

Presentation to the Working Group of Experts on People of African Descent  
Item 7 - 27<sup>th</sup> Session, 3<sup>rd</sup> December 2020

Theme: “The Urgency of Now: Systemic Racism and the Lessons of 2020”

**Sub-theme: “The DDPA+20 & the Mid-Term Review of the IDPAD”**

*CERD’s General Recommendation 36: Preventing and Combating Racial Profiling by Law  
Enforcement Officials: Convergence with the DDPA & The IDPAD*

©Verene Shepherd, Vice Chair, CERD  
(Check against delivery)

Dr Reid, Excellences and other representatives of States, members of NGOs and CSOs, a very good morning from Jamaica; and thank you to the WGEPAD for inviting me to participate in this Session. I greet the Chair and other Members of the Working Group, the Secretariat that supports them, members of OHCHR, including Mr Yury Boychenko and my fellow panellists, Ms. Pierrette Herzberger-Fofana and Mr John Binondo.

I cannot believe that it is already approaching Durban+20 and the mid-term of the United Nations International Decade for People of African Descent (IDPAD). But it is so; time passes. My disappointment is that too many still only pay lip service to these momentous landmarks for people of African descent, failing to launch or implement the critical recommendations of the Durban Declaration and Programme of Action (DDPA) or the Programme of Activities (POA) for the IDPAD, or advancing permanent actions that would be sustainable after the Decade is over. If we want a second Decade, for example, that should have been well-advanced already; and one hopes that the Permanent Forum and the UN Declaration will become realities to further protect our rights.

If there was ever a time when the DDPA and the POA for the International Decade for People of African Descent are needed, it is now. Where racism was hiding before, this pandemic has unmasked it; exposed it further; and the vulnerabilities that already walked beside people of African descent have quickened their steps. The COVID-19 pandemic has, in fact, brought racial disparity and discrimination to the surface in institutions designed to confer justice, equity and redress.

The intensification of racial discrimination, the killing of George Floyd and others in the USA and the globalization of the Black Lives Matter (BLM) movement, as you know, led the Human Rights Council to hold an urgent debate on “current racially inspired human rights violations, systemic racism, police brutality and violence against peaceful protests”; as well as to adopt resolution 43/1 entitled “Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers”. Consultation continues, to contribute to the comprehensive report which the High Commissioner for Human Rights has been tasked to prepare and present to the HRC on “systemic racism, violations of international human rights law against Africans and people of African descent by law enforcement agencies, especially those incidents that resulted in the death of George Floyd and other Africans and of people of African descent, to contribute to accountability and redress for victims.”

On the heels of 43/1 and the High Commissioner's task, has come CERD's General Recommendation 36, adopted on November 24, 2020 on the last day of our 102<sup>nd</sup> session, and after two years of consultation, drafting and redrafting, first under the leadership of Pastor Murillo, before it fell to me to see it through. This General Recommendation aims at preventing and combatting racial profiling by law enforcement officials. Based on the global environment, we consider that this guidance has come at a critical moment. Racial profiling by law enforcement officials has been a regular complaint by historically marginalised groups, especially people of African descent, and especially when they are minorities in the countries in which they live; and is increasing.

GR 36 is the first general recommendation by a human rights body to put law enforcement officials in its title, and to have a specific focus on the police. Its urgency is apparent. In its second large-scale EU-wide survey on migrants and minorities (EU-MIDIS II), the EU Fundamental Rights Agency has examined the experiences of almost 6,000 people of African descent in 12 EU Member States. The survey concludes that despite the efforts, people of African descent face widespread and entrenched prejudice and exclusion. The numbers of people of African descent experiencing racist violence are startling and in some cases reach as high as 14%. Illegal and discriminatory profiling by the police is a common reality while hurdles to inclusion are multi-faceted, particularly when it comes to looking for jobs and housing.<sup>1</sup>

