

**ROSALIND WILLIAMS LECRAFT V. SPAIN**

COMMUNICATION SUBMITTED FOR CONSIDERATION UNDER  
THE FIRST OPTIONAL PROTOCOL TO THE  
INTERNATIONAL CONVENANT ON CIVIL AND POLITICAL RIGHTS

*Before:*

**The United Nations Human Rights Committee  
Petitions Team  
Office of the High Commissioner for Human Rights  
United Nations Office at Geneva  
1211 Geneva 10, Switzerland  
Fax + 41 22 9179022**

*On behalf of:*

**Rosalind Williams Lecraft  
Plaza Conde de Miranda No. 4  
Madrid, Spain**

*Represented by:*

**Open Society Justice Initiative  
400 West 59<sup>th</sup> Street  
New York, NY 10019  
United States of America  
T: + (212) 548-0157 F: + (212) 548-4662  
[igoris@justiceinitiative.org](mailto:igoris@justiceinitiative.org)  
and**

**SOS Racismo - Madrid  
c/ Campomanes, 13, 2<sup>o</sup> izq.  
Madrid, Spain  
T/F: + (34) 91 559 29 06  
[sosracismomad@hotmail.com](mailto:sosracismomad@hotmail.com)  
and**

**Women's Link Worldwide  
c/ Zurbarán 18  
Madrid, Spain  
T: + (34) 91 185 1904 F: + (34) 91 185 1907  
[v.waisman@womenslinkworldwide.org](mailto:v.waisman@womenslinkworldwide.org)**

Date: September 11, 2006

## **I. INTRODUCTORY INFORMATION**

### **A. Information Concerning the Applicant of the Communication**

1. The Applicant in this communication is Rosalind Williams Lecraft, a naturalized Spanish citizen born in the state of Louisiana in the United States on March 2, 1943. She is an African-American. The Applicant is an independent art consultant who gained Spanish citizenship in 1969.
2. The complaint is being submitted to the United Nations Human Rights Committee on behalf of the Applicant by the Open Society Justice Initiative, SOS Racismo – Madrid, and Women’s Link Worldwide. *(See the Applicant’s signed Authorization Form, acknowledging that these organizations are acting with her knowledge and consent [Annex 1]).* The addressees for any confidential correspondence regarding this matter are:

Open Society Justice Initiative  
c/o Indira Goris, Program Officer  
400 West 59<sup>th</sup> Street, 4<sup>th</sup> Floor  
New York, NY 10019  
United States  
Tel: + 1 212 548 4662 Fax: + 1 212 548 0189  
[igoris@justiceinitiative.org](mailto:igoris@justiceinitiative.org)

and

Women’s Link Worldwide  
c/o Viviana Waisman, Executive Director  
C/ Zurbarán 18, 2<sup>o</sup>  
28010 Madrid  
Spain  
Tel: + (34) 91 185 1904 Fax: + (34) 91 185 1907  
[vwaisman@womenslinkworldwide.org](mailto:vwaisman@womenslinkworldwide.org)

## **II. STATE CONCERNED/ARTICLES VIOLATED/EXHAUSTION OF DOMESTIC REMEDIES/OTHER INTERNATIONAL PROCEDURES**

### **A. The State Concerned**

1. This communication is directed at Spain (“Spain” or “the Respondent State”), a State Party to the International Covenant on Civil and Political Rights (“the Covenant” or “ICCPR”) and the First Optional Protocol.

2. Spain acceded to the ICCPR on 27 April 1977 and to the Optional Protocol on 25 April 1985.

## **B. Article(s) of the ICCPR Violated**

3. This case arises in relation to the stopping and identification of the Applicant by a law enforcement official for the purpose of verifying her immigration status, an action based solely on her skin color and race/ethnicity, and which was upheld by the Spanish Constitutional Court. This case involves multiple violations of the ICCPR, including the rights to non-discrimination on the basis of race, colour, national or social origin, or other status, and freedom of movement as enshrined in Articles 12(1) and 26, together with Article 2, which requires the State Party to take proactive measures to “respect and ensure” the rights recognized in the Covenant.

## **C. Exhaustion of Domestic Remedies**

4. The Applicant challenged the lawfulness of her stop and identity check before a range of administrative bodies and the Spanish national courts over the course of nine years. On January 29, 2001 the Spanish Constitutional Court rendered a decision finding that the police action against the Applicant was lawful. The judgment of the Constitutional Court is final and conclusive. The Applicant has exhausted all possible domestic remedies. The Committee’s jurisprudence makes clear that there is no time bar on the filing of a communication after the exhaustion of domestic remedies.<sup>1</sup> Nonetheless, the Committee may exercise discretion in considering whether to review a communication submitted a long time after exhaustion.
5. Following the Constitutional Court ruling, the Applicant gave serious consideration to an application before the European Court of Human Rights (which must be filed within six months of the exhaustion of domestic remedies) or this Committee. She did not do so until now for two reasons: emotional distress and financial hardship. The Applicant was emotionally and psychologically exhausted after nine years of unsuccessful litigation at the national level, culminating with the Constitutional Court decision she is presently challenging. Moreover, the Applicant’s litigation in Spanish courts and before administrative bodies was entirely self-financed. At the relevant time, Spanish law provided no legal aid for the kinds of legal actions the Applicant was pursuing. Accordingly, following the Constitutional Court judgment in 2001, the Applicant simply lacked the financial wherewithal to retain legal representation for the purpose of preparing and filing a complaint with this Committee. It was not until the launch of an anti-discrimination strategic litigation project in Spain in 2004 that the Applicant was

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<sup>1</sup> In Part I of its guidelines enumerated in *Fact Sheet No.7/Rev.1, Complaint Procedures*, the Office for the High Commissioner for Human Rights states that “In general, there is no formal time limit after the date of the alleged violation for filing a complaint under the relevant treaties.” (Part I: Overview) (Available at: <http://www.unhchr.ch/html/menu6/2/fs7.htm#ccpr>).

able to secure pro bono representation to pursue her case.<sup>2</sup> The Committee is urged to consider as well that a) the decision of the Constitutional Court remains the law of the land in Spain to this day, b) it is, to the knowledge of the Applicant, the only decision by a high-level national judicial body in Europe to have squarely addressed the lawfulness of racial/ethnic profiling, and thus it carries significant weight, and c) while police profiling continues to be common practice in Spain, a number of factors – including fear of police reprisal, lack of rights awareness, and the common perception among immigrants (who are among the main targets of profiling) that Spanish courts will credit police testimony over their own – make it highly unlikely that future legal challenges to profiling will emerge.

