

Racial Discrimination in the Administration of Justice

*Submission of the Open Society Justice Initiative to the UN
Committee on the Elimination of Racial Discrimination on the
occasion of its 65th Session*

August 2004



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Racial discrimination¹ in the administration of justice is a global problem which subverts the rule of law, undermines faith in the legal system, and results in victimization of racial and ethnic groups by the very institutions responsible for their protection.² Discrimination exists at all levels of the criminal justice system, from racial profiling in the investigation of crimes, to disproportionate levels of police mistreatment during apprehension and/or custody, to the imposition of harsher sentences on members of certain racial/ethnic groups. In a mutually reinforcing cycle, the overrepresentation of minorities as victims and defendants in the criminal justice system undergirds prejudicial attitudes that – left unchecked – perpetuate further discrimination.

Since September 11, 2001, many of these problems have intensified, and the challenge of addressing them has grown more urgent. Anti-Arab and anti-Muslim sentiments have increased in many countries, among justice system actors and the population at large. As racial profiling has become more prevalent and widely accepted, Middle Eastern, North African and South Asian communities have been targeted for indiscriminate sweeps, investigations and detentions. All too often, legal protections have been suspended or simply ignored, and individuals have suffered physical or verbal abuse, unlawful surveillance, or imprisonment for no reason other than their race, ethnicity or place of origin. The officials responsible have rarely been held to account. Indiscriminate law enforcement and anti-terrorism tactics not only violate fundamental rights. They also divert scarce resources from more effective measures and discourage cooperation by members of affected communities.

¹ This document uses the definition of racial discrimination contained in Article 1 of the Convention for the Elimination of all Forms of Racial Discrimination (ICERD): “any distinction, exclusion, restriction or preference based on race, colour, descent, 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.” This definition encompasses both direct discrimination and indirect discrimination, in that it looks to the “purpose or effect” of the actions in question. See CERD, General Recommendation XIV on the Definition of Racial Discrimination, (Forty-second Session, 1993) (“In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.”).

² Racial discrimination in the administration of justice has attracted increased international attention. The Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance included the following passage:

We express our profound repudiation of the racism, racial discrimination, xenophobia and related intolerance that persist in some States in the functioning of the penal systems and in the application of the law, as well as in the actions and attitudes of institutions and individuals responsible for law enforcement, especially where this has contributed to certain groups being over-represented among persons under detention or imprisoned.

Durban Declaration against Racism, Racial Discrimination, Xenophobia and Related Intolerance, September 8, 2001, para. 25, <http://www.unhchr.ch/pdf/Durban.pdf> (accessed July 26, 2004).

The Sub-Commission on the Promotion and Protection of Human Rights has also recognized the importance of this issue, and has appointed a Special Rapporteur on discrimination in the criminal justice system. See UN 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, Preliminary Paper by Lei la Zerrougui, Special Rapporteur appointed to conduct a detailed study of discrimination in the criminal justice system in implementation of Sub-Commission Resolution 2002/3,” June 26, 2003, E/CN.4/Sub.2/2003/3, <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/33c77aaba6b81932c1256d790025293c?Opendocument> (accessed July 26, 2004).

The obstacles to addressing discrimination in the criminal justice system include entrenched assumptions about the criminal proclivity of racial and ethnic minorities, the propensity of government officials to exploit associations between race and crime for political ends, and deep alienation that divides many discriminated-against groups from law enforcement representatives. In addition, certain structural issues common to many criminal justice systems exacerbate these problems. Gathering racial and ethnic data on criminal justice practices is often a prerequisite to proving and combating discrimination. However, very few states collect such data. Ensuring the diversity of employees within the criminal justice system is also an important step towards ensuring the equitable administration of justice, but minorities remain under-represented in many criminal justice agencies.

Notwithstanding the severity and scope of these phenomena, few international provisions specifically prohibit the various manifestations of racial discrimination in the administration of justice. The Committee on the Elimination of Racial Discrimination (“CERD” or the “Committee”) is uniquely qualified to clarify governing principles and offer states guidance. Article 5(a) of the ICERD, which protects “the right to equal treatment before the tribunals and all other organs administering justice,” offers an appropriate foundation for the Committee’s deliberation. To this end, the Open Society Justice Initiative respectfully requests that the Committee consider promulgating a General Recommendation on racial discrimination in the administration of justice that takes into account the following elements.

I. Racial Profiling - Discrimination by the Police in Detaining, Stopping and Arresting Persons

Racial profiling – the use of racial or ethnic stereotypes by law enforcement officers as a factor in determining who has been, is, or may be involved in criminal activity – implicates Article 5(a) of the ICERD, as well as Articles 2(1), 9(1), 14(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR).³

A term that first gained currency in the United States and the United Kingdom, racial profiling has increasingly attracted concern in the rest of the world. The Programme of Action at the World Conference against Racism “[u]rges 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.”⁴

Racial profiling has received perhaps most attention in the U.S., where statistical evidence has revealed that the practice is common.⁵ Some of the most notorious cases involved traffic stops in the 1990s. In Maryland, for example, a study showed that 79.2 percent of drivers stopped and searched on the

³ See ICCPR, Arts. 2(1) (obliging each State Party “to respect and to ensure to all individuals ... 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”); 9(1) (protecting “the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”); 14(1) (“All persons shall be equal before the courts and tribunals”); and 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 ... national or social origin....”).

⁴ Durban Declaration, *supra* note 2 at para. 72.

