



SUBMISSION TO THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

DURING ITS CONSIDERATION OF THE SEVENTH TO NINTH PERIODIC
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July 2014



Submission to the Committee on the Elimination of Racial Discrimination

**During its Consideration of the Seventh to Ninth Periodic
Reports of the United States of America
CERD 85th Session**



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I. Summary

Human Rights Watch would like to express its appreciation to the United Nations Committee on the Elimination of Racial Discrimination (the “Committee”) for this opportunity to provide it with information on the compliance of the United States with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

We would like to acknowledge the submissions of our colleague nongovernmental organizations (NGOs), specifically the joint shadow reports written by a wide cross-section of US NGOs and coordinated by the US Human Rights Network. We urge the Committee to view this Human Rights Watch submission as complementary to the joint submissions and not as an attempt to catalog all of the instances in which US policies or practices raise concerns under ICERD.

The focus of our submission is primarily linked to research undertaken by Human Rights Watch since the last Committee review of the United States in 2008.

The US, while continuing to combat intentional racial discrimination, has yet to fully embrace the principles of the ICERD. The ICERD defines prohibited discrimination as any race-based distinction, exclusion, restriction or preference that has “the purpose or effect” of curtailing human rights and fundamental freedoms.¹ The specific reference to “purpose or effect” makes clear that discrimination can exist in the absence of an intent to harm members of a particular race or ethnicity. The Committee has called on countries to eliminate laws or practices that may be race-neutral on their face, but that unjustifiably result in significant racial disparities in their impact, even in the absence of racial animus.² While the United States has acknowledged the premise of “disparate impact” in employment, voting, and housing contexts, it fails to do so in other crucial arenas, such as

¹ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted December 21, 1965, G.A. Res. 2106 (XX), annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc A/6014 (1966), 660 U.N.T.S. 195, entered into force January 4, 1969. The United States acceded to ICERD on November 20, 1994.

² See UN Committee on the Elimination of Racial Discrimination, General Recommendation XIV(42), on art. 1, para. 1 of the Convention, U.N. GAOR, 48th Sess., Supp. No. 18, U.N. Doc. A/48/18 (1993), at 176. See also, Theodor Meron, “The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination,” *American Journal of International Law*, vol. 79, (1985), pp. 287-88.

its criminal justice system. The US's failure to reform laws that have the effect of creating or perpetuating racial discrimination is documented throughout this submission.

In this submission we address various racial disparities arising out of the administration of the US criminal justice system, beginning with its impact on youth in the criminal justice system. We also provide information on disparate treatment related to drug enforcement, bail practices, and application of the death penalty.

We address the surveillance of American Muslims in the name of counterterrorism and how such surveillance violates the ICERD. We also address racial disparities in US border enforcement.

Finally, we address how US laws that permit primarily Latino children to work in dangerous tobacco fields contravenes ICERD protections, and also how low-income racial minorities are facing inadequate access to health care in the United States.

We hope the Committee will find the following information helpful to its work.

II. Racial Discrimination in the Criminal Justice System

Sentencing youth to life without possibility of parole violates the right to equal treatment before the courts (Article 5(a))

In the Committee's concluding observations stemming from its 2008 review of the United States, the Committee recommended that the US "discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences."³ Since that review, the US has made welcome but limited steps toward limiting the sentencing of youth (or juveniles) to life without the possibility of parole (JLWOP). On the national level, the US Supreme Court has ruled on JLWOP sentences in two significant cases: In the 2010 *Graham v. Florida* decision, the Supreme Court struck down JLWOP in non-homicide cases; and in its 2012 *Miller v. Alabama* decision, the Court found mandatory JLWOP sentences unconstitutional, striking down laws that mandate life without parole sentences for youth. However, the court left open the possibility that children convicted of homicide might be sentenced to JLWOP on a discretionary basis in certain circumstances.

In 2012, the California Assembly [passed](#) Senate Bill 9, which allows people sentenced to life in prison and who were under age 18 at the time of their crime to ask the sentencing court to review their case and consider a new sentence permitting parole after serving 25 years in prison. The states of West Virginia and Hawaii eliminated the sentence of life without parole for youth in 2014.⁴ Also in 2014, the Florida state legislature [passed](#) a bill allowing for judicial review of nearly all very long or life sentences for youth offenders, establishing an opportunity for release beyond the rarely used executive powers of commutation or pardon. In [several](#) state courts, judges have found *Miller* retroactive, but the US Supreme Court has declined to address whether the decision is retroactive.

Despite these steps forward in limiting life without parole sentences for youth, as Human Rights Watch has documented in [2005](#), [2008](#), and [2012](#), the US continues to impose the

³ UN Committee on the Elimination of Racial Discrimination, "Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, United States of America," UN Doc. CERD/C/USA/CO/6, May 8, 2008, para. 21.

