group on Juvenile Justice, 2008, *Children in Conflict with the Law: Juvenile Justice and the U.S. Failure to Comply with Obligations under the Convention for the Elimination of All Forms of Racial Discrimination*, p. 8. Available at <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN14.doc>.

²⁸ USHRN Working Group on Juvenile Justice, *Children in Conflict with the Law*, p. 6.

²⁹ Human Rights Watch, “*When I Die, They’ll Send Me Home*”: *Youth Sentenced to Life without Parole in California*, p. 26. Published in January 2008. Available at <http://hrw.org/reports/2008/us0108/us0108web.pdf>.

³⁰ As an example, see American Civil Liberties Union of Southern California, 2008, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department*.

³¹ Amnesty International. *Threat and Humiliation: Racial Profiling, Domestic Security and Human Rights in the United States*, p.1. Available at http://www.amnestyusa.org/racial_profiling/report/rp_report.pdf.

anecdotal accounts of victims of racial profiling in stop and search operations by the police were heard, including a testimony by an African American Member of Congress victim of such an incident.

54. Several organizations expressed concern at the National Special Entry-Exit Registration Program (NSEERS), put in place in 2002. The special registration program required male non-citizens over the age of 16 and from 25 countries to register with local immigration authorities. Twenty-four of these countries have a majority Muslim population.³² While the initial requirements of re-registration after 30-days and one year of continuous presence in the United States have been suspended,³³ the program continues to be considered by civil society as discriminatory on the basis of national origin and religious background.

55. Civil society organizations expressed criticisms regarding recent attempts to address the issue. The *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* issued by the Department of Justice was criticized, particular because it “does not cover profiling based on religion, religious appearance or national origin; does not apply to local law enforcement agencies; does not include any enforcement mechanism; does not require data collection; does not specify any punishment for federal officers who disregard it; contains a blanket exception for cases of ‘threat to national security and other catastrophic events’ and ‘in enforcing laws and protecting the integrity of the Nations’ borders’”.³⁴

B. Hate crimes

56. Interlocutors highlighted that the main weakness of federal hate crimes legislation is the dual requirement that needs to be met for the Federal Government to be able to investigate and prosecute a case: bias-motivated violence and relation to a federally protected activity. In cases that do not meet these requirements, the jurisdiction lies at the state level. However, many states lack the capacity and resources to thoroughly investigate and prosecute such crimes. In this regard, a Local Law Enforcement Hate Crimes Prevention Act designed to strengthen the role of the Federal Government in the investigation and prosecution of such crimes and to expand the grounds for protection was approved in the House of Representatives and the Senate in 2007. However, it was withdrawn after an expression by the White House that the President would veto the bill, which was seen as “unnecessary and constitutionally questionable”.³⁵

³² The 25 countries are Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran (Islamic Republic of), Iraq, Jordan, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Morocco, Oman, North Korea, Pakistan, Qatar, Saudi Arabia, Somalia, the Sudan, Syrian Arab Republic, Tunisia, the United Arab Emirates and Yemen.

³³ See press release by the Department of Homeland Security, “NSEERS 30-Day and Annual Interview Requirements to be Suspended”, available at http://www.dhs.gov/xnews/releases/press_release_0306.shtm.

³⁴ Amnesty International. *Threat and Humiliation*.

³⁵ <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr1592sap-h.pdf>.

57. While many interlocutors expressed concern regarding the number of hate crimes in the United States, some NGOs highlighted that the government response has in general been more vigorous than in other countries.³⁶

C. Education

De facto school segregation

58. One of the most important decisions by the U.S. Supreme Court in the fight for racial equality was *Brown v. Board of Education* prohibiting school segregation. However, interlocutors pointed out that despite the end of *de jure* segregation and positive changes, particularly in the 1960-1980 period, the trend has since been reversed. The percentage of black students in predominantly minority schools, which was 77 percent in 1968 and decreased to 63 percent in 1988, had surged to 73 percent in 2005.³⁷ Civil society organizations expressed concern at recent U.S. Supreme Court decisions – *Parents Involved in Community Schools v. Seattle School District* and *Meredith v. Jefferson County Board of Directors* – that ruled that race-conscious integration measures are unconstitutional. In the view of many NGOs, these race-conscious measures are a necessary measure to ensure racial integration and made an essential contribution to de-segregation of schools, particularly in the South. Some organizations also pointed out that the rise of segregation also has an impact on the quality of education received by students belonging to minorities. Furthermore, a concern was expressed that the Court may have abandoned the notion that racial diversity can be considered a compelling interest that justifies the use of race-based criteria. This view is present in the dissenting opinion of Justice Breyer in the *Community Schools* case.³⁸

