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ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY

Discrimination in the criminal justice system

Progress report by Ms. Leïla Zerrougui, Special Rapporteur* **

* In accordance with General Assembly resolution 53/208 B, paragraph 8, this document is submitted late so as to include the most up-to-date information possible.

** The endnotes are circulated as received, in the original language only.

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Summary

This progress report is submitted pursuant to resolution 2002/3 of the Sub-Commission on the Promotion and Protection of Human Rights. It is devoted to an analysis of de jure discrimination and discrimination incorporated into the structure of the criminal justice system overall. The gravitation of substantive criminal law and procedural law towards ensuring the fundamental rights acknowledged by supranational sources has been used to gauge direct and indirect discrimination that seriously impairs enjoyment of the fundamental rights of those who are most vulnerable.

In view of the rules restricting the length of documents and the adjustments made in order to comply with Sub-Commission resolution 2004/24, the Special Rapporteur must point out straightaway that certain issues that were to have been considered at this stage have not been addressed or addressed exhaustively for the purposes of the study requested by the Sub Commission. They include, in particular, discriminatory treatment in prison administration and a gender-specific approach to discrimination. These issues will be studied in the final report.

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Introduction

1. At the fifty-second session of the Sub-Commission on the Promotion and Protection of Human Rights in 2000, and in the context of preparations for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the attention of the members of the Sub-Commission was drawn to the extent of discrimination in the administration of justice. In response to this concern, the Commission's sessional working group on the administration of justice entrusted Ms. Leïla Zerrougui with preparing a working paper on one aspect of discrimination in the administration of justice, that of discrimination in the criminal justice system.

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. The paper recalls the significance of the non-discrimination clause, equality before the law and equal protection of the law in the most relevant international instruments, identifies potential victims of discrimination, provides an overview of its various manifestations and proposes a conceptual framework for a possible study on discrimination in the criminal justice system.

3. In decision 2001/104 of 10 August 2001, the Sub-Commission, welcoming the working paper prepared by Ms. Zerrougui, requested her 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.

4. At the Sub-Commission's fifty-fourth session, Ms. Zerrougui submitted a final working paper (E/CN.4/Sub.2/2002/5) which focused on four main areas: (1) a review of the Sub-Commission's contribution in the matter under consideration; (2) the international context; (3) further consideration of some features of the conceptual framework proposed for the study; and (4) conclusions and recommendations. Since the final working paper was submitted against the background of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (the Durban Conference) and the attacks of 11 September 2001 on the World Trade Center, the repercussions of those two events on the question of discrimination in the criminal justice system were emphasized.

5. In resolution 2002/3 of 12 August 2002, entitled "Discrimination in the criminal justice system", the Sub-Commission welcomed with satisfaction the two working papers referred to above and recommended that the Commission on Human Rights should permit it to appoint Ms. Leïla Zerrougui as Special Rapporteur to conduct a detailed study of discrimination in the criminal justice system with a view to determining the most effective means of ensuring equal treatment in the criminal justice system for all persons without discrimination, particularly vulnerable persons, and requested her to submit a preliminary report to the Sub-Commission at its fifty-fifth session, a progress report at its fifty-sixth session and a final report at its fifty-seventh session.

6. At its fifty-ninth session, by decision 2003/108 of 23 April 2003, the Commission on Human Rights approved the appointment of Ms. Zerrougui as Special Rapporteur and requested the Secretary-General to provide her with any assistance necessary to enable her to fulfil her mandate, including the assistance of a consultant having specialized knowledge of the subject.

7. At the Sub-Commission's fifty-ninth session, for lack of time between the confirmation of her appointment by the Commission and the deadline for the submission of Sub-Commission documents, the Special Rapporteur was unable to produce the preliminary report; she nevertheless submitted a working paper (E/CN.4/Sub.2/2003/3) clarifying the general approach of the study and its conceptual framework and proposing a preliminary workplan to the Sub-Commission.

8. The proposed workplan is constructed round the following points: (a) vulnerable persons caught between formal equality before the law and the courts, and structural inequalities, distinctions and discrimination; (b) de jure discrimination and institutional discrimination in criminal process and prison administration; (c) discrimination in the criminal justice system from the gender-specific standpoint; (d) good practice adopted at the international, regional and national levels to reduce inequalities and eliminate discrimination in the criminal justice system; and (e) conclusions and recommendations, including guidelines, to guarantee vulnerable persons the right to non-discrimination and respect for their basic rights in the criminal justice system.

9. In 2004, Ms. Zerrougui left the Sub-Commission. She therefore decided not to submit a report to the fifty-sixth session so the Sub-Commission could, if it saw fit, entrust the study to one of its members. In its resolution 2004/24 of 12 August 2004, entitled "Discrimination in the criminal justice system", the Sub-Commission classified the working paper E/CN.4/Sub.2/2003/3 as a preliminary report and requested the Special Rapporteur to submit her progress report at its fifty-seventh session. The Special Rapporteur has taken note of this resolution and adjusted her approach in order to complete the study as two reports. This report is submitted pursuant to the resolution in question and resolution 2002/3 of 12 August 2002. It should be read in conjunction with working papers E/CN.4/Sub.2/2001/WG.1/CRP.1, E/CN.4/Sub.2/2002/5 and E/CN.4/Sub.2/2003/3.

I. PRELIMINARY OBSERVATIONS

10. In her preliminary work, the Special Rapporteur stressed that discrimination in numerous forms persists in the criminal justice system because it is not only behavioural or incidental but also institutional and structural. It was agreed that the study would cover the institutional framework and legislation relating to matters of substance and procedure governing at the national level the activities of the investigating, prosecuting and law-enforcement agencies and the courts, with a view to identifying de jure and indirect discrimination occurring at each stage of the criminal process from the police investigation to the sentence and execution of sentence.

11. The study makes no claim to study the diversity of national criminal justice systems or to show how each system generates or accentuates all forms of discrimination. The aim is to single out the discriminatory mechanisms which seriously impair enjoyment of the fundamental rights of the most vulnerable groups. This has been made possible by the gravitation of substantive criminal law and procedural law towards ensuring the fundamental rights acknowledged by supranational sources, a development which means that a number of rules have to be followed in the organization and operation of the justice system.

