**Submission of the International Legal Foundation in Response to the Call for Input to inform preparation of the report pursuant to United Nations General Assembly Resolution A/Res/78/234**

ABOUT THE ILF

Established in 2001, the International Legal Foundation (ILF) is internationally recognized as a leading expert in guaranteeing the right to high-quality legal representation for everyone arrested or detained. Around the world, we provide criminal defense services and assist countries to build sustainable, effective legal aid systems. The ILF’s expertise is rooted in our direct experience delivering legal aid in diverse legal contexts. Over the last 20+ years, the lawyers we have trained and mentored have won precedent-setting cases that uphold the rights of the accused, combat gender-based violence, challenge discrimination, and address the criminalization of poverty. The ILF is also a member of the Campaign to Decriminalize Poverty and Status, a global coalition of organizations that advocates for the repeal and reform of laws, policies, and practices that target individuals based on poverty, race, gender, migrant, or other status, or for their activism.

INTRODUCTION

The Durban Declaration and Programme of Action (DDPA), adopted at the World Conference against Racism in 2001, provides a robust framework for combating racism, racial discrimination, xenophobia, and related intolerance. Twenty-three years later, Black, indigenous, and other racialized groups continue to be victims of the exploitative, entrenched racism and xenophobia in which criminal justice systems around the world are mired. As has been widely studied and reported, the discriminatory justice institutions we find around the world today are rooted in slavery, colonialism, apartheid, genocide, nativism, and white supremacy.

This submission highlights criminal justice system manifestations of racism, xenophobia, and the intersection of the two around the world, with a particular focus on discriminatory laws and practices that serve to criminalize individuals based on their race and/or migrant status, as alluded to in Paragraph 85 of the Declaration.[[1]](#footnote-2) It concludes with a description of tentative steps taken by countries and civil society to begin to address the racism and xenophobia that are embedded in justice systems around the world, so that we may realize the promises of the DDPA.

1. **RACISM AND RACIAL DISCRIMINATION:**

Racism and xenophobia are intrinsic to the structure of many criminal justice systems around the world. This bias—both *de facto* and *de jure*—is manifested in discriminatory laws, police policies, prosecutorial practices, judicial determinations, inhumane conditions of incarceration, and unjust and overly burdensome conditions of bail, probation, and parole.

* 1. **Discriminatory Laws:**

Often, racial discrimination is embedded in a nation's criminal laws, arbitrarily criminalizing behaviors that are associated with particular racial groups. In Nepal, for example, the criminalization of cow slaughter has led to the prosecution and imprisonment of *Adivasi Janjati* (members of indigenous tribes), many of whom have traditionally eaten cow as part of their diet. In the United States, discriminatory drug policies have had a disastrous impact on Black and Brown communities. The onerous Anti-Drug Abuse Act of 1986, which created severe disparities in sentencing for crack versus powder cocaine offenses, disproportionately affected Black communities and created long-lasting effects that are still felt nearly 40 years later. (The Fair Sentencing Act of 2010 and the later First Step Act of 2019 reduced this disparity but did not eliminate it entirely.)

In Myanmar, the Citizenship Law of 1982 denied Rohingya people—including those whose families had lived there for generations—of citizenship, stripping them of many rights, including the right to move freely. This has had a devastating effect on the Rohingya people, who have been overwhelmingly arrested and prosecuted for traveling outside conflict affected Rakhine State without documentation. (Even within Rakhine State, many residents—both Rohingya and Hindu—report police harassment and profiling based on their darker skin color.[[2]](#footnote-3))

It bears noting that racial targeting does not happen only when the marginalized race is in the minority. In Brazil, Black people make up more than half (approximately 56%) of the population; yet they make up 80% of the victims of police killings.[[3]](#footnote-4) Another exemplar of this can be found in South Africa. As of 2022, 80% of South Africa's population was Black. But as of recent statistics, approximately 95% of the country's prison population is Black. This overrepresentation reflects broader historical inequalities and systemic issues within the criminal justice system that disproportionately affect persons of African descent. Factors contributing to this disparity include poverty, limited access to legal resources, and discrimination and biases in law enforcement and judicial processes—the same factors that are found in justice systems around the world.

