

Policy Department C
Citizens' Rights and Constitutional Affairs



**ETHNICITY AND RACE-BASED PROFILING
IN COUNTER-TERRORISM, LAW ENFORCEMENT
AND BORDER CONTROL**

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS



PARLAMENTO EUROPEO EVROPSKÝ PARLAMENT EUROPA-PARLAMENTET
EUROPÄISCHES PARLAMENT EUROOPA PARLAMENT EΥΡΩΠΑΪΚΟ ΚΟΙΝΟΒΟΥΛΙΟ EUROPEAN PARLIAMENT
PARLEMENT EUROPÉEN PARLAMENTO EUROPEO EIROPAS PARLAMENTS
EUROPOS PARLAMENTAS EURÓPAI PARLAMENT IL-PARLAMENT EWROPEW EUROPEES PARLEMENT
PARLAMENT EUROPEJSKI PARLAMENTO EUROPEU EURÓPSKY PARLAMENT
EVROPSKI PARLAMENT EUROOPAN PARLAMENTTI EUROPARLAMENTET

**Directorate General Internal Policies
Policy Department C
Citizens' Rights and Constitutional Affairs**

ETHNICITY AND RACE-BASED PROFILING IN COUNTER-TERRORISM, LAW ENFORCEMENT AND BORDER CONTROL

STUDY

Abstract:

The aim of this study is to synthesize legal arguments and research findings relating to ethno-racial profiling in the field of anti-terrorist policies and legal instruments. The ultimate goal is to formulate guidelines and recommendations for the European legislators. In Part I, the study provides an analysis of the concept and utility of profiling. This includes an assessment of the most important substantive criteria of profiling and the necessary safeguards. Part II focuses on the compatibility of profiling with the most important international, European and national human rights instruments, along with European instruments in the context of the fight against terrorism, police and judicial cooperation and exchange of information and intelligence between Member States, while also taking into account the rights and guarantees provided to individuals in terms of privacy, data protection and non-discrimination. Part III explores the impact of profiling on minority communities, police-minority relations, and the effectiveness of police and anti-terrorist law enforcement endeavours. Finally, Part IV offers recommendations on possible ways to carry out research on racial profiling and monitoring police activities in order to identify racial profiling practices.

PE 408.326

This study was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (**LIBE**).

This paper is published in the following languages: EN, FR.

Author: **András Pap, Institute for Legal Studies, Hungarian Academy of Sciences**

Under the coordination of the Justice and Home Affairs Section of the Centre for European Policy Studies (CEPS).

Manuscript completed in **November 2008**

Copies can be obtained through:

Mr Alessandro DAVOLI
Administrator Policy Department C
Tel: 32 2 2832207
Fax: 32 2 2832365
E-mail: alessandro.davoli@europarl.europa.eu

Information on **DG IPOL publications**:

<http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>

<http://www.ipolnet.ep.parl.union.eu/ipolnet/cms/pid/438>

Brussels, European Parliament

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

TABLE OF CONTENTS

PART I. DEFINITIONS AND CORE QUESTIONS	5
1. THE CONCEPT OF PROFILING	5
2. REASONS AND JUSTIFICATIONS	11
3. A NOTE ON TERMINOLOGY AND ETHNIC DATA	15
Part II. PROFILING AND THE LAW	17
1. EQUAL TREATMENT AND THE PROHIBITION OF DISCRIMINATION	18
2. THE FREEDOM OF INFORMATIONAL PRIVACY AND PROTECTION OF SENSITIVE PERSONAL DATA.....	22
3. THE RIGHT TO LIBERTY AND THE FREEDOM OF MOVEMENT	33
4. RIGHT TO PROPERTY, FREEDOM TO CONDUCT A BUSINESS, RIGHT TO FAIR TRIAL	33
5. RIGHT TO FAMILY AND PRIVATE LIFE	39
6. RIGHT TO INTERNATIONAL PROTECTION	39
PART III. IMPACTS OF ETHNIC PROFILING.....	39
1. THE EFFICACY OF ETHNIC PROFILING	40
2. TERRORISM, SECURITY IN THE NEW WORLD AND PROFILING... 	44
3. NUMBERS, EXAMPLES AND STUDIES – THE IMPACT OF PROFILING ON MINORITY COMMUNITIES	48
PART IV. WHAT TO DO?.....	50
REFERENCES.....	57

PART I. DEFINITIONS AND CORE QUESTIONS

1. THE CONCEPT OF PROFILING

To map out the boundaries of our scrutiny, first the concept of profiling needs to be defined. Once this task is accomplished, before turning to the analysis of how profiling is compatible with EU law and international human rights standards (in Part II), we will need to include a twofold limitation on our assessment, as this study only focuses on profiling (i) on the basis of race and ethnicity, as (ii) it comes up in law enforcement, border control and counter-terrorism measures. Other characteristics (gender, unspecified biometric data, etc.) that may serve as a basis for profiling, or other fields (like insurance, employment) where such screening mechanisms may also come into question remain outside the scope of analysis.

Throughout the study, the terms “*police*”, “*policing*” and “*law enforcement agents or agencies*” will be used synonymously – including both (i) public administrative and (ii) criminal investigative functions. In this regard, the terminology set forth by the explanatory memorandum of ECRI’s General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing will be followed, where the term “*police*” refers to those exercising (or having by law) the power to use force in order to maintain law and order in society, normally including *prevention and detection of crime* -- regardless of how such police are organised; whether centralised or locally oriented, whether structured in a civilian or military manner, whether labelled as services or forces, or whether they are accountable to the state, to international, regional or local authorities or to a wider public, including secret security and intelligence services and border control officials as well as private companies exercising police powers as defined above.¹ The term refers to *control, surveillance or investigation activities*. Acts that fall in this definition include: stops and searches; identity checks; vehicle inspections; personal searches; searches of homes and other premises; mass identity checks and searches; raids; surveillance (including wire-tapping); data mining/data trawling.²

There is not one universally accepted and utilized definition for profiling. Depending on the actual context, international organisations, academics and politicians use vastly differing criteria. Even in the narrowly defined context of racial profiling by law enforcement agencies, considerably different definitions have been used. For example, in 2002, the EU’s Working Party on Terrorism drew up recommendations for member states on the use of “terrorist profiling,” and defined it as using “a set of physical, psychological, or behavioural variables, which have been identified as typical of persons involved in terrorist activities and which may have some predictive value in that respect.”³ In their Opinion on ethnic profiling,⁴ the E.U. Network of Independent Experts on Fundamental Rights defines ethnic profiling as the *practice of classifying individuals according to their ‘race’ or ethnic origin, their religion or their national origin, on a systematic basis, whether by automatic means or not, and of treating these individuals on the basis of such a classification.* In its letter of 7 July 2006, the

¹ Para 22

² Para 36

³ Ben Hayes, A Failure to regulate: Data protection and Ethnic Profiling in the Police Sector in Europe, Justice Initiatives, Open Society Justice Initiative, June 2005, p. 37

⁴ 2006/4.

European Commission gave the following definition: racial or ethnic profiling encompasses any behaviour or discriminatory *practices* by law enforcement officials and other relevant public actors, against individuals on the basis of their race, ethnicity, religion or national origin, as opposed to their individual behaviour or whether they match a particular ‘suspect’ description’. According to James Goldston, the executive director of the Open Society Justice Initiative, by ethnic profiling we mean the use of racial, ethnic or religious *stereotypes* in making law enforcement decisions to arrest, stop and search, check identification documents, mine databases, gather intelligence and other techniques⁵. In *R. v. Richards*,⁶ a case presented to the Ontario Court of Appeals, the African Canadian Legal Clinic defined racial profiling as *criminal profiling based on race*. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. ECRI’s General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing⁷ uses the following definition: “The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in *control, surveillance or investigation activities*”.

Profiling in the abstract sense refers to identifying information, making predictions and, finally, inference.⁸ In any abstract profiling operation, three stages may be identified: The first stage is “*observation*”, often referred to as data warehousing, where personal or anonymous data are collated. If the data refer to an identifiable or identified individual, they will generally be anonymised during this stage. The collected data may be of internal or external origin. For example, a bank might draw up an anonymous list of its customers who are bad payers, together with their characteristics, or a marketing firm might acquire a list of the major supermarket chains’ “shopping baskets” without the shoppers being identified. This first stage is followed by a second set of operations, usually referred to as *data mining*,⁹ which is carried out by statistical methods and whose purpose is to establish, with a certain margin of error, *correlations* between certain observable variables. For instance, a bank might establish a statistical link between a long stay abroad and one or more missed loan repayments. The concrete outcome of this stage is a mechanism whereby individuals are categorised on the basis of some of their observable characteristics in order to infer, with a certain margin of error, others that are not observable. The third and last stage, known as “*inference*”, consists in applying the mechanism described above in order to be able to infer, on the basis of data relating to an identified or identifiable person, new data which are in fact

⁵ *Ethnic Profiling and Counter-Terrorism : Trends, Dangers and Alternatives*, June 2006

⁶ *R. v. Richards* (1999), 26 C.R.(5th) 286 (Ont. C.A.). 15

⁷ Adopted on 29 June 2007

⁸ For a detailed analysis, see Jean-Marc Dinant, Christophe Lazaro, Yves Pouillet, Nathalie Lefever, Antoinette Rouvroy: Application of Convention 108 to the profiling mechanism Some ideas for the future work of the consultative committee, Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (T-Pd) 24th meeting 13-14 March 2008 Strasbourg, G01 (T-PD), Secretariat document by prepared the Council of Europe Directorate General of Human Rights and Legal Affairs, Strasbourg, 11 January 2008 T-PD(2008)01

⁹ Data mining can be defined as the application of statistical, data analysis and artificial intelligence techniques to the exploration and analysis with no preconceived ideas of (often large) computer data bases in order to extract fresh information that may be of use to the holder of these data. In other words, the value of data mining is that it is an IT tool which can “make the data talk”. Generally speaking, the methods on which data mining is based can be divided into two categories: some are *descriptive* and others *predictive*, depending on whether the aim is to explain or predict a “target” variable. Descriptive methods are used to bring out information that is present but hidden within the mass of data, while predictive methods are used to exploit a set of observed and documented events in order to try and predict the development of an activity by drawing projection curves. This method can be applied to management of customer relations in order to predict a customer’s behaviour. The aim is for example to determine the profile of individuals with a high purchasing probability or to predict when a customer will become disloyal. Id. p. 8-9.

those of the category to which he or she belongs. Very often, only this last operation is referred to as “profiling”, it, however, is essential, to see this final stage as part of a process.¹⁰

The Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data defined profiling as a *computerised method involving data mining from data warehouses*, which makes it possible, or should make it possible, to place individuals, with a certain degree of probability, and hence with a certain induced error rate, in a particular *category* in order to take individual decisions relating to them. This concept of profiling *differs from criminal profiling*, where the aim is to get inside and understand the criminal’s mind, but is similar to behavioural analysis since the aim is not to understand the motives which lead or might lead an individual to adopt a given behaviour, but to establish a strong mathematical correlation between certain characteristics that the individual shares with other “similar” individuals and a given behaviour which one wishes to *predict or influence*. As this approach does not depend on human intelligence, but on statistical analysis of masses of figures relating to observations converted to digital form, it can be practised by means of a computer with minimum human intervention.¹¹

Lee Bygrave of the University of Oslo proposed the following definition: profiling is the process of *inferring a set of characteristics* (typically behavioural) about an individual person or collective entity and then treating that person/entity (or other persons/entities) in the light of these characteristics. As such, the profiling process has two main components: (i) profile generation – the process of inferring a profile; and (ii) profile application – the process of treating persons/entities in light of this profile”¹²

The word “*profile*” (*profil* in French) was originally used in the artistic field. It denoted the outlines and features of a face seen from one side or, more broadly, the portrayal of an object seen from one side only. By extension, this term eventually took on the figurative sense of “all the characteristic features of a thing, a situation or a *category of people*” Where people are concerned, this term thus refers to all the characteristic features exhibited by a person or category of persons.¹³ A profile is thus merely an image of a person based on different features: in the artist’s profile, features are sketched, in profiling, data are correlated and in neither case can the profile be equated with the person him or herself. The core of the profiling-problem will lie exactly in the fact that it tends to *reduce the person to the profile generated by automated processes* which are liable to be used as a basis for *decision-making*. These processes carry several risk factors. The European Commission for example has brought attention to the fact that the registered data images of persons (their “data shadows”) might eventually usurp the constitutive authority of the physical self despite their relatively attenuated and often misleading nature, along the fact that rampant automation of decision-making processes engenders a lack of involvement and abdication of responsibility on the part of “*human*” *decision-makers*.¹⁴ It is for this reason that Article 15 of the data protection Directive of the EU¹⁵ deals explicitly with “*automated individual decisions*.”¹⁶

¹⁰ Id. p. 3.

¹¹ Id. p.5.

¹² L. A. BYGRAVE, « Minding the machine : Article 15 of the EC Data Protection Directive and Automated Profiling », *Computer Law & Security Report*, 2001, vol. 17, pp. 17-24, available on-line at <http://www.austlii.edu.au/au/journals/PLPR/2000/40.html>.

¹³ Application of Convention 108..., p. 5.

¹⁴ See Id. p. 13.

¹⁵ Directive 95/46/EC

¹⁶ 1. Member States shall grant the right to every person not to be subject to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc. 2. Subject to the other articles of this Directive, Member States shall provide that a person may be subjected to a decision of the kind referred to in paragraph 1 if that decision: (a) is taken in the course of the entering into or performance of a contract, provided the request for the entering into or the

Historically, the term “profiling” in law enforcement first came to prominence in connection with the training of *crime profilers* in the USA. In theory, these people are supposed to be capable of determining a *criminal’s personality type* by analysing traces left at the scene of the crime. Recent developments in information technology, however, today make profiling activities increasingly easy and sophisticated, thus the possibilities offered by profiling are numerous and cover different areas of application. For example, in the USA, ATS (Automated Targeting System) has been developed in order to evaluate the probability of a given individual being a terrorist. Also, data mining is an extremely valuable tool in the area of marketing and customer management. It is one means of moving from mass marketing to genuinely personalised marketing. Likewise, profiling is widely used in the field of risk management, when determining the characteristics of high-risk customers. Such aims may include the adjustment of insurance premiums; prevention of arrears; aid to payment decisions where current account overdrafts exceed the authorised limit in the banking sector; use of a risk “score”¹⁷ in order to offer individual customers the most appropriate loan or refuse a loan depending on the probability of honouring repayment deadlines and the terms of the contract, etc. Cable digital TV provides programme distributors with precise information regarding channel selection and channel hopping by viewers who receive television channels via the telephone cable by means of DSL technology. They can thus create and keep a perfectly accurate viewing profile for each user. It therefore becomes technically possible to tailor advertisements to the user’s profile. Also, a similar methodology is used by Google’s on-line advertising system, where user’s click stream is monitored. In the age of strategic marketing, profiling and data mining is used in creating packages and special offers; designing new products and customer loyalty policy.¹⁸

Profiling based on *data mining* is, thus, the process by which large data bases of personal information are subjected to computerized searches using a set of specific criteria. In law enforcement, these criteria are generally based on the common characteristics of persons responsible for *past* offences and often include ethnicity, national origin and religion. The data is used to narrow down a set of targets for *further* investigation. Data mining has been explored with a specific interest in its potential as a tool to identify terror “sleeper cells” as was the case with Germany’s data mining effort after the discovery of the Hamburg cell in 2001. Called the *Rasterfahndung*, this massive and costly data mining exercise failed to turn up a single terrorist. The experience has been similar in the US, where immigration data was used to identify tens of thousands of persons for scrutiny as potential terrorists, but in the end not one charge on terrorism offences resulted. It is noteworthy that Germany’s constitutional court has ruled that, in the absence of a concrete danger, this technique constitutes an unwarranted intrusion on personal privacy.¹⁹

performance of the contract, lodged by the data subject, has been satisfied or that there are suitable measures to safeguard his legitimate interests, such as arrangements allowing him to put his point of view, or (b) is authorized by a law which also lays down measures to safeguard the data subject's legitimate interests.

¹⁷ For example, the Ombudsman in Cyprus – which delivers opinions on issues of equality and discrimination–delivered an opinion on a particular case of ethnic profiling on 23 June 2005. The Ombudsman decided that the policies of insurance companies to exclude Pontian Greeks from getting insured and/or have them insured at a higher rate, is discriminatory. The insurance companies argued that the reason why it is more difficult for Pontian Greeks to get insured is because of their past practice which has shown that they are more prone to accidents and usually do not cooperate well with the insurance companies. The Ombudsman noted that “such a policy is based on the racial or ethnic origin of the insured and is unacceptable as it violates the Equal Treatment (Racial or Ethnic) Origin Law.” See the E.U. Network of Independent Experts on Fundamental Rights Opinion 2006/4 on ethnic profiling.

¹⁸ Application of Convention 108..., p. 4-5 and 10-11.

¹⁹ The Federal Constitutional Court decided on April 4th, 2006, that the *Rasterfahndung* was not conform to the individual’s fundamental right of self-determination over personal information.. See Rebekah Delsol, Presentation to the LIBE Committee of the European Parliament, Brussels, 30 June 2008,

Let us collect some of the indispensable logical elements that pertain to the concept of profiling. Thus, profiling (i) can be applied in a number of contexts, that can vary from the commercial sector to the field of law enforcement; (ii) it is a mechanism where the task is to narrow down the circle of potential individuals that may fall within the scope of activities of a particular agent within the given field: it may involve identifying a group of customers or potential perpetrators; (iii) profiling will always include certain characteristics upon which the process relies; and (iv) there will always be a scheme of reasoning according to which these characteristics and the way of their employments is established. Each of the elements will evoke and include a set of legal rules or test to apply, where a specific type of profiling, say profiling on the basis of ethnicity applied in border control by the police, will involve a peculiar patchwork of legal norms. For example, if race or ethnicity is used within the process, stringent data protection regulations for the handling of sensitive data are applicable. Also, if the field of activity falls, say, within the scope the Race Directive²⁰ and the screening mechanism has the consequences of disparate treatment (which may include denying service or over-policing), the legality of profiling under the directive will depend on whether the rationale behind is rational and efficient (appropriate and necessary).

Bearing these in mind, let us now focus our attention on profiling on the basis of ethnicity and race as it comes up in the context of various law enforcement activities, especially in counter-terrorist measures and border control.

The legal context of law enforcement will be defined by all relevant constitutional, international and EC legal norms that apply to the field of law enforcement in general, and in addition that, special norms that regulate sensitive ethno-racial data handling and human rights protections for ethno-racial minorities.

According to Rebekah Delsol,²¹ racial profiling refers to the *use by the police of generalisations based on race, ethnicity, religion or national origin, rather than individual behaviour, specific suspect descriptions or accumulated intelligence*, as the basis for suspicion in directing discretionary law enforcement actions such as stops, identity checks, questioning, or searches among other tactics. Racial or ethnic profiling is, thus, distinct from ‘criminal profiling,’ which relies on forms of *statistical categorisation* of groups of people according to identifiable characteristics believed to correlate with certain behaviours. Specific definitions of racial or ethnic profiling vary along a continuum ranging from the use of race alone as the reason for the stop to those using race along with other factors as the reason for the stop.²²

Using a *narrow definition*, racial profiling occurs when a police officer stops, questions, arrests and/or searches someone *solely* on the basis of a person’s race or ethnicity. A *broader* definition acknowledges that race may be used as *one of several factors involved* in an officer’s decision to stop someone. A stop is likely to be made on the confluence of several factors such as race or ethnicity along with *age, dress* (hooded sweatshirts, baggy trousers, perceived gang dress etc.), time of the day, *geography* (looking ‘out of place’ in a neighbourhood or being in a designated ‘high-crime area’). This definition reflects the fact that racial profiling may be caused by the purposefully racist behaviour of individual officers, or the cumulative effect of the unconscious use of racist stereotypes, but may also result from

<http://www.europarl.europa.eu/document/activities/cont/200806/20080625ATT32712/20080625ATT32712EN.pdf>

²⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

²¹ Op cit.

²² Id.

institutional factors, such as the use of enforcement techniques and deployment patterns, which impact on ethnic groups unequally.²³

Profiling can take place in other stops or contacts with the public by any type of law enforcement officer or other authorities such as traffic stops in cities as well as highways, stopping and questioning of pedestrians in public places in urban areas, sweeps of trains and buses, immigration status checks by immigration officials, and airport security and customs checks or searches. Patterns of profiling can also be seen in discriminatory treatment after a stop has taken place, such as black motorists being given traffic citations while white motorists are let off with a warning, or Latino/a youth, but not white youth, being cited for noise violations, mass controls in public places, stop and search and identity checks, data mining and raids on places of worship, businesses and organisations.²⁴

Thus, ethnic or racial profiling, that is profiling that includes race and ethnicity as one of the characteristics involved in the process, is a practice that relies on the *tenet that ethnicity in itself signals a certain type of criminal involvement, terrorist plotting or illegal border crossing as more likely*, and this assumption serves as a sufficient and therefore legitimate basis for law enforcement (police, secret service etc.) *suspicion*. The peculiarity of profiling lies in the fact that it is *not based on illegal behaviour*, but is centred around idea to *collect legal behavioural patterns or character-traits that may signal criminal behaviour* – it is therefore based on an assumed correlation between criminality and the specified characteristics or behavioural patterns, a *deduction based on retrospectively judged effectiveness, which is always assumed, rather than checked and confirmed*.

From this it follows, that when considering the legality of certain specific profiling techniques, it needs to be scrutinized on the outset whether the inclusion of ethno-racial characteristics, or sensitive data handling would not deem the profiling mechanism facially illegal. Should a profiling scheme pass this first line of scrutiny, the legal qualification of the given measures will depend on its *proportionality*, which will need to include the scrutiny of the efficacy of the given mechanism. In other words, it is a necessary but not sufficient condition to be legal for a profiling mechanism that singles out individuals on the basis of their ethnicity or race to be efficient from the practical point of view: that is, it needs to be *proved* that criminal involvement is higher within the specific ethno-racial group and the hit rates (successful application of the profiling mechanism) need to be high. The objective measurement of these factors are logical and necessary conditions for the *balancing tests* that are applied by international judicial organs and constitutional courts, as these tests include the weighting of how intrusive certain means are in comparison to the ends—provided of course, that the ends are legitimate.

Law enforcement profiling, which mostly takes the form of stop and search, was first developed in the U.S. for detecting *drug* couriers, and was later implemented in *traffic control*, and more recently in *anti-terror* procedures. Originally, the procedure of profiling was aimed at creating a description profile for suspects, in order to help the authorities in filtering out potential perpetrators based on certain sets of (legal) behaviour and circumstances. In the case of drug couriers, such a characterization might include short stop-overs between significant drug sources and the distribution location, cash paid for the airline ticket, and, based on criminal statistics, also ethnicity, sex and age. The inclusion of ethnicity in the profile was reasoned by the fact that gangs that play key roles in organized crime tend to be almost exclusively ethnically homogenous.