12. Whatever the legal system to which the law applied in a national criminal justice system belongs (Roman-Germanic, common law, Muslim law, socialist law or any other substantive tradition-based law[1]) and whatever the procedure followed (adversarial, inquisitorial or combined), the influence exerted by the sources of international law requires States to ensure that all within their jurisdiction benefit from at least a hard core of fundamental rights.[2] These are: the right to a fair trial by a competent, independent and impartial court established by law and the right to legal aid; the presumption of innocence; the principle of legality and non-retroactivity of more stringent criminal laws; the principle of *non bis in idem*; the prohibition of torture and cruel, inhuman or degrading treatment, the inadmissibility of confessions obtained under torture or by the use of cruel, inhuman or degrading treatment; the right to liberty and security of person, the prohibition of imprisonment for civil debt, and the due process required to protect these rights.[3]

13. It is violations of this hard core of fundamental rights, for the most part non-derogable,[4] that reveal infringements of the right to non-discrimination. Discrimination is defined as "any distinction, exclusion, restriction or preference having the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".[5]

II. ACCESS TO THE LAW AND TO JUSTICE BETWEEN INFORMAL EQUALITY, STRUCTURAL INEQUALITIES, DISTINCTIONS AND DISCRIMINATION

14. Nowadays the right to non-discrimination is firmly anchored in international law; in some aspects at least it is even considered to be an integral part of customary international law,[6] and it is an established fact that some elements or aspects of this right cannot be derogated from in any circumstances.[7]

15. The corollary of the ban on discrimination is the general principle of equality:[8] equality before the law, equality before the courts, and the equal protection of the law. The most relevant human rights treaties contain a general clause on equality and categorically prohibit discrimination. The prohibition of discrimination requires States to comply with the general principle of equality and ensure full exercise the right to non-discrimination to all persons under their jurisdiction. These obligations are both negative and positive in nature.[9] States must not only themselves refrain from violating the right to non-discrimination, but must, if the need arises, take positive action to protect it not only against violation by their own agents but also against violation by private parties.[10]

16. In order to invoke the responsibility of States for violation of the right to non-discrimination, international and regional human rights treaty bodies have established criteria and follow original methods which, in addition to flagrant discrimination, enable them to identify prohibited inequalities, legitimate differences in treatment and the positive action needed to ensure equality for all in areas where equality of rights is formally acknowledged.[11] These criteria go beyond the abstract notion of equality and formal rights to encompass actual equality, that enjoyed by people in their essentially individual situations.[12]

17. The equal enjoyment of rights and freedoms does not imply identical treatment in every case.[13] The principle of equality applies when the parties in question find themselves in comparable situations.[14] Differences of treatment are acceptable when they are based on reasonable and objective criteria, aim at a legitimate goal in relation to international human rights law and are commensurate with achieving that goal.[15] Positive action and differential, preferential treatment to offset the effects of racist or sexist segregation therefore do not constitute discrimination.[16] International human rights law requires States to take action and pursue policies to reduce de facto inequalities and help groups facing deep-rooted discrimination to overcome their adverse situation vis-à-vis other members of the community.[17]

18. All these notions take on considerable importance in the criminal justice system because here nothing is more deceptive than equality. Even if it is assumed that everyone is formally guaranteed access to the courts and that in a literal sense the law is the same for everyone whether it protects, restrains or punishes, in practice access to the law and access to justice are fundamentally unequal. The reasons may be social, economic or cultural, or the persons concerned may suffer from social segregation or deep-seated discrimination.[18] Although social inequalities and racial disparities are acknowledged as standing in the way of equality of access to the law and justice, the idea of taking positive action to correct their adverse effects on vulnerable groups is not accepted everywhere. Supporters of "colour-blind, race-blind policy" hold that economic and social inequalities are inevitable and considerations of colour and race have no place in criminal justice.[19]

19. The facts and indicators of how discrimination manifests itself in many countries' criminal justice systems reveal three major trends in the representation of those in greatest need, non-nationals, indigenous populations, racial, ethnic, religious and linguistic minorities, women, children, persons discriminated against because of their ancestry, sexual orientation, gender identity or disability and other social groups which for various reasons, sometimes owing to a combination of several grounds for discrimination, are given inferior treatment, stigmatized or marginalized in a given society.[20] These groups, often the poorest of the poor,[21] are under-represented on the staff of the justice system, the police and all law enforcement services,[22] over-represented among victims,[23] and inordinately prevalent among lawbreakers, in the prison system and on death row.[24]

20. The situation is often described as a downward spiral from social discrimination to marginalization, incurring frustrations which may lead to criminal behaviour, in its turn a source of collective stigma.[25] Such stigmatization perpetuates structural inequalities and engenders differences in treatment that amount to direct or indirect discrimination. In a strictly formal sense, indirect discrimination may not be regarded as disallowed differentiation, but since in practice it gives rise to effects equivalent to those of direct discrimination, it is prohibited.[26] In principle, direct discrimination is not difficult to define or describe; keeping a check on indirect discrimination, however, is much more difficult because it often arises from laws, policies or practices that are apparently neutral. The system of minimum penalties and mandatory imprisonment applied to certain offences is a perfect illustration of laws that are apparently neutral but have a discriminatory side which emerges in practice. Practice is therefore the test for revealing indirect discrimination, particularly when equal access to the law and to justice is jeopardized.[27]

21. Equal access to the law and to justice would suggest at least equal familiarity with their workings, their concepts and arguments and an absence of financial barriers. But it is often the law itself which creates inequalities by means of money, culture, complex legal regulations, procedural inequalities, unequal opportunities and criminal policies that segregate or stigmatize.[28] It is thus very hard for vulnerable persons, often poor and illiterate, to know their rights and how to proceed in order to have them recognized by the courts.[29] How can they succeed when they are unable to afford a good-quality defence? The senior president of one court of cassation states unambivalently: "The technicality of an appeal on points of law in addition to the growing complexity of substantive and procedural law makes a defence without counsel, or even a defence without specialized counsel, a chimera. The setting-out of legal arguments is so special an exercise that a very large proportion of personal memoranda, whatever their type, is doomed to fail."[30]

22. A vision of access to the law, somewhat along the lines of a humanitarian mission of free legal aid provided by the bar to the impoverished, has long prevailed. The influence of international sources for the right to a fair trial has made it possible in many countries to abandon the aid system and acknowledge a genuine right to support in legal proceedings, while other countries continue to resort to legal aid to ensure some semblance of defence for the poorest individuals.[31]

23. The rights of the defence are nevertheless equivalent to a general principle of law. Some regard them as a principle of natural law,[32] valid in all cases. In criminal affairs in particular the right to be assisted by counsel of one's own choice and, if appropriate, by a court-appointed lawyer is a basic guarantee for ensuring a genuine right to a fair trial.[33] National legislation generally guarantees this right, at least for people accused of fairly serious offences. In practice, the requirements for a good-quality defence are not always met, particularly for persons dependent on legal aid.

24. All the studies and papers that have considered access to legal aid for the very poor reveal that quality standards required for the defence of the destitute are very low, and community investment in legal aid is grossly inadequate in nearly all countries.[34] The Working Group on Arbitrary Detention has observed during visits to a number of very different countries that legal aid is rudimentary in poor countries and substantially underpaid in wealthy ones. It is sometimes entrusted to non-professionals, preliminary investigations and pretrial proceedings are often conducted without a lawyer, and court-appointed lawyers for the actual hearing are generally told what cases they are to defend only hours or days before the trial. In certain countries, people found guilty may be required to repay any sums advanced for legal aid, and this discourages them from seeking the assistance of a lawyer.[35] The Working Group has also observed that defendants who have not been informed of their rights decline the assistance of a lawyer.[36] Thus not even persons deprived of their liberty are assured of access to a court-appointed lawyer.[37] It has also been reported that certain minorities are discriminated against in the support provided during legal proceedings.[38]

25. Where foreigners, linguistic minorities and members of groups from cultures other than those dominant in the criminal justice system are concerned, inequalities of language and culture augment the inequalities resulting from money and complex legal rules.[39] For members of such

groups the language of justice is a genuine obstacle to the right to a fair trial.[40] If the principle of equality before the courts and the right to a fair trial is to be respected, a party to the proceedings who does not understand or speak the language used in the courts must have the assistance of an interpreter free of charge and be given a translation of the main procedural decisions.

