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ADMINISTRATION OF JUSTICE

Discrimination in the criminal justice system

Final working paper prepared by Ms. Leïla Zerrougui pursuant to Sub-Commission decision 2001/104

CONTENTS

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Introduction

1. At its fifty-second session, in the course of preparations for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the attention of the Sub-Commission on the Promotion and Protection of Human Rights was drawn to the extent of discrimination in the administration of justice. In response to this concern, the Sub-Commission's sessional working group on the administration of justice decided, when it adopted its report, to request Ms. Leïla Zerrougui to prepare a working paper on discrimination in the criminal justice system for its next session.

2. At the Sub-Commission's fifty-third session, Ms. Zerrougui submitted a working paper to the sessional working group (E/CN.4/Sub.2/2001/WG.1/CRP.1), in which she confirmed the scale of the phenomenon of discrimination in the administration of justice and where she pointed out that she had found, in the light of the documentation she had consulted and the research she had undertaken, that discrimination appeared to be common practice in police stations, in prisons, in the courts and in places of detention used for aliens in illegal situations, refugees and asylum-seekers.

3. In her working paper, Ms. Zerrougui recalls the significance of the non-discrimination clause, equality before the law and equal protection of the law in the most relevant international instruments. She identifies the potential victims of discrimination and proposes a conceptual framework for a possible study on discrimination in the criminal justice system. This framework stresses the need for information regarding the manifestations of discrimination in the criminal justice system, while suggesting that the study should concentrate on research into and the identification of discriminatory mechanisms responsible for the persistence of discrimination in the administration of criminal justice.

4. Comments were made on the working paper by members of the sessional working group and the Sub-Commission, which included discrimination in the administration of justice as a sub-item of item 3 of the agenda of the fifty-third session on the administration of justice. The members of the Sub-Commission recognized that in view of its complexity and importance the subject required a full study, but that more detailed research needed to be undertaken on certain aspects. They stressed the need to identify discriminatory mechanisms in inter-State cooperation and those arising from the failure of national criminal justice systems to meet the requirements of vulnerable social groups, especially aliens, minorities, indigenous people and socially deprived categories. Some members suggested that the planned study should not cover discriminatory motivations in too much detail, particularly in the case of passive discrimination, but that it should also look into the operation of international criminal tribunals and the status of victims of organized crime.

5. In decision 2001/104 of 10 August 2001, the Sub-Commission, concerned at the extent of discrimination in the criminal justice system and welcoming the working paper (E/CN.4/Sub.2/2001/WG.1/CRP.1) prepared Ms. Leïla Zerrougui for the sessional working group on the administration of justice, decided to request Ms. Zerrougui to pursue her research, taking into consideration the comments made by members of the Sub-Commission, and to submit her final working paper at its fifty-fourth session. This document is submitted pursuant to that decision.

I. REVIEW OF THE SUB-COMMISSION'S CONTRIBUTION

6. The Sub-Commission has played a very prominent part in the fight against discrimination and its contribution has been considerable.[1] As far as discrimination in the administration of justice is concerned, it appears that two studies on the subject were made in the past by two members of the Sub-Commission. The first was prepared by Mr. Mohammed Ahmed Abu Rannat, Special Rapporteur of the Sub-Commission, on equality in the administration of justice.[2] The second of those studies, prepared by Mr. Justice Abu Sayeed Chowdhury, Special Rapporteur of the Sub-Commission, was entitled: "Study on discriminatory treatment of members of racial, ethnic, religious or linguistic groups at the various levels in the administration of criminal justice, such as police, military, administrative and judicial investigations, arrest, detention, trial and execution of sentences, including the ideologies or beliefs which contribute or lead to racism in the administration of criminal justice."[3] In order to capitalize on that experience and to avoid overlapping, both documents were used to prepare this working paper. The following conclusions may be drawn.

7. Mr. Rannat's study of equality in the administration of justice came at a time (in the 1960s) when the meaning of discrimination in international standards was not as precise and clear-cut as it is today. It was undertaken to examine the scope of article 10 of the Universal Declaration on Human Rights and was intended to lead to the adoption of principles, a declaration or a convention on equality in the administration of justice. The study, which concentrated on the treatment of equality in criminal, civil and administrative procedures, succeeded in setting out a set of rules for fair trial and included general recommendations on ways of preventing discrimination.

8. Nowadays, the prohibition of discrimination, equality before the law and equal protection of the law have been defined and established as a general clause and a fundamental rule of international law on human rights, not only in the administration of justice, but in all areas subject to regulation.[4] There is no need for a further study to identify the rules of fair trial or to explain the significance of equality before the law and equal protection of the law. What might be useful, however, would be to study the daily workings of criminal justice and to examine carefully the mechanisms which, in violation of international rules, tend to perpetuate discrimination in criminal justice systems.

9. Judge Chowdhury's study concerned the discriminatory treatment meted out to members of racial, ethnic, religious or language groups at different stages of criminal procedure. The Special Rapporteur made clear from the start where the emphasis of the study would be placed when he said that, with the exception of South Africa,[5] where racism was enshrined in the law, there were few regions in the world where cases of de jure discrimination against racist groups were frequently found. The study therefore concentrated on behavioural discrimination, on doctrines and practices conveying racial prejudice, and on situations which appeared to reflect a selective application of the law to specific racial, ethnic, religious or language groups.[6]

10. In other words, if a fresh study is undertaken on discrimination in the criminal justice system, it is bound to shed new light on the matter. This is firstly because it has now been established that institutionalized discrimination exists and persists in national criminal justice systems,[7] secondly because as a result of globalization and regional integration, discriminatory

practices spread across borders and take on new form,[8] and thirdly because the sort of colonialism which produced the most intolerable forms of de jure discrimination in the administration of justice has not completely disappeared.[9] This study is all the more worthwhile insofar as it appears justified by the events which are currently upsetting the international context, while its scope will be broadened by its coverage of other vulnerable or victimized groups, which are nowadays subject to discrimination in the administration of criminal justice.[10]

II. THE INTERNATIONAL CONTEXT

11. This working paper is being drafted against the background of two major international events: the World Conference against Racism, Xenophobia and Related Intolerance, which was held in Durban (South Africa) from 31 August to 8 September 2001, and the tragedy of 11 September 2001.

