

Violations of CERD at the Communications Management Units

NGO Shadow Report before the United Nations Committee on the Elimination of Racial Discrimination

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I. Reporting Organization(s)

This report was prepared by the Center for Constitutional Rights (CCR). CCR is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.¹

II. Issue Summary

A close examination of the U.S. Bureau of Prison's use of Communications Management Units will assist the CERD Committee's understanding the U.S. government's failure to uphold its human rights obligations to prevent racial discrimination within the administration and functioning of the criminal justice system.

Background

In 2006, the Federal Bureau of Prisons (BOP) secretly opened the first Communications Management Unit (CMU), a prison unit designed to isolate and segregate certain prisoners in the federal prison system from the rest of the BOP population. There are currently two CMUs, one located in Terre Haute, Indiana and the other in Marion, Illinois. Together, they house between 60 and 70 prisoners.²

¹ Learn more at www.ccrjustice.org.

² CCR, Factsheet, CMUs: The Federal Prison System's Experiment in Social Isolation, Updated March 2013, available: www.ccrjustice.org/files/CCR_CMU_Factsheet_March2013.pdf.

While the BOP claims that the CMUs are designed to hold dangerous terrorists and other high-risk prisoners who require heightened monitoring of their external and internal communications, this account is incomplete. Because of the minimal procedural protections in place to guide CMU designations, the BOP has disproportionately focused on Muslim prisoners, and those with unpopular political views, irrespective of the alleged threat that they pose.³

April 2014 Release of Government Documents Reveal Numerous Rights Violations

In 2010, CCR filed a legal challenge to various policies and practices the CMUs.⁴ In April 2014, CCR was able to make available dozens of BOP documents obtained through this litigation for the first time. These documents confirm systematic rights violations at the CMUs. Most relevant to the Committee's 2014 review of the U.S. government, discovery in the case illustrates the discriminatory nature of CMU designations along with myriad due process violations in the CMU designation and review process.⁵

Discriminatory Designations to the CMUs

An examination of the CMU population uncovers a vast overrepresentation of Muslims. While this is likely the result of purposeful targeting of Muslims for CMU designation, the disproportionate focus on Muslim prisoners is troubling even if only discriminatory impact can be proven.

The first CMU was opened in 2006 in the absence of written criteria or a designation process.⁶ Over the next three years, the BOP continued to designate prisoners to the CMU in the absence of any explicit written criteria or process.⁷ Eventually, the BOP documented a vague series of criteria in response to the type of individuals who were approved for transfer to the unit.⁸ These vague and inconsistent criteria have allowed for a disturbing overrepresentation of Muslims in the CMU.⁹ Of 178 total documented CMU designations, 101 were of Muslims.¹⁰ This is a nearly 1000% overrepresentation of Muslims compared to the BOP's general federal prison population.¹¹

Though the BOP has previously defended this overrepresentation as the unavoidable and non-discriminatory consequence of their focus on individuals with terrorism convictions, a close look at the data contradicts this explanation. Of the first 55 prisoners designated to the CMU, 45 were sent there because of their connection to terrorism, but the remaining 10 were designated due to involvement in prohibited activities related to communication, not terrorism. Of those ten, eight self-reported as Muslim.¹² The BOP cannot defend these troubling statistics simply by invoking terrorism. Indeed, CCR believes that the CMUs were created to allow for the segregation and

³ Prisoners have also been sent to the CMU in retaliation for challenging poor treatment or other rights violations in the federal prison system.

⁴ *Aref v. Holder* is a federal lawsuit challenging the policies and conditions at the two CMUs, as well as the circumstances under which they were established. Learn more at www.ccrjustice.org/cmu.

⁵ CCR, Statement of Undisputed Facts and supporting exhibits, in *Aref v. Holder*, April 23, 2014, available: <http://ccrjustice.org/ourcases/current-cases/aref-et-al-v-holder-et-al>

⁶ *Id.* at ¶ 84, 85.

