

LEGAL RIGHTS - CRIMINAL - Equal Treatment

II. GENERAL COMMENTS AND RECOMMENDATIONS

- CERD General recommendation XXXI (Sixty-seventh session, 2005): The Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, A/60/18 (2005) 98 at preamble and paras. 1-41.

The Committee on the Elimination of Racial Discrimination,

Recalling the definition of racial discrimination set out in article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Recalling the provisions of article 5 (a) of the Convention, under which States parties have an obligation to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the right to equal treatment before the tribunals and all other organs administering justice,

Recalling that article 6 of the Convention requires States parties to assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination,

Referring to paragraph 25 of the declaration adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, in 2001, which expressed “profound repudiation of the racism, racial discrimination, xenophobia and related intolerance that persist in some States in the functioning of the penal system 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 overrepresented among persons under detention or imprisoned”,

Referring to the work of the Commission on Human Rights and of the Sub-Commission on the Promotion and Protection of Human Rights (see E/CN.4/Sub.2/2005/7) concerning discrimination in the criminal justice system,

Bearing in mind the reports of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance,

Referring to the 1951 Convention relating to the Status of Refugees, in particular article 16, which stipulates that “[a] refugee shall have free access to the courts of law on the territory of all Contracting States”,

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Bearing in mind the observations relating to the functioning of the system of justice made in the Committee's conclusions concerning reports submitted by States parties and in general recommendations XXVII (2000) on discrimination against Roma, XXIX (2002) on discrimination based on descent and XXX (2004) on discrimination against non-citizens,

Convinced 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,

Considering that no country is free from racial discrimination in the administration and functioning of the criminal justice system, regardless of the type of law applied or the judicial system in force, whether accusatorial, inquisitorial or mixed,

Considering that the risks of discrimination in the administration and functioning of the criminal justice system have increased in recent years, partly as a result of the rise in immigration and population movements, which have prompted prejudice and feelings of xenophobia or intolerance among certain sections of the population and certain law enforcement officials, and partly as a result of the security policies and anti-terrorism measures adopted by many States, which among other things have encouraged the emergence of anti-Arab or anti-Muslim feelings, or, as a reaction, anti-Semitic feelings, in a number of countries,

Determined to combat all forms of discrimination in the administration and functioning of the criminal justice system which may be suffered, in all countries of the world, by persons belonging to racial or ethnic groups, in particular non-citizens - including immigrants, refugees, asylum-seekers and stateless persons - Roma/Gypsies, indigenous peoples, displaced populations, persons discriminated against because of their descent, as well as other vulnerable groups which are particularly exposed to exclusion, marginalization and non-integration in society, paying particular attention to the situation of women and children belonging to the aforementioned groups, who are susceptible to multiple discrimination because of their race and because of their sex or their age,

Formulates the following recommendations addressed to States parties:

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I. General steps

A. Steps to be taken in order to better gauge the existence and extent of racial discrimination in the administration and functioning of the criminal justice system; the search for indicators attesting to such discrimination

1. Factual indicators

1. States parties should pay the greatest attention to the following possible indicators of racial discrimination:

(a) The number and percentage of persons belonging to the groups referred to in the last paragraph of the preamble who are victims of aggression or other offences, especially when they are committed by police officers or other State officials;

(b) The absence or small number of complaints, prosecutions and convictions relating to acts of racial discrimination in the country. Such a statistic should not be viewed as necessarily positive, contrary to the belief of some States. It may also reveal either that victims have inadequate information concerning their rights, or that they fear social censure or reprisals, or that victims with limited resources fear the cost and complexity of the judicial process, or that there is a lack of trust in the police and judicial authorities, or that the authorities are insufficiently alert to or aware of offences involving racism;

(c) Insufficient or no information on the behaviour of law enforcement personnel *vis-à-vis* persons belonging to the groups referred to in the last paragraph of the preamble;

(d) The proportionately higher crime rates attributed to persons belonging to those groups, particularly as regards petty street crime and offences related to drugs and prostitution, as indicators of the exclusion or the non-integration of such persons into society;

(e) The number and percentage of persons belonging to those groups who are held in prison or preventive detention, including internment centres, penal establishments, psychiatric establishments or holding areas in airports;

(f) The handing down by the courts of harsher or inappropriate sentences against persons belonging to those groups;

(g) The insufficient representation of persons belonging to those groups among the ranks of the police, in the system of justice, including judges and jurors, and in other law enforcement departments.

