

Rights Working Group Suggested List of Issues to Country Report Task Force on the United States
107th Session of the Human Rights Committee, Geneva, 11-28 March 2013

United States Compliance with the International Covenant on Civil and Political Rights
**The Persistence, in the United States, of Discriminatory Profiling Based on
Race, Ethnicity, Religion and National Origin**

1. Rights Working Group (RWG) formed in the aftermath of September 11th to promote and protect the human rights of all people in the United States. A coalition of more than 350 local, state and national organizations,ⁱ RWG works collaboratively to advocate for the civil liberties and human rights of everyone regardless of race, ethnicity, religion, national origin, citizenship or immigration status. RWG convenes and mobilizes its diverse constituencies and amplifies their efforts to hold the U.S. government accountable to protecting human rights, focusing on the evolving connections among national security, counter-terrorism, immigration enforcement and criminal justice policies and systems. This submission is based on information received from our member organizations as well as on human rights reports since the last ICCPR review of the United States of America.

Issue Summary

2. As a State Party to the International Covenant on Civil and Political Rights (ICCPR), the United States (U.S.) is obligated to ensure the non-derogable right of all people under its jurisdiction to be free from discrimination. By implementing and expanding policies and programs that allow for or incentivize the use of racial profilingⁱⁱ, the U.S. government has failed in complying with the obligation to honor the principles of equality and non-discrimination.
3. Racial profiling in the popularly termed “driving or walking while black or brown” contexts has long been perpetrated by state and local law enforcement agencies around the country. Across the United States, traffic and pedestrian stops continue to be used as a pretext for determining whether black and Latino individuals are engaged in criminal activity. These racially motivated stops and searches remain unproductive, resulting in extremely low seizure rates of contraband. In the first nine months of 2012 in New York City, for example, 443,422 individuals were subjected to police stops and street interrogations. 87% were black or Latino and 89% of the individuals stopped were completely innocent.ⁱⁱⁱ
4. During the Obama Administration’s first term, federal immigration initiatives have increasingly implicated state and local law enforcement in civil immigration enforcement, an area of law historically considered to be within the sole purview of federal authorities. Examples include the 287(g) program, where state and local officials are deputized to enforce federal immigration law; the Secure Communities program, where biometric information obtained in state or local booking processes is sent by the Federal Bureau of Investigations to the Department of Homeland Security (DHS) for an immigration status check; and the Criminal Alien Program, which allows state and local law enforcement agents to arrest individuals and invite federal immigration officers to come into their jails to check immigration status. These programs incentivize racial profiling and data has shown that state and local law enforcement agents have disproportionately targeted Latinos.^{iv} Even U.S. citizens and lawful permanent residents have been swept up, with one independent study approximating that as many as 3,600 U.S. citizens have been identified and arrested for immigration violations under the auspices of Secure Communities.^v This greater involvement in immigration enforcement has required state and local agents to assist in performing immigration functions for which they are untrained and unprepared, resulting in allegations of racial profiling and violations of due process rights.
5. A Department of Justice Office of Legal Counsel (OLC) Memorandum, dated April 3, 2002 regarding the non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration

violations (inherent authority memo) reversed years of previous legal opinions by finding that state and local law enforcement had “inherent authority” to enforce immigration law.^{vi} Since the Committee last reviewed U.S. compliance with the ICCPR, this memo has been interpreted by some state and local law enforcement as granting states the inherent power to arrest individuals for violations of immigration law. This federal devolution of immigration enforcement authority to states and localities has emboldened racist and xenophobic efforts in state and local political bodies. Unsurprisingly, we have seen anti-immigrant state bills and local ordinances take root across the country that cite to and rely on this perceived “inherent authority”^{vii} - most notably in Arizona’s SB 1070 and its copycats in Alabama, Georgia, Indiana, South Carolina, and Utah.