⁴ "West Virginia eliminates life without parole for children," The Campaign for the Fair Sentencing of Youth, March 29, 2014, <http://fairsentencingofyouth.org/2014/03/29/west-virginia-eliminates-life-without-parole-for-children/> (accessed July 21, 2014); "Hawaii legislature abolishes juvenile life without parole," The Campaign for the Fair Sentencing of Youth, May 6, 2014, <http://fairsentencingofyouth.org/hawaii-abolishes-juvenile-life-without-parole/> (accessed July 21, 2014).

sentence, and the sentence continues to run afoul of the ICERD. Relative to their population, African American youth are more likely to serve a JLWOP sentence. In our 2008 [submission](#) to this Committee we noted that in California, African American youth arrested for murder were sentenced to life without parole at a rate 6 times that of white youth arrested for murder. Among all 25 US states for which we had data, African American youth arrested for murder were sentenced to LWOP at a rate 1.5 times that of white youth arrested for murder. A 2012 report by the Sentencing Project noted that racial dynamics, taking into account the race of the offender and victim, continued to show that African American youth were disproportionately serving JLWOP sentences.⁵

Recommendations

1. The Committee should urge the United States to implement policies that end the use of life sentences for federal crimes committed by people under the age of 18.
2. The Committee should recommend that the United States, including its constituent state governments, end the use of life without parole sentences for crimes committed by people below the age of 18 and retroactively apply the Supreme Court decisions limiting JLWOP sentences.

Disparate treatment of children prosecuted as adults violates the right to equal treatment before the courts (Article 5(a)) and the right to participate in the political process (Article 5(c))

In April 2014, Human Rights Watch released a report, [Branded for Life](#), on the prosecution of children as adults in the state of Florida. Every year, thousands of children are prosecuted as adults in Florida. The overwhelming majority are teenagers sent from the juvenile justice system to adult court at the sole discretion of prosecutors, whose decisions are not subject to judicial review. This almost unfettered discretion is commonly referred to as “direct file” authority. Once convicted of a felony in adult court, these children suffer lifelong consequences, including voter disenfranchisement, as Florida disenfranchises convicted felons for life.

We found that one quarter of the children in Florida’s juvenile justice system are African American boys, but they account for 51 percent of transfers to the adult system. Thirty

⁵ Ashley Nellis, “The Lives of Juvenile Lifers: Findings from a National Survey,” The Sentencing Project, March 2012, http://sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf (accessed July 21, 2014).

percent of children in the juvenile justice system are white boys, but they account for only 24 percent of transfers. African American boys are significantly more likely than white boys to be transferred to adult court after being arrested for violent offenses other than murder: from fiscal year 2008 to fiscal year 2013, 13 percent of black boys were transferred to adult court whereas only 7 percent of white boys were transferred following such arrests, and we found similar disparities in drug felony arrests.

The racial disparities in the use of transfers to adult court have consequences that last beyond any jail or prison term. The Committee in its 2008 concluding observations raised concerns with voter disenfranchisement, noting its disparate impact on persons belonging to racial minorities.⁶ In its submission to the Committee, the United States notes that legislation has been introduced in Congress that expands opportunities for people who have completed federal criminal sentences to regain the right to vote in federal elections, but the US submission also notes that primarily states determine eligibility for most elections.⁷

Lifetime disenfranchisement for any felony, no matter how serious, is an arbitrary and disproportionate punishment or collateral consequence to punishment. As we have pointed out most recently in our 2014 report, *Nation Behind Bars*, felony disenfranchisement imposes undue restrictions on important rights to participate in political processes that cannot be justified by criminal conduct or individual blameworthiness.⁸ Disenfranchisement imposed due to actions committed when a person was a mere adolescent is even more out of proportion to a young person's culpability. Finally, disenfranchisement that is disproportionately borne by persons within specific racial minority groups is incompatible with the protections of the ICERD. Of the more than one million people barred from voting in Florida due to the state's felony disenfranchisement law, nearly one in three are African American men, who make up only 10 percent of the population.

Recommendations

1. The Committee should urge the US government and its constituent state governments to require that any decision to transfer a child to the adult criminal justice system be made by a judge based on testimony and evidence presented in

⁶ UN Committee on the Elimination of Racial Discrimination, "Concluding observations of the Committee on the Elimination of Racial Discrimination, United States of America," May 8, 2008, para. 27.

⁷ Government of the United States of America, Reports submitted by States parties under article 9 of the Convention, Seventh to ninth periodic reports of States parties due in 2011, United States of America, CERD/C/USA/7-9, para. 102.

⁸ Human Rights Watch and the Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, October 1998, <http://www.hrw.org/news/1998/10/21/felon-laws-bar-39-million-americans-voting>.

- a hearing, with a statutory presumption that the child remain in the juvenile system. States should study and document racial disparities in the decisions to transfer children to adult courts.
2. The Committee should urge the United States to pass legislation that restores federal voting rights to people upon completing their criminal sentences.
 3. The Committee should urge the United States, including its constituent state governments, to restore state and local voting rights to persons upon completing their criminal sentences.