⁷ *Id.* at ¶ 88.

⁸ *Id.* at ¶ 127.

⁹ The Muslims detained in these two CMUs are both of Middle Eastern descent and also African-American (many who converted during their time in the prison system).

¹⁰ Statement of Undisputed Facts and supporting exhibits, at ¶ 272.

¹¹ *Id.* at ¶ 274; CCR, Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment in *Aref v. Holder*, April 23, 2014, available: <http://ccrjustice.org/files/Memo%20in%20Support%20of%20Summary%20Judgment%20Motion.pdf>

¹² CCR, Statement of Undisputed Facts and supporting exhibits at ¶ 273, CCR, Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, p. 10.

restrictive treatment of primarily Muslim prisoners based on the U.S. government's belief that such prisoners inherently pose a threat to institution security.¹³

Many CMU prisoners have neither significant disciplinary records nor a history of communications-related misconduct. Instead, religious profiling and political scapegoating keep them locked inside these special units. The discriminatory nature of CMU designations is further accentuated by the fact that CMUs have been used to also house various outspoken individuals with "unpopular" political views, such as environmental activists. Some of these prisoners may have been brought to the CMU as a calculated means to "integrate" the units after critical press attention focused on the targeting of Muslims.¹⁴

While it is difficult to prove purposeful discrimination by the BOP in designating Muslims to the CMU *because* they are Muslim, as opposed to some other legitimate factor, the CMU's vast overrepresentation of Muslims is problematic in itself. The units function, and are perceived by Muslim communities, as segregated units for their community. This public conception is furthered by the opacity of CMU designation and review procedures, and the myriad due process violations which characterize these secretive units. These issues are discussed below.

Lack of Due Process

Through our litigation, CCR has uncovered evidence of fundamental due process violations in all aspects of CMU designation and review. As described above, the BOP has not provided clear criteria for designating prisoners to the units¹⁵ and when prisoners are told the purported reason or their CMU placement, these reasons are frequently demonstrably false or inaccurate.¹⁶ Moreover, the BOP does not require that the final decision-maker document or explain the reason(s) relied upon in ordering that a prisoner be sent to a CMU.¹⁷ The Notice provided to prisoners upon arrival at a CMU does not include the actual rationale or information that was used to make that decision. Thus, the BOP provides CMU prisoners no meaningful way to challenge these incomplete and inaccurate notices, or understand what alleged conduct led to their CMU confinement. As a result, prisoners languish for years in the CMU for no discernible, non-discriminatory reason.¹⁸

These realities give rise to concerns over the obligations under CERD to prevent discrimination of U.S. government agencies in their administration and functioning of the criminal justice system. Additionally of concern is the lack of meaningful processes and opportunities for those who wish to challenge their designation and continued placement in the units.¹⁹

III. Legal Framework

CERD guarantee the right of everyone, without distinction as to race, to equal protection of the law.²⁰ States Parties to the CERD treaty must take affirmative action to eliminate racial

¹³ CCR, First Amended Complaint, in *Aref v. Holder*, September 5, 2012, available: <http://ccrjustice.org/files/First%20Amended%20Complaint%20with%20Exhibits%20-%20Redacted.pdf>, p. 30.

¹⁴ CCR, CMUs: The Federal Prison System's Experiment in Social Isolation.

¹⁵ CCR, Statement of Undisputed Facts and supporting exhibits, ¶¶85, 88, 123, 124, 127,

See also CCR, Exhibit 46, <http://ccrjustice.org/files/SI%20-%20Exhibit%2046.pdf>.

¹⁶ CCR, Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, pp. 21-4.

¹⁷ CCR, Statement of Undisputed Facts and supporting exhibits, in *Aref v. Holder*, ¶¶ 144-7.

¹⁸ CCR, Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, pp. 25-9.

¹⁹ *Id.*, pp. 20-31.

