**Human Rights Watch Submission on**

**Draft General Recommendation No. 36 on Preventing and Combatting Racial Profiling**

**Introduction**

Human Rights Watch (HRW) welcomes the decision of the Committee on the Elimination of Racial Discrimination (the Committee) to adopt a general recommendation on racial profiling and the work that Committee has done in this area to date. We are also grateful for the opportunity to make a submission to the Committee on draft General Recommendation No.36. HRW is drawing upon research it has conducted on the experiences of persons and communities subject to racial profiling in a number of countries to inform the following submission, including in the United States, Canada, Europe and China. We also include a list of key relevant HRW publications on racial profiling at the end of this submission.

At the outset HRW would make a few overarching observations on the draft:

1. We believe the recommendation would be strengthened by the addition of citations to the evidence in the form of CERD observations on states party, or third party studies or research supporting the factual findings of the impact of racial profiling set out in the draft recommendation, for example the findings in paras. 19 and 24.
2. We believe that the Committee should be more robust in addressing the question of accountability and remedial action for engaging in racial profiling, including in its recommendations.
3. We believe the issue of intersectional discrimination should be further developed in the recommendation based on the profiling experiences of, for example, gay black men or black transgender women, youth from ethnic minorities or youth of color, and persons from indigenous or ethnic populations with disabilities who come in contact with law enforcement, including in penitentiary systems.[[1]](#footnote-1) We believe that in a document with the potential impact that a CERD general recommendation has, it is important to identify the harms caused by racial profiling of persons who experience intersectional discrimination so that they can be addressed.
4. We have grave concerns about any use of risk assessment tools—that is, mathematical formulas to estimate the likelihood that an individual will commit some future misconduct— in law enforcement decision making, including by judicial bodies, because they make recommendations based on statistical estimates and profiles rather than individualized evidence, and therefore have inherent racial and class bias.

**Defining and understanding racial profiling**

Human Rights Watch notes that the current definition of racial profiling in para. 16 is limited to its use by law enforcement agents for their enforcement action.

HRW suggests that the title of the recommendation should reflect this and to recognize that there are other forms of unlawful profiling not covered, or not covered in depth, in this recommendation. HRW suggests the title be “General Recommendation No. 46 on Preventing and Combatting Racial Profiling *in Law Enforcement*”.

HRW would also suggest deleting “for allegedly supposed reasons of public safety and protection” in the definition, as that could be taken to limit racial profiling to contexts in which such reasons are invoked. However racial profiling can occur for other supposed reasons, such as social control, or without any purported justification.

HRW suggests in para. 16

* deleting the reference to “individual behaviour” as the phrase “objective evidence” should also cover the kind of individualized behavior that gives rise to reasonable justification for state action. However not every form of individual behavior justifies reasonable suspicion, and some individual behavior could still be misused to racially profile a person.
* adding the phrase “or other infractions of the law” after “in criminal activity” to ensure law enforcement actions taken in pursuit of administrative, including immigration offences are covered;[[2]](#footnote-2)
* amend the definition in the second sentence of para. 16 to read that racial profiling may *“result in”* rather than may “include” the listed actions.

HRW notes that other public authorities and state agents, in areas such as education or social welfare, can also engage in discriminatory decision-making based on the same type of generalizations or stereotypes used by law enforcement referred to in para. 16. We believe that while the Committee may not intend to address the actions of public authorities beyond law enforcement in this recommendation, the Committee should add a paragraph acknowledging that other public authorities and state agents beyond law enforcement can engage in discriminatory profiling.

In para. 17, HRW urges the Committee to include “actual or perceived sexual orientation and gender identity” and “disability” as prohibited grounds for profiling. HRW research also indicates a clear correlation between where people live or spend time (i.e. poor, disadvantaged neighborhoods) as well as manner of dress (i.e. wearing hoodies) and racial profiling.[[3]](#footnote-3) HRW urges the Committee to include reference to the fact that residence or presence in a particular neighborhood and style of dress may serve as proxies for racial profiling.