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2. In order for these factual indicators to be well known and used, States parties should embark on regular and public collection of information from police, judicial and prison authorities and immigration services, while respecting standards of confidentiality, anonymity and protection of personal data.

3. In particular, States parties should have access to comprehensive statistical or other information on complaints, prosecutions and convictions relating to acts of racism and xenophobia, as well as on compensation awarded to the victims of such acts, whether such compensation is paid by the perpetrators of the offences or under State compensation plans financed from public funds.

2. Legislative indicators

4. The following should be regarded as indicators of potential causes of racial discrimination:

(a) Any gaps in domestic legislation on racial discrimination. In this regard, States parties should fully comply with the requirements of article 4 of the Convention and criminalize all acts of racism as provided by that article, in particular the dissemination of ideas based on racial superiority or hatred, incitement to racial hatred, violence or incitement to racial violence, but also racist propaganda activities and participation in racist organizations. States parties are also encouraged to incorporate a provision in their criminal legislation to the effect that committing offences for racial reasons generally constitutes an aggravating circumstance;

(b) The potential indirect discriminatory effects of certain domestic legislation, particularly legislation on terrorism, immigration, nationality, banning or deportation of non-citizens from a country, as well as legislation that has the effect of penalizing without legitimate grounds certain groups or membership of certain communities. States should seek to eliminate the discriminatory effects of such legislation and in any case to respect the principle of proportionality in its application to persons belonging to the groups referred to in the last paragraph of the preamble.

B. Strategies to be developed to prevent racial discrimination in the administration and functioning of the criminal justice system

5. States parties should pursue national strategies the objectives of which include the following:

(a) To eliminate laws that have an impact in terms of racial discrimination, particularly those which target certain groups indirectly by penalizing acts which can be committed only by

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persons belonging to such groups, or laws that apply only to non-nationals without legitimate grounds or which do not respect the principle of proportionality;

(b) To develop, through appropriate education programmes, training in respect for human rights, tolerance and friendship among racial or ethnic groups, as well as sensitization to intercultural relations, for law enforcement officials: police personnel, persons working in the system of justice, prison institutions, psychiatric establishments, social and medical services, etc.;

(c) To foster dialogue and cooperation between the police and judicial authorities and the representatives of the various groups referred to in the last paragraph of the preamble, in order to combat prejudice and create a relationship of trust;

(d) To promote proper representation of persons belonging to racial and ethnic groups in the police and the system of justice;

(e) To ensure respect for, and recognition of the traditional systems of justice of indigenous peoples, in conformity with international human rights law;

(f) To make the necessary changes to the prison regime for prisoners belonging to the groups referred to in the last paragraph of the preamble, so as to take into account their cultural and religious practices;

(g) To institute, in situations of mass population movements, the interim measures and arrangements necessary for the operation of the justice system in order to take account of the particularly vulnerable situation of displaced persons, in particular by setting up decentralized courts at the places where the displaced persons are staying or by organizing mobile courts;

(h) To set up, in post-conflict situations, plans for the reconstruction of the legal system and the re-establishment of the rule of law throughout the territory of the countries concerned, by availing themselves, in particular, of the international technical assistance provided by the relevant United Nations entities;

(i) To implement national strategies or plans of action aimed at the elimination of structural racial discrimination. These long-term strategies should include specific objectives and actions as well as indicators against which progress can be measured. They should include, in particular, guidelines for prevention, recording, investigation and prosecution of racist or xenophobic incidents, assessment of the level of satisfaction among all communities concerning their relations with the police and the system of justice, and recruitment and promotion in the judicial system of persons belonging to various racial or ethnic groups;

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(j) To entrust an independent national institution with the task of tracking, monitoring and measuring progress made under the national plans of action and guidelines against racial discrimination, identifying undetected manifestations of racial discrimination and submitting recommendations and proposals for improvement.

II. Steps to be taken to prevent racial discrimination with regard to victims of racism

A. Access to the law and to justice

6. In accordance with article 6 of the Convention, States parties are obliged to guarantee the right of every person within their jurisdiction to an effective remedy against the perpetrators of acts of racial discrimination, without discrimination of any kind, whether such acts are committed by private individuals or State officials, as well as the right to seek just and adequate reparation for the damage suffered.

7. In order to facilitate access to justice for the victims of racism, States parties should strive to supply the requisite legal information to persons belonging to the most vulnerable social groups, who are often unaware of their rights.

8. In that regard, States parties should promote, in the areas where such persons live, institutions such as free legal help and advice centres, legal information centres and centres for conciliation and mediation.

