# **Observations of the Center for Constitutional Rights (CCR) on Draft General recommendation No. 36 on Preventing and Combating Racial Profiling**

The Center for Constitutional Rights (CCR) welcomes the opportunity to provide input as to the UN International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) Committee Draft General Recommendation No. 36.

We are dedicated to supporting social justice movements in their fight for liberation and the defense of their civil and human rights. Through litigation, advocacy, and strategic communications, CCR works to dismantle systems of oppression and build power in communities under threat. CCR has a strong practice of engaging with international human rights bodies to highlight the cases we work on and to draw attention to human rights violations.[[1]](#footnote-1)

CCR commends the Committee on the Elimination of Racial Discrimination (“the Committee”) on the Draft General Recommendation No. 36 (“Recommendation”) with respect to its broad definition of racial profiling.[[2]](#footnote-2) Additionally, CCR supports the attention paid to “terrorist-profiling practices,”[[3]](#footnote-3) collateral immigration consequences as a byproduct of profiling,[[4]](#footnote-4) the humiliation and counterproductivity of racial profiling as a law enforcement tool,[[5]](#footnote-5) the dangers of racial bias in artificial intelligence (“A.I.”),[[6]](#footnote-6) and open engagement with affected communities on police practices.[[7]](#footnote-7)

The following submission focuses on a range of issues relevant to this Recommendation, which we believe may benefit the Committee in their deliberations in finalizing the Recommendation. Specifically, CCR recommends that the Committee (i) recognize the particular vulnerabilities experienced by immigrants and expressly reference religion or perceived religion as a common ground of profiling; (ii) recommend localities adopt a transparent, accountable, and independent oversight mechanism for the police; (iii) include the term “predictive policing” in its discussion of A.I and condemn the discriminatory use of criminal and gang databases; and (iv) condemn discrimination on the basis of gender identity, expression, and sexual orientation. We also ask the Committee to encourage States to embrace a robust anti-discrimination framework that considers discriminatory impact rather than just discriminatory intent.

**(i) Refugees, Immigrants, and Persons Living without Status**

In **paragraph 16**, the Recommendation rightly condemns discrimination on the basis of national origin. CCR encourages the Committee to recognize the **particular vulnerabilities** **of refugees, immigrants, and persons without legal status** with regards to discriminatory profiling.The Trump Administration’s vitriolic speech against immigrants is particularly offensive, but the persecution and discrimination of migrants knows no borders. Although the current administration’s tactics are obviously motivated by animus against immigrants, foster white supremacy, and fly in the face of our Constitution and international obligations, these tactics also build on discrimination through other means. The practices of police violence against migrants are aided by impunity, deportation mandates and mechanisms, the unlawful use of surveillance by law enforcement, the conflation of one’s status with perceived criminality, and other discriminatory practices years in the making.

The most vulnerable immigrant communities tend to bear the heaviest burden of discriminatory policies. For instance, the so-called “Muslim Ban” categorically bars immigrant visas originating from Yemen, Iran, Somalia, Syria, and Libya, and has created a family separation crisis which has been broadly condemned by US rights advocates. The bar against immigration from Yemen coincides with what the U.N. Secretary-General has called “the world’s worst humanitarian crisis.”[[8]](#footnote-8) In 2018, CCR filed *Alobahy v. Trump*, a federal lawsuit over the State Department’s refusal to issue visas for Yemeni spouses and children of legal residents and citizens that had already been approved prior to the Muslim Ban.[[9]](#footnote-9) On March 4, 2019, our Plaintiffs ended their lawsuit after being provided visas. However, qualified immigrants whose visas were not approved in time still languish in their countries of origin for no reason but their nationality and religion. Simply put, the Muslim Ban codifies Islamophobia and xenophobia. Such practices should be considered by the Committee as governments across the world embrace similarly repressive responses to migration crises at their borders. To combat such efforts depriving religious minorities of due process and statutory entitlements, CCR encourages the Committee to include **religion** and **perceived religion** in its definition of racial profiling in **paragraph 16.** The Committee should be clear in its recognition that while religion and race are often linked, discrimination can occur on each of these grounds independently.