26. People accused of criminal offences are explicitly guaranteed the right to have the assistance of an interpreter.[41] The guarantee of a translation of the main procedural decisions is embodied in case law.[42] The Rome Statute of the International Criminal Court specifies the defendant's right in this regard in article 67 (f): "To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks." The Human Rights Committee considers that, even in a civil or administrative court, inability to speak or understand the language used should prompt the court to provide for an interpreter and a translation of the main written proceedings.[43]

27. In State practice, budgetary provision for such matters is inadequate, the interpreters selected are not always competent and are rarely qualified to understand all the nuances of legal language, translation of the proceedings is limited to the sentence and it has been observed that the translation of a sentence may take several months and thus delay any appeal or the benefit of a less strict regime of detention.[44] These budgetary restrictions also affect the defendant's right to communicate with his lawyer since court-appointed lawyers do not generally understand the language of the person they are required to defend.

28. For vulnerable groups, therefore, ill-preparedness owing to poverty, ignorance and stigmatization creates a strong probability of their being consigned to pretrial detention, having their right to a fair trial infringed and, sometimes, being given a disproportionate or frankly unjust sentence.[45] Contributing factors are an inability to pay bail or provide sureties (that the defendant will attend court), a poor defence, and limited access to the services of a competent interpreter and translations of the evidence in the file. These violations are not only the consequence of intractable economic and social inequalities. In the criminal justice system, discrimination and its disproportionate impact on vulnerable groups have become institutionalized.[46]

III. DE JURE DISCRIMINATION AND INSTITUTIONAL DISCRIMINATION IN CRIMINAL PROCESS

29. De jure discrimination is not basically hard to identify since it is generally explicit. To give three examples: (1) in combating terrorism and controlling immigration, discriminatory provisions based on the nationality or place of origin of the persons targeted that affect non-derogable rights and the most fundamental judicial guarantees;[47] (2) in countries applying Muslim law, criminal legislation discriminating against non-Muslim minorities;[48] (3) in these and other countries, de jure discrimination on sex, gender or gender-identity grounds explicitly embodied in the laws and rules of procedure.[49]

30. It is, however, far more difficult to identify institutional discrimination, which is often indirect. It is frequently the disproportionate impact it has on vulnerable groups that enables it to be identified.

A. Impact of the characteristics of the legal system

31. The documentation gathered for this study clearly shows that whatever the legal and procedural system in force in a given country, the structural inequalities, stereotypes and prejudices are mirrored in the criminal justice system. It has even been proved that the advantages and positive aspects of a specific legal system do not always benefit potential victims of discrimination and racism, while the system's disadvantages stigmatize them more than other members of the community.

32. Thus, in systems applying the inquisitorial model, or a combination of the inquisitorial and adversarial models, the disadvantages of the inquisitorial procedure particularly affect vulnerable groups. The fact that the preliminary investigation is confidential and in written form, the imbalance between the parties to the proceedings, the procedure for establishing evidence and the broad powers conferred on the legal professionals, without proper monitoring,[50] lead to violations of the fundamental rights of the most vulnerable. These violations are well documented in the reports of the Working Group on Arbitrary Detention on its visits to China, Belarus, Latvia, Argentina, Mexico, the Islamic Republic of Iran and other countries with an inquisitorial tradition.[51]

33. In legal systems which give the investigation and prosecution authorities pre-eminence over judges, it is this that facilitates the repression of certain groups. When these same authorities decide on the need for pretrial detention, on continued detention in custody for investigation purposes and on the custodial regime to apply, discriminatory use is made of detention and the custodial system as forms of duress to punish, obtain confessions or make it easier to fabricate evidence.[52]

34. The adversarial system inherited from common law is often presented as the procedure that best respects the rights of the defence and provides genuine safeguards, particularly for the accused since, formally, it guarantees that both parties are heard and ensures complete "equality of arms" between accuser and accused at every stage of criminal proceedings. Given the demonstrable lack of real access to an adequate defence by those most in need and the correlation between poverty, exclusion and discrimination, these safeguards are totally ineffective in practice for potential victims of discrimination.

35. In their book *Procédures pénales*, Guinchard and Buisson question how well the rights of the defence are guaranteed by the Anglo-Saxon system as follows: "… the waywardness of the American justice system, a two-track system in which a poor individual is all the readier to accept a 'plea bargain'[53] since he cannot afford a lawyer who will stand by him through all the ins and outs of a lengthy trial; so he opts for a quick trial by agreeing to plead guilty. About 90 per cent of proceedings in America and in an agreement of this type between the prosecuting authority and the accused. Speed rules, but when a self-proclaimed guilty party appears in court, any possibility of a debate about his guilt having been ruled out, does this not encroach on the rights of the defence?"[54]

36. A guilty plea is not specific to American justice; it is used in other countries to avoid long and costly proceedings and to relieve increasingly congested justice systems. Fears are nevertheless expressed about the inequality and injustice it generates and the risks of coercion of vulnerable individuals who are not always aware of their rights or cannot understand the implications of the bargain proposed.

37. Another observation is that the markedly popular nature of justice and the distinction made between grand jury and trial jury originally designed to prevent judicial errors are inevitably biased by underrepresentation of minorities on juries and in judiciary staff resulting from social segregation policies and the strict application of "colour-blind, race-blind equality".[55]

38. Since in some cases the composition of the jury and the venue of a trial are decisive factors, common law gives courts the right to order a change of venue in order to ensure that the accused receives a fair trial and an impartial jury. Practice reveals that the procedure may also be used in a non-egalitarian or frankly discriminatory fashion, as may be seen in the *Rodney King* case.[56] Furthermore, when discrimination is alleged the courts place the burden of proof on the complainant, or apply methods and criteria which result in the systematic rejection of the allegations.

39. The importance of the approach and methods used by national courts is perfectly illustrated in an article by Brand on a century of case law in the United States Supreme Court: "*The Court's methodology focuses on preventing discriminatory exclusion of minorities from the jury box rather than on guaranteeing their non discriminatory inclusion. The difference in emphasis is profound; its net effect is devastating … The Court's flawed methodology and naïve assumptions about race explain the continuing chasm between the rhetoric of inclusion and the reality of exclusion*."[57]

40. In national systems and sometimes even within regional human rights bodies, the burden and manner of proof are among the principal obstacles for victims of discrimination. The criterion of proof beyond all reasonable doubt applied by the European Court of Human Rights makes it impossible to prove discrimination on the grounds of race or ethnic origin (violation of article 14 of the European Convention on Human Rights). In *Natchova v. Bulgaria*, by relying on indirect evidence and shifting the burden of proof onto the defendant Government, the Court was able to conclude that article 14 of the Convention had been violated.[58]

41. In international human rights law, intent is not a decisive factor in proving discrimination; the effects, and more particularly the disproportionate impact of discrimination are sufficient.[59] In State practice, racial disparities are not always taken into account to prove discrimination;[60] racial motivation is not easy to prove, and even where evidence exists it is not always accessible to the victim.[61] The situation is still more difficult when the victim has to prove discrimination before a criminal court.