⁵ See, e.g., Deborah A. Ramirez, Jennifer Hoopes & Tara Lai Quinlan, “Defining Racial Profiling in a Post-September 11 World,” 40 *Am. Crim. L. Rev.* 1195 (2003); David A. Harris, “The Stories, the Statistics and the Law: Why ‘Driving While Black’ Matters,” 84 *Minn. L. Rev.* 265 (1999).

Maryland Turnpike were black, even though 74.7 percent of drivers exceeding the speed limit were white and only 17.5 percent were black.⁶ Studies from other U.S. states documented similar patterns of profiling.⁷

In parts of Europe, although the term is less familiar, anecdotal evidence suggests that racial profiling by police is widespread. The European Commission against Racism and Intolerance (ECRI) has expressed concerns about the practice of racial profiling in several European countries, including Austria, Romania, Russia, Spain, Switzerland, Ukraine and the United Kingdom.⁸ In the United Kingdom, a government report recently found that, nationwide in 2002/03, “[f]or the majority of police forces, it was apparent that the number of recorded ‘stop and searches’ relative to the resident population was consistently higher for Black people than for White people. ... Overall, Black people were recorded as being 6 times more likely to be searched than White people.”⁹ In Spain, information concerning police activity recorded by Amnesty International “suggests the existence of a disturbing pattern of ‘racial profiling,’ whereby persons are stopped and searched on the basis of their race or ethnic origin.”¹⁰

In a number of European countries, the Roma in particular have been subjected to racial profiling by the police. In Romania, ECRI has expressed concern about violent raids by the police “where Roma/Gypsy communities are living, often at night and with no authorisation. ... [P]ersons thus apprehended, including women and children, are then taken to the police station for questioning.”¹¹ A member of the United Nations Committee Against Torture has spoken out against similar practices by the Greek police of targeting Roma camps, stating that such actions seemed to be “akin to the racial profiling that had received so much attention in the United States.”¹²

Racial profiling has played a role in the war against terror since September 11, 2001.¹³ In response to this concern, the UN Commission on Human Rights at its fifty-eighth session adopted a resolution stating that “States and international organizations have a responsibility to ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin, and urges all States to rescind or refrain from all forms of racial profiling.”¹⁴ However, reports of profiling persist.

⁶ Ramirez et al., *supra* note 5 at 1198.

⁷ Harris, *supra* note 5 at 275-88.

⁸ ECRI, *Second Report on Austria* (2000) para. 39; ECRI, *Second Report on Romania* (2001) para. 46; ECRI, *Second Report on the Russian Federation* (2001) para. 62; ECRI, *Second Report on Spain* (2002) para. 38; ECRI, *Third Report on Switzerland* (2003) para. 29; ECRI, *Second Report on Ukraine* (2003) para. 42; ECRI, *Second Report on the United Kingdom* (2000) para. 45. ECRI Country Reports are available at <http://www.coe.int/T/E/human%5Frights/Ecri/1%2DECRI/2%2DCountry%2Dby%2Dcountry%5FApproach/>.

⁹ Home Office, *Statistics on Race and the Criminal Justice System* (2003) 27, <http://www.homeoffice.gov.uk/docs3/s95race2003.pdf> (accessed July 26, 2004).

¹⁰ Amnesty International, *Spain: Crisis of Identity, Race-Related Torture and Ill-Treatment by State Agents* (2002) <http://web.amnesty.org/library/Index/ENGEUR410012002?open&of=ENG-ESP> (accessed July 26, 2004).

¹¹ ECRI, *Second Report on Romania* (2001) para. 45, <http://www.coe.int/T/E/human%5Frights/Ecri/1%2DECRI/2%2DCountry%2Dby%2Dcountry%5FApproach/Romania/CBC2-Romania.asp#TopOfPage> (accessed July 26, 2004).

¹² Quoted in European Roma Rights Center and Greek Helsinki Monitor, *Cleaning Operations: Excluding Roma in Greece*, Country Report Series No. 12 (2003) 112, <http://www.errc.org/db/00/09/m00000009.pdf> (accessed July 26, 2004) (quoting Summary Record of the First Part of the 463rd Meeting: Greece, of May 9, 2001, CAT/C/SR.463 (Summary Record), para. 7).

¹³ See, e.g. Samuel R. Gross and Debra Livingston, “Racial Profiling under Attack,” 102 *Colum. L. Rev.* 1413, 1413 (2002); Ramirez, *supra* note 5 at 1201.

¹⁴ Commission on Human Rights, Resolution 2002/68, Racism, Racial Discrimination, Xenophobia and Related Intolerance, [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.RES.2002.68.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2002.68.En?Opendocument) (accessed July 26, 2004).

In the U.S., while the Justice Department has promulgated standards regarding racial profiling in “traditional law enforcement activities,”¹⁵ these standards “do not affect current Federal policy with respect to law enforcement activities and other efforts to defend and safeguard against threats to national security or the integrity of the Nation’s borders.”¹⁶

Shortly after 9/11, the Justice Department targeted thousands of Arab and South Asian men. A recent report by the Office of the Inspector General found that “the Department’s policy was to ‘use whatever means legally available’ to detain a person linked to the terrorists who might present a threat In some instances ... that would mean detaining aliens on immigration charges, and in other cases criminal charges.”¹⁷ As the American Civil Liberties Union (ACLU) subsequently noted:

It soon became clear that most, if not all, of the several thousand detainees picked up by federal agents in the immediate aftermath of 9/11 were guilty of little more than being Arab, Muslim or South Asian, and in the wrong place at the wrong time. The “tips” leading to their arrests were often tainted with ethnic bias. The vast majority of the men were detained on pretexts: They may have been guilty of minor immigration law offenses for which they would not have been detained, much less deported, under normal circumstances. The men were held for months on end under extraordinarily restrictive and, in some cases, abusive conditions.¹⁸

Since September 11, the Justice Department has also required immigrants from 24 Arab and Muslim countries (and North Korea) to “report to the government to register and be fingerprinted, photographed and questioned.”¹⁹ The registration process often results in deportation on charges unrelated to terrorism. According to the ACLU, of the 83,310 foreign nationals registered, 13,740 were placed into deportation proceedings.²⁰

The United Kingdom also seems to be engaged in terrorism-related racial profiling. In most instances law enforcement officers are governed by rules requiring that in order to stop and search an individual the law enforcement officer must have “reasonable grounds for suspicion,” which “can never be supported on the basis of personal factors alone without reliable supporting intelligence or information of some specific behavior by the person concerned. For example, a person’s race, age, appearance, or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each

¹⁵ U.S. Department of Justice, Civil Rights Division, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (June, 2003), http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm (accessed July 26, 2004) (“In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity in a specific suspect description. This prohibition applies even where the use of race or ethnicity might otherwise be lawful. In conducting activities in connection with a specific investigation, Federal law enforcement officers may consider race and ethnicity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization. This standard applies even where the use of race or ethnicity might otherwise be lawful.”).

¹⁶ *Id.* In situations such as these, “Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States.” *Id.*

¹⁷ Office of the Inspector Gen., U.S. Dep’t of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (2003) 13, <http://www.usdoj.gov/oig/igspecl1.htm> (accessed July 26, 2004).

¹⁸ American Civil Liberties Union, *Sanctioned Bias: Racial Profiling Since 9/11* (2004) 5, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15102&c=207#fileattach> (accessed July 26, 2004).

¹⁹ *Id.* at 6.

²⁰ *Id.* at 7. Although the ICERD exempts from its application the “legal provisions of States Parties concerning nationality, citizenship or naturalization” (Art. 1.2), it prohibits “discriminat[ing] against any particular nationality” among non-citizens. (Art. 1.3).

other as the reason for searching that person.”²¹ However, the Terrorism Act 2000 grants law enforcement officials stop and search powers without reasonable suspicion in certain instances.²² According to the Institute for Race Relations, “people categorised under the police’s ‘other’ category – which would presumably include those from the Middle Eastern and North African refugee communities – were seven times more likely to be stopped and searched [under the powers granted by the Terrorism Act 2000] than Whites.”²³

Racial profiling with respect to terrorism has also been observed in Germany. Thus, the German government has reportedly “compiled a vast database of six million personal records, of which 20,000 have been singled out as potential terrorists, even though there is no concrete evidence against them. To qualify for inclusion on this list, a suspect has to be, among other things, a (presumed) Muslim, ‘from an Islamic state’ and not previously involved in crime.”²⁴

At present, there is often insufficient data to confirm allegations of racial profiling from other countries. The absence of data is a problem addressed below, in section VIII.

II. Disproportionate Incidence of Police Brutality Against Racial/Ethnic Groups

Police brutality that targets or disproportionately affects racial and ethnic minorities implicates Article 5(b) of the ICERD, as well as Articles 2(1), 6(1), 7, 10(1) and 26 of the ICCPR.²⁵

There is evidence that many discriminated against racial/ethnic groups are disproportionately victims of police abuse, during investigation, arrest and custody. Police violence is notoriously difficult to document and punish. By its very nature, much police misconduct takes place behind closed doors, where the opportunity for independent observation is limited. Moreover, racial and ethnic minorities are frequently impaired in pressing charges against the police by fear of retaliation, insufficient awareness of their rights, and inadequate access to legal assistance.

ECRI has raised concerns about police brutality disproportionately impacting selected racial/ethnic groups in Albania, Austria, Bulgaria, Cyprus, the Czech Republic, France, Macedonia, Germany, Greece, Hungary, Poland, Portugal, Romania, Spain, Switzerland and Ukraine.²⁶ In Bulgaria several studies have documented a higher incidence of abuse by police

²¹ Police and Criminal Evidence Act (1984), Code A, para. 2.2, http://www.homeoffice.gov.uk/docs3/pacecode_a.pdf (accessed July 26, 2004).

²² Terrorism Act 2000, §44, [http://www.homeoffice.gov.uk/terrorism/govprotect/legislation/index.html#Terrorism%20Act%202000%20\(TACT\)](http://www.homeoffice.gov.uk/terrorism/govprotect/legislation/index.html#Terrorism%20Act%202000%20(TACT)) (accessed July 26, 2004).

²³ Arun Kundnani, “Analysis: the war on terror leads to racial profiling,” Institute of Race Relations (July 7, 2004), <http://www.irr.org.uk/2004/july/ak000006.html> (accessed July 26, 2004).

²⁴ *Id.*

²⁵ See ICERD, Art. 5(b) (obliging States Parties to guarantee equality before the law in the enjoyment of the “right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution”); ICCPR, Arts. 6(1) (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”); 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”); 10(1) (“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”).