CCR also encourages the Committee to include language condemning **surveillance and targeting of communities at their places of work and worship** which have disproportionately targeted Muslim communities in the U.S.Such wide-scale enforcement does away with the Constitutional requirement for particularized suspicion before arrest, and criminalizes an entire segment of society based solely on their religion. Following September 11, 2001, the New York City Police Department (NYPD) conducted an illegal surveillance program targeting American Muslims living in New York and beyond, gathering information about their places of worship, organizational associations, businesses, and schools, all without suspicion of wrongdoing.[[10]](#footnote-10) While we are delighted that the NYPD has settled with our clients in one of the cases challenging this program[[11]](#footnote-11), we caution that the conflation of identity with criminality must be strongly condemned.

**(ii) Accountability and Transparency**

CCR encourages the Committee to **elevate transparency and accountability in all aspects of policing, surveillance, and prosecution**, especially where issues of national security and terrorism are concerned, and condemn States who hide behind so-called “state secrets privilege” in order to dodge accountability. While we welcome the need for reporting in **paragraph 31,** it is often up to civil society in the U.S. to compel law enforcement agencies to turn over data on racial profiling. CCR would further encourage the Committee to request that States collect data and report on the use of force by police and deaths at the hands of police, as well as disciplinary outcomes reporting.[[12]](#footnote-12) [[13]](#footnote-13) The Committee should recommend states adopt a **procedural mechanism** **for transparency** **and accountability** to facilitate civilian access to government documents and to allow policing guidelines, criminal profiles, and arrest criteria, be made available to the general public. Further to the goal of transparency, in **paragraph 34** it should be made clear that an **independent complaints mechanism** should be truly independent of the police.

CCR successfully challenged the NYPD’s discriminatory and abusive policing practices in *Floyd et al. v. City of New York*.[[14]](#footnote-14) In a groundbreaking decision, a federal judge found the NYPD liable for a pattern and practice of racial profiling and unconstitutional stops,[[15]](#footnote-15) and the NYPD is currently under a federal monitorship to oversee court-ordered reforms to address its biased policing. While the court-appointed monitor is mandated to publicly report every six months as to progress, most of what occurs within the case and the pre-development of pending reforms is shrouded from the public until finalized. As recently as June 2019, the Office of the Inspector General for the NYPD issued a report finding that the NYPD failed to substantiate a single biased policing complaint since starting to track and investigate such matters.[[16]](#footnote-16) This report underscores the necessity of independent oversight mechanisms, and illustrates how reforms do not matter unless they are actually enforced. Law enforcement agencies must be held accountable when they fail to uphold policies that prohibit discrimination. Thus, it is crucial that the Committee add to **paragraphs 31-33** the explicit role of governments and law enforcement agencies to provide **public access to information** about policing practices and be compelled to do so regularly. As evidenced by the June 2019 report, without compulsory reporting, police departments will fail to implement racial profiling prohibitions.

Regarding the Committee’s contemplation of Accountability, CCR believes there should be a stronger discussion of the affirmative roles of government agencies. In *Floyd*, we successfully advocated for an official community input process, which after a series of detailed activities with impacted New Yorkers, identified additional reforms that the NYPD should be ordered to comply with.[[17]](#footnote-17) Further, CCR notes that the Committee’s recommendations for legislative measures[[18]](#footnote-18) should also cover local and municipal regulations governing the police, and should include proper **legal remedies** for racial profiling by the State. Specifically, **paragraph 32** should be amended to demand that localities oblige managers and supervisors to intervene strongly, effectively, and meaningfully to address acts of racial profiling by their employees. Supervisors often play a critical role in addressing misconduct and implementing effective disciplinary measures to correct and address problematic behaviors by their subordinates.[[19]](#footnote-19)

While we welcome the inclusion of the robust role of **civil society** in **paragraphs 33-34**,it is absolutely crucial that the Committee call on States to **affirmatively provide this information.**  Moreover, law enforcement can illegally target anti-discrimination and anti-police violence activists and use political activism as a proxy for suspicion. We have recently documented tactics of law enforcement to surveil so-called “Black Identity Extremists.”[[20]](#footnote-20) We encourage the Committee to add a paragraph calling on States to ensure appropriate measures are implemented to ensure both the **physical safety of activists** as well as the protection of their constitutional and human rights.