B. The victim's place in the criminal process

42. Filing a complaint is not always easy, particularly when the victim belongs to a vulnerable group, and more especially when the complaint concerns agents of the State.[62] Pressure, unenthusiastic lawyers, the lack of information on the course of proceedings, the intimidating nature of the machinery of justice[63] and the lack of support during criminal

proceedings all add to victims' reluctance to initiate or pursue legal measures, particularly since very few countries provide victims with legal aid. The slowness and ponderousness of legal proceedings also erode victims' trust in the justice system. These constraints can be explained, in part at least, by the victim's place in criminal proceedings, particularly when he or she belongs to a vulnerable social category.

43. As we made clear in our preparatory work, criminal justice has long regarded the victim as a third party in proceedings under practically all legal systems; sometimes the victim is not even a party. In some legal systems (common law), the victim is an ordinary witness, does not take part in the arguments, cannot sue for damages in criminal proceedings and must take an oath before making a statement. In other systems, the victim may bring a civil action in a criminal court, but only if the prosecution has initiated proceedings. Countries that have adopted this system have generally combined it with a feature in the victim's favour: in the event of a decision not to prosecute, he or she may apply to the appeal court for an order that the prosecution must bring proceedings. A third type of legislation permits the victim to act both by bringing proceedings, i.e. compensating for lack of action or shortcomings on the part of the prosecution, or by intervention, i.e. acceding to the proceedings after the prosecution has brought a criminal action.[64]

44. It must, however, be made clear that allowing the victim the right to bring a criminal action does not turn him into a second-line public prosecutor, since his intervention is not designed to prevent presumed offenders from going unpunished but solely to enable him to seek damages for injury resulting from an offence. In the most advantageous systems the victim's rights in criminal proceedings are limited to ensuring this goal. The victim is not allowed to oppose or contest the release, mild sentence or any other kind of clemency shown to the accused by the court.

45. In Muslim law, however, victims and their families have a central role to play in criminal proceedings, particularly in the case of violence to life and person. In countries where the body of criminal law is based on the ancient *lex talionis*, proceedings against the life or physical integrity of the person are subject to the decision of the victim or his or her family, who may ask for the guilty party to suffer the same treatment as he or she suffered (*qisas*) or accept financial compensation (*diyah*) (blood money). In the absence of agreement between victim and perpetrator, *diyah* is calculated on the basis of a predetermined scale, with *diyah* for a woman being assessed at half that for a man. This same highly discriminatory principle is also applied to *dhimmah*, the religious minorities recognized in Muslim law.[65] Under this principle, minorities not so recognized are ipso facto excluded from the right to compensation.[66] Survivals of this traditional role favouring the victim generate other forms of inequality of treatment and discrimination that affect the poor, minorities and, especially, women.[67]

46. It is clear from the foregoing that even in the most favourable legal systems, the victim's place in criminal proceedings is by and large secondary, and this obviously influences his or her rights and perception of the justice system. Surveys and research provide evidence that victims are very often dissatisfied with the reception the courts give to their complaints and the way they are treated in the criminal justice system. Criminal proceedings are often described by victims as a traumatic experience.

47. Meanwhile, under the nudging of international law, the rights of the accused continue to be consolidated, creating an imbalance in criminal proceedings. Unlike violations of the rights of the accused, which often invalidate proceedings, failure to observe victims' rights in no way prejudices the outcome. It neither renders evidence inadmissible nor prevents an acquittal. Criminal procedure does not of itself make any provision for punishing failure to respect victims' rights.[68]

48. The consolidation of the victim's place in criminal proceedings began in 1985 with the adoption by the United Nations General Assembly of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which guarantees victims the right to be present during proceedings, to be provided with assistance for their defence, to be informed of the progress of proceedings and to participate in the decision-making process.

49. The case law of the international criminal tribunals for the former Yugoslavia and Rwanda and the Rome Statute of the International Criminal Court have introduced new safeguards for victims of the most serious crimes.[69] Other binding international instruments have emerged to reinforce the rights of some vulnerable victims, including women and children.[70] This positive development has prompted most countries to reform their criminal justice systems with a view to redefining victims' rights and setting up legal mechanisms and instruments that take account of the basic aspects of equity with regard to victims.[71]

50. As in the case of the other rules and regulations, however, it is in implementation that problems emerge and shortcomings appear, particularly in the protection of vulnerable persons.

C. The structural dimension of discrimination by the police and other participants in the criminal justice process

51. In considering human rights violations in general, and more particularly violations of the right to non-discrimination in the criminal justice system, it may be observed that it is within the security services and more particularly the police that the most serious, the most flagrant and the commonest violations occur.[72] Some claim that these are only individual, isolated acts; others assert that violations by the police are structural by nature and reflect trends in society. It is true that when there is endemic racism towards a specific group in society that group is often stigmatized by the police, but over and above individual behaviour it has been proved that police brutality and discriminatory treatment of certain groups have become institutionalized.[73]

52. "Colour-blind, race-blind" recruitment policies are one instance of structural discrimination which in nearly all countries results in minorities being underrepresented in the police and other law enforcement agencies. This underrepresentation helps perpetuate stereotypes based on race, ethnic group, colour, religion, parentage or place of origin in attributing criminal propensities or identifying criminal tendencies and the places where they are concentrated.[74]

53. The thrust of policies to combat crime and maintain order and security is not without influence on the behaviour of the police and the existence of "racial profiling".[75] In his report to the Commission on Human Rights at its sixtieth session, the Special Rapporteur on contemporary forms of racism and racial discrimination said that, "In a number of countries,

certain racial or ethnic minorities are associated in the minds of the authorities with certain types of crimes and antisocial acts, such as drug trafficking, illegal immigration, pickpocketing and shoplifting […]. Racial and religious profiling, in view of its widespread practice in all continents, and especially of the responsibility borne by the central law enforcement agencies, appears as an alarming indicator of the rise of a racist and discriminatory culture and mentality in many societies."[76] The Special Rapporteur on the question of torture also reports racial profiling in the practice of torture.[77] The numbers of members of vulnerable groups who die in custody or suffer police brutality are often out of all proportion to their number within the population.[78]

54. Reliable sources have on several occasions revealed and decried the institutional dimension of racial discrimination and racial profiling by the police using statistics on challenges and arrests in the street of members of traditionally stigmatized minorities for offences concerning drugs, prostitution or petty crime, and citing the concentration of patrols and checks in the poorest districts.[79] But it is particularly in the context of post-11 September 2001 counter-terrorist activity that racial profiling targeting the Arab minority and South Asian Muslims has become official policy, in the United States in particular, but also in many other countries.[80]

55. The institutional dimension of the discrimination ascribed to the police and other law enforcement services also derives from a number of combined factors. These include: the range of powers given the police to combat crime and ensure order and security, the inadequate means put at their disposal, the type of supervision under which the police operate and the existence or absence of efficient remedies and positive measures to prevent and punish violations of the rights of the most vulnerable.