Drug enforcement and sentencing violates the right to equal treatment before the courts (Article 5(a))

Throughout the United States, the ostensibly race-neutral effort to curtail the use and distribution of illegal drugs continues to disproportionately target African Americans. African Americans are arrested on drug charges at more than 3 times the rate of whites and are sent to prison for drug convictions at 10 times the white rate.⁹ These disparities cannot be explained by racial patterns of drug crime. They reflect law enforcement decisions to concentrate resources in low-income minority neighborhoods. They also reflect deeply rooted racialized concerns, beliefs, and attitudes that shape the nation's understanding of the "drug problem" and skew the policies chosen to respond to it.¹⁰

Even absent conscious racism in anti-drug policies and practices, race matters. The choice of arrest and imprisonment as the primary anti-drug strategy disproportionately burdens African Americans and continues to thwart efforts to improve opportunities and living standards for black Americans, deepen the disadvantages of poverty and social marginalization, and threaten hard-fought civil rights progress.¹¹

Extensive [research](#) by Human Rights Watch and many others has shown that the higher rates of minority incarceration for drug offenses are not a reflection of higher rates of drug

⁹ See Jamie Fellner, "Race and Drugs," in the *Oxford Handbook of Ethnicity, Crime, and Immigration*, Sandra M. Bucerius and Michael Tonry, ed. (Oxford: Oxford University Press, 2013), http://www.hrw.org/sites/default/files/related_material/Race%20and%20Drugs.pdf.

¹⁰ Jamie Fellner, "In Anti-Drug Policy, Race Remains," Huffington Post, March 5, 2009. http://www.huffingtonpost.com/jamie-fellner/in-antidrug-policy-race-r_b_172159.html (accessed July 21, 2014)

¹¹ Jamie Fellner, "Race and Drugs," Sandra Bucerius and Michael Tonry, ed., *The Oxford Handbook of Ethnicity, Crime, and Immigration* (Oxford: Oxford University Press, 2014).

offending conduct.¹² In absolute numbers, many more whites than African Americans use illicit drugs, and the best available evidence indicates that African Americans are no more likely than whites to sell drugs. Nevertheless, African Americans are arrested for drug offenses at a much higher rate than whites.¹³ They also are more likely to be convicted, to be sent to prison after conviction, and to receive longer sentences. Though 13 percent of the population, African Americans constitute 27 percent of all federal drug offenders.¹⁴ Latinos comprise 17 percent of the population but 48 percent of all drug offenders convicted in federal court. The average sentence for federal African American drug offenders was much higher than for whites: 92 months compared to 67 months.¹⁵

Most experts agree that racial disparities in drug arrests reflect the concentration of drug law enforcement activities in inner city areas with high minority populations. The causes of higher rates of conviction and incarceration and of longer sentences are complex, but include the fact that African Americans may be more likely to have longer criminal histories because of higher arrest rates and racially influenced prosecutorial charging decisions.

Under longstanding US jurisprudence, facially race-neutral governmental policies and practices do not violate the constitutional guarantee of equal protection unless there is both discriminatory impact and discriminatory purpose. The requirement of proof of intent has been a formidable barrier for victims of discrimination in the criminal justice system seeking judicial relief. The US Congress has never enacted legislation that would permit federal lawsuits based solely on racially discriminatory impact in drug law enforcement.

Under ICERD, of course, unwarranted racial disparities can constitute prohibited discrimination regardless of discriminatory intent. ICERD requires state parties to “take effective measures to review governmental, national, and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.” The Committee has in the past recommended that state parties pay close attention to factual indicators that would reveal

¹² Ibid. See also Human Rights Watch, *Targeting Blacks: Drug Law Enforcement and Race in the United States*, May 2008, <http://www.hrw.org/reports/2008/05/04/targeting-blacks>.

¹³ Ibid.

¹⁴ United States Sentencing Commission (USSC), 2013 Sourcebook of Federal Sentencing Statistics, <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013> (accessed July 8, 2014), Table 34: Race Of Drug Offenders In Each Drug Type.

¹⁵ Human Rights Watch comments on US Sentencing Commission consideration of retroactivity of proposed amendments to the Drug Quantity Table in the US federal sentencing guidelines, July 8, 2014, http://www.hrw.org/sites/default/files/related_material/2014_US_RetroactivityUSSC.pdf.

impermissible racial discrimination regardless of intent.¹⁶ These include looking at proportionately higher arrest rates involving racial and ethnic minorities, with particular attention to drug related crimes, and harsher sentencing against racial and ethnic minorities.

There have been some modest reforms to address these problems at the federal level, but more should be done to ensure all people benefit from them. The US Sentencing Commission has decided that the existing federal sentencing guidelines for drugs are disproportionately severe and has modified them for both future cases and for people already sentenced.¹⁷ Three out of four people eligible to seek relief under a retroactive application of the sentencing guideline reductions are racial and ethnic minorities (15,600 African Americans and 22,224 Latinos).¹⁸ The Commission's sentencing reduction will not solve the problem of disproportionate sentencing for drug offenses, but it may partially alleviate the disparate impact on African Americans and Latinos of higher rates of conviction and incarceration.

Recommendations

1. The Committee should ask the US government to withhold federal funding and the cooperation of federal drug law enforcement agents from police departments that engage in unwarranted racially disparate drug arrests.
2. The Committee should ask the US government and its constituent state governments to provide the necessary statistics by which it can determine whether the activities of drug law enforcement agencies yield an unwarranted racially disparate impact.
3. The Committee should ask the US government to undertake a systematic examination of the purpose of drug laws, their patterns of enforcement, their

¹⁶ UN Committee on the Elimination of Racial Discrimination, General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, UN Doc. A/60/18 (2005).