A. World Conference against Racism

12. While the preparatory work for the World Conference against Racism drew attention to the scale of the phenomenon of discrimination in the administration of criminal justice, the actual Declaration of the Conference is absolutely unambiguous in that respect: it not only confirmed the existence of behavioural discrimination in national criminal justice systems, but it also referred to the persistence of de jure discrimination. Paragraph 25 of the Declaration reads as follows: "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." (A/CONF.189/12)

13. The Programme of Action adopted by the Conference draws attention to inequalities of treatment regarding access to justice for people of African descent, migrants and their families, women, children, minorities, Roma, refugees and asylum-seekers and indigenous peoples. States are urged to ensure that the treatment of such persons by police and immigration services respects their dignity and is non-discriminatory, to prevent and detect effectively misconduct by police officers and other law enforcement personnel which is motivated by racism and discrimination, to implement and enforce effective measures to eliminate the phenomenon known as "racial profiling", to combat impunity, seen as a serious obstacle to a fair and equitable justice system, and to examine possible links between criminal prosecution, police violence and penal sanctions, on the one hand, and racism, racial discrimination, xenophobia and related intolerance, on the other. (A/CONF.189/12, paras. 66 et seq.)[11]

14. In other words, the manifestations of discrimination in the administration of criminal justice are clearly spelt out in the Declaration and Programme of Action of the World Conference against Racism. Follow-up bodies are planned for the Conference and the Sub-Commission on the Promotion and Protection of Human Rights has been called upon, as a mechanism of the Commission on Human Rights, to contribute to the implementation of the Conference's Programme of Action. At its fifty-eighth session, the Commission on

Human Rights adopted a decision (2002/109) inviting the Sub-Commission to give careful consideration to the Durban Declaration and Programme of Action and to play a complementary role in the realization of the objectives of the World Conference.[12]

B. Implications of the tragedy of 11 September 2001

15. The attacks of 11 September 2001 upset the whole international community and were unanimously condemned. In resolutions 1373 (2001) and 1377 (2001) adopted on 28 September and 12 November 2001 respectively, the Security Council called on all States to take a series of measures to prevent, criminalize and suppress all terrorist acts within their jurisdiction and to increase inter-State cooperation in order to eradicate international terrorism. The international community did not, however, hesitate to deplore occurrences of violations of human rights and/or humanitarian law committed in response to those attacks. Criticism was levelled, inter alia, at the legal procedures adopted and at certain measures applied in the name of counter-terrorism.[13] Arrests and incommunicado detention targeting aliens and certain communities of immigrants in a number of countries met with particularly sharp criticism.[14]

16. At its sixtieth session, on 22 March 2002, the Committee on the Elimination of Racial Discrimination adopted a statement calling on States and international organizations to ensure that any measures taken to combat terrorism did not, in purpose or effect, give rise to discrimination on the grounds of race, colour, descent or national or ethnic origin. At its fifty-eighth session, the Commission on Human Rights also adopted a resolution, in which it 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."[15]

17. While recalling these recommendations and criticism, we keep sight of the fact that, in order to combat terrorism, Governments often had to deal with exceptional situations and extremely serious crimes. In her preliminary report (E/CN.4/Sub.2/1999/27) submitted at the Sub-Commission's fifty-second session, Ms. Kalliopi K. Koufa, Special Rapporteur on terrorism, wrote that: "In response to the terrorists' despicable conduct and the threats posed to society, the authorities of the State which is responsible for bringing the terrorist violence to an end are entitled to adopt counter-terrorist measures and may not be constrained by the normal limits of official measures for the prevention of ordinary crime."

18. This right the States are granted is not, however, devoid of safeguards.[16] In General Comment No. 29 concerning states of emergency, adopted on 31 August 2001, the Human Rights Committee specified that even when the life of a nation is threatened, no derogation is allowed from certain rights (CCPR/C/21/Rev.11/Add.11). The same view was expressed by the High Commissioner for Human Rights at the fifty-eighth session of the Commission on Human Rights, in the introductory statement to her report on the follow-up to the World Conference on Human Rights.

19. The question of whether or not measures adopted to counter terrorism comply with international rules on human rights and humanitarian law does not fall within the terms of reference we were assigned by the Sub-Commission. Our views and analyses are concerned

only with certain provisions considered as discriminatory, related to the administration of criminal justice and/or measures in the administration of justice applied selectively on grounds purely of the nationality, religion or ethnic origin of targeted individuals.[17]

20. The paper submitted to the working group on the administration of justice drew attention to the fact that in certain crisis situations, the proportion of human rights violations increases significantly in the daily life of people and in criminal justice administration, in particular affecting the most vulnerable persons and groups and those who, rightly or wrongly, are held in any way to be responsible for the crisis (E/CN.4/Sub.2/2001/NG.1/CRP.1, para. 3). This tendency was confirmed by the tragic events of 11 September.[18]

21. In General Comment No. 29 referred to above, with regard to the non-discrimination clause, the Human Rights Committee states that "Even though article 26 or the other Covenant provisions related to non-discrimination (arts. 2, 3, 14, para. 1, 23, para. 4, 24, para. 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances."

22. Admittedly in the case of serious crimes and dangerous criminals using sophisticated means and working with organized, transnational networks, it is not always easy to reconcile respect for the guarantees enshrined in international law and the desire not to leave the most serious crimes unpunished and to bring their perpetrators to trial. Difficulties arise in particular with observance of the presumption of innocence, prolonged pre-trial detention and the conditions in which persons accused of serious crimes are detained. International criminal tribunals have come up against these problems and their ways of overcoming them have not always escaped criticism.[19]

23. A distinction must be drawn, however, between differences of treatment which may be justified by the complexity of cases, the gravity of the incriminated acts or the dangerous nature of criminals on the one hand and discriminatory measures and practices on the other. Whenever 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 the 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.[20]

24. If the Sub-Commission were to consider a study on discrimination in criminal justice systems, this question should be looked at in more detail with a view to ascertaining, in the case of the most serious crimes, what may be admitted in international law in terms of the differences of treatment required for the satisfactory administration of justice, with particular reference to the application thereof by international criminal tribunals, and to distinguishing criteria used in regional human rights protection systems and their application on a national basis. This matter could also be dealt with as part of a separate study, which one of the Sub-Commission members might be requested to undertake.

III. SOME FEATURES OF THE CONCEPTUAL FRAMEWORK FOR AN ENVISAGED STUDY

25. In the document prepared for the Sub-Commission's sessional working group on the administration of justice, it was stressed that a study on discrimination in the criminal justice system can be justified only if it is essentially concerned with analysing the discriminatory mechanisms that still exist in national criminal justice systems. A number of paths of research were identified and some issues were selected to serve as the basis for a study on discrimination in criminal justice systems.