²⁰ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. Doc. A/6014 (Dec. 21, 1965), available: <http://www2.ohchr.org/english/law/cerd.htm> (hereinafter "CERD"), Art. 5 and 5(a).

discrimination in all its forms,²¹ and to review, amend, or nullify laws or practices that have the purpose or effect of discriminating on the basis of race.²² Article 2 of CERD also underlines the role of agencies of the U.S. government to comply with CERD.²³

However, in comparison to CERD and other international standards, U.S. law offers a much more restrictive conception of racial discrimination. For example, the Equal Protection Clause of the 14th Amendment to the U.S. Constitution prohibits state governments from engaging in discriminatory practices, however, longstanding constitutional jurisprudence has established that evidence of a disparate racial impact associated with a facially neutral provision or policy is insufficient to establish discrimination absent additional evidence of discriminatory intent.²⁴²⁵ Such practices do not constitute “discrimination” under U.S. law so long as they are justified as reasonable means to a legitimate end, in clear violation of the international community’s consideration, including under CERD, of the “purpose or effect” of discriminatory policies and practices. As such, international law provides a richer understanding of State obligations to eliminate such discrimination.

Article 5 of CERD underlines the positive obligations on the part of State Parties to be guaranteed by all “organs administering justice.”²⁶ In 2005, the CERD Committee examined the prevention of racial discrimination in the administration and functioning of the criminal justice system at length when it issued General Recommendation 31,²⁷ and later referred to this Recommendation in previous periodic reviews of the U.S. government (see “Concluding Observations” section below).

IV. Concluding Observations

As the CMUs were opened without public knowledge in 2006 and 2008, the Committee has not yet had the opportunity to engage specifically on the CMUs. However, the CERD Committee has previously expressed its concern over the use of discriminatory prison policies and practices, the overrepresentation of minorities in the criminal justice system and particularly within U.S. prisons and the need for government agencies to affirmatively take steps to uphold CERD obligations in the administration and functioning of the criminal justice system.

In its 2008 Concluding Observations, the Committee notes the need to “[a]ddress racial disparities in the criminal justice system,”²⁸ and the need for guaranteeing equal treatment before “organs

²¹ CERD, Art. 2(1).

²² *Id.*, Art. 2(1)(c) (stating that [e]ach State Party shall 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”).

²³ *Id.*, Art. 2(1)(a) noting the obligation of State Parties “to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.”

²⁴ See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (holding that discriminatory impact alone isn’t enough to establish a violation of the equal protection clause of the 14th Amendment when challenging a facially neutral government policy); *Brown v. City of Oneonta, New York*, 221 F.3d 329 (2d Cir. 2000) (holding that the questioning of 200 African American males demonstrated a discriminatory impact but was insufficient to establish discriminatory intent necessary for an equal protection claim).

²⁵ As such, equal protection challenges to policies and practices resulting in a disparate racial impact routinely fail in U.S. courts, including in our legal challenge in *Aref v. Holder*.

²⁶ CERD, Art. 5(a).

²⁷ 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, CERD/A/60/18(SUPP), 10 March 2005, Para 460 (hereinafter “CERD Committee Gen. Rec 31”).

²⁸ Committee on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, ¶ 20, CERD/C/USA/CO/6, 8 May 2008, available at: <http://www.refworld.org/publisher.CERD.USA.4885cfa70.0.html> (hereinafter “2008 Concluding Observations”).

administering justice.”²⁹ Additionally, the Committee stressed its deep concern in the 2008 Concluding Observations about “the increase in racial profiling against Arabs, Muslims, and South Asians in the wake of the 11 September 2001 attack, and recommended that the U.S. “strengthen its efforts to combat racial profiling at the federal and state levels.”³⁰

Moreover, the requirement of discriminatory intent under U.S. law is clearly at odds with the definition of discrimination articulated in CERD, and has been the subject of repeated criticism from the CERD Committee, both in its 2001 and 2008 Concluding Observations.³¹

V. U.S. Government Reports and Responses

In their January 2009 Response to the CERD Committee, the U.S. government acknowledged General Recommendation 31 and outlined its “robust framework for combating racial profiling at the federal and state levels,” and referred the Committee to previously submitted materials outlining its “numerous efforts throughout the States to document and combat the practice of racial profiling.”³² Despite its proclamation, the U.S. government has not sufficiently prevented racial discrimination in the criminal justice system – particularly in the CMUs.