6. One troubling trend post-9/11 is the use by federal law enforcement agencies and the U.S. military of biased and false information in training materials about Muslims and Islam. For example, a 2006 Federal Bureau of Investigation (FBI) report stated that individuals who convert to Islam are on the path to becoming “homegrown Islamic extremists if they wear traditional Muslim attire, grow facial hair, frequently attend a mosque or prayer group, travel to a Muslim country or increase their support of a pro-Muslim social group or political cause.”^{viii} Many recent news reports have highlighted the FBI’s use of biased experts and training materials, but this troubling practice extends beyond the FBI to the U.S. Attorney’s Anti-Terrorism Advisory Councils, the U.S. Department of Homeland Security and the U.S. Army.^{ix} Discriminatory domestic intelligence work, however, doesn’t stop with the work of federal entities—it extends to local law enforcement agencies. The New York Police Department (NYPD) has aggressively relied on identity-based intelligence gathering, using census data to racially map and infiltrate ethnic communities. As discovered by a months-long investigation by the Associated Press, “[t]he department has dispatched teams of undercover officers, known as ‘rakers,’ into minority neighborhoods as part of a human mapping program . . . They’ve monitored daily life in bookstores, bars, cafes and nightclubs. Police have also used informants, known as ‘mosque crawlers,’ to monitor sermons, even when they have no evidence of wrongdoing.”^x
7. The U.S. Border Patrol has doubled in size since 2003 and currently employs more than 21,000 agents, with 85% of the force deployed at the southwest border with Mexico. The southwest border has also been increasingly militarized with the addition of physical infrastructure and technologies, such as approximately 650 miles of border fencing and up to 10 unmanned aerial vehicles on patrol. This rapid expansion of border enforcement resources has come with few corresponding accountability and oversight mechanisms. This imbalance has resulted in a tremendous increase in human rights violations including racial profiling and harassment of Native American/American Indians and Latinos—many of whom are U.S. citizens and have lived in the region for generations. Incidents of excessive use of force are also on the rise and at least 23 people have been killed or seriously injured on the northern and southern border by Customs and Border Patrol officials since January 2010.^{xi} This trend has been met with a complete lack of transparent and thorough investigations into the overwhelming majority of these use-of-force incidents.
8. Operation Streamline requires the federal criminal prosecution and detention of all unlawful border crossers and primarily targets migrant workers with no criminal history. This program has generated unprecedented immigration caseloads in federal district courts along the border. The great volume of cases has forced federal judges hearing Operation Streamline cases to combine the initial appearance, arraignment, plea and sentencing into one mass hearing, and many Streamline defendants complete their entire criminal proceeding—from the initial meeting with their attorneys to being sentenced—in one single day.^{xii} These practices violate fundamental due process rights.

2006 HRC Concluding Observations

9. In paragraph 24 of its 2006 Concluding Observations of U.S. compliance with the ICCPR (CCPR/C/USA/CO/3/ Rev.1), the Human Rights Committee called upon the U.S. government to “continue and intensify its efforts to put an end to racial profiling used by federal as well as state law enforcement

officials.” The Committee further noted a desire “to receive more detailed information about the extent to which such practices still persist, as well as statistical data on complaints, prosecutions and sentences in such matters.” In paragraph 27, the Committee expressed concern “about the increased level of militarization on the southwest border with Mexico” and recommended the adoption of concrete measures “to ensure that only agents who have received adequate training on immigration issues enforce immigration laws.”

U.S. Government Report

10. The U.S. government’s fourth periodic report submitted to the Human Rights Committee touted the federal government’s efforts to combat racial profiling, citing as evidence (1) outreach conducted by the Department of Justice and Department of Homeland Security Office of Civil Rights and Civil Liberties (CRCL) to communities to “address concerns regarding racial, ethnic, and religious discrimination (paragraph 105 and 107) and strengthened training provided to federal and local law enforcement officers (paragraphs 600 and 601); (2) CRCL investigations of complaints (paragraph 106) and several investigations by the Department of Justice Civil Rights Division into patterns or practices of discriminatory policing (paragraph 183 and 484) and (3) Department of Justice lawsuits filed against several states that have passed anti-immigrant state-level laws like Arizona’s infamous SB1070 (paragraphs 636-640).^{xiii}
11. Despite what may have been good intentions by the Department of Homeland Security CRCL to establish outreach efforts and complaint mechanisms, NGOs and community groups have lost faith in these initiatives. In 2012, CRCL solicited information from NGOs related to 287(g) jurisdictions that may be problematic due to allegations of civil rights violations or anti-immigrant animus by law enforcement or other government entities within the jurisdiction. NGOs around the country scrambled to produce the information, submitting relevant data and reports which were seemingly disregarded when the Department chose to renew all 287(g) agreements temporarily in what appears to have been a political calculation around President Obama’s reelection campaign. CRCL’s complaint mechanisms are also roundly criticized for their lengthy (up to one year) duration and unobservable impact on systemic problems.
12. The claim of strengthened training is also misleading. A 2011 review by the Department of Homeland Security Office of Inspector General of the 287(g) Program found that the program training did not include instruction in critical skills and that participants did not find that the training prepared them for the practical requirements of conducting inspections. We are unaware of any significant improvements in the adequacy of the 287(g) training since that time^{xiv} and the Obama Administration in fact expanded the 287(g) program in 2009, adding programs in new jurisdictions and bringing the total number to 57 programs in place and 9 additional agreements in negotiation (as of October 16, 2012). Secure Communities is now implemented in 97% of U.S. jurisdictions and is expected to go nationwide in a matter of months; there is no training provided to participating law enforcement agencies on the obligation to uphold human rights in its implementation. The Department of Homeland Security initiated a months-long project in 2011 to devise a statistical monitoring tool that could identify problematic jurisdictions participating in the Secure Communities Program. The effort failed to produce a useful tool.
13. We applaud the Department of Justice for initiating pattern or practice investigations into problematic jurisdictions and for filing lawsuits against states that have passed anti-immigrant state-level laws. These investigations are unfortunately limited to a small number of jurisdictions, do not provide remedies for individuals, and are undermined by the Department of Homeland Security which has retained the 287(g) and Secure Communities Programs in several of these jurisdictions.
14. The Obama Administration has failed to take affirmative steps to support congressional efforts to pass the federal End Racial Profiling Act and the review of the 2003 Department of Justice Guidance on the Use of Race by Federal Law Enforcement Agencies remains incomplete.