9. States parties should also expand their cooperation with associations of lawyers, university institutions, legal advice centres and non-governmental organizations specializing in protecting the rights of marginalized communities and in the prevention of discrimination.

B. Reporting of incidents to the authorities competent for receiving complaints

10. States parties should take the necessary steps to ensure that the police services have an adequate and accessible presence in the neighbourhoods, regions, collective facilities, camps or centres where the persons belonging to the groups referred to in the last paragraph of the preamble reside, so that complaints from such persons can be expeditiously received.

11. The competent services should be instructed to receive the victims of acts of racism in police stations in a satisfactory manner, so that complaints are recorded immediately, investigations are pursued without delay and in an effective, independent and impartial manner, and files relating to racist or xenophobic incidents are retained and incorporated into databases.

12. Any refusal by a police official to accept a complaint involving an act of racism should

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lead to disciplinary or penal sanctions, and those sanctions should be increased if corruption is involved.

13. Conversely, it should be the right and duty of any police official or State employee to refuse to obey orders or instructions that require him or her to commit violations of human rights, particularly those based on racial discrimination. States parties should guarantee the freedom of any official to invoke this right without fear of punishment.

14. In cases of allegations of torture, ill-treatment or executions, investigations should be conducted in accordance with the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions 1/ and the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 2/

C. Initiation of judicial proceedings

15. States parties should remind public prosecutors and members of the prosecution service of the general importance of prosecuting racist acts, including minor offences committed with racist motives, since any racially motivated offence undermines social cohesion and society as a whole.

16. In advance of the initiation of proceedings, States parties could also encourage, with a view to respecting the rights of the victims, the use of parajudicial procedures for conflict resolution, including customary procedures compatible with human rights, mediation or conciliation, which can serve as useful options for the victims of acts of racism and to which less stigma may be attached.

17. In order to make it easier for the victims of acts of racism to bring actions in the courts, the steps to be taken should include the following:

(a) Offering procedural status for the victims of racism and xenophobia and associations for the protection of the rights of such victims, such as an opportunity to associate themselves with the criminal proceedings, or other similar procedures that might enable them to assert their rights in the criminal proceedings, at no cost to themselves;

(b) Granting victims effective judicial cooperation and legal aid, including the assistance of counsel and an interpreter free of charge;

(c) Ensuring that victims have information about the progress of the proceedings;

(d) Guaranteeing protection for the victim or the victim's family against any form of

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intimidation or reprisals;

(e) Providing for the possibility of suspending the functions, for the duration of the investigation, of the agents of the State against whom the complaints were made.

18. In countries where there are assistance and compensation plans for victims, States parties should ensure that such plans are available to all victims without discrimination and regardless of their nationality or residential status.

D. Functioning of the system of justice

19. States parties should ensure that the system of justice:

(a) Grants a proper place to victims and their families, as well as witnesses, throughout the proceedings, by enabling complainants to be heard by the judges during the examination proceedings and the court hearing, to have access to information, to confront hostile witnesses, to challenge evidence and to be informed of the progress of proceedings;

(b) Treats the victims of racial discrimination without discrimination or prejudice, while respecting their dignity, through ensuring in particular that hearings, questioning or confrontations are carried out with the necessary sensitivity as far as racism is concerned;

(c) Guarantees the victim a court judgement within a reasonable period;

(d) Guarantees victims just and adequate reparation for the material and moral harm suffered as a result of racial discrimination.

III. Steps to be taken to prevent racial discrimination in regard to accused persons who are subject to judicial proceedings

A. Questioning, interrogation and arrest

20. States parties should 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.

21. States parties should prevent and most severely punish violence, acts of torture, cruel, inhuman or degrading treatment and all violations of human rights affecting persons belonging to the groups referred to in the last paragraph of the preamble which are committed by State officials, particularly police and army personnel, customs authorities, and

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persons working in airports, penal institutions and social, medical and psychiatric services.

22. States parties should ensure the observance of the general principle of proportionality and strict necessity in recourse to force against persons belonging to the groups referred to in the last paragraph of the preamble, in accordance with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. 3/

23. States parties should also guarantee to all arrested persons, whatever the racial, national or ethnic group to which they belong, enjoyment of the fundamental rights of the defence enshrined in the relevant international human rights instruments (especially the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights), in particular the right not to be arbitrarily arrested or detained, the right to be informed of the reasons for their arrest, the right to the assistance of an interpreter, the right to the assistance of counsel, the right to be brought promptly before a judge or an authority empowered by the law to perform judicial functions, the right to consular protection guaranteed by article 36 of the Vienna Convention on Consular Relations and, in the case of refugees, the right to contact the Office of the United Nations High Commissioner for Refugees.

