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**Committee on the Elimination of Racial Discrimination****General recommendation No. 36****Preventing and Combating Racial Profiling by Law Enforcement Officials****I. Introduction**

1. At its ninety-second session, the Committee on the Elimination of Racial Discrimination (the Committee) decided to hold a thematic discussion on *racial discrimination in today's world: racial profiling, ethnic cleansing and current global issues and challenges*. The discussion took place on 29 November 2017 in Geneva and focused on analysing the experiences, challenges, and lessons learned in working to combat racial profiling and ethnic cleansing to date and on how the Committee could strengthen its work against racial profiling and ethnic cleansing, for greater impact on the ground.

2. Following the discussion, the Committee expressed its intention to work on drafting a general recommendation to provide guidance on preventing and combating racial profiling in order to assist State parties in discharging their obligations, including reporting obligations. The present general recommendation is of relevance to all stakeholders in the fight against racial discrimination, and seeks to contribute to strengthening democracy, rule of law, peace and security among communities, peoples and States.

3. At its ninety-eighth session, the Committee began its deliberations with a view to draft a general recommendation No. 36 on the prevention and combating of racial profiling, in consultation with all interested parties<sup>1</sup>. The Committee also held debates with sectors of academia with emphasis on the implications of artificial intelligence (AI) on racial profiling.

**II. Established principles and practice**

4. In drafting this general recommendation, the Committee has taken account of its extensive practice in combating racial profiling, by law enforcement officials, primarily in the context of review of State party reports and in key general recommendations. The Committee has explicitly addressed the issue of racial profiling in its general recommendation No. 30 (2005) on discrimination against non-citizens recommending States to “ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping”; in general recommendation No. 31 (2005) on the prevention of racial discrimination in the

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<sup>1</sup> See the contributions to Draft general recommendation No. 36, available at: <https://www.ohchr.org/EN/HRBodies/CERD/Pages/GC36.aspx>.

administration and functioning of the criminal justice system,<sup>2</sup> in which the Committee has recommended that States parties “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”; and in general recommendation No. 34 (2011) on racial discrimination against people of African descent<sup>3</sup>, which requests States to “take resolute action to counter any tendency to target, stigmatize, stereotype or profile people African descent, by law enforcement officials, politicians and educators.” However, other recommendations are also relevant to racial profiling such as, general recommendation No. 13 (1993) on the training of law enforcement officials in the protection of human rights, which stresses that law enforcement officials should receive training to ensure they uphold “the human rights of all persons without distinction as to race, colour or national or ethnic origin.”<sup>4</sup>; general recommendation No. 23 (1997) on the rights of Indigenous Peoples, stressing that Indigenous Peoples should be free from any discrimination, in particular that based on indigenous origin or identity; general recommendation No. 27 (2000) on discrimination against Roma, which provides guidance for preventing police illegal use of force against Roma, particularly in connection with arrest and detention, and for building trust between Roma communities and the police; general recommendation No. 32 (2009) on the meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, 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>5</sup>; and general recommendation No. 35 (2013) on combating racist hate speech.<sup>6</sup>

5. 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>7</sup>

6. Additionally, several other international human rights mechanisms have explicitly highlighted racial profiling as a violation of international human rights law. In 2009, in its decision of the case *Williams Lecraft v. Spain*<sup>8</sup>, the Human Rights Committee was the first treaty monitoring body to directly acknowledge racial profiling as unlawful discrimination. 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

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<sup>2</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>3</sup> CERD general recommendation No. 34 (2011) on racial discrimination against people of African descent, para. 31.

<sup>4</sup> CERD general recommendation No. 13 (1993) on the training of law enforcement officials in the protection of human rights.

<sup>5</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>6</sup> CERD general recommendation No. 35 (2013) on combating racist hate speech.

<sup>7</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>8</sup> Communication No. 1493/2006 *Rosalind Williams Lecraft v. Spain*, Views adopted on 27 July 2009.

seekers, people of African descent, Indigenous Peoples, as well as religious and ethnic minorities including the Roma;<sup>9</sup> a concern echoed by the Committee against Torture.<sup>10</sup>

7. 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.

