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PRESENTATION OF THE CERD’S GENERAL RECOMMENDATION ON THE PREVENTION OF RACIAL DISCRIMINATION IN THE ADMINISTRATION AND FUNCTIONING OF CRIMINAL JUSTICE

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Why did I choose, within the framework of our Forum on Minorities, to speak about the UN Committee on the Elimination of Racial Discrimination (CERD) and more specifically its General Recommendation No. 31 of 2005 on the prevention of racial discrimination in the administration and functioning of criminal justice?

I will briefly explain the reasons for this choice, before going on to present the contents of Recommendation No. 31/2005.

= I = The reasons for choosing the General Recommendation N ° 31/2005 of the CERD:

1. The first reason is that, in its Recommendation No. 31/2005, the CERD makes clear that certain groups of society or certain minorities are particularly exposed to racial or ethnic discrimination in the functioning of the criminal justice system. Among these groups, CERD has identified, in particular, immigrants, refugees, asylum seekers, stateless persons, displaced persons, non-citizens, indigenous and indigenous peoples, Roma and Gypsies, persons discriminated against because of their ascendance or for belonging to a caste, and also of African-descendent people. Particularly, CERD’s general recommendations have been in favour of some of these groups or minorities.

Admittedly, General Recommendation No. 31/2005 specifically targets discriminations of a racial or ethnic nature which can be identified in the functioning of justice.

But you will see that, in addition to racial or ethnic discrimination, all kinds of discrimination in the functioning of the criminal justice system are at the same time concerned. Hence the more general scope of this recommendation, in which we are all interested.

2 - The second reason is that the CERD is the oldest of the ten Committees Independent of experts or "treaty bodies" existing at the United Nations. Its experience is therefore particularly useful to evoke.

In addition, CERD is specifically charged with ensuring the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, adopted on 21 December 1965 and ratified to date by 177 States.

This enables it to play the role of a genuine "global observatory of racial and ethnic discrimination" in all our societies. However, we know how important this task is, the fight against these forms of discrimination constitutes one of the major challenges for safeguarding social cohesion in our contemporary societies, which have become multi-ethnic and multicultural.

3 - The third reason for the interest of CERD General Recommendation No. 31/2005 is that it was drawn up based on a very wide range of information gathered by the Committee on the functioning of justice in all states part of the International Convention which the CERD is responsible for enforcing.

This information is based on:

- on the one hand, the governmental reports submitted periodically to the Committee and the individual complaints or communications received by the Committee, identifying various dysfunctions or bad practices in the administration of criminal justice;
- on the other hand, information provided by other United Nations bodies (in particular the former Sub-Commission on Human Rights and the Special Rapporteurs on contemporary forms of racism), but also regional Protection of human rights (such as the Council of Europe, its European Commission against Racism and Intolerance (ECRI);
- lastly, the very important contributions made in the CERD of 2005 by several non-governmental organizations, including the Open Society Justice Initiative, the International Commission of Jurists, Amnesty International, Human Rights Watch, Quaker UN Office, and the FIDH.

4 - A fourth reason for the choice of CERD Recommendation No. 31/2005 is twofold:

- A substantive ground: Racial or ethnic discrimination against certain groups or minorities, when manifested in the administration and functioning of justice itself, is a particularly serious violation of the rule of law and the principle of a fair trial, which directly affects persons belonging to groups that the justice system has the task of protecting. The gravity of this infringement is further increased when it comes to criminal justice, which directly affects the freedom of persons, their integrity, their dignity and their reputation.

- Contingent or circumstantial reasons: the risks of racial discrimination in the administration and functioning of justice have increased in recent years:

On the one hand, under the effects of increased immigration and population movements, amplified by situations of conflict or war and the global economic crisis, which have aroused, in certain sections of the population and among certain agents who enforce the law enforcement, prejudice and feelings of xenophobia or intolerance against certain minority groups designated as "scapegoats" for difficulties encountered in these countries;

On the other hand, under the effects of security policies and the legislation or exceptional measures adopted by many states to combat terrorism in its various forms, when they became disproportionate and no longer respected fundamental rights, have encouraged the emergence of xenophobic attitudes or stereotypes and "racial profiling" practices, such as anti-Arab, anti-Muslim and anti-Semitic reactions.

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= II = The content of the General Recommendation N ° 31/2005 of the CERD:

The General Recommendation first recalls in its Preamble that while justice can generally be regarded as impartial and not suspect of racism, no country is immune from racial discrimination in the functioning of its justice, no matter what system of law is applied or the criminal procedure in force (of the accusatory, inquisitorial or mixed type).

The General Recommendation identifies three types of measures to be implemented:

General measures;

Measures to protect the "victims" of racism, in order to prevent racial discrimination which, they may encounter when they are brought before the courts;

Measures aimed at "prosecuted persons" in order to prevent racial discrimination against them in the functioning of the criminal justice system.

