

# Submission on the visit to Spain of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance

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In advance of the Special Rapporteur's visit to Spain in January 2013, this submission details the extent and impact of ethnic profiling on minorities in Spain, and how these practices violate international human rights standards.

## I. Executive Summary and Recommendations

Spanish police routinely rely on physical or racial characteristics when conducting identity checks in the course of ordinary law enforcement and as part of immigration control. The use of such ethnic profiling disproportionately affects the rapidly growing number of ethnic minorities in Spain simply because they do not “look” Spanish.

This practice continues despite the fact that the United Nations Human Rights Committee found ethnic profiling to be impermissible in its 2009 decision in *Rosalind Williams v. Spain*. The Human Rights Committee stated that while identity checks can be carried out for protecting public safety, preventing crime, and controlling illegal immigration, the physical and ethnic characteristics of people targeted cannot be considered indicators of potentially illegal immigration status and cannot serve as justifications for identity checks. This decision challenged a 2001 Judgment of the Spanish Constitutional Court that allowed police officers to use racial, ethnic and other physical characteristics to determine the likelihood of someone being an undocumented migrant, thereby legitimating the practice of ethnic profiling.

Ethnic profiling not only constitutes an unlawful form of racial discrimination that stigmatizes communities based on their ethnic traits. These practices also impair the enjoyment of a number of other human rights, such as the right to liberty and security of person and the right to freedom of movement. In advance of the Special Rapporteur’s first visit to Spain in January 2013, this submission details the extent and impact of ethnic profiling on minorities in Spain, and how these practices violate a host of international human rights standards.

The Open Society Justice Initiative promotes human rights and builds legal capacity through litigation, advocacy, research, and technical assistance. Since 2005, the Justice Initiative has been documenting the prevalence of ethnic profiling in Spain as part of a wider drive to bring European practice in line with European and international law. In 2006, the Justice Initiative, jointly with the civil society organizations *Women’s Link Worldwide* and *SOS Racismo Madrid*, brought the *Rosalind Williams* case before the Human Rights Committee. In addition, over a six-month period in 2007-2008, the Justice Initiative carried out a qualitative study of stop and search in two Spanish towns and found a disproportionate impact on persons belonging to ethnic minorities, whether Spanish citizens or migrants in a regular or irregular situation. The Justice Initiative is now carrying out projects in Spain to promote full implementation of the Human Rights Committee’s decision in *Rosalind Williams v. Spain*, generate public awareness of the negative impacts of ethnic profiling and promote the introduction of good practices by Spanish police forces that demonstrably improve both fairness and services in diverse communities.

This submission offers six recommendations to address the problem of ethnic profiling in Spain and four key questions to ask the Spanish government. **Specifically, the Justice Initiative urges the Special Rapporteur to recommend that the Spanish government:**

1. Amend both the Organic Law 4/2000 of January 11, 2000, on the rights and freedoms of foreigners in Spain and their social integration (*Ley Orgánica sobre derechos y libertades de los extranjeros en España y su integración social*) and the Organic Law 1/1992 of February 21, 1992, on Protection of Public Safety (*Ley Orgánica sobre Protección de la Seguridad Ciudadana*) to comply with the UN Human Rights Committee’s 2009 ruling in the *Rosalind Williams v. Spain* case, including by:
  - Amending each law to include a specific prohibition of the use by police of physical or ethnic characteristics to target persons for controls (in the absence of a specific suspect description), and
  - Establishing clear criteria for initiating and conducting stops, identity checks, and searches based upon a reasonable individualized suspicion that the subject in question has committed or is in the act of committing a crime, or lacks required immigration documentation.
2. Introduce “stop forms” to record all stops and searches and identity checks, along with
  - The implementation of a monitoring system allowing police officers and managers to detect and address any patterns of disproportionality;
  - Community engagement, through the sharing of collected data on stops and identity checks, and efforts to jointly identify solutions to problems and discriminatory trends;
  - The establishment of independent supervision and complaints mechanisms for discriminatory activities by police.
3. Ensure that police officers receive training on human rights and in particular on non-discrimination and the prohibition of ethnic profiling. Training for police officers should be practical and emphasize building skills needed for human rights-compliant policing such as; the use of data and intelligence-led policing; valid grounds for individualized reasonable suspicion; and community consultation.
4. Take measures to improve police-community relations and build trust, including by reaching out to representative ethnic and religious minority communities across Spain through public forums and discussion to enhance mutual understanding and trust; develop community policing initiatives; and create specialized ethnic and religious outreach units in the police.
5. Ensure the recruitment of police officers with migrant and/or ethnic minority backgrounds with a view to establishing a police force that is representative of the community.