**(iii) Predictive Policing & Criminal and Gang Databases**

CCR welcomes the Committee’s reference in **paragraphs 21-24** to “automated decision making, predictive analysis, and the use of algorithms to predict and combat crime,” and would encourage the Committee adopt the accepted moniker of “**predictive policing,**” and include reference to **criminal and gang databases**. Further to the Committee’s appropriately skeptical view of A.I.,[[21]](#footnote-21) the Recommendation should also condemn the criminalization of peoples’ identities through the use by law enforcement agencies of **criminal and gang databases**.

CCR advocates against the use of gang databases which have supplanted discriminatory street policing with discriminatory A.I. Gang databases do not require even a suspicion of criminality and are often not subject to judicial review. These gang databases are striking examples of the harm done when layered grounds of discriminatory profiling intersect. In New York City, the NYPD maintains a database of “local street gangs” and relies on this racially discriminatory system to conduct military-style gang takedowns and to surveil community members. Those in the database face increased police surveillance, higher bail if detained, elevated charges, increased aggression during police encounters, and, for people of color who are also immigrants, many also face the threat of deportation. The database is 99 percent people of color.[[22]](#footnote-22) [[23]](#footnote-23)

The proliferation of predictive and database-driven policing is particularly worrying in view of the absence of any transparent oversight or accountability mechanism. The NYPD is only one of many police departments employing gang databases, and has not yet publicly disclosed whether there is any way to challenge inclusion in the database.[[24]](#footnote-24) Further, a state audit in California found that the “CalGang Database” included 42 people younger than one-year-old, 28 of whom had “admitted” to being gang members[[25]](#footnote-25) and that 90% of the 90,000 people in the database were men of color.[[26]](#footnote-26) In Chicago’s gang database, individuals can be included on the basis of suspicion or association rather than actualcriminal activity. Last year, Portland became the first city to abolish its gang list entirely after a 2016 analysis in the *Oregonian* revealed that African Americans made up just 7.5 percent of the city’s population, yet comprised 64 percent of the gang list. Meanwhile, left off the list was Jeremy Christian, a known white supremacist, who went on to kill two men who tried to stop him from attacking a pair of women who appeared to be Muslim.[[27]](#footnote-27) The clearly discriminatory effect of these databases, coupled with the lack of individualized suspicion, should be strongly condemned by the Committee in its discussion of A.I. bias.

The ability to challenge such transparently discriminatory profiling databases is difficult under U.S. law. For a finding of unlawful discrimination, there must be a clear intent to discriminate, not merely collateral discrimination incident to a legitimate government purpose. [[28]](#footnote-28) This legal standard sets an untenably high bar. In accordance with past UN CERD guidance, we ask the Committee to adopt language in **paragraphs 26-27** encouraging States to adopt legislative measures that prohibit *de facto* discrimination rather than requiring a finding of discriminatory intent.[[29]](#footnote-29)

**(iv) Actual or Perceived Gender Identity, Gender Expression, and Sexual Orientation**

At **paragraph 17**, the Committee refers to discrimination the basis of sex, gender, age, or religion or “other prohibited or intersecting grounds.” While this definition is broad, we believe a properly expansive view of the mandate would include consideration of the impact of racial profiling as it intersects with **gender identity, gender expression,** and **sexual orientation**. We would also urge the Committee to change “addressed” to “eradicated” to mimic the strength of tone found elsewhere in the Recommendation. This builds on the recognition of such protected categories by the Independent Expert's Report to the Human Rights Committee [[30]](#footnote-30) and would position the Committee to consider the impact of government policies and practices on LGBTQIA+ communities who face a particularly targeted and intersectional policy impact.