**Consequences of racial profiling**

In the first sentence of para. 18, HRW suggests replacing “attitudes and wellbeing” with “outlook, wellbeing and security”. We also suggest removing the word ‘ineffective’ from the second sentence of para. 18, as depending on the goal of law enforcement, for example from the point of view of social control, racial profiling can be ‘effective’; and the unacceptability of racial profiling would not change if its “effectiveness” was established. The same concern arises in relation to para. 20 below.

Para. 18 notes that racial profiling can contribute to “the stigmatization and negative stereotyping of targeted groups”, and HRW suggests that the Committee also acknowledge that it can contribute to ‘underpolicing’ – a lack of responsiveness by law enforcement authorities to victims of crime who belong to groups that face bias - and may further exacerbate the harsh negative consequences of criminal convictions on members of groups that are racially profiled.

We urge the Committee to delete the phrase “may lead targeted communities to embracing illegitimate or criminal lifestyles” as the use of terms “illegitimate” and “lifestyle” here can reinforce stereotypes. We also suggest deleting the word “delinquency” as the meaning is not clear, and again can reinforce stereotypes.

HRW would urge deleting para. 20 in the recommendation. HRW believes that debates about efficacy of racial profiling are not appropriate in a document that is examining the practice from the perspective of human rights norms and state obligations, in particular relating to non-discrimination. Racial profiling by law enforcement is prohibited under human rights law as an egregious form of discrimination that violates the rights of those subjected to it, even if data were arguably to show it is “effective” for a particular purpose.

HRW urges the Committee to also acknowledge the consequence of racial profiling that targets children, including its impact on a child’s development and damaged relations between children and law enforcement.[[4]](#footnote-4)

**Racial biases associated with artificial intelligence[[5]](#footnote-5)**

In para. 21 HRW urges the Committee to be clear in the text if by “artificial intelligence” it means more than automated decision-making or predictive analysis. Also, at the end of the first sentence we suggest adding “and access to social programs and benefits.”

We suggest considering deletion of the positive endorsement given to artificial intelligence in the phrase “Although artificial … social improvement”. It is highly disputed that artificial intelligence and the use of algorithms represents a “great social improvement”, given this can magnify the impact of existing biases, as the recommendation itself acknowledges in para.23.

In the second sentence of para. 22 we suggest the sentence read “artificial intelligence *including* the growing use of algorithms” rather than “and” algorithms, as artificial intelligence involves the use of algorithms. We also suggest adding the word “potential” to the phrase “despite its [*potential*] benefits.”

Para. 23 refers to a particular study that demonstrated that errors in facial recognition occurred in “up to 20 per cent of the time” for women and people with darker skin colors. However, it is not clear if this figure holds true globally, or in countries such as e.g. China, and there is reason to believe that the figure for bias failure in facial recognition may well be higher across the world. HRW recommends that the Committee clarify the scope of the finding of up to 20 percent facial recognition failure.

In para. 24 we believe the Committee should take a much stronger position on the harm of biases in the use of artificial intelligence in the judicial system. We suggest replacing “worrying” with “unacceptable”.

**Recommendations**

In para. 27, HRW would encourage the Committee to emphasize that law enforcement agencies are not just police, but include for example immigration, custodial, and probation officials. We also believe that the guidance on the prohibition of racial profiling called for in the paragraph should be directed to all public authorities and state agents who may engage in such discriminatory decision making. This would also apply to human rights training and education in para. 28.

HRW also encourages the Committee in para.27, or in a standalone paragraph, to include a recommendation for states

* to have clear and enforceable guidelines on the permissible grounds for conducting an identity check, on when a check can be escalated to a body search or search of personal belongings, and when a person can be taken into custody e.g. to a police station for further verification of their documents; and
* to develop specific regulations and guidance to counter racial profiling in law enforcement activities involving children.

In para. 31, we suggest adding “and anonymized” after “disaggregated” in the first sentence. We believe that anonymizing the data, as well as the statistics generated, is a key safeguard to prevent misuse. We also suggest including a requirement that “details on the grounds for the stop/control” be recorded in addition to the outcome of the encounter.