Achievement gaps

59. Civil society representatives highlighted that while the achievement gap between students belonging to minorities and white students has narrowed in the past years, it is still in a similar level to 1990. The introduction of the No Child Left Behind Act placed high emphasis on educational performance; however, interlocutors highlighted the negative incentives created by the Act and its disproportionate effects on minority children. In particular, it was argued that the focus on standardized performance tests that penalize schools that underperform creates an incentive for schools to push out low-performing, at-risk students – a group that is composed disproportionately of minorities – in order to improve the overall school performance.

³⁶ See, for example, Human Rights First, *The United States: 2008 Hate Crime Survey*.

³⁷ Gary Orfield and Chungmei Lee, 2007, *Historical Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*. Available at http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf.

³⁸ U.S. Supreme Court, *Parents Involved in Community Schools v. Seattle School District*, dissenting opinion by Justice Stephen Breyer.

Schools as an entry point to the criminal justice system

60. Many NGOs used the metaphor of the “school to prison pipeline” to refer to the failure of the school system to educate pupils adequately, serving rather as a conduit to juvenile and criminal justice.³⁹ Among the chief causes of this phenomenon, interlocutors referred to the widespread application of Zero Tolerance Policies, which call for severe punishment for minor infractions. These measures are considered to have gone beyond reasonable policies to prevent violence in school, leading to what is considered to be an overreliance on disciplinary methods (e.g. suspensions and expulsions) and the criminalization of school misbehaviour (i.e. by referring students with non-violent behaviour to juvenile courts). In Texas, for example, “disruptive behaviour” corresponds to 17 percent of school arrests and “disorderly conduct” comprised 26 percent of such arrests.⁴⁰ In meetings with parents of students that were disciplined, the Special Rapporteur was informed of several practices that exist in some school districts, such as the issuing of fines by the police to students with inappropriate behaviour, regular searches and reported cases of excessive use of force by police officers inside schools. Civil society pointed to racial disparities in the application of these disciplinary measures. For example, whereas African-American children represent only 17 percent of public school enrolment, they constitute 32 percent of out-of-school suspensions.⁴¹ Some studies have also indicated that African-American students are more likely than white students to be suspended, expelled or arrested for the same kind of school conduct.⁴²

D. Housing

61. Concerns about fair housing expressed by civil society generally focus on two major issues: direct discriminatory practices and structural factors that have an impact, even if unintended, on the housing situation of minorities.

62. According to interlocutors, direct discriminatory practices in housing continue to exist. Data produced in paired testing, which allows for a comparison of treatment between whites and persons of color when they have similar qualifications, identified subtle forms of direct discrimination. This includes the practice of “steering” members of racial or ethnic groups towards neighbourhoods primarily occupied by those same groups, prohibited under the Fair

³⁹ See, for example, NAACP Legal Defense Fund, *Dismantling the school-to-prison pipeline*, available at http://www.naacpldf.org/content/pdf/pipeline/Dismantling_the_School_to_Prison_Pipeline.pdf; Advancement Project and The Civil Rights Project at Harvard University, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies*, p. 6, available at <http://www.advancementproject.org/reports/opsusp.pdf> and ACLU, *Race and Ethnicity in America*, p. 146.

⁴⁰ ACLU, *Race and Ethnicity in America*, p. 149.

⁴¹ Advancement Project and The Civil Rights Project at Harvard University, *Opportunities Suspended*, p. 6.

⁴² NAACP Legal Defense Fund, *Dismantling the school-to-prison pipeline*, p. 7.