24. As regards persons placed in administrative holding centres or in holding areas in airports, States parties should ensure that they enjoy sufficiently decent living conditions.

25. Lastly, as regards the questioning or arrest of persons belonging to the groups referred to in the last paragraph of the preamble, States parties should bear in mind the special precautions to be taken when dealing with women or minors, because of their particular vulnerability.

B. Pretrial detention

26. Bearing in mind statistics which show that persons held awaiting trial include an excessively high number of non-nationals and persons belonging to the groups referred to in the last paragraph of the preamble, States parties should ensure:

(a) That the mere fact of belonging to a racial or ethnic group or one of the aforementioned groups is not a sufficient reason, *de jure* or *de facto*, to place a person in pretrial detention. Such pretrial detention can be justified only on objective grounds stipulated in the law, such as the risk of flight, the risk that the person might destroy evidence or influence witnesses, or the risk of a serious disturbance of public order;

(b) That the requirement to deposit a guarantee or financial security in order to obtain release pending trial is applied in a manner appropriate to the situation of persons belonging to such groups, who are often in straitened economic circumstances, so as to prevent this requirement

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from leading to discrimination against such persons;

(c) That the guarantees often required of accused persons as a condition of their remaining at liberty pending trial (fixed address, declared employment, stable family ties) are weighed in the light of the insecure situation which may result from their membership of such groups, particularly in the case of women and minors;

(d) That persons belonging to such groups who are held pending trial enjoy all the rights to which prisoners are entitled under the relevant international norms, and particularly the rights specially adapted to their circumstances: the right to respect for their traditions as regards religion, culture and food, the right to relations with their families, the right to the assistance of an interpreter and, where appropriate, the right to consular assistance.

C. The trial and the court judgement

27. Prior to the trial, States parties may, where appropriate, give preference to non-judicial or parajudicial procedures for dealing with the offence, taking into account the cultural or customary background of the perpetrator, especially in the case of persons belonging to indigenous peoples.

28. In general, States parties must ensure that persons belonging to the groups referred to in the last paragraph of the preamble, like all other persons, enjoy all the guarantees of a fair trial and equality before the law, as enshrined in the relevant international human rights instruments, and specifically.

1. The right to the presumption of innocence

29. This right implies that the police authorities, the judicial authorities and other public authorities must be forbidden to express their opinions publicly concerning the guilt of the accused before the court reaches a decision, much less to cast suspicion in advance on the members of a specific racial or ethnic group. These authorities have an obligation to ensure that the mass media do not disseminate information which might stigmatize certain categories of persons, particularly those belonging to the groups referred to in the last paragraph of the preamble.

2. The right to the assistance of counsel and the right to an interpreter

30. Effectively guaranteeing these rights implies that States parties must set up a system under which counsel and interpreters will be assigned free of charge, together with legal help or advice and interpretation services for persons belonging to the groups referred to in the last paragraph of the preamble.

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3. The right to an independent and impartial tribunal

31. States parties should strive firmly to ensure a lack of any racial or xenophobic prejudice on the part of judges, jury members and other judicial personnel.

32. They should prevent all direct influence by pressure groups, ideologies, religions and churches on the functioning of the system of justice and on the decisions of judges, which may have a discriminatory effect on certain groups.

33. States parties may, in this regard, take into account the Bangalore Principles of Judicial Conduct adopted in 2002 (E/CN.4/2003/65, annex), which recommend in particular that:

- Judges should be aware of the diversity of society and differences linked with background, in particular racial origins;
- They should not, by words or conduct, manifest any bias towards persons or groups on the grounds of their racial or other origin;
- They should carry out their duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and their colleagues, without unjustified differentiation; and
- They should oppose the manifestation of prejudice by the persons under their direction and by lawyers or their adoption of discriminatory behaviour towards a person or group on the basis of their colour, racial, national, religious or sexual origin, or on other irrelevant grounds.

D. Guarantee of fair punishment

34. In this regard, States should ensure that the courts do not apply harsher punishments solely because of an accused person's membership of a specific racial or ethnic group.

35. Special attention should be paid in this regard to the system of minimum punishments and obligatory detention applicable to certain offences and to capital punishment in countries which have not abolished it, bearing in mind reports that this punishment is imposed and carried out more frequently against persons belonging to specific racial or ethnic groups.