26. These issues are as follows:

(a) Insufficient or ineffective protection against discrimination in regional systems for the protection of human rights and the impact this has on the effective exercise of the guarantees provided for criminal justice;

(b) Discrimination institutionalized in some regional legal standards and in bilateral conventions on cooperation in criminal matters. Such discrimination is particularly aimed at aliens;

(c) Passive or active discrimination that takes several forms and appears in some national criminal laws concerning matters of substance and/or procedure;

(d) Discrimination that is nowhere explicit but is inevitable in the absence of affirmative action and measures that would enable certain persons to exercise their rights effectively and actually benefit from the guarantees prescribed in the legal standards;

(e) Discrimination deriving from the organization and/or operation of a criminal justice and prison system that is often inadequately provided with human and material resources and ill-adapted to the needs of the most vulnerable groups and persons, owing to the precariousness of their social status;

(f) Structural discrimination, which stems from the mode of organization and operation of the police services, the nature of their tasks and the relations between the police and the courts, and the unavailability or ineffectiveness of remedies against abuses of power;

(g) De facto or behavioural discrimination that reflects racist, sexist or xenophobic attitudes expressing prejudices or often unjustified age-old fears. Such discrimination is reproduced by national criminal justice systems and policies with some specific features proper to each region or country. For further details see document E/CN.4/Sub.2/2001/WG.1/CRP.1, paragraph 41.

27. In their comments the Sub-Commission experts proposed some other lines of research and expressed the wish that the present document should deal, inter alia, with cases of discrimination in inter-State police and judicial cooperation and with discrimination that is aimed essentially at indigenous peoples, minorities, aliens, victims of organized crime and deprived persons. The following discussion attempts to take these recommendations into account:

A. The fragile status of aliens and discriminatory mechanisms in inter-State cooperation on criminal matters

28. International, regional and bilateral cooperation on matters of criminal justice is an effective method encouraged by the United Nations for combating transnational crime and especially terrorism and organized crime.[21] Such cooperation is also recommended for combating corruption, for protecting the most vulnerable victims,[22] for putting prisoners in touch with their families and for facilitating their reintegration into society.[23] Such cooperation is embodied in a series of legal instruments, in particular treaties concerning extradition, mutual assistance on police and judicial matters, transfer of proceedings, execution of judgements and transfer of foreign prisoners.[24] In principle, this legal framework should comply with the standards of international law prohibiting discrimination.

29. Unfortunately, this basic principle is not always respected. States base their cooperation in judicial and police matters on national preference and the protection of their own interests; they are primarily concerned with the security aspect, which often takes precedence over the fundamental rights of certain groups considered to be potentially dangerous or undesirable. At present these are mainly aliens, who by virtue of their foreign nationality are excluded from the application of some treaties for regional or bilateral cooperation or are the victims of direct or indirect discrimination stemming from the application of certain cooperation agreements, particularly on police matters.

30. The exclusion of aliens from the benefits provided by certain forms of cooperation has become institutionalized in multilateral and bilateral agreements concerning the transfer of foreign prisoners. In the vast majority of such agreements, and contrary to the recommendations of the United Nations, the transfer of prisoners is confined to nationals of the contracting States, thus depriving aliens residing in those States of the right to request transfer to the country where they have established their customary residence.[25]

31. And yet this form of cooperation is recommended in order not to break the family and social links of sentenced persons with their environment, and in order to facilitate their social resettlement, which is regarded as one of the objectives of the sentence[26] and is virtually impossible to achieve in an environment other than their own. It is also desirable and encouraged in order to avoid unequal treatment depriving foreign prisoners of such personal measures as early release, prison leave and special release arrangements that differentially extend the period of imprisonment.[27]

32. This difference in treatment based on nationality is aggravated by the precarious status of aliens in national standards and in regional systems for the protection of human rights, and in practice is reflected in the systematic deprivation of foreign prisoners of all rehabilitation and resettlement measures.

33. Thus the European Convention for the Protection of Human Rights does not protect aliens, even those lawfully resident in a European State, against expulsion. Article 1 of additional protocol No. 7 recognizes the right of Member States to expel aliens or escort them to the frontier in pursuance of a decision reached in accordance with law. This provision is also

contained in the American Convention on Human Rights (art. 22, para. 6) and in the African Charter on Human and Peoples' Rights (art. 12, para. 4). In application of this right accorded to States, national courts have frequently considered the expulsion of aliens, even those lawfully resident, following convictions for offences of varying seriousness, as a measure necessary in the interests of public order and therefore taken in accordance with law.[28]

34. Expulsion following a criminal conviction is a current practice even with regard to aliens who have very strong family ties in the country where they are lawfully resident. This subjects them 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 that country no longer exist or never did exist. National courts take the view that the expulsion of a foreigner is a police measure and does not constitute a criminal sanction. In the European context a distinction is made between European and non-European aliens, whereby only the latter are exposed to the risk of expulsion.[29]

35. Expulsion following a criminal conviction may not in itself be regarded as discrimination if it does not produce inequality of treatment depriving aliens of certain rights or infringing the recognized rights of all persons without distinction. In practice, since they are eligible for expulsion, foreign prisoners are routinely remanded in custody until their trial, and after their conviction they are denied any measures of social resettlement.

36. With the formation of regional integration groups the rights of nationals of these groups of countries are strengthened and judicial and police cooperation for their protection develops, but at the same time new forms of discrimination are generated towards non-nationals, even those lawfully resident in these countries.[30] In such regions, exclusions and discriminatory practices towards aliens are most commonly brought about through police cooperation.[31] Clandestine immigration and unlawful residence, particularly in countries with a large flow of migrants, are increasingly being assimilated to criminal behaviour and are the subject of cooperation between the police and immigration services.[32]

37. Discrimination arising out of inter-State cooperation on criminal matters is not the only form of discrimination suffered by aliens; the most flagrant discrimination is to be found in national laws, to which must be added de facto or behavioural discrimination.[33] These people, who are stigmatized and rendered vulnerable on account of their foreign nationality, are often subjected to unequal treatment that infringes their rights and facilitates their exploitation by criminal organizations.

38. While the battle against organized transnational crime mobilizes judicial and police cooperation, this cooperation often ignores the rights of the victims of such crime. Thus the victims of trafficking for the purpose of sexual exploitation, of forced or clandestine labour, or of networks of drug traffickers are considered to be potentially dangerous people who need to be deported or escorted to the frontier as soon as possible. Such persons are often kept in custody pending their expulsion; their grievances concerning the violations to which they were subjected during their stay are rarely listened to, and even when the perpetrators of such violations are prosecuted the chances of success are minimal.[34]

39. Among the most vulnerable victims of organized crime, it is foreign women who are the most deeply wronged; they are subjected to threefold discrimination: as women they are discriminated against within their own group; as victims of the sex trade they are discriminated against within society and by the courts;[35] and as aliens in an unlawful situation they are particularly vulnerable because they are at risk of expulsion or imprisonment used as a "means of protection".[36] In the hands of traffickers and pimps, these victims suffer various types of maltreatment, such as harassment, rape and physical attacks, not to mention restrictions on their freedom. They are often treated as criminals by the authorities of the countries to which they are taken. If they are in an irregular situation in the country where they are living and dread returning to their country of origin, the risk of deportation guarantees their silence and ensures that the criminals go unpunished. The insignificant number of prosecutions of the perpetrators of the trade in women is instructive when compared with the true extent of the problem.