¹⁷ "U.S. Sentencing Commission unanimously votes to allow delayed retroactive reduction in drug trafficking sentences," US Sentencing Commission press release, July 18, 2014, http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf (accessed July 21, 2014). Also, Congress is also currently debating whether to make the Fair Sentencing Act (the bill reducing the sentencing disparity between crack and powder cocaine) retroactive, but it appears that the legislation has little chance of passing in this Congress. Editorial Board, "Sentencing Reform Runs Aground: Bipartisan Push to Reform Sentencing Stalls in Congress," *New York Times*, June 21, 2014, <http://www.nytimes.com/2014/06/22/opinion/sunday/bipartisan-push-to-reform-sentencing-stalls-in-congress.html> (accessed July 21, 2014).

¹⁸ "Memorandum from Office of Research and Data and Office of General Counsel to Chair Saris, Commissioners, and Kenneth Cohen," US Sentencing Commission, May 27, 2014, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140527_Drug_Retro_Analysis.pdf (accessed July 8, 2014).

effects on drug use and distribution, and alternative responses to drug use and distribution to determine whether there are cost-effective measures that would reduce harmful effects of drug use and sales without disproportionately burdening minority communities with arrest and incarceration.

4. The Committee should recommend that the US government and its constituent state governments should apply any guideline and statutory criminal sentencing reductions retroactively if doing so would reduce sentences disproportionately and unjustifiably burden racial and ethnic minorities.

Bail practices violate the right to equal treatment before the courts (Article 5(a))

In 2010, Human Rights Watch issued a [report](#) on the use of bail and pretrial detention in New York City that identified problematic racial disparities.¹⁹ We found that deprivation of liberty in the form of pretrial detention because of an inability to post bail is endured primarily by African Americans and Latinos. We noted that 89 percent of all pretrial detainees held on small amounts of bail (\$1,000 or less) were from minority communities.

This disproportionate pretrial detention of minorities stems from the disproportionate rates of minority arrests. Although they constitute 51 percent of New York City's population, African Americans and Latinos comprise 82 percent of all misdemeanor arrestees. They account for 87 percent of arrests for misdemeanor possession of marijuana in public view, even though drug-use surveys indicate that whites use marijuana as much if not more than minorities.²⁰

The Committee has urged states to ensure that the “requirement to deposit a guarantee or financial security ... to obtain release pending trial is applied in a manner appropriate to the situation of persons in vulnerable groups, who are often in straitened economic circumstances, so as to prevent the requirement from leading to discrimination.”²¹ In New

¹⁹ Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, December 2010, <http://www.hrw.org/reports/2010/12/02/price-freedom-o>.

²⁰ Harry G. Levine and Deborah Peterson Small, “Marijuana Arrest Crusade: Racial Bias and Police Policy in New York City, 1997-2007,” New York Civil Liberties Union, April 2008, http://www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf (accessed July 21, 2014); Andrew Golub, Bruce D. Johnson, and Eloise Dunlap, “The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City,” *Criminology and Public Policy*, vol. 6(1) (2007), p. 131-164.

²¹ UN Committee on the Elimination of Racial Discrimination, General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, UN Doc. A/60/18 (2005), para. 26.

York City, bail practices yield a double discrimination—pre-trial detention is imposed on the basis of economic resources and race.

Recommendation

1. The Committee should recommend that the United States take steps to ensure pretrial detention is not used disproportionately against racial and ethnic minorities, including those who have scant financial resources. A first step might be to collect racial data on pretrial detention in a random sample of large urban counties. The United States should also review federal pretrial detention to ensure there is no discriminatory impact in the application of federal bail requirements.

Capital punishment in the United States violates the right to equal treatment before the courts (Article 5(a))

Racial disparities continue to permeate the use of capital punishment in the US. As of July 1, 23 people have been executed in the US in 2014.²² Of those 23, half (12) were African American, even though African Americans comprise only 13 percent of the US population. There were 31 homicide victims in the crimes related to these 23 executions—of these 31 victims, two-thirds (21) were white.

This issue is not new to the Committee. In its 2008 concluding observations, the Committee stated that it “remains concerned about the persistent and significant racial disparities with regard to the imposition of the death penalty, particularly those associated with the race of the victim” and recommended that the US study the “underlying factors of the substantial racial disparities in the imposition of the death penalty.”²³ During its 2010 Universal Periodic Review before the UN Human Rights Council, the US supported a recommendation from France that it “[u]ndertake studies to determine the factors of racial disparity in the application of the death penalty, to prepare effective strategies aimed at ending possible discriminatory practices.”²⁴ The US has yet to undertake such a study.

²² Death Penalty Information Center, “Execution List 2014,” <http://www.deathpenaltyinfo.org/execution-list-2014> (accessed July 8, 2014).

²³ UN Committee on the Elimination of Racial Discrimination, “Concluding observations of the Committee on the Elimination of Racial Discrimination, United States of America,” May 8, 2008, para. 23.