Legal Framework

Articles 2 (right to non-discrimination), 9 (right to protection from arbitrary arrest and detention) and 26 (right to equal protection) of the ICCPR are primarily relevant to the issue of racial profiling.

Other UN Body and IACHR Recommendations

15. In paragraph 14 of its 2008 Concluding Observations of U.S. compliance with the ICERD (CERD/C/USA/CO/6), the Committee on the Elimination of Racial Discrimination (CERD) recommended that the U.S. “strengthen its efforts to combat racial profiling at the federal and state levels.”
16. In September 2009, the CERD sent a follow-up letter to the Obama Administration and raised concerns about the use of racial profiling in migration policies and urged the U.S. government to reconsider its policy under the 287(g) Program. The CERD additionally urged the U.S. to eliminate loopholes in the 2003 Department of Justice (DOJ) Guidance Regarding the Use of Race by Federal Law Enforcement Agencies and the adoption of federal legislation prohibiting racial profiling.^{xv}
17. The UN Special Rapporteur on Racism in his 2009 report on his country visit to the U.S. also called attention to the serious problem of racial profiling by law enforcement. He criticized the persistent use of racial profiling by law enforcement officials, particularly in stops and searches of members of African American and Hispanic communities. He also noted concerns with profiling practices that target people of Arab, Muslim, South Asian or Middle-Eastern descent, particularly in air travel and border control. The Special Rapporteur urged the U.S. government to adopt federal legislation prohibiting racial profiling and he called for action by state governments to do the same.
18. In his January 2007 report, the Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism noted that U.S. policies designed to counter terrorism singled out immigrants from Arab and/or Muslim populations and expressed grave concern with the use of terrorist profiles based on race, ethnicity, religion or national origin.
19. Racial profiling was one of the top issues raised during the 2010 Universal Periodic Review of the United States, with countries making strong and specific recommendations to the United States to take affirmative steps to end the practice.
20. The Inter-American Commission on Human Rights in its 2010 report on immigration in the United States expressed concern about the 287(g), Secure Communities and Criminal Alien Programs and recommended the elimination of 287(g) and that state and local partners only be allowed to participate in immigration enforcement after an individual has been criminally convicted or a criminal proceeding has been fully adjudicated.^{xvi}
21. In paragraph 25 of its 2008 Concluding Observations of U.S. compliance with the ICERD (CERD/C/USA/CO/6), the CERD Committee expressed concern regarding use of excessive or deadly force against “racial, ethnic or national minorities,” which included “undocumented migrants crossing the U.S.-Mexico border,” and called for adequate oversight mechanisms, further training and assurance that reports are “independently, promptly and thoroughly investigated.”