Housing Act.⁴³ Steering practices have generally contributed to a persistence of residential segregation. Direct discrimination has also been detected in rental and sale of houses as well as in mortgage lending, with people of colour being more likely to receive higher cost or subprime loans than white borrowers with similar income and other characteristics.⁴⁴

63. Concerns were expressed that the FHEO, which is the key agency responsible for acting on complaints of housing discrimination, only finds reasonable cause for discrimination in a small number of complaints and that the period of investigation is often surpasses the 100-day mark set by Congress.⁴⁵ It should be noted, however, that a number of cases are resolved through the conciliation and settlement processes which are encouraged under the Fair Housing Act. At the same time, enforcement actions by the Civil Rights Division at the Department of Justice were also criticized due to the limited number of cases it has initiated. Another problem raised by civil society is the large number of unreported cases of fair housing violations due to lack of knowledge of Fair Housing laws. While the Special Rapporteur was informed by HUD of many awareness-raising initiatives, civil society deemed them insufficient to educate the public.⁴⁶

64. A particular dimension of the housing problem highlighted by civil society lies in homelessness. The Special Rapporteur visited the Skid Row area in Los Angeles, interacting with a number of homeless persons and civil society support groups. Interlocutors highlighted the disproportionate impact of homelessness among minorities, particular African Americans, as also highlighted by the Human Rights Committee in its 2006 of the United States periodic report.⁴⁷ This problem is often reinforced by the reduction of funds for the construction of public housing. In addition, relations between law enforcement and homeless persons were also highlighted as an important problem, particularly with regard to the enforcement of minor law enforcement violations which often take a disproportionately high number of African American homeless persons to the criminal justice system.

⁴³ A recent report by the National Fair Housing Alliance described paired tests that showed that in 20 percent of tests, African American or Hispanic testers were denied service or provided limited service by real estate agents. See *2008 Fair Housing Trends Report*, p. 28. Available at <http://www.nationalfairhousing.org/> An increase in steering from 1989 to 2000 was also detected in the Housing Discrimination Study 2000 conducted by HUD.

⁴⁴ See Vikas Bajaj and Ford Fessenden, “What’s Behind the Race Gap”, *New York Times*, 4 November 2007. Quoted in the shadow report *Residential Segregation and Housing Discrimination in the United States* submitted to CERD by Housing Scholars and Research and Advocacy Organizations, p.18. <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN27.pdf>.

⁴⁵ See U.S. General Accounting Office, *Fair Housing: Opportunities to Improve HUD’s Oversight and Management of the Enforcement Process*. Available at <http://www.gao.gov/new.items/d04463.pdf>.

⁴⁶ *Residential Segregation and Housing Discrimination in the United States*.

⁴⁷ See CCPR/C/USA/CO/3, para. 22.

65. The issue of residential segregation was directly observed by the Special Rapporteur, who examined the issue in-depth in his visits outside the capital. Despite some progresses in the 1980-2000 period,⁴⁸ they contributed little to change the overall static patterns of residential segregation in the country. Furthermore, civil society noted that residential segregation has a direct impact on school segregation and that the two problems should be tackled together.

E. Employment

66. Interlocutors stated that ethnic disparities in employment and, more generally, poverty levels have fundamental consequences for the overall situation of racial and ethnic minorities in the United States. Whereas the unemployment rate for non-Hispanic whites in 2007 was 5.2 percent, it was 12.6 percent for American Indians or Alaskan Natives, 12 percent for African-Americans and 7.3 percent for Hispanics.⁴⁹

67. While many interlocutors pointed these disparities in unemployment level as an indication of the interplay of race and socio-economic status, concerns over forms of direct and indirect discrimination in employment were also raised. One of the issues that was raised concerns the legal remedies available to undocumented migrants (see subsection III.h). Another issue of concern regards the lack of protection for certain occupations, particularly domestic and agricultural workers, which disproportionately affect Africa-Americans and Hispanics. In some cases, these occupations may be excluded from the legal protections offered by a number of statutes, such as minimum wages, overtime pay and job safety.

68. Civil society organizations pointed to inadequate enforcement of Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex and national origin, highlighting a the limited number of Title VII cases filed by the Civil Rights Division of the Department of Justice. In particular, reference was made to the low percentage of cases referred to the Civil Rights Division by the EEOC that are actually taken up.

