|  |  |  |  |
| --- | --- | --- | --- |
|  |  | CERD/C/GC/36 | |
|  | **General Recommendation  *(Draft version 10 May 2019)*** | | Distr.: General  14 May 2019  Original: English |

**Committee on the Elimination of Racial Discrimination**

Draft General recommendation No. 36

Preventing and Combating Racial Profiling: A call for contribution by 30 June 2019

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. Participants in the discussion included, in addition to members of the Committee, representatives from permanent missions to the United Nations Office in Geneva, national human rights institutions, non-governmental organizations, academics and interested individuals.
3. 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 States 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.

II. Approach adopted

1. In drafting the recommendation, the Committee has taken account of its extensive practice in combating racial profiling. Key general recommendations of the Committee that address or are relevant to racial profiling include General Recommendation No. 13 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.”[[1]](#footnote-2); General recommendation N° 23 on the rights of indigenous peoples; General Recommendation N° 27 on discrimination against Roma; General recommendation No. 31 which provides guidance to States on national strategies to combat racial discrimination in the criminal justice system[[2]](#footnote-3); and General Recommendation No. 34 on racial discrimination against people of African descent, suggests State parties to “….ensure that people of African descent are not victims of practices of racial or ethnic profiling.”[[3]](#footnote-4)
2. Additionally, several international human rights mechanisms have explicitly highlighted racial profiling as a violation of international human rights law. A 2009 decision by the CCPR was the first decision by a treaty monitoring body directly acknowledging racial profiling as unlawful discrimination (*Williams Lecraft v. Spain*).[[4]](#footnote-5)
3. 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 officers relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity.
4. In his report of 2015, the former Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, indicated that racial and ethnic profiling 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.[[5]](#footnote-6)
5. In 2019, the High Commissioner for Human Rights in the publication on “Preventing and countering racial profiling of people of African descent: Good practices and challenges” mentioned 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 individual was engaged in criminal activity. Racial profiling results in discriminatory decision-making. She 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 practices in many agencies.[[6]](#footnote-7)
6. In his report of 2007, the former 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.[[7]](#footnote-8) He 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.[[8]](#footnote-9)
7. In their concluding observations issued in response to regular reports from States parties to various instruments, treaty bodies provide opportunities to highlight positive and negative developments in the implementation of the treaties and make recommendations for improvement. The Committee on the Elimination of Racial Discrimination and the Human Rights Committee have expressed concerns about the use of racial profiling and recommended that States address the practice.[[9]](#footnote-10)
8. Finally, the recommendation is drafted within the framework and as a contribution to the implementation of the 2030 Agenda for Sustainable Development, with its overarching commitment to “leaving non one behind ”and “reaching the furthers behind first”, which provides critical entry points and opportunities to the Committee’s work particularly on Goal 10 reduce inequality within and among countries and Goal 16 promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

III. Resources of the Convention

1. The identification, prevention and combating of the practice of racial profiling is integral to the achievement of the objectives of the Convention — which is dedicated to the elimination of racial discrimination in all its forms. The practice of racial profiling violates three of the most fundamental principles of human rights: (i) non-discrimination based on race, colour, descent, or national or ethnic origin; (ii) equality before the law and (iii) the guarantee of due process of the law. These principles are the anchors of the Universal Declaration of Human Rights and the Convention. They are also core principles in all human rights treaty and national legal systems. The Committee has made clear that racial profiling violates the prohibition against discrimination.
2. While the term racial profiling is not explicitly used in the Convention, this lack of explicit reference has not impeded the Committee from identifying and naming racial profiling practices and exploring the relationship between racial profiling and the standards of the Convention. The present recommendation focuses on the ensemble of Convention provisions that cumulatively enable the identification of expression that constitutes racial profiling.
3. While article 2 of the Convention has functioned as the principal vehicle for combating racial profiling and incorporates the undertaking by States parties to eliminate racial discrimination, obligations also exist under other articles in the Convention make distinctive contributions towards banning racial profiling. Thus, the due regard clause in article 5 guarantees the right to equality before the law, without racial discrimination in the enjoyment of rights, including to equal protection against racial discrimination. Article 7 highlights the role of “teaching, education, culture and information” in the promotion of interethnic understanding and tolerance. Article 6 focuses on securing effective protection and remedies for victims of racial discrimination and the right to seek “just and adequate reparation or satisfaction” for damage suffered. The provisions include obligations on States to take steps to eliminate discrimination through laws, policies and institutions. The present recommendation focuses in particular on articles 2, 3, 4, 5, 6 and 7 of the Convention.
4. Racial profiling may negatively impact peoples’ enjoyment of a number of other human rights embodied in international treaties, including, by way of example, rights to life, liberty and security; privacy; freedom of movement; freedom of association; protections against arbitrary arrests and other interventions; rights to effective remedy.

