Virtual Session of the Intergovernmental Working Group on the Implementation of the Durban Declaration and Programme of Action (DDPA)

*Geneva, Tuesday 12th October 2021, 15:00 to 18:00.*

*Presented by ©Verene Shepherd, Vice-Chair, The CERD*

*(Mark against delivery)*

Thank you Chair and greetings to Members of the IGWG, Members of Special Procedures, the OHCHR, Other UN Mechanisms, fellow panellists and our virtual audience. This Panel discussion is being held on a very painful date for Indigenous Peoples and African people everywhere as it is the day that marked the start of the destruction of the Indies and the African holocaust. And so assessing the extent to which the DDPA and the POA of the IDPAD has been implemented and have served to advance the elimination of racial discrimination is very fitting indeed.

I begin with reminding us of the opening paragraph of the DDPA.

“Although the standard of non-discrimination has been established as a bedrock principle of international law, the persistence of racism, racial discrimination, xenophobia and related intolerance clearly demonstrates the need to look for new ways to address this problem with more resolve, with more humanity and with greater efficiency. The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, from 31 August to 8 September 2001, helped focus the international community’s thinking about where action to date has been insufficient, and in what areas and in what ways we can do more to create just and fair societies free of racial discrimination.”

However, when we survey the international community’s actions twenty years on, we cannot help but conclude that implementation of the DDPA, like the Programme of Activities of the International Decade for People of African Descent (2015-2024), has been insufficient. The observation that “we can do more to create just and fair societies free of racial discrimination,” therefore remains true.

I also note that the documents adopted in Durban 2001, specified that “a victim-oriented approach was an important tool to eliminate racial discrimination. Specific reference was made to Africans and persons of African descent, Asians and persons of Asian descent, indigenous peoples, migrants, refugees, minorities, the Roma and others. Durban also put the gender dimension of racial discrimination on the map, as well as the more general question of multiple discrimination.

How can we use this Forum to advocate anew for respect for the dignity and rights of marginalized groups specified above? First, I suggest that we recognize and abhor the grounds on which these and other groups are subjected to racial discrimination. In paragraph 2 under “general Issues”, the DDPA stresses the following:

*“We recognize that racism, racial discrimination, xenophobia and related intolerance occur on the grounds of race, colour, descent or national or ethnic origin and that victims can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status.”*

This goes a little further than the ICERD Art. 1, but still aligns with it. **Article 1** of the Convention defines "racial discrimination" as:

*... any distinction, exclusion, restriction or preference based on*[*race*](https://en.wikipedia.org/wiki/Race_(classification_of_human_beings))*, colour, descent, or national or*[*ethnic*](https://en.wikipedia.org/wiki/Ethnic_group)*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*

Second, recognize that one of the methods by which groups are subjected to racial discrimination on these grounds is racial profiling. The DDPA, the IDPAD and the ICERD recognize racial profiling as a barrier to access to justice and non-discrimination. Racial profiling is not only practiced at the National, but also at the international level, specifically at borders where law enforcement officials interface with migrants and normal international passengers/travellers.

**The DDPA:**

* Urges States, including their law enforcement agencies, to design and fully implement effective policies and programmes to prevent, detect and ensure accountability for misconduct by police officers and other law enforcement personnel which is motivated by racism, racial discrimination, xenophobia and related intolerance, and to prosecute perpetrators of such misconduct [para 71]

AND

* Urges 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. [Para 72]

**The IDPAD: 2015-2024 – PROGRAMME OF ACTIVITIES:**

Under Justice, specifically “access to justice”, the IDPAD recommends that

States should: (a) Introduce measures to ensure equality before the law, notably in the enjoyment of the right to equal treatment before the tribunals and all other organs administering justice; (b) Design, implement and enforce effective measures to eliminate the phenomenon popularly known as “racial profiling”; (c) Eliminate institutionalized stereotypes concerning people of African descent and applying appropriate sanctions against law enforcement officials who act on the basis of racial profiling [para 17]

**CERD ACTIONS:**

It was in consideration of these as well as concerns expressed by Civil

Society and members of affected groups, that CERD adopted

GR 36 “Preventing and Combatting Racial Profiling by Law

Enforcement Officials’ at its 102nd session (16–24 November 2020).