Thus, at the heart of ethno-racial profiling is the idea that the race or ethnicity of the perpetrator serves as a useful tool for the detection of criminality. Therefore, stops are not or

²³ Id.

²⁴ Id.

not solely induced by suspicious or illegal behaviour, or by a piece of information that would concern the defendant specifically. Instead, a *prediction* provides grounds for police action: based on the high rate of criminality within the ethnic group or its dominant (exclusive) involvement in committing certain acts of terrorism, it seems like a rational assumption to stop someone on ethnic grounds. Measures are therefore applied not so much or solely on the basis of the (suspicious) behaviour of the individual, but based on an aggregate reasoning. This does not necessarily involve a discriminatory intent, since the goal is to make an efficient *allocation of the limited amount of the available police and security resources*. After all, one might argue that minorities (blacks, Roma, etc.) constitute a very large proportion the prison population (vastly exceeding their ration in the overall population) and many, or most of the terrorists are presumably Muslim fundamentalists (mostly from Arab countries). Accordingly, appropriate restriction of the circle of suspects seems easily justifiable. For example, the EU Terrorism situation and trend report 2008 identifies five types of terrorist groups and movements, two of which: “Islamist terrorism” and “Ethno-nationalist and separatist terrorist groups” include classifications that deem such interconnections useful.

2. REASONS AND JUSTIFICATIONS

In addition to the two important points already identified in the ethno-racial profiling discourse (the handling of sensitive data and the efficacy of profiling), this brings up a third important point of scrutiny: the reasons and justifications (standards of suspicion or probable cause) based on which law enforcement action or sanctions, such as stop and search may be initiated. It is important to note that since law enforcement work, investigation, crime prevention is not built solely on actual illegal behaviour and suspicion, a core concept in this discussion is not always easy to codify.

The question can be rephrased as under *what conditions* might the police (or other law enforcement organs) initiate action? The standards will change according to how concretely specified the perpetrator is, what the degree of suspicion is, and in what capacity the law enforcement agent is acting: is it a random, voluntary encounter; consensual questioning that does not involve coercion, where in theory the citizen may disregard the question; stopping and questioning during an investigation; vehicle control; border control, etc. Along the way, we may well ask: is it justifiable to institute a roadblock obstructing everyone’s way (and not just that of a specific ethnic group)? *What kind of suspicion* (if any) is necessary for such a measure? Are random checks acceptable?²⁵ In order to easily pinpoint to unwarranted ethnic motivation, it would require that the court (or legislator) state that police action can be initiated exclusively on the basis of *individual behaviour* or suspect description. But courts throughout the world will uphold a number of types of *general controls*: roadblocks, raids, alcohol tests,²⁶ Courts have not been entirely consistent either. In the 1975 Brignoni-Ponce

²⁵ For example, in the 1979 Delaware v. Prouse case (440 US 648, (1979) the Supreme Court found random stops and checks to be unconstitutional. (See for example Anthony Thompson, Stopping the Usual Suspects: Race and the Fourth Amendment, New York University Law Review, October, 1999, pp. 973-974.) In the 2000 City of Indianapolis v. Edmund case (531 US 32 (2000)), the Court still found it unacceptable to have a road check following a roadblock, with the involvement of drug-searching dogs. But the Court upheld a roadblock in the context of a 2004 investigation concerning a hit-and-run accident, when during the time when the crime was committed, the road was blocked and without using further coercive measures the police politely asked motorists about the case, showing them photographs. (Illinois v. Lidster, (000 U.S. 02-1060 (2004)), see also Thompson, p. 920. The question is, of course, whether the Court’s position would be similar if the roadblock were put in front of a mosque or a Middle-Eastern grocery store...

²⁶ For alcohol tests ordered for railroad workers involved in an accident see Skinner v. Railway Labour Executives Assn, (489 US 602, (1989)); for sobriety tests around nightclubs see Police v. Sitz (496 US 444, (1990)), and for alcohol tests prior

case, for example, the US Supreme Court did not accept the authorities' defence that in the vicinity of the U.S.-Mexican border, on a stretch of road that usually teems with illegal immigrants, someone could be stopped solely on the grounds that she looks Mexican.²⁷ Stark contrast is provided by a 2001 decision of the Spanish constitutional court, which stated that skin colour and foreign appearance could serve as a profound cause for determining whom the police might stop. A year after the Brignoni-decision, in *US vs. Martinez-Fuerte*,²⁸ based on a similar pretext (the large number of Mexicans), the American Supreme Court, too, found it acceptable to order a roadblock.

As Sarah Ludford points out, “*profiling can be implicit, for example when it reflects a reliance on stereotypes about minority groups' propensity to offend in police decisions about which persons appear suspicious. Other forms of profiling are explicit, as when a specific set of criteria are used as the basis for directing investigative inquiries.*”²⁹ The American case law and jurisprudence provides good illustration for the case. As spelled out by a set of detailed court decisions, the law distinguishes four ways in which police action may rely upon ethnicity or race, applying different constitutional measures for each of them.

(a) The first, unproblematic scenario is when the victim or witness to a crime provides a *description of a specific suspect* which includes ethno-racial characteristics. In these situations, American courts have invariably found that it was legal to use such information—in search warrants, for example.

(b) A second, somewhat different scenario is one in which the description provided by the victim or witness contains very little concrete detail about the suspect beyond her race or ethnicity. In such cases, on several occasions, the courts' stance was that race and ethnicity can be operative in negative descriptions only; for example, if the informant identified the perpetrator as black, then that information can serve as basis for the police not to stop whites and Asians, but it would border on discrimination for them to start stopping blacks without any further reason for doing so beside their skin colour. This way, if we know only that the perpetrator is black, then the law enforcement syllogism means the following: the perpetrator is black and the suspect is white; from these it follows that the perpetrator cannot be identical with the suspect; but it does not follow from the pair of claims that the perpetrator is black and so is the suspect (or the pedestrian or driver), that then the suspect is the perpetrator.³⁰

(c) The third case is racial profiling, which relies on the tenet that ethnicity in itself makes criminal involvement more likely, and this assumption is not based on any specific or general information about a given, concrete individual.

(d) Finally, the fourth case, which features prominently in the war against terror, involves *preventive measures* that rely on official, written directives about certain racial, ethnic, national or citizenship-based considerations. In these cases, the application of ethno-racial profiles is no longer left to the *discretion* of the police, border guards and airport security personnel. Instead, ethnic profiling becomes an officially formulated *prescription*. For example, recommendation of the President of the Hungarian Financial Supervisory Authority No. 1/2004 on the prevention and impeding of terrorist financing and money laundering provides a vivid example for singling out Arab and Muslim countries by the very

to after-hours extra-curricular school events see for example, *Veronia Sch. Dist. 47J v. Acton* (515 US 646 (1995)), *Bd. of Educ. v. Earls* (536 US 822 (2002))

²⁷ *US v. Brignoni-Ponce*, 422 US 873 (1975)

²⁸ [428 U.S. 543 \(1976\)](#)

²⁹ See the Working Document on problem of profiling, notably on the basis of ethnicity and race, in counterterrorism, law enforcement, immigration, customs and border control by the Committee on Civil Liberties, Justice and Home Affairs. Rapporteur: Sarah Ludford., 30.9.2008, DT\745085EN.doc PE413.954v02-00. p. 2.

³⁰ See Sharon Davies: Reflections on the Criminal Justice System after September 11, 2001, *Ohio State Journal of Criminal Law*, Fall, 2003, p. 66.

formulation of its due diligence and reporting requirements: “Transactions should primarily be examined in terms of whether they are related to individuals, countries or organisations contained in the specific international lists. ... Raised attention needs to be paid to electronically sent and received amounts, which are unusual for certain reasons, including especially the size of the amount, the beneficiary target country, the country of the customer placing the order, currency or the method of sending or receipt. .. If an activity does not fit in the registered and reported activities, if the origin of received funds is unclear, if an amount increases from unusual sources, the target country or addressee raises a suspicion, the financial service provider needs to analyse and evaluate them with special care, and the transaction should be reported to the authority even if the smallest suspicion arises.”³¹

The question of how to, and how not to take ethno-racial classifications into consideration in policing is only one of the intricate issues involved in the legal assessment of racial profiling. Another question relates to general police powers and the issue of when police is authorised to perform coercive measures, including those to stop and search. In *Delaware v. Prouse*,³² the Supreme Court has acknowledged the *dangers of unconstrained police discretion*. In *Prouse*, a police officer stopped a motorist, not because of any traffic violation or suspicious activity, but simply to spot-check the driver's license and registration. The officer did not conduct this random spot check pursuant to any police department or state standards, guidelines, or procedures. Finding that the motor vehicle stop constituted a seizure, the Court proceeded to balance the interests of the State of Delaware against the intrusions on the motorist's Fourth Amendment (a the clause in the constitution that guards against unreasonable stops and seizures) protections. The State asserted that a practice of discretionary spot checks promoted its interest in ensuring the safety of its roads. The Court found that the spot checks that were not suspicion-based only marginally contributed to roadway safety. Highlighting the limits of acceptable police discretion, the Court has contrasted the problematic discretionary spot checks in *Prouse* with the more neutral, though still not suspicion-based, checkpoints in cases like *Michigan Department of State Police v. Sitz*.³³ Here, motorists challenged sobriety checkpoints in which the police stopped all drivers, without individualized reasonable suspicion or probable cause, and briefly examined them for signs of driving under the influence of alcohol. A checkpoint advisory committee had created guide-lines regarding the selection and administration of the checkpoints. Unlike in *Prouse*, the officers who staffed the checkpoints in *Sitz* did not choose whom to stop. Instead, the checkpoints were selected according to predetermined guidelines, and the officers stopped every approaching automobile. Thus, there existed little opportunity for arbitrary and unconstrained exercise of discretion by law enforcement. Applying a balancing test, the Court ultimately upheld the state's use of the checkpoints because the state's interest in preventing drunk driving, and the extent to which the checkpoints could reasonably be said to advance that interest, outweighed the intrusions on the motorists. In *Illinois v. Lidster*,³⁴ the court upheld highway checkpoint to seek information on fatal hit-and-run accident committed one week before.

Taking into consideration the complexity of racial profiling, in order to tackle to problem efficiently, it is also important to scrutinize the question of *individual suspect descriptions*. The requirement of probable cause to initiate stop and search procedures only tackles one element of a potentially arbitrary policing practice. Since overt and covert racial

³¹ See, <http://www.pszaf.hu/english/start.html>

³² 440 U.S. 648 (1979)

³³ 496 U.S. 444 (1990).

³⁴ 540 U.S. 419 (2004)

prejudices are widespread in society, before including an ethno-racial element in a suspect description, police should be put under an obligation to thoroughly investigate the reliability of such descriptions. As Priyamvada Sinha points out, a useful suspect description is one that is *complete, accurate, and reliable*. However, several factors can impede the creation of a useful suspect description, including the circumstances of the crime, the specific characteristics and capabilities of the witness and, also, the efficacy of the police interviewer. There are a number of relevant factors to a victim's or a witness's ability to perceive and to remember: poor or nonexistent lighting, the speed of the event, violence that renders the incident difficult to perceive and to remember by the witness, but also stress level, age, and bias. A witness may also not recognize or predict her own inability to perceive or to remember and may not be able to convey effectively to an interviewer her perceptions due to fear, anxiety, or limitations on verbal skills.

A landmark study regarding perception and memory demonstrates the strong influence of race on witnesses. White subjects were instructed to look at pictures of an African American man and a white man who appeared to be arguing, in which the white man was holding a razor. The subject was asked to describe the scene to a second person, who then related that description to another person, and so on. Researchers discovered that in the successive descriptions, the razor often migrated from the hand of the white man to that of the African American man. They concluded that this result was due to *cultural biases* or stereotypes of African Americans as being more prone to criminality and violence. Also, victims tend to mischaracterize or to overestimate the number of incidents with African Americans in crime victimization surveys. Records in Portland, Oregon revealed only a thirty-four percent agreement rate between the racial characteristics of suspects recorded in police data and those reported to researchers in subsequent surveys about crime. The victims also estimated a greater number of incidents involving African American suspects than did the police. The researcher suggested that such inaccuracies in crime victimization surveys might be examples of victims "project[ing] *racial bias* or prejudice into their perception of who committed the crime."³⁵

American jurisprudence³⁶ provides a number of examples where courts found stops illegitimate when based on *overbroad suspect descriptions*. The issue was highlighted by the infamous 1969 Davis v. Mississippi case,³⁷ where a woman who had been raped described her assailant to the police as a male "Negro youth." The police subsequently questioned or fingerprinted between sixty-five and seventy-five young African American males at the police station, in school, and on the streets. There were numerous other cases: while trying to capture a serial rapist in a primarily white area of Ann Arbor, Michigan, the police identified over 700 African American men as suspects, on the basis of a description of a "six-foot black man." They took DNA samples from 160 African American men. The attorney who represented donors seeking the return of their DNA samples commented that the "[p]olice attempted to [test] every African American man in the city who vaguely met the description." In Philadelphia, eight women who were raped described their assailant as a "slender black male." The Philadelphia Police Department used this sparse description to stop and question many African American males ranging in age from twenty to forty, weighing 120 to 160 pounds, and from five feet four inches to five feet ten inches. A woman who was raped at a bus stop in Baltimore, Maryland reported to the police that the perpetrator was an African American man, in his early thirties, about five feet ten inches, and weighing 180 pounds. The police district commander issued a memorandum to officers that simply instructed: "Every black male

³⁵ Priyamvada Sinha, *Police Use of Race in Suspect Descriptions: Constitutional Considerations*, 31 *New York University Review of Law and Social Change* (2006), pp. 144-45, 149 and 155

³⁶ See Sinha, pp. 135-139

³⁷ [394 U.S. 721 \(1969\)](#)

around this Bus Stop is to be stopped until the subject is apprehended." In *Brown v. United States*³⁸, the District of Columbia Circuit Court held that an anonymous tip regarding a narcotics seller who was a "black male, approximately 5'6" in height, wearing a white shirt with dark writing on the front and blue jeans" was inadequate as a suspect description, absent any other indicia of distinctiveness. Citing another case,³⁹ the court noted that "[d]escriptions applicable to large numbers of people will not support a finding of probable cause".

In time, American courts developed *more and more articulated guidelines* to annul such practices. In *People v. Robinson*,⁴⁰ a New York state court overturned a conviction in a case where the police had stopped, searched, and arrested suspects on the basis of descriptions of young African American men with medium builds and slightly varying heights. The court likewise noted the insufficiency of such general descriptions, which could have matched many people in the neighbourhood. In *United States v. Jones*,⁴¹ a circuit court held that an anonymous tip that several Black males were drinking and causing a disturbance at specific intersection "was so barren of detail about the alleged culprits' physical descriptions" that, coupled with a lack of corroboration, it could not establish reasonable suspicion for stop). In *Commonwealth v. Creek*⁴² the court held that holding physical description of "black male with a black [three-quarter] length goose" jacket was insufficient suspect description where the defendant was arrested in predominantly African American neighbourhood on a cold fall night. In *Faulk v. State*⁴³ the court held that description of an armed robber as "young black male wearing a multicoloured shirt" was too general to yield probable cause and noting that police officer who stopped appellant "had only one fact to connect the appellant to the armed robbery--that he was a young black male". In *Brown v. State*⁴⁴ it was found that the description in an armed robbery including race and approximate height and weight, coupled with absence of any incriminating conduct or circumstances surrounding appellants, failed to yield probable cause for arrest.⁴⁵

3. A NOTE ON TERMINOLOGY AND ETHNIC DATA

It should be noted that there is a crucial difference between the *continental conception* and the *Anglo-American* one: unlike the continental tradition, the U.S. and the UK have a generally accepted practice of *processing*⁴⁶ *ethno-racial data*.⁴⁷ Thus in the latter countries,

³⁸ [590 A.2d 1008 \(D.C. 1991\)](#)

³⁹ [Commonwealth v. Jackson, 331 A.2d 189, 191 \(Pa. 1975\)](#)

⁴⁰ [Robinson, 507 N.Y.S.2d at 269-70](#)

⁴¹ [242 F.3d 215, 216, 218-19 \(4th Cir. 2001\)](#)

⁴² [597 N.E.2d 1029, 1031 \(Mass. 1992\)](#)

⁴³ [574 S.W.2d 764, 765-66 \(Tex. Crim. App. 1978\)](#)

⁴⁴ [481 S.W.2d 106, 110-12 \(Tex. Crim. App. 1972\)](#)

⁴⁵ There are other, more recent cases that include a different context for stop and search: in [Buffkins v. City of Omaha, 922 F.2d 465, 467, 470 \(8th Cir. 1990\)](#) the court held that a tip that a black person or persons arriving on a flight from Denver would be importing cocaine to the Omaha, Nebraska, area before 5:00 p.m. on March 17, 1987, was not sufficient to justify stopping a Black woman carrying toy animal. In [United States v. Grant, 920 F.2d 376, 388 \(6th Cir. 1990\)](#) the court found no reasonable suspicion where Border Patrol agents in Detroit, Michigan airport stopped defendant because he was man of colour with dreadlocked hair and his flight originated in Los Angeles, California, an alleged "drug source" city. In [Orhorhaghe v. INS, 38 F.3d 488, 497 \(9th Cir. 1994\)](#) the court held that the sole basis for suspicion was racial background or national origin, assumed from defendant's "foreign-sounding" surname, which did not satisfy reasonable suspicion for seizure. In [United States v. Tapia, 912 F.2d 1367, 1368, 1371 \(11th Cir. 1990\)](#) the court held that Mexican ancestry, possessing few pieces of luggage, being visibly nervous, and travelling with out-of-state license plates is not enough to yield reasonable suspicion for additional detention after initial traffic stop.

⁴⁶ The generic term "processing" covers the collection of data and production of files, their storage, the dissemination and publication of data, and their transfer in various forms to other operators.

⁴⁷ Application No. 57328/00

ethno-racial data processing does not constitute a sensitive issue from a data protection perspective. Regarding a related question: besides obvious differences, this briefing paper will treat *racial, ethnic and nationality-based terminology* as synonymous. Definitions may actually overlap. For example, in 2007 in its decision *D.H. and Others v. The Czech Republic*, the Grand Chamber of the ECHR mentioned racial discrimination in a Roma school-segregation case. The European Court of Human Rights in the case of *Timishev v. Russia*,⁴⁸ ‘Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its *origin* in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds’. Non-essentialist definitions of ethnicity all insist that this is a *socially constructed concept*, which cannot be reduced to a list of attributes. For example, ECRI used the following *list of characteristics* referring, directly or indirectly, to ethnic or national origin: ethnicity, ethnicity of parents, appearance, nationality, citizenship, place of birth/country of birth, nationality, birth of parents, language used, mother tongue, name and first name, skin colour on photograph, religion, continent and country of origin (if outside Europe), religious beliefs, clothing, traditions, eating habits, sense of collective belonging, tribe membership.⁴⁹

The UN Principles and recommendations for population and housing censuses⁵⁰ sets forth that “the national and/or ethnic groups of the population about which information is needed in different countries are dependent upon *national circumstances*. Some of the bases upon which ethnic groups are identified are ethnic nationality (in other words country or area of origin as distinct from citizenship or country of legal nationality), race, colour, language, religion, customs of dress or eating, tribe, or various combinations of these characteristics. In addition, some of the terms used, such as ‘race’, ‘origin’ and ‘tribe’, have a number of different connotations.” In a revised version⁵¹, it states that “broadly defined, ethnicity is based on a shared understanding of history and territorial origins (regional and national) of an ethnic group or community as well as on particular cultural characteristics such as language and/or religion. Respondents’ understanding or views about ethnicity, awareness of their family background, the number of generations they have spent in a country, and the length of time since immigration are all possible factors affecting the reporting of ethnicity in a census. *Ethnicity is multidimensional and is more a process than a static concept, and so ethnic classification should be treated with moveable boundaries*. Ethnicity can be measured using a variety of concepts, including ethnic ancestry or origin, ethnic identity, cultural origins, nationality, race, colour, minority status, tribe, language, religion or various combinations of these concepts. Because of the *interpretative difficulties* that may occur with measuring ethnicity in a census, it is important that, where such an investigation is undertaken, the basic criteria used to measure the concept are clearly explained to respondents and in the dissemination of the resulting data.”

Recommendation 1735 (2006) of the Council of Europe’s Parliamentary Assembly⁵² on the concept of “*Nation*” holds that “the Assembly, aware of the need to clarify the terminology used in constitutions and legislations in force to cover the phenomenon of ethnic, linguistic and cultural links between groups of citizens living in different states, in particular

⁴⁸ Appl. nos. 55762/00 and 55974/00, judgment of 13 December 2005 (final on 13 March 2006).

⁴⁹ Patrick Simon: “Ethnic” statistics and data protection in the Council of Europe countries Study Report, Institut National d’Etudes Démographiques Strasbourg, 2007, p. 20.

⁵⁰ Revision 1 (1998), Statistical Studies; Series M No. 67/rev1, (g) National and/or ethnic group 2.116. New York, United Nations, See Simon, p. 28

⁵¹ Principles and recommendations for population and housing censuses, Revision 2, Draft. United Nations, September 2006. (f) Ethnicity 2.142. and 2.143., Simon, id.

⁵² Sections 2-4

the use of the word ‘nation’ as well as the correlation with a specific historical or political context, has considered whether, and how, the concept of ‘nation’—where applicable, a rethought and modernised concept—can help to address the question of national minorities and their rights in 21st-century Europe. The Committee on Legal Affairs and Human Rights, in a study of the concept of ‘nation’ and its use in Europe based on data gathered from questionnaire replies from 35 national parliamentary delegations and on statements by experts in law and political science at a hearing it organised in Berlin on 7 June 2004, concluded that it was difficult, not to say *impossible, to arrive at a common definition* of the concept of ‘nation’. The term ‘nation’ is deeply rooted in peoples’ *culture and history* and incorporates fundamental elements of their *identity*. It is also closely linked to political ideologies, which have exploited it and adulterated its original meaning.”

The Framework Convention for the Protection of National Minorities contains no definition of the term “national minority”. Paragraph 12 of the explanatory report on the Convention explains that this omission reflects the adoption of a pragmatic approach, since “it is impossible to arrive at a definition capable of mustering the general support of all Council of Europe member States”.⁵³

Having identified the concept and the most important features and elements of ethno-racial profiling, let us now turn to the assessment of the compatibility of profiling with the most important international, European and national human rights instruments.

PART II. PROFILING AND THE LAW

In order to map out the legal body that is applicable to racial profiling under *international human rights law and EC law*, I shall follow a fourfold analysis: (i) which fundamental right is involved; (ii) where is it set forth; (iii) how is the fundamental right infringed by profiling; and (iv) what steps can be recommended to remedy the violation of the given fundamental right. The following six areas may be identified: equal treatment and the prohibition of discrimination, freedom of informational privacy and protection of sensitive personal data, right to liberty and the freedom of movement, right to property, freedom to conduct a business, right to fair trial, right to family and private life, and right to asylum. We will discuss these in turn.

