

Guidance at a critical moment – thoughts on CERD’s General Recommendation on racial profiling by law enforcement officials

David Keane

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The term “racial profiling” is not found in the [International Convention on the Elimination of All Forms of Racial Discrimination](#) (ICERD), but practices of racial profiling have long been of concern to its monitoring body, the [Committee on the Elimination of Racial Discrimination](#) (CERD). Just recently, on 24 November 2020, CERD issued [General Recommendation \(GR\) 36 on Preventing and Combating Racial Profiling by Law Enforcement Officials](#). The document comes at a critical time, against the backdrop of a global Black Lives Matter movement. This is reflected in the title, the first draft of which read “GR 36 on Preventing and Combating Racial Profiling”, to which “by Law Enforcement Officials” has subsequently been added. GR 36 is divided into eight sections, and each will be examined briefly.

I Introduction

Section I recounts how in November 2017, at its 92nd session, the Committee held a [thematic discussion](#) on “Racial discrimination in today’s world: racial profiling, ethnic cleansing and challenges”. Following the thematic discussion, the Committee expressed its intention to elaborate a general recommendation. In 2019, at its 98th session, CERD circulated a [draft GR 36](#) and invited interested stakeholders to comment. Draft GR 36 received [submissions](#) from ten States parties, four UN bodies, nine National Human Rights Institutions (NHRIs), fifteen Non-Governmental/Civil Society Organisations (NGO/CSOs) and six regional human rights bodies. The specific contribution of these stakeholders is often not referenced in the final text, but it can at times be evinced from changes made to the draft. Two differences may be noted between the title of the thematic discussion and that of GR 36. Firstly, the concept of “ethnic cleansing” was removed at a relatively early stage. Draft GR 36 does not have ethnic cleansing in its title, and discusses it only in its first paragraph in a description of the thematic discussion. [Palestine](#)’s comment on draft GR 36 is the only reference made to ethnic cleansing in any of the stakeholder submissions, in which it calls for a general recommendation on this. Secondly, as noted above, the title of GR 36 specifically references “law enforcement officials”, which was not in the title of the thematic discussion or draft GR 36. This was suggested in the [contribution of the Rule of Law, Equality and Non Discrimination branch of the Office of the High Commissioner for Human Rights](#) among others, which pointed out that since the draft mainly concerns racial profiling by law enforcement, this should be included in its title.

GR 36 (2020) was adopted under the leadership of CERD member Ms Verene Shepherd. In a [video of the closing of CERD's 102nd session](#), former CERD member Mr Murillo Martinez was also thanked for initiating the work. Mr Murillo Martinez was instrumental in the adoption of [CERD GR 34 \(2011\) on Racial Discrimination against People of African Descent](#). GR 34 calls on States parties to “ensure that people of African descent are not victims of practices of racial or ethnic profiling” (para. 39). In a [2015 interview](#) with the Institute on Race, Equality and Human Rights, Mr Murillo Martinez had signalled two or three phenomena of increasing concern to the Committee, including: “the use of racial profiling in the United States and in Latin America. Without a doubt this is an especially worrisome situation, not only for the US but for the entirety of the international community”.

II Established principles and practice

Section II notes how CERD took account of its “extensive practice in combating racial profiling by law enforcement officials”. It cites its concluding observations, general recommendations and the practice of other bodies, in particular the Human Rights Committee (CCPR). Concluding Observations in relation to States parties such as the Russian Federation and the United States of America are cited, showing repeatedly expressed concerns (para. 5). Relevant general recommendations are described, including [GR 31 \(2005\) on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice system](#): “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” (para. 20). The CCPR is acknowledged as the “the first treaty monitoring body to directly acknowledge racial profiling as unlawful discrimination” in the individual communication [Williams Lecraft v. Spain](#) (2009).