Also in the final sentence, rather than stating that “this information must not be misused”, we would urge the Committee to be clear that states should adopt and implement effective safeguards to prevent misuse, and provide robust mechanisms for redress in the event of misuse.

In section F on accountability, we urge the Committee to specifically call for states to have independent, external mechanisms for accountability for racial profiling by law enforcement. We also believe that the recommendation to civil society groups to hold police and governments accountable in para. 33, is unrealistic without a recommendation on other independent accountability mechanisms.

HRW has called for accountability to include law enforcement agencies’ use of stop forms as written documentation of all identity checks. These forms would include at a minimum the name and age of the person stopped, the name and unit of the officer making the stop, and the legal basis for the stop.  Personal information such as ethnic origin should be recorded separately in an anonymized fashion. We urge the Committee to consider a recommendation along these lines.

In section G on artificial intelligence, HRW believes that it is important to recognize that artificial intelligence when used, for example, in pretrial or bail/probation risk assessment tools, inevitably contributes to racial profiling as they make recommendations based on statistical estimates and profiles rather than individualized evidence, so will have inherent racial and class bias. For this reason HRW has opposed their use in the United States.[[6]](#footnote-6) We believe that the safeguards listed in para. 36, such as oversight, community impact assessments, and guidelines are too susceptible to manipulation and do not compensate for the inherently discriminatory nature of these tools.

In para. 35, we suggest that the freedoms of speech and assembly also be listed as rights that need to be protected from being undermined by artificial intelligence.

We believe para. 37 should be strengthened to address what should be done if the oversight bodies mentioned find that artificial tools are entrenching inequalities – i.e. explain their power to take action.

We urge the Committee to make para. 38 more robust by calling on states to adopt “regulations or laws” not just “guidelines” that businesses need to observe in their work with and on artificial intelligence.

**Annex: Selected Human Rights Watch Publications on Racial Profiling**

**Algeria**

[Algeria: Inhumane Treatment of Migrants - Pregnant Women, Children, Asylum Seekers Among Thousand Expelled to Desert](https://www.hrw.org/news/2018/06/28/algeria-inhumane-treatment-migrants), June 28, 2018

[Algeria: Surge in Deportations of Migrants- Apparent Racial Profiling, Summary Expulsion of Sub-Saharan Africans](https://www.hrw.org/news/2014/12/03/letter-attorney-general-eric-holder-new-racial-profiling-guidelines), October 30, 2017

**China**

[China: Minority Region Collects DNA from Millions: Private Information Gathered by Police, Under Guise of Public Health Program](https://www.hrw.org/news/2018/06/01/q-profile-based-risk-assessment-us-pretrial-incarceration-release-decisions), December 13, 2017

[China: Police ‘Big Data’ Systems Violate Privacy, Target Dissent - Automated Systems Track People Authorities Claim ‘Threatening’](https://www.hrw.org/news/2009/06/19/race-drugs-and-law-enforcement-united-states), November 19, 2017

[China: Police DNA Database Threatens Privacy: 40 Million Profiled Includes Dissidents, Migrants, Muslim Uyghurs](https://www.hrw.org/news/2018/12/20/criminal-justice-coalition-submits-comments-policing), May 15, 2017

[One Passport, Two Systems](https://www.hrw.org/news/2017/10/30/algeria-surge-deportations-migrants) China’s Restrictions on Foreign Travel by Tibetans and Others, July 13, 2015

**France**

[“The Root of Humiliation” Abusive Identity Checks in France](https://www.hrw.org/report/2012/01/26/root-humiliation/abusive-identity-checks-france), January 2012

[France: Abusive Identity Checks of Minority Youth](https://www.hrw.org/news/2017/12/13/china-minority-region-collects-dna-millions) - Misuse of Police Powers Damages Community Relations, January 2012.