On the outset, the following should be stated: according to constitutional jurisprudence and well-established case law, even when, in abstract terms, a *legitimate aim* exists, the notion of *objective and reasonable justification* should be interpreted as restrictively as possible in order to assess whether the *proportionality test between the means employed and the aims sought to be realised* is satisfied in the context of racial profiling. The i) effectiveness criterion, the ii) necessity criterion, and the iii) harm criterion will be the key concepts here.

Under the *effectiveness criterion* the ability of the concrete measure to achieve the ends for which it was conceived is meant and it includes the consideration of the extent to which the measure in question has led to identification of criminals, along the extent to which the measure in question affects the ability of the police to work with minority groups to identify criminals and the extent to which the measure in question may divert the police away from identifying real criminal activities. The *necessity criterion* (for a detailed assessment see Part III.) refers to the existence or otherwise of other, less invasive, measures in order to achieve the same aim. Finally, the *harm criterion* involves the scrutiny of the extent to which the concrete measure affects the rights of the individual (right to respect for private and family life, right to liberty

⁵³ Council of Europe, H(1995)010. Simon, p. 30.

and security, right to be free from discrimination, etc.). As spelled out in ECRI's General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing, beyond considerations relating to the individual rights affected, the harm criterion should be understood in more general terms, as including considerations on the extent to which the measure in question institutionalises prejudice and legitimises discriminatory behaviour among the general public towards members of certain groups. Research has shown that racial profiling has considerably negative effects. Racial profiling generates a feeling of humiliation and injustice among certain groups of persons and results in their stigmatisation and alienation as well as in the deterioration of relations between these groups and the police, due to loss of trust in the latter. In this context, ECRI stresses the importance to examine, as part of the assessment of the harm criterion, the behaviour of the police when conducting the relevant control, surveillance or investigation activity. For instance, in the case of stops, courtesy and explanations provided on the grounds for the stop have a central role in the individual's experience of the stop. It is also important to assess the extent to which certain groups are stigmatised as a result of decisions to concentrate police efforts on specific crimes or in certain geographical areas.

1. EQUAL TREATMENT AND THE PROHIBITION OF DISCRIMINATION

In its General Policy Recommendation No. 8 on Combating Racism While Fighting Terrorism⁵⁴, ECRI Notes that the *fight against terrorism* engaged by the member States of the Council of Europe since the events of 11 September 2001 has in some cases resulted in the adoption of directly or indirectly discriminatory legislation or regulations, notably on grounds of nationality, national or ethnic origin and religion and, more often, in discriminatory practices by public authorities and that terrorist acts, and, in some cases, the fight against terrorism have also resulted in increased levels of racist prejudice and racial discrimination by individuals and organisations. ECRI also notes that as a result of the fight against terrorism engaged since the events of 11 September 2001, certain groups of persons, notably Arabs, Jews, Muslims, certain asylum seekers, refugees and immigrants, certain visible minorities and persons perceived as belonging to such groups, have become particularly vulnerable to racism and/or to racial discrimination across many fields of public life including education, employment, housing, access to goods and services, access to public places and freedom of movement. Also, increasing difficulties have been experienced by asylum seekers in accessing the asylum procedures of the member States of the Council of Europe, along a progressive erosion of refugee protection as a result of restrictive legal measures and practices connected with the fight against terrorism.⁵⁵

⁵⁴ ECRI(2004)26 adopted on 17 MARCH 2004 Strasbourg, 8 June 2004

⁵⁵ In this document ECRI recommends to the governments of member States: to pay particular attention to guaranteeing in a non discriminatory way the freedoms of association, expression, religion and movement and to ensuring that no discrimination ensues from legislation and regulations - or their implementation - notably governing the following areas: checks carried out by law enforcement officials within the countries and by border control personnel, administrative and pre-trial detention, conditions of detention, fair trial, criminal procedure, protection of personal data, protection of private and family life, expulsion, extradition, deportation and the principle of non-refoulement, issuing of visas, residence and work permits and family reunification, acquisition and revocation of citizenship. Recommendations were also made to ensure that then member states' national legislation expressly includes the right not to be subject to racial discrimination among the rights from which no derogation may be made even in time of emergency; that the right to seek asylum is ensured and the principle of non-refoulement are thoroughly respected in all cases and without discrimination, notably on grounds of country of origin; and that member states pay particular attention in this respect to the need to ensure access to the asylum procedure and a fair mechanism for the examination of the claims that safeguards basic procedural rights. Also, ECRI recommends to ensure the existence and functioning of an independent specialised

The principle of equal treatment is expressed in a number of international documents, from the *European Convention of Human Rights through the European Convention on Human Rights, the Charter of Fundamental Rights of the EU and the International Convention on the Elimination of all forms of Racial Discrimination*. For our purposes, the *Race Directive* is of particular interest, since, ethno-racial profiling may amount to both *indirect and direct discrimination*. As the Directive (and the national legislations transposing it) explicitly outlaws disparate treatment on the basis of ethnicity and race, it derives from the Directives that law enforcement practices (which fall under social services, thus fall under the scope of the directive) need to be monitored. It can be argued that unless there is an objective and rational proof for the higher criminality of the profiled ethno-racial group, *overpolicing amounts to both indirect discrimination*, and the stopping of minority individuals without specific behavioural reasoning (illegal activity), or a suspect profile, amounts to direct discrimination as well.

According to ECRI's General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination⁵⁶, "direct racial discrimination" shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. "Indirect racial discrimination" shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. As spelled out in the explanatory memorandum: the meaning of the expression "differential treatment" is wide and includes any distinction, exclusion, restriction, preference or omission, be it past, present or potential. The term "ground" must include grounds which are actual or presumed. For instance, if a person experiences adverse treatment due to the presumption that he or she is a Muslim, when in reality this is not the case, this treatment would still constitute discrimination on the basis of religion. Discriminatory actions are rarely based solely on one or more of the enumerated grounds, but are rather based on a combination of these grounds with other factors. For discrimination to occur, it is therefore sufficient that one of the enumerated grounds constitutes one of the factors leading to the differential treatment. The law should provide that the prohibition of discrimination applies to all public authorities as well as to all natural or legal persons, both in the public and in the private sectors, in all areas, notably: employment; membership of professional organisations; education; training; housing; health; social protection; goods and services intended for the public and public places; exercise of economic activity; public services. Para 26 of the explanatory memorandum states that the field of public services includes the activities of the police and other law enforcement officials, border control officials, the army and prison personnel.

ECRI's mentioned General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination finds that racial profiling constitutes a specific form of *racial*

body to combat racism and racial discrimination competent, inter alia, in assisting victims in bringing complaints of racism and racial discrimination that may arise as a result of the fight against terrorism, and to encourage debate within the media profession on the image that they convey of minority groups in connection with the fight against terrorism and on the particular responsibility of the media professions -- in this connection, to avoid perpetuating prejudices and spreading biased information or introduce into the school curricula, at all levels, education in diversity and on the need to combat intolerance, racist stereotypes and prejudices, and raise the awareness of public officials and the general public on these subjects.

⁵⁶ Adopted on 13 December 2002

discrimination. By defining racial profiling as the use by the police of certain grounds in control, surveillance or investigation activities, without objective and reasonable justification, it claims that the use of these grounds has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Thus, returning to our initial jurisprudential framework: even when, in abstract terms, a *legitimate aim* exists (for instance the prevention of disorder or crime), the use of these grounds in control, surveillance or investigation activities can hardly be justified outside the case where the police act on the basis of a specific suspect description within the relevant time-limits, i.e. when it pursues a specific lead concerning the identifying characteristics of a person involved in a specific criminal activity. In order for the police to avoid racial profiling, control, surveillance or investigation activities should be strictly based on individual behaviour and/or accumulated intelligence. The notion of *objective and reasonable justification* should be interpreted as restrictively as possible with respect to differential treatment based on any of the enumerated grounds, thus different considerations should be taken into account in order to assess whether the *proportionality test between the means employed and the aims sought to be realised* is satisfied in the context of racial profiling.

The Recommendation notes that in the same way as racial discrimination, racial profiling can take the form of *indirect racial discrimination*. In other words, the police may *use (without objective and reasonable justification) criteria which are apparently neutral, but impact disproportionately on a group of persons designated by grounds such as race, colour, language, religion, nationality or national or ethnic origin*. For instance, a profile that tells the police to stop all women who wear a headscarf could constitute racial profiling inasmuch as it would impact disproportionately on Muslim women and would not have an objective and reasonable justification. The prohibition of racial profiling should also cover these indirect forms of racial profiling. Furthermore, the Recommendation notes that in the same way as racial discrimination, racial profiling can take the form of discrimination by association. This occurs when a person is discriminated against on the basis of his or her association or contacts with persons designated by one of the grounds mentioned above.⁵⁷

In its General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2005), the Committee for the Elimination of Racial Discrimination states that one central question in its opinion is the distinction between ethnic profiling as a means to identify instances of racial or ethnic discrimination, on the one hand, and ethnic profiling which constitutes *per se* a form of racial discrimination, on the other hand. Perhaps paradoxically, while individuals should be protected from any form of ethnic classification which could lead to these individuals being subjected to discrimination, ethnic profiling typically takes the form of *practices* by public authorities, which remain unregulated or may even be prohibited by law. Only the monitoring of the behaviour of the public authorities by the use of statistics may serve to highlight such practices. This constitutes the first condition for such discriminatory practices to be effectively combated.

In line with this, the E.U. Network of Independent Experts on Fundamental Rights⁵⁸ draws attention to the fact that ethnic profiling may or may not be discriminatory, depending on the purpose of such classification and on the use made of this information; and that it may or may not be compatible with the rules pertaining to the protection of private life in the processing of personal data. Opinion 2006/4 emphasizes that *the use of 'racial' or ethnic characteristics as part of a set of factors that are systematically associated with particular offences and used as a basis for making law enforcement decisions is clearly discriminatory, not only because of the absence of any proven statistically significant correlation between*

⁵⁷ Para 27-34 and 38

⁵⁸ See Opinion 2006/4 on ethnic profiling

indicators linked to race or ethnicity, religion or national origin, on the one hand, and propensity to commit certain criminal offences, on the other hand, but also because the principle of non-discrimination requires that *only in exceptional circumstances should the race or ethnicity, the religion or the nationality of a person, influence the decision about how to treat or not to treat that person.* Under the case law of the ECHR, Article 14 of the European Convention on Human Rights, ‘*no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures*’⁵⁹. Also, as concerns differential treatment on the ground of nationality, the European Court of Human Rights includes this ground among those for which “*very weighty reasons*” are required in order for differential treatment to be justified⁶⁰. In the Network’s view, the same conclusions follow from the *International Convention for the Elimination of All Forms of Racial Discrimination*.⁶¹ The argument within the opinion is as follows: the consequences of treating individuals similarly situated differently according to their supposed ‘race’ or to their ethnicity has so far-reaching consequences in creating divisiveness and resentment, in feeding into stereotypes, and in leading to over-criminalization of certain categories of persons in turn reinforcing such stereotypical associations between crime and ethnicity, that differential treatment on this ground should in principle be considered unlawful under any circumstances. The opinion cites *Baroness Hale of Richmond* from the House of Lords: “*The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping. Even if, for example, most women are less strong than most men, it must not be assumed that the individual woman who has applied for the job does not have the strength to do it. Nor, for that matter, should it be assumed that an individual man does have that strength. If strength is a qualification, all applicants should be required to demonstrate that they qualify.*”

The Network’s opinion demonstrates that European case-law is somewhat uneven in the matter: For example, in the United Kingdom, by the House of Lords in *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport*⁶²

⁵⁹ Eur. Ct. HR (2nd sect.), *Timishev v. Russia* (Appl. nos. 55762/00 and 55974/00), judgment of 13 December 2005 (final on 13 March 2006), § 58

⁶⁰ ECHR, 16 September 1996, *Gaygusuz v. Austria*, § 42

⁶¹ All the EU Member States are parties to the 1965 International Convention on the Elimination of All forms of Racial Discrimination (ICERD, 660 U.N.T.S. 195, entered into force on January 4th, 1969). In Article 1(1) this convention defines ‘racial discrimination’ as ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’. It prohibits ethnic profiling which results in such a discrimination. The Committee on the Elimination of Racial Discrimination called on Canada to ensure that application of Canada’s Anti-Terrorism Act ‘does not lead to negative consequences for ethnic and religious groups, migrants, asylum seekers and refugees, in particular as a result of racial profiling’, *Concluding Observations: Canada*, U.N. Doc. CERD C/61/CO/3, para. 338 (2002). Also, the Committee for the Elimination of Racial Discrimination adopted a General Recommendation in which it emphasizes, in particular, 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’ (General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2005), para. 20). These universal standards have been reinforced by intergovernmental exhortations. Thus, in 2000, the Programme of Action at the UN World Conference against Racism urged “States to design, implement and enforce effective measures to eliminate the phenomenon popularly known as ‘racial profiling’”.

⁶² [2004] UKHL 55, 9 December 2004,

immigration officers operating at Prague Airport were held to have discriminated on racial grounds—contrary to the Race Relations Act 1976, s 1(1)(a)—against Roma seeking to travel from that airport to the United Kingdom by treating them more sceptically than non-Roma when determining whether to grant them leave to enter the United Kingdom.

The decision was in stark contrast to the mentioned judgement passed by the Second Chamber of the Spanish Constitutional Court on 29 January 2001.⁶³ Here the Court took the view that the arrest of a woman in a train station, in order to identify her and to control the legality of her administrative situation, could not be considered discriminatory, although she was dark skinned. The woman concerned was an African-American of naturalized Spanish citizenship. The identity check by the police took place upon her leaving a train. She had no identity documents with her but assured the police that she was of Spanish nationality, and that the documents were at her home. She was travelling with her husband, who was white and was not checked.

In contrast to this position, a complaint for discrimination filed in similar circumstances did succeed before the Austrian Constitutional Court.⁶⁴ An Austrian citizen born in Ghana and her four-year-old daughter travelled by train from the Netherlands to Austria. During the train ride her luggage was controlled by law enforcement organs without any result. After arriving in Vienna she was controlled a second time without any result and had to declare her consent to an X-ray examination, which passed also without any result. The woman submitted a complaint to the Independent Administrative Tribunal in Vienna, arguing that the above-mentioned treatment has only happened by reason of their colour and birth. Their complaint has been dismissed but later reversed by the Constitutional Court.

2. THE FREEDOM OF INFORMATIONAL PRIVACY AND PROTECTION OF SENSITIVE PERSONAL DATA

How is *racial profiling, informational privacy and the protection of sensitive personal data connected*? In two ways: (i) *law enforcement agencies may include ethno-racial data in their profiling, and this raises data protections concerns*, and also (ii) *the combating of racial discrimination and racial profiling involves monitoring law enforcement activities, and their impact on minority communities*, and this also *includes the processing of ethno-racial data*. Let us consider the two scenarios separately, beginning with the latter.

In most of the EU Member States, law enforcement officers are granted broad discretionary powers in the fulfilment of certain duties, such as the performance of identity checks or ‘stop-and-search’ arrests, or the proactive surveillance of certain individuals identified as posing a threat to public order or security. *Racial profiling* can take the form of systematic classification of persons according to certain criteria, such as ‘race’ or ethnic origin, religion or national origin, and it *can even be unintentional or unconscious* as far as the individual law enforcement agents are concerned.⁶⁵ Also, the attitude underlying racial profiling is one that may be consciously or unconsciously held. That is, the police officer need not be an overt racist. His or her conduct may be based on subconscious racial stereotyping.

⁶³ Tribunal Constitucional, Sala Segunda, Sentencia 13/2001 de 29 Ene. 2001, rec. 490/1997.

⁶⁴ See See Opinion 2006/4 of the Network of Independent Experts on Fundamental Rights on ethnic profiling.

⁶⁵ This has been identified in a number of court decisions. For example, the E.U. Network of Independent Experts on Fundamental Rights refers to a Canadian case, where the court held that “As with other systemic practices, racial profiling can be conscious or unconscious, intentional or unintentional. Racial profiling by police officers may be unconscious”, *The Queen v. Campbell*, Court of Quebec Criminal Division, No 500-01-004657-042-001, judgment of 27 January 2005 by the Honourable Westmoreland-Traoré, at para. 34. Also see: *R. v. Brown*, 173 CCC (3d) 23, para. 8

As Rebekah Delsol put it, many officers are unaware of the degree to which ethnic stereotypes drive their subjective decision-making. Any single to decision to stop and search a person, or select a traveller for extra scrutiny may appear reasonable. It is when law enforcement strategies are monitored for patterns that a disproportionate focus on minorities appears. Ethnic profiling remains persistent and pervasive precisely because it reflects the habitual and subconscious use of negative stereotypes—stereotypes that are deeply-rooted in the *institutional culture of law enforcement* and in the broader general public.⁶⁶

It is important to stress that in most cases there will be no *written documentation available for profiling*, especially if it involves ethno-racial features, which would carry a strict data processing legal regime. It will, in most cases take the form of *oral instructions, or even implicit policy guidelines*, for example while carrying out stops and searches or other controls. Also, another likely source of profiling policies will be communicated in *classified secret service documents or be non-transparent parts of a data-base matrix*. In these cases, violations of data protection regulations can hardly be tracked, an operative definition for profiling should, however, refer to the actual practice and not only the official guidelines upon which services or activities are officially performed. Consequentially, the *ethno-racial profiling discourse should not stop at aiming to declare such practices illegal*, but should *reverse the burden of proof on the member states' organs to carry out thorough monitoring and a developed complaints-mechanism*. The meeting point for ethno-racial profiling and data protection is located at the monitoring procedures, where it is our recommendation to declare the need for monitoring of all law enforcement activities on which the shadow of profiling is shed, and this should include the mandatory registration of all relevant law enforcement procedures (such as stop and search), as well as the processing of sensitive data should explicitly be authorised – obviously bearing in mind the generally applicable safeguards, such as anonymisation.

To sum up, the fact that racial profiling does not necessarily take the form of systematically classifying individuals according to their 'race', ethnic origin, religion or national origin and that it can lack all codified sources implies that the fact that ethnic profiling has occurred typically will be impossible to prove except by circumstantial evidence – and this triggers an unquestionable need for monitoring law enforcement practices.

The question is: is this possible under European data protection regulation? *Does the logic of protecting privacy impede the protection from discrimination?* Data which reveal ethnic and racial origin or religion may be collected under the *data protection laws* when: (i) *laws* make their collection necessary. For example, anti-discrimination laws may include provisions of this kind, but only the Race Relations Act in the United Kingdom and the Minorities Act⁶⁷ in the Netherlands make collecting statistical data mandatory. Laws on national minorities more frequently include references which may remove the prohibition on collecting "ethnic" data. (ii) *Tax liabilities* and the organisation of worship make it necessary to record religious affiliation. (iii) The concept of "*reasons of public interest*" is applied and justifies a derogation from the prohibition on collecting such data. This will be an ad hoc derogation, producing less far-reaching effects than the legal obligation, and presupposing that the supervisory authority has recognised the reason as being "of public interest". (iv) When *explicit consent* has been given.⁶⁸

⁶⁶ Rebekah Delsol, Presentation to the LIBE Committee of the European Parliament, Brussels, 30 June 2008, <http://www.europarl.europa.eu/document/activities/cont/200806/20080625ATT32712/20080625ATT32712EN.pdf>

⁶⁷ Minderhedennota, 1979, amended to Alloctonenbeleid in 1989

⁶⁸ Patrick Simon: "Ethnic" statistics and data protection in the Council of Europe countries Study Report, Institut National d'Etudes Démographiques Strasbourg, 2007, p. 25.

The protection of sensitive data is spelled out in the European Convention on Human Rights, the Charter of Fundamental Rights of the EU; the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981; the 95/46/EC of European Parliament and of Council Directive of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and a number of other documents like the Council of Europe Committee of Ministers Recommendation No. R (87) 15 to Member States regulating the use of Personal Data in the Police Sector⁶⁹; or even the Schengen Borders Code.⁷⁰ The most important rule pertaining to the processing of personal data that reveal *racial or ethnic origin* is that it is only acceptable under very limited circumstances, such as if the data subject has given his explicit consent to the processing of those data, or processing is necessary for affirmative action, or for the protection of the vital interests of the data, or the data is made anonymous. Should the legislator (national or international law-maker) decide to include ethno-racial characteristics as a formal part within a general criminal profile, singling out ethno-racial groups, any law enforcement classification of an individual would most likely also involve an unacceptable sensitive data processing.

According to the E.U. Network of Independent Experts⁷¹, the rules on the protection of the right to respect for private life in the processing of personal data, as contained in the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data⁷² or in the Basic Principles contained in the Appendix to the Recommendation Rec(87)15 addressed by the Committee of Ministers to the Member States of the Council of Europe, regulating the use of personal data in the police sector, or as may be expressed in the future in the Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters proposed by

⁶⁹ Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies

⁷⁰ Convention ETS 108 Article 6 - Special categories of data Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions. Under Directive 95/46/EC Article 8 – The Processing of special categories of data 1. Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life. Under Directive 95 Article 8 (1) Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life. Paragraph 1 shall not apply where Article 8 (2a) the data subject has given his explicit consent to the processing of those data, except where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject's giving his consent Article 8 (2b) processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law insofar as it is authorised by national law providing for adequate safeguards 26 Article 8 (2c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent Article 8 (2d) processing is carried out in the course of its legitimate activities with appropriate guarantees by a foundation, association or any other non-profit seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects Article 8 (2e) the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims. Article 8 (3). Paragraph 1 shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject under national law or rules established by national competent bodies subject to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy. Article 8 (4). Subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions in addition to those laid down in paragraph 2 either by national law or by decision of the supervisory authority.

⁷¹ Opinion 2006/4

⁷² C.E.T.S., n° 108

the European Commission in October 2005⁷³, do not impose obstacles to such statistical processing of data collected in order to ensure an improved monitoring of the law enforcement authorities in the situations where they are allowed broad discretionary powers, which they might use arbitrarily or in discriminatory fashion.

'*Personal data*' are defined as any information relating to an identified or identifiable natural person. No processing of such 'personal data' is required where information is collected on an anonymous basis, in order to establish the existence of discriminatory practices amounting to ethnic profiling. In its Thematic Comment n°3 on the rights of minorities in the European Union, the EU Network of Independent Experts explained that once personal data are made anonymous in order to be used in statistics,⁷⁴ the information contained in such statistics should not be considered as personal data.⁷⁵ This should be taken into consideration when comparing the possible forms which monitoring, based on ethnic or religious categories, is envisaged. According to the Network⁷⁶, such a monitoring may consist in: (i) collecting information from the individuals concerned, in order to use this information for statistical purposes after these data are anonymised; (ii) processing information not obtained from the individuals concerned but relating to particular individuals, for the same statistical purpose; (iii) the use of other reliable techniques, such as those traditionally used in social science empirical research, including the use of representative samples, personal interviews conducted by independent researchers, under the principle of anonymity.