40. With regard to the deportation and escorting to the frontier of people who are present unlawfully in the territory of a foreign country, the international standards only provide protection against their expulsion to a country where they are in danger of suffering inhuman or degrading treatment or when there is a genuine threat to their right to life in that country. However, several United Nations mechanisms have criticized the practice of systematic or mandatory detention of immigrants in an unlawful situation or of refugees and asylum-seekers.[37]

41. During their stay, these particularly vulnerable people are often the victims of human rights violations, as occurs with workers brought in clandestinely and exploited in violation of international standards, persons subjected to enforced prostitution or those who have suffered inhuman or degrading treatment on police premises or in the provisional detention centres provided for them.[38]

42. Even when prosecutions have been instituted, the host countries - often worried by security or internal political considerations - generally refuse these people the right to remain in the country pending the trial of the perpetrators of the violations. This refusal deprives them de facto of an acknowledged right of all victims, that of attending the trial and demanding redress. This enforced absence of the victims benefits the perpetrators of the violations, who often escape conviction because after an expulsion measure the victims are no longer allowed to re-enter the country and even if they are allowed, they often lack the resources to return in order to attend the trial or to have themselves represented by a lawyer.[39]

43. These few examples of direct or indirect discrimination, attributable either to the low level of protection for aliens or to inter-State cooperation on criminal matters, are not the only forms of discrimination to which aliens are subjected. As a particularly vulnerable group, non-citizens are faced with other forms of discrimination which they often share with other vulnerable or low-status populations. Such discrimination is intrinsically linked to structural situations of injustice and low esteem. National criminal justice systems reproduce the prejudices and stereotypes of society and in many countries are designed by the dominant groups and are therefore unsuited to the needs of the dominated or low-status groups.

B. The unsuitability of national criminal justice systems for the needs of vulnerable populations

44. Crime is a reason often put forward to justify the ghettoization, marginalization or exclusion of the most vulnerable groups of society, the very people whose rights over the centuries have been reduced, in public life and/or the family, to non-rights or lesser rights. These are women, children, minorities, indigenous groups, aliens and all the people on the fringe of society who are stigmatized for one reason or another; since the crime rate among these groups is for objective reasons generally high, the criminal argument and crime statistics are brandished to justify exclusion and discrimination.

45. This brief outline conceals a reality that cannot be denied, the correlation between criminal behaviour and a deprived socio-economic situation, which is particularly characteristic of migrant workers and their families, some national minorities and indigenous peoples.[40] For the last two categories, the historical context is not irrelevant to the disproportionately high rates of crime and victimization compared with the size of these groups in society.[41] The policies of extermination, exclusion or enforced assimilation imposed upon these communities by the dominant groups have led to disturbances and caused the break-up of the value systems that used to preserve cohesion within these groups; their traditional values often differ from those that others try to impose upon them and which they have difficulty in assimilating.[42]

46. Specialists claim that criminals belonging to marginalized social categories reject the criminal justice system, which they describe rightly or wrongly as “unfair”. This attitude is used to justify actions for which responsibility is placed on society and to absolve the perpetrators from guilt, thus leading to an increase in the rate of recidivism, especially among young people from these groups. Erica-Irene Daes, Chairperson of the Sub-Commission’s Working Group on Indigenous Populations, confirms that indigenous peoples often refuse to accept the judicial system. The fact remains that for some underprivileged groups, the criminal justice system in force in the host countries or even in their own countries is not adapted to either their problems or their needs and is often inaccessible to them, thus perpetuating exclusion and sometimes displaying gross discrimination.[43]

47. Unfortunately, these familiar problems, often used to explain the increasing crime rates among such groups, do not lead to the adoption of appropriate policies for crime prevention and for social resettlement of reformable criminals. Prevention and resettlement require the mobilization of resources that neither politicians nor society are prepared to provide. Consequently, so as to give the impression that they are responding to the legitimate concerns of citizens faced with increasingly sophisticated and organized crime, Governments opt for incarceration and ever more repressive measures.[44]

48. The non-governmental organization Penal Reform International describes this reality on page 6 of its annual report for 2000: “Proportions of people from ethnic minorities in the prison population in very many countries are higher than that in the general population. Studies have shown that this is frequently the result of racial bias in police and court activities, and that people from ethnic minorities are also discriminated against within prison. In some countries, there are

substantial numbers of foreigners in prison who may have difficulty with the national language and therefore have limited access to information vital to their case. They may also experience many other problems in prison.[45] Mentally disturbed people have special difficulties within justice systems and are often imprisoned inappropriately as opposed to receiving hospital treatment. Often children in conflict with the law are imprisoned and harshly treated, in contravention of international standards designed to protect and promote children's rights. … Women form less than 5 per cent of prison populations in most countries. Because they are in a minority, their specific needs are often overlooked. They are often imprisoned far from their homes, further damaging important family relationships."

49. In the developing countries - and even though in some of them the will may exist to battle effectively against criminality, which is often poverty criminality - the means are sorely lacking, so that the only response remaining is automatic incarceration, often under unacceptable conditions.[46] In most of these countries the prisons are overcrowded and the justice system lacks the resources to guarantee a fair trial for poor defendants who are unable to afford a good-quality defence or even any defence at all. Legal assistance is confined at best, and in the most serious cases, to the appointment of an official lawyer to assist the defendant on the day of the trial.[47]

50. People in the indigent social categories, who are often over-represented in the criminal justice system, are faced with other forms of discrimination resulting from their insolvency. For example, because they are unable to find the amounts required for release on bail they are detained in custody until their trial. In some countries insolvent prisoners who are unable to pay the fine to which they have been sentenced are kept in detention for the purpose of enforcement by committal. Some systems authorize imprisonment for private debt, in violation of article 11 of the International Covenant on Civil and Political Rights (insofar as the countries have ratified it).[48]

51. In resolution 56/161 adopted on 9 December 2001 on human rights in the administration of justice, the United Nations General Assembly: "appeals to Governments to include in their national development plans the administration of justice as an integral part of the development process and to allocate adequate resources for the provision of legal-aid services with a view to promoting and protecting human rights, and invites the international community to respond favourably to requests for financial and technical assistance for the enhancement and strengthening of the administration of justice".