8. In his report of 2007, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism noted that, since 11 September 2001, law enforcement authorities around the globe had adopted measures based on terrorist profiles, which included characteristics such as a person's presumed race, ethnicity, national origin or religion.<sup>11</sup> The Special Rapporteur stressed that terrorist-profiling practices based on "race" were incompatible with human rights principles and that such profiling practices were unsuitable and ineffective means of identifying potential terrorists and that they also entailed considerable negative consequences that might render such measures counterproductive in the fight against terrorism.<sup>12</sup>

9. Finally, the present general recommendation is also drafted within the framework, and as a contribution to, the implementation of the 2030 Agenda for Sustainable Development, with its overarching commitments to "leaving no one behind" and "reaching the furthers behind first", which provide critical entry points and opportunities to the Committee's work particularly on Goal 10 reducing inequality and Goal 16 promoting peaceful and inclusive societies for sustainable development, providing access to justice for all and build effective, accountable and inclusive institutions at all levels.<sup>13</sup>

### III. Scope

10. The Committee has often expressed its concern about the use of racial profiling by law enforcement officials targeting various minority groups based on specific characteristics such as a person's presumed race, skin colour, descent, national or ethnic origin. The Committee has identified that law enforcement officials such as police officers and border control officials, exercise their missions with arbitrary police stops, arbitrary identity checks, random inspection of objects in the possession of any person, and arbitrary arrests<sup>14</sup>. The Committee has noted with concern that racial profiling has increased due to contemporary concerns about terrorism and migration exacerbating prejudice and intolerance towards members of certain ethnic groups.

11. The Committee has recognized 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.<sup>15</sup>

12. In addition, the Committee observes that the increasing use of new technological tools, including AI, in areas such as security, border control and access to social services, has the

<sup>9</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>10</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.

<sup>11</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/4/26, para. 34.

<sup>12</sup> *Ibid.*, para. 83.

<sup>13</sup> <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>.

<sup>14</sup> CERD/C/MUS/CO/20-23, paras. 20-21; CERC/C/BLR/CO/20-23, paras. 23-24; CERD/C/ESP/CO/21-23, paras. 27-28; CERD/C/DEU/CO/19-22, para 11.

<sup>15</sup> CERD/C/MUS/CO/20-23, para. 20; CERD/C/RUS/CO/23-24, paras. 15(b); 16(c); CERD/C/CAN/CO/21-23, paras. 15; 16 (a), (b), (c), (d); CERD/C/ITA/CO/19-20, paras. 27-28.

potential to deepen racism, racial discrimination, xenophobia and other forms of exclusion. However, this general recommendation focuses on algorithmic decision making and AI in relation to racial profiling by law enforcement officials and therefore, many other potentially harmful AI-related topics are outside of its scope. While aware that AI in many decision-making processes can contribute to greater effectiveness in some areas, the Committee also realizes that, there is a real risk of algorithmic bias, when AI is used in decision-making in the context of law enforcement. Algorithmic profiling rises serious concerns and the consequences on the rights of the victims could be very serious.

#### **IV. Defining and understanding racial profiling**

13. There is no universal definition of racial profiling in international human rights law. However, as a persistent phenomenon in all regions of the world, different international and regional human rights bodies and institutions have adopted definitions of racial profiling which have the following 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 relevant intersecting grounds such as religion, sex 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.

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

15. The Inter-American Commission on Human Rights (IACHR), has defined racial profiling as “a tactic adopted for supposed reasons of public safety and protection [...] motivated by stereotypes based on race, colour, ethnicity, language, descent, religion, nationality, place of birth, or a combination of these factors, rather than on objective suspicions, which tends to single out individuals or groups in a discriminatory way based on the erroneous assumption that people with such characteristics are prone to engage in specific types of crimes”<sup>16</sup>. According to the Arab Human Rights Committee, racial profiling can be defined as the use by law enforcement agents of generalizations or stereotypes related to presumed race, colour, descent, nationality, place of birth, or national or ethnic origin – rather than objective evidence or individual behaviour – as a basis for identifying a particular individual as being, or having been, engaged in a criminal activity, resulting in discriminatory decision-making. In its General Policy recommendation No. 11 on combating racism and racial discrimination in policing adopted in 2007, the European Commission against Racism and Intolerance (ECRI), provides a definition of racial profiling as “the use by the police with no objective or reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigative activities”.<sup>17</sup>

16. In his report of 2015, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, indicated that racial and ethnic profiling by law enforcement officials could be commonly understood to mean “a reliance by law enforcement, security and border control personnel on race, colour, descent or national or ethnic origin as a basis for subjecting persons to detailed searches, identity checks and investigations or for determining whether an individual was engaged in criminal activity.”<sup>18</sup>

17. The High Commissioner for Human Rights has added that racial profiling refers to the process by which law enforcement relies on generalizations based on race, colour, descent or national or ethnic origin, rather than objective evidence or individual behaviour, to subject people to stops, detailed searches, identity checks and investigations, or for deciding that an

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<sup>16</sup> IACHR, *People of African Descent in the Americas* (2011), para. 143.