F. Discrimination in the aftermath of the events of 11 September 2001

69. The Special Rapporteur met with several representatives of the Arab, Sikh, Middle Eastern and South Asian communities in the United States to hear their views concerning the situation after 9/11. Their common view was that their situation had deteriorated quickly in the aftermath of 9/11, particularly due to the extension of national security measures that in their view discriminate against these communities. One of the major concerns regards instances of racial profiling, particularly in airports, as well as programs such as NSEERS (see section III.A above).

⁴⁸ See U.S. Census Bureau, *Racial and Ethnic Residential Segregation in the United States: 1980-2000*. Available at http://www.census.gov/hhes/www/housing/housing_patterns/pdf/censr-3.pdf.

⁴⁹ U.S. Census Bureau, 2007 American Community Survey.

70. An increase in cases of discrimination and harassment in the workplace was also reported, not only towards people of Arab or Muslim descent, but also against Sikhs. Serious concern was expressed regarding the long delay in the processing of citizenship applications, which had been disproportionately high for individuals of Arab, Middle Eastern or South Asian descent.⁵⁰

71. More broadly, these organizations referred to overall negative perceptions of the American public towards Muslims. Reference was made to a recent USA Today/Gallup poll that showed that 39 percent of Americans felt at least some prejudice against Muslims and that 22 percent would not want Muslims as neighbors.⁵¹ While a number of organizations welcomed outreach initiatives developed by the Government in the aftermath of 9/11, they expressed the need for comprehensive actions to address issues of stereotyping and concrete policy changes in areas that have a discriminatory impact on individuals of Arab, Sikh, Middle Eastern and South Asian descent.

G. Measures taken in the aftermath of Hurricane Katrina

72. The Special Rapporteur travelled to New Orleans, as well as the Louisiana and Mississippi Gulf coast, in order to hear local civil society, community leaders and residents about their concerns in the aftermath of Katrina. In addition, he visited different neighborhoods that were severely affected by the storm, including the 9th Ward of New Orleans. He also met with the Mayor of New Orleans, with whom he discussed the reconstruction efforts and implications for minorities.

73. Data from the U.S. Census Bureau show the massive impact of Hurricane Katrina in the entire Gulf coast. In the State of Louisiana, 1.3 million people were displaced, with a dramatic depopulation of New Orleans as a whole.⁵² However, data indicate the disproportionately high impact of Katrina for African-Americans. For example, whereas the population of whites in New Orleans decreased approximately 39 percent after Katrina, the population of African-Americans declined around 69 percent. The ethnic makeup of the city also changed: African-Americans formed around 67.3 percent of the population before Katrina and comprised only 58.8 percent after the hurricane.⁵³

⁵⁰ Center for Human Rights and Global Justice, *Americans on Hold: Profiling, Citizenship, and the "War on Terror"*. Available at <http://www.chrgj.org/docs/AOH/AmericansonHoldReport.pdf>.

⁵¹ Quoted in Council of American-Islamic Relations, 2007, *The Status of Muslim Civil Rights in the United States*, p. 6.

⁵² Louisiana Recovery Authority, *Hurricane Katrina Anniversary Data for Louisiana*. Available at <http://lra.louisiana.gov/assets/docs/searchable/LouisianaKatrinaAnniversaryData082206.pdf>.

⁵³ U.S. Census Bureau, 2000 Census and 2006 American Community Survey. In 2000, according to the Census, the white population of New Orleans was 135,956 and the African-American population was 325,947. In 2006, according to the American Community Survey, the white population was estimated at 82,107 and the African-American population at 131,441.