IV. Defining and understanding racial profiling

1. Racial profiling is the use, by law enforcement agents, for allegedly supposed reasons of public safety and protection 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 erroneous suspicion that people with such characteristics are prone to engage in or may be involved in criminal activity to guide law enforcement actions, resulting in discriminatory decision-making. Racial profiling may include, for example, stops, identity checks, personal searches, arrests, raids, border and custom checks, home searches, targeting for surveillance, or immigration decisions. These actions may involve law enforcement agents in police, customs, immigration, and national security agencies, and may variously take place in the context of street-policing, anti-terrorism operations, or immigration and border control.[[10]](#footnote-11)
2. The Committee observes that profiling can also be biased on the basis of sex, gender, age, or religion or other prohibited or intersecting grounds. Those practices should be also addressed.

V. Consequences of racial profiling

1. Research indicates that racial profiling has negative effects on the attitudes and wellbeing of the people and communities it targets. [[11]](#footnote-12)[[12]](#footnote-13) [[13]](#footnote-14) Studies have suggested that racial profiling may also be ineffective and counterproductive as a general law enforcement tool. Specifically, research has suggested that people targeted by law enforcement authorities tend to have less trust in those authorities and, as a result, be less willing to cooperate with police, thereby potentially limiting the effectiveness of the latter. [[14]](#footnote-15) [[15]](#footnote-16) [[16]](#footnote-17) This sense of injustice, humiliation and lost of trust in the police and other authorities may result in reduced reporting of crimes. Racial profiling may also contribute to the stigmatization and negative stereotyping of targeted groups, which results in fewer social and economic opportunities for members of those communities and may have negative consequences in their full enjoyment of the right to education and work (art. 5 of ICERD). In turn, some evidence suggest that racial profiling may lead targeted communities to embracing illegitimate or criminal lifestyles and contribute to increased crime and delinquency. [[17]](#footnote-18)
2. Article 5 of ICERD guaranties the right to equal treatment before courts, tribunals and all other organs administering justice. The consequences of racial profiling for targeted communities has so far-reaching consequences at all levels of the administration and functioning of the justice system, particularly on the criminal justice system, jeopardizing Art. 5 of ICERD and resulting i) in the over-criminalization of certain categories of persons in turn reinforcing such stereotypical associations between crime and ethnicity; ii) disproportionate incarceration rates; iii) higher numbers and percentage of individuals belonging to targeted communities victims of aggression or other offences, committed by police officers or other State officials; iv) the absence or small number of complaints, prosecutions and convictions relating to acts of racial discrimination and the absence of effective remedies v) higher number and percentage of individuals belonging to targeted communities who are deprived of liberty, including held in prison or preventive detention; and vi) the handing down by the courts of harsher or inappropriate sentences against targeted communities, among others[[18]](#footnote-19).
3. There are also significant doubts about the effectiveness of racial profiling as a law enforcement tactic.[[19]](#footnote-20) [[20]](#footnote-21) [[21]](#footnote-22) [[22]](#footnote-23) This is particularly the case if it represents a missed opportunity to use empirically validated policing tactics that are known to be effective[[23]](#footnote-24).