²⁶ ECRI, *Second Report on Albania* (2000) para. 31; ECRI, *Second Report on Austria* (2000) para. 39; ECRI, *Third Report on Bulgaria* (2003) paras 76-77; ECRI, *Second Report on Cyprus* (2000) para. 41; ECRI, *Third Report on the Czech Republic* (2003) para. 75; ECRI, *Second Report on France* (1999) para. 29; ECRI, *Second Report on “the*

during arrest and in detention against the Roma than against ethnic Bulgarians.²⁷ Amnesty International has noted that in Spain, when minorities are stopped by the police, if they are “thought to be resisting or questioning police identity checks, they may be abused and assaulted and end up in hospital, sometimes with serious injuries.”²⁸ In several instances the European Court of Human Rights has found violations of the European Convention on Human Rights based on incidences of police brutality against minorities.²⁹

There are some indications that police brutality disproportionately impacts discriminated against racial/ethnic groups outside of Europe as well, although the lack of data and less developed regional structures complicate documentation of the problem. In Brazil, research has shown that, in 2003, “[p]ersons of color were five times more likely to be shot or killed in the course of a law enforcement action than were persons perceived to be white. During the year, the Sao Paulo police ombudsman repeated his 2002 claim that the majority of victims in police killings were young black men from impoverished areas on the periphery of major cities.”³⁰ Amnesty International has found that “[i]n Mauritius, half of the detainees who died in custody in suspicious circumstances between 1979 and 2001 were from the Creole minority which constitutes less than 25 per cent of the population.”³¹

III. Racial Discrimination in Charging, Verdicts and Sentencing

Racial discrimination in charging, verdicts and sentencing implicates Article 5(a) of the ICERD as well as Articles 2(1), 9, 14 and 26, and – in countries that have not abolished the death penalty – Article 6 of the ICCPR.

Former Yugoslav Republic of Macedonia” (2000) para. 32; ECRI, *Third Report on Germany* (2003) para. 79; ECRI, *Third Report on Greece* (2003) para. 105; ECRI, *Third Report on Hungary* (2003) para. 88; ECRI, *Second Report on Poland* (1999) para. 50; ECRI, *Second Report on Portugal* (2002) para. 46; ECRI, *Second Report on Romania* (2001) para. 46; ECRI, *Second Report on Spain* (2002) para. 38; ECRI, *Third Report on Switzerland* (2003) para. 29; ECRI, *Second Report on Ukraine* (2001) para. 42. ECRI Country Reports are available at <http://www.coe.int/T/E/human%5Frights/Ecri/1%2DECRI/2%2DCountry%2Dby%2Dcountry%5FApproach/> (accessed July 26, 2004).

²⁷ See, e.g., Bulgarian Helsinki Committee, *Alternative Report to the Report Submitted by Bulgaria Pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities* (2003) 6-7, <http://www.bghelsinki.org/frames-reports.htm> (accessed July 26, 2004).

²⁸ Amnesty International, *supra* note 10.

²⁹ See, e.g., *Tekin v. Turkey* (1998) 31 E.H.R.R. 4 (finding a violation of Articles 3 and 13 of the European Convention on Human Rights (ECHR) (right to be free of torture and inhuman or degrading treatment or punishment and right to an effective remedy) in a case of police brutality against a Kurdish journalist); *Aksoy v. Turkey* (1996) 23 E.H.R.R. 553 (finding a violation of Articles 3, 5(3) and 13 of the ECHR (right to be free of torture and inhuman or degrading treatment or punishment, right to be brought promptly before a judge upon detention, and right to an effective remedy) in a case of police brutality against an alleged member of the Workers’ Party of Kurdistan); *Nachova and Others v. Bulgaria*, judgment of Feb. 26, 2004, Nos. 43577/98 and 43579/98 (on referral to Grand Chamber) (finding a violation of Articles 2 and 14 of the ECHR (right to life and effective investigation and right to enjoy rights and freedoms of the convention free from racial discrimination) in the case of the shooting to death of two Bulgarian nationals of Roma origin by military police); *Balogh v. Hungary*, judgment of July 20, 2004, No. 47940/99 (finding a violation of Article 3 of the ECHR (right to be free from torture and inhuman or degrading treatment or punishment) in a case dealing with police brutality against a Hungarian of Roma origin).

³⁰ United States Department of State, *Country Reports on Human Rights Practices: 2003 (Brazil)*, <http://www.state.gov/g/drl/rls/hrrpt/2003/27888.htm> (accessed July 26, 2004).

³¹ Amnesty International, *Policing to Protect Human Rights: A Survey of Police Practice in Countries in the Southern African Development Community, 1997-2002* (2002) 21, <http://web.amnesty.org/library/index/engaf030042002> (accessed July 26, 2004).

Where data are available, disturbing patterns suggest that racial and ethnic minorities in certain countries may be charged with more serious crimes. When convicted of crimes they often receive harsher penalties than others convicted of the same crime.

In the United States, Human Rights Watch has found that “the war on drugs has been waged disproportionately against black Americans.” According to its research, “blacks comprise 62.7 percent and whites 36.7 percent of all drug offenders admitted to state prison,” even though there are “five times more white drug users than black. Relative to the population, black men are admitted to state prison on drug charges at a rate that is 13.4 times greater than that of white men. In large part because of the extraordinary racial disparities in incarceration for drug offenses, blacks are incarcerated for all offenses at 8.2 times the rate of whites.”³²

There is also evidence that the Roma in some countries in Europe may be subject to harsher sentences than others. In the Czech Republic, one study concluded that “male Romani defendants in identical positions to non-Romani defendants (meaning defendants of similar age, similar background, alleged to have committed similar crimes, etc.) receive disproportionately longer sentences than their non-Romani counterparts.”³³ In Bulgaria, the Bulgarian Helsinki Committee found that:

According to several surveys conducted between 1999 and 2002, [Muslims and Roma in Bulgaria] were ... over-represented among those who complain of physical abuse during arrest and preliminary investigation and among those who did not have a lawyer at all stages of criminal proceedings. For these and for purely discriminatory reasons Roma and Muslims (Turks and Pomaks) are also more likely to get harsher sentences compared to Bulgarians for the same offences.³⁴

A look at the death penalty reveals even more sobering statistics. The UN Commission on Human Rights has noted in its Resolution on the question of the death penalty that “in some countries, ... persons belonging to national or ethnic, religious and linguistic minorities appear to be disproportionately subject to the death penalty.”³⁵ In the United States numerous studies have shown that both the race of the defendant and that of the victim are statistically significant factors in determining whether or not a state defendant will receive the death penalty.³⁶ At the federal level, a 2001 Justice Department report revealed that 85 percent of defendants on federal death row were not white, and that 80 percent of cases submitted to the U.S. Attorney General for federal death penalty eligibility involved defendants who were black or Hispanic.³⁷

Such discriminatory practices are not limited to the United States. An Amnesty International report observed that, even though “[i]n law the death penalty in Saudi Arabia is applicable to all capital offenders

³² Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs*, Vol. 12, No. 2 (2000), <http://www.hrw.org/reports/2000/usa/> (accessed July 26, 2004).

³³ Barbora Bukovská, “Romani men in black suits: racism in the criminal justice system in the Czech Republic,” *Roma Rights*, European Roma Rights Center, No. 1 (2001), http://lists.errc.org/rr_nr1_2001/noteb4.shtml (accessed July 26, 2004).

³⁴ Bulgarian Helsinki Committee, *supra* note 27 at 10.

³⁵ Commission on Human Rights, *The question of the death penalty*, 2002/77, <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/e93443efabf7a6c4c156bab00500ef6?Opendocument> (accessed July 26, 2004).

³⁶ See, e.g., ACLU, *Race and the Death Penalty* (2004), <http://www.aclu.org/DeathPenalty/DeathPenalty.cfm?ID=9312&c=62> (accessed July 26, 2004) (discussing several such studies).

³⁷ United States Department of Justice, *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review* (June 6, 2001), <http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm> (accessed July 26, 2004).

without distinction ... in practice it disproportionately affects the disadvantaged and the victims of discrimination such as foreign workers and women. More than half of those executed in Saudi Arabia over the last decade were foreign nationals, whose various communities constitute six million of the total population of Saudi Arabia (which [was then] approximately 19 million).³⁸ This is not simply “a reflection of these sectors of society being responsible for the problem of mounting crime.” Rather, the report identified as contributing factors that non-Saudis are “in a foreign land with no relatives to turn to for help, together with language complications.”³⁹ In one monitored time period, one in six Saudi Arabian nationals sentenced to death received pardons, whereas only one in 45 foreign nationals did. “Without family, a tribal base of money, foreign workers’ chances of receiving a pardon ... after being sentenced to death are therefore very slim.”⁴⁰

IV. Racial Discrimination in Access to Counsel

Racial discrimination in access to counsel for those charged with crimes implicates Article 5(a) of the ICERD, and Articles 2(1), 14(3)(d)⁴¹ and 26 of the ICCPR.

Although the right of access to state-appointed legal aid for criminal defendants is widely recognized in many national constitutions and laws, it is often honored in the breach.⁴² To the extent that discriminated against racial/ethnic groups suffer from greater socio-economic hardship, they will often be both overrepresented in the criminal justice system and less able to afford counsel of their own. Thus they are disproportionately impacted when the state does not provide access to counsel for indigent people. Lack of legal representation compounds the effects of discriminatory treatment. Persons without counsel are more vulnerable to police abuse, and less able to defend themselves at trial.

While there is very little data on this important issue, at least one report has shown that minorities in Bulgaria enjoy less access to counsel than others.⁴³ The report concluded that, while overall “55% of the respondents reported a lack of access to lawyers during preliminary investigation in 2001,” the percentage of Romani respondents with no lawyer in pre-trial proceedings was 61 percent.⁴⁴ According to the report, “being an ethnic Bulgarian is a factor which increases the possibility of the defendant’s being represented by a lawyer during first instance court proceedings.”⁴⁵

V. The Racially Discriminatory Impact of Laws/Practices which Mandate Expulsion of Non-Citizens as a Consequence of Conviction

Under certain circumstances, the expulsion of non-citizens who have been convicted of a crime may implicate Article 17 of the ICCPR, which guarantees the right to be free from arbitrary interference with family and private life. This generally occurs when the non-citizen has strong familial ties to the country of residence and few such ties to the country of citizenship. To the extent that such expulsions

³⁸ Amnesty International, *Defying World Trends – Saudi Arabia’s Extensive Use of Capital Punishment* (Nov. 1, 2001), available at <http://web.amnesty.org/library/Index/ENGMDE230152001?open&of=ENG-SAU> (accessed July 26, 2004).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See ICCPR, Art. 14(3)(d) (guaranteeing everyone charged with a criminal offense the right “to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it”).

⁴² See generally Public Interest Law Initiative, et al., *Access to Justice in Central and Eastern Europe: Country Reports* (2003) (noting numerous failures to assure representation for indigent accused).

⁴³ Bulgarian Helsinki Committee, *supra* note 27.

⁴⁴ *Id.* at 7.