56. When the police have broad discretionary powers and are the only authority empowered to investigate violations ascribed to their officers, when external supervisory mechanisms are non-existent or do not have the power to punish and halt violations, and in particular when lodging a complaint entails considerable risks and offers no guarantee of success, abuses are inevitable and impunity is assured since the system makes for it.[81] Sometimes there is not only inefficiency, inadequacy or genuine incapacity, but also a conscious desire to discriminate against or put down certain social groups.[82]

57. States often cite the absence or rarity of complaints as evidence that there exist no violations, discrimination or racism. In its preliminary draft general recommendation on the prevention of racial discrimination in the administration and functioning of justice, the Committee for the Elimination of Racial Discrimination states that "The absence or small number of complaints, prosecutions and convictions relating to acts of racial discrimination […] should not be viewed as necessarily positive, contrary to the belief of some States. It may also reveal either that victims have inadequate information concerning their rights, or that they fear social censure or reprisals, or that victims with limited resources fear the cost and complexity of the judicial process, or that there is a lack of trust in the police and judicial authorities, or that the authorities are insufficiently alert to or aware of offences involving racism".[83]

58. Discrimination is not confined to the police but is also practised by other participants in the criminal justice process. Since minority groups are underrepresented in the administration of justice, police stereotypes vis-à-vis certain groups can be found in the decisions of those who design criminal policy and in those of prosecutors and judges. It is an established fact that

offences involving members of stigmatized or marginalized groups are more severely punished.[84] The disproportionate impact on indigenous populations and on certain groups stigmatized by crime of the system of minimum penalties and mandatory imprisonment applied in certain countries to certain offences confirms this trend.[85] Statistics and facts show that race, colour and place of origin are decisive factors in the application of the death penalty.[86] It has also been established that disparities in incarceration are the consequence of slanted criminal policy and a tendency for the members of vulnerable groups to be prosecuted and imprisoned more frequently.[87]

IV. CONCLUSION

59. The final working paper, E/CN.4/Sub.2/2002/5, demonstrated the existence of de jure discrimination and institutional discrimination stemming from inter-State cooperation in criminal matters. This report focuses on an analysis of institutional and structural discrimination in the national criminal justice system and on those aspects of it that show that discrimination is not only behavioural or de facto and does not derive only from the rules applied in national systems of criminal justice. The gravitation of substantive criminal law and procedural law towards ensuring the fundamental rights acknowledged by supranational sources has been used to gauge direct and indirect discrimination that seriously impairs enjoyment of the fundamental rights of those who are most vulnerable.

60. In view of the rules restricting the length of documents and the adjustments made in order to comply with Sub-Commission resolution 2004/24, a number of issues that were to have been considered at this stage of the study have not been addressed. These include in particular discriminatory treatment in prison administration and a gender-specific approach to discrimination. They will be studied in the final report. That report will, however, give prominence to good international, regional and national practice in combating discrimination in the criminal justice system, and make recommendations for promoting and applying the best practices identified.

Notes

[1] Voir R. David et C. Jauffret-Spinosi, *Les grands systèmes de droit contemporains*, 11e éd., Paris, Dalloz, 2002; voir également "Criminal Justice Profiles of Asia: Investigation, Prosecution, and Trial", UNAFEI (Institut des Nations Unies pour la prévention du crime et le traitement des délinquants en Asie et en Extrême-Orient), 1995.

[2] Voir «Droit processuel. – Droit commun et droit comparé du procès: les sources d'attraction du droit processuel à la garantie des droits fondamentaux», Précis Dalloz, 1re éd., p. 52.

[3] Voir L. Doswald-Beck et R. Kolb, *Garanties judiciaires et droits de l'homme. – Nations Unies, systèmes européen, américain et africain: textes et résumés de la jurisprudence internationale*, Strasbourg, Édition N. P. Engel, 2004.

[4] Observation générale n° 29 du Comité des droits de l'homme, relative aux états d'urgence (voir la base de données des organes de surveillance de l'application des traités sur le site www.unhchr.org).

[5] Voir le rapport de la Haut-Commissaire à la soixantième session de la Commission des droits de l'homme intitulé «Étude analytique du principe fondamental de non-discrimination dans le contexte de la mondialisation» (E/CN.4/2004/40, par. 7 à 15).

[6] Voir le rapport de la Commission du droit international à l'Assemblée générale sur les travaux de sa cinquante-troisième session, en 2001 (A/56/10), p. 224. Voir également A. Bayefsky, "The principle of equality or non-discrimination in international law", *Human Rights Journal*, vol. 11, n^{os} 1-2, p. 18 à 24.

[7] Observation générale n° 29, par. 8.

[8] Sur les notions d'égalité et de non-discrimination, on consultera avec profit le livre de R. Hernu, *Principe d'égalité et principe de non-discrimination dans la jurisprudence de la Cour de Justice des Communautés européennes* (notamment p. 246), Paris, LGDJ, juin 2003.

[9] Voir *Non-Discrimination in International Law: A Handbook for Practitioners* (textes réunis par K. Kitching), chap. I^{er}, "State obligations: public and private discrimination", Londres, INTERIGHTS, janvier 2005, p. 22.

[10] Le Comité des droits économiques, sociaux et culturels considère que les droits énoncés dans le Pacte imposent trois sortes d'obligation aux États parties: l'obligation de respecter ces droits, l'obligation de les défendre et l'obligation d'en assurer le plein exercice. Cette dernière obligation, à son tour, suppose à la fois l'obligation de faciliter l'exercice de ces droits et l'obligation d'accorder ces droits: voir le rapport intérimaire de A. Eide (E/CN.4/Sub.2/2003/21, par. 45 et suiv.). Voir également l'observation générale n° 31 du Comité des droits de l'homme, par. 10 et 11, et la recommandation n° 30 du Comité pour l'élimination de la discrimination raciale, par. 1 à 5.

[11] *A Handbook for Practitioners* (op. cit. *supra* note 9), chap. IV, p. 115. Voir également *Human Rights in the Administration of Justice*, chap. 13, "The rights to equality and non-discrimination in the administration of justice", p. 651 (publication des Nations Unies).

[12] La Cour européenne des droits de l'homme rappelle chaque fois que «la Convention a pour but de protéger des droits non pas théoriques ou illusoires mais concrets et effectifs» (voir, entre autres, *Artico* c. *Italie*, 13 mai 1980).

[13] Observation générale n° 18, par. 10.

[14] Comité des droits de l'homme, communication n^{o} 172/1984 du 9 avril 1987, *S. W. M. Broeks* v. *The Netherlands, Documents officiels de l'Assemblée générale à sa quarante-deuxième session* (A/42/40), p. 150, par. 13. La Cour européenne des droits de l'homme considère que le droit de jouir des droits garantis par la Convention sans être soumis à discrimination est également transgressé lorsque, sans justification objective et raisonnable, les États n'appliquent pas un traitement différent à des personnes dont les situations sont sensiblement différentes (6 avril 2000, *Thlimmenos* c. *Grèce*, requête n° 34369/97, point 44). La position de la Cour

interaméricaine des droits de l'homme sur la non-discrimination et l'égalité a été précisée dans l'avis consultatif sur la proposition d'amendement de la Constitution du Costa Rica (OC-4/84, 19 janvier 1984, *Series A, No. 4*, p. 104).