Even though the term "racial profiling" is not found in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Committee has repeatedly expressed concerns in its concluding observations about the use of racial profiling by law enforcement officials and recommended that States parties take measures to put an end to this practice.<sup>2</sup> Additionally, several other international human rights mechanisms have explicitly highlighted racial profiling as a violation of international human rights law. In more recent concluding observations, the Human Rights Committee regularly expresses concern at the continuous practice of racial profiling by law enforcement officials, targeting in particular specific groups, such as migrants, asylum seekers, people of African descent, Indigenous Peoples, as well as religious and ethnic minorities including the Roma;<sup>3</sup> a concern echoed by the Committee against Torture.<sup>4</sup> These strengthen GR 36.

CERD has also explicitly addressed the issue of racial profiling in previous general recommendations: No. 30 (2005) on discrimination against non-citizens; No. 31 (2005) on the prevention of racial discrimination in the administration and functioning

<sup>1</sup> Being Black in the EU Second European Union Minorities and Discrimination Survey

<sup>2</sup> CERD/C/RUS/CO/23-24, paras. 15-16; CERD/C/CAN/CO/21-27, paras 15-16; CERD/C/CO/19-20, paras 27-28; [CERD/C/ESP/CO/21-23, para. 27](#); [CERD/C/SVN/CO/8-11, para. 8 \(d\)](#); [CERD/C/POL/CO/20-21, para. 11](#); [CERD/C/NLD/CO/19-21](#), paras. 13- 15; [CERD/CHE/CO/7-9, para. 14](#); CERD/C/USA/CO/7-9, paras. 8; 18.

<sup>3</sup> CCPR/C/NZL/CO/6, paras. 23-24; CCPR/C/AUT/CO/5, paras. 19-20; [CCPR/C/FRA/CO/5](#), para. 15; [CCPR/C/ESP/CO/6](#), para. 8; [CCPR/C/RUS/CO/7](#), para. 7; [CCPR/C/USA/CO/4, para. 7](#).

<sup>4</sup> CAT/C/USA/CO/3-5, para. 26; CAT/C/CPV/CO/, para. 20; CAT/C/ARG/CO/5-6, para. 35; CAT/C/NLD/CO/7, paras 44-45.

of the criminal justice system,<sup>5</sup> and No. 34 (2011) on racial discrimination against people of African descent.<sup>6</sup> Guidance to law enforcement also resides in No. 13 (1993) on the training of law enforcement officials in the protection of human rights; No. 32 (2009) on the meaning and scope of special measures in the ICERD, in which the Committee mentions the notion of “intersectionality” whereby it addresses “situations of double or multiple discrimination – such as discrimination on grounds of gender or religion – when discrimination on such a ground appears to exist in combination with a ground or grounds listed in article 1 of the Convention”<sup>7</sup>; and general recommendation No. 35 (2013) on combating racist hate speech.<sup>8</sup>

So, now CERD has a GR to support its longstanding concern; and many stakeholders agree that the document comes at a critical time, against the backdrop of a global BLM movement.

In drafting this general recommendation, the CERD was quite aware that both the DDPA and the POA for the IDPAD, express concern with racial profiling. In the Durban Declaration and Programme of Action, adopted by Member States at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, in 2001, States were urged to design, implement and enforce effective measures to eliminate racial profiling, comprising the practice of police and other law enforcement officials relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity.<sup>9</sup>

These protected grounds, align with the ICERD, article 1 of which defines racial discrimination as *“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.”*

In terms of the Decade, the caution against racial profiling falls under **Access to Justice**, which calls on States under para 17 (b) to design, implement and enforce effective measures to eliminate the phenomenon popularly known as “racial profiling;” with 17 (c) referring to eliminating institutionalized stereotypes concerning people of African descent and applying appropriate sanctions against law enforcement officials who act on the basis of racial profiling.

While there is no one definition, definitions of racial profiling have the following common elements: a) committed by law enforcement authorities; b) is not motivated by objective criteria or reasonable justification; c) is based on grounds of race, colour, descent, national or ethnic origin or relevant intersecting grounds such as religion, sex

---

<sup>5</sup> CERD general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, para. 20.