In the course of developing recommendations to the Spanish government, we also urge the Special Rapporteur to ask the Spanish authorities questions that would clarify the implementation and impact of the recent Directive to police officers from the Ministry of the Interior (Circular 2/2012 adopted on 20 May 2012), which prohibits “the establishment of identification quotas or the detention of foreigners by any unit of the National Police”, and instructs the police to “equally avoiding massive or indiscriminate conduct based solely on ethnic criteria.” Specifically, we encourage the Special Rapporteur to request information about:

1. The total number of identity checks carried out by agents of the National Police throughout the Spanish territory, differentiating between those carried out during the five months prior to the adoption of Circular 2/2012 (i.e. between 20 December 2011 and 20 May 2012) and during the five months following the approval of the Circular (i.e. between 20 May 2012 and 20 October 2012) to be able to assess its effect.
2. During both periods, the breakdown between (i) police stops (identity checks) carried out in the framework of preventing criminal acts; and (ii) those carried out in the context of immigration law.
3. Also during both periods, the number of police stops that ultimately resulted in the discovery of unlawful/illicit activity, broken down between police stops carried out in the framework of the prevention of criminal acts and those related to immigration law; and
4. For all of the above, details of the breakdown in terms of nationality and ethnic background of the individuals subject to police stops.

## II. INTRODUCTION

“Ethnic profiling” is the use by law enforcement officers of race, ethnicity, religion, or national origin rather than individual behavior as the basis for making decisions about who has been or may be involved in criminal activity. Ethnic profiling appears most frequently in police officers’ decisions about who to stop and ask for identity papers (ID), question, search, and sometimes arrest.

Ethnic profiling in policing has concerned the Special Rapporteur on racism on a number of previous occasions, including in the context of several country visits. Examples include ethnic profiling of Black persons in Brazil<sup>1</sup> and Switzerland;<sup>2</sup> of Muslims and Arabs in Italy,<sup>3</sup> Estonia,<sup>4</sup> and Germany;<sup>5</sup> and of Roma in Latvia<sup>6</sup> and Hungary.<sup>7</sup> Following the 2007 visit to the Russian Federation, the Special Rapporteur called on the government to “take measures to stop practices of racial profiling, particularly racially targeted passport and registration checks conducted against specific communities by law enforcement agents ... including education and sensitization of law enforcement officials to ensure that their duties are carried out with no distinction as to race, colour, national or ethnic origin.”<sup>8</sup> The Special Rapporteur has also called on the United States government as a matter of urgency to “clarify to law enforcement officials the obligation of equal treatment and, in particular, the prohibition of racial profiling” and for State Governments to “adopt comprehensive legislation prohibiting racial profiling” in response to widespread use of ethnic profiling by police in stop and search operations.<sup>9</sup> The Special Rapporteur further recommended that the government “monitor trends regarding racial profiling and treatment of

minorities by law enforcement, federal, state and local governments” and “collect and publicize data about police stops and searches as well as instances of police abuse. Independent oversight bodies should be established within police agencies, with real authority to investigate complaints of human rights violations in general and racism in particular. Adequate resources should also be provided to train police and other law enforcement officials.”

Ethnic profiling in Spain should be a central concern during the Special Rapporteur’s forthcoming visit as it continues to be a persistent and pervasive problem with significant adverse impacts on the rights of ethnic minorities and on police-community relations and society at large.

### III. ETHNIC PROFILING IN SPAIN

Spain’s population is estimated at 47 million, of which approximately 12 percent are non-Spanish nationals.<sup>10</sup> In 2011, a total of 8,773,862 identity checks were carried out in Spain under article 20 of the Law on Public Safety, the main law allowing police to carry out such checks.<sup>11</sup> This figure also represents a significant increase (of 23 percent) on the more than 7.1 million identity checks that were carried out in 2010 - around 6.9 million of which were carried out in public spaces.<sup>12</sup> Spain does not collect ethnic data on its population, nor does it gather disaggregated data on the use of identity checks by law enforcement making it very difficult to provide a statistical measure of any disparate impacts on ethnic minorities.<sup>13</sup>

However, ethnic profiling in the street, around public transport hubs, in restaurants, at public school entrances, in telephone centers, and even at customer service centers for migrants has been documented by a number of non-governmental organizations.<sup>14</sup> The Spanish Ombudsperson (*Defensor del Pueblo*) has also received a high number of complaints about the generalized use of identity checks against foreign nationals by the police.<sup>15</sup> In 2010, 141 civil society associations filed complaints with the Ombudsperson requesting an investigation into identity checks being conducted on foreigners.<sup>16</sup> In February 2012, the Ombudsperson urged the Ministry of the Interior to adopt “appropriate guidelines in order to eradicate the detected police practice of identity checks based on ethnic and racial profiles”<sup>17</sup>.