⁴⁵ *Id.* (internal quotations omitted).

disproportionately impact individuals of certain racial, ethnic or national origin, this practice may also raise concerns under Article 5(a) of the ICERD and Articles 2(1) and 26 of the ICCPR.

The UN Special Rapporteur on discrimination in the criminal justice system has observed that “[e]xpulsion following a criminal conviction is a current practice even with regard to aliens who have very strong family ties in the country where they are lawfully resident. This subjects them to double punishment when they are convicted because after serving their sentence they are generally expelled to their country of origin even though family, social and sometimes cultural links with the country no longer exist or never did exist.”⁴⁶ The European Court of Human Rights has found in several instances that expulsion of aliens convicted of crimes violated Article 8 of the European Convention on Human Rights, which guarantees the right to respect for family and private life.⁴⁷

A United States District Judge has similarly held that deportation of individuals convicted of a crime could violate Article 17 of the ICCPR, as well as Articles 3 and 7 of the Convention on the Rights of the Child and customary international law.⁴⁸ Although the UN Human Rights Committee has not dealt with the question concerning convicted criminals, it has held that deportation for other reasons of the parents of a citizen may breach Articles 17, 23 and 24 of the ICCPR.⁴⁹

Particularly in the aftermath of September 11, 2001, some governments have seized upon expulsion following criminal conviction as a tool to remove certain persons from the territory in disregard of the right to family life. The U.S., for example, has increased pressure on certain countries to sign agreements allowing the repatriation of convicted criminals.⁵⁰

VI. Ineffective Legal Remedies

Article 6 of the ICERD, Article 2(3) of the ICCPR and Article 2 of the UN Convention Against Torture require that individuals whose rights under the treaty in question have been violated have access to effective remedies.

Countries generally have laws against acts of violence, including many that specifically address racially-motivated violence on the part of both private actors and law enforcement officers. In recent years a growing body of jurisprudence has imposed affirmative obligations on governments to investigate allegations of violence and enforce criminal penalties against perpetrators.⁵¹ Where there is evidence that

⁴⁶ Zerrougui, *supra* note 2 at para. 34.

⁴⁷ See, e.g., *Nasri v. France* (1995) 21 E.H.R.R. 458; *Beldjoudi v. France* (1992) 14 E.H.R.R. 801; *Moustaquim v. Belgium* (1991) 13 E.H.R.R. 802.

⁴⁸ *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), *rev'd on other grounds*, *Beharry v. Ashcroft*, 329 F. 3d 51 (2d Cir. 2003).

⁴⁹ Communication No. 930/2000, *Hendrick Winata and So Lan Li v. Australia*, Report of the Human Rights Committee, Vol. II, UN doc. A/56/40 (Vol. III) (2001) 199-210.

⁵⁰ See, e.g., Deborah Sontag, “In a Homeland Far From Home,” *The New York Times Magazine*, November 16, 2003 at 48 (describing the deportation, pursuant to repatriation agreement of a Cambodian national who had lived in the U.S. since he was a young child, and was forced to leave a wife and two children upon returning to Cambodia).

⁵¹ See, e.g., *Assenov v. Bulgaria*, 28 E.H.R.R. 652 (1998) (Article 3 of ECHR requires an “effective official investigation ... capable of leading to the identification and punishment of those responsible” in cases of police ill-treatment); *X & Y v. Netherlands*, 8 E.H.R.R. 235 (1985) (recognizing positive obligation to provide and enforce criminal penalties for rape).

violence is motivated by racial animus, governments must “take all reasonable steps to unmask any racial motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events.”⁵²

However, in practice it can be very difficult for victims of such abuses to have access to effective legal remedies. In a number of countries, legislation which criminalizes or authorizes sentencing enhancements for racial motivation in connection with a criminal act suffers from imprecision, incompleteness and/or infrequent enforcement.

Both Amnesty International and ECRI have expressed concern about the length of investigations into allegations of police abuse in Germany, as well as the reluctance of prosecutors to press charges against the police, and the practice of filing counter-charges against victims.⁵³ ECRI has also raised concerns about lack of effective remedies for police misconduct in Austria, Bulgaria, the Czech Republic, Finland, France, Poland, Romania, Russia, Spain and Ukraine.⁵⁴

In Zimbabwe Human Rights Watch found that from early 2000 through the end of 2001, militia associated with the ruling party “have intimidated, assaulted, and, in at least seven cases killed white farm owners in the course of occupying commercial farms. A much larger number of victims have come from among farm workers on commercial farms; several tens of farm workers have been killed.”⁵⁵ Many of the farm workers are immigrants. The findings “confirmed the reports of Zimbabwean and other international human rights organizations that the police have at best failed to take action against the alleged perpetrators of violent crimes, and in some cases have actively assisted illegal action.”⁵⁶

While most countries at least have laws on the books regarding racially-motivated violence, many lack effective legal remedies for other types of discrimination within the criminal justice system, such as discrimination in sentencing or racial profiling at the point of arrest.

VII. Racial Discrimination in Public Employment by Criminal Justice Agencies

Racial discrimination in employment by criminal justice agencies – including law enforcement and the courts – implicates the right to non-discriminatory access to work protected by Article 5(e)(i) of ICERD. It also has a direct effect on the right to equal treatment in the administration of justice under

⁵² *Nachova v. Bulgaria*, *supra* note 29, para. 158. In *Nachova*, the Court held that “any evidence of racist verbal abuse by law enforcement agents during an operation involving the use of force against persons from an ethnic or other minority is highly relevant to the question whether or not unlawful, hatred-induced violence has taken place. Where such evidence comes to light in the investigation, it must be verified and – if confirmed – trigger a thorough examination of all the facts in order to uncover any possible racist motives.” *Id.* at para. 162.