VI. Racial biases associated with artificial intelligence

1. Artificial intelligence, automated decision making, predictive data analysis, and the use of algorithms to predict and combat crime, poses great challenges for human interaction, in areas such as access to employment, higher education, and the judicial system. Although artificial intelligence and in the use of algorithms, represents a great social improvement, the risks associated to the prejudices and racial biases inherent in the human condition, pose a challenge for the implementation of the International Convention for the Elimination of all forms of Racial Discrimination (ICERD), including its articles 2, 5, 6 and 7.
2. Although when the Convention was drafted, artificial intelligence was not a relevant area, ICERD is a living instrument adaptable to the circumstances and challenges that social changes entail. Artificial intelligence and the growing use of algorithms, despite its benefits, has its own particular challenges.
3. A number of factors ingrain bias into artificial intelligence systems, increasing their discriminatory potential. These include the way in which artificial intelligence 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. The widespread use of facial recognition software poses an additional challenge for human rights and artificial intelligence governance. For example, facial recognition applications suffer from being grounded in predominantly white, male datasets, with errors occurring in up to 20 per cent of the time for women and people with darker skin colours.[[24]](#footnote-25).When such systems are used to, for example, categorize images available through a search engine, their discriminatory potential can translate into concrete interferences with individuals’ exercise of their rights to seek, receive and impart information and freely assemble or associate.[[25]](#footnote-26) Some social groups that have been historically discriminated against – such as women, people of African descent, indigenous peoples, Roma, Jews and others – are unequally and disproportionately reflected in the results of the algorithms. Clearly, algorithms reproduce the inequalities of the real world.
4. Biases in the use of artificial intelligence are also worrying in the judicial system. 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 algorithms, 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.

VII. Recommendations

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

A. Legislative measures

1. 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.
2. States should develop laws and policies that prohibit the generalized use of race, ethnicity and other prohibited grounds of discrimination as a basis for suspicion and decision-making in law enforcement actions and require individualized suspicion based on reasonable and objective grounds. These prohibitions against racial profiling should be accompanied by guidance for law enforcement agencies on the ground, in how they should make decisions in a non-discriminatory manner.

B. Human rights education and training

1. Law enforcement agencies should develop targeted training programmes for law enforcement that sensitize law enforcement agencies about biases and the communities they serve and promote an understanding of the laws and policies that govern their conduct. Affected groups should be engaged in the development and delivery of training where possible. In addition, given concerns about the limitations of training on changing attitudes and behaviour, non-discrimination and bias training should be evaluated to ensure that it is having desired impacts.

C. Recruitment measures

1. Law enforcement agencies should develop recruitment, retention and advancement strategies that promote a diverse workforce that better reflects the populations they serve. This has the potential to influence the culture of agencies and the attitudes of staff with a view to produce less biased decision-making.

D. Dialogue with communities

1. Law enforcement and community leaders/members should constructively engage one another in dialogue about police tactics, racial profiling, and community impacts. This should help improve communication and reduce levels of (and perceptions of) racial profiling. Police-community dialogue should be expanded beyond community leaders, many profiled groups are poorly 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.

E. Disaggregated data

1. Law enforcement agencies should commit to collecting disaggregated data on relevant law enforcement practices (such as identity checks, traffic stops or border searches), which includes information on the ethnic origin of members of the public targeted, as well as details and outcome of the encounter. The anonymized statistics generated should be made public and discussed with local police and communities. Such data should be collected in accordance with human rights and fundamental freedoms, such as data protection regulations and privacy guarantees. This information must not be misused.

F. Accountability

1. Managers and supervisors within law enforcement agencies should promote non-discriminatory policies and practices within their agencies, and monitor agent behaviours, holding them accountable for deviations from policy. This can be supported by the availability of data and analysis collected on agent decision-making and practice. Managers should also review the impact of operations at higher risk of generating disproportionate outcomes on specific groups or communities.
2. Civil society groups are encouraged to hold police agencies and governments accountable for the actions of law enforcement agents. This includes monitoring police activities, publicizing findings, lobbying for improvements, litigating cases, as well as engaging constructively with governments and law enforcement agencies.
3. International and regional human rights mechanisms, NHRIs or equality bodies, civil society groups and members of the public should have the possibility to challenge inappropriate practices of law enforcement agencies. Members of the public should be able to make complaints through an independent mechanism in addition to directly with police.

