

# Racial Profiling in Germany: Is Lecraft vs. Spain applicable?

by [Tim Hoff](#), [Laura Lambert](#)



The fundamental "incompatibility between democracy and racism" was asserted by the U.N. High Commissioner for Human Rights in 2003 in condemning, inter alia, state activities based on racial discrimination (UNHCHR 2003). However, one particular form of racial discrimination by the nation-state has recently stirred up public debate in Europe. Racial or ethnic profiling has been condemned by many NGOs as a police tactic based on the suspicion and prosecution of people according to their 'racial', 'ethnic' or 'national' origin (KOP Berlin). While racial profiling is clearly prohibited by law in many U.S. states, in Europe there is so far no direct legal proscription and only very limited court activity. However, one case was brought to the U.N. Human Rights Committee in 2009 as the first international jurisdiction condemning racial profiling. In contrast, a German court has just declared racial profiling to be legal. What can be learned from the international law on this question, and could it be applied to the German situation? In the following discussion, we will elaborate the assumption that an individual complaint on the basis of the International Covenant on Civil and Political Rights (ICCPR) will be helpful to combating racial profiling in Germany.

## U.N. Human Rights Conventions and Avenues for Complaints

The U.N. Human Rights Committee basically offers three complaint mechanisms for human rights abuses:

Regarding the specific situation of racial profiling, the best option seems to be to file individual complaints under the international human rights treaties. Once a State party has made a relevant declaration under one of the seven international human rights treaties, individuals can complain about violations of that treaty by the State party to the relevant human rights treaty body. The latter then decides if there has been a violation, and may oblige the State party to provide an effective remedy to the individual. In order to prevent similar violations, the treaty bodies can also provide proactive guidelines (OHCHR 2008:155-161); these would appear to be useful considering that racial profiling is a European-wide problem.

The second complaint mechanism - the Individual Communications under special procedures of the Human Rights Council - is not legally binding. Therefore, the states could easily ignore what is being said on the UN level about racial profiling.

The third complaint mechanism - the Human Rights Council complaint procedure - must refer to a larger number of people (ibid.), which would be very hard to prove in the case of racial profiling.

In light of these facts, efforts to combat racial profiling on the UN level would be best served by bringing a single case as an individual complaint to one of the treaty bodies.

## Racial Profiling in UN Ruling: Lecraft vs. Spain

The UN Human Rights System does offer one substantial ruling on the question of racial profiling

(CCPR/C/96/D/1493/2006): In 1992, Rosalind Williams Lecraft, a Spanish citizen of African-American descent, was singled out for an identity check by a National Police officer at the Spanish railway station Valladolid. When asked to explain the reasons for the identity check, the police officer stated that he was obliged to "check the identity of people like her" to control undocumented migration and that he was following instructions from the Ministry of the Interior to control "'coloured people' in particula" (ibid.).

The following day, Rosalind Lecraft filed a complaint at the local police station, initiating litigation that would last for years. In her complaint, she alleges that she was subject to direct racial discrimination: The reason for her being singled out was that she belonged to a racial group not commonly associated with Spanish nationality, whereas, she argues, skin colour cannot be a viable indicator of nationality. Therefore, selecting her for an identity check based on skin colour meant that she was treated less favourably than other Spanish citizens, e.g. her white husband who was accompanying her (ibid.).

In a stark rejection of this point of view, the Spanish Ministry of Interior and all Spanish courts dismissed the accusation of (direct) racial discrimination. Following the Ministry of Interior and the Constitutional Court, a specific order obliging police officers to conduct checks based on race did not exist, and would be unconstitutional. However, the National High Court ruled that in order to control undocumented migration - especially from sub-Saharan Africa - and to maintain security, police officers are to identify "foreigners"; this may be applied proportionately to black subjects. Moreover, the possibility of indirect racial discrimination may be excluded since the police officer did not show signs of holding racist stereotypes (ibid.)

In 2006, Rosalind Lecraft found legal support from several NGOs and went to the U.N. Human Rights Committee to file an individual complaint against Spain on the basis of the Optional Protocol, accessed by the latter in 1985.

In June 2009, the Committee argued explicitly in favour of Rosalind Lecraft. Their logic was that identity checks to curb undocumented migration may be an appropriate measure, but they are not by themselves an indicator of illegal presence in a country, and should not target only people with specific physical or ethnic characteristics. Failing to do so compromises the dignity of the person concerned, and may help aggravate racism. In the case of Lecraft, 'race' was the "decisive factor in her being suspected of unlawful conduct." Interestingly, there is no requirement for a written order expressly requiring identity checks based on skin colour; the police officer merely used 'race' as an explanation for the identity check, and the courts subsequently supported it as a criterion. However, this does not imply that every differential treatment is discriminatory, as long as the criteria are reasonable, objective and legitimate under the ICCPR.

More precisely, the identity check of Rosalind Lecraft violated the right to freedom from legal discrimination on the basis of race (§ 26), which requires the Spanish state to provide effective remedy (§ 2.3). Following from this, Spain had to offer a public apology and, more importantly, was obliged "to take all necessary steps to ensure that its officials do not repeat the kind of acts observed in this case" (ibid.). According to Amnesty International, Lecraft has yet to receive remedy, and the Spanish state has not taken measures to end racial profiling consonant with the decision of the U.N. Human Rights Committee (Amnesty International 2011).

To sum up, Lecraft vs. Spain is a clear test case for efforts to combat racial profiling at the international level. Meanwhile, racial profiling has just been "legalized" by a German court. This will be documented below.

## **Racial Profiling in Germany**

### **Former Regulations**

In 2011, the German government found the differential treatment of people according to their 'race', place of origin or religion to be "incompatible" with the role of police in a democratic constitutional state (Deutscher Bundestag 2011: 1). Therefore, no written order or instructions for racial profiling are included in federal police law (ibid.).