<sup>17</sup> Available on: <https://rm.coe.int/ecri-general-policy-recommendation-no-11-on-combating-racism-and-racia/16808b5adf>.

<sup>18</sup> Report of the Special rapporteur on the contemporary forms of racism, racial discrimination, xenophobia and related intolerance, A/HRC/29/46, para. 2.

individual was engaged in criminal activity. Racial profiling, then, results in discriminatory decision-making. The High Commissioner further pointed out that whether arising from the attitudes and practices of individual officers or the discriminatory culture or policies of law enforcement agencies, racial profiling is a long-standing practice in many agencies.<sup>19</sup>

18. For the purpose of this general recommendation, racial profiling is understood in the way it has been referred to in paragraph 72 of the Durban Programme of Action; 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”.<sup>20</sup> 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.

19. Racial profiling by law enforcement officials may also include, *inter alia* raids, border and custom checks, home searches, targeting for surveillance, operations to maintain or re-establish law and order or immigration decisions. These actions may variously take place in the context of street-policing and anti-terrorism operations.<sup>21</sup>

20. Racial profiling is linked to stereotypes and biases, which can be conscious or unconscious, individual, or institutional and structural. Stereotyping becomes a violation of international human rights law when stereotypical assumptions are put into practice to undermine the enjoyment of human rights.<sup>22</sup>

## V. Principles and general obligations of the Convention

21. 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 Convention on the Elimination of All Forms of Racial Discrimination (the Convention), which is dedicated to the elimination of racial discrimination in all its forms. 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, including other intersecting grounds; 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 and the Convention<sup>23</sup>.

22. The Convention’s preamble emphasizes that “all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination.” While the term racial profiling is not explicitly referred to in the Convention, this has not impeded the Committee from identifying racial profiling practices and exploring the relationship between racial profiling and the standards of the Convention.

23. Under article 2 of the Convention, each State undertakes not to engage in any act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and institutions, national or local, shall act in conformity with this obligation. As racial profiling is a practice which has the potential to promote and perpetuate racist incidents, racial prejudice, and stereotypes,<sup>24</sup> it runs counter to the very idea of the Convention. Accordingly, States Parties are obliged to review their policies, laws and regulations with a view to ensuring that racial profiling does not take place and is not facilitated. States Parties are obliged to actively take steps to eliminate

<sup>19</sup> United Nations, *Preventing and countering racial profiling of people of African descent: Good practices and challenges- Foreword*, 2019.

<sup>20</sup> *World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration and Programme of Action*, United Nations, Human Rights, New York, 2002, p. 70. Also available on: [https://www.ohchr.org/Documents/Publications/Durban\\_text\\_en.pdf](https://www.ohchr.org/Documents/Publications/Durban_text_en.pdf).

<sup>21</sup> Report of the Secretary General of the United Nations on the implementation of the International Decade for People of African descent, (2018) A/73/354.

<sup>22</sup> OHCHR Commissioned Report “[Gender stereotyping as a human rights violation](#)”.

<sup>23</sup> Arts. 2 and 7 and articles 2 and 5 (a) of the ICERD.

<sup>24</sup> CERD/C/IRL/CO/3-4, para. 18.

discrimination through laws, policies and institutions. The prohibition to engage in acts of racial profiling and the obligation to ensure that public authorities and institutions do not apply practices of racial profiling is furthermore derived from Article 5 of the Convention. The practice of racial profiling is incompatible with the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law and equal treatment. It is furthermore incompatible with the non-discriminatory guarantee of other civil rights such as the right to freedom of movement.