G. Artificial intelligence

1. When procuring or deploying artificial intelligence systems of applications States should adopt legislative, administrative and other measures to ensure that law enforcement agencies act consistently with human rights principles and norms, States should also ensure the human rights compliance and the ethnical governance of artificial intelligence. These measures should aim at preventing artificial intelligence from undermining the right to not be discriminated against; the right to equality before the law; the right to personal freedom and security; the right to the presumption of innocence; rights to life, liberty and security; privacy; freedom of movement; freedom of association; protections against arbitrary arrests and other interventions; rights to effective remedy.
2. States should ensure community impact assessments, piloting and evaluation should precede the introduction of new technologies to assure their neutrality on protected personal grounds such as race and ethnicity and compliance with human rights standards, including the right to privacy.
3. States should adopt measures to ensure that police oversight bodies have a mandate to investigate the use of artificial intelligent tools by police, and assess them against a range of criteria to ensure they are not entrenching inequalities or producing discriminatory results. States should also ensure that those oversight bodies have technical staff who are able to conduct such required technical analysis.
4. States must adopt measures to ensure human rights compliance of private sector design, deployment and implementation of artificial intelligence systems. States should also ensure the adoption and periodically revision of guidelines that companies/business’ must observe in the programming, use and commercialization of algorithms, susceptible to racial biases, and in general any form of discrimination likely to be in violation of the International Convention for the Elimination of all forms of Racial discrimination.
5. States should document and report in their reports to the Committee for the Elimination of Racial Discrimination, the cases of racial discrimination associated with artificial intelligence, and the measures of prevention and sanction adopted.
6. Human rights bodies, States, national human rights institutions and civil society organization should carry out and disseminate studies and good practices of prevention or response to 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 training of the algorithms, amenable to observation under the prism of the International Convention for the Elimination of all forms of Racial Discrimination.