52. Discrimination against persons who belong to indigent populations takes a number of forms: it may be deliberate,[49] it may be passive,[50] and sometimes its discriminatory nature is revealed through the application of a law that applies to all.[51]

IV. CONCLUSIONS AND RECOMMENDATIONS

53. The present document discusses only a few aspects of a complex phenomenon that is on the increase and which is regularly denounced by all the United Nations mechanisms, each within the limits of its mandate. At this stage the objective has simply been to consider some of

the recommendations contained in the comments made by members of the Sub-Commission during the presentation of the working document prepared for the sessional working group on the administration of justice.

54. In dealing with this subject, some of the shortcomings or inadequacies that lead to discrimination in the administration of criminal justice have been dealt with, but the author has endeavoured above all to disregard the peripheral forms of discrimination that are not directly attributable to the administration of criminal justice but which are passively or actively applied or reproduced by the system. This approach will make it possible, if a study on discrimination in the criminal justice system is considered by the Sub-Commission, to concentrate future work on criminal justice procedure and on the organization and operation of police services and of judicial and prison administration in order to detect and identify discriminatory mechanisms and discrimination de jure in legislation concerning matters of substance and/or procedure and to make useful recommendations. The Sub-Commission could make a qualitative contribution to further the debate that has been initiated by other United Nations mechanisms concerning the need to reform the criminal justice system so as to ensure its effectiveness without sacrificing equity.[52] As pointed out above, the Sub-Commission is also expected to make a contribution to the implementation of the Programme of Action of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

Notes

[1] The working paper prepared by Mr. Sérgio Pinheiro, member of the Sub-Commission, in preparation for the World Conference against Racism, gives an outline of this contribution (A/CONF.189/PC.1/13/Add.1).

[2] This study was the sixth in a series of studies undertaken by the Sub-Commission on Prevention of Discrimination and Protection of Minorities concerning discriminatory measures in various fields. It was started in 1963 and completed in 1969. Mohamed A.A. Rannat, *Study of equality in the administration of justice* (United Nations publication, Sales No. F.71XIV.5).

[3] The study was published in two parts, the first in 1981 under reference E/CN.4/Sub.2/L.766, and the second in 1982 under reference E/CN.4/Sub.2/1982/7.

[4] This question has already been covered in the working paper submitted to the Sub-Commission's working group on the administration of justice (E/CN.4/Sub.2/2001/WG.1/CRP.1, pp. 3-8).

[5] At the time South Africa was subject to the rules of apartheid.

[6] The study includes three chapters, the first of which analyses the historic causes of racial discrimination and underlying doctrines and prejudices, and the third of which - entrusted to Mr. Louis Joinet by Sub-Commission decision 2001/103 - concerns the operation of military courts. Only chapter II, dealing with discriminatory practices in police and criminal justice procedures, could be used and updated in the event of a new study being undertaken.

[7] Discriminatory provisions, particularly affecting women, children, indigenous people, minorities and aliens, appear in the criminal laws of several countries. See in particular the report of the United Nations High Commissioner for Human Rights submitted pursuant to General Assembly resolution 48/141 (E/CN.4/2001/16) and the paper of the tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders entitled "Women in the criminal justice system" (A/CONF.187/12).

[8] This paper deals with certain aspects of these new forms of discrimination, which are targeted chiefly at migrants, refugees and asylum-seekers, and the victims of trafficking.

[9] The Special Rapporteur of the Commission on Human Rights, Mr. John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, in his report to the fifty-eighth session of the Commission, gives an outline of discriminatory practices of the Israeli judicial system in the occupied territories (E/CN.4/2001/32, paras. 48-53).

[10] These groups were identified in the document prepared for the working group on the administration of justice, which refers in paragraph 39 to "the wide range of discriminatory practices and of the grounds of discrimination to which the victims are subjected, depending on their alienness, sex, ethnic or religious affiliation, age, disability, sexual orientation or material disadvantage, as the case may be, with some cases even involving double or triple discrimination" (E/CN.4/Sub.2/2001/WG.1/CRP.1).

[11] In this respect it is worth highlighting the significant effort made by non-governmental organizations in Durban to include discrimination in the administration of criminal justice in the Programme of Action of the World Conference. See in particular the contributions by Amnesty International, the World Organization against Torture, Penal Reform International and International Criminal Justice CAUCUS.

[12] A second draft decision (E/CN.4/2002/L.82) submitted under item 6 of the agenda was withdrawn by its joint authors.

[13] Counter-terrorist laws were passed in several countries in the weeks following the attacks against New York and Washington, but it was the legal measure introduced by the Government of the United States which attracted most criticism, especially the "Presidential Order on Military Tribunals" of 13 November 2001. That measure was considered by well known intellectuals and human rights defenders as discriminatory and in violation of international law and the United States Constitution. See in particular the criticism expressed by Robert Kodok Goldman, Chairman of the Inter-American Commission on Human Rights, under the title "Why President Bush's Military Order Runs Afoul of the Law", and the article published in *Le Monde* of 29 November 2001 entitled "*Après la victoire, la justice*", by Robert Badinter, former French Minister of Justice and Senator. See also the report by Dato' Param Cumaraswamy, Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers (E/CN.4/2002/72, para. 208) and the publications by Amnesty International, Human Rights Watch and the International Federation of Human Rights.

[14] See the report published by Amnesty International in March 2002: "Amnesty International's concerns regarding post-September 11 detentions in USA" (AI Index: AMR 51/044/2002).

[15] See the related resolution entitled "Racism, racial discrimination, xenophobia and related intolerance" (E/CN.4/2002/68).

[16] In a joint statement dated 29 November 2001 by the United Nations High Commissioner for Human Rights, the Secretary-General of the Council of Europe and the Director of the Organization for Security and Cooperation in Europe (OSCE), the view is expressed that: "While we recognize that the threat of terrorism may require specific measures, we call on all Governments to refrain from any excessive steps which would violate fundamental freedoms and undermine legitimate dissent. Such steps might particularly affect the presumption of innocence, the rights to a fair trial, freedom from torture, privacy rights, freedom of expression and assembly, and the right to seek asylum. Anti-terrorism measures targeting specific ethnic or religious groups would also be contrary to human rights law and international commitments and would carry the risk of sparking a dangerous upsurge of discrimination and racism."