There is no universal definition of racial profiling in international human rights law. However, as a persistent phenomenon in all regions of the world, various international and regional human rights bodies and institutions have adopted definitions of racial profiling, which have a number of common elements. Racial profiling is: (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 their intersection with other relevant grounds, such as religion, sex or gender, sexual orientation and gender identity, disability and age, migration status, or work or other status; (d) is used in specific contexts, such as controlling immigration and combating criminal activity, terrorism or other activities that allegedly violate or may result in the violation of the law.

Racial profiling is committed through behaviour or through acts such as arbitrary stops, searches, identity checks, investigations and arrests.

The identification, prevention and combating of the practice of racial profiling by law enforcement officials is integral to the achievement of the objectives of the International Convention on the Elimination of All Forms of Racial Discrimination. The practice of racial profiling by law enforcement officials violates fundamental principles of human rights, which rest on: (a) non-discrimination based on grounds of race, colour, descent, or national or ethnic origin, or other intersecting grounds; and (b) equality before the law. It may also violate due process and fair trial rights. These principles and rights are the anchors of the Universal Declaration of Human Rights (arts. 2 and 7) and the Convention (arts. 2 and 5 (a)).

Consequences of racial profiling

Racial profiling has negative and cumulative effects on the attitudes and well-being of individuals and communities,[[1]](#footnote-1) given that a person may be regularly subjected to racial profiling in his or her daily life. Victims of racial profiling often understate and interiorize its impact in the face of a lack of effective remedies and restorative tools. 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, tend to be less willing to cooperate, thereby potentially limiting the effectiveness of law enforcement. Racial profiling practices influence daily routines of law enforcement and undermine, whether through conscious or unconscious actions, the capacity to support victims of crimes belonging to the affected communities. A sense of injustice and humiliation, the loss of trust in law enforcement, secondary victimization, fear of reprisals and limited access to information about legal rights or assistance may result in reduced reporting of crimes and reduced information for intelligence purposes.

Racial profiling by law enforcement officials has far-reaching consequences at all levels of administration of the justice system, particularly in the criminal justice system. Racial profiling can lead to, among other things: (a) the overcriminalization of certain categories of persons protected under the Convention; (b) the reinforcement of misleading stereotypical associations between crime and ethnicity and the cultivation of abusive operational practices; (c) disproportionate incarceration rates for groups protected under the Convention; (d) the higher vulnerability of persons belonging to groups protected under the Convention to abuse of force or authority by law enforcement officials; (e) the underreporting of acts of racial discrimination and hate crimes; and (f) the handing down by courts of harsher sentences against members of targeted communities.

Algorithmic profiling and racial bias and discrimination

Owing to rapid advances in technological development, the actions of law enforcement officials are increasingly determined or informed by algorithmic profiling,[[2]](#footnote-2) which may include big data, automated decision-making and artificial intelligence tools and methods.[[3]](#footnote-3) While such advances have the potential to increase the accuracy, effectiveness and efficiency of the decisions and actions of law enforcement officials, there is a great risk that they may also reproduce and reinforce biases and aggravate or lead to discriminatory practices.[[4]](#footnote-4) Given the opacity of algorithmic analytics and decision-making, in particular when artificial intelligence methods are employed, discriminatory outcomes of algorithmic profiling can often be less obvious and more difficult to detect than those of human decisions and thus more difficult to contest.[[5]](#footnote-5) In addition, human rights defenders generally are not adequately equipped technologically to identify such discriminatory methods.