²⁴ Human Rights Council Working Group on the Universal Periodic Review, Ninth session, Draft report of the Working Group on the Universal Periodic Review, United States of America (Draft report), A/HRC/WG.6/9/L.9, November 10, 2010, http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A_HRC_WG.6_9_L.9_USA.pdf (accessed July 8, 2014), para. 92.95.

In 1987, the US Supreme Court declined to use statistical evidence as proof of unconstitutional racial discrimination in application of capital punishment.²⁵ However, one state attempted to address effective racial discrimination in capital punishment since the last US review before this committee. The state of North Carolina in 2009 passed the Racial Justice Act,²⁶ which allowed inmates on death row to use statistics to show that racial considerations played a role in their sentencing. If inmates could show in a hearing that race played a substantial factor in their sentencing, their death sentence would be commuted to life without parole. (African Americans make up 20 percent of the population of North Carolina, but comprise 52 percent of inmates on death row in the state.²⁷) Under the Racial Justice Act, four inmates had their sentence commuted, primarily on data showing how African Americans had been disproportionately removed from their state's jury pools.²⁸

After a change in the composition of the North Carolina legislature in 2010, and the election of a new governor, North Carolina narrowed and then finally repealed the Racial Justice Act in 2011. The state supreme court is currently reviewing whether the four commutations should be reversed in light of this appeal.

North Carolina briefly grasped the spirit of the ICERD by calling into question policies that have the purpose *or* effect of creating racial disparities. The Racial Justice Act helped the state to become aware of the pervasive ways racial considerations were inappropriately influencing decisions involving the death penalty.

Recommendations

1. The Committee should remind the United States of its commitment to study racial disparities in the application of capital punishment at all stages of the criminal justice system.
2. The Committee should recommend that the United States and its constituent state governments adopt policies or legislation that mirror the North Carolina Racial Justice Act.

²⁵ *McCleskey v. Kemp*, 481 US 279 (1987).

²⁶ Death Penalty Information Center, "Racial Justice Act Passed in North Carolina House and Senate," undated, <http://www.deathpenaltyinfo.org/racial-justice-act-passed-north-carolina-house-and-senate> (accessed July 8, 2014).

²⁷ North Carolina Department of Public Safety, "Offenders on Death Row," undated, <https://www.ncdps.gov/index2.cfm?a=000003,002240,002327,002328#> (accessed July 8, 2014).

²⁸ Lane Forsheim, "Four Inmates Might Return to Death Row Because North Carolina Republicans Repealed a Racial Justice Law," *New Republic*, May 9, 2014, <http://www.newrepublic.com/article/117699/repeal-racial-justice-act-north-carolina-gop-takeover> (accessed July 8, 2014).

III. Surveillance and Profiling of American Muslims

The surveillance and profiling of American Muslims violates the ICERD requirement that the state rescind laws that perpetuate racial discrimination (Article 2(1)(c)) and violates the right to equal treatment before the courts (Article 5(a))

In a July 2014 report, [*Illusion of Justice*](#), Human Rights Watch documented discriminatory surveillance and targeting of American Muslims by the Federal Bureau of Investigation (FBI) for terrorism investigations. This discriminatory treatment included: 1) the identification of persons or communities as potential terrorists based solely on their religious or political affiliation; 2) using paid informants or undercover agents to infiltrate religious and cultural institutions to seek out individuals who might be susceptible to influence; and 3) conducting interviews with community members under the guise of “community outreach” that were actually used for information-gathering.

During our research, many mosque congregants described to us what they believed were signs of surveillance by local law enforcement or the FBI: unmarked cars parked outside of the mosque, unknown individuals writing down license plate numbers of cars parked at the mosque, or even showing up to hear Friday sermons and introducing themselves to other congregants and offering to help with jobs, loans or charity work. The report documented American Muslims’ generalized anxiety and fear that they put themselves at risk of law enforcement surveillance and targeting whenever they engaged with Muslim and community institutions, for example, by attending mosque, contributing to charity organizations, volunteering or helping organize community events. Individuals reported that this fear had, during some periods, driven them or their acquaintances to avoid expressing political opinions or engaging in basic religious practices such as group prayer.

Some community members said that fears of surveillance and informant infiltration had negatively transformed the quality of the mosque—from a place of spiritual sanctuary and community togetherness to a place where they had to be on their guard, watch what they said, with whom they spoke, and even how often they attended services.

As a result of this distrust, some American Muslims reported that they became reluctant to engage with law enforcement because they believed it could lead to their being arbitrarily targeted—either to become an informant, or to be prosecuted. This reluctance can have ramifications for their willingness to report a crime tip or fully cooperate in bona fide terrorism investigations.

FBI agents have in some cases presented their attendance at mosque or cultural events, or their visits to individuals' homes and schools, as “community outreach”—friendly and casual—but instead collected intelligence on the behavior of law-abiding American Muslim individuals and communities. This runs counter to the FBI's own policy of separating investigation work from community outreach. It has the effect of tainting all FBI community partnership efforts as insincere, and fuels the perception that the FBI views all American Muslims as inherently suspect. It also drives speculation within communities that the FBI is taking advantage of their willingness to engage, and instead is performing clandestine investigations and ultimately building prosecutions against vulnerable community members.

