Organization for Security and Co-Operation in Europe (OSCE)

Office for Democratic Institutions and Human Rights (ODIHR)

**ODIHR Comments on the CERD Draft General Recommendation No. 36 Preventing and Combating Racial Profiling**

Warsaw, 27 June 2019

# General comments

The OSCE Office for Democratic Institutions and Human Rights (ODIHR) welcomes the initiative of the Committee on the Elimination of Racial Discrimination (the Committee) to prepare a General Recommendation on Preventing and Combating Racial Profiling, which will prove useful also for ODIHR. In light of its ongoing activities to assist OSCE participating States in the implementation of their human dimension commitments pertaining to equality and non-discrimination in different fields, ODIHR is pleased to provide the following information and suggestions for the Committee’s consideration in finalizing the General Recommendation.

Discriminatory profiling in countering terrorism

OSCE participating States have firmly rejected the identification of terrorism with any ethnicity, nationality, religion or belief and consistently reaffirmed the importance of equality and non-discrimination in countering terrorism.[[1]](#footnote-1)

On that basis, ODIHR is also addressing the issue of discriminatory profiling in law enforcement as part of its work to promote human rights compliant responses to terrorism and violent extremism and radicalization that lead to terrorism (VERLT). In particular, ODIHR’s human rights and anti-terrorism programme provides expert advice, tools and resources for policy makers and counter-terrorism practitioners as well as capacity building for law enforcement officers.

In its *Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework[[2]](#footnote-2)*, ODIHR underlined that attempts to detect so-called foreign terrorist fighters” (FTFs) based on profiling techniques that use stereotypical assumptions about religion, age, nationality, ethnic or other background are not only at risk of being discriminatory, but are also likely to be ineffective, given that there is no single FTF profile. Therefore, in countering terrorism and preventing VERLT it is necessary to follow a targeted approach focused on what individuals do, not on characteristics or pre-determined assumptions based on ethnicity, religion or gender.[[3]](#footnote-3)

Similarly, the *OSCE Guidebook Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community Policing Approach[[4]](#footnote-4)* underlines the importance of equality and non-discrimination in preventing and combatting terrorism as recognized in OSCE commitments, not least because discriminatory treatment may be a factor conducive to violent radicalization and terrorism.[[5]](#footnote-5) A particular concern in policing terms, as set out in the OSCE Guidebook, is discriminatory ethnic profiling, i.e. the exercise of police powers against individuals based on stereotypical, broad and unqualified assumptions related to nationality, ethnicity or religion. Discriminatory profiling can occur in police stop-and-search, or surveillance activities or counterterrorism operations. Whereas profiling techniques based on behaviours and specific conduct as well as concrete evidence and intelligence may be legitimate, discriminatory profiling is unlawful. Furthermore, it has also proven to be ineffective as terrorist groups can easily circumvent it.[[6]](#footnote-6)

These concerns are also examined in the publication *Human Rights in Counter-Terrorism Investigations: A Practical Manual for Law Enforcement Officers[[7]](#footnote-7).* Discriminatory profiling is not only unlawful but also ineffective and counter-productive because it creates adverse effects. It seriously impacts innocent individuals who happen to fit the profile. It results in the stigmatization of certain individuals and entire communities and the social construction that all those who share the same “racial”, ethnic or religious characteristics are potential terrorism suspects. Such stigmatization and alienation hinders potential cooperation between the police and the public and may contribute to terrorist radicalization since it feeds terrorist narratives and may drive those who are wrongfully targeted into the hands of recruiters of terrorist and violent extremist groups. In its capacity building activities, ODIHR therefore seeks to sensitize law enforcement officers to the counter-productive effects of discriminatory profiling and the risks of stereotypes and implicit biases that may hamper both the effectiveness of counter-terrorism policing and its human rights compliance.[[8]](#footnote-8)

The above is in line with the considerations in section II (Approach adopted) and section V (Consequences of racial profiling) of the draft General recommendation. The Committee may wish to draw on ODIHR’s resources in those sections, as it deems appropriate.

# Section IV

ODIHR would strongly suggest to take out 'may' throughout the whole text, as there is plenty of evidence gathered from various sources proving irrefutably all negative effects and consequences of the abusive practice of racial profiling.

Section IV. § 16: “(…) Racial profiling *~~may~~* include, for example, stops, identity checks, personal searches, *detainment or* arrests, *targeted police* raids, *evictions,* 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, *as well as private security services,* and *~~may~~* variously take place in the context of street *or community* policing, anti-terrorism operations, *court proceedings,* or immigration and border control.”

# Section V

Section V. § 18: “This sense of injustice, humiliation and loss of trust in the police and other authorities *~~may~~* result in reduced reporting of crimes *and discrimination, as it was also evidenced through EU FRA survey reports.*[[9]](#footnote-9) 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~~* *civil* right*s* *~~to education and work~~* *and access to public services* (art. 5 of ICERD). (…)”

Section V. § 19: “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 *and lasting* 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 *being* victims of aggression or other offences *including excessive and disproportionate use of force and of firearms*, 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 hate crime* and the absence of effective remedies; (…).”

Section V. § 19: Should not be limited to stereotypical associations between crime and ethnicity.

Section V. § 19: ODIHR recommends a more nuanced approach and suggests inserting the term “potentially“ as follows: “*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* ***potentially*** *i) in the over-criminalization of certain categories of persons in turn reinforcing such stereotypical associations between crime and ethnicity;*”

ODIHR also suggests amending point “*iii)*” of this paragraph in the following way “*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****, including with a bias motivation on the part of the perpetrators****;*”*.*

Furthermore, the following part of the text should be amended as follows: “*iv) the absence or small number of complaints, prosecutions and convictions relating to acts of racial discrimination and the absence of effective remedies****, including due******to State authorities’ lack awareness of offences involving racism.***”

ODIHR is of the view that references the *indicators* *of racial discrimination* under the CERD General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System[[10]](#footnote-10) (referred to under Footnote 18 of the Draft General Recommendation) should not be confused with direct and unavoidable consequences of racial profiling without further substantiation. Therefore, ODIHR suggests using a more nuanced language.

According to the internationally accepted concept of hate crimes, incidents referred to under point “iii)” could constitute hate crimes, i.e. criminal offences committed with a bias motivation (see OSCE Ministerial Council Decision 9/09, Combating Hate Crimes, Athens, 2009), the latter being the main element of such offences. ODIHR, through its work with law enforcement and prosecutors, but also other international authorities such as ECRI have observed widespread prejudices and discriminatory practices, leading potentially to hate crimes, on the part of law enforcement and towards different groups and communities all over the OSCE (including Council of Europe) regions [see, for instance, the recent case of *Lingurar v. Romania*, no. 48474/14, judgment (ECtHR) of 16 April 2019].[[11]](#footnote-11)

The same prejudices are then likely to lead to failures in recognizing, investigating and prosecuting hate crimes, i.e. failures to unmask the biased motive on the part of perpetrators, including namely criminal offences committed by law enforcement.[[12]](#footnote-12) The point “iv)” should, therefore, take into account more comprehensively the wording of the CERD General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System[[13]](#footnote-13) (referred to under Footnote 18 of the Draft General Recommendation).

SectionV. § 19: On 23 May 2019, ODIHR published *Gender, Diversity and Justice: Overview and Recommendations* (see <https://www.osce.org/odihr/419840>). The paper draws on the results of a needs assessment study carried out by ODIHR in 2017. In addition to outlining challenges and identifying good practice solutions related to gender equality and diversity among justice system actors, in terms of recruitment and selection of a diverse workforce and ensuring workplace equality, the needs assessment also examined the effects of gender and diversity among justice system actors on the fairness of outcomes, as perceived by end users of the justice system. In particular, “The needs assessment study findings confirm that **gender balance and minority representation in justice systems are important factors in fairer justice system outcomes**. This is due to a number of factors, including greater public trust in justice systems where justice sector workforces are visibly more diverse. In addition, **workplace diversity can help make justice sector practitioners more sensitive to different considerations for different groups, allowing them to overcome their implicit biases and unconscious stereotyping**.”[[14]](#footnote-14) Relevant recommendations from the paper in this regard include:

* Consider introducing mandatory pre-service orientation for incoming staff to address workplace equality and the eradication of implicit bias, among other issues.[[15]](#footnote-15)
* Promote better representation and inclusion of women and minorities to combat practitioners’ implicit biases by exposing them to a diverse working environment.[[16]](#footnote-16)
* Incorporate topics specific to ethnic minorities in legal education, including continuing legal education, to sensitize justice sector professionals to related issues and to prevent unconscious bias and stereotyping, with particular attention to Roma and Sinti. Ideally, this should not only include legal issues but also information on the nature and scale of anti-Roma racism, as well as the situation with regard to systemic discrimination against Roma and Sinti.[[17]](#footnote-17)
* Promote civil society monitoring of criminal, civil and administrative proceedings as a tool for detecting instances of bias, stereotyping and discrimination in the justice system, and to initiate public debate.[[18]](#footnote-18)

Section V. § 20: “*There are also significant doubts about the effectiveness of racial profiling as a law enforcement tactic.* (…)” We suggest that the reference to ‘effectiveness of racial profiling as a law enforcement tactic’ is considered for removal from the text. While being aware of a number of unsanctioned /informal practices employed by Police, which lie outside of the legal framework of police procedures, tactics and overall conduct, it is important to be consistent in treating racial profiling for what it is, an illegal act leading to discrimination and violation of a number of legally protected characteristics. Therefore, a debate about whether racial profiling as a police tactic is effective or not, is irrelevant and unnecessary in this context.

Section V. § 21: European Union Agency for Fundamental Rights prepared publication #BigData: Discrimination in data-supported decision making (2018) to which could this paragraph refer.[[19]](#footnote-19)

Section V. § 21: “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 , the judicial system and *freedom of movement.* “ Biases in the use of artificial intelligence are also worrying for the freedom of movement of persons. In order to allow persons to benefit from travel, states are using algorithms to foresee possibilities of ‘risks’ including terrorism, criminal activities, and/or risks of overstaying.

# Section VI

Section VI. § 22: “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 *and implies risks of discrimination and potential further exclusion of certain groups*.”

Section VI. § 23: “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*, intentionally or unintentionally,* into those datasets, the artificial intelligence models themselves and the way in which the outputs of the artificial intelligence model are implemented in practice. (…) Clearly, algorithms reproduce the *prejudices and* inequalities of the real world.”

Section VI. § 24: “Biases in the use of artificial intelligence are also worrying in the judicial system. Increasingly, when *conducting judicial investigations and indictments, and eventually* applying a sanction, *in the process of* deciding whether someone should be sent to prison, bailed out or receive another punishment, *prosecutors and judges* are resorting to the*ir subjective and often stereotypical perception and experience, including the* use of algorithms, in order to foresee the possibilities that an individual may commit one or several crimes in the future. (…)”.

Section VI. A § 27: “(…) These prohibitions against racial profiling should be accompanied by guidance *and training* for law enforcement agencies on the ground, in how they should make *non-discriminatory* decisions in a *~~non-discriminatory~~* manner *that is fully complaint with human rights*.”

Section VI. B § 28: “*Law enforcement agencies and responsible state bodies should commit to developing policies and procedures to ensure an effective police response to bias-motivated violence.*Law enforcement agencies should develop targeted training programmes *as part of both initial education and in-job training* 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 *and adjusted /tailored in ways* to ensure that it is having desired impacts.”

Section VI. B § 28: ODIHR welcomes the references to the need on human rights education and training and, in addition, proposes to mention explicitly training programmes focused on ensuring accountability of perpetrators of discriminatory criminal offences, including namely hate crimes and in particular those committed by law enforcement.

Since also § 32 focuses on accountability, the education and training programmes should cover this area as well and stress the need to ensure law enforcement, police oversight authorities’ and prosecutors’ skills to investigate and prosecute hate crimes (incidents which may be the result of systemic ethnic profiling). ODIHR has implemented numerous training activities and programmes within the OSCE region in this field during the past decades while both relevant existing ODIHR’s training programmes for law enforcement and prosecutors [[20]](#footnote-20) include modules focusing on sensitizing “*law enforcement agencies about biases and the communities they serve and promote an understanding of the laws and policies that govern their conduct*” and go beyond in explaining how prejudices, stereotyping and discrimination can lead to both hate crimes and failures on the part of the investigation.

Section VI. C § 29: In regard to promoting a diverse workforce, ODIHR developed a paper – Gender, Diversity and Justice: Overview and Recommendations – providing analysis and recommendations for building a more inclusive justice system in the OSCE region.[[21]](#footnote-21)

Section VI. D § 30: “Law enforcement and community leaders/members should constructively engage one another in dialogue about police tactics, *preventing and combating* racial profiling, and community impacts. (…) Young people *and excluded groups, such as Roma,* who are most commonly targeted by police would be a key example.”

Section VI. D § 31: ODIHR recommends amending the relevant paragraph in a way that the data collection covers separately also all incidents where there is a suspicion that ill-treatment by law enforcement was committed with a bias motivation. While the most important is to record and collect data regarding different bias motivations behind the individual incidents, it is advised that where data on hate crimes and hate incidents are already collected in a disaggregated manner, the identification of the perpetrator as of a law enforcement agent is made part of such data sets.

The cases of intentional infliction of ill-treatment committed by police officers, let alone when classifiable as hate crimes, constitute the most serious cases human right violations as they *may* amount to the violation of the international *ius cogens* (imperative) norm of the prohibition of torture.[[22]](#footnote-22) A similar approach is taken by the European Court of Human Rights which considers ill-treatment committed by police officers as a direct violation of thus substantive limb of Article 3 ECHR and requires that bias motivation behind the perpetrators’ acts is unmasked under the procedural limb of the mentioned provision.[[23]](#footnote-23) As mentioned above, bias-motivated ill-treatment committed by law enforcement might likely be a consequence of wide-spread discriminatory practices or even policies. It is therefore desirable to collect data desegregated appropriately.

Section VI. F § 32: “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. *Teachers and trainers at police / law enforcement schools and academies should integrate effective and human rights-compliant policing practices into the curriculum.*(…).”

Section VI. G § 35: “(…) These measures should aim at preventing artificial intelligence from undermining the right to not be discriminated against, *as well as to perpetuating existing state of exclusion of certain groups, or deepen it*; 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.”

Section VI. G § 38: “States must adopt measures to ensure human rights compliance of *both state and* private sector design, deployment and implementation of artificial intelligence systems. (…)”

# Section VII

Section VII § 27 **- Concerning legislative measures**: The Committee may wish to add that the prohibition against racial profiling should not only be accompanied by guidance for law enforcement officers, which is important, but also by appropriate institutional frameworks, policies and oversight mechanisms to ensure implementation of the law in practice. Furthermore, the law should specifically set out the remedies and complaints mechanisms available to anyone whose rights might have been violated by unlawful profiling as also referred to in para 34 (accountability).

Section VII § 28 **-** **Concerning human rights education and training:** The Committee may wish to add specifically that States are encouraged to seek, where needed, the assistance of international and regional governmental and non-governmental organizations in developing and delivering such training for law enforcement officers.

Section VII § 30 **-** **Dialogue with communities:** In the title of the section and the paragraph itself the Committee may wish to consider replacing the word “dialogue” with “engagement” or another similar term which appears to imply stronger and more sustained interaction with communities. Participation of representatives from ethnic minorities in complaint mechanisms referred to in para 34 (accountability) may be an additional way of increasing trust and legitimacy in police-community interaction.[[24]](#footnote-24)

Section VII § 31 and 32 **-** **Concerning accountability, para 32 (in connection with disaggregated data, para 31):** The draft General recommendation rightly refers to the importance of data availability and analysis for accountability. The Committee may wish to expand on this, for example, with regard to stop-and-search forms. States should be encouraged to record the reasons for a stop-and-search and provide the target of such measures with a written copy along with information on his or her rights and available complaints mechanisms to ensure such mechanisms are sufficiently known and accessible.[[25]](#footnote-25)

Section VII § 32: ODIHR recommends that the relevant paragraph focusing on *Accountability* sets forth clearly that the responsibility and accountability for the State’s illicit actions lie primarily upon the States (in practice through their law enforcement agencies and their staff). The relevant paragraph should mention the requirement to set forth mechanisms that ensure such accountability including through an effective investigation of illicit actions conducted by independent and impartial oversight authorities where appropriate.

In the relevant paragraph focusing on *Accountability,* there is little about the fact that the responsibility and accountability lie primarily upon the States, in practice through their law enforcement agencies and their staff. An effective and independent oversight mechanism should be put in place to hold such State actors accountable for discriminatory practices including namely unjustified use of force against individuals based on prejudices and discrimination qualifiable as hate crimes.[[26]](#footnote-26)

Section VII §38 - **Concerning artificial intelligence:** As set out in para 38, States must adopt measures to ensure human rights compliance of the private sector in the design, deployment and implementation of artificial intelligence systems. The Committee may wish to consider adding that this should also apply when trading and exporting such systems to other countries.

1. See for example “Declaration on strengthening OSCE efforts to prevent and counter terrorism” adopted by the OSCE Ministerial Council in Hamburg on 9 December 2016, MC.DOC/1/16; “Ministerial Declaration on preventing and countering violent extremism and radicalization that lead to terrorism”, adopted by the OSCE Ministerial Council in Belgrade on 4 December 2015, MC.DOC/4/15; and the “OSCE Consolidated Framework for the Fight against Terrorism”, 7 December 2012, PC.DEC/1063. [↑](#footnote-ref-1)
2. The Guidelines have been published in September 2018 and are available at <https://www.osce.org/odihr/393503>. [↑](#footnote-ref-2)
3. Ibid. pp. 62-63 (section 3.6. *Acknowledging and addressing direct and indirect discrimination* and related recommendations). [↑](#footnote-ref-3)
4. The OSCE Guidebook has developed jointly by OSCE/ODIHR and the OSCE Secretariat’s Transnational Threats Department and published in February 2014. It is available in English, Russian, Bosnian, Serbian, Albanian and Arabic at <https://www.osce.org/secretariat/111438>. [↑](#footnote-ref-4)
5. This has been recognized internationally, for example in the 2006 UN Global Counter Terrorism Strategy and the biannual resolutions of the General Assembly on the review of the Strategy adopted thereafter. See e.g. Resolution adopted by the UN General Assembly on 26 June 2018, UN Doc. A/RES/72/284, Preamble. [↑](#footnote-ref-5)
6. See OSCE Guidebook, pp. 56-60. [↑](#footnote-ref-6)
7. The Manual has been developed jointly by ODIHR and the OSCE Secretariat’s Transnational Threats Department and published in November2013. It is available at <https://www.osce.org/odihr/108930>. See in particular pp. 23-25. [↑](#footnote-ref-7)
8. See for example <https://www.osce.org/odihr/404042>; <https://www.osce.org/odihr/385869>; and <https://www.osce.org/odihr/382414>. [↑](#footnote-ref-8)
9. <https://fra.europa.eu/en/publication-type/report>. [↑](#footnote-ref-9)
10. See Part A. (Steps to be taken in order to better gauge the existence and extent of racial discrimination in the administration and functioning of the criminal justice system; the search for indicators attesting to such discrimination), Section 1. (Factual indicators), Point 1, Letter b. [↑](#footnote-ref-10)
11. The case concerned a raid in 2011 by 85 police and gendarmes on the Roma community where the ECtHR concluded on violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights as concerned the ill-treatment of the applicant family during the raid, and two violations of Article 14 (prohibition of discrimination) in conjunction with Article 3 because the raid had been racially motivated and the related investigation had been ineffective. ECtHR explicitly stated that the applicants had been targeted because the authorities had perceived the Roma community in general as criminal. That had amounted to ethnic profiling and had been discriminatory (see § 76 of the judgment). [↑](#footnote-ref-11)
12. Ibid (§§ 79-82). See also *Stoica v. Romania*, no. 42722/02, judgment (ECtHR) of 4 March 2008, § 128. [↑](#footnote-ref-12)
13. See Part A. (Steps to be taken in order to better gauge the existence and extent of racial discrimination in the administration and functioning of the criminal justice system; the search for indicators attesting to such discrimination), Section 1. (Factual indicators), Point 1, Letter b. [↑](#footnote-ref-13)
14. OSCE/ODIHR, “Gender, Diversity and Justice: Overview and Recommendations,” May 2019, pages 6-7, <https://www.osce.org/odihr/419840?download=true>. [↑](#footnote-ref-14)
15. Id at page 24. [↑](#footnote-ref-15)
16. Id at page 25. [↑](#footnote-ref-16)
17. Id at page 27. [↑](#footnote-ref-17)
18. Id at page 27. [↑](#footnote-ref-18)
19. <https://fra.europa.eu/en/publication/2018/big-data-discrimination>. [↑](#footnote-ref-19)
20. ODIHR’s Training Against Hate Crimes for Law Enforcement (TAHCLE) and Prosecutors and Hate Crimes Training (PAHCT) programmes. [↑](#footnote-ref-20)
21. <https://www.osce.org/odihr/419840?download=true>. [↑](#footnote-ref-21)
22. See e.g. the CCPR General Comment No. 24 (1994), § 8. [↑](#footnote-ref-22)
23. See, among many others, *Stoica v. Romania*, judgment (ECtHR) cited above. [↑](#footnote-ref-23)
24. See OSCE Guidebook *Preventing Terrorism and Countering VERLT: A Community Policing Approach,* pp. 149-150. For additional recommendations concerning police engagement with youth, women’s groups, faith-based organizations, ethnic minorities and other groups see pp. 126-161 of the Guidebook. [↑](#footnote-ref-24)
25. For further details see OSCE Guidebook *Preventing Terrorism and Countering VERLT: A Community Policing Approach,* pp. 59-60, with information on a police-civil society initiative in this field. [↑](#footnote-ref-25)
26. See, among others, *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, judgment (ECtHR, Grand Chamber) of 6 July 2005, § 160 and other international resources cited therein. [↑](#footnote-ref-26)