[15] Observation générale n° 18 du Comité des droits économiques, sociaux et culturels et recommandation générale n° 30 du Comité pour l'élimination de la discrimination raciale, par. 24. Voir à ce sujet T. Choudhury, "The Human Rights Committee's interpretation of ICCPR article 26", Department of Law, University of Durham.

[16] Observation générale n° 28 du Comité des droits de l'homme, relative à l'égalité des droits entre hommes et femmes (art. 3).

[17] Observation générale n° 18. Voir également la recommandation générale n° 28 concernant la discrimination fondée sur l'ascendance du Comité pour l'élimination de la discrimination raciale.

[18] Voir à ce sujet "Racial Bias in Lethal Police Action in Brazil", recherche menée par J. Cavallaro, A. Alves et C. Jakimiak pour mesurer l'effet de la race dans le système de sécurité publique au Brésil, document électronique de l'Open Society Justice Intiative, p. 2 (www.justiceinitiative.org), et le rapport de mission au Brésil du Rapporteur spécial sur l'indépendance des juges et des avocats, Leandro Despouy (E/CN.4/2005/60/Add.3), par. 24.

[19] Sur les résistances à l'application de mesures positives dans la sphère de la justice pénale aux États-Unis, voir P. Butler, "Affirmative action, diversity of opinions: affirmative action and the criminal law", *University of Colorado Law Review*, vol. 68, 1997, p. 841.

[20] Les manifestations de la discrimination et l'identification des victimes potentielles de la discrimination dans le système de justice pénale ont été traitées dans le document de travail E/CN.4/sub.2/2001/WG.1/CRP.1 (par. 30 et suiv.).

[21] Dans le résumé de son rapport à la soixante et unième session de la Commission des droits de l'homme, le Rapporteur spécial sur les formes contemporaines de racisme et de discrimination raciale, Doudou Diène, indique qu'il a relevé, dans trois pays visités (Nicaragua, Guatemala et Honduras), «trois expressions caractéristiques d'une réalité de discrimination profonde: une adéquation troublante entre la carte de la pauvreté et celle des communautés autochtones et d'ascendance africaine; une participation marginale aux structures du pouvoir…, [une] présence insignifiante dans les structures de pouvoir des médias (…) ainsi que la faiblesse de la prise de conscience de la profondeur et de l'enracinement de la discrimination tant au niveau des autorités politiques qu'au sein de la population dans son ensemble» (E/CN.4/2005/18/Add.6).

[22] Voir K. Daley, Symposium on race and criminal justice, "Criminal law and justice system practices as racist, white, and racialised", 1994, 51 *Wash & Lee L. Rev.* 431. L'article traite de la surreprésentation des Blancs dans l'administration de la justice aux États-Unis, dans l'application des lois pénales et parmi les concepteurs des politiques pénales, d'une part, et la surreprésentation des Noirs dans la population qui subit ces politiques et ces lois, d'autres part.

[23] À ce sujet, voir notamment “Racism and the administration of justice”, Amnesty International (ACT 40/020/2001) et «Effet raciste: justice pénale et administration publique», Human Rights Watch, 2001.

[24] Voir “Ethnic Profiling by Police in Europe”, Open Society Justice Initiative, juin 2005; voir aussi le rapport du Rapporteur spécial sur la situation des droits de l’homme et des libertés fondamentales des populations autochtones, Rodolfo Stavenhagen (E/CN.4/2004/80), par. 23.

[25] La stigmatisation par le crime des populations vulnérables a été traitée dans le document de travail final E/CN.4/Sub.2/2002/5, par. 44 et suiv.

[26] Voir Hernu, op. cit. *supra* note 8, p. 267, concernant les caractères de la discrimination directe et indirecte. Voir aussi Conseil de l’Europe, directive 2000/43/EC du 29 juin 2000 mettant en œuvre le principe du traitement égal des personnes indépendamment de leur origine raciale ou ethnique (la «directive raciale», art. 2).

[27] Sur la signification de la garantie de l’égal accès à la justice, les limites à son effectivité, notamment en droit européen, on consultera avec profit «Droit processuel: droit commun et droit comparé du procès», Précis Dalloz, 2e éd., 2003, p. 349; voir aussi C. Harlow, «L’accès à la justice comme droit de l’homme», dans *L’Union européenne et les droits de l’homme*, Bruxelles, Bruylant, 2001, p. 189.

[28] Voir «Les inégalités devant la loi et la justice», Association française droit et démocratie dans *Petites Affiches* no 238 du 28 novembre 2002, Édition quotidienne des journaux judiciaires associés.

[29] Dans un débat diffusé le 27 avril 2005 par la chaîne de télévision de l’Assemblée nationale de la République française sur le traitement de la récidive, les responsables de l’administration pénitentiaire ont reconnu que 64 % des détenus n’ont aucun diplôme, 30 % ont des difficultés de lecture et 50 % n’ont pas travaillé depuis plus d’un an quand ils rentrent en détention préventive.

[30] Guy Canivet, Premier Président de la Cour de Cassation française dans «L’accès au juge de cassation et le principe d’égalité» (2002) et «Les inégalités devant la loi et la justice», p. 15.

[31] “Legal Aid Reform and Access to Justice”, Open Society Justice Intiative, février 2004.

[32] B. Oppetit, *Philosophie du droit*, Paris, Dalloz, 1999, p. 117.

[33] Pour les références normatives relatives au droit à un avocat, consulter le document “Non-Citizens and the Administration of Criminal Justice: Submission to the Committee on the Elimination of Racial Discrimination”, p. 12 (al. *f*), Commission internationale de juristes, janvier 2004 (disponible sur le site www.icj.org).

[34] J. A. Goldston résume la réalité de l’aide juridictionnelle par cette phrase: “*The right to legal aid in criminal cases, widely proclaimed in a range of human rights instruments and national constitutions, is routinely ignored. Defendants, who can’t pay, are interrogated, charged, tried and convicted without a lawyer, or with only the most cursory and sub-standard representation*”,

"Legal Aid Reform and Access to Justice" (op. cit. *supra* note 31). Voir également "Understanding and Addressing Racial Discrimination in Representation" (E/CN.4/2003/WG.20/Misc.3) et "Assembly Line Justice: Mississippi's Indigent Defense Crisis" (E/CN.4/2003/WG.20/Misc.4). Ces deux documents ont été soumis à la troisième session du Groupe de travail d'experts sur les personnes d'ascendance africaine (E/CN.4/2004/17/Add.2).

35 Voir, entre autres, les rapports de visite à Bahreïn (E/CN.4/2002/77/Add.2, par. 65), au Mexique (E/CN.4/2003/8/Add.3, par. 52 à 56), en Lettonie (E/CN.4/2005/6/Add.2, par. 49 à 54), au Bélarus (E/CN.4/2005/6/Add.3, par. 39 et suiv.), en République islamique d'Iran (E/CN.4/2004/3/Add.2, par. 49).

36 Voir E/CN.4/2005/6/Add.2, par. 51 à 54.

37 Le Comité des droits de l'homme considère que pour les personnes privées de liberté le droit à un avocat doit être assuré avant et pendant le procès (voir *Borisenko c. Hongrie*, 6 décembre 2002 [CCPR/C/76/D/1999], par. 7.5).