6. In this regard, it is important to underscore that the discriminatory racial profiling suffered by the Applicant was not an isolated event. Rather, it is emblematic of a larger pattern of racial profiling and racially discriminatory behavior by law enforcement officials in Spain that has been well-documented by international and regional human rights bodies. Unfortunately, the Constitutional Court judgment which Applicant challenges in this communication has apparently contributed to the prevalence of racial profiling in Spain.
7. In 1996, CERD expressed concern about the growing “evidence of racist attitudes on the part of members of the police and the Civil Guard” in Spain.<sup>3</sup> In 2004, CERD noted an increasing number of “allegations received of instances of police misbehavior towards ethnic minorities or persons of non-Spanish origin, including abusive and insulting speech, ill-treatment and violence,” encouraging the State party to provide “training to ensure that in the performance of their duties they respect and protect human dignity and maintain and uphold the human rights of all persons without distinction as to race, colour or national or ethnic origin.”<sup>4</sup> In 2003, the European Commission against Racism and Intolerance (ECRI) reported increasing numbers of allegations of discriminatory identity checks, abusive language, ill-treatment and violence against minorities and non-nationals carried out by law enforcement officers. Despite laws guarding against discriminatory and arbitrary conduct, ECRI concluded that “racial profiling is reportedly common, affecting Roma, foreigners, and Spanish citizens of immigrant background.”<sup>5</sup> ECRI’s most recent country report on Spain, published in 2006, specifically identifies Spain’s

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<sup>2</sup> In 2004, the Open Society Justice Initiative embarked upon a partnership project with Women’s Link Worldwide and SOS Racismo - Madrid to develop strategic advocacy projects with the aim of working to combat race discrimination in Spain. Discrimination on the grounds of race, ethnicity, gender, and nationality and racial violence remain severely under-addressed in Spain, even in the face of ever-increasing evidence of discriminatory practices against racial and ethnic minorities, immigrants and women by both private citizens and public agencies. With the exception of a small community of anti-discrimination activists, there was a general lack of experience in conceptualizing and identifying concrete manifestations of racial/ethnic discrimination and the particular ways it intersects with sex discrimination, and an almost non-existent tradition of utilizing the legal system to combat such violence and multiple forms of discrimination.

<sup>3</sup> CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Spain*. 28/03/1996, Un Doc. CERD/C/304/Add.

<sup>4</sup> CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Spain*. 28/04/2004, UN Doc. CERD/C/64/CO/6, para. 11; see also CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Spain*. 10/08/1994, UN Doc. A/49/18, paras. 479-511.

<sup>5</sup> ECRI, *Second Report on Spain (Adopted on 13 December 2003)*, para. 16.

Constitutional Court decision as a leading cause behind the continued practice of racial profiling, noting that, “although the [Supreme Court] has clarified that the suspicion of a law enforcement officer leading to identifications and searches cannot be ‘illogical, irrational or arbitrary,’ there is reported to be no absolute clarity at present on the grounds that may justify the suspicion leading to this type of control.”<sup>6</sup>

8. A fact finding investigation carried out by a coalition of international and national human rights organizations in 2005 found that racial profiling is an increasingly common phenomenon.<sup>7</sup> The research revealed that police officers often employ in practice vague criteria as a basis for stopping individuals, such as “nervousness,” being “out of place at the wrong time,” “looking evasive,” “looking weird or strange,” and “giving bad looks to police.”
9. Amnesty International has identified a pattern of “violation by law enforcement officers of the rights of members of ethnic minorities or persons of non-Spanish origin.”<sup>8</sup> Moreover, “[o]ften such violations appear to arise as a direct result of a deliberate policy of ‘racial profiling,’” and observes that “the majority of race-related ill-treatment in Spain stems from incidents arising from identity checks.”<sup>9</sup> Amnesty International further noted that the Constitutional Court decision under review here had converted into constitutional doctrine the police practice of using skin color or other foreign appearance as a criterion for deciding when police officers should carry out identity checks. As a result, “despite the existence of laws and codes which attempt to guard against discriminatory or arbitrary conduct by state agents, and to which lip service is often paid, ‘racial profiling’ is common and the discriminatory use of identity checks ... has led to a situation in which many persons of foreign origin in Spain have been abused, and physically ill-treated by public officials. There are numerous allegations that those who are intercepted or arrested have not been given explanations for their interception or arrest, and that challenges have been interpreted as resistance to police authority and often penalized.”<sup>10</sup>

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<sup>6</sup> ECRI, *Third Report on Spain (Adopted on 24 June 2005)*, para. 18. ECRI recommends that Spanish authorities firstly conduct research into “possible patterns of discrimination facing ethnic minority groups in the criminal justice system. In particular, it recommends that such research address the areas highlighted above” (para. 19) and secondly, into “the extent of ethnic profiling practices in the different police forces which operate in Spain at national, regional and local level and take all the necessary measures to counter any such practices. For instance, the Spanish authorities could consider the introduction of a system of registration in connection with police checks that enables individuals to document how frequently they are checked, in order to identify possible patterns of direct or indirect racial discrimination” (para. 20).

<sup>7</sup> Daniel Wagman, *Ethnic Profiling in Spain: Investigations and Recommendations* (July 2006) (available at: [www.justiceinitiative.org/db/resource2?res\\_id=103397](http://www.justiceinitiative.org/db/resource2?res_id=103397)).

<sup>8</sup> Amnesty International, *Spain: Crisis of Identity: Race-Related Torture and Ill-Treatment by State Agents* (2002), pp. 18.

<sup>9</sup> *Ibid* at pp. 2 and 18

<sup>10</sup> *Ibid* at p. 86

## **D. Other International Procedures**

10. This matter has not been submitted to any other international forum for investigation or settlement.

## **III. SUMMARY OF FACTS**

### **A. The Identity Check**

1. At approximately one in the afternoon of 6 December 1992, the Applicant arrived at the Valladolid *Campo Grande* railway station on a train coming from Madrid. She was accompanied by her husband, Federico Agustín Calabuig, and their son Ivan Calabuig-Paris. Moments after the Applicant, her husband and son had disembarked from the train, a National Police (*Policia Nacional*) officer approached the Applicant and asked her to provide him with her identity document (the "*Documento Nacional de Identificación*" or "DNI"). The National Police officer did not ask her husband, son, or any other passengers on the platform for their identity documents.
2. The Applicant and her husband insisted that the officer explain the reason for the identity check. The National Police officer explained that he was obligated to check the identity of persons who "looked like her." When the Applicant's husband asked what the expression "like her" signified, the police officer answered, "like her," while pointing at the Applicant, adding that "many of them are illegal immigrants." The officer further explained that, in carrying out the identity check, he was obeying an order of the Ministry of the Interior that called on National Police officers to conduct identity checks, in particular, of "persons of color." The officer continued to insist that she produce her DNI. The Applicant's husband commented to the officer that his request to see the Applicant's DNI based solely on her skin color constituted racial discrimination, which the officer denied, explaining that he needed to check individuals' identity documents due to the high number of illegal immigrants residing in Spain.
3. The Applicant and her husband asked to see the police officer's own DNI as well as his badge; in response, the officer told them that unless they changed their attitudes, he would detain them after advising them of their rights. The Applicant subsequently showed her DNI to the National Police officer. The Applicant and her husband continued to insist on seeing the officer's badge and DNI, informing him that they intended to lodge a complaint with the National Police. The police officer subsequently led them to an office at the railway station, where he took down the Applicant's and her husband's identification information. The National Police officer also showed them his badge, No. 64.085.
4. On 7 December 1992, the day following the identity check at the Valladolid railway station, the Applicant and her husband went to the National Police Headquarters in Valladolid (*Jefatura Superior de Policia*) at the San Pablo District Police Station to lodge