Recommended Questions

Department of Justice & Department of Homeland Security Accountability: *We understand that the Department of Homeland Security (DHS) has limited the Secure Communities Program in some jurisdictions found by the Department of Justice (DOJ) to have engaged in a pattern or practice of discriminatory profiling or those where the DOJ has challenged anti-immigrant state laws. We also understand that the program in these jurisdictions limits only the information shared with the state/local law enforcement agencies but doesn't address the issue that the*

simple presence of an immigration enforcement program in a problematic jurisdiction creates an additional incentive to racially profile—because local law enforcement is aware that immigration status checks will be conducted and possible immigration actions taken. Why doesn't DHS fully terminate the Secure Communities Program in these jurisdictions? Given the ample documentation of human rights violations and the widespread criticism from both government and civil society sources, why haven't DHS 287(g) agreements been eliminated completely? How will DHS track potential violations related to racial profiling considering the failure of the recent statistical monitoring project? How is the Department of Justice investigating the Federal Bureau of Investigation's racial mapping initiatives and those undertaken by state and local law enforcement agencies?

Federal Legislation and Guidance: *Why is the current administration not taking affirmative steps to end racial profiling such as by supporting congressional efforts to pass the End Racial Profiling Act? What is the status of the 2003 Department of Justice Guidance on the Use of Race by Federal Law Enforcement Agencies? Why is the process stalled and will the review result in guidance that is enforceable, applies to state and local law enforcement agencies and closes existing loopholes—such as including religion and national origin as protected classes and prohibiting racial profiling in all contexts, including national security, border security and surveillance activities?*

Deaths at the Northern and Southern Borders: *What is the status of Department of Justice and Department of Homeland Security investigations into deaths at the northern and southern border at the hands of border patrol agents? What is being done to ensure accountability and remedies for the families of victims? What are the Departments of Justice and Homeland Security doing to address concerns related to violations of due process rights in the course of rushed Operation Streamline prosecutions?*

Suggested Recommendations

- The Department of Homeland Security should eliminate existing 287(g) agreements and initiate no new agreements; fully terminate Secure Communities in jurisdictions that wish not to participate in the program; and immediately suspend Secure Communities, the Criminal Alien Program, and other similar formal and informal partnerships in jurisdictions with a documented record of racial profiling, where DOJ is actively investigating a pattern or practice of discriminatory policing or in states like Arizona and Alabama that have enacted anti-immigrant state legislation.
- Rescind the DOJ's 2002 OLC "inherent authority" memo and issue a new memo clarifying that state and local law enforcement agents may not enforce federal immigration laws.
- Review, reform and disseminate to all Customs and Border Protection sectors and field offices policies that:
 - ban the use of racial profiling, (i.e., relying, to any degree, on race, ethnicity, national origin, or religion in selecting which individual to subject to routine or spontaneous investigatory activities);
 - prevent immigration enforcement activities on interior transportation services and in sensitive community locations; and
 - incorporate de-escalation techniques commonly used as best practices by law enforcement agencies to reduce the need for use of force and ensure lethal force is only used as a last resort.
- The Obama Administration should affirmatively support congressional efforts to pass the End Racial Profiling Act.
- The U.S. government should eliminate Operation Streamline and end the practice of criminalizing immigration violations.

¹ A full list of our member organizations and steering committee members is available on our website: www.rightsworkinggroup.org.