As noted above, the collection of data is relevant to ethnic profiling by police for two reasons. First, data is required to discover whether police are, in fact, engaging in profiling on the basis of race or ethnicity. Data on the ethnicity of individuals stopped by police is critical for monitoring police performance and ensuring it is non-discriminatory. According to EU law, this kind of information can be lawfully collected with the consent of the individual, and used to generate statistical information as long as it is anonymised. Second, criminal or terrorist profiles can be generated by police on the basis of personal data gathered in numerous other contexts, including immigration points and places of employment and education—and these may include an ethnic component unless expressly prohibited. Sadly, European law has consistently failed to improve on a non-binding Council of Europe Recommendation of 1987 on the collection, storing, and processing of personal data in the police sector, including “sensitive” data relating to race and ethnicity.⁷⁷

⁷³ COM (2005) 475 of 4 October 2005

⁷⁴ As R. Padiou points out “Statistics are based on data on individuals, but are not interested in individuals. Their sole purpose is to describe situations in global terms or bolster general conclusions” Padiou R. (2000) «Mobiliser les données existantes : enjeux et conditions», in *L'utilisation des sources administratives en démographie, sociologie et statistique sociale*, Dossiers et recherches No. 86, INED, p. 9-

⁷⁵ According to Directive 95, Article 2 (a) “‘personal data’ shall mean any information relating to an identified or identifiable natural person (‘data subject’); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity”.

⁷⁶ 2006/4

⁷⁷ Council of Europe data protection measures International data protection law in Europe is derived from the 1981 Council of Europe (COE) Convention on the “Protection of Individuals with regard to Automatic Processing of Personal Data,” itself the result of a COE parliamentary assembly resolution of 1968. The principles embodied in the Convention are that the collection of personal data, and access to it, must be restricted. Data should only be used for the purpose for which it was collected, and retained only as long as strictly necessary. Individuals should be able to find out what data is held on them and have recourse to mechanisms to challenge its use, accuracy, or retention. The European Court of Human Rights has so far been unable to give meaningful effect to this right as guaranteed in Article 8 of the European Convention on Human Rights. The convention singles out “special categories of data” for particular attention. Thus, “[p]ersonal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards.”

Traditionally, *Council of Europe's Convention 108 and European Directive 95/46* have offered protection against infringements of individual freedoms and privacy, but only in the case of inappropriate uses of personal data, that is data on identified or identifiable individuals. What distinguishes profiling is that it involves the processing of data that is anonymous, anonymised or coded.⁷⁸ However, the Consultative Committee on the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data has been on the opinion that specific profiling comes within the scope of Convention 108 and that specific or individual profiles constitute personal data in connection with which those concerned have the rights specified in that Convention. Therefore the three pillars of personal data processing (lawfulness, transparency and proportionality) must be applied at an early stage of any profiling operation, even if the human data being processed are not personal.⁷⁹ The simple fact of individuals' being subjected to automated profiling to assess certain aspects of their personality should be sufficient by itself to entitle them to be informed of this profiling and of its underlying logic, and to challenge it, at least in certain cases of automated processing deemed to be capable of making such assessments.⁸⁰

Another important feature of profiling relates to the *proliferation of biometrics*⁸¹ industry, which *curtails the involvement of human participation* and control in decision-making, along recent trends of *outsourcing traditional state authorities* to the private sector. It appears to be the case that industrial business interests go hand in hand with government policies to strengthen control mechanisms – often lacking proper efficacy and risk assessment and evading traditional democratic control-mechanisms. As a briefing paper⁸² commissioned by the Directorate-General Internal Policies points out, governments across the EU increasingly advocate biometric enhanced identity documents. However, the *mesmerising*

However, states can ignore these safeguards “in the interests of . . . protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences.” The police, in other words, were effectively exempt. To counteract this outcome, the Council of Europe drew up a recommendation in 1987 “regulating the use of personal data in the police sector.” This document advised that data held by the police be supervised independently, suggests limits on its collection, storage and use, and recommends restrictions on the exchange of information with other public bodies, as well as time limits, data security, and notification of the data subject. The recommendation included a stricter rule on the processing of “special categories of data,” such as race or religion. Although its binding force is still somewhat ambiguous, the right to data protection, as subsequently included in the EU Charter of Fundamental Rights of 2000, offers a broader exemption for state agencies from data protection than that found in either the COE convention or the EC Data Protection Directive. However, at a minimum, the rights of individual access to data and the rectification of errors are entrenched. Ben Hayes, A Failure to regulate: Data protection and Ethnic Profiling in the Police Sector in Europe, Justice Initiatives, Open Society Justice Initiative, June 2005, p. 32-34

⁷⁸ The statistical result and methodology detaches the information from the individual. ““For statistical purposes” refers to any operation of collection and processing of personal data necessary for statistical surveys or for the production of statistical results. Such operations exclude any use of the information obtained for decisions or measures concerning a particular individual”. “Statistical results” means information which has been obtained by processing personal data in order to characterise a collective phenomenon in a considered population. Application of Convention 108., p. 18-21 and 30.

⁷⁹ Under Principle 2.4. of the Basic Principles contained in the Appendix to the Recommendation Rec(87)15 addressed by the Committee of Ministers to the Member States of the Council of Europe, regulating the use of personal data in the police sector, the collection of data on individuals solely on the basis that they have a particular racial origin, particular religious convictions, sexual behaviour or political opinions or belong to particular movements or organisations which are not proscribed by law should be prohibited. The collection of data concerning these factors may only be carried out if absolutely necessary for the purposes of a particular inquiry.

⁸⁰ Id. p. 33-34.

⁸¹ A biometric is a measurement and biometric identifiers are supposed to uniquely identify and reliably confirm an individual's identity.

⁸² Juliet Lodge: Trends in Biometrics, Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs, Briefing Paper, 4 December 2006.

possibilities opened by inter-operability,⁸³ information and data exchange by civil and law enforcement agencies so far escape effective parliamentary scrutiny and control, and citizens are unlikely to have a choice as to whether or not they wish to supply their biometric details to government authorities or public policy agencies.⁸⁴

Biometric data to verify the authenticity of an individual's claim to be the person named on, say, a travel or any other document are not new. What is new is (a) the speed with which biometric data can be collected, stored and exchanged by inter-operable data systems and data miners; (b) their conflation with information from which culture, behaviour and/or profiles may be inferred; and (c) apparent willingness by EU policy-makers to allow biometric data transfer on a one way basis to a third state.⁸⁵ However, Juliet Lodge argues that the use of biometrics raises similar concerns to those relating to the storage of DNA data. The trend is for biometrics (iris recognition, finger prints, thumb-prints, hand-prints, voice-prints, signatures, 3D facial images, face or vein heat pattern imaging) to be used as a password or key to authenticate an individual's identity and with it her entitlement to access public and commercial services, exercise political rights (for example, though e-voting), and engage in processes connected to living in modern societies.

At the same time, as the briefing paper points out, in all EU member states, the trend is for government agencies and corporate interests using biometricised documents to *downplay the technical disadvantages* (false positive and false negative matches of all biometric tools, costs, divergent or competing standards, problems with proper installation of systems, network security, durability, quality of images and documents, dangers of inter-operability, susceptibility to capture by ambient technologies, fraud, ID theft, ambiguities regarding the ownership of legal liability for systems, etc) and advocate their widespread roll-out as a way to extend the application of information and communication technologies (ICT's) to government. Especially in relation to certain problematic policy areas: to monitor migration, combat identity theft and fraud, cut costs, produce efficiency gains for administration, and enhance convenient access to government services for citizens. Juliet Lodge claims that generally, states play relatively little attention to the issues of digi-inclusion and digi-exclusion, mandatory versus voluntary enrolment in biometricised identity documents, the ability of users to pay for the initial and subsequent cards, and safeguards against malevolent insider fraud. The ideal of exchanging personal data (including biometric data) subject to the principle of informed consent seems understood but not necessarily well-articulated in legislation or implementation. Governments and commercial interests rather than citizens seem to be the drivers behind and beneficiaries of e-government delivery. This is partly because communication over the purposes of biometric ID cards, and accountability for their deployment is hazy, weak or non-existent, costs are poorly communicated in many states, with implausible claims in some as to how they will combat crime, illegal immigration and terrorism (the culture of fear) and enable simple e-government in civil and critical infrastructure applications. The result is that *legislation lags very far behind ICT progress*.⁸⁶

Within the trend for biometric processing to become omnipresent lies a sever danger: for biometric data to be useful, data banks need to be, and technically speaking, can easily become *inter-operable*—both within member states' national administrations and across them. The needs of *Frontex, Europol, Eurodac, VIS, SIS II, police, customs, migration and judicial cooperation on law enforcement, crime and immigration matters, as well as in relation to cross-border civil law issues*, ranging from the procurement of goods and services

⁸³ Inter-operability is a term used to refer to the capacity of databases to be linked or interrogated to enable deeper searches for information on a given individual subject.

⁸⁴ Lodge, op.cit.

⁸⁵ As illustrated, for example, by the PNR arguments before and after 30 September 2006. Lodge, id.

⁸⁶ Lodge, op.cit.

to family law, driving licences and insurance all could be handled by one huge database. This would, of course generate a considerable degree of resistance, if communicated openly, however, it appears to be the case that soon a biometricised ID card (biometricised travel documents, eIDs, e-purse, and transaction cards) can easily become the only way of crossing quasi-borders in non-territorial spaces of e-governance, as well as at the virtual and drifting borders of the EU. These cards can be used for purposes other than the very limited ones of verifying a person's identity, e.g. to check that one has paid road tax, has insurance and so on. Inter-operable data bases are very useful to both private and public sectors.

Even though the voluntary subscription of citizens to use digi-IDs, verichips or smartcards seems to imply a greater degree of trust towards private authorities than to public ones, it may be misleading, since with the proliferation of security obligations burdening private entities, the line between public and private services blurs. It needs to be added that driven by business interests in the biometrics industry, such obligations to participate in state control might not even be so burdensome for private entities making profit from the deal. Juliet Lodge emphasizes that out-sourcing data collation, processing and checking on civil and commercial matters is risky and eludes effective, territorial scrutiny by existing political or regulatory authorities. Outsourcing aggravates the decline in parliaments' ability to hold governments accountable.⁸⁷

It has been shown in the previous analyses that *proportionality and impact-assessment* will be a central point in the legality of profiling: now the scrutiny is from the point of non-discrimination or data protection. As Rebekah Delsol points out, Europe's rapidly-expanding immigration and border control data bases offer a new information resource for law enforcement and counter-terrorism as well as immigration control, and it may well be tempting to seek to exploit them through the use of profiling. However, as border control systems rapidly create large volumes of data and law enforcement access to this data is permitted for counter-terrorism investigations as well as immigration control, it is incumbent on the European Union to rectify what has become an unintelligible system of standards with complex and overlapping data protection standards and complete gaps in anti-discrimination norms.⁸⁸

It should also be added that terrorist organisations in the *EU Terrorism situation and trend report 2008* (TE-SAT) are categorised by their source of motivation (even if the categories are not necessarily mutually exclusive). The types are: (i) Islamist terrorism, movements that are motivated either in whole or in part by an abusive interpretation of Islam; the use of violence is regarded by its practitioners as a divine duty or sacramental act. (ii) Ethno-nationalist and separatist terrorist groups, such as Euskadi Ta Askatasuna (ETA), Kurdistan Workers' Party (PKK/KONGRA-GEL) and Real Irish Republican Army (RIRA), which seek international recognition and political self-determination and are motivated by nationalism, ethnicity and/or religion. (iii) Left-wing terrorist groups, such as the Revolutionary People's Liberation Army (DHKP-C), or the Unofficial Anarchist Federation (Federazione Anarchica Informale, FAI), which seek to change the entire political, social and economic system of a state according to an extremist leftist model. (iv) Right-wing terrorist groups that seek to change the entire political, social and economic system on an extremist rightist model, and (v) Single Issue Terrorism, where violence is committed with the desire to change a specific policy or practice within a target society. We can see that the "ethno-

⁸⁷ Id.

⁸⁸ Rebekah Delsol, Presentation to the LIBE Committee of the European Parliament, Brussels, 30 June 2008, <http://www.europarl.europa.eu/document/activities/cont/200806/20080625ATT32712/20080625ATT32712EN.pdf>

nationalist and separatist terrorist groups” typology, by using the ethno-national classification, presupposes the processing of some sort of ethno-national data.

For example, in the opinion of the *European Data Protection Supervisor*⁸⁹ issued on the recent proposal of the Commission for a Council Framework Decision on the use of *Passenger Name Record (PNR)* data for law enforcement purposes⁹⁰, while acknowledging that the fight against terrorism is a *legitimate purpose*, the EDPS expressed serious concerns about the *necessity and proportionality* of the proposal which, in his view, are not sufficiently established in the proposal. Peter Hustinx held that necessary safeguards on the use by law enforcement of personal data include at least the following: (i) Adequacy and effectiveness: in order for specific profiling practices involving the processing of data to be considered adequate or effective the profile must be based on an objective, statistically significant link between the criteria employed in the profile (ethnicity, age, gender, nationality, etc) and the phenomenon it seeks to address (crime, illegal immigration, terrorism, insurance fraud, etc.). (ii) Proportionality: the use of the data and the scope of that use must be proportionate to the law enforcement objective to be realised through its use. (iii) Accuracy: there must be mechanisms that allow for the verification of the accuracy and reliability of personal data entered. (iv) Time limits: the inclusion of a person in a data base must be reassessed regularly, as must the criteria and underlying logic for that inclusion. If there are no valid reasons, the information must be erased. Race, ethnicity and religion do not constitute valid reasons for inclusion in the absence of other material facts. (v) Redress: in view of the possible consequences for individuals, redress must be effective and accessible.⁹¹ The EDPS was of the opinion that in order to analyse the legitimacy of the proposed measures in accordance with fundamental data protection principles, and notably Article 8 of the European Charter of Fundamental Rights and Articles 5 to 8 of the Council of Europe Convention No. 1087, it is necessary to identify clearly the purpose of the intended processing of personal data, to assess its necessity and its proportionality. It should be ensured that no other means is available, that would be less invasive, to reach the envisaged purpose. However, while Advanced Passenger Information (API) data are supposed to help identifying individuals, PNR data do not have an identification purpose, but the details of the PNR would contribute to carrying out risk assessments of the persons, obtaining intelligence and making associations between known

⁸⁹ Brussels, 20 December 2007 Peter Hustinx European Data Protection Supervisor

⁹⁰ Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes. The purpose of the proposal is to have air carriers make PNR information available to law enforcement authorities in the EU Member States and help them in the prevention and fight against terrorist offences and organised crime. The proposal provides that air carriers make available 19 PNR data elements of their passengers to the Member States. Such data must be made available only for flights to and from the EU (excluding intra-EU or domestic flights). EU carriers will be required to "push" or transmit the data to the Member States authorities. Air carriers will not be required to collect or retain any data further to those already collected for commercial purposes. The recipient of the data in the Member States will be a Passenger Information Unit (PIU) to be designated in each Member State. Such PIU will have the aim of carrying out a risk assessment of the passengers and identify people who will be subjected to further enquiries upon their arrival/departure from the Member State. PIU's will share the results of such assessments with other PIU's where necessary and retain the data for 5 years in an active database and for 8 years in a dormant database. The Framework Decision on Data Protection in criminal matters (yet to be adopted) will govern all data processing under the proposal, as well as the transfers of data to third countries. According to the proposal, no sensitive data will be used and there will be no enforcement action taken solely on the basis of the automatic processing of PNR. The information will be collected in analysis units that will make a "risk assessment" of the traveller, which could lead to the questioning or even refusal of the entry. Arrangements for transmission of PNR data for comparable purposes have been concluded by the European Union with the USA, as well as with Canada. A first agreement concluded with the USA in May 2004 was replaced by a new agreement in July 2007. A similar agreement was concluded with Canada in July 2005. In addition, negotiations are due to start between the EU and Australia for an agreement on the exchange of PNR data, and South Korea is also requiring PNR data from flights to its territory, without any plan for negotiation at European level at this stage.

⁹¹ See the Working Document on problem of profiling, notably on the basis of ethnicity and race, in counterterrorism, law enforcement, immigration, customs and border control by the Committee on Civil Liberties, Justice and Home Affairs. Rapporteur: Sarah Ludford., 30.9.2008, DT\745085EN.doc PE413.954v02-00. p. 7

and unknown people. The purpose of the measures envisaged does not only cover the catching of known persons but also the locating of persons that may fall within the criteria of the proposal. Although it cannot be assumed that passengers would be targeted according to their religion or other sensitive data, it appears nevertheless that they would be subject to investigation on the basis of a mix of in concreto and in abstracto information, including standard patterns and abstract profiles⁹². The main concern of the EDPS relates to the fact that decisions on individuals will be taken on the basis of patterns and criteria established using the data of passengers in general. Thus decisions on one individual might be taken, using as a reference (at least partially), patterns derived from the data of other individuals. It is thus in relation to an abstract context that decisions will be taken, which can greatly affect data subjects. It is extremely difficult for individuals to defend themselves against such decisions.

The ombudsman holds that while the general purpose to fight against terrorism and organised crime is in itself clear and legitimate, the core of the processing to be put in place is not sufficiently circumscribed and justified. The EDPS considers that techniques consisting of assessing the risk presented by individuals using data mining tools and behavioural patterns need to be further assessed, and their utility be clearly established in the framework of the fight against terrorism, before they are used on such a wide scale. Building upon different data bases without a global view on the concrete results and shortcomings is contrary to a rational legislative policy in which new instruments must not be adopted before existing instruments have been fully implemented and proved to be insufficient. The fight against terrorism can certainly be a legitimate ground to apply exceptions to the fundamental rights to privacy and data protection. However, to be valid, the necessity of the intrusion must be supported by clear and undeniable elements, and the proportionality of the processing must be demonstrated. This is all the more required in case of extensive intrusion in the privacy of individuals, as foreseen in the proposal.⁹³

Similar concerns were raised in the opinions of the EU's *Article 29 Data Protection Working Party* which, during the consultation period concluded that they have not seen any information presented by the Commission that would substantiate the pressing need to process PNR data for the purpose of preventing and fighting terrorism and related crimes or law enforcement. They also stated that bulk transfer of personal data, which would include unsuspected travellers to other authorities would be disproportionate, as data may only be provided to an authority if necessary for a given purpose.

In its resolution of 12 December 2007 on the fight against terrorism⁹⁴, the *European Parliament* expressed similar concerns about the far-reaching consequences of using large-scale immigration and *asylum databases* (again, which curtail human control in the decision-making process) at the EU level in the fight against terrorism and in particular about giving access to the *Eurodac*⁹⁵ database to Member States' police and law enforcement authorities, as well as Europol in the course of their duties in relation to the prevention, detection and investigation of terrorist offences and other serious criminal offences, as called for in the conclusions of the Justice and Home Affairs Council of 12 and 13 June 2007⁹⁶. The resolution⁹⁷ points out that the primary purpose of Eurodac as a first pillar database is to

⁹² Para 13-14, 19-22

⁹³ Para 114-117

⁹⁴ P6_TA(2007)0612

⁹⁵ The Eurodac system enables Member States to identify asylum-seekers and persons who have crossed an external frontier of the Community in an irregular manner. By comparing fingerprints Member States can determine whether an asylum-seeker or a foreign national found illegally present within a Member State has previously claimed asylum in another Member State.

⁹⁶ Part D.

⁹⁷ Para 16

facilitate the application of the Dublin II Regulation to establish the Member State responsible for examining an asylum application, and that any proposal to transform it into a security measure and criminal investigation tool would be unlikely to be legal under EU or international law, thus⁹⁸ it raises concerns that access by law enforcement authorities and Europol to the Eurodac database could lead to stigmatisation of, discrimination against, and possible danger to, asylum seekers. The European Parliament reiterated⁹⁹ that any form of 'profiling' in counter-terrorism measures is unacceptable; and regards it as unacceptable to pursue an EU-PNR system without a complete evaluation of the EU-US and EU-Canada PNR agreements, in particular their impact on reducing the threat and increasing security as well as their impact on privacy and civil liberties. The Resolution, while expressing concerns at Member States' knee-jerk reaction to anti-terror legislation, in which the desire to send a political message often takes priority over serious and conscientious consideration of the boundaries of the possible and the useful, including the increasingly inadequate consideration of rule of law principles, such as the proportionality principle and the presumption of innocence¹⁰⁰, expresses its desire to attentively examine these measures and reiterates its concerns on the proposal for EU-PNR system, especially concerning the necessity and proportionality of the proposed profiling scheme on which it seems to be based. The European Parliament reminded the Commission of the importance of evidence-based policy making; therefore calls on the Commission to ensure that all future counter-terrorism proposals are accompanied by a thorough impact assessment or evaluation which demonstrates the necessity and usefulness of the measures to be taken.

The concerns are echoed by the European Parliament's draft recommendation to the Council on the problem of profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control.¹⁰¹ Although the proposal excludes the processing of sensitive data per se, according to the Parliament was concerned¹⁰² that the collection of personal data of passengers travelling¹⁰³ to the EU could provide a basis for profiling, including on the basis of race or ethnicity, since it envisages 'running the PNR data of passengers against a combination of characteristics and behavioural patterns, aimed at creating a risk-assessment' and states that 'when a passenger fits within a certain risk-assessment, then he could be identified as a high-risk passenger'. As Sarah Ludford points out: "*It is a fundamental principle of the rule of law that law enforcement*

⁹⁸ Para 17

⁹⁹ Para 19

¹⁰⁰ Para 31, 27 and 29

¹⁰¹ Proposal for a Recommendation to the Council pursuant to Rule 114(1) of the Rules of Procedure by Sarah Ludford on behalf of the ALDE Group on the problem of profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control, 19 December 2007, INI/2008/2020, <http://www.europarl.europa.eu/oeil/file.jsp?id=5587632>

¹⁰² Part D.