<sup>6</sup> CERD general recommendation No. 34 (2011) on racial discrimination against people of African descent, para. 31.

<sup>7</sup> CERD general recommendation No. 32 (2009) on the meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination.

<sup>8</sup> CERD general recommendation No. 35 (2013) on combatting racist hate speech.

or gender, sexual orientation and gender identity, disability and age, migration status, work or other status; d) is used in specific contexts such as immigration control, criminal activity, anti-terrorism or other activity which allegedly violates or may result in the violation of the law.

For its workable definition, though, racial profiling is understood in the way it has been referred to in paragraph 72 of the DDP, that is, “the practice of law enforcement 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”. In this context, racial discrimination often intersects with other grounds such as religion, sex and gender, sexual orientation and gender identity, disability and age, migration status, work or other status.

The overarching rationale for GR 36 is that in addition to being unlawful, racial profiling may also be ineffective and counterproductive as a general law enforcement tool. People who perceive that they have been subjected to discriminatory law enforcement actions tend to have less trust in law enforcement and, as a result, be less willing to cooperate, thereby potentially limiting the effectiveness of the latter. Racial profiling practices influence law enforcement daily routines and undermine, consciously or unconsciously, their capacity to support victims of crimes belonging to these communities. This sense of injustice, humiliation, loss of trust in the law enforcement, secondary victimisation, fear of reprisals and limited access to information about legal rights or assistance may result in reduced reporting of crimes and information for intelligence purposes.

### **Recommendations**

These can be found in SECTION VII of the document, which divides its recommendations into seven categories and provides a number of important practical steps to realise the objectives. The seven are:

- Legislative and policy measures
- Human rights education and training
- Recruitment measures
- Community policing
- Disaggregated data
- Accountability
- Artificial intelligence

Some commentators like Prof David Keane have described Section VII as “highly innovative because it describes (para 31) how rapid advances in technological development mean that increasingly, the actions of law enforcement officials are determined or informed by algorithmic profiling, which may include big data,

automated decision-making and artificial intelligence.”<sup>10</sup> GR 36 discusses how discriminatory outcomes of algorithmic profiling can often be less obvious and more difficult to detect and that human rights defenders around the globe are not technologically adequately equipped to identify these practices (para. 31). Predictive policing which relies on historical data can easily produce discriminatory outcomes (para. 33).

Other specific content under the recommendations include that incidents of racial profiling by law enforcement agencies should be investigated effectively in accordance with international human rights standards, those responsible be prosecuted and if convicted, they should be sanctioned with appropriate penalties and compensation be granted to victims.

In terms of Artificial intelligence CERD notes that the increased use by law enforcement of big data, AI, facial recognition, and other new technology risks deepening racism, racial discrimination, xenophobia and consequently the violation of many human rights. Big data and AI tools may reproduce and reinforce already existing biases and lead to even more discriminatory practices.

To conclude, I quote from the Working Group’s Report on its visit to Panama, and which we included under Section VI, “Consequences of Racial Profiling”:

*“Racial profiling has negative and cumulative effects on the attitudes and wellbeing of individuals and communities, taking into account that a person may be regularly subjected to racial profiling in his or her daily life.”*<sup>11</sup>

Victims of racial profiling often understate and interiorise its impact due to lack of effective remedies and restorative tools.

So that is an overview of GR 36, its pretexts, context and application.

The full general recommendation is now available [online](#)

---

---

<sup>10</sup> See Keane’s “Guidance at a critical moment – thoughts on CERD’s General Recommendation on racial profiling by law enforcement officials.” <https://voelkerrechtsblog.org/articles/guidance-at-a-critical-moment-thoughts-on-the-cerds-general-recommendation-on-racial-profiling/>

<sup>11</sup> Report of Working Group of Experts on People of African Descent on its mission to Panama, (A/HRC/24/52/Add.2, para. 57).