Section II omits CERD practice in relation to its [early warning measures and urgent procedures](#). These are aimed at preventing existing situations escalating and responding to problems requiring immediate attention to prevent or limit serious violations of the Convention. They allow CERD to respond to situations outside of the normal reporting cycle. In June 2020, CERD issued a [Statement](#) under this procedure which expressed alarm at “the horrific killing of George Floyd in Minneapolis on 25 May 2020” and the “continuing practice of racial profiling, the brutality and excessive use of force by law enforcement officials against persons belonging to racial and ethnic minorities, including unarmed individuals, leading to disproportionately recurrent killings of unarmed African Americans without appropriate accountability”. The Statement expressly linked racial profiling with police violence. A reference to the early warning measures and urgent procedure, with the Statement as an example, would surely have added to the text.

III Scope

Section III refers to CERD’s recognition in its previous practice, that “specific groups, such as Indigenous Peoples, people of African descent, national and ethnic

minorities, including Roma, and migrants, refugees and asylum seekers, are the most vulnerable to racial profiling” (para. 11). It notes also that racial profiling has increased due to contemporary concerns about terrorism and migration. Independent UN experts and NGO/CSO contributions to draft GR 36 provided a voice to victims of racial profiling, reflected in the groups identified in this section. For example, the [UN Special Rapporteur on trafficking in persons](#) highlighted how racial profiling poses significant risks to migrants and others. The [Fundación Secretariado Gitano](#) pointed out that “the Roma community is amongst one of the most targeted groups by law enforcement officials” (para. II.1). The [Union of British Colombia Indian Chiefs](#) provided First Nations’ experiences of racial profiling and racialized policing. It considered that the “pre-existing colonial framework of any nation...must be recognized as a root cause and factor in racial profiling”, a statement that did not find its way into the GR, but one worth reflecting on.

IV Defining and understanding racial profiling

Section IV states that “there is no universal definition of racial profiling in international human rights law”. Instead, “as a persistent phenomenon in all regions of the world”, different bodies have adopted definitions. These are considered to “have the following common elements: racial profiling is a) committed by law enforcement authorities; b) is not motivated by objective criteria (...); c) is based on grounds of race, colour, descent, national or ethnic origin, or relevant intersecting grounds (...); d) is used in specific contexts such as immigration control, criminal justice, anti-terrorism or other activities” (para. 13). This definitional section drew on the [contributions of regional bodies to draft GR 36](#), in particular the Arab Human Rights Committee, the European Commission against Racism and Intolerance – whose [2007 definition](#) was adopted by many European states – and the Inter-American Commission on Human Rights. No single understanding prevailed but rather the definition arrived at is a composite. It may be noted that the African human rights bodies did not offer any contribution, despite a [statement](#) from the chairperson of the African Union condemning the murder of George Floyd. Similarly no African state party to ICERD commented on draft GR 36.

V Principles and general obligations of the Convention

Section V identifies the relevant legal provisions and consequent obligations in the text of the Convention, including Articles 2, 5, 6 and 7. This section could have been stronger in relation to Article 5, reading only that the prohibition to engage in acts of racial profiling “is furthermore derived from Article 5” (para. 23). Article 5(a) relates to equal treatment before organs administering justice, and 5(b) 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. Article 5(b) in particular relates to state, including police, violence. Thus, Article 5 surely deserved its own paragraph. CERD [reporting guidelines from 2008](#) on Article 5(b) request information from States parties on measures taken to “prevent the use of illegal force by the police against persons belonging to groups protected under the Convention” (para. I.B.2), and ensure that perpetrators “do not enjoy any degree of impunity” (para. I.B.1). In addition, despite noting that “racial profiling and hate speech are closely interrelated” (para. 27), there is no reference to Article 4, the key

provision on racist hate speech. [Japan](#), in a two-paragraph comment on draft GR 36, reminded the Committee that “this General Recommendation does not have any such effect as either changing or revising the provisions of the Convention, and is not legally binding to the State parties” (para. 1). In light of such comments, it is important to tie the GR as closely to the Convention text as possible. While this has been largely achieved in relation to other provisions, Articles 4 and 5 should have been addressed in more detail.