## **B. Complaint to the Ministry of the Interior**

5. On 15 February 1993, the Applicant, her husband and son submitted a two-part written complaint to the General Registry of the Ministry of the Interior (“the Ministry”) (*Ministerio del Interior Registro General*). The first part of the Applicant’s complaint challenged the alleged order of the Ministry that (according to the National Police officer who carried out the identity check of the Applicant on 6 December 1992) called on National Police officers to target persons of color for identity checks. The second part of the complaint requested that the General Administration of the State take responsibility – and compensate the Applicant – for the unlawful actions of the Ministry of the Interior. The complaint argued that the practice of stopping people based on their race or ethnicity when carrying out identity checks contravened well-established Spanish and European legal norms against discrimination and arbitrary detention and protecting freedom of movement.<sup>11</sup> Thus, the Applicant alleged that the identity check carried out on her solely on the basis of her skin colour constituted a racially discriminatory act, one which produced moral and psychological damages to her and her family. The Applicant requested damages in the amount of five million pesetas (approximately 30,000 Euros). (See *Applicant’s Written Complaint to the General Registry of the Ministry of the Interior* dated 15 March 1993 [*Annex 3*]).
6. On 16 March 1993 the Applicant submitted medical documents supporting her request for damages. A certified document by Dr. Alba M. Gasparino, who treated the Applicant for trauma related to the events of 7 December 1992, explained that because of the race-based identity check she endured, the Applicant experienced a negative reaction that made her prone to fear and prevented her from enjoying regular social and work activities. Dr. Gasparino diagnosed the Applicant as suffering from acute social anxiety. (See *Medical Evaluation from Dr. Gasparino*, dated 15 March 1993 [*Annex 4*]).
7. The first part of the complaint was declared inadmissible by the Ministry of the Interior. A resolution issued by the Ministry on 7 February 1994 explained that Article 113 of the Law on Administrative Procedure requires that all administrative recourses to the Ministry be brought against determinate administrative policies and their resulting actions. The resolution found that there did not exist any order to carry out identity checks based on race/ethnicity. Accordingly, the complaint was dismissed as to this allegation. The Ministry explicitly stated that were such an order to exist, it would be

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<sup>11</sup> *Spanish Constitution* (1978): Articles 17, 18, 19, 24-2; *European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols* (ECHR), Articles 5, 6, 14.

unconstitutional and, therefore, null and void. The Ministry refused to consider the legality of the National Police officer's identity check on the Applicant, explaining that the Applicant's complaint only challenged the existence of a general order to carry out identity checks on dark-skinned persons, rather than the particular action taken against her. The Ministry therefore dismissed any claims on its patrimonial responsibility. (See *Ministry of the Interior Resolution* dated 15 April 1993 [Annex 5]).

8. The second portion of the Applicant's complaint, requesting damages in the amount of five million pesetas, was also rejected. The Ministry held that the National Police officer was acting within the scope of his responsibility to control illegal immigration when he took into consideration the Applicant's race or ethnicity in his determination to request her identification. This decision by the Ministry of the Interior marked the end of the administrative appeals process. The Applicant was thus informed that any further appeal of its Resolution would need to be brought as a contentious-administrative action before the appropriate tribunal. Accordingly, on 6 April 1994, the Applicant appealed the Resolution by the Ministry of the Interior to the National Court (*Audiencia Nacional Sala de lo Contencioso-Administrativo*).

### **C. Decision by the National Court**

9. The National Court rendered its decision dismissing the Applicant's appeal on 29 November 1996. The National Court held that residents in Spain have a general obligation to identify themselves to public authorities, and that this obligation forms part of the "social contract." Furthermore, the Court ruled that the identity check of the Applicant was in accordance with the general application of Spain's immigration laws as set forth in Royal Decree 1119/1986 of 26 May, Article 72.1, which authorizes police officers to demand identification from any foreigners seeking to enter Spain. According to the National Court, the propriety of the identity check was also buttressed by the preamble of Organic Law 1/92 on Citizen Security, which empowered the state to carry out such actions so long as verification of the persons' identities was necessary for "the protection of security..." (See Annex 6 for copies of relevant laws and regulations). Furthermore, the National Court found that the identity check of the Applicant was not disproportionate, as the Applicant belonged to the "black race" and was therefore more likely to be a foreigner. The Court did not find that the identity check carried out on the Applicant caused any humiliation or other effects, given that the action was legal and fell within the bounds of what the Court held could reasonably be expected of a member of Spanish society. (See *National Court Decision on Appeal No. 1/450/93* dated 29 November 1996 [Annex 7]).
10. The Applicant appealed the decision of the National Court to the Spanish Constitutional Court; the appeal was accepted on 5 October 1998. The Applicant based her appeal on Articles 14 (right to non-discrimination), 17 (right to liberty and security of person), 19 (right to freedom of movement), 24.1 (right to effective judicial protection), and 24.2 (right to fair trial) of the Spanish Constitution (or "the Constitution"), as well as Articles 5 (right to liberty and security of person), 6 (right to a fair and public hearing), and 14

(right to non-discrimination) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (“the ECHR”). The Applicant requested that the Constitutional Court find the police action of 6 December 1992 unconstitutional and illegal; vacate the decisions of the Ministry of the Interior and the National Court; recognize the Applicant’s right to be free from discrimination based on her race, and order the state to indemnify the Applicant and her family for damages in the amount of five million Spanish *pesetas* to compensate for the moral and psychological harm caused to her and her family.

11. In her appeal, the Applicant argued that the National Police officer had clearly used race as the sole determinant criterion in carrying out her identity check, a clear violation of the right to non-discrimination. The Applicant also explained that her right to a fair hearing was violated by the National Court, as its decision did not address the violations to her fundamental rights that she alleged in her appeal – particularly the violation of her right to non-discrimination – but was rather based exclusively on an administrative regulation. This was true even though the National Court’s decision clearly conceded that the applicant was stopped due to her race. (See *Constitutional Court Appeal No. 490/97* dated 7 February 1997 [*Annex 8*]).

#### **D. Decision by the Constitutional Court**

12. In a six-to-one decision issued on 29 January 2001, the Constitutional Court upheld the National Court’s ruling that the identity stop based on race/ethnicity did not violate the Applicant’s fundamental rights. The Court found that the Applicant’s right to a fair trial had not been violated, as under Spanish law tribunals are obligated only to explain the legal basis, or the *ratio decidendi*, for their decision and are not obligated to give an exhaustive treatment of all claims. Furthermore, the Constitutional Court found that the National Court had addressed the constitutional issues before it in the Applicant’s appeal. The National Court’s decision, however, rested on its finding that the identity check of the Applicant on 6 December 1992 was legal, for the reasons stated above. The Constitutional Court refused to assess whether the Applicant’s rights to liberty and security of person, freedom of movement, and presumption of innocence had been violated because these claims had not been raised before the National Court. (See *Constitutional Court Decision No. 13/2001* dated 29 January 2001 [*Annex 9*]).
13. The Court furthermore held that the Applicant’s husband and son did not have legal standing in the claims presented by Ms. Williams despite having participated in the previous legal proceedings. The Court specified that the issue under scrutiny was whether the identity check carried out on the Applicant on 6 December 1992 constituted a violation of the Applicant’s right to non-discrimination and not whether, in general, identity checks based on race were unconstitutional.

14. With respect to the Applicant's claim of discrimination, the Constitutional Court acknowledged that the prohibition against discrimination enshrined in Article 14 of the Spanish Constitution encompasses both direct and indirect discrimination.<sup>12</sup>
15. Affirming the National Court's decision, the Constitutional Court found that the identification requirement imposed on the Applicant did not amount to "patent," or direct, discrimination, since there was no specific order or instruction to identify individuals of a specific race.
16. In determining whether "covert," or indirect, discrimination took place the Court explained that there would have to be proof that Ms. Williams was stopped for some reason other than to determine whether she was a foreigner – i.e., that a nationality check was a pretext for race.<sup>13</sup> The Court considered that a person's racial or ethnic identity is a legitimate indicator of nationality. In this regard, the Court recalled its jurisprudence establishing that the ethnic and/or racial make-up of a person used in a "descriptive" manner is not per se discriminatory.<sup>14</sup>
17. The Court rested its assessment of "covert" discrimination on two regulations which authorized the National Police to carry out identity checks. The first, Organic Law 7/1985 on the Rights and Freedoms of Foreigners in Spain, obligated foreigners to carry with them, and show, when requested, a passport or other document used to enter Spain, and, where relevant, a residency permit. The second, Organic Law 1/1992 on the Protection of Citizen Security, obliges foreigners in Spain to have – and show, when requested – documentation proving their identity and legal status in Spain.<sup>15</sup> (*See Annex 6 for copies of relevant laws and regulations*). The Court found it "necessary to recognize that when police controls serve the purpose [of enforcing these laws], specific physical or ethnic characteristics can be taken into consideration as reasonably indicative of the national origin of the person who has them."<sup>16</sup> The Court explained:

[T]he police action used the racial criterion as merely indicative of a greater probability that the interested party was not Spanish. None of the circumstances that occurred in said intervention indicates that the

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<sup>12</sup> The Court said that the prohibition against discrimination "includes not only patent discrimination, that is, the legally manifest and unjustifiably differentiated and unfavorable treatment of some persons in relation to others, but also the covert form, that is, the formal or apparently neutral or non-discriminatory treatment from which is derived, due to the various factual circumstances in the case, adverse impact on the persons who are the object of the constitutionally censurable practice or conduct, to the extent that the measure which produces the adverse effect lacks justification (i.e., is not based on an objective requirement that is indispensable for attaining a lawful objective) or is not suitable for the attainment of said objective." Constitutional Court Judgment *STC 13/2001*, Section II, para. 8.

<sup>13</sup> *Ibid* at Section II, para. 9.

<sup>14</sup> *Ibid* at Section II, para. 9.

<sup>15</sup> Organic Law 1/1992 of February 21, 1992 on the Protection of Citizen Security, Article 12.1.

<sup>16</sup> *Supra* note 12, Section II, para. 8. According to the Court, "the place and time in which said person is, in which it is usual for him to bring with him documentation proving his identity, makes it not illogical to carry out these controls on them, which, due to the circumstances indicated, are less burdensome on that person whose identification is requested. The variety of these types of circumstances [for example places of transit of travelers, lodging, and areas with a special incidence of immigration] determines that its evaluation is eminently casuistic.

conduct of the acting National Police officer was guided by racial prejudice or special bias against the members of a specific ethnic group, as alleged in the complaint. Thus, the police action took place in a place of travelers' transit, a railway station, in which, on the one hand, it is not illogical to think that there is a greater probability than in other places that persons who are selectively asked for identification may be foreigners; moreover, the inconveniences that any request for identification generates are minor and also reasonably assumable as burdens inherent to social life.<sup>17</sup>

18. Thus the Court concluded that the National Police officer's action "[had] legal coverage and conform[ed] to criteria of reason and proportionality."<sup>18</sup>

#### IV. APPLICABLE LAW

##### A. Prohibition of Racial Discrimination in International Law

###### *Prohibition of Racial Discrimination as a Jus Cogens Norm*

1. Racial discrimination is a particular evil to which international and comparative law accords priority in combating and redressing. The prohibition of racial discrimination is recognized in all major international and regional human rights instruments.<sup>19</sup> The

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<sup>17</sup> Ibid at Section II, para. 9.

<sup>18</sup> Ibid at Section II, para. 9.

<sup>19</sup> *International Covenant on Civil and Political Rights* ("ICCPR"), Article 2(1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;" *International Convention on the Elimination of All Forms of Racial Discrimination* ("ICERD"), Article 2: 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. ..." Article 1(3) of the *United Nations Charter* ("UN Charter") includes among the purposes of the United Nations "promoting and encouraging respect for human rights and for fundamental freedoms from all without distinction as to race, sex, language or religion..." Article 55(c) of the UN Charter commits the United Nations to promote non-discrimination. Article 2 of the *Universal Declaration of Human Rights* ("the Declaration") states that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status" and further states that "no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-governing or under any other limitation of sovereignty." Article 7 of the Declaration holds, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." See also the *International Covenant on Economic, Social and Cultural Rights* ("the ICESCR"), Article 2(2): "[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Article 14 of the ECHR states that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination

prohibition of racial discrimination has become a *jus cogens*, or peremptory norm, of international law, as recognized by this Committee and other international, regional, and national human rights bodies: “Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”<sup>20</sup>

2. The right to non-discrimination has been recognized by this Committee as a non-derogable human right. In its General Comment on non-discrimination, the Committee emphasized that “the principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant. While article 4, paragraph 1, allows States parties to take measures derogating from certain obligations under the Covenant in time of public emergency, the same article requires, *inter alia*, that those measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Furthermore, article 20, paragraph 2, obligates States parties to prohibit by law any advocacy of national, racial or religious hatred which constitutes incitement to discrimination.”<sup>21</sup> The Committee’s jurisprudence has consistently underscored that the all-encompassing character of article 1, paragraph 1 of the Convention “leaves no room for distinguishing between different categories of persons...to the extent of holding the Covenant to be applicable in one case but not in the other... It is, therefore, clear that the

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on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.” Article 1 of *Protocol No. 12* to the ECHR, entered into force on April 1, 2005, holds that “the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Article 21 of the *Charter of Fundamental Rights of the European Union* holds that “[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.” See also the *African Charter on Human and Peoples’ Rights*, Chapter 1, Article 2 (“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”); the *American Convention on Human Rights*, Articles 1(1) (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition”) and 24 (“All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law”).

<sup>20</sup> UN Human Rights Committee, *General Comment No. 18: Non-Discrimination:10/11/1989*, UN Doc. A/45/40, para. 1. See also the Inter-American Court of Human Rights, *Juridical Conditions and Rights of the Undocumented Migrants, Advisory Opinion (09/17/2003)* OC-18/03, Inter-Am. Ct. H.R. (Ser. A), No. 18 (2003), para. 101: “the principles of equality before the law, equal protection before the law and non-discrimination belong to *jus cogens*, because the whole legal structure of national and international public order rests on it and is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic, or social origin, nationality, age, economic situation, property, civil status, birth, or any other status is unacceptable...At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.”

<sup>21</sup> *Ibid.* See also the UN Human Rights Committee, *General Comment No. 29: States of Emergency (article 4)* UN Doc CCPR/C/21/Rev.1/Add.11 (2001), para. 8.

Covenant is not, and should not be conceived of in terms of whose rights shall be protected but in terms of what rights shall be guaranteed and to what extent.”<sup>22</sup>

3. Articles 2(1) and 26 of the ICCPR create distinct obligations for States parties. Article 2(1) obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>23</sup>
4. Article 26 is a free-standing guarantee of non-discrimination. It does not duplicate the guarantees provided in Article 2, but rather, establishes the right to non-discrimination as an autonomous right by prohibiting discrimination “in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof... [T]he application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.”<sup>24</sup>
5. The Spanish Constitution of 1978 establishes equality as one of its highest values, incorporating into national law the prohibition of racial discrimination. Article 14 explicitly prohibits racial discrimination, establishing that “Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.”<sup>25</sup>

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<sup>22</sup> UN Human Rights Committee, *Vuolanne v. Finland* (Communication No. 265/1987), UN Doc. Supp. No. 40 (A/44/40) at 249 (1989), para. 9.3.

<sup>23</sup> *General Comment No. 18: Non-Discrimination: 10/11/1989*, supra note 20. The jurisprudence of the Committee is clear on these distinct obligations. See for example, *Broeks v. Netherlands* (Communication No. 172/1984, UN Doc. CCPR/C/OP/2 at 196 (1990), para. 12.3); *Danning v. Netherlands* (Communication No. 180/1984), UN Doc. Supp. No. 40 (A/42/40) at 151 (1987); and *Järvinen v. Finland* (Communication No. 295/1988) UN Doc. CCPR/C/39/D/295/1988 (1990), para. 6.2.