¹⁰³ Europe is and will continue to be the world's most important tourist destination. According to Eurostat, there are in the order of 300 million EU27 external border crossings at the 1792 designated EU external border crossing points with controls (665 air borders, 871 sea borders and 246 land borders) per annum (i.e. approximately 150 million movements into the EU and 150 million out) at designated border crossing points. It is estimated that 160 million of these border crossings are made by EU citizens, 60 million by third country nationals (TCN) not requiring a visa and 80 million by TCN requiring visas. According to the data from the Member States there were 880 million EU27 external border crossings in 2005 and 878 million in 2006. Member States do not record such movements in a coherent manner, so the rates are based on estimations or samples. It is estimated that there were up to 8 million illegal immigrants within the EU in 2006. 80% of which were within the Schengen area. It is likely that over half of illegal immigrants enter the EU legally but become illegal due to overstaying their right to stay. In 2006 over 300,000 (year 2005 280 000; year 2004 397 000) persons were refused entry at EU borders. Most of these were from third countries where visas are required. New tools for an integrated European Border Management Strategy, MEMO/08/85, Brussels, 13 February 2008

actions should be based on an individual's personal conduct, not on their identity."¹⁰⁴ The rapporteur argues as follows: Article 15 (1) of Directive 95/46/EC on data protection gives people a right not to be subjected to "decisions providing legal effects...based solely on automated processing of data intended to evaluate certain personal aspects." It is suggested that profiling which simply selects people for further checks, without in itself producing adverse or legal effects for them, cannot be harmful to their interests. Thus the Commission proposal for an EU PNR scheme specifies that there must be a further step, presumably an official's assessment of the relevance of an identification based on risk assessment/profiling, before enforcement action takes place: "*No enforcement action shall be taken by the Passenger Information Units and the competent authorities of the Member States only by reason of the automated processing of PNR data or by reason of a person's race or ethnic origin, religious or philosophical belief, political opinion or sexual orientation.*" However, Baroness Ludford emphasizes that Article 8 of the draft 'third pillar' framework decision on data protection in policing and criminal justice relaxes that safeguard by providing that an adverse decision can be taken on the basis of data mining or profiling alone, as long as there is some legal protection for the person concerned. "*A decision which produces an adverse legal effect for the data subject or seriously affects him and which is based solely on automated data processing for the purposes of assessing individual aspects of the data subject shall be permitted only when the legitimate interests of the data subject are safeguarded by law. However, given that no specific standards or criteria are laid down for those measures, the value of this provision appears to be rather low. ... Data mining is based on a set of criteria, is often conducted on a large scale, and frequently includes aspects of sensitive personal data such as ethnicity, national origin, religion, of other information that is a proxy for sensitive data (for example, meal choice on flights can identify persons who request halal meals, presumed to be Muslim)... When persons are identified through a process relying on profiling, they are identified as suspicious on the basis of criteria that they have no control to change. In effect, this is akin to a reversal of the presumption of innocence, and points to the need for strong safeguards to protect personal data, particularly sensitive personal data, and restrict the manner in which it has potential for abuse in law enforcement.*"¹⁰⁵

Baroness Ludford argues that the European Parliament has raised repeated concerns related to profiling, in particular regarding race, ethnicity and religion, in the context of data protection, law enforcement cooperation, exchange of data and intelligence, aviation and transport security, immigration and border management and treatment of minorities and there is still a need to get some agreement on a definition, then guidance on the legitimacy and legality of specific instances of profiling, as a basis for the creation of safeguards and accountability mechanisms. The reason for that lies within the fact that "profiling is used in many different fields of law enforcement and administrative control, ranging from counter-terrorism and domestic law enforcement to immigration, customs and border control. The lines between these different fields have become increasingly blurred as information collected in one area is shared with others, as agencies respond to pressures to increase intelligence sharing under the principle of availability, and as broader efforts are made to promote increased cooperation and joint operations. EU databases such as the Visa Information System (VIS), the Schengen Information System (SIS I and SIS II) and Eurodac are viewed as a resource for criminal justice cooperation as reflected in proposals to grant law enforcement access to these data bases and to create operational links between VIS, SIS II and Eurodac.

¹⁰⁴ See the Working Document on problem of profiling, notably on the basis of ethnicity and race, in counterterrorism, law enforcement, immigration, customs and border control by the Committee on Civil Liberties, Justice and Home Affairs. Rapporteur: Sarah Ludford., 30.9.2008, DT745085EN.doc PE413.954v02-00. p. 2.

¹⁰⁵ Id. pp 6-7.

*The Commission proposal for a European Passenger Name Record (PNR) system provides for the collection of the personal data of passengers travelling to the EU. The proposal is for “running the PNR data of passengers against a combination of characteristics and behavioural patterns aimed at creating a risk-assessment”. Although the Commission has declined to accept the label of “profiling” for this activity, a common-sense view suggests it must fit any reasonable definition.”*¹⁰⁶ ... The rapporteur argues that as the Electronic System of Travelling Authorisation (ESTA) will “concern third country nationals not requiring a visa [and] allow national authorities to make an individual assessment of each passenger before he/she embarks on an aircraft heading to Europe.”, as a consequence, the process of certifying whether a person is a bona fide/low risk traveller or a threat to public security and order is left to Member States on the basis of undefined criteria – who, enjoying a wide range of freedom from European scrutiny, presumably will draw up risk assessment profiles as a basis for decisions. This creates a clear potential for an accountability gap, which is only worsened by the fact that even though one may well argue that law enforcement constitutes a ‘public good and service’ which should therefore come within the scope of the Race Directive, an important exception to the protections offered by it is created by Article 3(2) which allows differential treatment on ground of nationality.¹⁰⁷ “While immigration decisions have to be made on the basis of nationality, this broad exclusion of nationality discrimination leaves a significant gap in protection and can ‘mask’ forms of discrimination based on race or ethnic origin as supposedly legitimate differences based on nationality. For example, those responsible for immigration control may stop persons who “look foreign”, which in practice generally means non-white European appearance.”

3. THE RIGHT TO LIBERTY AND THE FREEDOM OF MOVEMENT

The right to liberty and the freedom of movement is also spelled out in a number of international documents, from the European Convention of Human Rights through the Charter of Fundamental Rights of the EU. If the right for law enforcement officers to stop and frisk people is defined vaguely, it involves a serious curtailment of this right. It is our recommendation therefore to regulate as precisely as possible the requirements for such law enforcement competences. It is desirable to require either (i) illegal behaviour, or (ii) properly defined suspicious behaviour; or (iii) specific information, (iv) or narrowly tailored suspect description; or (v) general, that is not ethno-racial group-specific guidelines, along (vii) a thorough registration of all stops and search procedures, where the ethno-racial classification of the defendants are registered. This would also help combating discrimination.

4. RIGHT TO PROPERTY, FREEDOM TO CONDUCT A BUSINESS, RIGHT TO FAIR TRIAL

Racial profiling may also come up in the *context of “proscribing”* – a process done on the EU and the UN level. Since proscription is usually *based on secret information*, but in any case, a process lacking transparency and a clearly defined legal framework and there is a

¹⁰⁶ See the Working Document on problem of profiling, notably on the basis of ethnicity and race, in counterterrorism, law enforcement, immigration, customs and border control by the Committee on Civil Liberties, Justice and Home Affairs. Rapporteur: Sarah Ludford., 30.9.2008, DT\745085EN.doc PE413.954v02-00. pp. 2. and 4.

¹⁰⁷ Id. pp. 4-6.

direct reference (see the TE-SAT report) to Muslim fundamentalism, the question needs to be included in the profiling-debate.

Financial sanctions that target potential terrorists and collaborators is an issue where law enforcement practices under recent anti-terrorist legislation is particularly vulnerable to ethno-racial profiling. The policy of "proscription", or "designation", of groups and individuals as "terrorist" has been deployed as a crucial legal weapon in the global war on terrorism. Despite its *serious human rights implications, judicial review is excluded from the highly politicised process of designating persons and legal entities as terrorists*. According to Statewatch, proscription has extremely serious consequences, not just for the groups and individuals that are named expressly on the lists, but their associates, supporters and contact networks. Given these implications for fundamental rights, the failure to provide adequate mechanisms for appeal and redress for groups and individuals affected by proscription is extremely alarming. Let us not forget, the process potentially involves a great number of people, as even if someone donates to a charity or sells a box of matches to someone who is listed as a terrorist, this amounts to supporting terrorism – and one cannot even exculpate herself on the basis of not being aware of the listing.

As Iain Cameron notes: “The effect[s] of a freezing order, if it is effectively implemented, are devastating for the target, as he or she cannot use any of his or her assets, or receive pay or even, legally speaking, social security.¹⁰⁸ Although proscription carries extremely serious consequences,¹⁰⁹ particularly for individuals subject to asset freezing, this policy has been embraced uncritically by the international community and member states’ domestic legal system. It also appears to be the case that the implementation of these political commitments does not always go hand in hand with the subsequent adjustment of the legal and constitutional system. Popularly supported and politically accepted as it is, legal exceptionalism does not always fit well with the traditional principles of constitutionalism.

In the case of proscription the selection criteria and process for designation is fairly straightforward. "Intelligence", much of it secret, provides the basis for including groups and individuals on the various lists. The judiciary is excluded and parliaments play only a minimal role in the EU and UN frameworks, where there is no democratic scrutiny whatsoever. None of the regimes provide for notification to the accused that designation is pending or opportunity for the accused to contest any allegations before proscription: the normal judicial process is entirely discarded.¹¹⁰ It needs to be noted that in EU member states designation to a smart list may come from three sources: on the basis the UN Security Council’s decision, on the basis of one of the EU’s own list, and some member states may enforce and execute US proscriptions – each differs in terms of legal nature, and procedures and guarantees are not harmonized.

The *UN Security Council* is a political organ, created to make political decisions that bind member states. Recent anti-terrorist action plans have, however, actually given quasi-judicial authority to the Council for imposing sanctions on persons and legal entities without the proper guarantees habitually present in all national procedures that may end in imposing

¹⁰⁸ See Statewatch Analysis, Terrorising the rule of law: the policy and practice of proscription , <http://www.statewatch.org/terrorlists/terrorlists.pdf>.

¹⁰⁹ See Iain Cameron (2003) European Anti-Terrorist Blacklisting, in Human Rights Law Review, vol. 3, no. 2. Together with the EU legislation allowing proscription, the first EU "terrorist" list was agreed by "written procedure" on the 27 December 2001. This meant that the four legal texts were simply faxed around to the foreign ministries of the 15 EU member states and adopted if none raised any objections, which two days after Christmas was surely unlikely. The various UN Security Council Resolutions have been adopted in similar fashion - at least in terms of the absolute lack of debate. Both the UN and EU lists have been amended so many times it is very difficult to keep track of the decisions being taken. See Statewatch Analysis, Terrorising the rule of law: the policy and practice of proscription , <http://www.statewatch.org/terrorlists/terrorlists.pdf>.

such sanctions. It was commonly held that the Security Council (as a political organ) is not and should not be bogged down by restraints like judicial independence, the presumption of innocence, fair trial etc., because initially, Council resolutions affected states only and the sanctions were political in nature. Needless to say, this is hardly the case today, with financial and other sanctions pertaining to persons and organisations designated as terrorists. Because UN sanctions (qua non-self executing international rules) are formally only binding states and not, say, the financial institutions that will eventually freeze the accounts, it is obviously the state who is bound to simultaneously bear responsibility for keeping its international obligations and uphold internal rule of law.¹¹¹ In other words, it may create *conflicting responsibilities* if a state receives a Security Council resolution which is based on mostly unrevealed sources of information and political deliberations (invariably lacking fair trial guarantees). The reason: the *state will be under an obligation to a) enforce these sanctions under its jurisdiction, while b) it will not be exempt from the rule of law obligation* to respect the “presumption of innocence” principle, for example.¹¹² The first question (which will remain unanswered within the bounds of this paper) is thus the following: *can an obligation under international law be contrary to international jus cogens?* There is some literature that would support an affirmative answer to this question. For example, Derek Bowett argues that “...a Council decision is not a treaty obligation. The obligation to comply may be, but the decision per se is not. ...The Council decisions are binding only in so far as they are in accordance with the Charter.”¹¹³ Michael Fraas considers the UN and, as its organ, the Security Council to be bound by general international law, in particular basic human rights guarantees and norms of jus cogens.¹¹⁴ His reasoning about jus cogens is as follows: The constituent treaty of an international organization may not contradict jus cogens rules. “From this it follows that the organs of the organization may not be empowered to violate rules of jus cogens.”¹¹⁵

But let us assume that national law actually satisfyingly accommodates these sanctions, say, with an institution that resembles pre-trial detention. Let us also assume that satisfactory forums and procedures (that include judicial guarantees) are being created for people under these sanctions to prove their innocence and provide evidence for, say, an error that caused them to appear on a list of terrorists. However unlikely, for the purposes of the example, let us imagine that even though her bank accounts are frozen, a terrorist suspect manages to hire a competent attorney who finds out that she is indeed an exemplary patriot only her name happens to closely resemble that of a terrorist’s and it had been misspelled or mistyped in one of the secret service files – a phenomenon not entirely unusual when

¹¹¹ According to Article 25 of the UN Charter, States have the obligation to implement enforcement measures adopted pursuant to Article 41, which obligation they perform in accordance with their national constitutional system.

¹¹² The presumption of innocence is a fundamental right, laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union (CFREU). Article 6 of the Treaty on European Union (TEU) provides that the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to Member States. The “presumption of innocence” is mentioned in Art. 6(2) ECHR (The right to a fair trial): “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law” and Art. 48 CFREU (Presumption of innocence and right of defence): “1. Everyone who has been charged shall be presumed innocent until proved guilty according to law. 2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.” For more, see, *The Presumption of Innocence*, Green Paper, Commission of The European Communities, Brussels, 26.4.2006, COM(2006) 174 final.

¹¹³ Derek Bowett, *The Impact of Security Council Decisions on Dispute Settlement Procedures*, 5 EJIL (1996), pp. 4-5

¹¹⁴ Michael Fraas, *Sicherheitsrat der Vereinten Nationen und Internationaler Gerichtshof: Die Rechtmässigkeitsprüfung von Beschlüssen des Sicherheitsrats der Vereinten Nationen im Rahmen des VII. Kapitels der Charta durch den Internationalen Gerichtshof*. Frankfurt am Main: Peter Lang, 1998., pp. 82-4, 246.

¹¹⁵ Bowett, op. cit, p. 77. For more, see Bardo Fassbender, *Quis judicabit? The Security Council, Its Powers and Its Legal Control*, Review Essay, EJIL Vol. 11 (2000) No. 1

transcribing Arabic names to English. The question is, even if such a simple factual error relating the UN Security Council's decision can be proved, what procedures would follow? Can such a resolution be rebutted?¹¹⁶ Or all the state can do is ask the Security Council to correct its decision?¹¹⁷ Should we opt for the second alternative, subsequent questions arise: can a national court order the state to file such a request to the Security Council? What happens if the Security Council is reluctant to change its resolution? Can a national court nevertheless order the suspension of such a sanction?¹¹⁸

According to a Statewatch Analysis: "The UN and EU lists make no provision for appeal to the courts whatsoever." Groups and individuals on the lists may make diplomatic representations to their government, or the government that they believe proposed their proscription. An individual EU member state may grant a "specific authorisation" to unfreeze funds and resources after consultation with the other Member States, the Council of the EU and the European Commission (the issue of whether to continue to include someone on the EU list is decided by the Council). In the UN framework the requested member state may then make "diplomatic" representations to the Security Council Committee with a view to informal resolution of the issue¹¹⁹ (and failing this, resolution by the Security Council itself). As far as the courts are concerned, individuals and groups could challenge the application of the EU/UN measures in the national courts on the basis that they contravene human rights or constitutional standards—though such appeals could well be denied on the grounds that international sanctions regimes are binding on member states. Groups and individuals have indirect recourse to the EU Courts and can seek annulment of the Council measures implementing the freezing regime, or damages for unlawful Council acts at the European Court of First Instance (and subsequently the full European Court of Justice). However, the proceedings in these courts would be directed at the EC/EU rules; they would not really concern the national measures implementing them."¹²⁰ A number of groups have taken case to the EU Courts and claimed sizeable damages. The composition and functioning of the CFI and ECJ as international courts, however, leaves them inadequately equipped to deal with the complex issues raised by proscription cases. In such a situation, they offer no real prospect of adequate judicial redress for groups and individuals proscribed as "terrorist" by the EU. A vivid example for this can be seen in the Court of First Instance judgements in the case of 'Ahmed Ali Yusuf and Al Barakaat International Foundation'¹²¹ and Yassin Abdullah Kadi¹²²

¹¹⁶ There is some literature that suggest this possibility. See Derek Bowett, *The Impact of Security Council Decisions on Dispute Settlement Procedures*, 5 EJIL (1994) 1-101.

¹¹⁷ For example, Jochen Herbst argues that the judicial review of the legality of SC decisions is both possible under procedural law and permitted under UN constitutional law. The General Assembly and the SC have the right to request an advisory opinion of the ICJ on the legality of a SC decision. See *Rechtskontrolle des UN-Sicherheitsrates*. Frankfurt am Main: Peter Lang, 1999.

¹¹⁸ Bill Bowring - Douwe Korff, *Terrorist Designation with Regard to European and International Law: The Case of the PMOI*, International Conference of Jurists, Paris, 10 November 2004, <http://www.cageprisoners.com/articles.php?id=7822>

¹¹⁹ In the Ahmed Ali Yusuf and Al Barakaat International Foundation case (see below), the Swedish government actually resisted and argued on behalf of its named citizens.

¹²⁰ Statewatch Analysis, *Terrorising the rule of law: the policy and practice of proscription* <http://www.statewatch.org/terrorlists/terrorlists.pdf>.

¹²¹ Applicants argued that Articles 60 EC and 301 EC, on the basis of which that regulation had been adopted, authorise the Council solely to take measures against third countries and not, as it did in this case, against nationals of a Member State residing in that Member State. Applicants also denied the allegation that sanctions were imposed on them on account of their association with the regime of the Taliban in Afghanistan. In their view, the sanctions were not imposed on them because they maintained a link with that regime but because of the Security Council's desire to combat international terrorism, regarded as a threat to international peace and security.

v Council of the European Union and Commission of the European Communities'.¹²³ Here, the court held that the European Community is competent to order the freezing of individuals' funds in connection with the fight against international terrorism. However, insofar as they are required by the Security Council of the United Nations, for the most part, these measures fall outside the scope of judicial review. The Court of First Instance held that, according to international law, the obligations of the Member States of the United Nations under the Charter of the United Nations prevail over any other obligation, including their obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms and under the EC Treaty and this paramount status extends to decisions of the Security Council, as although it is not a member of the United Nations, the Community must also be considered to be bound by the obligations flowing from the Charter of the United Nations, in the same way as are its Member States, by virtue of the Treaty establishing it.¹²⁴ The Court went on to state that any review of the internal lawfulness of the regulation would therefore involve the Court in examining, indirectly, the lawfulness of the decisions in question. Having regard to the rule of paramount status set out above, those decisions fall, in principle, outside the ambit of the Court's judicial review and the Court has no authority to call into question, even indirectly, their lawfulness in the light of Community law or of fundamental rights as recognised in the Community legal order.

In regards of the *jus cogens* issue, according to the Court of First Instance, it is nevertheless empowered to check the lawfulness of the contested regulation and, indirectly, of the Security Council resolutions implemented by that regulation in the light of the higher rules of general international law falling within the scope of *jus cogens*, understood as a peremptory norm of public international law. However, after due scrutiny, the Court found that the freezing of funds provided for by the contested regulation does not infringe the applicants' fundamental rights as protected by *jus cogens*.¹²⁵ On the other hand, the Court was on the opinion that it is not for it to review indirectly whether the Security Council's resolutions are compatible with fundamental rights as protected by the Community legal order, or to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council. The Court also pointed out that the right of access to the courts is not absolute. In

¹²² In support of his claims, the applicant has put forward in his application three grounds of annulment alleging breaches of his fundamental rights. The first alleges breach of the right to a fair hearing, the second, breach of the right to respect for property and of the principle of proportionality, and the third, breach of the right to effective judicial review.

¹²³ T-306/01 and T-315/01, 21 September 2005. Also see T-253/02 Chakif Ayadi, CFI, 12 December 2006, Organisation des Modjahedines de Peuple d'Iran, T-228/02

¹²⁴ See Press Release No 79/05.

¹²⁵ The Court held that because the contested regulation makes express provision for possible derogations, at the request of interested persons, allowing access to funds necessary to cover basic expenses. It is therefore neither the purpose nor the effect of those measures to subject the applicants to inhuman or degrading treatment, nor have the applicants been arbitrarily deprived of their right to property, in so far as that right is protected by *jus cogens*. Indeed, the freezing of funds constitutes one aspect of the United Nations' legitimate fight against international terrorism and is a precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof. Furthermore, the Court held, the resolutions of the Security Council provide for a means of reviewing, after certain periods, the overall system of sanctions and for a procedure enabling the persons concerned to present their case to the Sanctions Committee for review, through their State. As regards the rights of defence, the Court found that no rule of *jus cogens* appears to require a personal hearing of those individuals concerned by the Sanctions Committee. Since the regulation is a precautionary measure restricting the availability of property, observance of the fundamental rights of the persons concerned does not require the facts and evidence adduced against them to be communicated to them, where the Security Council was of the view that that there are grounds concerning the international community's security that militate against it. *Id.*

this instance, it is curtailed by the immunity from jurisdiction enjoyed by the Security Council.¹²⁶

Once all avenues for appeal have been explored, proscription may be challenged at the European Court of Human Rights. The ECHR, however, has so far held that all judicial remedies -- including the ECJ must be exhausted before it can consider any cases, and this leaves applicants facing severely lengthy procedures.¹²⁷ In conclusion, it is well to note that even though the EU has created a mechanism that is aimed at creating unified normativity, the EU is not (yet) a member of the UN and only national organs are regarded as addressees (and responsibility bearers) of sanction resolutions. National rules are therefore viable, indispensable and crucial elements in the process.¹²⁸

The Security Council probably registered repeated human rights concerns raised by academia and human rights NGOs, and “as part of its commitment to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions”, on 19 December 2006, adopted resolution 1730 (2006) by which it requested the Secretary-General to establish within the Secretariat (Security Council Subsidiary Organs Branch), a focal point to receive *de-listing* requests and perform the tasks described in the annex to that resolution. Petitioners seeking to submit a request for de-listing can now do so either through the focal point process outlined in resolution 1730 (2006) and its annex or through their State of residence or citizenship. As of 30 March 2007 the Secretary-General informed the President of the Security Council that the focal point for de-listing had been established and provided the contact details.¹²⁹

This way, the key to the above questions will be about *how the state inserts its international obligation (and domestic national security interest) into its constitutional system*. Very often neither the *process of implementation*, and thereby the source-of-law nature of the sanctions, nor the adjacent legislation that would integrate them into the nation’s legal system are sufficiently coordinated. It is therefore our recommendation to insert legal remedies (building on independent judicial organs) in the process of proscription, along a set of safeguards that ensure that national legislation transforms the decisions of international organs in a proper and constitutional manner. In regards of proscribing and listing terrorists (and those organisation supporting them) a greater degree of transparency, the development of a more *coherent legal framework to harmonize various list and their enforcement and a more stringent judicial review of the sanctions is required*.

¹²⁶ For more, see William Vlcek, The European Court of Justice and Acts to Combat the Financing of Terrorism by the European Community, Challenge Research Note Work Package 2 – Securitization beyond borders: Exceptionalism inside the EU and impact on policing beyond borders, November 2005.

¹²⁷ Id.

¹²⁸ See Pavoni, p. 610.

¹²⁹ See <http://www.un.org/sc/committees/dfp.shtml>. Pursuant to footnote 1 of the annex to resolution 1730 (2006) a State can decide, that as a rule, its citizens or residents should address their de-listing requests directly to the focal point. The State will do so by a declaration addressed to the Chairman of the Committee that will be published on the Committee's website. So far, according to the UNSC official website, only France has done so. As of 3 September 2008, statistics relating to the focal point process are as follows: that total number of de-listing requests received by the Focal Point (i) in regards of the consolidated list maintained by the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities the total number of de-listing requests received by the Focal Point was 9; (ii) in regards of the list of individuals and list of entities maintained by the Security Council Committee established pursuant to resolution 1518 (2003) is 1; (iii) in regards of the travel ban list and assets freeze list maintained by the Security Council Committee established pursuant to resolution 1521 (2003) concerning Liberia, 12, and 4 in regards of the consolidated list maintained by the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo.