* 1. **Discriminatory Policing:**

Patterns of discriminatory and biased policing can be found throughout the world. On February 2, 2024, the European Court of Human Rights held that Swiss courts had violated, *inter alia*, the European Commission on Human Rights's prohibition of discrimination by failing to investigate whether the identity stop of a “dark-skinned man" in a Zurich railway station was caused by discriminatory racial profiling.[[4]](#footnote-5) In June 2023, N.M, a 17-year-old child of North African descent, was shot and killed by French police officers after allegedly refusing to comply with an order during a traffic stop This was not an isolated incident. Indeed, this was the sixteenth fatality for failure to obey an order during a police stop between 2022 and late 2023, and the 32nd such killing from 2017 to mid-2023. A majority of those killed have been Black or of Arab origin.[[5]](#footnote-6) The number of such fatalities has grown five-fold since 2017. This is no coincidence. In 2017, France passed a new public security law—ostensibly to combat terrorism—that loosened the rules around when police can fire their weapons.[[6]](#footnote-7) In a pattern seen around the world, lax regulations on police use of force disproportionately impact individuals perceived to belong to marginalized racial groups, often with tragic results. Indeed, in its report on policing in the United States, the UN Mechanism on Racial Justice in Law Enforcement stated it was “profoundly concerned" about the lack of clear national standards for police use of force, noting that it created a situation that was “conducive to the early and unjustified use of force, including lethal force, by law enforcement.”[[7]](#footnote-8)

* 1. **Discriminatory Prosecutions:**

Prosecutorial discretion, the authority of prosecutors to decide whether to bring charges, what charges to bring, and how to pursue each case, is a key driver of racial disparities in the criminal justice system. This discretion is exercised through various mechanisms, and in nearly every critical stage of a criminal case. It can be seen in charging decisions, bail requests, plea offers, consideration for cooperation, and decisions on whether to lessen or dismiss charges altogether.

Implicit biases harbored by prosecutors can result in the disproportionately harsh treatment of individuals from marginalized racial groups. For instance, studies have shown that Black defendants in the United States are more likely to be charged with offenses carrying heavier penalties than their white counterparts are for similar crimes. In both state and federal courts, prosecutors are more likely to charge Black defendants with offenses that carry higher mandatory minimum sentences, or under recidivist statutes (such as “three strikes" laws).[[8]](#footnote-9) Additionally, Black and Latine defendants often receive less favorable plea offers compared to their white counterparts, leading to longer sentences, more onerous conditions of release, and the attendant collateral consequences. This systemic issue perpetuates racial inequality, undermining the principles of fairness and justice.

* 1. **Discriminatory Sentencings and Disparate Sentences**:

Sentencing discretion allows judges to consider various factors in fashioning a sentence, including the nature and circumstances of the offense, the defendant’s criminal history, and the defendant's personal characteristics. While this flexibility can promote individualized justice, it can also lead to disparities when not guided by clear and consistent criteria.

Studies have shown that implicit racial biases can influence perceptions of threat, culpability, and deservingness of harsh punishment, contributing to broad sentencing disparities between Black and white defendants in the United States.[[9]](#footnote-10) A five-year study conducted by the United States Sentencing Commission found that Black males received sentences 13.4% longer, Hispanic males received sentences 11.2% longer, and Hispanic females received sentences 27.8% longer than their white counterparts.[[10]](#footnote-11) These disparities are repeated around the world. A 2000 report from England and Wales showed that although racial minorities made up only 7.7% of all males and 7.6% of all females, they accounted for a whopping 19% and 25% of the prison population, respectively.[[11]](#footnote-12)

1. **XENOPHOBIA:**

While xenophobia and racial discrimination overlap, they are distinct in the forms they take, the harms they cause, and the vulnerabilities of those affected. From Australia to Zambia, migrants are criminalized as they risk their lives seeking basic survival, dignity, and a better, safer life for their families, often pushing these populations further into the shadows.[[12]](#footnote-13) Further, when law enforcement officers are given broad powers to arrest individuals on *suspicion* of illegal migration, individuals perceived to be from those same communities are more likely to be subjected to profiling and over-criminalization for non-immigration related offenses as well.