38 Voir «Discrimination raciale dans l'administration de la justice», document présenté par l'Open Society Justice Initiative au Comité pour l'élimination de la discrimination raciale lors de sa soixante-cinquième session (août 2004), p. 8.

39 L'impact de la différence de culture et l'obstacle de la langue ont été traités dans les travaux préparatoires (E/CN.4/Sub.2/2002/5, note 43). Voir également P. Hughs et M. J. Mossman, «Repenser l'accès à la justice au Canada», p. 42 (Ministère de la justice du Canada et R. Stavenhagen) [E/CN.4/2004/80, par. 23 et 54].

40 "Non-Citizens and the Administration of Criminal Justice" (op. cit. *supra* note 33), p. 13 (al. *g*).

41 Article 14 (par. 3, al. *f*) du Pacte international relatif aux droits civils et politiques, articles 55 (par. 1, al. *c*) et 67 (al. *f*) du Statut de Rome de la Cour pénale internationale, articles 5 (par. 2) et 6 (par. 3, al. *e*) de la Convention européenne des droits de l'homme et article 8 (par. 2, al. *a*) de la Convention américaine des droits de l'homme.

42 «Droit processuel: droit commun et droit comparé du procès», La langue utilisée: obstacle à un procès équitable?», op. cit. *supra* note 27, p. 646.

43 Comité des droits de l'homme, 8 novembre 1989, *Revue universelle des droits de l'homme*, 1991, p. 167.

44 Groupe de travail sur la détention arbitraire (E/CN.4/2002/77/Add.2, par. 94 et E/CN.4/2005/6/Add.2, par. 62).

45 "Racial Discrimination in Charging, Verdict and Sentencing", document présenté par l'Open Society Justice Initiative au Comité pour l'élimination de la discrimination raciale, p. 6.

46 "Racial Bias in Lethal Police Action in Brazil" (op. cit. *supra* note 18).

47 Les violations des droits de l'homme et plus particulièrement du droit à la non-discrimination dans le cadre de la lutte contre le terrorisme ont été largement documentées dans les rapports de l'ensemble des mécanismes des droits de l'homme et par les ONG. Sur la violation du droit à la non-discrimination, voir le rapport de l'expert indépendant sur la protection des droits de l'homme et des libertés fondamentales dans la lutte antiterroriste (E/CN.4/2005/103), p. 23.

48 Rapport du Groupe de travail sur la détention arbitraire sur sa visite en République islamique d'Iran (E/CN.4/2004/3/Add.2), par. 26.

49 Voir "International Human Rights References to Non-Discrimination on the Ground of Sexual Orientation" sur la criminalisation de l'homosexualité (Commission internationale de juristes, 2004). Dans son rapport 1998-1999, l'ONG Equality Now donne des exemples de lois explicitement discriminatoires à l'égard des femmes dans 45 pays à travers le monde.

50 S. Guinchard et J. Buisson, *Procédures pénales*, 2e éd., 2002, Paris, Litec, p. 52.

51 Les rapports du Groupe de travail sur la détention arbitraire sont disponibles sur le site du Haut-Commissariat aux droits de l'homme (www.ohchr.org/issue/detention/index.htm).

52 Voir les derniers rapports du Groupe de travail sur la détention arbitraire sur ses visites en Lettonie (E/CN.4/2005/6/Add.2), au Bélarus (E/CN.4/2005/6/Add.3) et en Chine (E/CN.4/2005/6/Add.4).

53 Dans le *plea-bargaining*, les inculpés renoncent à trois de leurs garanties constitutionnelles: le droit à ne pas témoigner contre soi-même, le droit à un jury et le droit à un contre-interrogatoire. C'est pourquoi la Cour suprême des États-Unis a précisé que les comptes rendus doivent mettre en évidence que l'inculpé a plaidé coupable volontairement et en toute connaissance de cause (*Brady c. Etats-Unis*).

54 Guinchard et Buisson, op. cit. *supra* note 50, p. 145.

55 Jeffrey S. Brand, "The Supreme Court. – Equal Protection and Jury Selection: Denying that race still matters", *Wisconsin Law Review*, 511, 605 (1994).

56 Dans l'affaire *Rodney King* (1992), la Cour d'appel de Californie a autorisé un changement de lieu qui a permis aux policiers blancs accusés d'avoir passé à tabac King d'être jugés dans une banlieue en grande majorité blanche et d'obtenir un verdict de non-culpabilité prononcé par un jury composé de dix Blancs, un Noir et un Hispanique, verdict qui a provoqué des émeutes qui firent plus de 50 morts.

[57] Brand, loc. cit. (*supra* note 55). Voir également J. R. Kramer, 67, *Tulane Law Review*, 1725 (1993).

[58] Voir le commentaire de l'arrêt du 26 févier 2004 de la Commission européenne des droits de l'homme dans l'affaire *Natchova c. Bulgarie* par B. Plese, "The Strasboug Court Finally Redresses Racial Discrimination", *Roma Rights Quarterly Journal*, European Roma Rights Center, n° 1, 2004, p. 109 et dans *A Handbook for Practitioners* (op. cit. *supra* note 9), p. 84. Dans l'affaire *Chedli Ben Ahmed Karoui c. Suède*, requête n° 185/2001, le Comité contre la torture a indiqué que «l'importante documentation digne de foi fournie» renversait la charge de la preuve sur l'État partie (CAT/C/28/D/185/2001, par. 10).

[59] E/CN.4/2004/40, par. 8.

[60] Amnesty International, "Racism and the administration of justice", p. 16.

[61] *A Handbook for Practitioners* (op. cit. *supra* note 9), chap. IV, p. 124.

[62] Sur les pressions et les difficultés que rencontrent les membres des minorités qui décident de déposer plainte contre la police pour mauvais traitement, voir Panayote Dimitras, "Highly irregular police investigation into ill-treatment of Romany men by police officers", *Roma Rights Quarterly Journal*, European Roma Rights Center, n° 5, 2003, p. 138.

[63] Les étrangers en situation irrégulière et les victimes de traffic d'être humains comptent parmi les victimes qui appréhendent le plus tout contact avec la justice (E/CN.4/2002/5, par. 37 et suiv.).

[64] Voir à ce sujet *La procédure pénale comparée dans les systèmes modernes: rapports de synthèse des colloques de l'ISISC*, sous la direction de Cherif Bassiouni et Jean Pradel, 1998, Toulouse, Éditions Érès, p. 38.

[65] Rapport du Groupe de travail sur la détention arbitraire en République islamique d'Iran (E/CN.4/2004/3/Add.2), par. 26.

[66] C'est le cas notamment des Bahaïs en République islamique d'Iran. Dans un jugement rendu le 10 mars 2002 par la Cour de district de Minù-Dasht, la Cour a débouté les ayants droit des victimes de leur demande en indemnisation alors qu'elle a déclaré l'accusé coupable d'homicide et l'a condamné à trois ans d'emprisonnement. La Cour a motivé sa décision en ces termes: "*The members of the Bahà'ï sect are not considered as Dhimmi [i.e. Jews, Christians and Zoroastrians, recognized in the constitution]… Therefore, blood money is not applicable to them…[the Court] decided as to the issue of blood money, to clear the accused of any obligation*".