5. RIGHT TO FAMILY AND PRIVATE LIFE

Ethno-racial profiling by law enforcement agencies may also come up in the context of right to family and private life (as set forth, for example by the European Convention on Human Rights, the Charter of Fundamental Rights of the EU) when the denial of entry or family reunification shows peculiar patterns. The statistical monitoring of all petitioners and the approved applications would serve the purpose of precluding potential discriminatory profiling.

6. RIGHT TO INTERNATIONAL PROTECTION

Similarly, ethno-racial profiling by law enforcement agencies may also come up in the context of asylum-seekers, (the right to asylum is set forth, for example, by the European Convention on Human Rights, the Charter of Fundamental Rights of the EU, along the Council Directive [2003/9/EC](#) of 27 January 2003 laying down minimum standards for the reception of asylum seekers) when certain asylum-seekers' applications, identified by Eurodac are dealt with in extradited procedures -- for example under the Dublin II Directive¹³⁰ establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national). It is our recommendation to open access to all asylum-cases, require substantial and individualized investigation in every case, along the monitoring of procedures. Also, special attention needs to be focused on the prohibition of torture as it is intertwined with the principle of non-refoulement, which is an absolute right that cannot be curtailed under any circumstances, even in the case of criminals. It might even be worth considering to establish a special protection mechanism (similar to the ECHR's Rule 39 interim measures)¹³¹ in this issue. Possible instruments for such competences include the Council of Europe Human Rights Commissioner, the FRA, or NHRS'.

PART III. IMPACTS OF ETHNIC PROFILING

After having formulated a working definition for ethno-racial profiling (Part I) and having identified the most important applicable EC law and international human rights requirements (Part II), this Part focuses on the assessment of ethno-racial profiling in law enforcement and counter-terrorist measures. The analysis is threefold: the impact of profiling on (i) the effectiveness of police and anti-terrorist law enforcement endeavours; (ii) minority communities, and (iii) police-minority relations.

¹³⁰ Council Regulation (EC) No 343/2003 of 18 February 2003. The Dublin Convention of 15 June 1990, to which all Member States are party, provides a mechanism for determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Union. In view of the difficulties the Member States anticipated in identifying aliens who had already lodged an asylum application in another Member State, in 1991 Ministers responsible for immigration agreed to establish a Community-wide system for the comparison of the fingerprints of asylum applicants.

¹³¹ Rule 39 Rules of Court: '1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it. 2. Notice of these measures shall be given to the Committee of Ministers. 3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.'

1. THE EFFICACY OF ETHNIC PROFILING

As it had been demonstrated above, the *logic of ethnic profiling, as used in current law enforcement mechanisms is problematic* in several ways. One could either approach the question from *examining deviant behaviour* (criminality, terrorism), and, *following the well-established methodology criminologists habitually apply*, formulate verified classifications. This would be one of the methodologically and professionally acceptable ways to arrive to ethnicity as a helpful and relevant category. *Another legitimate approach* would be the *sociological or anthropological examination of ethnic communities* (their behavioural patterns) and the scrutiny of deviant behaviour. Either ways, *strong material evidence* would be *required* for the connection between ethnicity and deviant behaviour: *reliable statistics, and well-argued proof* for the utility of how one can make *predictions for the future based on statistical facts that always relate to the past*. The core question will be: can we formulate a matrix based on these data, which can *exclude human control and decision-making* – something bureaucrats (be it risk assessors in investment banks, public administrators or law enforcement agents) have always longed for.

In connection with anti-terror measures, we witness a renewed debate over preventive measures based on *ethno-racial profiling*. Some commentators emphasize that *ethnic profiling is in principle unacceptable*. The result, according to these critics, is the *harassment of the innocent minority middle class*, which is subjected to a kind of “*racial tax*” that affects all aspects of people’s lives. A *further unwanted result* is the *strengthening of racial/ethnic essentialism, reductionism* to black and white/Muslim and non-Muslim/Roma and non-Roma/immigrant and non-immigrant, etc.).

Another, straightforwardly pragmatic criticism has been calling attention to the *practical ineffectiveness* of racial profiling: inherent in the *prima facie* plausible reasoning based on statistics there is a *profound (and provable) error*. From the practical point of view racial profiling could only be justified based on the assumption that the *race or ethnicity of the person being profiled is knowable* and that there is a *consistent and statistically significant relationship between race or ethnicity and propensity to commit crime*. In fact, *neither of these is consistently true*. Ethnic profiling assumes a consistent association, if not a causal relationship, between race/ethnicity and certain kinds of criminal activity. But policies premised on the notion that members of certain ethnic groups are more or less likely to sell drugs, carry firearms, or commit terrorist acts, are both under- and over-inclusive. They thus risk focusing undue law enforcement attention and resources on those who fit the profile, while overlooking others who don’t.¹³² Racial profiles are, thus, *both over-inclusive and under-inclusive* – over-inclusive in the sense that many, indeed most, of the people who fit into the category are entirely innocent, and under-inclusive in the sense that many other types of criminals or terrorists who do not fit the profile will thereby escape police attention.

James Goldston argues that it is mistaken to believe that ethnic profiling is also problematic in respect that it assumes that the race/ethnicity of the person profiled is knowable and determinate. But this is not always so.¹³³ Racial profiling also faces the

¹³² James Goldston, *Toward a Europe Without Ethnic Profiling*, Justice Initiatives, Open Society Justice Initiative, June 2005

¹³³ James Goldston, *Toward a Europe Without Ethnic Profiling*, Justice Initiatives, Open Society Justice Initiative, June 2005. For example, according to a study by the World Bank in Romania, 61 per cent of those classified as Roma by the interviewers, did not claim themselves as such (in Hungary the discrepancy in the identification rates was 24 % in Bulgaria and 38% in Hungary). The country has a population of 23 million, with 2-2,5 million Roma, according to unofficial estimates, yet only 409,111 identified themselves as such at the 1992 census. See Dena Ringold – Mitchell A. Orenstein – Erika Wilkens: *Roma in an expanding Europe. Breaking the poverty cycle.* (A World Bank Study 2003) 29.o, <http://www->

problems of predictability and evasion: the more predictable police profiles become, the easier it is for perpetrators to adapt to circumvent the profile.

In the past decade or so, considerable *research*¹³⁴ focused on the efficacy of ethnic profiling. Studies conducted in the US and elsewhere have targeted stops based on racial profiling, involving vehicle checks and body searches. The aim was to discern how effective these measures were in detecting drug possession and illegal possession of weapons. American studies on (mostly) highway patrols have shown that blacks, comprising 12.3 percent of the American population, are significantly overrepresented among those stopped and checked by the police.¹³⁵ In New Jersey, between 1994 and 1999, 53 percent of those stopped by the police were black, 24.1 percent were Hispanic and only 21 percent were white.¹³⁶ The studies have clearly demonstrated that there was no significant, tangible difference between the proportional hit rate within the white population and the non-white population. Not only did the study find that the authorities habitually stopped a disproportionate number of non-white drivers, but they have also confirmed that the hit rate does not justify the utility of ethnic profiling.¹³⁷

Evidence thus refutes the proposition that minorities are more likely to be involved in crime and highlights that racial profiling is an ineffective use of police resources, by engaging in stopping and searching practices that are likely to be unproductive. For example, despite the collection and trawling of the data of 8.3 million people, the mentioned *Rasterfahndung* operation in Germany failed to identify a single terrorist. In 1998, the U.S. Custom Service responded to allegations of racial and gender profiling and low hit rates across all ethnic groups. In 1998, 43% of searches that Customs performed were on African-Americans and Latino/as. US Customs changed its stop and search procedures removing race from the factors considered when stops were made and introduced observational techniques focusing on behaviours such as nervousness and inconsistencies in passenger explanations; intelligence improved the supervision of stop and search decisions. By 2000, the racial disparities in Customs searches had nearly disappeared. Customs conducted 75% fewer searches and their hit rate improved from under 5% to over 13%, the hit rate for all ethnic groups had become almost even. Using intelligence-based, race-neutral criteria allowed Customs to improve its effectiveness while stopping fewer innocent people, the vast majority of whom were people of

wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/01/07/000094946_02122404075867/Rendered/INDEX/multi0page.txt. When a person interviewed identifies herself as Roma, it will always be in accordance with the interviewer's classification.. Patricia Ahmed-Cynthia Feliciano-Rebecca Jean Emigh, Ethnic Classification in Eastern Europe, p.10., <http://www.sscnet.ucla.edu/soc/groups/ccsa/ahmed.PDF>

¹³⁴ William J. Stuntz, Local Policing After the Terror, Yale Law Review, June 2002., Samuel R Gross – Debra Livingston: Racial Profiling Under Attack, Columbia Law Review, June 2002, Mariano-Florentino Cuéllar: Choosing Anti-Terror Targets by National Origin and Race, Harvard Latino Law Review, Spring 2003, David A Harris, Using Race as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description Yes; Prediction, No, Mississippi Law Journal Special Edition 2003, Richard Banks, Beyond racial Profiling: Race, Policing, and the Drug War, Stanford Law Review, December, 2003, Richard Banks, Racial profiling and antiterrorism efforts, Cornell Law Review, July 2004, David A Harris, Racial profiling revisited: „Just common sense” in the fight against terror?, Criminal Justice, Summer 2002, Sharon Davies: Reflections on the Criminal Justice System after September 11, 2001, Ohio State Journal of Criminal Law, Fall, 2003, Deborah Ramirez-Jennifer Hoopes-Tara Lai Quinlan, Defining Racial Profiling in a Post-September 11 World, American Criminal Law Review, Summer, 2003, Liam Braber, Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security, Villanova Law Review, 2002.

¹³⁵ <http://quickfacts.census.gov/qfd/states/00000.html>

¹³⁶ See Michael Buerger – Amy Farrell, The evidence of racial profiling: interpreting documented and unofficial sources, Police Quarterly, Vol. 5. No 3, September, 2002, p. 290, David A. Harris, The Stories, the Statistics, and the Law: Why „Driving While Black” Matters, Minnesota Law Review, December 1999, p. 267.

¹³⁷ Rebekah Delsol, Presentation to the LIBE Committee of the European Parliament, Brussels, 30 June 2008, <http://www.europarl.europa.eu/document/activities/cont/200806/20080625ATT32712/20080625ATT32712EN.pdf>

colour. Other attempts to address profiling have included improving internal supervision, training and the development of early warning systems to identify officers who are potentially racially profiling. We might sum up the results thus: the retrospectively judged effectiveness (which was always assumed, rather than checked and confirmed) turns out to be illusory and does not provide an appropriate policing, prevention and security policy.

Racial profiling relies on the assumption that ethnicity and a high rate of criminality are connected, so the hit rate must be higher among, certain ethno-racially identified groups. For a long time, no-one had asked for a proof of this seemingly sensible connection; after all, a sufficient number of criminals were found among the disproportionately high number of minority members stopped. But researchers argue that this does not yield a cost effective method because the number of false negatives and false positives is bound to be much too high.¹³⁸ In other words, the measures have a disproportionate negative impact on the black (Roma, Arab) population that is law-abiding, while also reducing the possibility of finding perpetrators that belong to the majority population.¹³⁹

Another argument against racial profiling mentions the *risks inherent in alienating crucial minority communities* in the context of law enforcement (policing and prevention). Ethnic profiling raises further, severe misgivings apart from the problem of false positives and negatives. It is already familiar in the model of *community policing* that there is danger in alienating crucial populations. This model maintains that local policing is most effectively done with active participation from the community. Law enforcement thus should not be an antagonistic, unjust, oppressive power, but a protector of peaceful, law-abiding people, with the criminals pitted as the enemy. With respect to terrorism, we should also not overlook the importance of community cooperation. It is no coincidence that the Bush government identified truck drivers, cab drivers and parking meter attendants as high-priority potential informants (helpful in identifying bombers or suicide bombers), and, above all, the Muslim community, which can detect suspicious behaviour.¹⁴⁰ Indeed, most of the (very few) American terrorists identified up until recently were caught based on community reports like those in Lackawana, New York, where a report from the local Muslim community tipped off the authorities, leading to the arrest.¹⁴¹

It is important to highlight that *criticism towards racial profiling does not only come from the human rights-advocate point of view*. As the explanatory memorandum to ECRI's

¹³⁸ See for example Mariano-Florentino Cuéllar: Choosing Anti-Terror Targets by National Origin and Race, Harvard Latino Law Review, Spring 2003., Leonard Baynes, Racial Profiling, September 11th and the Media. A Critical Race Theory Analysis, Virginia Sports and Entertainment Law Journal, Winter 2002, pp. 12-13, and Deborah Ramirez-Jennifer Hoopes-Tara Lai Quinlan, Defining Racial Profiling in a Post-September 11 World, American Criminal Law Review, Summer, 2003, p. 1213.

¹³⁹ Consider the fact that the name of Yigal Amir, Yizchak Rabin's assassin would not have cropped up based on any kind of assassin profile; nor would the person who first blew up a commercial aircraft— she was a woman who wanted her husband dead in 1949. Gregory Nojeim, Aviation Security Profiling and Passengers' Civil Liberties, Air and Space Lawyer, Summer, 1998, p. 5. We need only mention a couple of incidents that happened on American soil: Richard Reid (the "shoe bomber"), a Brit from the West Indies; Jose Padilla (the "dirty bomb" terrorist of Chicago's O'Hare Airport), a Hispanic man who converted to Islam while in jail; Zaccarias Moussaoui from Morocco; not to mention white Americans like John Walker Lindh (the American Talib), Timothy McVeigh, and Charles Bishop. See Harris 2004, p. 940., see also Leonard Baynes, Racial Profiling, September 11th and the Media. A Critical Race Theory Analysis, Virginia Sports and Entertainment Law Journal, Winter 2002, Thomas W. Joo, Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11, Columbia Human Rights Law Review, Fall, 2002.

¹⁴⁰ See for example Steven Brandl, Back to the future: The implications of September 11, 2001 on law enforcement practice and policy, or Ohio State Journal of Criminal Law, Fall, 2003, Mark Osler, Capone and Bin Laden: The failure of government at the cusp of war and crime, Baylor Law Review, Spring 2003.

¹⁴¹ David A. Harris: New Risks; New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001, Utah Law Review, 2004, p. 933.

General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing points out,¹⁴² “the aim of this Recommendation is therefore by no means to highlight bad policing and stigmatise the police, but to help them to promote security and human rights for all through adequate policing. ... ECRI is aware that the police often works in a difficult context and that the everyday reality of combating crime, including terrorism, pose real challenges that need to be met. However, ECRI is convinced that racism and racial discrimination, including racial profiling, cannot constitute a possible response to these challenges. Firstly, because they violate human rights. Secondly, because they reinforce prejudice and stereotypes about certain minority groups and legitimise racism and racial discrimination against them among the general population. Thirdly, because racial profiling is not effective and is conducive to less, not more human security. ECRI believes that it is trust in the police by all segments of society that enhances overall security. It is not possible for the police to work effectively, including against specific security challenges, without the co-operation of all components of society, majority and minority.”

This is reiterated in the explanatory memorandum to the Recommendation Rec(2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics.¹⁴³ “police services are greatly enhanced if police enjoy the consent and close co-operation of the public. The public is dependent upon the responsible delivery of police services for the delivery of which the police are invested with considerable authority, including discretion, which constitutes a virtual monopoly of legitimate coercion. For this reason the public has a need for assurance. The High Commissioner on National Minorities Recommendations on Policing in Multi-Ethnic Societies¹⁴⁴ states that “the central message of the Recommendations is that *good policing* in multi-ethnic societies is dependent on the establishment of a relationship of trust and confidence, built on regular communication and practical co-operation, between the police and the minorities. ... As has already been noted, the police in a democracy are usually the most visible of the public authorities, as well as being those with the most immediate powers over the everyday lives of citizens.”

It has to be added that policing in Europe has become increasingly contested in the recent decades and has been subject to unprecedented levels of public scrutiny. Stop and search powers have played a central role in this process and, though often described as an essential part of modern policing, have continued to provide a flashpoint in police–community relations.¹⁴⁵ The police are, in many ways, more accountable today than they have ever been and are certainly under greater scrutiny. Media and public debate has become more informed and more critical; the gaze of external bodies has become ever more intense; and a variety of performance indicators have been introduced in order to assess what the police do and how they do it. “Having lost the automatic trust they once enjoyed, the police cannot retrieve it wholesale: public confidence is tentative and brittle and has to be renegotiated case by case.” Part of these efforts lies within the fact that there is a struggle to restore the legitimacy of the police without new “legitimizing myths” created.¹⁴⁶

As Mary O’Rawe concludes her analysis of policing in Northern Ireland: “perhaps the fundamental lesson to be learned from decades of de facto ethnic profiling by police in Northern Ireland is its failure to check terrorism. To the contrary, discriminatory police action fuelled terrorist recruitment and radicalized the affected population. Levels of violence rose following periods of intense repression. Certain members of profiled communities came to tolerate actions by paramilitaries that they might otherwise have deplored. “The more a

¹⁴² Para 23 and 25.

¹⁴³ Para I.1.

¹⁴⁴ Section V.

¹⁴⁵ See Rebekah Delsol-Michael Shiner: *Regulating Stop and Search: A Challenge for Police and Community Relations in England and Wales*, *Critical Criminology* (2006)

¹⁴⁶ *Id.*

community feels voiceless, unable to address the injustice in their lives, the more tolerant of violence they become particularly when it is aimed at the perceived source of injustice.”¹⁴⁷

In response to research findings and political criticism, in June 1999, US President Bill Clinton committed his administration to “stop the morally indefensible, deeply corrosive practice of racial profiling.” As he explained: “Racial profiling is, in fact, the opposite of good police work, where actions are based on hard facts, not stereotypes. It is wrong; it is destructive; and it must stop.” Twenty months later, in a speech to a joint session of Congress, President George W. Bush similarly pledged “to end racial profiling.” Echoing Clinton’s words, he said simply, “It’s wrong and we will end it in America.”¹⁴⁸

2. TERRORISM, SECURITY IN THE NEW WORLD AND PROFILING

The irony of the situation is that it was right around the time of the *World Trade Center attacks* that racial profiling suffered decisive rejection within professional as well as political circles. In the fall of 1999, 81 percent of those asked opposed stops and vehicle control based on ethnic profiling. By contrast, in a poll conducted a few weeks after September 11, 2001, 58 percent approved of the idea that Arabs (including American citizens) be subject to stricter security checks before a flight.¹⁴⁹ Even people of colour--historically the subjects of racial profiling practices by the police--indicated that they would support racial profiling of individuals of Middle Eastern descent. A 2004 poll found that while only thirty-one percent of Americans believed racial profiling was justified when stopping motorists, forty-five percent continued to feel the practice was justified at airport security checkpoints. Apparently tracking popular sentiment, the Department of Justice (DOJ) has stated that it ostensibly bans racial profiling in federal law enforcement, yet accepts a greater role for the use of race in national security investigations. In a policy guidance issued in June 2003, the DOJ condemned the use of race in routine domestic law enforcement as a profile or "stereotype." It even asserted that its racial profiling guidance was more stringent than required by law.¹⁵⁰

What is behind the changes in the public and professional sentiment towards racial profiling?¹⁵¹ With increases in the dangers and risks involved, we are increasingly willing to give up on some of our rights, especially if there is a life or death situation at hand. Faced with the possibility of an asymmetric crime in which the death of a single terrorist yields the death of thousands, people’s sense of justice is not necessarily offended by an effective procedure that is based on discrimination and prejudice.

As a general note, it should be added that just about everywhere in the world, the war against terrorism has had the effect of widening the control functions of the national security and immigration services, as well as of other law enforcement authorities. The expanded

¹⁴⁷ Mary O’Rawe *Ethnic Profiling, Policing, and Suspect Communities: Lessons from Northern Ireland*, Justice Initiatives, Open Society Justice Initiative, June 2005 p. 95.

¹⁴⁸ Christopher Stone, *Preparing a Fresh Assault on Ethnic Profiling*, Justice Initiatives, Open Society Justice Initiative, June 2005, p. 1.

¹⁴⁹ Samuel R Gross – Debra Livingston: *Racial Profiling Under Attack*, *Columbia Law Review*, June 2002, p. 1413.

¹⁵⁰ Priyamvada Sinha: *Police Use of Race in Suspect Descriptions: Constitutional Considerations*, 31 *New York University Review of Law and Social Change* (2006), pp. 138-139

¹⁵¹ In the U.S., in 2002, 30 percent of those asked supported that foreigners from an unfriendly state who were legally residing in the U.S. could be interned. Moreover, 53 percent approved that the borders to Arab countries be closed. Stephen Ellmann, *Racial Profiling and Terrorism*, *New York Law School Journal of Human Rights*, 2003, No. 19. p. 345.

measures and procedures thus introduced were often ones that legislators and law enforcement officials otherwise only had dreamed of attaining, but this time around, they could take advantage of changes in the public sentiment due to society's shock over the tragic events and fear spreading in their wake. For example, there are certain regulations with respect to banking (and clients' data) that the authorities have been longing for, to aid them in their fight against drugs and organized crime, but beforehand they were unable to attain them due to constitutional misgivings. Under the auspices of anti-terror action, all of a sudden, the same regulations become acceptable. Likewise, recent decades saw the prospects of police patrolling based on discriminatory racial profiling fail miserably within the Anglo-American world. All the same, the Muslim population became a natural target of the war against terrorism. It looks as though the horrific image of weapons of mass destruction and recurring terrorist attacks has overwritten the previously held principle that it is better to have nine criminals go free than to have a single innocent person punished.

The *uniqueness of this New World is twofold*: First, *new standards* have been set up (required and accepted) for government activism in the sphere of *curtailing freedom as an exchange for security*. People (the political class, the electorate) appear to be willing to reformulate the traditional balance between liberty and security: a little bit more documents and ID-checks, longer lines and more flexible search-warrants seem an acceptable tax levied in return for more stringent demands for government-provided security. It seems to be the case that there is a broad consensus on the fact that traditional policing principles or, for that matter, the law of the Geneva Conventions (regulating the interrogation of prisoners of war, for example) have become unsuited for handling the peculiar warfare put on by suicide bombers and terrorist organizations. This may be alarming for many, but one can easily say that if this New Security Deal is passed within the habitual pathways of constitutional participatory democracy, there probably is not too much room for complaints against a unanimously empowered protective state. After all, the state is theoretically reconstructed as the outcome of a notional social contract in which individuals agree to trade a quotient of their liberty in exchange for the state's guardianship of security¹⁵² in the broad sense.