Moreover, in its June 2013 periodic report before the Committee, the U.S. noted that racial or ethnic profiling “is not effective law enforcement practice and is not consistent with our commitment to fairness in our justice system,”³³ however, the report failed to discuss the existence of the CMUs, which are a stark example of a failure to uphold fairness and combat discrimination. Additionally in this 2013 report, the U.S. government noted a so-called shift in racial makeup of U.S. prisons as an indicator that the government was addressing the Committee’s concerns. Nevertheless, the continued overrepresentation of Muslims in the CMUs stands in conflict to this claim.

VI. U.N. Treaty Body Engagement, Findings and Recommendations

In 2010, the U.S. was reviewed for the first time formally under the Universal Periodic Review Process. In March 2011, the U.S. government formally accepted recommendations made by the U.N. Human Rights Council, noting that it supported Sweden’s recommendation to ensure the “full enjoyment of human rights by persons deprived of their liberty.”³⁴ However, the policies, practices

²⁹ 2008 Concluding Observations, ¶ 20.

³⁰ *Id.*, ¶ 14

³¹ In its 2001 Concluding Observations, the Committee noted that the U.S. should take appropriate measures to “ensure effective protections against any form of racial discrimination and any unjustifiably disparate impact.” Committee on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America. CERD/C/Misc./56/18, para. 394. August, 2001 (hereinafter “2001 Concluding Observations”). In its 2008 Concluding Observations, the CERD Committee underscored how the U.S. understanding of racial discrimination “was not always in line” with the understanding in the CERD treaty, 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” would be prohibited under CERD and reminded the U.S. government of its obligation to “prohibit[] racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.” 2008 Concluding Observations ¶ 10.

³² United States Response to Specific Recommendations Identified by the Committee on the Elimination of Racial Discrimination, January 13, 2009, p. 4.

³³ Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination, 12 June, 2013, available at http://www.ushrnetwork.org/sites/ushrnetwork.org/files/periodic_icerd_report_of_the_usg_2013.pdf.

³⁴ Recommendation 177, “Report of the Working Group on the Universal Periodic Review: United States of America,” A/HRC/16/11 (Jan. 4, 2011) available at: <http://www.unhcr.org/refworld/docid/4d6b6d3e2.html>.

and conditions at the CMUs contradict the U.S.' assertion and constitute a significant blemish on the U.S. human rights record.

During its March 2014 review of the U.S. government's compliance with the international civil and political rights treaty, the U.N. Human Rights Committee also noted its concern about the continued presence of racial disparities within the criminal justice system, and called on the U.S. government to "step up its efforts to robustly address racial disparities in the criminal justice system"³⁵

VII. Recommended Questions

We respectfully request the Committee's consideration of these sample questions during the U.S. government's periodic review session:

- Considering the nearly 1000% overrepresentation of Muslims at the CMUs, what measures are being taken to ensure that Muslim and Arab men are not being singled out for CMU designation?
- Why doesn't the BOP provide set criteria for and a meaningful way to challenge one's designation to the CMU?

VIII. Suggested Recommendations to the United States

We respectfully request the Committee's consideration of the following sample recommendations:

- Ensure no one is sent to the CMUs on the basis of their ethnicity, religion or protected activities or beliefs, and that these factors are not used as a proxy for designation to the units.
- Express concern over the CMUs and the ability of the U.S. government to meet its obligations to prevent racial discrimination in the administration and functioning of the criminal justice system.

³⁵ U.N. Human Rights Committee, Concluding Observations on the fourth periodic report of the United States of America, 23 April 2014, CCPR/C/USA/CO/4, ¶ 6.