**Germany**

[Universal Periodic Review: Joint HRW Submission on Germany, with Forum Menschenrechte](https://www.hrw.org/news/2009/03/17/anti-drug-policy-race-remains), April 18, 2013

**Greece**

[Greece: Police Abusing Marginalized People - Target the Homeless, Drug Users, Sex Workers in Athens](https://www.hrw.org/news/2015/05/06/greece-police-abusing-marginalized-people), May 6, 2015

**Russia**

[Russia: Mass Detention of Migrants- Racial Profiling, Arbitrary Detention, Harsh Detention Conditions](https://www.hrw.org/report/2015/07/13/one-passport-two-systems/chinas-restrictions-foreign-travel-tibetans-and-others), August 8, 2013

[Russia: Reported Roundup of Tajik Migrants - Stop Ethnically Targeted Detentions, Stereotyping](https://www.hrw.org/news/2011/11/15/russia-reported-roundup-tajik-migrants), November 15, 2011

[Russia Targets Georgians for Expulsion- Government Targeted Ethnic Group in Response to Political Conflict](https://www.hrw.org/news/2017/11/19/china-police-big-data-systems-violate-privacy-target-dissent), September 30, 2007

**UK**

[UK: Without Suspicion Stop and Search under the Terrorism Act 2000](https://www.hrw.org/news/2002/03/13/human-rights-watch-presentation-united-states-sentencing-commission-proportionality), July 2010

**United States** For research on racial profiling in the **United States**, see in General <https://www.hrw.org/united-states/criminal-justice>.

*Reports on racial profiling include:*

[“Not in it for Justice” - How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People, April 11, 2017](https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly)

[Every 25 Seconds - The Human Toll of Criminalizing Drug Use in the United States, October 12, 2016](https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states)

[Illusion of Justice - Human Rights Abuses in US Terrorism Prosecutions, July 21, 2014](https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions)

[In the Name of Security](https://www.hrw.org/news/2012/01/26/france-abusive-identity-checks-minority-youth) - Counterterrorism Laws Worldwide since September 11, June 29, 2012

[No Way to Live](https://www.hrw.org/news/2013/04/18/universal-periodic-review-joint-hrw-submission-germany-forum-menschenrechte) - Alabama’s Immigrant Law, December 14, 2011

[Decades of Disparity](https://www.hrw.org/news/2017/05/15/china-police-dna-database-threatens-privacy) - Drug Arrests and Race in the United States, March 2, 2009

[Targeting Blacks](https://www.hrw.org/news/2013/08/08/russia-mass-detention-migrants) - Drug Law Enforcement and Race in the United States, May 4, 2008

*Other research products include:*

[Submission to Illinois Supreme Court Commission on Pretrial Practices](https://www.hrw.org/news/2019/06/26/submission-illinois-supreme-court-commission-pretrial-practices) , June 2019

[Letter to House Judiciary Committee Regarding Concerns with H.R. 2820, the Dream Act of 2019](https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11) ,

May 2019

[List of Issues Submission to the United Nations Human Rights Committee During its Periodic Review of the US](https://www.hrw.org/report/2011/12/14/no-way-live/alabamas-immigrant-law), January 2019

[Criminal Justice Coalition Submits Comments on Policing](https://www.hrw.org/report/2010/07/04/without-suspicion/stop-and-search-under-terrorism-act-2000), December 2018

[Human Rights Watch Comments on California Judicial Council Bail Reform Rules](https://www.hrw.org/news/2019/05/21/letter-house-judiciary-committee-regarding-concerns-hr-2820-dream-act-2019), December 2018

[Q & A: Profile Based Risk Assessment for US Pretrial Incarceration, Release Decisions](https://www.hrw.org/news/2007/09/30/russia-targets-georgians-expulsion), June 2018

[Q & A: White House Immigration Principles and Policies](https://www.hrw.org/report/2009/03/02/decades-disparity/drug-arrests-and-race-united-states), October 2017

Questions and Answers: The Trump Administration’s Immigration Enforcement Memos, March 2017

[A call for police accountability](https://www.hrw.org/report/2008/05/04/targeting-blacks/drug-law-enforcement-and-race-united-states), September 2015

[Why are US police departments still race-biased?](https://www.hrw.org/news/2015/03/17/why-are-us-police-departments-still-race-biased) , March 2015