<sup>24</sup> *General Comment No. 18: Non-Discrimination: 10/11/1989*, supra note 20 at para. 12. . The jurisprudence of the Committee is clear on these distinct obligations. See for example, *Broeks v. Netherlands* (Communication No. 172/1984, UN Doc. CCPR/C/OP/2 at 196 (1990), para. 12.3); *Danning v. Netherlands* (Communication No. 180/1984), UN Doc. Supp. No. 40 (A/42/40) at 151 (1987); and *Järvinen v. Finland* (Communication No. 295/1988) UN Doc. CCPR/C/39/D/295/1988 (1990), para. 6.2.

<sup>25</sup> This Article is binding on all public authorities, as per Article 53.1 of the Spanish Constitution, which affirms that “[t]he rights and freedoms recognized in the Chapter 2 of the present Part are binding on all public authorities.” Article 9.2 of the Constitution states that “[i]t is the responsibility of the public authorities to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life.” Article 10.2 provides that “[P]rovisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain,” which include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the European Social Charter, and the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.

### Direct and Indirect Discrimination

6. The ICCPR prohibits both direct and indirect discrimination: “The Committee believes that the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the *purpose* or *effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>26</sup> A similar approach has been adopted by other international and regional human rights bodies.<sup>27</sup> Direct discrimination involves less favorable treatment of the complainant than of someone else on prohibited grounds – such as racial or ethnic origin - in comparable circumstances. Direct discrimination can almost never be justified.<sup>28</sup>
7. Indirect discrimination – also known as “de facto discrimination” or “disparate/adverse impact or effect” – occurs when a practice, rule, requirement or condition is neutral on its face but disproportionately impacts particular groups. Indirect discrimination claims require a two-part analysis. First, the complainant must establish a *prima facie* case of indirect discrimination – a showing that application of the norm at issue has produced disproportionately negative effects for members of a particular group. Second, once a *prima facie* case is established, the burden of proof shifts to the defendant to show either (a) that there is in fact no discriminatory impact, or (b) that the discriminatory impact is objectively and reasonably justified. Once the burden of proof shifts, the court must ascertain whether the evidence adduced by the defendant is adequate to rebut the factual presumption of discrimination drawn from the *prima facie* case of the complainant. If the discrimination is not rebutted, the court must find that the discrimination has been

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<sup>26</sup> *General Comment No. 18: Non-Discrimination: 10/11/1989*, *supra* note 20 at para. 7 (emphasis added).

<sup>27</sup> See, for example, the ICERD, Article 1(1); UN Committee for the Elimination of Racial Discrimination (“CERD”), *General Recommendation No. 14: Definition of Racial Discrimination. 22/03/1993*, U.N. Doc. A/48/18 at 114, para. 2; European Union (“EU”), *Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, Article 2(2); Inter-American Court of Human Rights, *Juridical Conditions and Rights of the Undocumented Migrants*, *supra* note 20 at para. 103; and ECtHR, *Case Relating to Certain Aspects of the Law on the Use of Languages in Education in Belgium* (“The Belgian Linguistics Case”) (EHRR 252 (1968)), para. 10.

<sup>28</sup> See *Regina v. Immigration Officer at Prague Airport and another (Respondents)*, *ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55, para. 74 (“If direct discrimination of this sort is shown... save for some very limited exceptions, there is no defence of objective justification. The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group”). See also *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56 at para. 232.

proven.<sup>29</sup> This test for proportionality and objective justification for differential treatment is mirrored in other international human rights mechanisms.<sup>30</sup>

8. The jurisprudence of the Committee makes it clear that intent to discriminate is irrelevant to a finding of discrimination, a position that is shared by most other jurisdictions.<sup>31</sup>
9. Prior to the 2003 transposition of the European Union's *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* ("the EU Race Directive"), Spanish constitutional jurisprudence provided the only definitions of direct and indirect discrimination in Spanish law. In a 1987 judgment, the Spanish Constitutional Court recognized that "Article 14 comprises, on the one hand, the general equality clause and, on the other, the prohibition of discrimination on specific grounds...which are historically deeply rooted and which have put portions of the population in positions which are disadvantageous and openly contrary to the dignity of the individual recognized in Article 10 of the [Spanish Constitution]." <sup>32</sup> A 1998 Constitutional Court judgment found that there was "hidden" discrimination in a sex discrimination lawsuit – although there apparently were other reasons for the difference in treatment, the Court held that it was actually the person's sex which had caused the discriminatory treatment.<sup>33</sup> In a 1991 case involving employment discrimination, the Court established that when a woman invokes discrimination in

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<sup>29</sup> See, for example, *Chedi Ben Ahmed Kouri v. Sweden* (Communication No. 185/2001), UN Doc. A/57/44 (2002) at 198, para. 10; *Foin v. France* (Communication No. 666/1995), UN Doc. CCPR/C/67/D/666/1995 (1999); *Malik v. Czech Republic* (Communication No. 669/1995), UN Doc. CCPR/C/64/D/669/1995 (1998), para. 6.5; *van Oord v. Netherlands* (Communication No. 658/1995), UN Doc. CCPR/C/60/D/658/1995 (1997), para. 8.5; *Drobek v. Slovakia* (Communication No. 643/1995), UN Doc. No. CCPR/C/D/643/1995 (1997), para. 6.5; *Nahlik v. Austria* (Communication No. 608/1995) UN Doc. CCPR/C/57/D/608/1995 (1996), para. 8.2.

<sup>30</sup> See from the European Court of Justice: *Case 170/84 Bilka-Kaufhaus GmbH v. Weber von Hartz* [1986] E.C.R. 1607 [1986] 2 C.M.L.R. 701, para. 31; *Case C-33/89 Maria Kowlaska v. Freie und Hansestadt Hamburg* [1990] E.C.R. I-02591, para. 16, *Case C-184/89 Nimz v. Freie und Hansestadt Hamburg* [1990] E.C.R. I297, para. 15; *Case 109/88 Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, ex parte Danfoss A/S*, [1989] E.C.R. 3199 [1991] 1 C.M.L.R. 8 (1989). From the European Court of Human Rights: *Nachova and Others v. Bulgaria* [2005] ECHR 43577/98. See also relevant case law from other jurisdictions; for example, from the Netherlands Supreme Court: *RK Woningbouwvereniging Binderen v. S. Kaya* 10 December 1982, *NJ* 1983/687; from the Supreme Court of Canada: *Canada (British Columbia [Superintendent of Motor Vehicles]) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at para. 20; from the United States Supreme Court: *McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1973). See also the *Canadian Human Rights Act* (R.S., 1985, c. H-6), s. 15; *New Zealand Human Rights Act 1993*, section 92F; *United States Civil Rights Act 1991* (Pb. L. 102-166), section 105(a).

<sup>31</sup> See, for example, *Broeks v. Netherlands*, *supra* note 23 at paras. 12.3-16, where the Committee found a violation of Article 26 of the ICCPR on grounds of sex discrimination, even though the State party had not intended to discriminate against women; *Simunek et al v. Czech Republic*, (Communication No. 516/1992) UN Doc. CCPR/C/54/D/516/1992 (1995), paras. 11.7, where the Committee determined that "the intent of the legislature [was] not alone dispositive in determining a breach of article 26 of the Covenant...[A]n act which is not politically motivated may still contravene article 26 if its effects are discriminatory." See also *Althammer v. Austria*, (Communication No. 998/2001) UN Doc. CCPR/C/78/D/998/2001 (2003), where the Committee employs similar reasoning. See also, from the ECtHR, *Hugh Jordan v. United Kingdom* [2001] ECHR 323, para. 154; CERD, *General Recommendation No. 19: Racial segregation and apartheid* (Art. 3) (18/08/1995) UN Doc. A/50/18 at 140, para. 3; and European Union, *Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin 2000/43/EC*, Article 2[b].