In 2007, the Justice Initiative undertook a qualitative study in Spain based on extensive interviews with police officers and officials as well as persons that had been subjected to identity checks to document the scope of the practice, which confirmed concerns expressed by a number of monitoring bodies as well as other NGOs about the widespread use of ethnic profiling by Spanish law enforcement.<sup>18</sup>

A subsequent project – Strategies for Effective Police Stop and Search or “STEPSS” – carried out in collaboration with police in the municipalities of Fuenlabrada (Madrid)<sup>19</sup> and Gerona<sup>20</sup> produced quantitative data on police identity checks that provided statistical evidence of the use of ethnic profiling.<sup>21</sup> STEPSS data showed that the municipal police of Fuenlabrada carried out a total of 3,050 stops during the 6-month pilot period. These identity checks clearly disproportionately affected ethnic minorities.<sup>22</sup> In Gerona, the study found significant variations in the use of identity checks by the municipal police and the Catalan police force,<sup>23</sup> but in both cases the data showed clear evidence of ethnic profiling.<sup>24</sup> Yet the police only detected offenses in nine percent of stops of Moroccans compared to 17 percent of stops of ethnic Spaniards confirming that the use of ethnic profiling is not an effective law enforcement strategy.

Regional monitoring bodies have also recently documented ethnic profiling in Spain. The European Union Fundamental Rights Agency in 2008 surveyed police stops of minorities and found that 42 percent of respondents in Spain from North Africa had been stopped by police in the preceding 12 months, while only 12 percent of the majority Spanish population had been stopped.<sup>25</sup> In March 2012, the Council of Europe’s Advisory Committee on the Framework Convention for the Protection of National Minorities adopted its opinion on Spain’s compliance with the Convention.<sup>26</sup> It expressed deep concern at continuing widespread ethnic profiling by police against some minority groups in public places and even in bars and internet and phone centers. It was also concerned with reports of witnesses of “stop and search” being subsequently charged with obstructing the work of the police.<sup>27</sup>

Disproportionate identity checks of persons belonging to ethnic minorities have consequences for individuals, communities and wider society. For the individuals experiencing repeat stop and search encounters, it can be a frightening, embarrassing and humiliating experience. Amnesty International’s investigation into ethnic profiling in Madrid produced testimonies about the widespread feeling of humiliation, rejection and division between those perceived as foreigners and Spanish persons that discriminatory identity checks produce.<sup>28</sup>

More widely, ethnic profiling in stop and search both stems from and reinforces stereotypes that associate minorities and foreigners with criminals and irregular migrants. It feeds the logic underlying public racism. Worse, ethnic profiling stigmatizes entire communities, with no evidence that it improves police effectiveness.<sup>29</sup> In fact, it is counter-productive, wasting valuable police resources stopping millions of people, with little result apart from alienating large sections of society, whose assistance is needed for effective policing.

### **Good Practices to Address Profiling tested by Local Police**

As mentioned above, there have been some good practice examples of police in Spain reducing the use of ethnic profiling. The study by the Justice Initiative was part of STEPSS, a larger project aimed at (1) identifying and reducing disproportionality in identity checks and stops and searches of ethnic minority and immigrant communities; (2) increasing the efficiency of police stops through improved management and supervision; (3) improving police-community relations by sharing and discussing stop data and reviewing security concerns and operational priorities; and (4) creating models of good practice to share with other police forces. Three police forces were involved in the project: the local police of Fuenlabrada, the local police of Gerona and the *Mossos d’Esquadra* (Catalan police force) department in Gerona. They developed tools to monitor the use of identity checks and stop and search powers and determine whether they disproportionately affected minority communities, and assessed their effectiveness in detecting and investigating crime. Community consultation was integral to the project process and included police-community discussion of public safety policies and concerns and alternative ways of addressing them.

In Fuenlabrada in particular the project produced very positive results. Over the six months of data gathering, the police there reduced the disproportionality in the rate at which they were stopping all persons of immigrant origin. The rate at which officers conducted stops overall fell

by well over half, while the percentage of their stops that produced positive outcomes increased by nearly three times. In Fuenlabrada police managers and supervisors also used the stop data to supervise individual officers more closely, and to examine the impact of specific operations and personnel deployments. The data enabled them to factor disproportionate ethnic impacts into their strategic decision-making and reduce unfair policing while enhancing efficiency. The project demonstrated that unlawful discrimination can be reduced and police efficiency improved with the necessary commitment from police managers and supervisors. After the six months pilot project police managers in Fuenlabrada decided to keep using the stop forms.

The *Plataforma por la Gestión Policial de la Diversidad* (PGPD),<sup>30</sup> a network of police representatives and civil society organizations, was created in 2010 to promote improved and non-discriminatory police services. The PGPD is currently implementing a pilot project with three local police departments in Castellón, A Coruña and Málaga called *Programa para la Identificación Policial Eficaz*<sup>31</sup> (Program for the Effectiveness of the Police Stops, PIPE), which essentially replicates the STEPSS project described above.

Regrettably, successive Spanish central governments have to date lacked the commitment shown by some local police forces to addressing widespread racial profiling. The Minister of Interior has rejected complaints of ethnic profiling and stated that law enforcement officials act within the law and in compliance with human rights<sup>32</sup> and has even denied the existence of these discriminatory police practices in Spain. However, in recent months there have been some positive signs that the government's position with regard to ethnic profiling may be shifting towards a willingness to acknowledge the practice, and hopefully also to take steps to address it.