However, the police were granted several instruments to make identity checks easier in specific circumstances. For instance, federal police are allowed to check trains, airports, cross-border traffic and anyone in an area less than 30 km from a border without a given pretext. Also, Berlin police officers can spontaneously declare any location a "dangerous place," which enables them to do identity checks. NGOs have collected data showing that these rulings produce racial profiling, even if it is not directly stipulated as such in legal documents (KOP Berlin).

### **Train case and outcome**

In December 2010, in situation similar to the one presented above, a 25 year old student from Kassel became the victim of racial profiling by German federal police officers. While on a train to Frankfurt/Main, the young male was approached by two officers who asked for his ID because he "appeared" to be "foreign." The student, who was familiar with the experience of being the only one checked, told the police that he had no papers on him, which led to a verbal exchange which ending with his being brought to the local police station. Although his German citizenship was eventually proven, the incident resulted in a defamation suit in which the policemen accused the student of insulting them verbally. In that lawsuit, one officer argued that the reason why the young male had been subject to a search in the first place was his outward appearance. The policeman said that he was looking for people who might be living in Germany without (the right) papers and that he preferred to check "foreign-appearing" people. He also stated that skin color is one such criterion. The student tried to achieve an official statement by the administrative court (Verwaltungsgericht, VG) Koblenz that the policemen's practice was against the law, but he lost (5 K 1026/11.KO).

The court in Koblenz stated\*\* that this practice was and is in accordance with the law. The federal police law legitimizes random ID spotchecks of people within a 30 km proximity to the border in order to prevent irregular migration (§ 23 Abs. 1 Nr. 3 BPolG). It is also lawful to select these people based on their outward appearance, the court ruled - even if there is no grounds for suspicion or crime in progress. Due to their limited numbers, the police are limited to spotchecks and applying certain criteria such as outward appearance. Their "relevant experience in border policing" prevents an arbitrary use of that criteria, the court argued.

NGOs were outraged by this first decision, and are very happy that it is being appealed at the moment. "International and European bodies like the UN Human Rights Committee and the European Court of Human Rights, as well as the European Union Agency for Fundamental Rights, have all clearly determined that record checks and identity checks that are exclusively or largely based on criteria like a person's ethnic origin or 'skin color' violate the ban on racial discrimination," wrote the German Institute for Human Rights in a statement commenting on the court case (vgl. Spiegel 2012). They state further:

*"So the real problem here is the law. If you allow checks without suspicion in order to fight illegal migration, then you also automatically create a discriminatory situation. This discrimination is particularly directed at those who have legal residency here or have even long been German citizens. With each check, they will be reminded once again that they don't actually belong here and, at the very least, have an appearance that leads police to imagine they are illegal immigrants...Here, the seeds of distrust and racism are permanently sown. Such laws only serve to hinder integration and should be eliminated."* (Spiegel 2012)

## **Is the Spanish Case Applicable to Germany?**

Comparing the Spanish to the German case, some important similarities can be found.

In 1993, Germany like Spain accessed the Optional Protocol of the ICCPR; thus, the country has opened up possibilities for making individual complaints to the U.N. Human Rights Committee (Optional Protocol to ICCPR). Also, in both cases, EU citizens were stopped in a train or at a railway station for the purpose of immigration control.

Consequently, an individual complaint on the basis of the ICCPR is very likely to be successful. However, even before the German case reaches the UN level, a national decision condemning racial profiling is very likely in this instance. It is possible that the ongoing appeal against the decision made in Koblenz will be successful, putting an end to the litigation. Here, the German Constitutional Court should condemn racial profiling based on the article proscribing racial discrimination (Art. 3.3 GG).

Nevertheless, a UN decision could be helpful in this context: the human rights treaty bodies can provide proactive guidelines to prevent racial profiling. The systematic assigning of responsibilities would probably be necessary to efficiently combat the hard-to-grasp problem of racial profiling. Even if there is no way of enforcing them beyond diplomatic means, this would still place international pressure on the state and give a clearer picture of how racial profiling is taking place there.

The guidelines could include:

- reparation for the affected person;
- review laws allowing for identity checks in border regions and "dangerous places";
- abolishment of identity checks in public transport;
- abolishment of EU carrier sanctions;
- enhanced human rights education in police training;
- introduction of a quota for minorities in public services;
- research on structural racism;
- public apology from the German state.

If something can be learned from the Spanish case, it is that even clearer and more legally binding orders from the U.N. Human Rights Committee are needed.

However, it should be added that it remains highly problematic to fight racial profiling exclusively on a legal basis, since only cases involving citizens or residents can be analysed. Certainly, refugees and undocumented migrants are much more affected by racial profiling and discrimination. Consequently, the legal battle against racial profiling ends up reproducing the same social hierarchy created by immigration laws. In that sense, it would be helpful to develop a UN complaint mechanism which does not necessarily need to pass through all national levels in order to strengthen the rights of legally insecure migrants.

Also, it should be noted that in no case has racial profiling been based upon a written order to policemen. Rather, the importance of everyday racism and racist ideologies in perpetuating such profiling must be underlined. It is the interaction of governmental strategies and racist mindsets which keeps racial discrimination alive, and which makes it difficult to address racial profiling since the law is seemingly neutral. Effective policies in this direction, therefore, also needs to include education and cultural sensitization on a broader scale.

\*\* See <http://www.anwaltskanzlei-adam.de/index.php?sonderseite-vg-koblenz-dokumente> and <http://www.lawblog.de/index.php/archives/2012/03/27/der-neger-ist-verdchtig/> for more legal information on the case.

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