[US: Updated Racial Profiling Rules Fall Short - Congress Should Ban Use of Tactic for Communities, at Border, December 2014](https://www.hrw.org/news/2014/12/08/us-updated-racial-profiling-rules-fall-short)

[Letter to Attorney General Eric Holder on new racial profiling guidelines](https://www.hrw.org/news/2018/12/10/human-rights-watch-comments-california-judicial-council-bail-reform-rules) , December 2014

[US: Holder Should Press for Police Reform - Ferguson Unrest Shows Need for Effective Oversight, Transparency, August 2014](https://www.hrw.org/news/2014/08/20/us-holder-should-press-police-reform)

[US: End discriminatory community profiling - Letter to US Attorney General Holder regarding proposed reforms to racial profiling guidance, April 2014](https://www.hrw.org/news/2014/04/21/us-end-discriminatory-community-profiling)

[Alabama: Seek Full Repeal of Anti-Immigrant Law - Proposed Amendments Made Bad Legislation Worse, May 2012](https://www.hrw.org/news/2012/05/18/alabama-seek-full-repeal-anti-immigrant-law)

[US: End Discriminatory Profiling by Police - Written statement to the Subcommittee on the Constitution, Civil Rights, and Human Rights of the Senate Committee on the Judiciary, April 2012](https://www.hrw.org/news/2012/04/17/us-end-discriminatory-profiling-police)

[US: Accept UPR Recommendations on Pressing Human Rights Challenges, January 2011](https://www.hrw.org/news/2011/01/25/us-accept-upr-recommendations-pressing-human-rights-challenges)

[Letter to Assistant Secretary Esther Brimmer, Mr. Harold Hongju Koh, Assistant Secretary Michael H. Posner, and other US UPR Delegation Members, January 2011](https://www.hrw.org/news/2011/01/25/us-accept-upr-recommendations-pressing-human-rights-challenges)

[US: A Long Way to Go - Racial Disparities in Drug Policies, August 2010](https://www.hrw.org/news/2010/08/18/us-long-way-go)

[US: Arizona Violating Human Rights Treaty - New Immigration Law Contrary to Binding International Anti-Racism Measure, April 2010](https://www.hrw.org/news/2010/04/30/us-arizona-violating-human-rights-treaty)

[Race, Drugs, and Law Enforcement in the United States](https://www.hrw.org/news/2019/01/14/list-issues-submission-united-nations-human-rights-committee-during-its-periodic), June 2009

### [In Anti-Drug Policy, Race Remains](https://www.hrw.org/news/2017/10/13/q-white-house-immigration-principles-and-policies), March 2009

[Human Rights Watch Presentation to the United States Sentencing Commission on Proportionality and Federal Crack Sentences](https://www.hrw.org/news/2015/09/30/call-police-accountability), March 2002

[United States: Stark Race Disparities in Drug Incarceration - Some states send black men to prison at rates 27 to 57 times greater than whites, June 2000](https://www.hrw.org/news/2000/06/07/united-states-stark-race-disparities-drug-incarceration)

1. For example in [“I needed help, Instead I was Punished”: Abuse and Neglect of Prisoners with Disabilities in Australia,](https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities) Human Rights Watch documented how Aboriginal and Torres Strait Islander people are over represented in the prison population, in particular when they also have disabilities, pp. 35-37; or in [Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada](https://www.hrw.org/report/2013/02/13/those-who-take-us-away/abusive-policing-and-failures-protection-indigenous-women#02889c) we documented how indigenous women and girls experience presumptions of criminality in how they are policed and how police respond to gender specific crimes, pp. 46–50; or in [Living at Risk: Transgender Women, HIV, and Human Rights in South Florida](https://www.hrw.org/report/2018/11/20/living-risk/transgender-women-hiv-and-human-rights-south-florida), where we note that in the US where one of five trans women has been incarcerated, African-American trans women are three times more likely to face arrest than their white counterparts, p.4. [↑](#footnote-ref-1)
2. This is important to cover actions such as immigration identity checks, which are regularly based on racial profiling, but are to detect administrative rather than criminal offences. For example in its 2017 [Conclusions and Observations on Russia](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsnLht97JCs%2fgtYiPXQ%2f%2b4iE7ukTT14m%2becJYUSHmqdz4u6Soz69fKsUApaoBEUr59t4YcZVsGGtqqYpufqZy1NxwQlQOV1CFk6ZGavveEj24FrRWDQvojATkNJOzpbXKCQ%3d%3d), the Committee noted that “[d]e facto racial profiling by the police persists in the State party, targeting in particular migrants, people from Central Asia and the Caucasus and persons of Roma origin, and manifests itself inter alia by arbitrary identity checks by the police and unnecessary arrests”, para. 15. [↑](#footnote-ref-2)
3. See e.g. [“The Root of Humiliation” Abusive Identity Checks in France](https://www.hrw.org/report/2012/01/26/root-humiliation/abusive-identity-checks-france), January 2012 and

