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HUMAN RIGHTS COUNCIL

Fourth session

Working Group of Experts on People of African Descent

Sixth session

Geneva, 29 January - 2 February 2007

### THEMATIC ANALYSIS: DISCUSSION AND ANALYSIS

#### Racial profiling

#### Note by the Secretariat

1. The Durban Declaration and Programme of Action specify that a victim-oriented approach is an important tool to eliminate racial discrimination. Specific reference is made to Africans and people of African descent. Paragraph 7 of the Durban Programme of Action "requests the Commission on Human Rights to consider establishing a working group or other mechanism of the United Nations to study the problems of racial discrimination faced by people of African descent living in the African Diaspora and make proposals for the elimination of racial discrimination against people of African descent".
2. The Working Group of Experts on People of African Descent was established by Commission on Human Rights resolution 2002/68 of 25 April 2002. Its mandate, spelled out in paragraph 8 of that resolution and further expanded in paragraphs 24-25 of resolution 2003/30, is to:
  - Study the problems of racial discrimination faced by people of African descent living in the Diaspora and to this end gather all relevant information from Governments, non-governmental organizations and other relevant sources, including through holding public meetings with them;
  - Propose measures to ensure full and effective access to the justice system by people of African descent;
  - Submit recommendations on the design, implementation and enforcement of effective measures to eliminate racial profiling of people of African descent;
  - Elaborate short-, medium- and long-term proposals for the elimination of racial discrimination against people of African descent, bearing in mind the need for close collaboration with international and development institutions and the specialized agencies of the United Nations system to promote the human rights of people of African descent;

- To make proposals on the elimination of racial discrimination against Africans and people of African descent in all parts of the world;
  - To address all the issues concerning the well-being of Africans and people of African descent contained in the Durban Declaration and Programme of Action;
3. At its first and second sessions, held from 25 to 29 November 2002 and from 3 to 7 February 2003, the Working Group decided to recommend that specific themes relevant to the situation of people of African descent be addressed at forthcoming sessions. The Working Group considers that this approach will allow invited panellists on the selected themes to inform the discussions and enrich the debates at the sessions, and lead to the formulation by the Working Group of measures and recommendations addressed to the Commission.
  4. Relying on the provisions of the Durban Declaration and Programme of Action, the Working Group decided that the theme to be examined at the sixth session would be issue will be racial profiling. Racial profiling as defined by paragraph 72 of the Durban Programme of Action is “the practice of police and other law enforcement officers relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity”.
  5. The explicit targeting of specific groups by law enforcement officials violates a number of provisions of international law. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), defines racial discrimination as: “any distinction, exclusion, restriction or preference based on race, colour, descend or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.<sup>1</sup>
  6. “Article 2” of the same Convention further declares that: “State Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.”
  7. Similarly, “article 5” of ICERD states: “In compliance with the fundamental obligations laid down in article 2 of this Convention, State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law.”
  8. The International Covenant on Civil and Political Rights also places emphasis on the non-discrimination obligations for all State Parties. Even during times of emergency, where States may derogate from certain other rights specified in the Covenant, the prohibition on discrimination remains intact.<sup>2</sup> Furthermore, article 4 of this Covenant declares: “*In time of public emergency which*

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<sup>1</sup> See, “Threat and humiliation, racial profiling, domestic security, and human rights in the United States”, Amnesty International, October 2004

<sup>2</sup> See Human Rights Committee, General Comment No. 29, “Derogations during a state of emergency” (art. 4), (CCPR/C/21/Rev.1/Add.11 (2001)). In this document, the Human Rights Committee emphasizes that “elements... of the right to non-discriminations ... cannot be derogated from in any circumstances” (para. 8).

*threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion and social origin”.*