In the United States, for example, a growing number of states are considering (and passing) legislation that would allow local police to enforce immigration laws, a duty that has heretofore been in the near-exclusive purview of the federal government.[[13]](#footnote-14)

It is not only migrants who face illegal arrests, arbitrary prosecutions, and unfair treatment in the courts. Increasingly, governments are criminalizing the provision of humanitarian, legal, or other support for asylum-seekers and other migrants.[[14]](#footnote-15) In 2018, Hungary passed the so-called “Stop Soros law,” which criminalized activists, lawyers, and humanitarians who assisted asylum-seekers.[[15]](#footnote-16) Three years later the Court of Justice of the European Union struck down this law, noting its many violations of EU law and ordering Hungary to comply immediately.[[16]](#footnote-17) Italy's 2018 “Salvini Decree" criminalized providing humanitarian aid to migrants at sea, including targeting NGO rescue boats.[[17]](#footnote-18)

Combatting xenophobia in criminal justice systems requires an honest examination of penal laws and policies that are grounded in racist notions of otherness, inferiority, and intrinsic criminality. Only by identifying and reforming discriminatory criminal laws can the intersection of xenophobia and racism in criminal justice systems be effectively addressed.

1. **LESSONS LEARNED AND PROMISING PRACTICES:**
   1. **Legal, Policy, and Institutional Steps to Address Racism and Xenophobia in Criminal Justice Systems:**

To realize the goals of the DDPA, countries are implementing measures aimed at addressing racism, racial discrimination, and xenophobia in their criminal justice systems. For example, in 2023 the UK budget included a 16% increase in funding for legal aid to ensure that asylum seekers and migrants have access to legal representation (though significant gaps remain).[[18]](#footnote-19) The US Department of Justice recently issued its Guidance for Federal Law Enforcement Agencies on the Use of Protected Characteristics, which sets out concrete instructions for when federal officers may consider an individual's race (among other characteristics) in taking law enforcement actions.[[19]](#footnote-20)

Where States have been slow to act, international human rights institutions and civil society have continued to work to find innovative approaches to reforming discriminatory laws. For example, in September 2022, the Campaign to Decriminalize Poverty and Status adopted the Cape Declaration, setting out a guide for addressing criminal justice system discrimination.[[20]](#footnote-21) The International Independent Expert Mechanism to Advance Racial Justice in Law Enforcement issued a report in August 2022, enunciating the need for disaggregated data, and describing ways this data could be used to reform policy.[[21]](#footnote-22) This report explicitly referenced the powerful 2018 report by the Inter-American Commission on Human Rights titled “Police Violence Against Afro-descendants in the United States,” which laid out several recommendations for addressing the issue of racial discrimination against Black people in the United States's criminal justice system.[[22]](#footnote-23) In November 2023, the first Regional Legal Aid Conference was held in India, providing a platform for Ministries of Justice, high court justices, and legal aid practitioners from South Asia and Africa to engage in a meaningful interchange of innovative ideas, lessons learned, and best practices to combat, *inter alia*, racial and anti-migrant discrimination in their respective criminal justice systems.

Taken together, these and other texts lay out several promising legal and policy recommendations to address racism and xenophobia in criminal justice systems, as laid out below.