⁵³ Amnesty International, *Back in the Spotlight, Allegations of Police Ill-Treatment and Excessive Use of Force in Germany* (2004), available at <http://web.amnesty.org/library/Index/ENGEUR230012004?open&of=ENG-DEU> (accessed July 26, 2004); ECRI, *Third Report on Germany* (2003) para. 81.

⁵⁴ ECRI, *Second Report on Austria* (2000) para. 40; ECRI, *Third Report on Bulgaria* (2003) para. 76; ECRI, *Third Report on the Czech Republic* (2003) para. 75; ECRI, *Second Report on Finland* (2001) para. 38; ECRI, *Second Report on France* (1999) para. 30; ECRI, *Second Report on Poland* (1999) para. 49; ECRI, *Second Report on Romania* (2001) para. 47; ECRI, *Second Report on the Russian Federation* (2001) para. 63; ECRI, *Second Report on Spain* (2002) para. 39; ECRI, *Second Report on Ukraine* (2001) para. 43. ECRI Country Reports are available at <http://www.coe.int/T/E/human%5Frights/Ecricr/1%2DECRI/2%2DCountry%2Dby%2Dcountry%5Fapproach/> (accessed July 26, 2004).

⁵⁵ Human Rights Watch, *Fast Track Land Reform in Zimbabwe*, Vol. 14, No. 1 (Mar. 2002), <http://www.hrw.org/reports/2002/zimbabwe/> (accessed July 26, 2004).

⁵⁶ *Id.*

Article 5(a). Under appropriate conditions, states may adopt “special measures,” including affirmative employment and recruitment practices, to secure the advancement of racial and ethnic minority groups.⁵⁷

A police force which pursues discriminatory employment policies will have difficulty promoting equal treatment of suspects and detainees by its own officers. Racial diversity in law enforcement facilitates improved relationships and enhanced cooperation with affected communities in the fight against crime.

The Programme of Action of the World Conference on Racism “[u]rges States ... [t]o create and implement policies that promote a high-quality and diverse police force free from racism, racial discrimination, xenophobia and related intolerance, and recruit actively all groups, including minorities, into public employment, including the police force and other agencies within the criminal justice system (such as prosecutors).”⁵⁸ The European Commission’s Directorate-General for Employment and Social Affairs has also recognized the need for diversity in law enforcement. Its “action programme to combat discrimination” includes as one of its four priorities “stamping out discrimination by public authorities towards both the people they serve and those they employ.”⁵⁹ This includes an emphasis on “making policing and law enforcement more equitable.”⁶⁰

VIII. Racial and Ethnic Data

The availability of reliable data about the actual practices of various actors in the criminal justice system is a prerequisite to effectively combating racial discrimination in the administration of justice. Without reliable race- and ethnic-coded data, it is difficult to prove many allegations of discrimination. At the same time, if misused, such data can threaten individual privacy, reinforce racial prejudice and further discriminatory practices. In short, racial and ethnic data are at once imperative and must be used with care. Given the challenges involved, it should not be surprising that racial and ethnic data are scarce.

The importance of data broken down by race or ethnicity has been repeatedly noted by numerous international monitoring bodies.

This Committee has expressly asked States Parties to include in their reports under Article 9 “relevant information on the demographic composition of the population,”⁶¹ and has affirmed that, in preparing such reports, “ethnic characteristics of the country are of particular importance in connection with the ... Convention....”⁶²

In Europe, the very definition of indirect discrimination contained in the European Union Race Directive implies a need for race-coded data.⁶³ Indeed, the Race Directive explicitly permits the use of statistical evidence to prove indirect discrimination:

⁵⁷ See ICERD, Art. 1(4). The recently adopted European Union Race Directive authorizes adoption and maintenance of “specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.” (Art. 5).

⁵⁸ Durban Declaration, *supra* note 2 at para. 74.

⁵⁹ Directorate-General for Employment and Social Affairs, *Annual Report on Equality and Non-Discrimination* (2003) 22, http://europa.eu.int/comm/employment_social/publications/2003/keam03001_en.pdf (accessed July 26, 2004).

⁶⁰ *Id.* at 26.

⁶¹ CERD General Recommendation IV (1973).

⁶² CERD, “General Guidelines Regarding the Form and Content of Reports to be Submitted by States Parties under Article 9, Para. 1 of the Convention.”

⁶³ See EU Race Directive, Art. 2(2)(b) (indirect discrimination occurs “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 appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be addressed by any means *including on the basis of statistical evidence*.⁶⁴

ECRI has also underscored the need for such data.⁶⁵

And yet, notwithstanding its importance, many governments commonly refuse to collect or provide such information, often on the grounds that race or ethnic data breach privacy and/or data protection norms. However, appropriately used and managed, racial and ethnic data need not pose a danger to individual freedom. Proving discrimination generally requires collective and anonymous data capable of establishing patterns and practices, rather than the individualized, identifiable information safeguarded by most data protection norms. For example, the Council of the European Union Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data⁶⁶ expressly exempts from its application anonymous statistical information of the kind needed to document and prove racial discrimination. According to the Directive, “the principles of protection must apply to any information concerning an identified or identifiable person [T]he principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable.”⁶⁷ The Council of Europe’s 1981 Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data is in accord.⁶⁸