All these measures are set out at length in the text of the General Recommendation, and it is not possible for me to present them in detail. You can find them in full in the list of General Recommendations of the CERD, which can be found on the website of the United Nations High Commissioner for Human Rights (<http://uhri.ohchr.org/en>, "Treaty bodies, CERD).

I shall confine myself here to presenting to you some of these measures which seem to me the most important:

1- General measures:

They include evaluative measures and policy measures:

-a- "Assessment" measures are designed to identify "indicators" of racial discrimination in the functioning of criminal justice, which may be "factual" indicators or "legislative" indicators.

= Among the "factual" indicators, states are requested to pay close attention to the following:

- the number and percentage of persons belonging to certain racial or ethnic groups who are victims of aggression or other offenses, especially when it is committed by state agents;
- the absence or scarcity of complaints, prosecutions and judgments concerning acts of racial discrimination in the country, which should not be regarded as necessarily positive, contrary to the view of some states;
- proportionately higher rates of delinquency attributed to persons belonging to racial or ethnic minorities or marginalized groups;
- the number and percentage of persons belonging to such groups or minorities who are detained in criminal or administrative detention, including administrative detention centres, penitentiary centres, psychiatric establishments or waiting areas at airports;
- the imposition by the courts of more severe or inadequate penalties for persons belonging to such groups or minorities;
- the insufficient proportion of persons belonging to these groups or minorities who are included in the police and judicial staff, including judges and jurors, as well as in other law enforcement agencies.

States are required to collect regular and public information on this matter from the police and judicial authorities in order for publicise these factual indicators.

= Among the "legislative" indicators, the General Recommendation considers that they should be regarded as indicators of the causes of potential racial discrimination:

- on the one hand, the gaps that may exist in national legislation concerning racial discrimination;
- on the other hand, the indirect discriminatory effects which certain national legislations, in particular legislation on immigration, nationality, the fight against terrorism, penalties providing for the prohibition or removal of national territory against non-citizens, as well as legislation that has the effect of penalising certain groups belonging to certain communities without legitimate reason.

-b- Regarding "strategic" measures, states are requested to develop national strategies with the following objectives:

- to eliminate laws that have a social discriminatory effect, especially those that indirectly target certain groups or those that apply only to non-nationals without legitimate reason;
- to develop training in human rights and interracial or inter-ethnic understanding for law enforcement officials: police, gendarmerie, justice, penitentiary, psychiatric and social staff, medical and other;
- to promote dialogue and consultation between the police and

Justice and representatives of different racial and ethnic groups in order to combat prejudice and build trust;

- to ensure adequate representation of persons belonging to these racial and ethnic groups within the police and the judiciary;
- to ensure respect for and recognition of traditional justice systems of indigenous peoples, in accordance with international human rights law;
- to establish, in post-conflict periods, plans for the reconstruction of the judicial system and the restoration of the rule of law throughout the territories of the countries concerned, in particular through the technical assistance of the competent institutions of the United Nations United.

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2- Measures for the protection of "victims" to prevent racial discrimination they may encounter in the functioning of criminal justice:

The General Recommendation indicates the measures to be taken to protect victims at each stage of the proceedings:

= At the stage of access to law and to justice, states must take the necessary measures to provide legal information to persons belonging to the most vulnerable social groups and to promote in the sectors in which they live such free counselling and legal advice, legal information centres, law centres, as well as cooperation with lawyers' associations and non-governmental organizations specialised in the defence of the rights of marginalised communities and in the prevention of discrimination.

= At the stage of the collection of complaints, states are requested, for example:

- to ensure that police services are sufficiently present and accessible in the neighbourhoods, regions or camps where persons belonging to disadvantaged racial or ethnic groups live, so that the complaints of such persons can be duly gathered;
- to ensure that victims of acts of racism are satisfactorily accommodated in police stations, that complaints are registered immediately, that investigations are carried out without delay in an effective and impartial manner, and that records relating to racist or xenophobic incidents are kept and used in databases;
- to discipline or penalize any refusal to take a complaint for an act of racism by a police officer;

- to carry out effective investigations into allegations of ill-treatment, torture or unlawful killings, in accordance with the United Nations Principles on the matter.

= At the stage of referral to justice, states are requested, for example:

- to provide with a procedural status for victims and associations for the defence of victims of racism and xenophobia, such as the possibility of constituting a civil party or other similar modalities, enabling them to assert their rights in the criminal trial, at no cost to them;
- to provide victims with effective legal and judicial assistance, including the free assistance of a lawyer and an interpreter;
- to provide victims or their relatives with protection against any form of intimidation or retaliation;
- to ensure that all victims are provided with the assistance and compensation mechanisms provided for them, without discrimination and regardless of their nationality or residence status.

= At the stage of the trial, states are encouraged to place sufficient emphasis on the victims, their families and witnesses throughout the proceedings, by allowing the complainants to be heard by the judges within the framework of the trial, to have access to information, to confront unfavourable witnesses, to challenge evidence, to be informed of the progress of the proceedings, to receive fair and adequate compensation for the harm suffered, all within a reasonable time, without discrimination or prejudice and with respect for the dignity due to the victims of racial discrimination.