[17] Amnesty International has published a document entitled "Rights at Risk. Amnesty International's concerns regarding security legislation and law enforcement measures", in which it mentions countries which have adopted legislation containing provisions which are discriminatory and incompatible with the rules of fair trial. Those countries include China, Egypt, Israel, Malaysia, Turkey, United Kingdom, United States, Zambia and Zimbabwe. It also mentions the draft text on the European arrest warrant (AI-index: ACT30/001/2002).

[18] The High Commissioner for Human Rights confirmed this tendency in the above-mentioned introductory statement in the following terms: "On 10 December 2001, on the occasion of Human Rights Day, 17 special rapporteurs and independent experts of the Commission on Human Rights expressed their concern over reported human rights violations and measures that have targeted particular groups such as human rights defenders, migrants, asylum-seekers and refugees, religious and ethnic minorities, political activists and the media. Ensuring that innocent people do not become the victims of counter-terrorism measures."

[19] In Deliberation No. 6, the Working Group on Arbitrary Detention gave a review of the circumstances and conditions which, before an international tribunal, might justify the maintenance of detention or prolonged pre-trial detention for persons accused of serious crimes. In support of its jurisprudence the Working Group referred to the practices of national courts. See the report of the Working Group on Arbitrary Detention for the year 2000 (E/CN.4/2001/14, paras. 12-33).

[20] Equality between citizens and aliens before the law and before the courts is enshrined in several United Nations instruments. In General Comment No. 15, the Human Rights Committee states that aliens are entitled to equal rights with citizens before the courts and to a fair and public hearing by a competent, independent and impartial tribunal established by law. The same principle is referred to in the Declaration on Victims. Concerning the rights of aliens, see the work published by UNESCO in 2001 entitled "United to Combat Racism. Dedicated to the World Conference against Racism, Racial Discrimination, Xenophobia and Related

Intolerance". This document recalls the rights granted in international and regional norms to migrant workers, Stateless persons, refugees and asylum-seekers and highlights equality before the courts between citizens and aliens. See also the preliminary report of the Special Rapporteur, David Weissbrot, on the rights of non-citizens (E/CN.4/Sub.2/2001/20 and Add.1).

[21] In the fight against terrorism, inter-State cooperation is not only encouraged but is an obligation for all States. In its resolution 1373 (2001), which is immediately applicable, the Security Council expresses concern at the connection between international terrorism and organized crime, illicit drugs, money-laundering an illegal movement of nuclear, chemical, biological and other potentially deadly materials and emphasizes the need for national, subregional, regional and international coordination in order to respond to these threats to international security. The Security Council calls upon all States to apply the measures adopted and threatens sanctions against any that refuse to cooperate.

[22] A number of mandatory international instruments call upon States to strengthen cooperation in order to protect the rights of certain vulnerable victims, including women, children and migrants. Specifically these are the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; the United Nations Convention against Transnational Organized Crime and its two additional protocols, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants. These instruments have been adopted by the United Nations General Assembly and should in principle enter into force during 2002.

[23] See the model treaties on international cooperation in criminal matters, in particular those concerning the transfer of proceedings in criminal matters and the transfer of supervision of offenders conditionally sentenced or conditionally released and the Model Agreement on the Transfer of Foreign Prisoners. Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice (United Nations publication, Sales No.: E.92.IV.1 and corrigendum).

[24] Of the systems of regional cooperation on criminal and prison matters, the European system is by far the most successful; it is based on a substantial body of legal instruments that ensure very close and effective inter-State cooperation on criminal matters, especially in the European Union, in order to combat crime, to protect the rights of victims, to improve the conditions of detention and to encourage the reintegration of offenders into society. See Daniel Fontanaud, *La coopération judiciaire en Europe*, La Documentation française, No. 786, 20 June 1997.

[25] Article 1 of the Model Agreement on the Transfer of Foreign Prisoners, adopted by the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, stipulates as follows: "The social resettlement of offenders should be promoted by facilitating the return of persons convicted of crime abroad to their country of nationality *or of residence* to serve their sentence at the earliest possible stage. In accordance with the above, States should afford each other the widest measure of cooperation". This recommendation has been implemented only partially in the treaties concerning the transfer of foreign prisoners, whether they be multilateral or bilateral treaties, since the criterion applied is nationality and foreigners who have established their customary residence in the States parties to such treaties are excluded.

See the European Convention of 21 May 1983 on the Transfer of Sentenced Persons; see also the bilateral agreements between the United States of America and several countries, between Spain, Portugal and some countries of Latin America, between France and several African States, etc.

[26] Article 10, paragraph 3 of the International Covenant on Civil and Political Rights states: "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation".

[27] This difference in treatment is contrary to the United Nations Standard Minimum Rules for the Treatment of Prisoners, which lay stress on social resettlement and prohibit discrimination in the treatment of prisoners.

[28] See M. Fabre and A. Gouron-Mazel, *Convention européenne des droits de l'homme. Application par le juge français: 10 ans de jurisprudence*, Edition LITEC, 1998, pp. 158-190. In many countries the law specifically provides for the automatic expulsion of aliens, even those lawfully resident, when they are given a prison sentence. If there are difficulties in deporting them after completion of their sentence, the aliens, even minors, are kept in detention.

[29] The European Court of Human Rights, applying the "ricochet" theory for the rights not recognized by the European Convention on Human Rights, particularly as regards the expulsion, escorting to the frontier and extradition of non-European aliens, has endeavoured in its judicial decisions to make up for the shortcomings of the Convention by imposing on Member States a number of restrictions that take into account the risks incurred by the persons concerned, their links with the country where they are resident and infringements of respect for private and family life. In order to decide whether there is any violation the Strasbourg judges refer, as the case may be, either to the provisions of the European instruments or to the standards of international law, but always with the following end in view: the European Convention must be interpreted in such a way as to guarantee rights that are real and effective, not theoretical and imaginary. See Jean Pradel and Geert Corstens, *Droit pénal européen*, Paris, Dalloz, 1999, pp. 286-289.

[30] Thus article 3 of the European Convention of 24 November 1983 on the Compensation of Victims of Violent Crimes excludes non-European victims from the compensation provided for by this agreement, stipulating that "compensation shall be paid by the State … to nationals of all member States of the Council of Europe …". It must be pointed out, however, that the reference to the instruments of judicial and police cooperation of the Council of Europe or the European Union unfortunately does not mean that the exclusions and discrimination described are confined to that area. The same concerns and the same restrictions are to be found in the majority of regional cooperation agreements, particularly when there is a substantial flow of migration towards the contracting countries. Exclusions and inequitable differences in treatment depriving aliens of some of the recognized rights of all persons without distinction, sometimes exposing them to inhuman and degrading treatment, have been noted by the United Nations human rights monitoring mechanisms in the Gulf States, the United States of America, Japan, Korea, Australia, Canada and in countries of the South that serve as transit points or host countries for displaced populations and refugees fleeing from wars and persecution. See in particular the concluding observations made by the treaty bodies when considering the periodic reports of member States.