The other apparent specialty of this new era is that the *concept of security*, which is thus *positioned centrally in the political, legal and social discourse does not seem to receive the degree of scrutiny its weight and relevance would require*. In other words, not only is "security" a *buzz-word for budgetary and policy demands* that can easily overrule long-standing constitutional and human rights limits for government power, but while willingly giving in to these demands, we do not even seem to investigate the actual effectiveness of many of these measures, for example, whether they actually provide us security (in exchange for the liberty value offered).

The *process of securitization* is intertwined with a number of institutional, political and *bureaucratic interests*, and the entire *avalanche is based on perception rather than on objective features*. The irony of the case is that no efforts are required from governments to try to assess how certain institutions or law enforcement measures will affect the actual risk of criminal or terrorist involvement, or even risk-perception. Thus, the state is under no pressure or obligation to prove the correlation between the increase in (the perception of) security—which is in most cases only assumed, presumed and forecasted. Presumably, a lack of a proper methodology to test such dynamics lies behind the fact that the public seems to accept

¹⁵² According to Ian Loader, the politics of resources or the politics of allocation is concerned with trying to ensure that all citizens are provided with a 'fair' share of available policing goods; something that requires attention both to the unwarranted 'over' (or overly invasive) policing of particular individuals or social groups, and to the inability of (disadvantaged) citizens and communities to acquire a proportionate level of such goods. See Ian Loader, Policing, Securitization and Democratization in Europe, Monday 18 April 2005, http://www.libertysecurity.org/article209.html?var_recherche=policing%2C%20securitization

“risk prevention” as a proper price to be paid for extended law enforcement authorizations, and social risks are not weighted against the potential benefits. “Prevention of terrorist attacks” appears to be a blank check, where we are waiving our rights to actually control the effectiveness of the preventive measures. If no terrorist attack happens, the government may argue that is exactly due to these preventive commitments that we could have escaped the threatening disasters. If such incidents do take place in our approximate or remote distance, it is even more a reason to strengthen government efforts and establish further law enforcement measures.

According to Peter Lock “Though once being *upgraded to ‘war’*, *anti-terrorism* becomes an open-ended activity because it is intrinsically impossible to define criteria which would unequivocally permit to declare victory and put an end to this war. The institutions charged with carrying out the ‘war against terrorism’ emerge as powerful bureaucracies with their own corporate agendas. They are often capable of eclipsing from parliamentary oversight. It plays to their advantage in their drive to achieve dominant positions in the state apparatus that many of their activities are shielded from scrutiny for asserted operational reasons. Their claims of effectiveness cannot be measured as the full dimension of their task is by definition unknown as long as the unbounded concept of terrorism rules political discourses. Their persistent exigency that they must be entitled to carry out covert operations at their own discretion is inherently difficult to monitor.¹⁵³ Commentators point out that fear also plays a noticeable role in generating identity and feeling of belonging, and collective insecurity can be understood as the purest form of community belonging. The «dangerisation process» facilitates an increasing culture of defence. The security discourse serves as an effective means to stimulate community belonging, and is an effective vehicle of post-industrial political power.¹⁵⁴

As an additional point, it is well to note that *measurement of the efficacy* of ethno-racial profiling is *further complicated* by the fact that in societies, *where ethnic prejudices are widespread*, there indeed will be a *support for discriminatory law enforcement practices*. If one ethnic group is associated by a higher degree of criminality among the majority of tax payers, police may in fact have a bone fide attachment to racial profiling, when wanting to “serve and protect” the majority—whose feeling of security, be based on biases and stereotypes as it is, will thus be satisfied¹⁵⁵ It is exactly for this reason, why detailed legal regulations,¹⁵⁶ monitoring and transparent data analysis are an important requirement.

The irony of the case is that inspired by the academic discipline of *law and economics*, in the past years, a considerable body of literature has focused on estimating the *social costs*

¹⁵³ Peter Lock, Anti-terrorism and Effects on Freedom of Movement- Assessing the Concept of Progress in the Fight against Terrorism, Wednesday 20 July 2005, http://www.libertysecurity.org/article318.html?var_recherche=lock%20peter

¹⁵⁴ See Michalis Lianos, Hegemonic Security Discourse: Late Modernity’s Grand Narrative, Tuesday 6 September 2005, http://www.libertysecurity.org/article386.html?var_recherche=michalis

¹⁵⁵ For example, in Hungary, research showed that even though the majority of the respondents of a survey was fully aware of the fact that stop and search practices are arbitrary, they are in favor of and would even step up the control of “suspicious” individuals and groups (including the Roma). According to a survey in 2006, almost two thirds (62 per cent) of the Hungarian adult population agreed fully or to some degree with the claim: “the tendency to commit crime is in the nature of the Romany” A 1997 survey by the Ministry of Interior, showed that 54 per cent of police perceived criminality as a central element of Roma identity See Andras L. Pap, Police ethnic profiling in Hungary – Lessons from an international research, *Regio, A review of Studies on Minorities, Politics, Society*, 2007, Vol. 10. pp. 117-140

¹⁵⁶ In Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn (Case C-54/07), the European Court of Justice held that the fact that there is widespread prejudice in society cannot serve as a basis for discrimination. The court dismissed the defence of the employer, who claimed that customers disfavour companies which employ immigrants as garage-door installers, thus they only interview applicants from the majority to these positions.

of crime and crime prevention – only these findings have not seem to have made the desirable impact on public policy and discourse. For example, Paul Dolan and Tessa Peasgood developed a methodology to provide estimates of the intangible costs arising from the anticipation of possible victimization; that is, estimates of the costs of fear of crime.¹⁵⁷ These costs are categorised according to whether they result in non-health-related losses or health-related losses. When people feel that they may be about to become a victim of crime, they will experience anxiety and stress. The frequency with which people are in this state and the intensity of the anxiety is one measure of the health-related loss from anticipated crime. Non-health losses are associated with changes in behaviour (where for example people use their own cars or take taxis rather than walk or use public transport because of their fear of crime)¹⁵⁸ and/or changes in how society is viewed.

For example, a *survey* of public attitudes to quality of life in the United Kingdom in 2001 found that crime was mentioned by 24 percent of respondents as an important factor affecting quality of life, which made crime the third largest factor after money and health.¹⁵⁹ They claim that the direct costs of security measures, insurance administration expenditure and costs incurred from crime-averting behaviour can be interpreted as revealing people's preferences to reduce the risks of victimization and the worry about victimization. Also, a further tangible cost attributable to anticipating crime is any loss in productivity caused by the time and energy spent on actions and emotions linked to anticipating possible victimization. This may include leaving work early to avoid walking home alone, or time spent dealing with a burglar alarm that has been accidentally set off.¹⁶⁰ In addition to these, other behavioural changes also involve additional time costs. Based on survey observations in the United States, on average, an adult spends two minutes locking and unlocking doors each day and just over two minutes a day looking for keys, which is valued at \$437 per year.¹⁶¹ It means that U.S. citizens are estimated to spend nearly \$90 billion worth of time each year simply locking their doors and searching for their keys.¹⁶²

It needs to be added that according to estimates, citizens of the United States spend more on private precautions—“estimates range from \$160 billion to \$300 billion per year—than on the entire public law enforcement budget. That is, citizens spend more on locks, neighbourhood watches, and the like than U.S. governments (state and federal) spend on police, judges, prosecutors, prisons, and prison guards.”¹⁶³

¹⁵⁷ Paul Dolan-Tessa Peasgood, Estimating the Economic and Social Costs of the Fear of Crime, *British Journal of Criminology*, January, 2007

¹⁵⁸ It needs to be added that more expensive forms of transport clearly bring other benefits, such as quicker and more comfortable journeys, and these benefits would need to be controlled for. *Id.* p. 123.

¹⁵⁹ Dolan-Peasgood, p. 123.

¹⁶⁰ Dolan-Peasgood, p.124.

¹⁶¹ A study found an average willingness to pay to avoid locking or unlocking assets of \$804 (from a sample of 140 respondents). The extra time taken walking home to avoid potentially dangerous shortcuts could, in principle, be valued in a similar way. Dolan-Peasgood, p. 124.

¹⁶² David A. Anderson, [The Aggregate Burden of Crime, 42 J.L. & Econ. 611, 623-24 \(1999\)](#).

¹⁶³ Robert A. Mikos, “Eggshell” Victims, Private Precautions, and the Societal benefits of shifting crime, *Michigan Law Review*, November, 2006, 308. The author also draws attention to the fact that literature supports the claim that many of the resources spent in the private war on crime are being wasted because many private precautions only shift crime onto other, less guarded citizens, and this redistribution of crime has no net social benefit, as precautions that only shift crime constitute rent-seeking behavior: individuals expend resources to transfer losses, without reducing the size of those losses. A typical example would be vehicle anti-theft devices which will urge thieves to target other cars but not deter them from stealing. A similar discussion centers on the question of gated communities, which are also found only to divert crime to other communities. (As of 2003, there were nearly seven million households located in gated communities in the US, which adds up to seven percent of all households.) It is for this reason that some local governments have simply refused to allow real estate developers to control access to new or existing communities. See Mikos, pp. 309, 315, 319

Bearing these in mind, it is worth noting that with all efforts and resources poured into the war against terrorism, and under its auspices, the development of an ever-so stringent border control mechanism, according to the EU Terrorism situation and trend report 2008, the vast majority of all arrested were EU citizens. Fifty-four percent of all court cases in 2007 were related to separatist terrorism, followed by thirty-eight percent in relation to Islamist terrorism. Court proceedings in relation to Islamist terrorism had an acquittal rate of 31 percent compared to 20 percent for left-wing and separatist terrorism. In 2007, the EU saw only two failed and two attempted attacks related to Islamist terrorism; while 201 suspects were arrested. For 2007 the member states reported one right-wing terrorist attack and 48 arrested related to right-wing terrorism.

This chapter has tried demonstrate that despite its centrality in the legality of profiling, due to the *elusive nature of security*, as understood in current socio-political debates, the *efficacy of many law enforcement measures, such as profiling are rarely measured*.

3. NUMBERS, EXAMPLES AND STUDIES – THE IMPACT OF PROFILING ON MINORITY COMMUNITIES

The impact-assessment of racial profiling would be incomplete without briefly discussing its impact on the minority community and policing in general. It is important to cite here some of the *data that may reveal the degree of how minorities are burdened by the criminal justice system*, for which *one of the reasons* may very well be *over-policing and profiling*. For example, Rebekah Delsol and Michael Shiner note that in the *United Kingdom* “for young black men in particular, the humiliating experience of being repeatedly stopped and searched is a fact of life, in some parts of London at least. It is hardly surprising that those on the receiving end of this treatment should develop hostile attitudes towards the police. The right to walk the streets is a fundamental one, and one that is quite rightly jealously guarded. Accompanying the perception that some black and minority ethnic communities were subject to disproportionate policing, there was increasing evidence of police failure to respond effectively to racially motivated attacks.” Figures for 2003/2004 showed that in the UK the rate of stop and search for black people was nearly six and-a-half times that for whites, while for Asians, the ratio was nearly twice that for whites.¹⁶⁴ Individual studies have identified racial profiling as prolific in other parts of Europe.

A study conducted on the *Moscow Metro* found that non-Slavs are on average 21.8 times more likely to be stopped by the police than Slavs although they make up only 4.6% of the riders in the Metro system. A 2006 study in *Bulgaria, Hungary and Spain* found that Roma and immigrants in Spain are more likely to be stopped on the street for the purpose of identity and immigration checks and once stopped are more likely to be treated disrespectfully by police officers. The report published by the Justice Initiative Program of the Open Society Institute (OSI)¹⁶⁵ found that in both Bulgaria and Hungary, Roma are about three times more likely than non-Roma to be stopped by police and are more likely to report unpleasant experiences. As mentioned above, in *Germany*, racial profiling has been used in the context of the post 9/11 terrorism threats. Between 2001 – 2003, German police undertook a massive

¹⁶⁴ Rebekah Delsol-Michael Shiner: *Regulating Stop and Search: A Challenge for Police and Community Relations in England and Wales*, *Critical Criminology* (2006) Also, Disproportionality is greater under powers that do not require reasonable suspicion, such as those for terrorism and suspicion of violent crime, indicating that where levels of police discretion are highest, generalisations and negative stereotypes play an even greater role.

¹⁶⁵ Joel Miller- Anikó Bernát- Blanka Dencső-Philip Gounev- András L. Pap-Bengona Pernas- Bori Simonovits-Dan Wagman, “And I can stop and search whoever I want’: Police stops of ethnic minorities in Bulgaria, Hungary and Spain, *Open Society Justice Initiative*, New York, 2007

data-mining or *Rasterfahndung* operation to identify potential terrorist sleeper cells. As mentioned above, the police collected the personal data of approximately 8.3 million people and “trawled” the data using an ethnic profile that included the Muslim religion and nationality or country of birth from a list of 26 states with predominantly Muslim populations. The ‘hits’ generated by the database as potential terrorists were then singled out for further investigation.

Stephen Humphreys noted that the consistent overrepresentation of minorities in *United States* custodial and correctional facilities is not contested. According to official Justice Department statistics, more than 60 percent of federal prisoners in 2002 were from minority groups, although they make up only 25 percent of the population. This figure, the department noted, was unchanged from 1996. Blacks alone have consistently made up 44-45 percent of the prison population since 1995, despite comprising only 12 percent of the total population. By 2002, there were 134,000 more blacks than whites in the country’s prisons, despite there being six times as many whites as blacks in the country as a whole. At the same time, the prison population has risen relentlessly. Between 1995 and 2002 the total number in custody increased by 30 percent (from 1,585,586 to 2,085,620). Altogether, blacks were seven times as likely as whites to be in prison, comprising 56 percent of all convicted drug offenders. According to the U.S. Department of Justice, “Overall, the increasing number of drug offenses [to 2001] accounted for 27 percent of the total growth among black inmates, 7 percent of the total growth among Hispanic inmates, and 15 percent of the growth among white inmates.” Human Rights Watch describes the war on drugs as “devastating to black Americans,” partly because it provides the background for ethnic profiling. In Spain, according to one study, about 25 percent of women in prison are Roma (while constituting only 1.4 percent of the Spanish population). In Italy, foreigners make up some 30 percent of prisoners.¹⁶⁶ In the USA, the targeting of minorities for traffic stops became so ubiquitous that it earned its own nick-name: “driving while black or brown” or “DWB”— a twist on the crime of driving while intoxicated or DWI. After the attacks of September 11th 2001, the ‘war on terror’ extended the practice of racial profiling to include Muslims and those perceived to be of Arab or Middle Eastern descent. Racial or religious profiling has been identified as occurring through car stops, aggressive enforcement of immigration laws and alien registration, intrusive security screening in airports and removal from planes. Since then, “flying while Arab” has also entered the lexicon of profiling.

Justices of the US Supreme Court have also acknowledged the negative impact of unregulated police discretion on communities of colour. In his dissent in the mentioned *United States v. Martinez-Fuerte*-case,¹⁶⁷ Justice Brennan predicted that the majority's decision, which permitted the use of Mexican ancestry as a primary factor in checkpoint stops to investigate undocumented immigration, would frustrate the Mexican American community, and warned “[t]hat deep resentment will be stirred by a sense of unfair discrimination is not difficult to foresee.” Later, in *Florida v. Bostick*,¹⁶⁸ Justice Marshall's dissent invoked the concern that the police used race as a factor in deciding which individuals to target in conducting ostensibly “random” bus sweeps. Justices in *Illinois v. Wardlow*¹⁶⁹ and *Atwater v. City of Lago Vista*¹⁷⁰ also discussed the impact of increased police powers on people of

¹⁶⁶ Stephen Humphreys, *The Case for Monitoring Ethnic Profiling in Europe*, Justice Initiatives, Open Society Justice Initiative, June 2005, pp. 45, 46 and 48

¹⁶⁷ [428 U.S. 543 \(1976\)](#)

¹⁶⁸ [501 U.S. 429 \(1991\)](#)

¹⁶⁹ [528 U.S. 119 \(2000\)](#)

¹⁷⁰ [532 U.S. 318 \(2001\)](#)

colour, who might have legitimate reasons to fear and flee from the police, or who might experience police harassment as a result of enforcement of a minor traffic law.¹⁷¹

To summarize the racial profiling discourse, we can say that there is *no evidence that profiling works, considerable evidence that it does not, and some disturbing indications that it may actually hamper law enforcement*. When police or immigration officials act on prejudice, they blind themselves to real suspicious behaviours. Profiles are both *under- and over-inclusive*; that is, they risk being too narrow and missing real suspects or too broad, in which case they are expensive to apply in terms of manpower and target large numbers of completely innocent people. More broadly, profiling feeds and aggravates *existing mistrust and consequent hostility and lack of cooperation in fighting crime and terrorism* among the very communities where support is most needed for counter-terrorism and immigration control.¹⁷² Critics have noted that racial/ethnic profiling *exact[s] a high price on individuals, groups, and communities* that are singled out for disproportionate attention. For the individual stopped and detained the experience, sometimes of frequent encounters with the police, can be frightening and humiliating. Racial/ethnic profiling stigmatises whole groups, contributing to the over-representation of ethnic minorities in other parts of the criminal justice system, legitimising racism, scapegoating and fostering mistrust between communities and the police. This in turn destroys the trust of those communities in the police and reduces their willingness to cooperate in criminal or terrorism investigations and turn to the police to control crime in their neighbourhoods.¹⁷³

PART IV. WHAT TO DO?

Bearing in mind the foregoing, the following recommendations are made to legislators and policy-makers to combat racial profiling and control:

- 1) It is advised to clearly define and prohibit all forms of racial profiling by law.¹⁷⁴ A legal framework ensuring an adequate protection from the risk of ethnic profiling in the field of law enforcement, should a) clearly prohibit ethnic profiling, to the extent that indicators relating to ‘race’, ethnicity, religion, national origin, etc, cannot be used as automatic, non-human controlled proxies for criminal behaviour, either in general or in the specific context of counter-terrorism strategies¹⁷⁵
- 2) Illegal data processing (data mining, data warehousing) for the purposes of profiling should explicitly be banned.
- 3) In order for the police to avoid racial profiling, control, surveillance or investigation activities should be strictly based on individual behaviour and/or accumulated intelligence.

¹⁷¹ Priyamvada Sinha: Police Use of Race in Suspect Descriptions: Constitutional Considerations, 31 New York University Review of Law and Social Change (2006), pp. 156

¹⁷² Rebekah Delsol, Presentation to the LIBE Committee of the European Parliament, Brussels, 30 June 2008, <http://www.europarl.europa.eu/document/activities/cont/200806/20080625ATT32712/20080625ATT32712EN.pdf>

¹⁷³ Rebekah Delsol, Presentation to the LIBE Committee of the European Parliament, Brussels, 30 June 2008, <http://www.europarl.europa.eu/document/activities/cont/200806/20080625ATT32712/20080625ATT32712EN.pdf>

¹⁷⁴ In line with ECRI General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing, para I.1

¹⁷⁵ As spelled out by the E.U. Network of Independent Experts on Fundamental Rights Ethnic Profiling Opinion 2006/4.

- 4) It is encouraged that this prohibition be explicitly included in the legislation transposing the Race Directive as well, in a way that policing is included among the public services equality bodies may have a jurisdiction over.
- 5) All current law enforcement and security practices which entail racial, ethnic and behavioural profiling and risk assessment should be subjected to research, analysis and political discussion, with the justification and benefits weighed against the harm from these practices, existing laws should be examined for the scope they give for profiling, and consideration given to law reform if necessary to ensure that discriminatory impact is avoided.¹⁷⁶ It is advised to carry out research including the collection of data broken down to grounds such as national or ethnic origin, language, religion and nationality in respect of relevant police activities. As part of this, a thorough impact assessment of all practices falling under racial profiling need to be included.¹⁷⁷ Monitoring should include

¹⁷⁶ In line with the European Parliament's draft recommendation to the Council on the problem of profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control prepared by Sarah Ludford.

¹⁷⁷ In line with ECRI General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing, para I.2. The explanatory memorandum to the recommendation notes that one of the main reasons for the gap in knowledge about racial profiling is the lack, in the vast majority of the member States of the Council of Europe is the lack of data broken down by grounds such as national or ethnic origin, language, religion and nationality. In its country monitoring reports, ECRI consistently recommends that member States collect such data, in order to monitor the situation of minority groups and identify possible patterns of direct or indirect discrimination they may face in different areas of life. Policing and, more generally, the criminal justice system are crucial areas in respect of which ECRI has called for this type of data to be collected in order to foster accountability and provide a common foundation of knowledge for policymaking. ECRI also consistently stresses that such data should be collected with due respect to the principles of confidentiality, informed consent and the voluntary self-identification of persons as belonging to a particular group and in close co-operation with all the relevant actors, including civil society organisations. For data broken down by grounds such as national or ethnic origin, language, religion and nationality to be used to identify and measure racial profiling, such data should be collected in respect of relevant police activities, including identity checks, vehicle inspections, personal searches, home/premises searches and raids. Data should also be collected on the final results of these activities (in terms of prosecutions and convictions) so as to be able to assess whether the ratio between checks carried out and actual convictions is any different for members of minority groups compared to the rest of the population. In order to be useful, research and monitoring of racial profiling must also respond to high standards of scientific research, which are to be reflected in the methodology used. ... For instance, when monitoring possible racial profiling in stops and searches carried out in a particular area at a particular time, care should be taken to measure the composition of the population in that area and at that time in order to determine whether the police are disproportionately stopping members of minority groups in that particular context. In its General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2005), the Committee for the Elimination of Racial Discrimination encourages the States parties, in order 'to better gauge the existence and extent of racial discrimination in the administration and functioning of the criminal justice system', to adopt a set of factual indicators facilitating the identification of such racial discrimination. In this respect, according to the Committee: 1. States parties should pay the greatest attention to the following possible indicators of racial discrimination: (a) The number and percentage of persons belonging to the groups referred to in the last paragraph of the preamble who are victims of aggression or other offences, especially when they are committed by police officers or other State officials; (b) The absence or small number of complaints, prosecutions and convictions relating to acts of racial discrimination in the country. Such a statistic should not be viewed as necessarily positive, contrary to the belief of some States. It may also reveal either that victims have inadequate information concerning their rights, or that they fear social censure or reprisals, or that victims with limited resources fear the cost and complexity of the judicial process, or that there is a lack of trust in the police and judicial authorities, or that the authorities are insufficiently alert to or aware of offences involving racism; (c) Insufficient or no information on the behaviour of law enforcement personnel vis-à-vis persons belonging to the groups referred to in the last paragraph of the preamble; (d) The proportionately higher crime rates attributed to persons belonging to those groups, particularly as regards petty street crime and offences related to drugs and prostitution, as indicators of the exclusion or the non-integration of such persons into society; (e) The number and percentage of persons belonging to those groups who are held in prison or preventive detention, including internment centres, penal establishments, psychiatric establishments or holding areas in airports; (f) The handing down by the courts of harsher or inappropriate sentences against persons

the denial of entry or family reunification, and asylum petitions. Data collection should always respect the principles of confidentiality, informed consent and the voluntary self-identification of persons as belonging to a particular group. Data collection should be extended to all relevant police activities, including identity checks, vehicle inspections, personal searches, home/premises searches and raids. Data should also be collected on the final results of these activities (in terms of prosecutions and convictions) so as to be able to assess whether the ratio between checks carried out and actual convictions is any different for members of minority groups compared to the rest of the population. When establishing its benchmarks, monitoring must respond to high standards of scientific research.