#### IV. DOMESTIC LEGAL FRAMEWORK

Article 14 of the Spanish Constitution provides that all citizens are equal before the law and may not be subject to discrimination on grounds of birth, race, sex, religion, opinion or any other status or personal or social circumstance. Article 13.1 confers the same Constitutional rights and freedoms to all foreigners residing in Spain as provided by law or treaties to which Spain is a party.

Rosalind Williams, a naturalized Spanish citizen of Afro-American origin, relied on Article 14 when she complained in 1992 of being stopped by police simply because she is black. The Spanish Constitutional Court, in a six-to-one decision issued on January 29, 2001, rejected her complaint, finding that a person's racial or ethnic identity is a legitimate indicator of nationality, and to refer to the race of a person in a "descriptive" manner is not *per se* discriminatory, as "specific physical or ethnic characteristics can be taken into consideration as reasonably indicative of the national origin of the person who has them."<sup>33</sup> The court explained that "the police action used the racial criterion as merely indicative of a greater probability that the interested party was not Spanish. None of the circumstances that occurred in said intervention indicates that the conduct of the acting National Police officer was guided by racial prejudice or special bias against the members of a specific ethnic group, as alleged in the complaint. Thus, the police action took place in a place of travelers' transit, a railway station, in which, on the one hand, it is not illogical to think that there is a greater probability than in other places that persons who are selectively asked for identification may be foreigners; moreover, the inconveniences that

any request for identification generates are minor and also reasonably assumable as burdens inherent to social life.”

The UN Human Rights Committee in 2009 rejected the ruling of the Spanish Constitutional Court and concluded that ethnic profiling violates the ICCPR Article 26 on equality before the law read together with Article 2, paragraph 3 on non-discrimination (more details about the decision in section V, below).<sup>34</sup> However, the Spanish government has not changed its practices following the Committee’s decision, which under Spanish law does not supersede the ruling of the Constitutional Court.

Identity checks in Spain are carried out on the basis of Organic Law 1/1992 of February 21, 1992, on Protection of Public Safety (“Public Safety Act”), which provides in Article 11 that foreigners in Spain are required to “provide documentation proving their identity and the fact of being legally in Spain.” Article 20.1 of the same Act empowers the security forces to, in the exercise of their duties of investigation or prevention, carry out identity checks when such checks are necessary for the exercise of their functions or the protection of public safety. One of these functions, according to Article 12 of the Public Safety Act, is immigration law enforcement. In addition, massive identification checks operations may be carried out in order to identify and detain the participants in a criminal offence that has caused serious alarm (Article 19 of the Public Safety Act). The Aliens Act (Law No. 4/2000 of 11 January on the rights and freedoms of foreigners in Spain and their social integration) also establishes the duty of all foreigners to carry documentation that proves their identity, and to display this documentation “when invited by the authorities or their agents, in the exercise of their functions.”<sup>35</sup> The refusal to produce one’s identity documents when requested may amount to a criminal offence as set out in Article 634 of the Spanish Penal Code, which makes it a crime to disobey authority.

The Organic Law 2/1986 of 13 March, 1986, on the Security Forces provides in Article 5 that the security forces must, in the performance of their duties, act with absolute political neutrality and impartiality and, therefore, without any discrimination based on race, religion or opinion. However, the law provides little guidance to police on when it is appropriate to stop or search a person. This opens the door to arbitrary and discriminatory use of the wide discretionary powers granted to law enforcement in carrying out identity checks.

Spanish law requires police officers to have a “motive” to conduct an identity check (i.e. these activities can only be carried out when are necessary to accomplish the functions of the police authorities). Exactly what constitutes “motive” remains undefined. The Spanish Supreme Court has ruled that stop and searches must be carried out with reasonable care and within the spirit of an investigation; the police can act on simple suspicion while conducting crime prevention police activities, but that suspicion cannot be “illogical, irrational or arbitrary”<sup>36</sup>. However, it appears from its ruling in the *Williams* case that the Constitutional Court does not consider racial stereotyping to be arbitrary in the context of immigration law enforcement activities.

Following a high number of complaints about ethnic profiling, the Ombudsperson recommended on February 2012 that the Directorate General of the Police provide appropriate instructions to eradicate the practice of identity checks based on ethnic and racial profiling and that control mechanisms be set up regarding identification practices in public places.



In May of this year, a new Circular 2/2012 (i.e. a guideline directive) of the General Directorate of Police was adopted. This Circular replaces the widely criticized Circular 1/2010,<sup>37</sup> and seems intended to respond to persistent allegations of ethnic profiling and the alleged use of arrest quotas of foreign nationals by the police. The new Circular provides that law enforcement activities targeted at foreigners should avoid any practice that could lead to undue restrictions on the rights and freedoms of immigrants. It states that the establishment of quotas for identity checks of foreigners is illegal and that the police should avoid indiscriminate actions based solely on ethnic criteria. However, these provisions are not contained in the part of the circular that sets out binding instructions to the police. Moreover, the binding provisions of the Circular do not contain any clear prohibition of racial discrimination. Instead it still allows police officers to exercise broad discretion in determining what might constitute grounds for stopping someone to check their identity. In the context of immigration control this could very well continue to result in widespread use of ethnic profiling.