[31] See *La justice pénale et l'Europe*, edited by F. Tulkens and H.D. Bosley, Brussels, Bruylant, 1996, and in particular F. Brion, "Les menaces d'une forteresse citoyenneté, crime et discrimination dans la construction de l'Union européenne", p. 253, and N. Busch, "Les fichiers automatisés", p. 135.

[32] The Additional Protocol against the Smuggling of Migrants clearly stipulates that the victims of the smuggling of migrants are victims and should not be subject to criminal prosecution, whereas in some countries clandestine immigration constitutes an offence under criminal law.

[33] See chapter II of the above-mentioned study by Mr. Justice Abu Sayeed Chowdhury (E/CN.4/Sub.2/1982/7).

[34] See Theo van Boven, "Common problems linked to all remedies available to victims of racial discrimination", p. 8 (HR/GVA/WCR/SEM.1/2000/BP.5). This document was submitted in preparation for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

[35] The courts are not only ill-equipped to deal with this type of crime but they reproduce the stereotypes concerning *provocation* or the *responsibility* of the victims of sexual attacks and the exploitation of prostitution. Generally speaking, criminal justice systems have little understanding of or ignore the victimization of women, on account of the historical tradition of violence inflicted on them and the erroneous sociological and psychological perception that does not always recognize the criminal nature of certain types of violence against women. With regard to the violence suffered by women, see the various reports of the Special Rapporteur on violence against women, its causes and consequences, and the report entitled "Discrimination against migrants - migrant women: in search of remedies" submitted by the Special Rapporteur on the human rights of migrants in preparation for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (A/CONF.189/PC.1/19).

[36] This practice, sometimes used against the victims' wishes, has been denounced by Ms. Radhika Coomaraswamy, Special Rapporteur on violence against women, its causes and consequences (E/CN.4/2001/73/Add.2) and by Ms. Gabriela Rodríguez Pizarro, Special Rapporteur on the human rights of migrants (E/CN.4/2000/82 and E/CN.4/2002/94) in their respective reports to the Commission on Human Rights. They also brought the matter to the attention of the Working Group on Arbitrary Detention and asked it to consider this problem, which they had noted in the territories and countries they visited in the course of their respective mandates. In the report it submitted to the fifty-eighth session of the Commission on Human Rights, the Working Group urged that recourse to deprivation of liberty in order to protect victims be reconsidered and be supervised by a judicial authority and in any case that the measure should be used only as a last resort and when the victims themselves desire it (E/CN.4/2002/77).

[37] The Working Group on Arbitrary Detention dealt with the issue of administrative custody of immigrants, asylum-seekers and refugees in its annual reports for 1999 and 2000 and specified their rights in its Deliberation No. 5 (E/CN.4/1999/63, E/CN.4/1999/63/Add.3 and Add.4 and E/CN.4/2001/14). The Human Rights Committee set out its position on the mandatory detention

of migrants in an unlawful situation during its consideration of the periodic report of Australia (CCPR/AUS/98/3 and 4). In its concluding observations dated 28 July 2000, the Committee considered that: "the mandatory detention under the Migration Act of 'unlawful non-citizens', including asylum-seekers, raises questions of compliance with article 9, paragraph 1, of the Covenant, which provides that no person shall be subjected to arbitrary detention. The Committee is concerned at the State party's policy, in this context of mandatory detention, of not informing the detainees of their right to seek legal advice and of not allowing access of non-governmental human rights organizations to the detainees in order to inform them of this right. The Committee urges the State party to reconsider its policy of mandatory detention of 'unlawful non-citizens' with a view to instituting alternative mechanisms of maintaining an orderly immigration process. The Committee recommends that the State party inform all detainees of their legal rights, including their right to seek legal counsel". Australia is not the only country to apply mandatory detention; other countries also practise this, especially after 11 September 2001.

[38] In police stations and detention centres, clandestine immigrants are particularly exposed to racial hatred and xenophobia. In November 2000 South Africa was deeply distressed by a video cassette broadcast by the South African Broadcasting Corporation; *Newsweek* (20 November 2000) reproduced its content in an article entitled "Brutal tale on the tape": "The tape is brutal and raw. Off camera, a voice announces the start of a 'dog training video'. Then six white South African policemen set their German shepherds on three defenceless black men. As the dogs chew on the victims' arms, legs and faces, the men scream and beg for mercy. The cops respond with punches, kicks and racial slurs. Toward the end of the edited 14-minute tape, one of the policemen draws his gun as if to execute one of the men. Another throws rocks at one of the victims as he shakes with fear… The policemen reportedly entertained friends by showing the 1998 home video at barbecues. The victims must have seemed safe targets - the SABC said all three were suspected illegal immigrants from Mozambique." Here it must be stressed that credible sources state that discrimination creates a climate conducive to the practice of torture and inhuman and degrading treatment. See the 2001-2002 compilation submitted by the World Organization Against Torture for the World Conference in Durban and the annual report of the Special Rapporteur on the question of torture submitted to the fifty-seventh session of the Commission on Human Rights (E/CN.4/2001/66, paras. 4-11).

[39] The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by United Nations General Assembly in resolution 40/34 of 29 November 1985 guarantees victims the right to be present at the trial, to receive assistance in defending themselves, to be informed of the progress of the proceedings and to take part in the decision-making process. See also the report by Mr. Cherif Bassiouni containing the revised version of the basic principles and guidelines elaborated by Mr. Theo van Boven on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms (E/CN.4/2000/62). The Commission on Human Rights, in resolution 2002/58 on violence against women migrant workers adopted at its fifty-eighth session, calls upon States, to the extent possible, to provide the victims of violence with legal and consular assistance, to take measures that will allow them to be present during the judicial process and to safeguard their dignified return to the country of origin.

[40] In a study based on the concluding observations of the Committee on the Rights of the Child for the period 1993-2000 entitled "Juvenile justice: the unwanted child of State responsibility", Bruce Abramson writes: "As the Committee sometimes points out, detention facilities and police contacts frequently have 'over-representations' of the poor and minority groups. This affects reform in multiple ways. For one, marginalized groups have the least ability to influence reform; for another, when tensions exist between social groups, there will be more abuses of power by individuals, whether they be police officers, staff in closed facilities, judges, or elected officials. And finally, we cannot hope to make significant progress in preventing juvenile crime when a State does not make a real commitment to tackle the deeper social injustices that lie behind the 'over-representation' of poor and marginalized groups in prisons."