   [Greece: Police Abusing Marginalized People - Target the Homeless, Drug Users, Sex Workers in Athens](https://www.hrw.org/news/2015/05/06/greece-police-abusing-marginalized-people), May 6, 2015. See also the findings by Open Society Justice Initiative on stops conducted against ethnic minorities based on location and clothing, particular “youth clothing”, [Profiling Minorities: A Study of Stop-and-Search Practices in Paris](https://www.justiceinitiative.org/publications/profiling-minorities-study-stop-and-search-practices-paris), 2009. [↑](#footnote-ref-3)
4. # See e.g., Human Rights Watch [France: Abusive Identity Checks of Minority Youth](https://www.hrw.org/news/2012/01/26/france-abusive-identity-checks-minority-youth) - Misuse of Police Powers Damages Community Relations, January 26, 2012; Open Society Justice Initiative, [Profiling Minorities: A Study of Stop-and-Search Practices in Paris](https://www.justiceinitiative.org/publications/profiling-minorities-study-stop-and-search-practices-paris), 2009; Ontario Human Rights Commission, [The Effects of Racial Profiling](http://www.ohrc.on.ca/en/paying-price-human-cost-racial-profiling/effects-racial-profiling).

   [↑](#footnote-ref-4)
5. # See HRW reporting on use of artificial intelligence by law enforcement in the US, [Q & A: Profile Based Risk Assessment for US Pretrial Incarceration, Release Decisions](https://www.hrw.org/news/2018/06/01/q-profile-based-risk-assessment-us-pretrial-incarceration-release-decisions), June 1, 2018; [Human Rights Watch Comments on California Judicial Council Bail Reform Rules](https://www.hrw.org/news/2018/12/10/human-rights-watch-comments-california-judicial-council-bail-reform-rules), December 10, 2018, and [HRW Submission to Illinois Supreme Court Commission on Pretrial Practices](https://www.hrw.org/news/2019/06/26/submission-illinois-supreme-court-commission-pretrial-practices), June 26, 2019 and in China for profiling of ethnic populations, for example Muslim Uyghurs, e.g. [China: Police DNA Database Threatens Privacy: 40 Million Profiled Includes Dissidents, Migrants, Muslim Uyghurs](https://www.hrw.org/news/2017/05/15/china-police-dna-database-threatens-privacy) and [China: Minority Region Collects DNA from Millions: Private Information Gathered by Police, Under Guise of Public Health Program](https://www.hrw.org/news/2017/12/13/china-minority-region-collects-dna-millions).

   [↑](#footnote-ref-5)
6. # See e.g. [HRW Submission to Illinois Supreme Court Commission on Pretrial Practices](https://www.hrw.org/news/2019/06/26/submission-illinois-supreme-court-commission-pretrial-practices), June 26, 2019; [Human Rights Watch Comments on California Judicial Council Bail Reform Rules](https://www.hrw.org/news/2018/12/10/human-rights-watch-comments-california-judicial-council-bail-reform-rules), December 10, 2018, and [Q & A: Profile Based Risk Assessment for US Pretrial Incarceration, Release Decisions](https://www.hrw.org/news/2018/06/01/q-profile-based-risk-assessment-us-pretrial-incarceration-release-decisions), June 1, 2018.

   [↑](#footnote-ref-6)