74. Interlocutors in the Gulf coast, including displaced families, argued that the Federal Government is not fulfilling its obligation to create adequate conditions for the return of the displaced, particularly in terms of housing. Serious concerns were voiced regarding the demolition of public housing and substitution by private development projects. The demolition of public housing in New Orleans was deemed to have a particularly grave impact for the African-American population, which constitutes the vast majority of public housing residents.⁵⁴

75. Another issue of concern in the reconstruction phase is employment. According to interlocutors, the combination of the surge in unemployment rates after Katrina and the arrival of a large population of migrant workers, particularly of Hispanic origin, both documented and undocumented, have created a vulnerable environment where workers have been exposed to exploitation and substandard conditions of employment. Ethnic tensions emerged in this context between some African-American and Hispanic individuals, particularly in the context of low wages and stiffened competition for jobs. Attempts to instrumentalize and overstate these tensions were also made, particularly by certain local politicians.⁵⁵

76. Interlocutors also mentioned cases of excessive use of force by law enforcement officials and military personnel in the early days after Katrina; arbitrary detention of persons who attempted to evacuate the city; inadequate treatment of inmates, particularly in the Orleans Parish Prison; and allegations of racially discriminatory results of decisions by the Army Corp of Engineers to increase the height of the levies in predominantly white neighbourhoods.

H. Immigration

77. The Special Rapporteur held a number of meetings with migrant workers across the country as well as civil society organizations working with migrant workers. In all of the meetings, migrant workers, particularly those who are undocumented, expressed serious concerns about their vulnerability and dire conditions.

78. The major issue raised was the disappointment with Congress' failure to approve the comprehensive immigration reform package put forward by the President. Migrant workers expressed the view that the regularization of their status would have represented improved protection and enforcement of their rights. This relates to their serious concern at the lack of legal protection they face, partly a result of the U.S. Supreme Court decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, in which the Court ruled that the National Labour Relations Board did not have the authority to order that employers award back pay for work not performed to undocumented workers victims of unfair labour practices. This decision is allegedly being used by lower courts in cases that restrict the rights of undocumented workers in other domains, including access to justice.⁵⁶

⁵⁴ For data on the reduction of public housing units, see USHRN, *Hurricane Katrina: A Response to the 2007 Periodic Report of the United States of America*, p. 7.

⁵⁵ See Advancement Project, *And Injustice for All: Workers' Lives in the Reconstruction of New Orleans*. Available at <http://www.advancementproject.org/reports/workersreport.pdf>, particularly pp. 11-13.

⁵⁶ For examples of such cases, see ACLU, *Race and Ethnicity in America*, p. 135.

79. Serious concern was expressed by several civil society organizations regarding worksite immigration enforcement by Immigration and Customs Enforcement (ICE) officials, particularly regarding allegations of the use of an individual's appearance to determine which individuals in a worksite or community should be screened for immigration status. Concerns were also expressed regarding cooperation agreements between ICE and local law enforcement agencies that allow the latter to enforce immigration laws, which could have serious implications in generating distrust among communities and local police.

V. ANALYSIS AND ASSESSMENT

80. Racism and racial discrimination have profoundly and lastingly marked and structured American society. The United States has made decisive progress in the political and legal combat against racism, through the resistance of communities of victims, the exemplary and powerful struggle of civil rights movements and the growing political confrontation of racism. However, the historical, cultural and human depth of racism still permeates all dimensions of life of American society.

81. The Special Rapporteur noted a strong awareness at all levels of government and society regarding the challenges in the fight against racism. He interprets this finding as a direct legacy of the continuous and determined struggle of the civil rights movement. In particular, he noted the recognition by authorities of the persistence of different manifestations of racism in the country and willingness to tackle this phenomenon. The Special Rapporteur considers awareness and open recognition of manifestations of racism as a precondition of any efforts to adequately tackle the problem. In particular, he commends the United States for the quantity and quality of information on issues related to his mandate, produced both by State institutions and civil society, and including racially- and ethnically-disaggregated data on demographic, social and cultural indicators. This information is essential for identifying trends and designing effective public policies.

82. The legacy of the civil rights movement is also reflected in the solid and comprehensive legal framework put in place in the country, particularly after the adoption of the Civil Rights Act of 1964 and extended in a variety of federal and local statutes and institutions. The Special Rapporteur would also like to note the central role played historically by the U.S. Supreme Court in the fight against racial discrimination, starting in *Brown v. Board of Education* and expanded thereafter. The legal and institutional frameworks are in any State the first lines of defence against racism, not only enforcing the obligation to equal treatment, but also giving victims access to remedies and, ultimately, to justice.