[41] All the mechanisms for the monitoring or protection of human rights denounce the abnormally high rates of victimization and detention of Afro-Americans, Aborigines, Dalits, Roma, children of indigenous peoples and migrant workers and other communities stigmatized by age-old structural injustices in several regions of the world. In resolution 2002/77 on "the question of the death penalty", adopted by the Commission on Human Rights at its fifty-eighth session, the Commission notes that in some countries persons belonging to national or ethnic, religious and linguistic minorities appear to be disproportionately subject to the death penalty.

[42] The Canadian Criminal Justice Association writes of indigenous peoples as follows: "Over the past 30 years, there have been numerous studies, reports and justice inquiries across the country, and a growing body of statistical information, that confirm that Aboriginal peoples experience disproportionately high rates of crime and victimization, are over-represented in the court and the correctional system, and further, feel a deep alienation from a justice system that is to them foreign and inaccessible … The justice system does not provide pamphlets or signs … in Aboriginal languages and those who speak only Aboriginal languages are not permitted to be jurors … Problems can also occur when the individual called upon to interpret for the Aboriginal offender is not trained for this task and has limited knowledge of legal concepts". See the Bulletin published on 15 May 2000 entitled "Aboriginal peoples and the criminal justice system".

[43] In the eleventh edition (2002) of the publication "Attacks on Justice", which is devoted to a study of the judicial systems in 47 countries, the Centre for the Independence of Judges and Lawyers (CIJL), referring to the work of the Chairperson of the Working Group on Indigenous Populations, describes the discrimination suffered by indigenous populations in the administration of justice in Mexico: "The language difficulties faced by non-Spanish-speakers and the lack of translators are among the gravest problems confronting indigenous people in the administration of justice" (pp. 368 and 369).

[44] In its annual report for 1999, the non-governmental organization Penal Reform International writes: "The reduction in social programmes and the high unemployment rate resulting from a worsening of the economy have fostered crime and violence, two serious problems in the Caribbean. Consequently, the Governments of the region are under heavy pressure from their populations for the severe punishment of violent crimes. Some public prosecutors are in favour

of the death penalty and the entire region is suffering from terribly overcrowded prisons and an unenlightened approach to sentencing. The prisoners are for the most part young first offenders convicted of minor offences, particularly minor infringements of the legislation on narcotics".

[45] See the annual reports of Gabriela Rodríguez Pizarro, Special Rapporteur of the Commission on Human Rights on the human rights of migrants. On page 4 of her report on her visit to Ecuador in 2001, she writes: "In the prison system, the Special Rapporteur noted with concern the situation of many foreign detainees who benefit from no representation from their countries' consuls. She was provided with testimony from persons unable to speak English or Spanish who had been tried without even being able to communicate with their defence counsel, in the absence of interpreters for their languages. Most detainees in such situations come from African, East European and Asian countries. The Special Rapporteur also encountered foreigners imprisoned for ordinary offences who, though they claimed to have served their sentences, remained in prison because they had no travel documents or money for the journey home" (E/CN.4/2002/94/Add.1). The Working Group on Arbitrary Detention made similar findings during its visit to Bahrain: "In its interview with prisoners, the delegation found that there were a very large number of foreigners serving prison sentences; many of them spoke neither Arabic nor English, yet had been sentenced without a lawyer present. Some were in prison for offences their employers said they had committed, which in some cases appeared to relate to labour-law disputes; they could call their consulates, but in practice the consulates let things be and neither visited them nor offered assistance" (E/CN.4/2002/77/Add.2, para. 94).

[46] In an article entitled "In the house of horror", the *Economist* of 11-17 November 2002 (p. 81) describes the conditions under which vulnerable prisoners are kept in a São Paulo prison: "The other prisoners and the warders call them amarillos (yellows). That is the colour their skin has turned after so much time spent squashed together: as many as 10 of them in a sparsely furnished cell intended for one or two. There is almost no fresh air, let alone sun. The yellows are caged up in a jail within a jail, along a dark corridor in pavilion Five of São Paulo's giant Carandiru prison. … most of the yellows … are too poor to buy a decent cell on the unofficial 'property market' which is operated in the less dismal parts of the prison by inmates and, it is said, jailers."

[47] The Working Group on Arbitrary Detention noted in its report on its visit to Bahrain in October 2001: "In practice, according to information from a number of past and present detainees and certain lawyers, legal representation is not permitted during police custody, despite there being no law against it. Generally speaking, it is only when a person is brought before a judge that the family hires a lawyer. For indigent persons, defence counsel is officially assigned only in criminal cases and only when a case comes to court … As all the preparatory proceedings are handled by the police, they take place - even in criminal cases - with no lawyer present and counsel is officially assigned to represent the accused only on the day of the trial. According to consistent reports from present and former detainees, the officially assigned counsel will often conduct a single interview with his client before defending him the same day" (E/CN.4/2002/77/Add.2, para. 65).

[48] Ibid., paras. 92 and 93.

[49] Sometimes the law requires a bond from a victim who wishes to bring criminal indemnification proceedings. In some legislations (France, Spain, Belgium and Arab laws) the victim may exercise the remedy of action, that is, he or she may make up for the inaction or deficiencies of the prosecution service by exercising the public right of action, but is required to post a bond.

[50] Passive discrimination takes several forms: establishing laws without specifying the procedures for their application, failing to take the positive actions that are essential for eliminating discrimination and for guaranteeing equal treatment for the most indigent, discouraging victims by the slowness of procedures and their uncertain results, demanding a level of proof that is difficult to provide, failing to protect vulnerable victims against reprisals, etc. All these aspects could be dealt with as part of a study on discrimination in criminal justice systems.

[51] For example, the adoption in Western Australia and the Northern Territory of a system of minimum penalties and mandatory imprisonment for certain offences against property has resulted in practice in an increase in the incarceration rate for Aboriginal minors. When considering the periodic reports of Australia, the Committee on the Rights of the Child (see A/53/41), the Human Rights Committee (see CCPR/C/AUS/98/3 and 4) and the Committee on the Elimination of Racial Discrimination (see A/55/18) have all taken the view, in respect of their own area of responsibility, that this law has had discriminatory repercussions for the indigenous peoples in their dealings with criminal justice and has led to the imposition of penalties unrelated to the severity of the offences committed. In the administration of justice, minors who belong to indigent or low-status social categories are particularly vulnerable and are subjected to discriminatory practices in many countries.

[52] The Commission on Crime Prevention and Criminal Justice has decided to discuss the following topic at its forthcoming eleventh session: “Reform of the criminal justice system: achieving effectiveness and equity”.