36. In the case of persons belonging to indigenous peoples, States parties should give preference to alternatives to imprisonment and to other forms of punishment that are better adapted to their legal system, bearing in mind in particular International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.

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37. Punishments targeted exclusively at non-nationals that are additional to punishments under ordinary law, such as deportation, expulsion or banning from the country concerned, should be imposed only in exceptional circumstances and in a proportionate manner, for serious reasons related to public order which are stipulated in the law, and should take into account the need to respect the private family life of those concerned and the international protection to which they are entitled.

E. Execution of sentences

38. When persons belonging to the groups referred to in the last paragraph of the preamble are serving prison terms, the States parties should:

(a) Guarantee such persons the enjoyment of all the rights to which prisoners are entitled under the relevant international norms, in particular rights specially adapted to their situation: the right to respect for their religious and cultural practices, the right to respect for their customs as regards food, the right to relations with their families, the right to the assistance of an interpreter, the right to basic welfare benefits and, where appropriate, the right to consular assistance. The medical, psychological or social services offered to prisoners should take their cultural background into account;

(b) Guarantee to all prisoners whose rights have been violated the right to an effective remedy before an independent and impartial authority;

(c) Comply, in this regard, with the United Nations norms in this field, and particularly the Standard Minimum Rules for the Treatment of Prisoners, 4/ the Basic Principles for the Treatment of Prisoners 5/ and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; 6/

(d) Allow such persons to benefit, where appropriate, from the provisions of domestic legislation and international or bilateral conventions relating to the transfer of foreign prisoners, offering them an opportunity to serve the prison term in their countries of origin.

39. Further, the independent authorities in the States parties that are responsible for supervising prison institutions should include members who have expertise in the field of racial discrimination and sound knowledge of the problems of racial and ethnic groups and the other vulnerable groups referred to in the last paragraph of the preamble; when necessary, such supervisory authorities should have an effective visit and complaint mechanism.

40. When non-nationals are sentenced to deportation, expulsion or banning from their territory, States parties should comply fully with the obligation of *non-refoulement* arising out of the international norms concerning refugees and human rights, and ensure that such

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persons will not be sent back to a country or territory where they would run the risk of serious violations of their human rights.

41. Lastly, with regard to women and children belonging to the groups referred to in the last paragraph of the preamble, States parties should pay the greatest attention possible with a view to ensuring that such persons benefit from the special regime to which they are entitled in relation to the execution of sentences, bearing in mind the particular difficulties faced by mothers of families and women belonging to certain communities, particularly indigenous communities.

Notes

1/ Recommended by the Economic and Social Council in its resolution 1989/65 of 24 May 1989.

2/ Recommended by the General Assembly in its resolution 55/89 of 4 December 2000.

3/ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990.

4/ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August-3 September 1955, and approved by the Economic and Social Council in its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

5/ Adopted and proclaimed by the General Assembly in its resolution 45/111 of 14 December 1990.

6/ Adopted by the General Assembly in its resolution 43/173 of 9 December 1988.

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- ICCPR General Comment 21 (Forty-fourth session, 1992): Article 10: Replaces General Comment 9 Concerning Humane Treatment of Persons Deprived of Liberty, A/47/40 (1992) 195 at para. 4.

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4. Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex,

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language, religion, political or other opinion, national or social origin, property, birth or other status.

- CERD General Recommendation XX (Forty-eighth session, 1996): Article 5: Non-Discriminatory Implementation of Rights and Freedoms, A/51/18 (1996) 124. For text of General Recommendation, see **EQUALITY AND DISCRIMINATION - RACIAL DISCRIMINATION**.
- ICCPR General Comment 9 (Sixteenth session, 1982): Article 10: Humane Treatment of Persons Deprived of Liberty, A/37/40 (1982) 96 at para. 3. For text of General Comment, see **HUMAN DIGNITY**.
- ICCPR General Comment 13 (Twenty-first session, 1984): Article 14: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, A/39/40 (1984) 143 at paras. 1-4. For text of General Comment, see **LEGAL RIGHTS - CRIMINAL - Right to a Fair and Public Hearing**.
- ICCPR General Comment 28 (Sixty-eighth session, 2000): Article 3: Equality of Rights Between Men and Women, A/55/40 vol. I (2000) 133 at para. 31. For text of General Comment, see **EQUALITY AND DISCRIMINATION - GENDER DISCRIMINATION - General**.