Even as some governments refuse to gather information to monitor discrimination, others misuse the information they do collect. This problem is most severe in the field of criminal justice, particularly where “crime statistics are brandished to justify exclusion and discrimination.”⁶⁹ For example, police reports that a certain percentage of crimes are committed by members of an ethnic minority may reinforce negative stereotypes. In other cases, race statistics are used to support the targeting of law enforcement measures in discriminatory ways. Thus, in 2000 in Germany, it was reported that Sinti and Roma minorities were “being specially registered in the databases and records of the Bavarian police as Roman/Sinti type, gypsy type or the old Nazi term *Landfahrer* (vagrant)... without reason or legal basis by their personal details and even the number plates of their cars and further data. The police justify this storage as supposedly ... preventive crime combat and explain that Sinti and Roma could be a public danger.”⁷⁰

⁶⁴ *Id.* (emphasis added).

⁶⁵ See, e.g., ECRI General Policy Recommendation No. 1 (“since it is difficult to develop and effectively implement policies ... without good data,” governments should “collect, in accordance with European laws, regulations and recommendations on data protection and protection of privacy, when and where appropriate, data which will assist in assessing and evaluating the situation and experiences of groups which are particularly vulnerable to racism, xenophobia, anti-Semitism and intolerance”).

⁶⁶ 95/46/EC, of 24 October 1995.

⁶⁷ *Id.*, para. 26. Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data similarly defines “personal data” as “any information relating to an identified or identifiable natural person.”

⁶⁸ See, e.g., Article 2(a) (“‘personal data’ means any information relating to an identified or identifiable individual”). See also Recommendation No. R(97)18 of the Committee of Ministers Concerning the Protection of Personal Data Collected and Processed for Statistical Purposes (1997), Appendix, Principles 1, 8.1 (distinguishing between “personal” and “anonymous” data, and making clear that “statistical results ... are not personal data, as they are not linked to an identified or identifiable natural person”).

⁶⁹ Zerrougui, *supra* note 2, para. 44. See, e.g., Associated Press, “Gypsies march to protest racism,” March 23, 2000 (“In the last five days, police have raided Bucharest’s seediest areas, in a crackdown on violent crime. Of 2,000 people arrested, police have said, most of them were Roma”).

⁷⁰ Report of the UN Special Rapporteur on Racism and Racial Discrimination (2000), E/CN.4/2000/16, 10 February 2000, para. 37.

Recommendations

In fashioning a General Recommendation on racial discrimination and the administration of justice, the Committee is requested to consider the following:

- Express concern at the pervasive patterns of racial discrimination in the criminal justice systems of many countries worldwide and the urgent need for action by States Parties
- Affirm that racial profiling in stops, arrests and detentions is unlawful and constitutes a violation of Article 5(a) of the ICERD
- Make clear that discrimination on grounds of race or ethnicity in the frequency and/or severity of charges, convictions, and/or sentences – including but not limited to the imposition of capital punishment – is unlawful and constitutes a violation of Article 5(a) of the ICERD
- Clarify that discrimination on grounds of race or ethnicity in access to counsel for indigent persons charged with crime is unlawful and a violation of Article 5(a) of the ICERD
- Affirm that the disproportionate imposition of expulsion following conviction upon non-citizens who are members of racial or ethnic minorities may, under certain circumstances, be unlawful and violate Article 5(a) of the ICERD
- Make clear that, as part of their obligations under the ICERD, States Parties must, in accordance with human rights principles and data protection and privacy norms, and in consultation with affected population groups, collect and publish anonymous, collective data documenting patterns of discrimination in the criminal justice system

The Committee is further requested to encourage States Parties to take the following actions:

- Discontinue and adopt legislation outlawing the practice of racial profiling, including in the context of anti-terrorism efforts
- Document on a continuing basis the presence and extent of racial discrimination in the administration of justice, including by requiring police, courts and prison authorities to gather, maintain and publish, consistent with human rights principles and data protection and privacy norms, and in consultation with affected population groups, statistical data that identifies the race/ethnicity of those involved in the criminal justice process
- Take effective measures to combat police mistreatment of racial and ethnic minorities, including by
 - establishing independent and effective civilian oversight mechanisms empowered to investigate complaints about police behavior and monitor conditions in places of detention and incarceration, and
 - collecting and publishing data on the number and nature of reports of police abuse of racial or ethnic minorities, as well as information on the number and outcome of cases resulting in discipline or prosecution
- Establish mandatory training programs in the practical application of human rights standards set out in the ICERD and other relevant instruments for law enforcement officers, prosecutors, judges, and corrections officials

- Create, fund and staff adequately national, independent, specialized bodies with the competence to investigate allegations of racial discrimination in the criminal justice system, as well as to assist victims to pursue remedies, where necessary through legal assistance and support
- Establish simple, flexible, and widely available procedures for the initiation of complaints regarding racial discrimination in the criminal justice system
- Adopt affirmative measures of recruitment and selection to insure adequate representation of racial and ethnic minorities in law enforcement, the judiciary and all criminal justice agencies.
- Ensure that all persons who so require receive competent legal representation and interpretation at all stages of the criminal justice process
- Ensure that all persons subject to expulsion upon conviction of a criminal offense are afforded due process and judicial review to protect against, inter alia, racial discrimination

OPEN SOCIETY

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The Open Society Justice Initiative, an operational program of the Open Society Institute, pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in five priority areas: national criminal justice, international justice, freedom of information and expression, equality and citizenship, and anticorruption. Its offices are in Abuja, Budapest, and New York.

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