

Forum on Minority Issues

Discrimination in the Criminal Justice System Legal Framework and Key Concepts

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Chairperson,

I want to thank you for the opportunity to speak today about the international Legal Framework relevant to the Forum's discussion of racial discrimination in national justice systems, institutions that are granted the enormous power and discretion to criminalize and punish with the imprimatur of the State. In every country, no matter what differences there might be in legal systems and cultural practices, this is awesome power.

And, as the Draft Recommendations we have before us states:

Regardless of the set of laws of a particular State is applicable for the criminal justice system or the procedure followed (adversarial, inquisitorial or combined), international law requires States to ensure that all individuals within their jurisdiction benefit from a fundamental basis of rights throughout the process: the right to a fair trial by a competent, independent and impartial court established by law, and the right to legal aid; the presumption of innocence; the principle of legality and non-retroactivity of more stringent criminal laws; the principle of double jeopardy; the prohibition of torture and cruel, inhuman or degrading treatment, and the inadmissibility of confessions obtained by torture or the use of cruel, inhuman or degrading treatment; and the right to liberty and security of person, the prohibition of imprisonment for civil debt, and the due process required to protect these rights. A/HRC/FMI/2015/

The fundamental rights to non-discrimination and to equal treatment are so foundational to the international human rights legal architecture that it is recognized as a peremptory norm of the highest order and it is repeated like a mantra in all human rights treaties, consensus based Declarations and documents that elaborate aspects of human rights soft law. With respect to the duty of non-discrimination in the administration of justice, international law is clear starting with the Universal Declaration, the International Covenant on Civil and Political Rights, the International Convention Against Racial Discrimination (ICERD), the Convention against Torture along with other core treaties and standards.¹

¹ See also paragraph 25 of the declaration adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, in 2001, which expressed "profound repudiation of the racism, racial discrimination, xenophobia and related intolerance that persist in some States in the functioning

In its General Recommendation No.31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, CERD outlines a number of factual indicators the presence of which should be taken by States to be alarm signals warning States that serious and urgent steps should be taken to address discrimination in the criminal justice system and in the larger society. Those warning signals include: the number of acts of violence committed by State officials against minority group members; low number of prosecutions relating to those acts of violence; the disproportionately high number of reported petty offences committed by minority group members; the percentage of minorities in prison or administrative detention; the disproportionately harsh sentences imposed on minorities; the insufficient representation of minorities in police, judges, jurors and other decision makers in the criminal justice system, and the insufficient data collections that would reveal the disparities.

General Recommendation No. 31 also details specific strategies that States can take to prevent violations of the Convention in the functioning of their criminal justice systems.

And since that Recommendation was adopted in 2005, CERD has criticised countries on every continent, in every region of the world for practices of law enforcement personnel which violate the rights of racial minorities. CERD has called on States to investigate and prosecute law enforcement officers who commit racially biased acts under the cover of enforcing law and order and to make those unlawful acts subject to increased penalties as aggravated offenses or hate crimes. Additionally, CERD has called on States to ensure that victims of police abuses are afforded remedies that are effective, independent and impartial and that victims receive fair and proper compensation.²

of the penal system and in the application of the law, as well as in the actions and attitudes of institutions and individuals responsible for law enforcement, especially where this has contributed to certain groups being overrepresented among persons under detention or imprisoned”

² For example: (Austria, 2012) reports of **racial profiling and the use of stops and searches (stop and frisk) of persons of ethnicities other than the majority.** the committee is further concerned at the failure by the state party to **adequately prosecute and punish law enforcement personnel who commit offences** against people with migration backgrounds and fail to provide equal protection under the law, as well as the failure to prosecute many violations of the prohibition of racial discrimination, considering them “petty offences” (arts. 2, 4, 5 and 6).

(Russian Federation, 2013) (a) ensure that the law on police is effectively implemented and **that appropriate legal measures are taken against law enforcement officials for unlawful conduct based on racially discriminatory grounds.**

(Ireland, 2011) c) reports that many non-irish people are subjected to police stops, and are required to produce identity cards, which practice has the potential to perpetuate racist incidents and the profiling of individuals on the basis of their race and colour (arts. 2, 3 and 6).

(Thailand, 2012) the discriminatory impact of the application of the special laws in force in the southern border provinces, including reports of identity checks and **arrests carried out on the basis of racial profiling, as well as reports of torture and enforced disappearance** of malayu thais.

(Panama, 2012) r) pay particular attention to the conditions of imprisonment of the large number of afro-panamanians deprived of their liberty

r) **to ensure that remedies are effective, independent and impartial and that victims receive fair and proper compensation**

r) to investigate and punish the practice of racial profiling used by the police against the population of african descent.

The Committee has recognized that it is critically important to understand the structural nature of racial discrimination. The Committee understands that particularly in societies where racial prejudice has been endemic over many eras, it becomes self-perpetuating in the social institutions that determine economic survival and social advancement. Discrimination, then, takes on a life of its own separate from any individual's personal bias, thereby allowing the realities of racism to sink below the level of conscious thought and intent.

CERD has called for robust special measures and affirmative action programs to be instituted particularly in situations of deeply engrained institutional/structural racism in order to short circuit and overcome the self-serving definitions of merit that often operate within such institutions to justify positions of privilege.³

This key understanding about the structural nature of racial inequality must be central to fashioning remedies. It is essential that States have comprehensive anti-discrimination legislation and strong enforcement institutions with procedures that can be initiated by victims and their representatives. Additionally, there needs to be a comprehensive approach that recognizes the importance of tackling legal regimes, policies and practices that have negative disparate impacts on communities disadvantaged by racial discrimination, regardless of proof that those policies were intended to create harm.

CERD has also recognized how the criminal justice system in multi-racial societies can be seen as the instrument of the majority community's power to marginalize minority communities. The nature of police operations then, as the point of first contact between minority communities and the penal system, is the point at which that power is most forcefully realized.

For example, CERD has acknowledged how legalizing or legitimating racial profiling authorizes police to engage minority community members with little or no legal justification. Stop and Frisk policies, Broken Windows Policing Practices and aggressive policing of petty offenses can radically increase the number of contacts between minorities and police. As one scholar, Devon Carbado of UCLA Law School has concluded, in racially charged societies, "The frequency of

(Ukraine, 2011) **the dismissive attitudes and reluctance to accept the racist or discriminatory nature of hate crimes by the law enforcement authorities** as well as the repeated incidents of ethnic and racial profiling by the police, resulting in a majority of the reported hate crimes remaining unanswered (art. 4 (a)).

³ The Committee has demonstrated its understanding of structural discrimination in its General Recommendation on Special Measures and numerous Concluding Observations on country reports.

these engagements inscribe black people as presumptively suspect, communicates the idea that black lives do not matter, and exposes them to the possibility of police violence.”⁴

CERD has also acknowledged the pervasive anti-Black prejudice that feeds and is equally fed by history and structural impediments in a vicious cycle that perpetuates vulnerability, stereotypes and stigma. Poverty is both a cause and a consequence of this cycle of rejection and despair.

In its General recommendation No. 34 adopted by CERD in 2011 on racial discrimination against people of African descent, the UN Committee on the Elimination of Racial Discrimination recognized that:

“6. Racism and structural discrimination against people of African descent, rooted in the infamous regime of slavery, are evident in the situations of inequality affecting them and reflected, *inter alia*, in the following domains: their grouping, together with indigenous peoples, among the poorest of the poor; their low rate of participation and representation in political and institutional decision-making processes; additional difficulties they face in access to and completion and quality of education, which results in the transmission of poverty from generation to generation; inequality in access to the labour market; limited social recognition and valuation of their ethnic and cultural diversity; and a disproportionate presence in prison populations.”

CERD has called on States to:

“39. Take measures to prevent the use of illegal force, torture, inhuman or degrading treatment or discrimination by the police or other law enforcement agencies and officials against people of African descent, especially in connection with arrest and detention, and ensure that people of African descent are not victims of practices of racial or ethnic profiling.”

Let’s be clear, in deeply divided multi-racial communities, the problem is not one of policing methodologies *per se*, but rather, the problem is racism.

The issue is one of explicit and implicit stereotypes of people, of all people of the minority community, as being poor and therefore angry and violent. Consider this scenario: Patterns of poverty, racially segregated residential areas and school districts often create enormous social distance between the daily lives of minority communities and others. Members of the majority don’t go to school with minorities, don’t live near them, or shop where they do. There may be a

⁴ Unpublished paper by Devon W. Carbado, *The Legalization of Racial Profiling: Setting the Stage for Police Violence*.

disproportionately high number of minorities in prison. That may send a message that all minorities are in some way criminal elements. In some situations police may feel that they have been given the mandate by the larger society to “enforce and control” minorities rather than to “protect and serve” those communities. So, police may enter minority communities with a mindset as if they are entering some kind of war zone. If they are armed with lethal weapons, then violence is not only a high possibility; violence is a probability.

Regrettably, the reality is that in some deeply divided multi-racial societies, the systems meant to administer justice are being used instead to address the fall-out when policies fail to fully integrate all sectors of the population into the full economic, education and social benefits of the nation. When we talk about the school to prison pipeline, we are talking about the massive failure of an education system, social supports and a national economy, that has relied on prisons to compensate for failures in other sectors. The outcome is one of the largest prison populations in the world which functions as a costly warehouse for what the majority may consider to be “surplus people.”

Chairperson,

We are here today and tomorrow to discuss safeguards and approaches that would prevent scenarios of violence and imprisonment such as the ones I have just described. I look forward to a candid and constructive discussion.

Thank you Chairperson,