<sup>32</sup> *Spanish Constitutional Court Judgment STC 128/1987*.

<sup>33</sup> *Spanish Constitutional Court Judgment STC 166/1998*.

employment, the judge may not limit him/herself to analyzing the reasonableness or the objective justification for the difference in treatment, but must also examine whether what appears to be a strictly reasonable differentiation in fact hides discrimination contrary to Article 14.<sup>34</sup>

10. The EU Race Directive was transposed into Spanish national law in December 2003, and came into force on January 1, 2004.<sup>35</sup> This new law defined direct and indirect discrimination according to the Race Directive's language. Direct discrimination "shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin"; indirect discrimination "shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

*The Prohibition of Racial Discrimination by Public Authorities, Particularly Law Enforcement Officers, in International Law*

11. The Committee has made clear that the actions of all branches of State parties' government – executive, legislative and judicial – and of other public or judicial authorities at all levels (national, regional, and local) may engage the responsibility of the State party, including its obligation to secure the right to non-discrimination on the basis of race or ethnic origin.<sup>36</sup> It has also affirmed that the legal obligation under Article 2, paragraph 1 of the ICCPR includes a negative obligation on behalf of the State party to not discriminate: "States parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights."<sup>37</sup> The Committee's General Comment 28 states that "[t]he right to equality before the law and freedom from discrimination protected by Article 26 requires States to act against discrimination by public and private agencies in all fields."<sup>38</sup> Furthermore, the Committee's jurisprudence, as well as that of other international,

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<sup>34</sup> *Spanish Constitutional Court Judgment STC 145/1991*. Also, see: Sierra, Maria Miguel for the European Monitoring Centre on Racism and Xenophobia, *Anti-discrimination Legislation in EU Member States: a comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the Council Directives: Spain*. (2002) at p.19 (Available at: [http://eumc.eu.int/eumc/material/pub/art13/ART13\\_Spain-en.pdf](http://eumc.eu.int/eumc/material/pub/art13/ART13_Spain-en.pdf)).

<sup>35</sup> *Law 63/2003 of 30 December, of Fiscal, Administrative and Social Measures*, arts. 27-43.

<sup>36</sup> Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para 4.

<sup>37</sup> *Ibid* at para. 6.

<sup>38</sup> UN Human Rights Committee, *General Comment No. 28, Equality of rights between men and women (article 3):29/03/2000*, UN Doc. No. CCPR/C/21/Rev.1/Add.10 (2000), para. 31.

regional, and national tribunals, makes clear that this interpretation applies to for both direct and indirect discrimination.<sup>39</sup>

12. The obligation of law enforcement agents not to discriminate on the basis of race or ethnic origin has received particular attention from this Committee as well as other international and regional human rights organs. The CERD, in its General Recommendation on the training of law enforcement officials in the protection of human rights, makes clear that the fulfillment of the right to non-discrimination “very much depends upon national law enforcement officials who exercise police powers, especially the powers of detention or arrest.”<sup>40</sup> CERD has further observed that, “even though the system of justice may be regarded as impartial and not affected by racism, racial discrimination or xenophobia, when racial or ethnic discrimination does exist in the administration and functioning of the system of justice, it constitutes a particularly serious violation of the rule of law, the principle of equality before the law, the principle of fair trial and the right to an independent and impartial tribunal, through its direct effect on persons belonging to groups which it is the very role of justice to protect.”<sup>41</sup> Article 2 of the United Nations *Code of Conduct for Law Enforcement Officials* furthermore urges that “in the performance of their duty, law enforcement officers shall respect and protect human dignity and maintain and uphold the human rights of all persons,” including those rights identified and protected by international instruments such as the ICCPR and the ICERD.<sup>42</sup> Multiple regional human rights bodies have adopted parallel codes of conduct for law enforcement and public officials.<sup>43</sup>

13. In Spain, the constitutional prohibitions against racial discrimination are mirrored in civil and criminal law, particularly as they relate to public agencies and officials. Article

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<sup>39</sup> See, for example, *Pepels v. Netherlands*, (Communication No. 484/1991) UN Doc. CCPR/C/51/D/484/1991 (1994); *Pons v. Spain* (Communication No. 454/1991) UN Doc. CCPR/C/55/D/454/1991 (1995), para. 9.3; *Nahlik v. Austria*, *supra* note 29 at para. 8.2 and *Simunek et al v. Czech Republic*, *supra* note 31 at para. 11.6). See CERD, *General Recommendation No. 20: Non-discriminatory implementation of rights and freedoms (Art. 5):15/03/06*, para. 2, which states, “Whenever a State imposes a restriction upon one of the rights listed in article 5 of the Convention, which applies ostensibly to all within its jurisdiction, it must ensure that neither in purpose nor effect is the restriction incompatible with article 1 of the Convention as an integral part of international human rights standards.”

<sup>40</sup> CERD, *General Recommendation 13: On the training of law enforcement officials in the protection of human rights* (21/03/1993) UN Doc. A/48/18 at 113, para. 2.

<sup>41</sup> CERD, *Draft General Recommendation on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System* (17/08/2005) U.N. Doc CERD/C/GC/31/Rev.4 , *Preamble*.

<sup>42</sup> *Code of Conduct for Law Enforcement Officials*, G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979).

<sup>43</sup> See the Council of Europe Committee of Ministers *Recommendation No. R (2001)10 of the Committee of Ministers to member States on the European Code of Police Ethics* (19/09/2001), Article 40: “The police shall carry out their tasks in a fair manner, guided, in particular, by the principles of impartiality and non-discrimination”; Council of Europe Committee of Ministers *Recommendation No. R(2000)10 of the Committee of Ministers to member States on codes of conducts for public officials* (11/05/2000), Article 7; *Parliamentary Assembly of the Council of Europe Thirty-First Ordinary Session Resolution 690 (1979) on the Declaration on the Police* (under Section A: Ethics I, para. 8: “A police officer shall not co-operate in the tracing, arresting, guarding or conveying of persons who, while not being suspected of having committed an illegal act, are searched for, detained or prosecuted because of their race, religion or political belief”; *International Association of Chiefs of Police, Law Enforcement Code of Ethics* (1957) which prohibits officers from permitting “personal feeling, prejudices [or] political beliefs” to influence any decisions.

511.1 of the Spanish Penal Code establishes that “[a]ny official of the public services who refuses a person a benefit to which he or she has a right, because of his or her ideology, religion or beliefs, race, ethnic origin or nationality...” shall be punished. Article 22.4 recognizes an aggravating circumstance of criminal responsibility if “the offence is committed for reasons that are racist, anti-Semitic or [based on] another sort of discrimination concerning the ideology, religion or beliefs, ethnic origin, race or nationality of the victim, as well as his or her sex or sexual orientation or any illness or disability from which he or she suffers.”<sup>44</sup> Law enforcement agents are responsible for carrying out their duties in compliance with the Spanish Constitution and the other laws, and, as instructed in Organic Law 2/1986 on Security Forces and Agencies, they must perform their duties in complete political neutrality and impartiality and, consequently, without any discrimination based on race, religion or opinion.<sup>45</sup> (See Annex 6 for copies of all relevant laws and regulations).