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3- Measures for "prosecuted persons" in order to prevent racial discrimination against them in the functioning of criminal justice:

The measures recommended by the General Recommendation concern each stage of the procedure Regarding persons prosecuted or "defendants":

= At the stage of arrest, interrogation and arrest of persons, states shall:

- to take the necessary measures to exclude interpellations, arrests and searches based exclusively on the persons' physical appearance, colour, features, belonging to a "visible minority" or a racial or ethnic group, as well as any "profiling" that exposes them to greater suspicion;
- to prevent and punish violence, cruel, inhuman or degrading treatment and all human rights violations against persons belonging to racial or ethnic minorities, especially when committed by state agents;

- to ensure that the general principle of proportionality and strict necessity for the use of force against persons belonging to racial or ethnic minorities is respected;
- to guarantee to all arrested persons, whatever their racial, national or ethnic affiliation, the enjoyment of all the procedural rights enshrined in international conventions;
- to ensure that persons who are placed in administrative detention centres or waiting areas at airports enjoy sufficiently decent living conditions.

= At the stage of pre-trial detention:

- Considering the data showing an excessively high number of non-nationals and persons belonging to racial or ethnic minorities among pre-trial detainees, states are requested to ensure that:
- simple membership of a racial or ethnic group should not be sufficient reason, *de jure* or *facto*, to place a person in pre-trial detention before judgment;
- to apply in an appropriate manner the requirement of a security or financial guarantee in the situation of persons belonging to racial or ethnic minorities, who are often in a precarious economic situation;
- assess with the guarantees of representation often required of pre-trial detainees as a condition for their continued release (fixed residence, declared work, stable family ties) considering the precarious situation that may result from their belonging to racial or ethnic minorities;
- persons belonging to racial or ethnic minorities who are incarcerated before trial must enjoy all the rights recognized by the relevant international standards, especially rights specially adapted to their situation: the right to respect for their religious, cultural and the right to family relations, the right to the assistance of an interpreter, the right to consular assistance, where appropriate.

= At the trial and trial stage:

States are required to ensure the enjoyment of all persons belonging to racial or ethnic minorities, as well as to all persons, all the guarantees of fair trial and equality before the law as enshrined in international relevant instruments on human rights: the right to the presumption of innocence; the right to free counsel and interpreter assistance for persons belonging to disadvantaged groups, in particular racial or ethnic minorities; the right to an independent and impartial tribunal, prohibiting any racial or xenophobic prejudice by the magistrates, jurors and other judicial personnel.

The General Recommendation invites States to take into account the "Bangalore Principles on Judicial Conduct" adopted in 2002 (E / CN.4 / 2003/65), which recommend, in particular, that judges should be aware of the diversity of Society and racial or other differences, that they do not show bias in their speech or behaviour towards persons or groups of persons based on their racial

or ethnic origin, and that they are opposed to their subordinates and lawyers show prejudice or discriminate against persons on the basis of their colour, race, national or religious origin, gender or other irrelevant basis.

= At the sanction stage:

In this regard, states parties should ensure that harsher sentences are not imposed solely on the basis of the accused's belonging to a particular racial or ethnic group.

Special attention should be paid to the death penalty in countries which have not abolished it yet, considering that it persons belonging to minorities racial or ethnic origin are more often pronounced and executed.

Regarding persons belonging to indigenous peoples, states parties are encouraged to promote the use of alternatives to imprisonment and the use of other sanctions appropriate to their customs and legal systems, taking into the ILO Convention No. 169 on Indigenous and Tribal Peoples.

Lastly, it is recalled that penalties intended exclusively for non-nationals, such as sentences for expulsion, expulsion or prohibition of national territory, must be imposed only on an exceptional and proportionate basis for serious reasons of public order considered by the law, as well as respect for the private and family life of the persons concerned and the international protection due to them.

= At the sentencing stage:

Where persons belonging to racial or ethnic minorities are serving a term of imprisonment, the General Recommendation requests states to ensure:

the enjoyment of all the rights recognized by the relevant international standards, in particular rights specially adapted to their situation: the right to respect their religious and cultural practices, the right to respect their eating habits, the right to have a relationship with their families, the right to the assistance of an interpreter, the right to basic social benefits, the right to consular assistance, the right of any prisoner whose rights have been violated to exercise an effective remedy before an independent and impartial authority;

where appropriate, the application of the provisions of domestic legislation and international or bilateral conventions relating to the transfer of foreign prisoners, affording them the possibility of serving the prison sentence in their countries of origin;

full compliance with the obligations of non-refoulement arising from international standards relating to refugees and human rights must be applied when sentences of expulsion or prohibition of national territory against non-nationals are imposed, ensuring that they are not returned to a country or territory where they are at risk of serious human rights abuses.