24. Under Article 6 of the Convention, States Parties are obliged to guarantee effective protection against any acts of racial discrimination. Accordingly, States Parties have to take preventive measures in order to ensure that public authorities and public institutions do not engage in practices of racial profiling. Article 6 furthermore requires States Parties to guarantee effective remedies against any act of racial discrimination. States Parties are obliged to ensure that their domestic legal order contains adequate and effective mechanisms in order to assert that racial profiling has taken place and to bring such a practice to an end. States Parties must furthermore guarantee the right to seek just and adequate reparation or satisfaction for damage suffered as a result of racial discrimination in the form of racial profiling. They must ensure that this right can be enforced in an effective manner. In light of the fact that the practice of racial profiling regularly affects members of a particular group or groups, States Parties are encouraged to consider establishing mechanisms for the collective enforcement of rights in the context of racial profiling.

25. Article 7 of the Convention highlights the role of teaching, education, culture and information in combatting racial discrimination. With regard to racial profiling, the fulfilment of the obligation of the States Parties not to engage in acts of racial discrimination depends upon the conduct of public authorities and public institutions. It is therefore of paramount importance that national law enforcement officials in particular are properly informed of their obligations.<sup>25</sup> Since racial profiling is often the result of well-established and unchallenged practices of public authorities and public institutions, States Parties have to ensure that national law enforcement officials are sufficiently aware of how to avoid engaging in practices of racial profiling. Raising such an awareness can contribute to the prevention of practices of racial profiling and help to overcome them where they are entrenched. Accordingly, States Parties should ensure that public authorities and institutions who engage in law enforcement are properly trained so as to not engage in practices of racial profiling.

## **VI. Consequences of racial profiling**

26. 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>26</sup> Victims of racial profiling often understate and interiorise its impact due to 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, 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.

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<sup>25</sup> CERD general recommendation No. 13.

<sup>26</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).

27. Racial profiling and hate speech are closely interrelated and the Committee has often addressed these two forms of discrimination simultaneously.<sup>27</sup> The dissemination of ideas based on racial or ethnic hatred, the persistent use of hate speech in the media and the use of racist political discourse by public officials contribute to exacerbate the discrimination and stereotyping by law enforcement officers. Those ethnic groups that are victims of hate speech will also become targets of racial profiling. On the other hand, racial profiling by law enforcement portrays racially discriminated groups as more prone to commit crimes, which will influence the public discourse and contribute to increase the dissemination of racist hatred.

28. Racial profiling may also negatively impact peoples' enjoyment of civil and political rights, including, the right to life (art. 6 of ICCPR), liberty and security (art. 9 of ICCPR); privacy (art. 17 of ICCPR); freedom of movement (art. 12 of ICCPR); freedom of association (art. 22 of ICCPR); and the right to an effective remedy (art. 2.3 of ICCPR).

29. The full enjoyment of people's economic, social and cultural rights, such as the right to adequate housing (art. 11 of ICESCR), health (art. 12 of ICESCR), education (arts. 13; 14 of ICESCR) and work (art. 6 of ICESCR), could also be affected by racial profiling.<sup>28</sup>

30. Racial profiling by law enforcement officials has far-reaching consequences at all levels of the administration of the justice system, particularly on the criminal justice system. Racial profiling can lead to a) the over-criminalization of certain categories of persons protected under the Convention; b) the reinforcement of misleading stereotypical associations between crime and ethnicity and cultivating abusive operational practices; c) disproportionate incarceration rates of groups protected under the Convention; d) higher vulnerability of persons belonging to groups protected under the Convention to abuse of force or authority by law enforcement officials; e) underreporting of acts of racial discrimination and hate crimes and f) the handing down by the courts of harsher sentences against targeted communities, among others.<sup>29</sup>

## VII. Algorithmic profiling and racial bias and discrimination

31. Rapid advances in technological development mean that increasingly, the actions of law enforcement officials are determined or informed by algorithmic profiling,<sup>30</sup> which may include big data, automated decision-making and artificial intelligence tools and methods.<sup>31</sup> 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.<sup>32</sup> Given the opacity of algorithmic analytics and decision-making, in particular when employing artificial intelligence methods, discriminatory outcomes of algorithmic profiling can often be less obvious and more difficult to detect than those of human decisions and thus more

<sup>27</sup> CERD/C/RUS/CO/23-24, paras 15-16; CERD/C/SVN/CO/8-11, paras. 8-9; CERD/C/NLD/CO/19-21, paras. 13-14; CERD/C/AUS/CO/18-20, para 14.

<sup>28</sup> Art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>29</sup> General recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system.