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We thank you for your consideration of our submission.

1. CCR has played a critical role during periodic reviews of the U.S. government by UN treaty bodies, including those that review the U.S.’ compliance with the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), CERD, and during the cumulative Universal Periodic Review (UPR). Additionally, CCR advocates before the Inter-American Commission on Human Rights. Learn more at [www.ccrjustice.org](http://www.ccrjustice.org). [↑](#footnote-ref-1)
2. UN Committee on the Elimination of Racial Discrimination, Draft General Recommendation n° 36 on preventing and combating racial profiling, 14 May 2019, UN Doc. CERD/C/GC/36, at ¶ 16, 19. Available at <https://www.ohchr.org/EN/HRBodies/CERD/Pages/GC36.aspx>. [↑](#footnote-ref-2)
3. *Id.*, ¶ 9. [↑](#footnote-ref-3)
4. *Id.*, ¶ 16. [↑](#footnote-ref-4)
5. *Id.*, ¶ 18, 20. [↑](#footnote-ref-5)
6. *Id.*, ¶ 21-24; 35-40. [↑](#footnote-ref-6)
7. *Id.*, ¶ 30. [↑](#footnote-ref-7)
8. Antonio Guterres, *Yemen the World’s Worst Humanitarian Crisis, Says UN Chief*, Inter Press Service (Apr. 4, 2018). Available at <http://www.ipsnews.net/2018/04/yemen-worlds-worst-humanitarian-crisis-says-un-chief/>. [↑](#footnote-ref-8)
9. *Alobahy v. Trump*. Available at <https://ccrjustice.org/Alobahy>. [↑](#footnote-ref-9)
10. In all, the NYPD surveilled over 250 mosques and hundreds of Muslim organizations, student groups, and businesses. *See* NGO Shadow Report before the United Nations Committee on the Elimination of Racial Discrimination, *Suspicionless Surveillance of Muslim Communities and the Increased Use and Abuse of Muslim Informants*, 85th Session, Geneva, 11-29 August 2014. Available at <https://ccrjustice.org/sites/default/files/assets/files/CCR_CERD_ShadowReport_Surveillance-20140708.pdf>. [↑](#footnote-ref-10)
11. *Hassan v. City of New York*. Available at <https://ccrjustice.org/home/what-we-do/our-cases/hassan-v-city-new-york>. [↑](#footnote-ref-11)
12. This outcome reporting would cover a wide range of misconduct and could be aggregated by specific unit or command of the law enforcement agency, and include information on the civilian reporting could include Description of Misconduct; Assignment Precinct or Unit of Member(s) of Service as well as Rank; Recommended Penalty; Final Penalty; and whether no disciplinary action was taken. [↑](#footnote-ref-12)
13. *See also generally* Draft comment quoting the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, [A/HRC/29/46](https://undocs.org/A/HRC/29/46), ¶ 2. [↑](#footnote-ref-13)
14. *Floyd, et al. v. City of New York*. Available at <https://ccrjustice.org/home/what-we-do/our-cases/floyd-et-al-v-city-new-york-et-al>. [↑](#footnote-ref-14)
15. “Landmark Decision: Judge Rules NYPD Stop and Frisk Practices Unconstitutional, Racially Discriminatory,” Press Release, August 12, 2013. Available at <https://ccrjustice.org/home/press-center/press-releases/landmark-decision-judge-rules-nypd-stop-and-frisk-practices>. [↑](#footnote-ref-15)
16. “Independent Investigation by Inspector General Slams NYPD for Continued Biased Policing Six Years After Stop-and-Frisk Trial”. Available at <https://ccrjustice.org/home/press-center/press-releases/independent-investigation-inspector-general-slams-nypd-continued>. [↑](#footnote-ref-16)