83. The vitality of civil society is a third decisive element that contributes to the fight against racism. The Special Rapporteur was impressed with the quality of the work conducted by NGOs across the country, playing a key role in holding governments accountable to its obligation to enforce civil rights laws.

84. The Special Rapporteur identified a number of challenges in the fight against racism that should be addressed, both at the Federal and local levels.

85. Throughout his mission and in the analysis of documents, the Special Rapporteur was exposed to three broad types of issues: instances of direct racial discrimination; laws and policies

that are *prima facie* non-discriminatory, but that have disparate effects for certain racial or ethnic groups; and problems that arise from the overlap of class, specifically poverty, and race or ethnicity.

86. Instances of direct discrimination and concrete racial bias still exist and are most pronounced with regards to law enforcement agencies. Despite the clear illegality of racial profiling under the fourteenth amendment, recent evidence shows practices that still prevail in law enforcement, such the disparity in the rate of arrests of minority and white drivers stopped by the police (see para. 52). In the educational system, evidence also shows racial bias in the type of disciplinary action given to white or minority students (see para. 64). In the justice system, evidence of racial bias in conviction rates and length of sentences of both juvenile and criminal courts exist (see paras. 50-55). In addition, programs such as NSEERS have clear ethnic or religious connotations (see para. 58). Direct discrimination was also found in many studies that used paired testing techniques, particularly in the areas of housing and employment. While these cases do not directly involve discrimination by state agents, strong enforcement of human rights is required. The Special Rapporteur notes that the right institutions are already in place to enforce existing laws, however, more robust efforts are required to increase the number of cases taken up every year, creating an important deterrent against future discrimination.

87. The Special Rapporteur also noted some laws and policies that are *prima facie* non-discriminatory but they have disparate effects for certain racial or ethnic groups. The key example of such practices is mandatory minimum sentences (see para. 53 above). While the Special Rapporteur welcomes the decision of the U.S. Sentencing Commission to revise the sentencing guidelines for crack cocaine offences, additional work needs to be done to review mandatory minimum sentences for crack cocaine, which disproportionately affect African-Americans.

88. Socio-economic indicators show that poverty and race or ethnicity continue to overlap in the United States. In 2007, whereas 9 percent of non-Hispanic whites were below the poverty level, 24.7 percent of African-Americans, 25.3 percent of American Indian and Alaskan Native and 20.7 percent of Hispanics were in that situation.⁵⁷ This reality is a direct legacy of the past, in particular slavery, segregation, the forcible resettlement of Native Americans, which was confronted by the United States during the civil rights movement. However, whereas the country managed to establish equal treatment and non-discrimination in its laws, it has yet to redress the socio-economic consequences of the historical legacy of racism. While noting some progress in this area, particularly in what concerns the representation and participation of racial and ethnic minorities in the high echelons of the political, economic and cultural arenas and the emergence of a middle class within minority groups, the Special Rapporteur underlines that much still needs to be done in this area.

89. The overlap between poverty and race in the United States creates structural problems that go far beyond patterns of income. Rather, it interacts with a number of mutually reinforcing factors, such as poor educational attainment, low-paying wages and inadequate housing, which create a vicious cycle of marginalization and exclusion of minorities. The overrepresentation of minorities in inferior schools, more vulnerable neighbourhoods, the juvenile justice system and

⁵⁷ U.S. Census Bureau, 2007 American Community Survey.

the criminal justice system are to a large extent linked to their overall socio-economic situation. At the same time, these trends also contribute to reinforce prejudices and stereotypes, such as an association of minorities to criminality or to poor educational performance.

90. The consequences of the overlap of poverty and race were clearly seen in the aftermath of Hurricane Katrina. Minorities, as the poorest segments of the population, lived in more vulnerable neighbourhoods and were more exposed to the effects of the storm. It is thus not unexpected that these groups suffered from disproportional displacement or loss of their homes. Katrina therefore illustrates the pernicious effects of socio-economic marginalization and shows the need for a robust and targeted governmental response to ensure that racial disparities are addressed.