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- ⁱⁱ In this submission we use the phrase ‘racial profiling’ to refer to profiling by law enforcement agencies based on race, ethnicity, religion, national origin or perceived immigration status.
- ⁱⁱⁱ New York Civil Liberties Union, Analysis of NYPD Stop-and-Frisk Data, *available at* <http://www.nyclu.org/content/stop-and-frisk-data>.
- ^{iv} Trevor Gardner II and Aarti Kohli, The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, University of California, Berkeley Law School, The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program (Sept. 2009), *available at* www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf. See also Aarti Kohli, Peter L. Markowitz and Lisa Chavez, The Chief Justice Earl Warren Institute on Law and Social Policy, University of California, Berkeley Law School, Secure Communities by the Numbers: An Analysis of Demographics and Due Process (Oct. 2011), *available at* http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.
- ^v Aarti Kohli, Peter L. Markowitz and Lisa Chavez, The Chief Justice Earl Warren Institute on Law and Social Policy, University of California, Berkeley Law School, Secure Communities by the Numbers: An Analysis of Demographics and Due Process (Oct. 2011), *available at* http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.
- ^{vi} See Department of Justice Office of Legal Counsel, Memorandum for the Attorney General (Apr. 2002), *available at* <http://www.aclu.org/files/FilesPDFs/ACF27DA.pdf>.
- ^{vii} Jerry Markon, *Memo from 2002 Could Complicate Challenge of Arizona Immigration Law*, Wash. Post, May 18, 2010, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/17/AR2010051702175.html>.
- ^{viii} Spencer Ackerman, *New Evidence of Anti-Islam Bias Underscores Deep Challenges for FBI’s Reform Pledge*, Wired Magazine, Sept. 23, 2011, *available at* <http://www.wired.com/dangerroom/2011/09/fbi-islam-domination/all/1>.
- ^{ix} Community Letter to the Honorable John Brennan, Assistant to the President for Homeland Security and Counterterrorism and Deputy National Security Advisor, Oct. 19, 2011, *available at* <http://www.muslimadvocates.org/Community%20letter%20to%20Brennan%20re%20FBI%20trainings%2C%2010-19-11%2C%20FINAL.pdf>.
- ^x Matt Apuzzo and Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, A.P., Aug. 24, 2011.
- ^{xi} Jorge A. Solis, 28, shot and killed, Douglas, AZ (Jan. 4, 2010); Victor Santillan de la Cruz, 36, shot and killed, Laredo, TX (March 31, 2010); Anastasio Hernandez Rojas, 32, tortured to death, San Diego, CA (May 28, 2010); Sergio Adrian H. Huereca, 15, shot and killed, El Paso, TX (June 7, 2010); Juan Mendez, 18, shot and killed, Eagle Pass, TX; Jesus E. Castro Romo, 30, survived shooting, Santa Cruz County, AZ (Nov. 16, 2010); Ramses Barron Torres, 17, shot and killed, Nogales, Mexico (Jan. 5, 2011); Roberto Pérez Pérez, beaten while in detention and died due to lack of proper medical care, San Diego, CA (Jan. 13, 2011); Alex Martinez, 30, shot and killed, Whatcom County, WA (Feb. 27, 2011); Carlos Lamadrid, 19, shot and killed, Douglas, AZ (March 21, 2011); Jose Gutierrez Guzman, 41, tased into a comatose state, survived, San Luis port of entry, AZ (March 30, 2011); Jose Alfredo Yañez Reyes, 40, shot and killed, Tijuana, Mexico (June 21, 2011); Hugo Veytia-Quintero, 47, survived shooting, San Diego, CA (Sept. 25, 2011); Gerardo Rico Lozana, 20, shot and killed near Corpus Christi, TX (Nov. 3, 2011); Byron Sosa Orellana, 28, shot and killed near Sells, AZ (Dec. 6, 2011); Alexander Martin, 24, died in car explosion that may have been caused by Border Patrol tasers (March 15, 2012); Charles Robinson, 75, shot and killed, Jackman, ME (June 23, 2012); Juan Pablo Perez Santillán, 30, shot and killed on the banks of the Río Grande, near Matamoros, Mexico (July 7, 2012); Guillermo Arévalo Pedroza, 36, shot and killed, Nuevo Laredo, Mexico (Sept. 3, 2012); Valerie Tachiquin-Alvarado, 32, shot and killed, Chula Vista, CA (Sept. 28, 2012); José Antonio Elena Rodriguez, shot and killed, Nogales, Sonora (Oct. 11, 2012); Margarito Lopez Morelos, 19, shot and killed, Baboquivari Mountains, AZ (Dec. 2, 2012); and unknown person, shot and injured, Gila Bend, AZ (Dec. 4, 2012).
- ^{xii} Joanna Lydgate, The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity, University of California, Berkeley Law School, *Assembly-Line Justice: A Review of Operation Streamline* (Jan. 2010), *available at* http://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf.
- ^{xiii} Human Rights Comm., Fourth Periodic Report: United States of America, U.N. Doc. CCPR/C/USA/4 (May 22, 2012), *available at* <http://www.state.gov/j/drl/rls/179781.htm>.
- ^{xiv} Dep’t of Homeland Sec. Office of Inspector General, *The Performance of 287(g) Agreements FY 2011 Update* (Sept. 2011), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_11-119_Sep11.pdf.
- ^{xv} Letter from Fatimata-Binta Victoire Dah, Chairperson of the Committee on the Elimination of Racial Discrimination, U.N. High Commission for Human Rights (Sept. 28, 2009), *available at* http://www.aclu.org/files/pdfs/humanrights/uncerdresponse_racialdiscrimination.pdf.
- ^{xvi} Inter-Am. Comm’n H.R., *Report on Immigration in the United States: Detention and Due Process* (Dec. 30, 2010), *available at* <http://cidh.org/pdf%20files/ReportOnImmigrationInTheUnited%20States-DetentionAndDueProcess.pdf>.