

PREVENTING AND COMBATTING RACIAL PROFILING BY LAW ENFORCEMENT OFFICIALS

GENERAL RECOMMENDATION NO.36

FREQUENTLY ASKED QUESTIONS

JANUARY 2021

What is the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)?

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is an international treaty that bans racial discrimination and sets out steps for States to take to prevent racial discrimination. 182 States have accepted (ratified) the ICERD. This means they are legally bound to implement it.

What is the Committee on the Elimination of Racial Discrimination (CERD)?

The Committee on the Elimination of Racial Discrimination (CERD) is a body of 18 independent experts that monitors the implementation of the ICERD by the ratifying States.

What are General Recommendations?

General Recommendations help to deepen the understanding of various aspects of ICERD. General Recommendations help States understand their legal obligations under ICERD; and help people understand their rights to be free from racial discrimination. To date, CERD has adopted 36 General Recommendations, covering themes such as racist hate speech and racial profiling.

What is the focus of this General Recommendation?

The focus of this General Recommendation is preventing and combatting racial profiling by law enforcement officials. This is because some law enforcement officials, such as police and border control officers, stop, check, inspect and arrest people in ways that affect specific people more than others, due to their race, skin colour, descent, or national or ethnic origin.

What is racial profiling?

For the purposes of the General Comment, racial profiling is *the practice of law enforcement 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.*

Racial profiling might be conscious or unconscious, individual or institutional and structural.

What are some typical acts of racial profiling in law enforcement?

Racial profiling by law enforcement officials may occur in any law enforcement activity, such as border and custom checks, home searches, targeting for surveillance, operations to maintain or re-establish law and order, or immigration decisions.

Who is more affected by racial profiling?

Racial profiling affects specific individuals and groups, such as indigenous peoples, people of African descent, national and ethnic minorities, Roma, migrants, refugees and asylum-seekers most.

What is the impact of racial profiling on people?

Racial profiling can have serious effects on people's lives. It can lead to a sense of injustice, fear and humiliation. In turn, people subject to racial profiling tend to have less trust in law enforcement and, as a result, be less willing to cooperate with law enforcement officials.

Racial profiling violates the people's right to be free from racial discrimination. It also affects their other rights, including rights to life, liberty and security of person, right to privacy, freedom of movement, freedom of association, right to work, right to health and the right to a remedy, among other rights.

What is the impact of racial profiling on the administration of justice?

Racial profiling has far-reaching impacts on the administration of justice, in particular the criminal justice system. It can lead to over-criminalization of certain groups, increase the incarceration of certain groups, increase vulnerability of certain people to the risk of abuse by law enforcement, lead to under-reporting of racial discrimination and hate crime, cultivate abusive practices in law enforcement operations, and result in harsher sentences for crimes committed by people affected by racial profiling.

What is the connection between racial profiling and racist hate speech?

Racist hate speech by the media and by politicians can encourage racial profiling by law enforcement officials. In turn, racial profiling in law enforcement can portray certain racially discriminated groups as more prone to commit crimes and can exacerbate racist hate speech against those people.

How can artificial intelligence contribute to racial profiling in law enforcement?

Artificial intelligence tools and methods, big data and automated decision-making are increasingly influencing the actions and decisions of law enforcement officials. While such advances have the potential to increase the accuracy, effectiveness and efficiency of actions and decisions of law enforcement officials, they may also reproduce and reinforce biases and aggravate or lead to discriminatory practices. In particular, if the data used to inform artificial intelligence models is itself biased, the artificial intelligence models are more likely to reproduce and reinforce these biases in ways that are discriminatory.

What are some examples of the ways artificial intelligence can contribute to racial profiling in law enforcement?

The use of historical arrest data to assist with predictive policing might reinforce biases and lead to discrimination. For example, arrest data for a predictive police model might reflect existing police biases that had focused policing on a minority or segregated neighbourhood. If this data informs a predictive police model, these data risk directing future police actions, resulting in further over-policing of certain areas and an impression of higher criminality in certain minority or segregated neighbourhoods, reinforcing stereotypes and discrimination.

The use of algorithmic profiling for sentencing by courts can also lead to discriminatory practices. A model relying on information such as the individual's criminal history, family and friends, their social conditions, work and academic history, in order to assess the 'danger' the person poses, might lead to harsher sentences for certain categories of people where the data is racially biased.

Why does CERD condemn the use of DNA profiling by law enforcement officials?