The Committee hopes that States will disseminate GR 36 and ensure its implementation for the protection of the rights of minorities. With this in mind, I suggest to you CERD’s recommendations to help in the eliminating of racial profiling, using GR 36:

First, Legislative and policy-related measures

States should develop and effectively implement laws and policies that define and prohibit racial profiling by law enforcement officials. Such measures should be accompanied by clear guidance for law enforcement agencies, ensuring that internal policies, including standard operating procedures and codes of conduct, are in line with human rights standards and principles. States should also be aware of laws and regulations that potentially enable or facilitate racial profiling. They should conduct studies to identify such laws and amend or repeal them accordingly.

States should ensure that law enforcement agencies develop, in consultation with relevant groups, detailed guidelines for stop-and-search practices with precise standards, in order to prevent racial profiling. They should establish effective, independent monitoring mechanisms, both internal and external, and envisage disciplinary measures for application in cases of misconduct. They should also carry out periodic audits, with the help of independent experts, to identify gaps in internal policies and practices. Transparency around the outcomes of such procedures is strongly recommended, as it may strengthen law enforcement accountability and trust among targeted individuals and communities.

In accordance with article 6 of the Convention, States must assure to everyone within their jurisdiction effective protection and remedies against any acts of racial discrimination which violate his or her human rights and fundamental freedoms contrary to the Convention, as well as the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

States are encouraged to adopt victim-centred approaches and to coordinate their support services effectively by promoting models of cooperation among the authorities, communities, civil society organizations, including those representing groups experiencing intersecting forms of discrimination, and national human rights institutions. The Committee stresses the interconnection between articles 5 (a) and 6 of the Convention and notes that judicial authorities and other organs administering justice should be effectively consulted and involved in such processes to prevent the perpetuation of a racial profiling effect in criminal proceedings.

Human rights education and training

States should develop specialized, mandatory training programmes for law enforcement agencies that raise awareness among law enforcement officials about the impact of biases on their work and that demonstrate how to ensure non-discriminatory conduct.

Both artificial intelligence experts and officials who interpret data must have a clear understanding of fundamental rights in order to avoid the entry of data that may contain or result in racial bias.

Human rights education and training are vital to ensuring that police officers do not discriminate. National human rights institutions, in cooperation with civil society organizations, can play a central role in training law enforcement officials, in auditing new technological tools that could lead to discrimination and in identifying other risks in practice.[[6]](#footnote-6)

Recruitment measures

States should ensure that law enforcement agencies develop recruitment, retention and advancement strategies that promote a diverse workforce that reflects the composition of the populations they serve. Such strategies could include setting internal quotas and developing a recruitment programme for ethnic minorities. This has the potential to influence the culture of agencies and the attitudes of staff with a view to producing less biased decision-making.

Community policing

States should ensure that law enforcement agencies develop strategies for effective engagement with individuals and groups facing racial discrimination that take into account the unique context, dynamics and needs of different communities. This should help to improve communication and reduce levels of distrust and of racial profiling. Police-community dialogue should be expanded beyond community leaders, as many groups, including women, are underrepresented at the community leadership level and may need dedicated and sensitive outreach efforts. Young people who are most commonly targeted by police would be a key example.

Disaggregated data

States should regularly collect and monitor disaggregated quantitative and qualitative data on relevant law enforcement practices, such as identity checks, traffic stops and border searches, which include information on the prohibited grounds for racial discrimination, including its intersecting forms, as well as the reason for the law enforcement action and the outcome of the encounter. The anonymized statistics generated by such practices should be made available to the public and discussed with local communities. The data should be collected in accordance with human rights standards and principles, data protection regulations and privacy guarantees. This information must not be misused.

States should also guard against forms of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that person’s performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements.[[7]](#footnote-7)

Accountability

States should establish oversight mechanisms, both within and external to law enforcement bodies, in order to prevent discriminatory behaviour; such mechanisms should develop internal guidelines, policies and regulations to combat and prevent racial profiling and ensure internal accountability by taking disciplinary action against officials who violate them.

Incidents of racial profiling by law enforcement agencies should be investigated effectively, in accordance with international human rights standards. Those responsible should be prosecuted and, if convicted, they should be sanctioned with appropriate penalties and compensation should be granted to victims.