- 6) To introduce a reasonable suspicion standard,¹⁷⁸ whereby powers relating to control, surveillance or investigation activities can only be exercised on the basis of a suspicion that is founded on objective criteria.¹⁷⁹

belonging to those groups; (g) The insufficient representation of persons belonging to those groups among the ranks of the police, in the system of justice, including judges and jurors, and in other law enforcement departments. The Committee notes that in order for these factual indicators to be well known and used, States parties should embark on regular and public collection of information from police, judicial and prison authorities and immigration services, while respecting standards of confidentiality, anonymity and protection of personal data. In particular, States parties should have access to comprehensive statistical or other information on complaints, prosecutions and convictions relating to acts of racism and xenophobia, as well as on compensation awarded to the victims of such acts, whether such compensation is paid by the perpetrators of the offences or under State compensation plans financed from public funds.

¹⁷⁸ The Constitutional Court of Slovenia, in a judgment delivered on 30 March 2006, found that such powers may have to contain sufficiently precise indications about how and in which conditions they should be exercised, in order to comply with the principle of legality and to avoid the risk of arbitrariness (Judgment U-I-152/03). This position is also that of the European Court of Human Rights in its reading of the requirements of Article 5 of the European Convention on Human Rights, which guarantees the right to liberty and safety (Eur. Ct. HR (2nd sect.), *Enhorn v. Sweden* (Appl. No. 56529/00), judgment of 25 January 2005, § 37).

¹⁷⁹ In line with ECRI General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing, para I.3. To introduce a reasonable suspicion standard, whereby powers relating to control, surveillance or investigation activities can only be exercised on the basis of a suspicion that is founded on objective criteria. The explanatory memorandum the European Code of Police Ethics provides in its paragraph that “[p]olice investigations shall, as a minimum, be based upon reasonable suspicion of an actual or possible offence or crime”. This means that there needs to be a suspicion of an offence or crime that is justified by some objective criteria before the police can initiate an investigation. Reasonable suspicion is usually defined as a suspicion of an offence that is justified by some objective criteria before the police can initiate an investigation or carry out control, surveillance or investigation activities. According to the code of practice in UK, reasonable suspicion can never be supported on the basis of personal factors alone without reliable or supporting intelligence or information or some specific behaviour by the person concerned. For example, a person’s race, age, appearance or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other as the reason for searching that person. Reasonable suspicion cannot be based on generalisations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity. Thus, front line officers before conducting a search officers must take “reasonable steps” to inform the subject of the search of the officers’ name and station; the legal power that is being exercised; the purpose of the search; the grounds for the search; and of their individual rights. Officers must make a record of any stop search unless there are “exceptional circumstances” that make this wholly impractical. If not done at the time, a record should be made as soon as practicable. Where a record is made at the time a copy should be given immediately to the subject of the search and should always include a note of their self-defined ethnic background, the purpose of the search, the grounds, the outcome and the identity of the officer involved. Supervising officers must monitor the use of stop and search powers and should: consider whether there is any evidence that such powers are being exercised on the basis of stereotyped images or inappropriate generalisations; satisfy themselves that the practice of officers under their supervision in stopping, searching and recording is fully in accordance with the law; examine whether the records reveal any trends or patterns which give cause for concern; take appropriate action where necessary. Senior officers must monitor the broader use of stop and search powers and, where necessary, take action at the relevant level. Additional supervisory and monitoring requirements Supervision and monitoring must be supported by the compilation of comprehensive statistical records of stops and searches at force, area, and local level. Any apparently disproportionate use of the

- 7) Along this, a detailed legislation is required to identify the legitimate reasons to perform stop and search procedures. As part of this, it needs to be defined with the greatest clarity possible the conditions under which law enforcement authorities may exercise their powers in areas such as identity checks or stop-and-search procedures¹⁸⁰ It is our recommendation therefore to regulate as precisely as possible the requirements for such law enforcement competences. It is desirable to require either (i) illegal behaviour, or (ii) properly defined suspicious behaviour; or (iii) specific information, (iv) or narrowly tailored suspect description; or (v) general, that is not ethno-racial group-specific guidelines, along (vi) a thorough registration of all stops and search procedures, where the ethno-racial classification of the defendants are registered.
- 8) It is also advisable to provide guidelines for the assessment and investigation that relates to the reliability of suspect descriptions, upon which stop and search can be performed.
- 9) Law enforcement officers should be required to inform parties about the reason of the stop, along the issuing of a written certificate.
- 10) Effective legal remedies should be established against unlawful or arbitrary measures based on profiling. Besides complaint mechanisms, such remedies may include compensation and the suspension of the application of the measures.
- 11) Law enforcement officers should be required to record and register all stop and search, including the perceived and self-identified ethnic data of the person stopped.¹⁸¹
- 12) Institutionalized, formal and informal for structures dialogues should be started between police and minority community¹⁸² with special focus on disclosing and debating stop and search and other policing statistics.¹⁸³
- 13) The recruitment of members of public services at all levels, and in particular police and support staff, from minority groups needs to be encouraged.¹⁸⁴ It is advised to recruit members of under-represented minority groups in the police and ensure that they have equal opportunities for progression in their careers.¹⁸⁵ The composition of the police – at local, regional and national levels and including senior as well as junior ranks, and also civilian personnel – should reflect the diversity of the population. Statistical targets should be set for increasing the representativeness of the police, and monitoring of the ethnic composition of the police should be introduced in order to measure progress.¹⁸⁶
- 14) Special attention need to be focused on the quality of stops that involve members of the minority community.

powers by particular officers or groups of officers or in relation to specific sections of the community should be identified and investigated. In order to promote public confidence in the use of the powers, forces in consultation with police authorities must make arrangements for the records to be scrutinised by representatives of the community, and explain the use of the powers at a local level. See Rebekah Delsol-Michael Shiner: *Regulating Stop and Search: A Challenge for Police and Community Relations in England and Wales*, *Critical Criminology* (2006)

¹⁸⁰ As spelled out by the E.U. Network of Independent Experts on Fundamental Rights *Ethnic Profiling Opinion* 2006/4.

¹⁸¹ For example, in the UK, the Police and Criminal Evidence Act 1984 Code A on Stop and Search has been revised to require the police when undertaking a stop and search of someone to record the person concerned's self-defined ethnic background and why the person was questioned.

¹⁸² In line with ECRI General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing, para IV.18.

¹⁸³ See ECRI General Policy Recommendation N°1: On Combating Racism, Xenophobia, Antisemitism And Intolerance Adopted By Ecri On 4 October 1996

¹⁸⁴ In line with ECRI General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing, para IV.18.

¹⁸⁵ In line with ECRI General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing, para IV.17.

¹⁸⁶ As set forth by the Rec(2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics, Part II. Para 4 and 5.

- 15) Police should receive training and other forms of professional support required to understand and respond appropriately to the sensitivities of minorities, and so that they are able to carry out their policing roles effectively in ways which promote harmony and reduce tensions.¹⁸⁷ Police should be assigned to task of developing methods and practices to communicate and co-operate with minorities and to build confidence together at local, regional and national levels.
- 16) A Code of Ethics (with a separate chapter on stop and search practices) for national police forces need to be adopted and disseminated along members of the minority communities.
- 17) It is advisable that the police receive training on the issue of racial profiling and on the use of the reasonable suspicion standards.¹⁸⁸ This training, which ought to have a special focus on stop and search practices, must cover the unlawfulness of racial profiling as well as its ineffectiveness and harmful nature as described above.
- 18) It is recommended that mechanisms are established to ensure that police are democratically accountable for their actions to people from all sections of the community. These need to include effective systems for making and following up complaints, which are accessible to persons belonging to national minorities.¹⁸⁹

¹⁸⁷ As set forth by the Rec(2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics, Part III. Para 8.

¹⁸⁸ In line with ECRI General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing, para I.4.

¹⁸⁹ As set forth by the Rec(2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics, Part IV. Para 12 and 15. As the explanatory note states: there are a variety of methods that police may use for developing communication with minorities. Some methods, such as the use of leaflets or radio and television, essentially involve one-way communication and are particularly useful for conveying information. To reach minorities by these means, leaflets in minority languages and broadcasts in the mass media, including in minority languages, should be used. More valuable for building confidence and mutual understanding, however, are interactive methods that involve personal contact and communication between police and minorities. These include the following: a) Community forums. These should have an ethnically representative membership and should meet on a regular basis to discuss issues of mutual concern. Such forums should play a routine consultative role, and serve as a source of information about and better understanding of the local community – and especially minority concerns about the operation of law enforcement agencies. They should also help to bring the national minorities closer to the state institutions, building trust in the police and helping to prevent as well as to defuse tensions. b) Public meetings. These should enable the police to consult with local communities on the widest possible basis. Public meetings should be open to all and should focus on a particular issue. They are especially valuable at times of community tension, as they enable the police to listen directly to the full range of community concerns and to disseminate accurate information about the situation and about the police response. c) Community advisory boards. Community advisory boards serve the specific purpose of advising senior police officers how the police role can be carried out most effectively in the context of the local community, including matters such as the policing of ethnic conflicts, dealing with issues of discrimination, and engaging in community consultation. Police should invite as members of advisory boards people whom they consider have the relevant skills and experience to give them such advice. They should be people who can give such advice from an independent perspective, and not simply approve of whatever the police propose. Membership should reflect the diverse ethnic composition of the local community. d) Joint police-community workshops. Such workshops would bring together police and people from the community to work together on problem-solving related to specific issues in police-community relations. Participants should be small in number, and carefully selected as persons who can contribute to the solution of a defined problem or issue. This format can also be used for training purposes, to increase mutual understanding and to improve methods of co-operation generally. A skilled facilitator should be engaged to act as moderator for such events. e) Community contact points at police stations. These should be staffed with officers from the various ethnic backgrounds, and should provide information to persons belonging to national minorities about legal procedures and about opportunities for recruitment into the police, as well as serving as a ‘public reception room’ where such persons can address issues of concern to the police. Contact points could also be established in regional and city police headquarters, and in police academies and training schools. In addition, ‘open days’ could be organized in police stations and other establishments at which tours could be provided (including for schoolchildren), and these could be particularly targeted at persons from national

- 19) All forms of racial discrimination and racially-motivated misconduct by the police must be prohibited, and it needs to be ensured that legislation prohibiting direct and indirect racial discrimination cover the activities of the police¹⁹⁰.
- 20) It is advisable to provide support and advice mechanisms for victims of racial discrimination and racially-motivated misconduct by the police.¹⁹¹
- 21) It is advisable to provide for a body, independent of the police and prosecution authorities, entrusted with the investigation of alleged cases of racial discrimination and racially-motivated misconduct by the police.¹⁹²
- 22) It is advisable to establish a mechanism for independent enquiry into incidents and areas of conflicts between the police and minority groups.¹⁹³
- 23) Concerning relations between the police and members of minority groups, the police should be placed under statutory obligation to promote equality and prevent racial discrimination in carrying out their functions.¹⁹⁴
- 24) Measures should be taken to ensure that police enforce the law in an impartial and non-discriminatory manner which does not single out any particular group. Such measures should include codes for the conduct of operational practices, such as use of police powers to stop and search people on the street and in other public places. When undertaking regular patrols in multi-ethnic areas, police should where possible deploy ethnically mixed teams in order to build public confidence and increase their operational effectiveness. Police should also ensure their tactics and appearance (e.g. numbers, visibility of weapons, choice of uniforms) are appropriate to the task and do not unnecessarily provoke fear and tension.¹⁹⁵
- 25) The collection of personal data for police purposes should be limited to such as is necessary for the prevention of a real danger or the suppression of a specific criminal offence. Any exception to this provision should be the subject of specific national legislation. Communication of data to foreign authorities should be restricted to police bodies. It should only be permissible: a. if there exists a clear legal provision under national or international law, b. in the absence of such a provision, if the communication is necessary for the prevention of a serious and imminent danger or is necessary for the suppression of a serious criminal offence under ordinary law, and provided that domestic regulations for the protection of the person are not prejudiced.¹⁹⁶ Law

minorities. f) Dedicated patrol officers regularly visiting particular communities. At local police stations, particular officers could be assigned responsibility for developing and maintaining contact with each national minority in the area. In addition to being the contact person for the minority within the police station, they should make regular patrols in and visits to the localities in which persons from such minorities live (including visits to schools), and they should establish personal contact and trust with members of such communities as widely as possible. In this way the police can ensure they are in touch with the needs and concerns of the widest possible range of people from national minorities, and establish lines of communication and relationships of mutual understanding and trust.

¹⁹⁰ In line with ECRI General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing, para II.1.

¹⁹¹ In line with ECRI General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing, para II.8.

¹⁹² In line with ECRI General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing, para III.10.

¹⁹³ See ECRI General Policy Recommendation N°1: On Combating Racism, Xenophobia, Antisemitism And Intolerance Adopted by ECRI on 4 October, 1996

¹⁹⁴ In line with ECRI General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing, para IV.15.

¹⁹⁵ As set forth by the Rec(2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics, Part V. Para 16 and 18.

¹⁹⁶ In line with the Council of Europe Committee of Ministers Recommendation No. R (87) 15 of of the Committee of Ministers to Member States Regulating the Use of Personal Data in the Police Sector (Adopted by

- enforcement access to personal data should require demonstrable need—not solely the belief that such data will aid an investigation—and demonstrate the lack of availability of measures that are less intrusive on privacy. Member states should adopt safeguards to protect personal data and oversee the manner in which it is used in law enforcement.¹⁹⁷
- 26) There is a need for establishing a clear definition of legitimate versus illegal uses of sensitive personal data in the security field and to encourage greater cooperation between relevant security agencies in understanding and addressing profiling, and working with relevant communities in this effort.¹⁹⁸
 - 27) A legal framework ensuring an adequate protection from the risk of ethnic profiling in the field of law enforcement should sanction any behaviour amounting to ethnic profiling not only through the use of criminal penalties, but also (or instead) through other means, including by providing civil remedies to victims or by administrative or disciplinary sanctions¹⁹⁹.
 - 28) Also, special attention needs to be focused on the prohibition of torture as it is intertwined with the principle of non-refoulement of asylum-seekers, which is an absolute right that cannot be curtailed under any circumstances, even in the case of criminals. It is worth considering to establish a special protection mechanism (similar to the ECHR's Rule 39 interim measures) for emergency measures (including a hotline service) in this issue. Possible instruments for such competences include the Council of Europe Human Rights Commissioner, the FRA, or NHRS'.
 - 29) In regards of proscribing and listing terrorists (and those organisation supporting them) a greater degree of transparency, the development of a more coherent legal framework to harmonize various list and their enforcement and a more stringent judicial review if the sanctions is required.
 - 30) Incorporating all of the above recommendations, the Framework Decision on data protection (including reliability, standards, quality, out-sourcing, inter-operability) for third pillar law enforcement purposes should be adopted urgently.

the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies), para 2.1. and 5.4. In its resolution of 12 December 2007 on the fight against terrorism, the European Parliament (Para 24) asked, the Commission to carry out an overall evaluation of the consequences of the anti-terrorism legislation, by measuring the effectiveness of the legislation, and by investigating its positive and negative effects, both in terms of security and in terms of citizens' rights; and to inform Parliament whether all the laws that infringe citizens' rights give citizens the possibility of correcting their data, of challenging the facts and of complaining about the proportionality of the measures. The Parliament (Para 25) also asked the Council and the Commission to cooperate in establishing a real feedback mechanism regarding the effectiveness of European and national measures in this field by progressively defining neutral indicators in relation to the development of the terrorist threat to the EU (e.g. statistics on number of inquiries and judicial proceedings, analysis of possible regional crises, evidence of successful/unsuccessful cooperation, etc.) so as to provide Parliament and national parliaments with a clearer picture at least of the effectiveness and any shortcomings or positive features of public policies in these areas.

¹⁹⁷ Rebekah Delsol, Presentation to the LIBE Committee of the European Parliament, Brussels, 30 June 2008, <http://www.europarl.europa.eu/document/activities/cont/200806/20080625ATT32712/20080625ATT32712EN.pdf>

¹⁹⁸ In line with the European Parliament's draft recommendation to the Council on the problem of profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control prepared by Sarah Ludford.

¹⁹⁹ As spelled out by the E.U. Network of Independent Experts on Fundamental Rights Ethnic Profiling Opinion 2006/4.

REFERENCES

- Ahmed, Patricia—Feliciano, Cynthia-- Emigh, Rebecca Jean: Ethnic Classification in Eastern Europe, <http://www.sscnet.ucla.edu/soc/groups/ccsa/ahmed.PDF>
- Anderson, David A.: The [Aggregate Burden of Crime](#), 42 *J.L. & Econ.* (1999)
- Banks, Richard Racial profiling and antiterrorism efforts, *Cornell Law Review*, July 2004,
- Harris, David A.: Racial profiling revisited: „Just common sense” in the fight against terror?, *Criminal Justice*, Summer 2002
- Banks, Richard: Beyond racial Profiling: Race, Policing, and the Drug War, *Stanford Law Review*, December, 2003
- Bowett, Derek: The Impact of Security Council Decisions on Dispute Settlement Procedures, 5 *European Journal of International Law* (1996)
- Bowring, Bill -- Korff, Douwe: Terrorist Designation with Regard to European and International Law: The Case of the PMOI, International Conference of Jurists, Paris, 10 November 2004, <http://www.cageprisoners.com/articles.php?id=7822>
- Braber, Liam: Korematsu’s Ghost: A Post-September 11th Analysis of Race and National Security, *Villanova Law Review*, 2002.
- Brandl, Steven: Back to the future: The implications of September 11, 2001 on law enforcement practice and policy, or *Ohio State Journal of Criminal Law*, Fall, 2003.
- Buerger, Michael –Farrell, Amy: The evidence of racial profiling: interpreting documented and unofficial sources, *Police Quarterly*, Vol. 5. No 3, September, 2002
- Bygrave, L. A. « Minding the machine : Article 15 of the EC Data Protection Directive and Automated Profiling », *Computer Law & Security Report*, 2001, vol. 17
- Cameron, Iain (2003) European Anti-Terrorist Blacklisting, in *Human Rights Law Review*, vol. 3, no. 2.
- Cuéllar, Mariano-Florentino: Choosing Anti-Terror Targets by National Origin and Race, *Harvard Latino Law Review*, Spring 2003
- Davies, Sharon: Reflections on the Criminal Justice System after September 11, 2001, *Ohio State Journal of Criminal Law*, Fall, 2003
- Delsol, Rebekah – Shiner, Michael: Regulating Stop and Search: A Challenge for Police and Community Relations in England and Wales, *Critical Criminology* (2006)
- Delsol, Rebekah Presentation to the LIBE Committee of the European Parliament, Brussels, 30 June 2008,

<http://www.europarl.europa.eu/document/activities/cont/200806/20080625ATT32712/20080625ATT32712EN.pdf>

Dinant, Jean-Marc—Lazaro, Christophe-- Poullet, Yves-- Lefever, Nathalie—Rouvroy, Antoinette: Application of Convention 108 to the profiling mechanism Some ideas for the future work of the consultative committee, Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (T-Pd) 24th meeting 13-14 March 2008 Strasbourg, G01 (T-PD), Secretariat document by prepared the Council of Europe Directorate General of Human Rights and Legal Affairs, Strasbourg, 11 January 2008 T-PD(2008)01

Dolan Paul--Peasgood, Tessa: Estimating the Economic and Social Costs of the Fear of Crime, *British Journal of Criminology*, January, 2007

ECRI General Policy Recommendation N° 11 on Combating Racism and Racial Discrimination in Policing

ECRI General Policy Recommendation N°1: On Combating Racism, Xenophobia, Antisemitism And Intolerance

ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination

ECRI General Policy Recommendation No. 8 on Combating Racism While Fighting Terrorism

Ellmann, Stephen: Racial Profiling and Terrorism, *New York Law School Journal of Human Rights*, 2003, No. 19

Fassbender, Bardo, *Quis judicabit? The Security Council, Its Powers and Its Legal Control*, Review Essay, *EJIL* Vol. 11 (2000) No. 1

Fraas, Michael, *Sicherheitsrat der Vereinten Nationen und Internationaler Gerichtshof: Die Rechtmässigkeitsprüfung von Beschlüssen des Sicherheitsrats der Vereinten Nationen im Rahmen des VII. Kapitels der Charta durch den Internationalen Gerichtshof*. Frankfurt am Main: Peter Lang, 1998.

General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2005)

Goldston, James: *Toward a Europe Without Ethnic Profiling*, Justice Initiatives, Open Society Justice Initiative, June 2005

Gross, Samuel R –Livingston, Debra: *Racial Profiling Under Attack*, *Columbia Law Review*, June 2002

Harris, David A.: *New Risks; New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001*, *Utah Law Review*, 2004

Harris, David A.: The Stories, the Statistics, and the Law: Why „Driving While Black” Matters, *Minnesota Law Review*, December 1999

Harris, David A.: Using Race as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description Yes; Prediction, No, *Mississippi Law Journal Special Edition* 2003,

Hayes, Ben: A Failure to regulate: Data protection and Ethnic Profiling in the Police Sector in Europe, *Justice Initiatives*, Open Society Justice Initiative, June 2005

Herbst, Jochen: *Rechtskontrolle des UN-Sicherheitsrates*. Frankfurt am Main: Peter Lang, 1999.

Humphreys, Stephen: The Case for Monitoring Ethnic Profiling in Europe, *Justice Initiatives*, Open Society Justice Initiative, June 2005

Joo, Thomas W.: Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11, *Columbia Human Rights Law Review*, Fall, 2002.

[Lianos](#), Michalis Hegemonic Security Discourse: Late Modernity’s Grand Narrative, Tuesday 6 September 2005,

Loader, Ian: Policing, Securitization and Democratization in Europe, Monday 18 April 2005, http://www.libertysecurity.org/article209.html?var_recherche=policing%2C%20securitization

Lock, Peter: Anti-terrorism and Effects on Freedom of Movement- Assessing the Concept of Progress in the Fight against Terrorism, Wednesday 20 July 2005, http://www.libertysecurity.org/article318.html?var_recherche=lock%20peter

Lodge, Juliet: Trends in Biometrics, Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs, Briefing Paper, 4 December 2006.

Mikos, Robert A: “Eggshell” Victims, Private Precautions, and the Societal benefits of shifting crime, *Michigan Law Review*, November, 2006

Miller, Joel – Balogi, Anna—Bezlov, Tihomir-- Gounev, Philip –Pap, András L – Pernas, Bengona – Simonovits, Bori – Vargha, Lili--Wagman, Dani Racism and Police Stops -- Adapting US and British Debates to Continental Europe, *European Journal of Criminology*, 2008:5

Miller, Joel –Bernát, Anikó – Dencsó, Blanka – Gounev, Philip –Pap, András L – Pernas, Bengona – