

June 27, 2019

To the CERD Committee:

The Open Society Justice Initiative welcomes General Recommendation No. 36 on *Preventing and Combating Racial Profiling* as a valuable contribution to the international legal framework to advance fair and effective policing.

Giving greater clarity to the scope and practical implications of the International Convention on the Elimination of All Forms of Racial Discrimination is especially welcome given that it has no explicit reference to policing. Racial profiling is a particularly pernicious form of discrimination as it is conducted by the very state authority charged with protecting the public and enforcing the law equally and impartially. The individuals and communities impacted by these practices are at a grave disadvantage and often have little recourse and few resources to challenge police practices. Yet an increasing body of evidence shows that racial profiling is deep-rooted and widespread across diverse global settings.

The Open Society Justice Initiative has worked to address racial or ethnic profiling in Europe since 2005. Colleagues at the Open Society Foundations support similar work in the US and Latin America. The following elements of the General Recommendation are especially welcome in advancing international standards:

- The requirement of individualized reasonable suspicion under legal standards;
- The recognition that legal standards must be accompanied by practical guidance;
- The note of caution in the call for more training, flagging the limits of training in changing attitudes. In our view, training should be accompanied by or follow standard-setting rather than being undertaken as a stand-alone activity;
- The important focus on retention and advancement in the call for workforce diversity. This reflects documented experiences of racism and bias against minority officers within police institutions;
- The emphasis on community dialogue, including dedicated outreach;
- The crucial importance of ethnic data for any serious effort to address and end racial profiling;
- The multi-faceted approach to accountability is welcome, in distinguishing organizational or departmental accountability through management and discipline, from community oversight and complaints mechanisms, and emphasizing the importance of a channel for complaints independent of the police themselves.

General Recommendation No. 36 is also helpful in drawing out the potential for profiling to take on new forms with the use of new technologies. Here the recommendations helpfully indicate the need for states to create a strong, human rights-based regulatory framework for this area, including placing strong human rights and non-discrimination requirements on the private sector. The recommendations reinforce and build on the Report of the UN Special Rapporteur on the promotion and protection of the

right to freedom of opinion and expression in the area of discrimination, law enforcement and criminal justice.

We suggest two areas in which the Recommendation should be strengthened:

- 1) **Adding the need to create viable legal remedies to the recommendations on accountability at F, paragraphs 32 - 34.** As noted by the European Network of Independent Experts in CFR-CDF.Opinion4.2006, civil and administrative remedies are more applicable to racial profiling than criminal actions (which challenge an individual officer's intent and do not address profiling as a wider pattern of practice). As in other areas of established non-discrimination law, effectively addressing profiling requires rules of evidence that include shifting the burden of proof and allowing statistical evidence to assure a viable legal remedy for victims. Class actions or the option of joining cases also provide relevant legal avenues for profiling practices. Remedies should also include a range of options beyond monetary damages, including orders for relief and reform, such as audits of police services, policies, requiring documentation of practices through tools such as stop forms and other recommended good practices.
- 2) **Expanding the section defining and understanding racial profiling at paragraphs 16 to 17 to include the discriminatory use of fines and administrative penalties against certain groups and/or in certain areas or neighborhoods.** Racial profiling is not solely a result of the discretionary decisions of individual police officers, but also results from operational decisions and orders from police managers, and from decisions to apply measures (fines, gang data bases, etc) to specific neighborhoods or groups of people without consideration for their discriminatory impacts.

We thank the Committee for its consideration of our feedback and welcome further opportunities to engage with follow-up to the Recommendation.

Yours sincerely,

Fair and Effective Policing Project  
Open Society Justice Initiative