#### Racial Profiling as an Impermissible Law Enforcement Practice

14. Racial profiling – the law enforcement practice of relying on generalizations about race, ethnicity, or national origin rather than specific, objectively identified evidence that would link a perpetrator to a crime in a particular place at a particular time – is a form of racial discrimination and thus also a violation of fundamental human rights. The impermissibility of this practice has been well-recognized by the United Nations and its human rights bodies. For example, the Programme of Action adopted after the UN World Conference against Racism urged “States to design, implement and enforce effective measures to eliminate the phenomenon popularly known as ‘racial profiling’ and comprising the practice of police and other law enforcement officers relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity.”<sup>46</sup>
15. In his report to the Commission on Human Rights on the occasion of its 60<sup>th</sup> session, the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance noted, “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.”<sup>47</sup> The Special Rapporteur on Discrimination in

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<sup>44</sup> Spanish Constitution of 1978; Organic Law 10/1995, of 23 November 1995, of the Penal Code.

<sup>45</sup> Organic Law 2/1986, of 13 March 1986, of Security Forces and Bodies, Title I, Chapter II, Article 5.

<sup>46</sup> World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Durban Programme of Action*, Section A. 1. para. 72. (8 September 2001), adopted by the General Assembly 27 March 2002.

<sup>47</sup> Commission on Human Rights, *Racism, Racial Discrimination, Xenophobia and All Forms of Racial Discrimination: Report by Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mr. Doudou Diène*, UN Doc. E/CN.4/2004/18, 4 January 2004, para. 7.

the Criminal System highlighted the “institutional dimension of racial discrimination and racial profiling by police using statistics on challenges and arrests in the street of members of traditionally stigmatized minorities for offences concerning drugs, prostitution or petty crime.”<sup>48</sup> CERD has recommended that States Parties “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 which exposes him or her to greater suspicion.”<sup>49</sup>

16. These general prohibitions against racial profiling have been mirrored in numerous concluding comments and observations issued by United Nations human rights bodies and other regional human rights bodies.<sup>50</sup>

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<sup>48</sup> Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Administration of Justice, Rule of Law and Democracy: Discrimination in the criminal justice system: Progress report by Ms. Leïla Zerrougui, Special Rapporteur*, UN Doc. E/CN.4/Sub.2/2005/7, 14 July 2005, paras. 53-54.

<sup>49</sup> CERD, *Draft General Recommendation 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, *supra* note 41 at Part B, s. 5(a). See also the European Commission against Racism and Intolerance’s (ECRI) *General Policy Recommendation No. 8 on combating racism while fighting terrorism* (08/06/2004) CRI(2004)26, para. 11, urging governments to “pay particular attention to...ensuring that no discrimination ensues from legislation and regulations – or their implementation” in, among other fields, “checks carried out by law enforcement officials within the countries and by border control personnel.”

<sup>50</sup> CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Spain*. 28/03/1996., and *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Spain*. 28/04/2004, *supra* note 3. See also: CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: France*. 01/03/94, UN Doc. A/49/18, para. 145 (“Concern is expressed over procedures concerning identity controls which confer on the police, for preventive reasons, broad discretion in checking the identity of foreigners in public, a measure which could encourage discrimination in practice.”); *Concluding observations of the Committee on the Elimination of Racial Discrimination: Ukraine*. 16/08/2001, UN Doc. A/56/18, para. 375, where the Committee “strongly recommended” that “the State party take actions to counter any tendency to target, stigmatize or stereotype, which could lead to racial profiling of particular population groups by police and immigration officers[...].”); *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada*. 01/11/2002, UN Doc. A/57/18, para. 338 (“the Committee requests the State party to ensure that the application of the Anti-Terrorism Act does not lead to negative consequences for ethnic and religious groups, migrants, asylum-seekers and refugees, in particular as a result of racial profiling.”); *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland*. 10/12/200. UN Doc. CERD/C/63/CO/11, para. 538 (“The Committee is concerned that a disproportionately high number of ‘stops and searches’ are carried out by the police against members of ethnic or racial minorities.”); *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Russian Federation*. 21/03/2003, UN Doc. CERD/C/62/CO/7, para. 13 (“The Committee is concerned at reports of racially selective inspections and identity checks targeting members of specific minorities...The Committee recommends that the State party take immediate steps to stop the practice of arbitrary identity checks by law enforcement authorities.”); *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*. 14/08/2001, UN Doc. A/56/18, para. 388; *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Republic of Moldova*. 21/05/2002, UN Doc. CERD/C/60/CO/9, para. 15. See also the ECRI, *Third Report on France (Adopted 25 June 2004)*, paras. 109-113; *Third Report on Germany (Adopted 5 December 2003)*, paras. 69-90, *Second Report on Italy, (Adopted 22 June 2001)*, para. 51, *Second Report on Sweden (Adopted 28 June 2001)*, paras. 65-67.

## V. LEGAL ARGUMENTS AS APPLIED TO THE FACTS

### A. The Singling Out of the Applicant for a Police Identity Check Because of Her Race Constitutes Direct Discrimination

1. The facts of the case at hand establish that the Applicant was clearly a victim of direct discrimination on the impermissible grounds of race. As each reviewing body in this case has made clear, the Applicant was singled out for an identity check solely and explicitly because of her race. As the Constitutional Court characterized it, “the police action used the racial criterion as *merely* indicative of the greater probability that the interested party was not Spanish.” (Emphasis added). Even assuming, as the Constitutional Court reasoned, that “specific physical or ethnic characteristics” are “reasonably indicative of the national origin of the person who has them,” international law forbids state authorities from making distinctions based on racial grounds. The historical record is simply too replete with the harm caused by racial distinctions to permit them to serve as a foundation for public policy – even a policy reflected in the individual decision-making of a street police officer.<sup>51</sup>
2. The Applicant was indisputably targeted because she belonged to a racial group not typically associated with Spanish nationality. A Spanish citizen herself, she was treated less favorably than other Spanish citizens – including her Caucasian husband accompanying her – are, have been, and would be treated in a comparable situation on the grounds of racial or ethnic origin. Accordingly, she has been the victim of direct discrimination on the basis of race. As the final word of the domestic legal system, the Constitutional Court’s endorsement of the police officer’s racial profiling has engaged the Spanish government’s responsibility for this discriminatory conduct. It is incumbent upon this Committee to vindicate the governing law and ask the State Party to compensate the Applicant.

### B. The Application of Facially Neutral Immigration Control Legislation in a Manner that Disparately Impacts Persons of African Heritage and Black Skin Color Constitutes Indirect Discrimination

*The facts of this case make out a prima facie case of disproportionate racial impact.*

3. Spanish legislation granting law enforcement agencies the power to carry out identification checks for the purpose of immigration control is neutral on its face.<sup>52</sup> Nonetheless, as applied, this legislation generates a disproportionate impact upon persons of the “black race” and/or anyone else with “specific physical or ethnic characteristics”

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<sup>51</sup> The Applicant continues to maintain – as she has throughout this litigation - that the police officer who stopped her for an identity check stated that, in targeting persons on the grounds of race, he was obeying an order of the Ministry of the Interior. Nonetheless, she does not rely on that assertion in support of her legal arguments herein, which are premised on the facts as found in the judgment of the Spanish Constitutional Court.

<sup>52</sup> *Organic Law 7/1985 of July 1, 1985 on the Rights and Freedoms of Foreigners in Spain; Organic Law 1/1992 of February 21, 1992 on the Protection of Citizen Security.*

considered to be “indicative” of non-Spanish nationality (in the language of the Constitutional Court, see Section 11 at para. 9 supra). Given the manner in which it has been applied by the National Police officer himself (see Section II, para. 1, supra) and the reviewing domestic courts, Spanish immigration control legislation would certainly “put persons of a racial or ethnic origin at a particular disadvantage compared with other persons....”