In certain situations law enforcement officials have employed algorithms to make a link between an individual's DNA and ethnicity or nationality, in turn risking racial profiling based on DNA. In turn,

law enforcement officials have used DNA profiling to conclude that certain individuals are more prone to violence or criminality on the basis of the ethnicity or nationality, leading to discriminatory policing practices against certain groups.

There are no direct linkages between an individual's DNA and ethnicity and nationality and CERD condemns the use of DNA profiling in law enforcement.

What does ICERD say about racial profiling?

The ICERD does not refer explicitly to racial profiling but several aspects of the Convention oblige States to take steps to prevent and remedy racial profiling. Specifically:

- Article 2 obliges States not to engage in any act or practice of racial discrimination and to ensure that all authorities and institutions respect this obligation. As racial profiling can promote and perpetuate racist incidents, racial prejudice and stereotyping, States must ensure that law enforcement officials and institutions do not engage in racial profiling.
- Article 5 obliges States to prohibit and eliminate racial discrimination and guarantee equality before the law, including in relation to the right to equal treatment before tribunals and in the administration of justice. Racial profiling in law enforcement is incompatible with this obligation.
- Article 6 obliges States to guarantee effective protection against racial discrimination. Consequently, States must take steps to prevent institutions from practicing racial profiling and they must guarantee effective remedies for individuals that have been subject to racial profiling.
- Article 7 highlights the role of teaching, education, culture and information in combatting racial discrimination. Therefore, States must inform law enforcement officials of their responsibilities not to engage in racial profiling and ensure they are sufficiently aware of how to avoid racial profiling practices.

What should States do to stop racial profiling?

Some of the main steps that States should take to stop racial profiling include the following:

- ✓ Introduce laws and guidelines that define and prohibit racial profiling and promote conduct that prevents racial profiling
- ✓ Develop specialized, mandatory training programmes to sensitize law enforcement officials on fundamental rights, the impact of racial profiling and how to ensure against racial discrimination
- ✓ Ensure that law enforcement agencies develop recruitment, retention and advancement strategies, including internal quotas, that promote a diverse work force that reflects the communities they serve
- ✓ Ensure that public information from the police and law enforcement agencies is reliable and objective and does not perpetuate racial stereotypes
- ✓ Refrain from releasing personal data about alleged perpetrators of crimes linked to their race, colour, descent, or national or ethnic origin
- ✓ Collect, publish and monitor disaggregated data related to law enforcement practices, including identity checks, traffic stops and border searches
- ✓ Guard against the automated processing of data that analyse certain personal aspects of an individual, including to predict an individual's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements

- ✓ Create oversight mechanisms for law enforcement agencies and an independent mechanism to receive complaints of racial discrimination and racial profiling, with powers to investigate allegations and report publicly on findings
- ✓ Prosecute and convict with appropriate sanctions perpetrators of racial profiling and ensure compensation for victims of racial profiling
- ✓ Consult with affected communities and promote models of cooperation between the authorities, communities and civil society organizations to help coordinate support services for victims of racial profiling.

What should States do specifically in relation to artificial intelligence?

Specifically in relation to artificial intelligence, States should:

- ✓ Prior to introducing algorithmic profiling systems, adopt legislative and other measures to determine their purpose and to regulate their use in conformity with ICERD
- ✓ Prior to introducing facial recognition technology, carefully assess its impact and its potential to lead to misidentification as a result of unrepresentative data sets
- ✓ Ensure transparency in the design of algorithmic profiling systems and allow researchers and civil society to scrutinize codes
- ✓ Monitor and assess the impact of algorithmic profiling systems throughout their life cycles, including through community impact assessments
- ✓ Adopt measures, such as independent oversight, audits and codes of conduct, to ensure the public and private sector comply with human rights standards in the design, deployment and implementation of artificial intelligence tools in the area of law enforcement
- ✓ Encourage the private sector not to sell or deploy an algorithmic profiling system where its human rights risks are too high or impossible to mitigate
- ✓ Investigate and sanction all allegations of algorithmic bias.

How can CERD help?

CERD can help combat racial profiling in law enforcement by:

- ✓ Reviewing States practices under the periodic reporting procedure in light of this General Recommendation and make recommendations to States
- ✓ Receive individual complaints from individuals alleging racial profiling from States that have accepted the Committee's competence to do so
- ✓ Receive and assist with requests from individuals and organizations for action against racial profiling under the Early Warning and Urgent Action procedure.

Learn more:

The full General Recommendation can be found here (add link)

For more information on the CERD and its work, have a look at the CERD homepage:

<https://www.ohchr.org/en/hrbodies/cerd/pages/cerdindex.aspx>