[67] E/CN.4/2004/3/Add.2, par. 65 (5).

[68] Voir «Délinquants et victimes: obligation redditionnelle et équité de la procédure judiciaire», dixième Congrès des Nations Unies pour la prévention du crime et le traitement des délinquants (A/CONF.187/8), par. 16.

[69] Les nombreuses décisions prises jusqu'ici, surtout par le Tribunal pénal international pour l'ex-Yougoslavie, ont donné l'occasion aux juridictions pénales internationales de développer une jurisprudence constructive qui traduit la volonté d'efficacité et qui peut constituer un modèle pour les systèmes nationaux de procédure pénale. L'apport de cette jurisprudence concerne entre autres la protection des victimes et des témoins par la non-divulgation de leur identité. Voir le document de travail présenté par Françoise Hampson sur la criminalisation des actes de violence sexuelle graves et la nécessité d'ouvrir une enquête à leur sujet et d'en poursuivre les auteurs (E/CN.4/Sub.2/2004/12).

[70] Il s'agit, notamment, de la Convention internationale sur la protection des droits de tous les travailleurs mignants et des membres de leur famille, de la Convention des Nations Unies contre la criminalité transnationale organisée et de ses deux Protocoles additionnels, le Protocole visant à prévenir, réprimer et punir la traite des personnes, en particulier des femmes et des enfants, et le Protocole contre le trafic illicite de migrants par terre, air et mer adoptés en novembre 2000 par l'Assemblée générale (ces instruments ne sont pas encore entrés en vigueur).

[71] Voir S. Frey, "Victim Protection in Criminal Proceedings: The Victim's Rights to Information, Participation and Protection in Criminal Proceedings", *Resources Material Series*, n° 63, UNAFEI, juillet 2004, p. 57.

[72] Solomi B. Bossa, juge de la High Court d'Ouganda et de la Cour de justice d'Afrique de l'Est dit à propos des abus de la police en Afrique: *"Police is often cited as big contributor to human rights abuse and injustice. The contributors factors are many and varied. Police is ill equipped, and is poorly facilitated. It lacks professionalism and is often corrupt. It is also largely prone to political interference and influence. This gravely affects the function of keeping law and order, as it often results in impartiality and inevitably persecution. It also affects the length and quality of investigations and the quality of crime justice*" (HR/NB/SEM.2/2002/BP.3).

[73] Dans "Reflection on racism and public policy", Rodolfo Svenhagen note que "*The youth of racial minorities have been particularly singled out through a process of "criminalization": in the United States for example Blacks and Latinos have been prominent victims of racial profiling and discrimination, and since the terrorist attacks of 11 September 2001, Arabs have become the newest targets of such practices. A number of countries began to see racism not as a series of isolated incidents, but rather as a patterned and structured social problem…The globally excluded, the persistently poor, the hungry and the sick … are also the victims of discrimination on ethnic, racial and cultural grounds*" (UNIRISD [Institut des Nations Unies pour le développement social], *News Bulletin*, n° 25, automne/hiver 2002, p. 43).

[74] Daley, “Criminal law and justice system practices as racist, white, and racialised” (loc. cit. *supra* note 22).

[75] Plusieurs définitions ont été avancées pour cerner le phénomène dit de «délit de faciès» ou «profilage racial»; le Programme d’action de Durban en donne une (A/CONF.189/12, par. 72); l’Open Society Justice Initiative, qui s’est beaucoup investie pour lutter contre ce phénomène, le définit comme étant “*The use of racial or ethnic stereotypes by law enforcement officers as a factor in determining who has been, is or may be involved in criminal activity*” (présenté au Comité pour l’élimination de la discrimination raciale). La Commission ontarienne des droits de la personne (Canada) donne une définition plus complète du profilage: «Toute action prise pour des raisons de sûreté, de sécurité ou de protection du public qui repose sur des stéréotypes fondés sur la race, la couleur, l’ethnie, la religion, le lieu d’origine ou une combinaison de ces facteurs plutôt que sur un soupçon raisonnable, dans le but d’isoler une personne à des fins d’examen ou de traitement particulier» (rapport d’enquête sur le profilage racial au Canada, intitulé «Un prix trop élevé: les coûts humains du profilage racial», 2003, www.ohrc.on.ca).

[76] E/CN.4/2004/18, p. 7.

[77] Voir le paragraphe 52 intitulé “Race-related torture”, rapport de mission en Espagne (E/CN.4/2004/56/Add.2) et rapport annuel (E/CN.4/2001/66, par. 4 à 11).

[78] Soumis par l’Open Society Justice Initiative au Comité pour l’élimination de la discrimination raciale, p. 7.

[79] Au Royaume-Uni, l’enquête concernant le meurtre de Stephen Lawrence conclut en 1999 que l’“institutional racism” était “a corrosive disease” au sein du Metropolitan Police Service et d’autres services de police “countrywide” (travaux publiés par l’Open Society Justice Initiative). Voir également “The Stories, the Statistics and the Law: Why ‘Driving While Black’ Matters”, 84 *Minn. L. Rev.* 265 (1999); Human Rights Watch, “Abusing the User: Police Misconduct, Harm Reduction and HIV/Aids in Vancouver” (2003) et les rapports de la Commission européenne contre le racisme et l’intolérance (ECRI).

[80] Voir, entre autres, Deborah A. Ramirez, Jennifer Hoopes et Tara Lai Quinlan, “Defining Racial Profiling in a Post-September 11 World”, 40 *Am. Crim. L. Rev.* 1195 (2003) et le rapport publié en février 2004 par l’American Civil Liberties Union (ACLU) intitulé “Sanctionned Bias: Racial Profiling since 9/11”.

[81] Voir H. C. Kelman, “The policy context of torture: A social-psychological analysis” dans *International Review of the Red Cross*, vol. 87, n° 857, mars 2005, p. 123. Voir également “Monitoring the right for an effective remedy for human rights violation”, Asian Human Rights Commission, mars 2001.

[82] Voir “International Human Rights References to Non-Discrimination on the Ground of Sexual Orientation” (op. cit. supra note 49). Voir également deux publications d’amnesty International: *Them and us: fighting discrimination and preventing torture* (2001) et *Identité sexuelle et persécution* (2001).

[83] Version de septembre 2004, p. 4, par. 2.

[84] Voir “Punishment and Prejudice, Racial Disparities in the War on Drugs”, Human Rights Watch (rapport, mai 2000).

[85] J. Bessant, “Australia’s mandatory sentencing laws, ethnicity and human rights”, p. 369 et suiv., *International Journal on Minority and Group Rights 2001, Netherlands*. Voir également “Punishment and Prejudice, Racial Disparities in the War on Drugs” (op. cit. *supra* note 84).

[86] Soumis par l’Open Society Justice Initiative au Comité pour l’élimination de la discrimination raciale, p. 8.

[87] The Sentencing Project, “Comparative International Rates of Incarceration: An Examination of Causes and Trends”, présenté à l’U.S. Commission on Civil Rights, 2003, p. 14.