<sup>30</sup> Algorithmic profiling includes any step-by-step computerised techniques that analyse data to identify trends, patterns or correlations, EU Fundamental Rights Agency, "Preventing unlawful profiling today and in the future: a guide", 2018, p. 98.

<sup>31</sup> 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 summarized this term as follows (A/73/348, para 2): "Artificial intelligence is often used as shorthand for the increasing independence, speed and scale connected to automated, computational decision-making. Artificial intelligence 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."

<sup>32</sup> Report of the Special Rapporteur on Racism, "Racial discrimination and emerging digital technologies: a human rights analysis", A/HRC/44/57, 2020, para. 38.

difficult to contest. In addition to opacity, human rights defenders around the globe are not technologically adequately equipped to identify these discriminatory practices.<sup>33</sup>

32. There are various entry points for bias that could be integrated into algorithmic profiling systems, ranging from the way in which these systems are designed, decisions as to the origin and scope of the datasets on which these systems are trained, societal and cultural biases that developers may build into those datasets, the artificial intelligence models themselves and the way in which the outputs of the artificial intelligence model are implemented in practice.<sup>34</sup> In particular, the following data-related factors may contribute to such negative outcomes: a) The data used include information concerning protected characteristics; b) so-called ‘proxy information’ is included in the data. As an example, postcodes often indirectly indicate race or ethnic origin in cases of segregated areas in cities; c) the data used are biased against a group;<sup>35</sup> d) the data used are of poor quality, including because they are poorly selected, incomplete, incorrect or outdated.<sup>36</sup>

33. Particular risks emerge when algorithmic profiling is used for determining the likelihood of criminal activity either in certain localities, by certain groups or even individuals. Predictive policing which relies on historical data for predicting possible future events, can easily produce discriminatory outcomes, in particular when the datasets used suffer from one or more of the afore-described flaws.<sup>37</sup> For example, historical arrest data about a neighbourhood may reflect racially biased policing practices; if fed into a predictive policing model, these data risk steering future predictions into the same, biased direction, leading to over-policing of the same neighbourhood, which in turn may lead to more arrests in the same neighbourhood, creating a dangerous feedback loop.

34. Similar mechanisms have been reported to be present in judicial systems.<sup>38</sup> Increasingly, when applying a sanction, deciding whether someone should be sent to prison, bailed out or receive another punishment, States are resorting to the use of algorithmic profiling, in order to foresee the possibilities that an individual may commit one or several crimes in the future. Authorities gather information regarding the criminal history of the individual, their family and friends, their social conditions, including their work and academic history, in order to assess the degree of "danger" posed by the person, from a score provided by the algorithm, which usually remains secret. This use of algorithmic profiling faces similar concerns as described in the preceding paragraph.

35. The increasing use of facial recognition and surveillance technologies to track and control specific demographics raises concerns with respect to many human rights, including the right to privacy, freedom of peaceful assembly and association; freedom of expression and freedom of movement. It is designed to automatically identify individuals based on their facial geometry, potentially profiling people based on grounds of discrimination such as race, colour, national or ethnic origin or gender.<sup>39</sup> Cameras equipped with real-time facial recognition technology are widely applied for the purpose of flagging and tracking of individuals,<sup>40</sup> which may enable governments and others to keep records of the movements

<sup>33</sup> AI Now, *The AI Now Report. The Social and Economic Implications of Artificial Intelligence Technologies in the Near-Term*. A summary of the AI Now public symposium, hosted by the White House and New York University’s Information Law Institute, July 7th, 2016, p. 7.

<sup>34</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/73/348, page 15.

<sup>35</sup> For example, when past discriminatory practices, such as arrests disproportionately affecting members of one group, are reflected in the data used for profiling, this will affect the outcomes of algorithmic profiling.

<sup>36</sup> EU Agency for Fundamental Rights, #BigData: Discrimination in data-supported decision making, FRA Focus Paper, May 2018, p. 4-5.

<sup>37</sup> See Rashida, Richardson et al, “Dirty data, bad predictions: how civil rights violations impact police data, predictive policing systems, and justice”, *New York University Law Review*, 94:192 (May 2019).

<sup>38</sup> See, for example, Julia Angwin et al, *Machine Bias*, ProPublica, May 23, 2016, available at <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

<sup>39</sup> Report of the Special Rapporteur on Racism, A/HRC/44/57, para. 14.

<sup>40</sup> A/HRC/39/29, para 14.

of large numbers of individuals, possibly based on protected characteristics.<sup>41</sup> Moreover, it has been demonstrated that the accuracy of facial recognition technology may differ depending on colour, ethnicity or gender of the persons assessed, which may lead to discrimination.<sup>42</sup>

36. In some instances, algorithms are being employed in DNA testing to determine the ethnicity or nationality of individuals. The results of this DNA testing can lead to profiling. The Committee notes in line with the scientific community that there are no direct linkages between an individual's DNA composition and their ethnicity or nationality. Therefore, the Committee condemns the use of DNA profiling by States and law enforcement authorities, especially border security. Additionally, results of DNA profiling have been used by law enforcement authorities to make false claims that certain ethnic minorities are more prone to violence and, therefore, these groups have been subjected to discriminatory police practices.<sup>43</sup>

## VIII. Recommendations

37. A variety of strategies have been adopted by governments, law enforcement agencies, and civil society organizations to counter the problem of racial profiling. The Committee is of the view that these provide the basis for recommendations to States and other actors:

### A. Legislative and policy related measures

38. As a pre-requisite, and without prejudice to further measures, comprehensive legislation against racial discrimination, including civil and administrative law as well as criminal law, is indispensable to combating racial profiling effectively. 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 to 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.

39. States should ensure that law enforcement agencies develop detailed guidelines for stop-and-search practices with precise standards in consultation with relevant groups, in order to prevent racial profiling. They should establish effective, independent, monitoring mechanisms, both internal and external, and envisage disciplinary measures 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 about the outcomes of these procedures is strongly recommended as it may strengthen law enforcement accountability and targeted individuals' and communities' trust.

40. In accordance with article 6 of the Convention, States have to 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.

41. States are encouraged to adopt victim-centred approaches and to coordinate effectively their support services by promoting models of cooperation between the

<sup>41</sup> A/HRC/41/35, para 12.

<sup>42</sup> Joy Buolamwini & Timnit Gebru, 2018. "Gender shades: Intersectional accuracy disparities in commercial gender classification", in: Proceedings of Machine Learning Research 81:1–15, 2018, Conference on Fairness, Accountability, and Transparency; Inioluwa Deborah Raji & Joy Buolamwini Actionable Auditing: Investigating the Impact of Publicly Naming Biased Performance Results of Commercial AI Products (2019).

<sup>43</sup> Ruha Benjamin, Race After Technology: Abolitionist Tools for the New Jim Code (July 2019) E-book <<https://www.wiley.com/en.jm/Race+After+Technology:+Abolitionist+Tools+for+the+New+Jim+Code-p-9781509526437>>.

authorities, the communities and the civil society organizations including those representing groups experiencing intersecting forms of discrimination and/or National Human Rights Institutions. The Committee stresses the interconnection between article 5 (a) and article 6 of the Convention and notes that judicial authorities and other organs administering justice should be effectively consulted and involved in these processes to prevent the perpetuation of racial profiling effect in criminal proceedings.

## **B. Human rights education and training**

42. States should develop specialized, mandatory training programmes for law enforcement agencies that sensitize law enforcement officials about the impact of biases on their work and demonstrate how to ensure non-discriminatory conduct. Stigmatized groups including those representing groups experiencing intersecting forms of discrimination should be engaged in the development and delivery of such training, where possible. Law enforcement agencies should ensure that in-service training to counter discrimination and bias-based policing is complemented by institutional interventions regarding limiting discretion and increased oversight in areas vulnerable to stereotyping and biases. In addition, given concerns about the limitations of trainings on changing attitudes and behaviour, non-discrimination and bias trainings should be regularly evaluated and updated to ensure that they have the desired impacts.

43. 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. States should provide training on racism and racial discrimination for experts and officials who interpret data, judicial officers and law enforcement officers, among others. States should develop procurement policies based on mandatory terms prohibiting racial discrimination.

44. States should promote the training of civil society organizations in cooperation with National Human Rights Institutions and specialised agencies on algorithmic bias and emerging technologies.

45. Human rights education and training are vital to ensure 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 and in auditing new technological tools that could lead to discrimination and in identifying other risks in practice.<sup>44</sup>

## **C. Recruitment measures**

46. 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. This 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 produce less biased decision-making.

47. States should ensure that law enforcement agencies regularly evaluate recruitment and promotion policies and, if necessary, undertake temporary special measures to address effectively the underrepresentation of various groups of national or ethnic origin as well as groups experiencing intersecting forms of discrimination based on, *inter alia*, religion, sex and gender, sexual orientation, disability and age.

## **D. Community policing**

48. 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 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,

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<sup>44</sup> Nicaragua's contribution, available at: <https://www.ohchr.org/EN/HRBodies/CERD/Pages/GC36.aspx>.

are under-represented at 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.

49. States should adopt measures to ensure that public information from the police and other law enforcement agencies is based on reliable and objective statistics and does not perpetuate stereotypes and bias against ethnic groups that are victims of discrimination. In addition, States should refrain from releasing personal data about the alleged perpetrator that is linked to the presumed race, colour, descent, or national or ethnic origin, unless such disclosure is strictly necessary and serves a legitimate purpose, such as in case of a wanted notice.

#### **E. Disaggregated data**

50. States should collect regularly and monitor disaggregated quantitative and qualitative data on relevant law enforcement practices such as identity checks, traffic stops or 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. Such data should be collected in accordance with human rights standards and principles, such as data protection regulations and privacy guarantees. This information must not be misused.

51. States should also guard against 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 natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements<sup>45</sup>.

#### **F. Accountability**

52. States should create a reporting mechanism for receiving complaints of racial discrimination and racism, as well as racial and ethnic profiling from citizens that are independent of law enforcement and other adjacent agencies. This body shall have the power to promptly and effectively investigate the alleged cases and work in concert with civil society and human rights monitoring bodies.<sup>46</sup> This body shall also report publicly on its findings in accordance with data protection regulations and human rights standards. This body should take into account the special needs of people with disabilities in the case of intersectional discrimination.

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

54. 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.

55. States should ensure that senior officials within law enforcement agencies promote non-discriminatory policies and practices within their agencies, and monitor rigorously the conduct of staff, holding them accountable for misconduct by the internal, independent oversight mechanism.<sup>47</sup> This can be supported by the availability of data and analysis

<sup>45</sup> 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, OJ L 119 (Police Directive), Art. 3(4).

<sup>46</sup> ECRI, General Policy recommendation No. 11 on combating racism and racial discrimination in policing, para. 10 and explanations.

<sup>47</sup> See above para. 53.

collected on officials' decision-making and practices. Senior officials should also review the impact of the application of legislation and operations, such as counter terrorism related ones, which may generate disproportionate impact on marginalised groups and communities.

56. National Human Rights Institutions and civil society organizations are encouraged to monitor incidents of racial profiling and assist victims of racial profiling. They should increase public awareness, publicize findings, lobby for reforms, as well as engage constructively with law enforcement agencies and other national and local institutions.

57. International and regional human rights mechanisms, National Human Rights Institutions or equality bodies, civil society groups and members of the public should have the possibility to complain against discriminatory practices of law enforcement agencies. Members of the public should be able to file complaints through independent mechanisms.

## **G. Artificial intelligence**

58. States should ensure full compliance with international human rights law of algorithmic profiling systems used for the purposes of law enforcement. 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 from human rights breaches. In particular these measures should aim at preventing the deployment of algorithmic profiling systems from undermining the right not to be discriminated against; the right to equality before the law; the right to personal freedom and security; the right to the presumption of innocence; the rights to life, liberty and security; privacy; freedom of movement; freedom of peaceful assembly and association; protections against arbitrary arrests and other interventions; the right to an effective remedy.

59. States should carefully assess the human rights impact prior to employing facial recognition technology that can lead to misidentification owing to a lack of representation in data collection. Before national deployment States should consider a pilot period under the supervision of an independent oversight body inclusive of individuals that reflect the diverse composition of the population, to mitigate against any potential instances of misidentification and profiling depending on the colour of the skin.

60. States should ensure that algorithmic profiling systems deployed for law enforcement purposes are designed for transparency and make allowances for researchers and civil society to access the code for scrutiny. There should be continuous assessment and monitoring of the human rights impact of those systems throughout their entire lifecycle, and States should take appropriate mitigation measures if risks or harms to human rights are identified. These processes should examine potential and actual discriminatory effects of algorithmic profiling based on grounds of race, colour, descent, national or ethnic origin and their intersection with other grounds, including religion, sex and gender, sexual orientation, and gender identity, disability and age, migration status, work or other status. They should be conducted already prior to the development or acquisition of such systems, wherever possible, and at least be done prior and during the full period of their use. This should include community impact assessments. Potentially or actually affected groups and relevant experts should be included in the assessment and mitigation processes.