The United States reports in its submission to the Committee that it has developed training “to increase communication, build trust, and encourage interactive dialogue among law enforcement officers and the diverse American communities, in which they work, including Arab, Muslim, South Asian, and Somali American communities.”²⁹ As Human Rights Watch documented, the FBI's approach to investigations is doing the opposite—it is not only discriminatory, but counterproductive, undermining trust in authorities in precisely the communities where law enforcement claims to want to build that trust.³⁰

In April, the *New York Times* reported that the US Justice Department was about to expand its definition of prohibited profiling under its Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (“Guidance”) to include religion and national origin.³¹ This would be an important development, yet four months later, the Justice Department has yet to release its amended guidelines.

²⁹ Government of the United States of America, Reports submitted by States parties under article 9 of the Convention, Seventh to ninth periodic reports of States parties due in 2011, United States of America, CERD/C/USA/7-9, para. 85.

³⁰ See Glenn Greenwald and Murtaza Hussain, “Meet the Muslim-American Leaders the FBI and NSA Have Been Spying On,” *The Intercept*, July 9, 2014. <https://firstlook.org/theintercept/article/2014/07/09/under-surveillance/> (accessed July 22, 2014).

³¹ Matt Apuzzo, “Profiling Rules Said to Give F.B.I. Tactical Leeway,” *New York Times*, April 9, 2014. <http://www.nytimes.com/2014/04/10/us/profiling-rules-said-to-give-fbi-tactical-leeway.html> (accessed July 22, 2014).

Recommendations

1. The Committee should ask the United States why the Justice Department has yet to release its amended Guidance regarding the use of race by federal law enforcement agencies so as to prohibit profiling on the basis of religion.
2. The Committee should recommend that the United States amend the Attorney General's Guidelines for Domestic FBI Operations to prohibit assessments or investigations of any kind solely on the basis of religion or religious behavior.

IV. Border Abuses

Investigating, surveilling, stopping, searching or otherwise targeting people solely on the basis of their race, ethnicity, religion, or national origin violates the requirement that the state rescind laws that perpetuate racial discrimination (Article 2(1)(c)) and violates the right to equal treatment before the courts and other organs administering justice (Article 5(a))

For racial, ethnic, and religious minorities, living in the border region or crossing the border can mean being singled out, stopped, searched, or harassed by US Customs and Border Protection, including the US Border Patrol, because of their appearance or name.

US regulations and law permit US Customs and Border Protection agents to patrol the border within a “reasonable distance” of the international boundary, defined as 100 air miles.³² Thus US citizens or others living within this zone on the southern and northern land borders of the United States come into routine contact with federal border agents and frequently report instances of racial profiling.

Human Rights Watch is currently investigating claims of racial profiling at the southern and northern border of the United States, including cases of US citizens of Mexican origin begin profiled and subjected to additional questioning. US Border Patrol agents in northern New York appear to work closely with local law enforcement, staffing temporary, rotating checkpoints together with New York State police, who routinely interrogate people who appear to be of Latin American origin about their immigration status.

US Customs and Border Protection agents also appear to be targeting individuals returning to the US from abroad at airports and land border crossings based on their religion, ethnicity, race or national origin. American Muslims and those perceived to be Muslim appear to be particularly singled out for interrogation including about their political views, religious beliefs, and practices and associations.³³

³² 8 U.S. Code § 1357, Powers of immigration officers and employees; 8 CFR 287.1, Definitions.

³³ Sarah Abdurrahman, “My Detainment Story Or: How I Learned To Stop Feeling Safe In My Own Country And Hate Border Agents,” *WNYC: On the Media*, September 20, 2013, <http://www.onthemedial.org/story/my-detainment-story-or-how-i-learned-stop-feeling-safe-my-own-country-and-hate-border-patrol/> (accessed July 22, 2014); Muslim Advocates, *Unreasonable Intrusions: Investigating the Politics, Faith & Finances of Americans Returning Home*, April 2009,

The Committee has recommended that states “[e]nsure that immigration policies do not have the effect of discriminating against persons on the basis of race, color, descent, or national or ethnic origin” and “[e]nsure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, color, descent, or national or ethnic origin.”³⁴ In General Recommendation No. 31, the Committee urged states to “prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person’s color or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion.”³⁵

US federal law enforcement officers must comply with guidance from the Department of Justice on the use of race.³⁶ This guidance purports to “prohibit racial profiling in law enforcement practices,” but it suffers from significant lacunae, which leave many people unprotected from discriminatory action. We welcome recent announcements that US Attorney General Eric Holder will revise this guidance to expand the definition of prohibited profiling to include not just race, but religion, national origin, gender and sexual orientation (although those revisions are not yet finalized, as noted above).³⁷ However, these revisions are insufficient. The guidance also allows exceptions from its strictures for border enforcement and national security, loopholes that should also be closed.

Recommendations

1. The Committee should urge the United States to issue improved guidelines on the use of race by federal agents that eliminates the border and national security loopholes and prohibit profiling on the basis of national origin and religion. The US should ensure that the amended Justice Department guidance is enforceable and applies to state and local law enforcement agencies working in collaboration with federal law enforcement.

https://d3n8a8pro7vhmx.cloudfront.net/muslimadvocates/pages/178/attachments/original/1360963837/Unreasonable_Intrusions_2009.pdf?1360963837 (accessed July 22, 2014).