91. The Special Rapporteur also noted that the socio-economic marginalization of racial or ethnic minorities has become more acute due to what he perceived as a slow process of *de facto* re-segregation in many areas of the American society. In particular, in his visits to metropolitan areas, he noted the striking pattern of ethnic and racial cleavages that persist and which are being reinforced by processes such as gentrification in neighbourhoods historically inhabited by minorities. A related aspect is the process of re-segregation in public schools. Several studies have shown that the present level of segregation is similar to that of the late 1960s. These processes not only contribute to keep racial groups physically separated, but also affect the marginalization of public services in areas that are predominantly attended by minorities. Ultimately, this creates an obstacle in the most important means of promoting equality of opportunity, which is to offer quality education for all students. In this regard, the Special Rapporteur is particularly concerned about the retraction of affirmative action policies, which make a tangible contribution to enhancing diversity and integration in schools.

92. The Special Rapporteur would like to make specific reference to the situation of Native Americans, which have been the first people to be historically discriminated in the continent. He was particularly sensitive to the statements made by the Principal Chief of the Cherokee Nation, Mr. Chad Smith, whom the Special Rapporteur met in Miami, as well as other indigenous leaders met in Omaha and Los Angeles, who highlighted the dire socio-economic conditions faced by many Native Americans and the difficulties in preserving their cultural heritage. He recalls the need for constant vigilance for the situation of Native Americans, which should be the subject of particular attention in view of the historical legacy of discrimination against them.

93. The situation in Puerto Rico also merits particular attention by the Government in view of its specificity. A number of particular elements should be borne in mind with regards to Puerto Rico: the ethnic dimension, including the racial make-up of the population and the situation of the black minority in the island; the cultural dimension, including the Hispanic origin of the population; and the political dimension, in particular the specific political status enjoyed by Puerto Rico in the United States. It is therefore essential that specific actions, in line with Puerto Rico's specificities, be undertaken to fight racism in the island.

94. The Special Rapporteur recalls the idea that he has put forward in many of his reports concerning the need to go beyond a legal strategy that guarantees non-discrimination. While essential, the legal strategy is only the first stage in the fight against racism. A long-term strategy needs to address the root causes of the phenomenon, particularly in terms of intellectual constructs, prejudices and perceptions. To fight these manifestations, the only effective solution

is to link the fight against racism to the deliberate politically conscious construction of a democratic, egalitarian and interactive multiculturalism. In his views, this is the most important problem the United States needs to face. A key notion in this regard is the need to promote interaction among different communities as an important means to create tolerance and mutual understanding, strengthening the social networks that hold a society together. Racial or ethnic communities in the United States still experience very little interaction with each other: racially-delimited neighbourhoods, schools and churches prevail. The promotion of more interaction among racial minorities is an essential step that needs to be taken to address the root causes of racism in the United States.

95. This notion of interactions among communities is also central to understand that the problem of racism in the United States is not solely that between a white majority and minorities, but also occurs among minorities themselves. In particular, many minority groups have been isolated, competing for jobs and social services. Apart from enforcing civil rights laws robustly, promoting more interaction among minorities themselves is an essential step in the fight against racism in the United States.

96. During the drafting of this report the United States elected President Barack Obama as its next Head of State. The Special Rapporteur would like to underscore the importance of this event in giving new visibility to minorities in the country. It further corroborates the view expressed in this report that the United States has made fundamental progress in the past decades in giving visibility to members of minorities in the political, economic and cultural arena. More significantly, this election is the outer reflection of the slow but profound transformation process in the deeper layers of consciousness of every citizen of the United States from all racial and ethnic communities, in the individual confrontation to racism in all dimensions and instances of every day life.

VI. RECOMMENDATIONS

97. Congress should establish a bipartisan Commission to evaluate the progress and failures in the fight against racism and the ongoing process of re-segregation, particularly in housing and education, and to find responses to check these trends. In this process, broad participation from civil society should be ensured.

98. The Government should reassess existing legislation on racism, racial discrimination, xenophobia and related intolerance in view of two main guidelines: addressing the overlapping nature of poverty and race or ethnicity; and linking the fight against racism to the construction of a democratic, egalitarian and interactive multiculturalism, in order to strengthen inter-community relations.

99. The Federal Government, in particular the Civil Rights Division of the Department of Justice, the Equal Employment Opportunities Commission and the Office of Fair Housing and Equal Opportunity of the Department of Housing and Urban Development should intensify their efforts to enforce federal civil rights laws in their respective domains.