Despite the adoption of this circular, ethnic profiling persists as regularly documented by “Neighborhood Brigades for the Observation of Human Rights” (*Brigadas Vecinales de Observación de Derechos Humanos*), an organization based in Madrid that documents and denounces identity checks that disproportionately target persons belonging to ethnic minorities.<sup>38</sup> Their December 11, 2012, report on identity controls in Madrid notes that they continued to receive reports of discriminatory controls following the May 2012 issuance of the above-mentioned circular. As of November 10, 2012, they had received 225 reports of alleged discriminatory police controls.<sup>39</sup>

Victims of these discriminatory police practices do not have access to effective remedies. The Council for the Promotion of Equal Treatment of All Persons without Discrimination on the Grounds of Racial or Ethnic Origin (*Consejo para la promoción de la igualdad de trato y no discriminación de las personas por su origen racial o étnico*) was established by law in 2003 and finally set up in October 2009. It is attached to the Ministry of Health Care, Social Policies and Equality (*Ministerio de Sanidad, Políticas Sociales e Igualdad*) and focuses on assistance to victims (mediation and legal advice mainly) through a network of Spanish NGOs. However, this body does not offer effective remedies to victims of ethnic profiling as (i) its mandate does not include police activities;<sup>40</sup> (ii) the Council lacks investigative powers and the right to initiate or participate in court proceedings; and (iii) it is not independent because it does not have adequate safeguards against interference from the State (the chair is appointed by the Minister and half of its members are representatives of the central and regional governments).<sup>41</sup> In addition, regular judicial proceedings are protracted and judges generally lack knowledge of international human rights law and non-discrimination provisions.<sup>42</sup>

## V. INTERNATIONAL LEGAL OBLIGATIONS BREACHED

Protection against ethnic profiling – a particularly pernicious form of discrimination on grounds of race and ethnic origin in the administration of justice - is contained in at least two international human rights conventions to which Spain is a party: the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD). The prohibition of racial discrimination is recognized as a peremptory and non-derogable norm of international law.<sup>43</sup> Ethnic profiling constitutes a form of

discrimination based on race and ethnicity that is prohibited under Spain's international legal obligations.

The general prohibition against discrimination based on race or ethnicity is most comprehensively set out in CERD, but is also contained in all other relevant international human rights instruments to which Spain is a party.<sup>44</sup> Under CERD Article 2(1)(a), Spain is obliged to “engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.” Article 2(1)(c) requires Spain 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 CERD Committee has clarified in its General Recommendation No. 30 that “differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”<sup>45</sup> It has further stated that states should ensure “that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin”<sup>46</sup> and “that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens.”<sup>47</sup> It is also worth noting that the CERD Committee has called for a reversal of “the burden of proof in civil proceedings involving discrimination based on race, colour, descent, and national or ethnic origin so that once a non-citizen has established a prima facie case that he or she has been a victim of such discrimination, it shall be for the respondent to provide evidence of an objective and reasonable justification for the differential treatment.”<sup>48</sup>

The right to equal treatment before the tribunals and all other organs administering justice is protected under CERD Article 5(a). The CERD Committee has stated in its General Recommendation No. 31 that “States parties should take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person's colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion.”<sup>49</sup> It has further stated that indicators of potential causes of racial discrimination include “the potential indirect discriminatory effects of certain domestic legislation, particularly legislation on terrorism, immigration ... States should seek to eliminate the discriminatory effects of such legislation and in any case to respect the principle of proportionality in its application”.<sup>50</sup> The disproportionate impact of identity checks on ethnic minorities in Spain clearly amounts to discrimination based on race or ethnicity.

The CERD Committee has directly expressed concerns about ethnic profiling by Spanish police in public places and neighborhoods with high concentrations of foreigners aimed at arresting those in an irregular situation.<sup>51</sup> In its Concluding Observations, the Committee recalled its General Recommendation No. 31, and urged Spain to take effective measures to eradicate the practice of identity checks based on ethnic or racial profiling. Furthermore, the Committee recommended that Spain consider amending those provisions of Circular No. 1/2010 of the

General Commissariat for Immigration and Borders and the relevant national legislation which allow interpretations that, in practice, can lead to indiscriminate detention and the restriction of the rights of foreign citizens in Spain. The Committee stated that, in light of its General Recommendation No. 13, “law enforcement officials should receive intensive training in human rights in order to guarantee that in the course of their duties they respect and protect the fundamental rights of all persons without discrimination on the basis of race, colour or ethnic or national origin.”