1. CERD General recommendation XIII on the training of law enforcement officials in the protection of human rights. [↑](#footnote-ref-2)
2. CERD General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system. [↑](#footnote-ref-3)
3. CERD General recommendation XXXIV on racial discrimination against people of African descent. [↑](#footnote-ref-4)
4. Communication No. 1493/2006 *Rosalind Williams Lecraft v. Spain*, Views adopted on 27 July 2009. [↑](#footnote-ref-5)
5. See 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), para. 2). [↑](#footnote-ref-6)
6. See United Nations publication on Preventing and countering racial profiling of people of African descent: Good practices and challenges, 2019 (18-21669). [↑](#footnote-ref-7)
7. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, ([A/HRC/4/26](https://undocs.org/A/HRC/4/26), para. 34). [↑](#footnote-ref-8)
8. Ibid., para. 83. [↑](#footnote-ref-9)
9. See for example Concluding Observations of CERD: Russian Federation CERD/C/RUS/CO/23-24, para 15-16 (2017); Canada CERD/C/CAN/CO/21-27, para 15-16 (2017); Italy CERD/C/CO/19-20, para 27-28 (2017) Spain, [CERD/C/ESP/CO/21-23, para. 27;](http://uhri.ohchr.org/document/index/339D6111-A60B-4405-A6CF-FB86EBF678BB) Slovenia, [CERD/C/SVN/CO/8-11, para. 8 d);](http://uhri.ohchr.org/document/index/F46CCE68-BF94-4DA9-8194-4064E43707DC) Poland, [CERD/C/POL/CO/20-21, para. 11](http://uhri.ohchr.org/document/index/1CFE84A8-10D3-4238-B794-8C740F8F9F16); Ireland, [CERD/C/IRL/CO/3-4 (CERD, 2011)](http://uhri.ohchr.org/document/index/8F820B28-E3DB-441B-A0E7-36FAE704E32C); the Netherlands, [CERD/C/NLD/CO/19-21,](http://uhri.ohchr.org/document/index/85FF441D-00E4-4C07-AA6E-91C2A8AF2DF7) para. 13 and 15; Switzerland [CERD/CHE/CO/7-9, para 14](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fCHE%2fCO%2f7-9&Lang=en) (2014); CERD/C/USA/CO/7-9, para 8 and 18 (2014). [↑](#footnote-ref-10)
10. See the 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. [↑](#footnote-ref-11)
11. See the report of Working Group of Experts on People of African Descent on its mission to Panama, (A/HRC/24/52/Add.2, para. 57). [↑](#footnote-ref-12)
12. Bradford, B., Jackson, J. and Stanko, E. A. (2009), ‘Contact and Confidence: Revisiting the Impact of Public Encounters with the Police’. Policing & Society, 19: 20–46; Miller, J., Davis, R. C., Henderson, N. J., Markovic, J., Ortiz, C. W. and Vera Institute of Justice (2004), Public Opinions of the Police: The Influence of Friends, Family and News Media. Vera Institute of Justice. Tyler, T. R., Fagan, J. and Geller, A. (2014), ‘Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men’s Legal Socialization’. Journal of Empirical Legal Studies, 11,751–85.). [↑](#footnote-ref-13)
13. Geller, Fagan, Tyler and Link, 2014. [↑](#footnote-ref-14)
14. Tyler, T. R. (2004), ‘Enhancing Police Legitimacy’ *The Annals of the American Academy of Political and Social Science*, 593: 84–99. ; Dai, M. (2007), ‘Procedural Justice During Police-Citizen Encounters’, doctoral dissertation, University of Cincinnati. [↑](#footnote-ref-15)
15. Wiley, Stephanie Ann, Lee Ann Slocum, and Finn‐Aage Esbensen. "The unintended consequences subsequent delinquency." Criminology 51, no. 4 (2013): 927-966. [↑](#footnote-ref-16)
16. Scarman, L. (1981), The Brixton Disorders. HMSO. Prasad, R. (2011), ‘Reading the Riots: *“Humiliating” Stop and Search a Key Factor in Anger Towards Police’,* The Guardian, available online at http://www.theguardian.com/uk/2011/dec/06/stop-and-search); Open Society Justice Initiative, R*educing Ethnic Profiling* in the *European Union*. A Handbook of Good Practice, 2012 [↑](#footnote-ref-17)
17. Open Society Justice Initiative, *Reducing Ethnic Profiling in the European Union: A Handbook of good practices* (New York, Open Society Foundations, 2012). [↑](#footnote-ref-18)
18. See, General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system. [↑](#footnote-ref-19)
19. Open Society Justice Initiative, *I Can Stop Whoever I Want: Ethnic Profiling in Bulgaria, Hungary and Spain*, New York, OSI, 2006. [↑](#footnote-ref-20)
20. Tiratelli, M., Quinton, P., and Bradford, B. (2018) ‘Does Stop and Search Deter Crime? Evidence from Ten Years of London-wide Data’, The British Journal of Criminology, 58(5): 1212–1231. [↑](#footnote-ref-21)
21. Delsol, R. (2015) ‘Effectiveness’, in R. Delsol and M. Shiner (eds.) Stop and Search: The Anatomy of a Police Power, Basingstoke: Palgrave Macmillan. [↑](#footnote-ref-22)
22. Harcourt, B. E. (2007) Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age, Chicago: University of Chicago Press. [↑](#footnote-ref-23)
23. Weisburd, David, Cody W. Telep, Joshua C. Hinkle, and John E. Eck. "*Is problem‐oriented policing systematic review and meta-analysis."* Justice Quarterly 31, no. 4 (2014): 633-663. [↑](#footnote-ref-24)
24. Joy Buolamwini, “The dangers of supremely white data and the coded gaze”, presented at Wikimania 2018, Cape Town. Available at https://www.youtube.com/watch?v= ZSJXKoD6mA8&feature=youtu.be. [↑](#footnote-ref-25)
25. See the report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, (A/73/348, page 15). [↑](#footnote-ref-26)