61. States should take all appropriate measures to ensure transparency of the use of algorithmic profiling systems. This includes public disclosure of the use of such systems and meaningful explanations of the ways the systems work, what data sets are being used, and what measures preventing or mitigating human rights harms are in place.

62. States should adopt measures to ensure that independent oversight bodies have a mandate to monitor the use of artificial intelligence tools by the public sector, and assess them against criteria developed in conformity with the Convention to ensure they are not entrenching inequalities or producing discriminatory results. States should also ensure that the functioning of such system is regularly monitored and evaluated in order to assess deficiencies and to take the necessary corrective measures. When the result of the assessment indicates a high risk of discrimination or other human rights violations, States should take measures to avoid the use of such technology.

63. States should adopt measures to ensure human rights compliance of private sector design, deployment and implementation of artificial intelligence systems in the area of law enforcement. States should also ensure the adoption and periodical revision of guidelines and codes of conduct that companies must observe in the programming, use and commercialization of algorithms that may lead to racial discrimination, and in general any form of discrimination likely to be in violation of the Convention.

64. States should adopt regulation ensuring that public sector bodies, private business enterprises and other relevant organizations, in the process of developing, learning, marketing and using algorithms: a) comply with the principle of equality and non-discrimination and to respect human rights in general in line with the 2011 Guiding Principles on Business and Human Rights (Guiding Principles 1, 2, 3, 11 and 24); b) respect the *precautionary* principle, and any other administrative or legislative measure, enacted to ensure transparency; c) disclose publicly if law enforcement has access to private data of individuals; d) avoid causing *disparate* or disproportionate impact on the social groups protected by the Convention.

65. States should ensure that all instances of algorithmic bias are duly investigated and sanctioned.

66. States should ensure that companies that are developing, selling or operating algorithmic profiling systems for law enforcement purposes have the responsibility to involve individuals from multiple disciplines such as sociology, political science, computer science and law to define the risks and to ensure respect for human rights. As part of fulfilling this responsibility, States should encourage companies to carry out human rights due diligence processes, which entail: a) conducting human rights impact assessments to identify and assess any actual or potentially adverse human rights impacts; b) integrating those assessments and taking appropriate action to prevent and mitigate adverse human rights impacts that have been identified; c) tracking the effectiveness of their efforts and d) reporting formally on how they have addressed their human rights responsibilities.<sup>48</sup>

67. In the process of identifying, assessing, preventing, and mitigating adverse human rights impacts, companies should pay particular attention to the data-related factors outlined above in paragraph 27. The selection of training data and the design of their models should be done in a way that prevents discriminatory outcomes and other adverse impacts on human rights. Moreover, companies should pursue diversity, equity, and other means of inclusion in the workforce developing algorithmic profiling systems. Companies should also be open to independent third-party audits of their algorithmic profiling systems.<sup>49</sup> 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 the planned or foreseeable use by a State, private sector actors should not sell or deploy an algorithmic profiling system.

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

69. Human rights bodies, States, national human rights institutions and civil society organizations should carry out studies, disseminate results and good practices on effective measures addressing racial biases derived from artificial intelligence, including those related to the human rights compliance and ethical aspects of machine learning and the relevant criteria in terms of interpretation or transparency in the processes of programming and

<sup>48</sup> UN Guiding Principles on Business and Human Rights, principles 17-21; A/HRC/39/29, para 45; see also The Toronto Declaration: Protecting the right to equality and non-discrimination in machine learning systems, available at [https://www.accessnow.org/cms/assets/uploads/2018/08/The-Toronto-Declaration\\_ENG\\_08-2018.pdf](https://www.accessnow.org/cms/assets/uploads/2018/08/The-Toronto-Declaration_ENG_08-2018.pdf).

<sup>49</sup> The Toronto Declaration: Protecting the right to equality and non-discrimination in machine learning systems, available at [https://www.accessnow.org/cms/assets/uploads/2018/08/The-Toronto-Declaration\\_ENG\\_08-2018.pdf](https://www.accessnow.org/cms/assets/uploads/2018/08/The-Toronto-Declaration_ENG_08-2018.pdf).

training of the algorithms, amenable to observation under the prism of the International Convention on the Elimination of All Forms of Racial Discrimination.

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