* 1. **Promising Practices and Recommendations:**
     1. Ensure access to high-quality legal representation for all suspected of, arrested for, charged with, or detained for a criminal offense, regardless of income or citizenship status. Racialized communities are often the least able to afford to hire a lawyer, while being the most likely to be subjected to rights violations by the criminal legal system. Increasing access to *quality* legal aid is the only way to ensure that those most likely to be targeted by the criminal justice system have the tools necessary to challenge the implicit (and explicit) racism and anti-migrant discrimination that permeates it.
     2. Evaluate and reform police policies and practices that are either facially or in effect discriminatory, such as racial profiling, arbitrary identity checks, stop and frisk practices, and police use of force policies.
     3. Establish accountability mechanisms for law enforcement organizations, to ensure compliance with international human rights standards.
     4. Engage impacted communities in the policy-making process. Crucially, engage members of marginalized racial groups and irregular migrant communities as the experts when it comes to the development and “real-world" implementation of policy reforms.
     5. Eliminate mandatory minimum sentencing laws. In many countries, these are triggered by arbitrarily determined, and often minor, offenses. Given the previously discussed racist and anti-migrant biases that can lead to police contact, charging decisions, and prosecutorial discretion, mandatory minimum sentences result in harsher penalties for disproportionate numbers of Black, indigenous, and other racialized people around the world.
     6. Extract meaningful data by implementing mandatory data collection methods that disaggregate by race, migrant status, and other salient factors such as income or country of origin. This data should be used to identify disparities in arrest rates, charging decisions, sentencing outcomes, and incarceration (including pretrial detention) rates, and should be made public.
     7. Eliminate procedural and legal barriers which limit the ability of individuals to file grievances or obtain effective remedies—including reparations for victims and their families—for police misconduct.

CONCLUSION

The detrimental effects of near-constant surveillance, over-criminalization, and over-prosecution fall disproportionately on Black, Brown, Indigenous, and migrant communities that are already marginalized for reasons beyond poverty, such as race, caste, gender, migrancy, or other status. Though criminal justice system involvement is multivariate, racism, racial discrimination, and xenophobia must be recognized as causes of criminal justice system discrimination requiring policy reforms, training, and accountability measures designed to address deeply ingrained biases.