17. Learn more about this community input process at [www.ccrjustice.org/floyd-timeline](http://www.ccrjustice.org/floyd-timeline). [↑](#footnote-ref-17)
18. CERD Committee General Recommendation 36 at ¶ 26, 27. [↑](#footnote-ref-18)
19. Ninth Report of the Independent Monitor, *Floyd v. City of New York*, No. 1:08-cv-01034-AT, Dkt # 680-1 at 11-14 (Jan. 11, 2019). *See also* Seventh Report of the Independent Monitor, *Floyd v. City of New York*, No. 1:08-cv-01034-AT, Dkt # 576 at 11-13 (Dec. 13, 2017). [↑](#footnote-ref-19)
20. Learn more from the documents we uncovered at: <https://ccrjustice.org/briefing-guide-color-change-v-fbi-dhs>. [↑](#footnote-ref-20)
21. CERD Committee General Recommendation 36 at ¶ 21-24; 35-40. [↑](#footnote-ref-21)
22. “NYPD Chief of Detectives Dermot Shea… stated that 99 percent of the roughly 17,200 individuals in the NYPD’s gang database are people of color, with 65 percent being African-American.” *See* Nick Rummel, “Groups Demand to See Criteria for NYPD Gang Database, Courthouse News Services, August 8, 2018. Available at <https://www.courthousenews.com/groups-demand-to-see-criteria-for-nypd-gang-database/>. [↑](#footnote-ref-22)
23. CCR and the NAACP Legal Defense and Education Fund filed suit against the NYPD over the department’s failure to provide an accurate and complete response to two separate requests for information on its gang policing tactics. *See* “Civil Rights Groups Sue NYPD Over Failure to Disclose Information on Gang Policing Policies,” Press Release, August 8, 2018. Available at <https://ccrjustice.org/home/press-center/press-releases/civil-rights-groups-sue-nypd-over-failure-disclose-information-gang> ; “NYPD’s ‘Gang’ Policing Tactics,” Press Release, August 9, 2018. Available at <https://www.naacpldf.org/case-issue/nypds-gang-policing-tactics/>. [↑](#footnote-ref-23)
24. *NAACP LDF and CCR v. New York City Police Dep’t*, Memorandum of Law in Support of Verified Petition, August 8, 2018, at 12. Available at <https://www.naacpldf.org/wp-content/uploads/Article-78-Memo-of-Law-ISO-Verified-Petition.pdf>. [↑](#footnote-ref-24)
25. Maureen Cavanaugh, Michael Lipkin, “State Audit Finds Serious Lapses in CalGang Database,” KPBS News, August 16, 2016. Available at <https://www.kpbs.org/news/2016/aug/16/state-audit-finds-serious-lapses-calgang-database/> [↑](#footnote-ref-25)
26. “A routine police stop landed him on California’s gang database. Is it racial profiling?” LA Times, May 9, 2019. Available at <https://www.latimes.com/politics/la-pol-ca-california-gang-database-calgang-criminal-justice-reform-20190509-story.html> [↑](#footnote-ref-26)
27. *See* Emmanuel Felton, “Gang Databases are a Life Sentence for Black and Latino Communities,” Pacific Standard, March 15, 2018. Available at <https://psmag.com/social-justice/gang-databases-life-sentence-for-black-and-latino-communities>. [↑](#footnote-ref-27)
28. *See generally McCleskey v. Kem*p, 481 U.S. 279, 298 (1987) (“For his claim to prevail, McCleskey would have to prove that the [government] enacted or maintained the … statute *because of* an anticipated racially discriminatory effect.”). [↑](#footnote-ref-28)
29. See UN CERD Convention, Article 2, “Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.” <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx> [↑](#footnote-ref-29)
30. RReport of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, [A/HRC/35/36](https://undocs.org/A/HRC/29/46). [↑](#footnote-ref-30)