100. Since the fight against racism needs to take place at the federal, state and local levels of government, the Special Rapporteur recommends that adequate consultation mechanisms be put in place for a coordinated approach at all levels of Government.

101. As a matter of urgency, the Government should clarify to law enforcement officials the obligation of equal treatment and, in particular, the prohibition of racial profiling. This process would benefit from the adoption by Congress of the End Racial Profiling Act. State Governments should also adopt comprehensive legislation prohibiting racial profiling.

102. To monitor trends regarding racial profiling and treatment of minorities by law enforcement, federal, state and local governments should collect and publicize data about police stops and searches as well as instances of police abuse. Independent oversight bodies should be established within police agencies, with real authority to investigate complaints of human rights violations in general and racism in particular. Adequate resources should also be provided to train police and other law enforcement officials.

103. Mandatory minimum sentences should be reviewed to assess disproportionate impact on racial or ethnic minorities. In particular, the different minimum sentences for crack and powder cocaine should be reassessed.

104. In order to diminish the impact of socio-economic marginalization of minorities in what concerns their access to justice, the Government should improve, including with adequate funding, the state of public defenders.

105. The Special Rapporteur recommends that complementary legislation be considered to further clarify the responsibility of law enforcement and criminal justice officials not only to protect human rights, but as key agents in the fight against racism.

106. In view of the recent recommendations by the Human Rights Committee,⁵⁸ the Committee Against Torture⁵⁹ and the Committee on the Elimination of Racial Discrimination,⁶⁰ and considering that the use of life imprisonment without parole against young offenders, including children, has had a disproportionate impact for racial minorities, federal and state governments should discontinue this practice against persons under the age of eighteen at the time the offence was committed.

107. The Government should intensify funding for testing programs and “pattern and practice” investigations to assess discrimination, particularly in the areas of housing and employment. Robust enforcement actions should be taken whenever civil rights violations are found.

108. The Department of Education, in partnership with state and local agencies, should conduct an impact assessment of disciplinary measures in public schools, including the criminalization of school misbehaviour, and revisit those measures that are disproportionately affecting racial or ethnic minorities.

⁵⁸ CCPR/C/USA/CO/3/Rev.1, para. 34.

⁵⁹ CAT/C/USA/CO/2, para. 34.

⁶⁰ CERD/C/USA/CO/6, para. 21.

109. Special measures to promote the integration of students in public schools as well as to reduce the achievement gap between white and minority students should be developed, in accordance with article 2, paragraph 2, of ICERD.

110. The Federal Government and the States of Louisiana, Alabama and Mississippi should increase its assistance to the persons displaced by Hurricane Katrina, particularly in the realm of housing. The principle that “competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence”⁶¹ should be respected.

⁶¹ Principle 28 of the United Nations Guiding Principles on Internal Displacement.

Appendix

LIST OF OFFICIAL MEETINGS

Federal level

Executive Branch

Department of State

Department of Justice (Civil Rights Division and Federal Bureau of Prisons)

Department of Homeland Security (Office of Civil Rights and Civil Liberties and U.S. Citizenship and Immigration Services)

Department of Interior (Assistant Secretary for Indian Affairs)

Department of Labor

Department of Education

Department of Housing and Urban Development

Equal Employment Opportunity Commission

Legislative Branch

Chairman of the Committee on the Judiciary, United States House of Representatives

Congressional Black Caucus

Staff of the Committees on the Judiciary and on Foreign Affairs, United States House of Representatives

Judiciary Branch

Justice Stephen Breyer, United States Supreme Court

Local level

Mr. Chad Smith, Principal Chief, Cherokee Nation

New York, NY: New York City Commission on Human Rights

Chicago, IL: Chicago Commission on Human Relations and members of the Mayor's office

Los Angeles, CA: Office of the Mayor of Los Angeles County, Commission on Human Relations, Men's Central Jail

New Orleans, LA: Mayor C. Ray Nagin

Miami, FL: officials working in the Miami-Dade County government

Puerto Rico: Ombudsman, Civil Rights Commission, Guerrero Prison