The UN Human Rights Committee in the case of *Rosalind Williams v. Spain*, mentioned above, held that police identity checks that are motivated by race or ethnicity violate international non-discrimination norms.<sup>52</sup> The Committee rejected the 2001 ruling of the Spanish Constitutional Court<sup>53</sup> that accorded the police broad latitude to “use the racial criterion as merely indicative of a greater probability that the interested party was not Spanish” and concluded that ethnic profiling violates the ICCPR Article 26 on equality before the law read together with Article 2, paragraph 3 on non-discrimination. The Committee found that while identity checks are permitted for protecting public safety, preventing crime, and controlling illegal immigration, the physical or ethnic characteristics of the persons targeted should not be considered as indicative of their possibly illegal situation in the country. Nor should identity checks be carried out so that only people with certain physical characteristics or ethnic backgrounds are targeted. This would not only adversely affect the dignity of those affected, but also contribute to the spread of xenophobic attitudes among the general population; it would also be inconsistent with an effective policy to combat racial discrimination.<sup>54</sup> As Spain’s population has become more and more multi-ethnic in recent years, skin color or ethnic origin is increasingly an unreliable indicator of nationality or immigrant status. Moreover, relying on ethnicity or race in stop and search unnecessarily stereotype and harm ethnic minority populations, and such practices constitute unlawful discrimination.

A number of other human rights are also impacted by ethnic profiling, including the right to freedom of movement and the right to liberty and security of person. The enjoyment of the right to freedom of movement, protected under CERD Article 5(d)(i), ICCPR Article 12 as well as UDHR Article 13, may be limited by legitimate national security restrictions set out in the ICCPR’s Article 12(3). ICCPR article 12(3) requires such restrictions to be “provided by law” and be “necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others.” Such legitimate restrictions, however, must also be consistent with other ICCPR rights, including Articles 2 and 26 against discrimination on account of, inter alia, race and ethnicity. The right to liberty and security of the person is protected under ICCPR Article 9 and its limitation is subject to similar narrow restrictions as under Article 12.

The right to an effective remedy is protected by UDHR Article 8, ICCPR Article 2(3), and CERD Article 6. One avenue to ensure effective protection and remedies to persons whose rights have been violated through discriminatory stop and search practices would be to provide them with a record of their encounter with the police through the use of “stop forms” by police. Such recording would provide victims of ethnic profiling with the possibility to prove that the stop was discriminatory and to seek remedy from the Spanish courts.

## VI. CONCLUSION

More than 20 years after Rosalind Williams was stopped by police merely because of the color of her skin, ethnic profiling is still a pervasive and persistent problem in Spain. Attempts by civil society and regional and international monitoring bodies to have the government address it have been met with resistance and even denial of the use of ethnic profiling. The Special Rapporteur's visit to Spain at a time when the government may be more open to acknowledge and address this problem offers a unique opportunity to engage the government in a frank dialogue about these discriminatory and illegal practices, and how Spanish police should carry out its functions to the benefit of and with respect for the rights of all persons in Spain, including its growing minority population.

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<sup>1</sup> Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mission to Brazil, E/CN.4/1996/72/Add.1, 23 January 1995.

<sup>2</sup> Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mission to Switzerland, A/HRC/4/19/Add.2, 30 January 2007.

<sup>3</sup> Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mission to Italy, A/HRC/4/19/Add.4, 15 February 2007.

<sup>4</sup> Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mission to Estonia, A/HRC/7/19/Add.2, 17 March 2008.

<sup>5</sup> Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mission to Germany, A/HRC/14/43/Add.2, 22 February 2010.

<sup>6</sup> Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mission to Latvia, A/HRC/7/19/Add.3, 5 March 2008.

<sup>7</sup> Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mission to Hungary, A/HRC/20/33/Add.1, 23 April 2012.

<sup>8</sup> Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mission to the Russian Federation, A/HRC/4/19/Add.3, 30 May 2007.

<sup>9</sup> Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mission to the United States of America, A/HRC/11/36/Add.3, 28 April 2009.

<sup>10</sup> *Instituto Nacional de Estadística*, "Avance del Padrón municipal", April 1, 2012.

<sup>11</sup> *Anuario Estadístico del Ministerio del Interior*, 2011, p. 33, <http://www.interior.gob.es/file/58/58130/58130.pdf>.

<sup>12</sup> *Anuario Estadístico del Ministerio del Interior*, 2010, p. 34, <http://www.interior.gob.es/file/53/53112/53112.pdf>.

<sup>13</sup> Report of Spain to the Committee on the Elimination of Racial Discrimination, 2 November 2009, CERD/C/ESP/18-20, para. 71-72, [www2.ohchr.org/english/bodies/cerd/docs/CERD.C.ESP.18-20\\_en.doc](http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.ESP.18-20_en.doc).

<sup>14</sup> See for example *Brigadas Vecinales de Observación de Derechos Humanos*, "Controles de identidad racistas en Madrid", 2011, [http://www.gugms.net/brigadasddhh/INFORME\\_BRIGADAS\\_2011.pdf](http://www.gugms.net/brigadasddhh/INFORME_BRIGADAS_2011.pdf), *Ferrocarril Clandestino*, "Informe de investigación sobre controles, identificaciones y detenciones", 2010,

<http://www.inmigrapenal.com/Areas/Detenciones/Documentos/InformeFerrocarrilRedDetenciones.pdf>, and Amnesty International, "Stop Racism, Not People: Racial profiling and immigration control in Spain", 2011, <http://www.amnesty.org/en/library/asset/EUR41/011/2011/en/60096e3f-ce52-4e7d-982a-b7a54291c941/eur410112011en.pdf>.