States should ensure that senior officials within law enforcement agencies promote non-discriminatory policies and practices within their agencies, rigorously monitor the conduct of staff and hold staff accountable for misconduct through the internal, independent oversight mechanism.[[8]](#footnote-8) These actions can be supported through the availability of data on and analysis of the decision-making and practices of staff. Senior officials should also review the impact of the application of legislation and operations, including those for countering terrorism, which may have a disproportionate impact on marginalized groups and communities.

Artificial intelligence

States should ensure that algorithmic profiling systems used for the purposes of law enforcement are in full compliance with international human rights law. To that effect, before procuring or deploying such systems States should adopt appropriate legislative, administrative and other measures to determine the purpose of their use and to regulate as accurately as possible the parameters and guarantees that prevent breaches of human rights. Such measures should, in particular, be aimed at ensuring that the deployment of algorithmic profiling systems does not undermine the right not to be discriminated against, the right to equality before the law, the right to liberty and security of person, the right to the presumption of innocence, the right to life, the right to privacy, freedom of movement, freedom of peaceful assembly and association, protections against arbitrary arrest and other interventions, and the right to an effective remedy.

Where the risk of discrimination or other human rights violations has been assessed to be too high or impossible to mitigate, including because of the nature of a planned or foreseeable use by a State, private sector actors should not sell or deploy an algorithmic profiling system.

States should document cases of racial discrimination associated with artificial intelligence, as well as prevention measures, sanctions and remedies, and include such information in their reports to the Committee.

Human rights bodies, States, national human rights institutions and civil society organizations should carry out, and disseminate the results of, studies, identify good practices on effective measures addressing racial biases derived from artificial intelligence, including those related to human rights compliance and ethical aspects of machine learning, and identify relevant criteria in terms of interpretation or transparency in the processes of the programming and training of algorithms, and should do so through the lens of the International Convention on the Elimination of All Forms of Racial Discrimination.

To conclude, the Durban Declaration and Programme of Action remains a profound milestone in articulating the harms of colonialism and slavery, both historically and in the present, emphasizing the structural forms of racism and racial discrimination that to this day require urgent attention. The UN High Commissioner for Human Rights has called for a transformative agenda to uproot systemic racism, including reparation for historic wrongs, an agenda imperative also laid down in the DDPA and the Programme of Activities for the International Decade for people of African descent.

The route to true racial justice and equality for people of African descent lies in reparation for the maangamizi. Former colonizers must repair the dark legacies of racial discrimination against people of African descent, before we can move forward in peace and reconciliation and build a better future.

1. See, for example, A/HRC/24/52/Add.2, para. 57. [↑](#footnote-ref-1)
2. Algorithmic profiling includes any step-by-step computerized technique used for analysing data to identify trends, patterns or correlations. European Union Agency for Fundamental Rights, *Preventing Unlawful Profiling Today and in the Future: A Guide* (2018), p. 97. [↑](#footnote-ref-2)
3. Although widely used, the term “artificial intelligence” is not clearly defined. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has noted that artificial intelligence is often used as shorthand for the increasing independence, speed and scale connected to automated, computational decision-making. It is not one thing only, but rather refers to a “constellation” of processes and technologies enabling computers to complement or replace specific tasks otherwise performed by humans, such as making decisions and solving problems (A/73/348, para. 2). [↑](#footnote-ref-3)
4. See A/HRC/44/57. [↑](#footnote-ref-4)
5. AI Now, “The AI Now report: the social and economic implications of artificial intelligence technologies in the near-term”, summary of the AI Now public symposium hosted by the White House and the Information Law Institute of New York University on 7 July 2016, p. 7. [↑](#footnote-ref-5)
6. Contribution from Nicaragua. [↑](#footnote-ref-6)
7. Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, art. 3 (4). [↑](#footnote-ref-7)
8. See paragraph 53 above. [↑](#footnote-ref-8)