³⁴ UN Committee on the Elimination of Racial Discrimination, General Recommendation XXX on Discrimination against Non-Citizens, UN Doc. CERD/C/64/Misc.11/rev.3 (2004).

³⁵ UN Committee on the Elimination of Racial Discrimination, General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, UN Doc. A/60/18 (2005), p. 98-108.

³⁶ US Department of Justice, “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies,” June 2003, http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf (accessed July 8, 2014).

³⁷ Matt Apuzzo, “U.S. to Expand Rules Limiting Use of Profiling by Federal Agents,” *New York Times*, January 16, 2014, <http://www.nytimes.com/2014/01/16/us/politics/us-to-expand-rules-limiting-use-of-profiling-by-federal-agents.html> (accessed July 8, 2014).

2. The Committee should urge the US Congress to pass the End Racial Profiling Act, which would ban racial profiling at the federal, state, and local level.
3. The Committee should urge the United States to institute reporting and transparency procedures for all US Border Patrol stops that require documentation of the agents' reasons for a stop, search, or interrogation.

V. Children Working in Agriculture

Laws allowing child labor in agriculture violate the right of non-discrimination in the enjoyment of the right to just working conditions (Article 5(e)(i))

Hundreds of thousands of children under age 18 are working in agriculture in the United States.³⁸ But under a double standard in the US Fair Labor Standards Act, child farmworkers can work at younger ages, for longer hours, and under more hazardous conditions than all other working children. Children as young as 12 can legally work for hire for unlimited hours outside of school on a farm of any size with parental permission, and children younger than 12 can work on small farms or farms owned and operated by family members for any number of hours outside of school. Outside of agriculture, the employment of children under 14 is strictly prohibited, and 14- and 15-year-olds can only work in certain jobs for a limited number of hours each day.³⁹ Under US labor law, children working in US agriculture are also permitted to engage in tasks deemed “particularly hazardous” at the age of 16, while in nonagricultural occupations, the minimum age for particularly hazardous work is 18.⁴⁰

The disparate treatment of agricultural work in child labor law reflects a larger disparity in the treatment of agricultural workers as compared to workers in all other industries. Both adult and child farmworkers are denied many fundamental protections that are provided to workers in other industries. For example, all farmworkers are exempt from overtime pay provisions,⁴¹ and farmworkers on small farms are exempt from minimum wage requirements.⁴² Farmworkers are also excluded from the federal law that guarantees employees the right to engage in collective bargaining and prohibits employers from interfering with freedom of association.⁴³

³⁸ The National Institute for Occupational Safety and Health (NIOSH) estimates that hundreds of thousands of children under the age of 18 work in US agriculture each year, but there is no comprehensive estimate of the number of child farmworkers in the US. Email from Kitty Hendricks, research health scientist, Division of Safety Research, National Institute for Occupational Safety and Health (NIOSH), to Human Rights Watch, December 31, 2013.

³⁹ 29 U.S.C. sec. 213(c).

⁴⁰ 29 U.S.C. sec. 213(c)(2).

⁴¹ 29 U.S.C. sec. 213(b)(12).

⁴² 29 U.S.C. sec. 213(a)(6)(A).

⁴³ The National Labor Relations Act (NLRA), 29 U.S.C. sec. 152(3).

Human Rights Watch has extensively documented the dangerous conditions of work for both adult and child farmworkers in the US,⁴⁴ most recently in a [report](#) on hazardous child labor in US tobacco farming.⁴⁵ Federal data on fatal occupational injuries indicate that agriculture is the most dangerous industry open to young workers. In 2012, two-thirds of children under the age of 18 who died from occupational injuries were agricultural workers,⁴⁶ and there were more than 1,800 nonfatal injuries to children under the age of 18 working on US farms.⁴⁷

Most hired agricultural workers in the United States are of Latin American origin.⁴⁸ As a result, the inadequate labor protections for agricultural workers, particularly child farmworkers, have a disparate impact on Latino workers, amounting to discrimination under international law.⁴⁹

In 2008, the Committee noted with concern that, “workers belonging to racial, ethnic and national minorities, in particular women and undocumented migrant workers, continue ... to be disproportionately represented in occupations characterised by long working hours, low wages, and unsafe or dangerous conditions of work.”⁵⁰ The Committee concluded that the US should ensure that racial discrimination is prohibited in all its forms, including laws and practices “that may not be discriminatory in purpose, but in effect.” It stated that:

indirect—or de facto—discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a particular racial, ethnic or national origin at a disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a

⁴⁴ Human Rights Watch, *Cultivating Fear*, May 2012, <http://www.hrw.org/reports/2012/05/15/cultivating-fear>; Human Rights Watch, *Fields of Peril: Child Labor in US Agriculture*, May 2010, <http://www.hrw.org/reports/2010/05/05/fields-peril>; Human Rights Watch, *Fingers to the Bone*, June 2000, <http://www.hrw.org/en/reports/2000/06/02/fingers-bone-o>.