VI Consequences of racial profiling

Section VI begins by noting that racial profiling “has negative and cumulative effects” on individuals and communities (para. 26). “Racial profiling by law enforcement officials has far-reaching consequences at all levels of the criminal justice system”, including the “over-criminalization” and “disproportionate incarceration” of protected groups (para. 30). This section highlights the devastating impact of racial profiling by law enforcement. It echoes the submission by the Inter-American Commission on Human Rights (IACHR), which described how “racial profiling has been a historic feature of policing in countries such as the US and Brazil” (para. 4). The IACHR based its submission on the substantial information that it received “on policies implemented by police departments across the Americas that encourage over-policing of Afro-descendant and other historically marginalized groups” (para. 1). It saw an “urgent need for further studies of the impact of racial profiling on its victims” (para. 8). GC 36 encourages States parties to adopt victim-centred approaches (para. 41).

VII Algorithmic profiling and racial bias and discrimination

Section VII is highly innovative. It describes 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” (para. 31). “Discriminatory outcomes of algorithmic profiling can often be less obvious and more difficult to detect”, and “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). Draft GC 36 had a section entitled “Racial biases associated with artificial intelligence” which referred to “automated decision making, predictive data analysis, and the use of algorithms to predict and combat crime”. It drew positive comment from all stakeholders. The [UK](#) was “supportive of the General Recommendation’s engagement with the issue of racial bias in artificial intelligence systems” (para. 5). The [EU’s Fundamental Rights Agency](#) found that “when algorithms are used for decision-making, there is potential for discrimination” (p. 2). The [UN Working Group of Experts on People of African Descent](#) noted that artificial intelligence technologies “should be subject to (...) particularly careful review as they may perpetuate bias in ways that are difficult to discover” (p. 2).

Two important contributions changed the language of the draft. The [Group of Independent Eminent Experts on the Implementation of the Durban Declaration and Programme of Action](#) (IEE) commented: “Artificial intelligence: it is suggested

to rename it to ‘Algorithmic Profiling’” (para. 7.7). Thus, the phrase “algorithmic profiling” appears to have entered international human rights law. [Amnesty International](#) suggested adding the reference to “predictive policing”, an expression which was also not included in draft GR 36, but figures in the adopted version of GR 36 (para. 33). Amnesty international warned: “as predictive policing systems advance rapidly and are deployed across the law enforcement and security sphere, there is evidence that the use of artificial intelligence systems can perpetuate and exacerbate discrimination and identity bias” (p. 3). The algorithmic profiling aspect of GR 36 engages to a significant extent the private sector, and should inform evolving standards on [business and human rights in the technology sector](#).

VIII Recommendations

Section VIII divides its recommendations into seven categories: A. Legislative and policy measures; B. Human rights education and training; C. Recruitment measures; D. Community policing; E. Disaggregated data; F. Accountability; G. Artificial intelligence. This section provides a number of important practical steps to realise the objectives.

In short...

GR 36 (2020) is an extremely important document that arrives at a critical moment. CERD and the drafting team should be commended for providing clear guidance on Convention obligations and responding to contemporary manifestations of racial profiling. It is also the first general comment to put law enforcement officials in its title, marking a specific focus by a human rights body on the police. Its urgency is apparent – the day of its publication, a [video emerged in France](#) of police violence based on racial profiling. Meanwhile [France’s](#) contribution to draft GR 36 was simply to reiterate its long-held position that providing statistics based on race and ethnicity is unconstitutional. States parties must understand the urgency of the addressed issue and implement the recommendations. In draft GR 36, Section D was called “Dialogue with Communities”. In their observations on the draft, the IEE suggested renaming it to “Community Policing”. This is a subtle change but one that captures the idea that policing should not be a two-way interaction, but rather controlled by the people that are policed. It is perhaps this recommendation that chimes most with calls for police reform in [Colombia](#), [India](#), [Nigeria](#), the [United States](#), and globally. From that recommendation, all others flow.