*The State Party has not satisfied its burden of providing an objective and reasonable justification for the disproportionate racial impact, including both a legitimate aim and appropriate and necessary means.*

4. The premise of the domestic courts reviewing the actions of the National Police officer at issue in this case was that they were justified by a legitimate aim - i.e., immigration control enforcement through the identification of undocumented non-citizens. Furthermore, the courts implicitly considered the targeting of persons of a particular race to constitute appropriate and necessary means to that end, because, in their view, black persons are more likely to be of non-Spanish nationality than persons with other racial attributes. But even the most cursory examination of this reasoning reveals its major flaws.
5. First, skin color is an unreliable predictor of nationality in at least two senses.
6. As the Applicant’s own situation makes clear, an increasing number of Spanish nationals are black or members of other ethnic minority groups, and thus are likely to unnecessarily endure the humiliation of being singled out for special police attention. As a matter of state policy, Spain does not collect data broken down by race or ethnicity. It is therefore difficult to provide precise estimates of the numbers of Spanish citizens that belong to ethnic minority groups. Nevertheless, the gap between homogeneous myth and heterogeneous reality is well-known. For decades, Spain has hosted the largest population of Roma, or “Gitanos,” in the European Union.<sup>53</sup> Many Roma are distinguished from other Spaniards by their physical appearance. In addition, immigration from regions such as North and Sub-Saharan Africa, Latin America, the Caribbean, and Asia has increased exponentially over the past decade.<sup>54</sup> Many of these immigrants have become naturalized

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<sup>53</sup> There are an estimated 500,000 – 600,000 *Gitanos* living in Spain, comprising approximately 1.5% of the total population (EUMAP, *The Situation of Roma in Spain* [Open Society Institute, 2002], p. 286).

<sup>54</sup> Ortega Pérez, Nieves. “Spain: Forging an Immigration Policy.” *Migration Information Source*. February 2003. (Available at: <http://www.migrationinformation.org/Profiles/display.cfm?ID=97>). The legal foreign-born population in Spain has quadrupled in less than a decade, increasing from approximately 500,000 in 1995 to an estimated 2,000,000 in 2004: “From 1981 to 1991, the foreign population increased by an average of 7 percent annually. As of 1992, this figure had climbed to 10 percent annually. From 1999 to 2000, the number of people from developing countries increased 214 percent annually, much higher than the 60 percent increase in the number of foreigners from industrialized nations.” Moreover, “[i]n 2001, resident foreigners in Spain accounted for 2.5 percent of the total population, and saw one of the largest annual increases in their numbers (23.81 percent) in recent years. The biggest communities of resident foreigners were Moroccans (234,937), Ecuadorians (84,699), the British (80,183), Germans (62,506), Colombians (48,710), French (44,798), and Portuguese (42,634). These figures reflect the increasing size of the traditional Moroccan community, as well as the trend of increased immigration from Latin America. The fact that neither of the top two nationalities was an EU country, as had been the case just five years ago, brings Spain

citizens under Spain's *jus sanguinis* citizenship policy.<sup>55</sup> Furthermore Spain also has a growing number of second generation immigrants – that is, Spanish citizens not of ethnic “Spanish” descent. For all these reasons, a policy which uses racial or ethnic identity as a basis for identifying Spanish citizens will almost certainly subject many citizens to police scrutiny without reason.

7. At the same time, a substantial number of non-nationals are white and look no different from the traditional image of indigenous Spaniards. A policy premised on targeting one race risks diverting police attention from those undocumented foreigners who do not belong to an ethnic or racial minority, including many individuals coming from other European, Latin American or North American nations.
8. In sum, using racial stereotypes as a determinant of immigration control unnecessarily harms black Spanish nationals, and overlooks non-nationals who do not “look different.” Like other manifestations of racial profiling, this policy is not only violative of rights; it is wasteful and counter-productive.
9. Second, even assuming that a policy targeting blacks was rationally related to the goal of immigration control, it would not be sufficient to constitute lawful justification. International human rights protection mechanisms have repeatedly underscored that “[r]acial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction.”<sup>56</sup> Unlike many other policy variables which justify deference from reviewing bodies, “a special importance should be attached to discrimination based on race.”<sup>57</sup> The frequency with which racial distinctions are used to the detriment of minority group members establishes a presumption of unlawfulness – which a state may rebut only with compelling evidence that they are necessary and there are no reasonable alternatives. The Spanish government has come forward with no such evidence in the instant case.
10. Third, as a policy matter, racial profiling of the kind upheld by the Spanish Constitutional Court is unwise. It reinforces racial prejudice in society as a whole and legitimizes – even if unintentionally – the use of racial distinctions for invidious and improper ends. As noted in the dissenting opinion of Constitutional Court Magistrate Julio Diego González

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more in line with the tradition of immigration from third (i.e. non-EU) countries, a tradition also visible in other European Union countries.

<sup>55</sup> According to a report published by the Organization for Economic Development and Cooperation (OECD), *Trends*, from 48,300 migrants became naturalized Spanish citizens between 1996 and 1999. The report found that almost two-thirds of those naturalized were from Latin America (mainly from the Dominican Republic and Peru), and that one in five applicants was of African origin (mainly from Morocco). The biggest increase was in applications from nationals of Ecuador and Cuba (Organization for Economic Development and Cooperation, *Trends in International Migration: Continuous Reporting System on Migration Annual Report 2001* (2003), pp. 241-242.

<sup>56</sup> *Timishev v. Russia* [2006], ECHR 55762/00;55974/00, at para. 56. See also *Nachova v. Bulgaria* *supra* note 30 at para.145 (“the authorities must use all available means to combat racism...”); *ibid* at para. 160 (noting “the need to reassert continuously society’s condemnation of racism and ethnic hatred...”); *Jersild v. Denmark* [1973], ECHR 15890/89, para. 30 (“The Court would emphasise at the outset that it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations.”).

<sup>57</sup> *East African Asians v. United Kingdom*, European Commission of Hum. Rts., 3 EHRR 76 (1973), para. 207.

Campos, such practices “attribute to foreigners a socially negative image, capable of provoking...xenophobic reactions.”<sup>58</sup>

## **V. RELIEF SOUGHT**

1. Applicant requests that the Human Rights Committee find that Spain has violated Article 2 , 12(1) and 26 of the ICCPR by sanctioning the use of racially discriminatory practices by state law enforcement agents and that it order Spain to immediately modify its legislation to correct this practice.
2. Applicant also requests that the government compensate Ms. Williams for physiological and moral damages suffered in the amount of 30,000 Euros, as well as to compensate her for all her legal expenses related to the litigation of this case in the national fora in the amount of 30,000 Euros, for a total of 60,000 Euros.

## **VI. CHECKLIST OF SUPPORTING DOCUMENTS**

- Annex 1:* Authorization Form
- Annex 2:* Police Complaint dated 7 December 1992
- Annex 3:* Ministry of the Interior Complaint dated 15 March 1993
- Annex 4:* Medical Evaluation by Dr. Alba M. Gasparino dated 15 March 1993
- Annex 5:* Ministry of the Interior Resolution dated 5 April 1993
- Annex 6:* Copies of relevant laws and regulations
- Annex 7:* National Court Decision dated 29 November 1996
- Annex 8:* Constitutional Court Appeal No. 490/97 dated 7 February 1997
- Annex 9:* Constitutional Court Decision No. 13/2001 dated 29 January 2001

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<sup>58</sup> *Supra* note 12 at para. 4 of dissenting opinion

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