9. In view of the severity of the scope of racial discrimination in the administration of justice, the Committee on the Elimination of Racial Discrimination adopted General Recommendation XXXI on the prevention or racial discrimination and functioning of the criminal justice system,<sup>3</sup> which provides an appropriate foundation for the Committee deliberations protecting the right to equal treatment before the tribunals and all other organs administering justice. In its general recommendations, the Committee requests State parties to pay the greatest attention to the following possible indicators of racial discrimination: “(a) the number and percentage of persons belonging to the groups [...] who are victims of aggression or other offences, especially when they are committed by police officers or other State officials; (b) the absence or small number of complaints, prosecutions and convictions relating to acts of racial discrimination in the country [...] 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; (c) insufficient or no information on the behaviour of law enforcement personnel vis-à-vis persons belonging to the groups [...]; (d) the proportionately higher crime rates attributed to persons belonging to those groups, particularly as regards petty street crime and offences related to drugs and prostitution, as indicators of the exclusion or the non-integration of such persons into society; (e) the number and percentage of persons belonging to those groups who are held in prison or preventive detention, including internment centres, penal establishments, psychiatric establishments or holding areas in airports; (f) the handing down by the courts of harsher or inappropriate sentences against persons belonging to those groups, (g) the insufficient representation of persons belonging to those groups among the ranks of the police, in the system of justice, including judges and jurors, and in other law enforcement departments”.<sup>4</sup> Furthermore, the Committee in the same general recommendation requests State parties to take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person’s colour or features or membership of a racial or ethnic group, or any profiling.
10. Racial profiling is a new term for an old practice known by other names - institutional racism and discrimination - and it owes its existence to prejudice and stigma towards certain groups. Racial profiling is usually defined in a law enforcement context. One study published in the *Canadian Review of Policing Research* (vol. 1, 2004) defined the concept of racial profiling as: "a racial disparity in police stop and search practices, customs searches at airports and border crossings, in police patrols in minority neighbourhoods and in undercover activities or sting operations which target particular ethnic groups". Several studies show the strong correlation between race and the unequal treatment of racial minorities at every stage of the criminal justice continuum, from interrogations to arrest, detention, charges, conviction, sentencing, prison and the death penalty. It all begins with an encounter with law enforcement—a discretionary decision by law enforcement officials to target a person not because he or she has committed a crime, but because of a person’s

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<sup>3</sup> A/60/18, para. 460.

<sup>4</sup> A/60/18, para. 460.

skin colour. This practice is commonly known as racial profiling. It essentially treats race as evidence of crime, targeting certain segments of the population as potential criminal offenders solely by virtue of their race because of a false assumption that most crimes are committed by racial minorities.<sup>5</sup> This practice not only violates the principle of equality before the law, but also international legal obligations aimed at eliminating racism and racial discrimination.

11. In her report the Special Rapporteur of the Sub Commission on the Promotion and Protection of Human Rights on discrimination in the criminal justice system<sup>6</sup> stated that: “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. 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”.<sup>7</sup>
12. The Special Rapporteur of the Sub-Commission on discrimination in the criminal justice system goes further in saying that “discrimination is not confined to the police but is also practiced 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.<sup>8</sup> [...] Statistics and facts show that race, colour and place of origin are decisive factors in the application of the death penalty.<sup>9</sup> 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<sup>10</sup>” (E/CN.4/Sub.2/2005/7, para.58).
13. In his report to the Commission on Human Rights at its sixtieth session, the Special Rapporteur on contemporary forms of racism said: “In a number of countries, certain racial or ethnic minorities are

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<sup>5</sup> See “Justice on trial: racial disparities in the American criminal justice system”, Leadership Conference on Civil Rights, p. 7.

<sup>6</sup> “Administration of Justice, Rule of Law and Democracy, Discrimination in the criminal justice system” progress report presented to the Sub-Commission on the Promotion and Protection of Human Rights at its fifty-seventh session, (E/CN.4/Sub.2/2005/7, para. 51).

<sup>7</sup> See also “Reflection on racism and public policy”, in which Rodolfo Stavenhagen notes that “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”. (UNRISD, *News Bulletin*, No. 25, Fall/winter 2002, p. 43).

<sup>8</sup> See “Punishment and prejudice: racial disparities in the war on drugs”, Human Rights Watch (Report, May 2000).

<sup>9</sup> Written statement by Open Society Justice Initiative to the Committee on the Elimination of Racial Discrimination, p. 8.

<sup>10</sup> The Sentencing Project, “Comparative international rates of incarceration: an examination of causes and trends”, presented to the U. S. Commission on Civil Rights, 2003, p. 14.

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 continent, 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” (E/CN.4/2004/18, paras. 58-59).

14. During the session, the following topics will be analysed and discussed: (a) the definition of racial profiling and the international framework prohibiting racial profiling; (b) the problem of racial profiling in the functioning of the administration of justice; (c) regional work and experiences on the issue of racial profiling; (d) the human impact of racial profiling; (e) the meaning of racial profiling in the context of the increase of racism; (f) the de jure discrimination and the institutional dimension of the discrimination ascribed to the police and other law enforcement services; (g) terror, crime and suspect communities: evidence of and solutions to ethnic profiling by police; (h) profiling in countering terrorism; (i) the problem of impunity and accountability relating to acts of racial profiling; (j) measures to combat racial profiling, including preventive positives measures; (k) data collection on ethnic profiling and (l) the benefits from overall representativeness in the police and criminal justice systems

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