1. *See* Durban Declaration and Programme of Action, 2001: “We condemn … legislation and practices based on racism, racial discrimination, xenophobia and related intolerance, as incompatible with democracy and transparent and accountable governance.” [↑](#footnote-ref-2)
2. *Minorities Racially Profiled and Targeted for Extortion by Junta Police in Rakhine State Capital*, Myo Tun, March 21, 2023, noting that “[a] 21-year-old resident of Sittwe who is a Burmese Hindu and also works as a tuk-tuk driver, said that he too had been targeted by the junta as the Rohingya have been, attributing this discrimination to his skin colour.” https://myanmar-now.org/en/news/minorities-racially-profiled-and-targeted-for-extortion-by-junta-police-in-rakhine-state-capital/ [↑](#footnote-ref-3)
3. “Brazil: Invite UN Experts on Racial Justice,” Human Rights Watch, April 18, 2022. [↑](#footnote-ref-4)
4. *Wa Baile v. Switzerland*, 43868/18 and 25883/21, 20 February, 2024. <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-14292%22>] [↑](#footnote-ref-5)
5. https://www.reuters.com/world/europe/french-police-use-of-force-powers-road-traffic-stops-2023-06-28/ [↑](#footnote-ref-6)
6. *Police homicides and refusal to comply. Has the law made police officers irresponsible?*, Sebastian Roche, Paul le Derff, and Simon Veraine; <https://esprit.presse.fr/actualites/sebastian-roche-et-paul-le-derff-et-simon-varaine/homicides-policiers-et-refus-d-obtemperer-44252> [↑](#footnote-ref-7)
7. *International Independent Expert Mechanism to Advance Racial Justice and Equality in the Context of Law Enforcement – Visit to the United States of America*, A/HRC/54/CRP.7, Published 26 September 2023. [↑](#footnote-ref-8)
8. “Race, Racial Threat, and Sentencing of Habitual Offenders,” Crawford, Charles, Ted G. Chiricos, and Gary Kleck, 1998. Criminology, 36 (3): 481–512. [↑](#footnote-ref-9)
9. Annabelle Bass, Jihye Choi, and Cheryl L. Dickter, *Perceptions of Black and White Individuals Sentenced for Violent and Nonviolent Crimes*, Journal of Social Psychology, Jan. 6, 2023. <https://onlinelibrary.wiley.com/doi/10.1111/jasp.12954> [↑](#footnote-ref-10)
10. 2023 Demographic Differences in Federal Sentencing, United States Sentencing Commission. <https://www.ussc.gov/research/research-reports/2023-demographic-differences-federal-sentencing#:~:text=Focusing%20solely%20on%20these%20cases,receiving%20a%20sentence%20of%20imprisonment>. [↑](#footnote-ref-11)
11. Home Office Prison Statistics 2000. <https://www.prisonpolicy.org/scans/prisonstats2000.pdf> [↑](#footnote-ref-12)
12. *See* Zambia Department of Immigration homepage, noting their detention of 313 migrants over three days in late May 2022. <https://www.zambiaimmigration.gov.zm/news/press-releases/immigration-removes-190-illegal-immigrants-and-relocates-95-refugees/>.  *See also* <https://www.iom.int/news/iom-alarmed-deaths-27-ethiopian-migrants-zambia>. *See also*, “Immigration Detention and Human Rights,” Australian Human Rights Commission. <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/projects/immigration-detention-and-human-rights#:~:text=Australia%20has%20one%20of%20the,of%20Australia's%20human%20rights%20obligations>. [↑](#footnote-ref-13)
13. *See, e.g.,* Texas SB 4 (2017), which grants police officers the authority to question and arrest individuals based on a mere suspicion of illegal immigration. (Texas SB4 passed muster in the US Supreme Court, but is currently on hold pending a decision from the Fifth Circuit Court of Appeals.) *See also* Arizona SB 1070 (2010), which was partially struck down by the US Supreme Court in 2012. [↑](#footnote-ref-14)
14. “European Court of Justice Ruling Bolsters Refugee and Migrant Rights Defenders; Upholding the Right to Defend the Rights of Refugees and Migrants,” Alex Neve, Global Justice Journal, Queens University, Nov. 30, 2021. https://globaljustice.queenslaw.ca/news/european-court-of-justice-ruling-bolsters-refugee-and-migrants-rights-defenders [↑](#footnote-ref-15)
15. https://www.bbc.com/news/world-europe-44546030 [↑](#footnote-ref-16)
16. “Top EU court hits Hungary over ‘Stop Soros’ migrant law,” Al Jazeera, Nov. 21, 2021. <https://www.aljazeera.com/news/2021/11/16/top-eu-court-hits-hungary-over-stop-soros-migrant-law> [↑](#footnote-ref-17)
17. “Crew of migrant rescue boat acquitted in Italy after seven-year ordeal,” Lorenzo Tondo, The Guardian, Apr. 19, 2024. <https://www.theguardian.com/world/2024/apr/19/italian-court-acquits-crew-of-migrant-refugee-rescue-boat-iuventa> [↑](#footnote-ref-18)
18. “UK foreign aid spending on asylum seekers rises again,” James Landsdale and Jennifer McKiernan, BBC News, April 10, 2024. <https://www.bbc.com/news/uk-politics-68781450> [↑](#footnote-ref-19)
19. Guidance for Federal Law Enforcement Agencies on the Use of Protected Characteristics, U.S. Department of Justice, May 2023. <https://www.justice.gov/d9/2023-05/Sec.%209%28e%29%20-%20Guidance%20for%20Federal%20LEAs%20on%20the%20Use%20of%20Protected%20Characteristics_FINAL%205.25.23_508.pdf> (Of course, it must be noted that such guidance was promulgated 20 years earlier, in June 2003, to little avail. It is hoped that the recent guidance document will be better heeded.) [↑](#footnote-ref-20)
20. The Cape Declaration on Decriminalising Poverty and Status. <https://cdn.penalreform.org/wp-content/uploads/2023/01/Cape-Declaration.pdf> [↑](#footnote-ref-21)
21. “Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers,” International Independent Expert Mechanism to Advance Racial Justice and Equality in Law Enforcement, A/HRC/51/55 (August 4, 2022). [↑](#footnote-ref-22)
22. “Police Violence Against Afro-descendants in the United States,” Inter-American Commission on Human Rights (November 26, 2018). [↑](#footnote-ref-23)