⁴⁵ Human Rights Watch, *Tobacco's Hidden Children: Hazardous Child Labor in United States Agriculture*, May 2014, <http://www.hrw.org/reports/2014/05/13/tobacco-s-hidden-children>.

⁴⁶ Email from Sean Smith, Bureau of Labor Statistics, US Department of Labor, to Human Rights Watch, October 23, 2013 (citing 2012 data); Bureau of Labor Statistics, US Department of Labor, National Census of Fatal Occupational Injuries in 2012 (Preliminary Results), <http://www.bls.gov/news.release/pdf/cfoi.pdf> (accessed December 13, 2013).

⁴⁷ These estimates include youth hired by farm operators and working household youth. Email from Kitty Hendricks, Research Health Scientist, Division of Safety Research, NIOSH, to Human Rights Watch (citing 2012 data), December 31, 2013.

⁴⁸ According to 2008-2009 survey data from the National Agricultural Workers Survey (NAWS), 76 percent of all US crop workers are Latino. Email from Egan Reich, US Department of Labor, to Human Rights Watch, May 6, 2014. Citing 2008-2009 data from “The National Agricultural Workers Survey: Public Access Data,” <http://www.doleta.gov/agworker/naws.cfm> (accessed May 6, 2014).

⁴⁹ Human Rights Watch, *Fields of Peril: Child Labor in US Agriculture*.

⁵⁰ UN Committee on the Elimination of Racial Discrimination, “Concluding observations of the Committee on the Elimination of Racial Discrimination, United States of America,” May 8, 2008, para 28.

legitimate aim and the means of achieving that aim are appropriate and necessary.⁵¹

The Committee has called upon the US government “to take all appropriate measures” to review existing laws and policies to “ensure the effective protection against any form of racial discrimination and any unjustifiably disparate impact.”⁵²

Recommendations

1. The Committee should urge the United States to amend the Fair Labor Standards Act (FLSA) to apply the same minimum age and maximum hour requirements to children working in agriculture as already apply to all other working children; to raise the minimum age for particularly hazardous work in agriculture from 16 to 18, in line with existing standards in all other industries; and to repeal the sections of the FLSA that exempt certain agricultural employers from paying workers minimum wage and overtime pay.
2. The Committee should ask the United States why its exclusion of farmworkers from the National Labor Relations Act is allowable in light of the inadequate labor protections available for agricultural workers, particularly child farmworkers, and which have a disparate impact on Latino workers.

⁵¹ Ibid.

⁵² UN Committee on the Elimination of Racial Discrimination, “Concluding Observation of the Committee on the Elimination of Racial Discrimination: United States of America,” CERD/C/Misc. /56/18, August 2001, paras. 380-407, para. 393.

VI. Inadequate Access to Health Care for Low-Income Racial Minorities

Inadequate access to health care for low-income racial minorities violates the right to medical care (Article 5(e)(iv))

The Committee noted in 2008 its concern that racial minorities lacked adequate access to health care in the US.⁵³ In 2010 Congress passed the Patient Protection and Affordable Care Act, which gives US states the opportunity to reduce the number of people with no health insurance by—among other measures—expanding eligibility for Medicaid, the public health insurance program for low-income persons. However, in July 2012, the US Supreme Court gave states the option to decline Medicaid expansion.⁵⁴ As of June 2014, 21 states have determined not to expand Medicaid for its uninsured population, despite the fact that the majority of costs for the expansion will be paid by the federal government. Eight of these states are in the southern United States where most African-Americans in the US reside.⁵⁵

Health disparities are dramatic in the US South, where racial minorities are more likely to be uninsured and have poor health outcomes.⁵⁶ For example, in Louisiana, 30 percent of African Americans and 51 percent of Latinos are uninsured compared to 18 percent of whites. African Americans comprise approximately 32 percent of the population of Louisiana yet 73 percent of new HIV infections are among African Americans.⁵⁷ Failure to expand Medicaid in these states will disproportionately impact African-Americans and Latinos who will remain uninsured and unable to access affordable health care.

Recommendation

1. The Committee should ask the United States to report on implementation of the Affordable Care Act as it relates to communities of racial and ethnic minorities, and

⁵³ UN Committee on the Elimination of Racial Discrimination, “Concluding observations of the Committee on the Elimination of Racial Discrimination, United States of America,” May 8, 2008, para 16.

⁵⁴ *National Federation of Independent Business v. Sebelius*, 567 US ____ (2012).

⁵⁵ Kaiser Family Foundation, “Status of State Action on the Medicaid Expansion Decision,” <http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/> (accessed June 18, 2014).

⁵⁶ Philethea Duckett and Samantha Artiga, “Health Coverage for the Black Population Today Under the Affordable Care Act,” Kaiser Family Foundation, July 23, 2013, <http://kff.org/disparities-policy/fact-sheet/health-coverage-for-the-black-population-today-and-under-the-affordable-care-act/> (accessed June 18, 2014).

⁵⁷ Louisiana Department of Health and Hospitals, “HIV and AIDS Quarterly Report,” March 2013, <http://www.dhh.louisiana.gov/assets/oph/HIVSTD/FIRSTQuarter2013.pdf> (accessed July 22, 2014).

to continue monitoring implementation as well as other steps taken by the US to improve access to health care for minority populations.



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