<sup>15</sup> Annual report of the Ombudsperson 2010, p. 462 and p. 2079,

<http://www.defensordelpueblo.es/es/Documentacion/Publicaciones/anual/Documentos/InformeAnualCortesGenerales2010.pdf>

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- <sup>16</sup> Annual report of the Ombudsperson 2011, Summary of the report to Parliament, p. 79, [http://www.defensordelpueblo.es/en/Documentacion/Opcion5/Documentos/INAN\\_2011\\_Press\\_Release\\_en.pdf](http://www.defensordelpueblo.es/en/Documentacion/Opcion5/Documentos/INAN_2011_Press_Release_en.pdf).
- <sup>17</sup> Press article published in 16 February 2012 <http://www.europapress.es/epsocial/inmigracion-00329/noticia-defensora-pueblo-pide-policia-medidas-erradicar-identificaciones-inmigrantes-basadas-raza-20120216145105.html>
- <sup>18</sup> Open Society Justice Initiative, “I Can Stop and Search Whoever I Want” - Police Stops of Ethnic Minorities in Bulgaria, Hungary and Spain, April 2007, <http://www.opensocietyfoundations.org/reports/i-can-stop-and-search-whoever-i-want-police-stops-ethnic-minorities-bulgaria-hungary-and>
- <sup>19</sup> Fuenlabrada is situated in the area of Madrid and has a population of around 201,000, around 15 percent of whom are immigrants primarily from Morocco, Ecuador and Romania.
- <sup>20</sup> Gerona has a population of around 92,000 with around 20 percent being migrants especially originating from Morocco, Honduras, Romania and Colombia.
- <sup>21</sup> Open Society Justice Initiative, “Addressing Ethnic Profiling by Police” - A Report on the Strategies for Effective Police Stop and Search Project, Improving relations between police and minority communities by increasing the fairness, effectiveness, and accountability of police stops in Bulgaria, Hungary, and Spain, 2009.
- <sup>22</sup> Persons from Morocco were 6.3 times more likely to be stopped than persons from the majority population, whereas Romanians and Ecuadorians were in turn 3.8 and 3.9 times more likely to be stopped, and Nigerians were 5.2 times more likely. Other groups were 2.1 times as likely to be stopped as Spanish persons. At the end of the study the rates had dropped to 3.4 for Moroccans, 2.0 for Ecuadorians, and 1.4 for Nigerians and other groups, while it had gone up to 4.8 for Romanians. The dramatic drop in stops of Moroccans was largely due to the police ending a fruitless counter-terrorism operation.
- <sup>23</sup> The regional police, known as the Mossos d’Esquadra, have responsibility for more serious crimes, and rely less on stops in their investigations. This at least partly explains why the Catalan police carried out 1,526 identity checks while the regional police undertook 902 checks.
- <sup>24</sup> There, Moroccans were 6.7 more likely than Spanish persons to be stopped by the municipal police (10 times more likely to be stopped by the Catalan police), Romanians were 10 times more likely to be stopped by municipal police and 6.1 times more likely to be stopped by the Catalan police, while Hondurans were 3.9 times more likely to be stopped by the municipal police, and 2.1 times more likely to be stopped by the Catalan police. Other groups were almost three times more likely to be stopped by either police force than the Spanish majority population.
- <sup>25</sup> European Union Agency for Fundamental Rights, “Data Focus report: Police Stops and Minorities”, European Union Minorities and Discrimination Survey (EU-MIDIS), 2010, [http://fra.europa.eu/sites/default/files/fra\\_uploads/1132-EU-MIDIS-police.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/1132-EU-MIDIS-police.pdf).
- <sup>26</sup> Advisory Committee on the Framework Convention for the Protection of National Minorities, Third opinion on Spain, adopted on March 22, 2012, ACFC/OP/III(2012)003, [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_3rd\\_OP\\_Spain\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_OP_Spain_en.pdf).
- <sup>27</sup> Amnesty International has documented several cases of persons who have documented identity checks being intimidated by police and in some cases charged with offences such as disobedience and restricting the work of the police, see “Stop Racism, Not People: Racial profiling and immigration control in Spain”, 2011, p. 18.
- <sup>28</sup> Amnesty International, “Stop Racism, Not People: Racial profiling and immigration control in Spain”, 2011, p. 16.
- <sup>29</sup> David Harris, Profiles in Injustice: Why Racial Profiling Cannot Work, (New York: The New Press, 2002). Joel Miller, Nick Bland, and Paul Quinton, The Impact of Stops and Searches on Crime and the Community: Police Research Series Paper 127 (London: Home Office, 2000). Ronald Weitzer and Steven A. Tuch, “Determinants of Public Satisfaction with the Police” in Police Quarterly No. 8 (3) 2005.
- <sup>30</sup> Website of the PGPD <http://www.gestionpolicialdiversidad.org/>
- <sup>31</sup> Scoping document of PIPE [http://gestionpolicialdiversidad.org/PDFactividades/Programa%20PIPE%20con cuestionario.pdf](http://gestionpolicialdiversidad.org/PDFactividades/Programa%20PIPE%20con%20cuestionario.pdf)
- <sup>32</sup> *Grupo inmigración y sistema penal, Controles de identidad, detenciones y uso del perfil étnico en la persecución y castigo del inmigrante “sin papeles” : ilegalidad e inconstitucionalidad de determinadas prácticas policiales*, p. 4, <http://www.inmigrapenal.com/Paginas/Documentos/CntrlIdntdadDtncnesPfilEtncos.pdf>.
- <sup>33</sup> Rosalind Williams, Spanish Constitutional Court Decision No. 13/2001, January 29, 2001 (STC 13/2001).
- <sup>34</sup> Human Rights Committee, Communication number 1493/2006, CCPR/C/96/D/1493/2006.
- <sup>35</sup> Article 4 of the Aliens Act and article 205.2 of the regulation on the Aliens Act.
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<sup>36</sup> Decision No. 4005/1991 (April 15, 1993), Supreme Court of Spain.

<sup>37</sup> Circular 1/2010 provided directives to police officers for the implementation of its responsibilities to prevent irregular immigration. Concerns have been expressed that the Circular allowed the police to place foreign nationals that had failed to prove their legal presence in Spain in preventive detention. See for example Amnesty International, “Stop Racism, Not People: Racial profiling and immigration control in Spain”, 2011, p. 25-27, and Committee on the Elimination of Racial Discrimination, Concluding Observations on Spain, April 8, 2011, para. 10. Circular 10/2012 prohibits detention of foreign nationals in an irregular situation, but requires such detention of the person does not have a regular domicile.

<sup>38</sup> *Brigadas Vecinales de Observación de Derechos Humanos*, <http://brigadasvecinales.org>.

<sup>39</sup> *Brigadas Vecinales de Observación de Derechos Humanos, Cuando la vulneración de derechos se normaliza. Controles de identidad Racistas en Madrid*, 2011- 2012, pp. 30-31. <http://brigadasvecinales.org/wp-content/uploads/2012/12/Informe-Brigadas-Vecinales-2011-2012.pdf>

<sup>40</sup> REAL DECRETO 1262/2007, de 21 de septiembre, por el que se regula la composición, competencias y régimen de funcionamiento del Consejo para la Promoción de la Igualdad de Trato y no Discriminación de las Personas por el Origen Racial o Étnico, Article 2.

[http://www.igualdadynodiscriminacion.org/tusDerechos/legislacion/estatal/pdf/rd\\_1262\\_2007.pdf](http://www.igualdadynodiscriminacion.org/tusDerechos/legislacion/estatal/pdf/rd_1262_2007.pdf)

<sup>41</sup> ECRI Report on Spain (Forth monitoring cycle), adopted on 7 December 2010 and issued on 8 February 2011, paras. 28-37. <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/spain/ESP-CBC-IV-2011-004-ENG.pdf>

<sup>42</sup> ECRI Report on Spain, Forth monitoring cycle), adopted on 7 December 2010 and issued on 8 February 2011, paragraphs 38-44. <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/spain/ESP-CBC-IV-2011-004-ENG.pdf>

<sup>43</sup> Human Rights Committee, General Comment No. 18: Non-Discrimination:10/11/1989, UN Doc. A/45/40.

<sup>44</sup> These include the Universal Declaration of Human Rights (UDHR) (Article 2), and the International Covenant on Civil and Political Rights (ICCPR) (Article 2 and Article 26).

<sup>45</sup> CERD, General Recommendation No.30: Discrimination Against Non Citizens, para. 4,

<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/e3980a673769e229c1256f8d0057cd3d?Opendocument>

<sup>46</sup> CERD, General Recommendation No.30: Discrimination Against Non Citizens, para. 9,

<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/e3980a673769e229c1256f8d0057cd3d?Opendocument>

<sup>47</sup> CERD, General Recommendation No.30: Discrimination Against Non Citizens, para. 7,

<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/e3980a673769e229c1256f8d0057cd3d?Opendocument>

<sup>48</sup> CERD, General Recommendation No.30: Discrimination Against Non Citizens, para. 24,

<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/e3980a673769e229c1256f8d0057cd3d?Opendocument>

<sup>49</sup> 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.

<sup>50</sup> 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.

<sup>51</sup> Committee on the Elimination of Racial Discrimination, Concluding Observations on Spain, April 8, 2011.

<sup>52</sup> Human Rights Committee, Communication number 1493/2006, CCPR/C/96/D/1493/2006.

<sup>53</sup> *Rosalind Williams*, Spanish Constitutional Court Decision No. 13/2001, January 29, 2001 (STC 13/2001).

<sup>54</sup> Human Rights Committee, Communication number 1493/2006, CCPR/C/96/D/1493/2006, paras. 7.2. and 7.4.

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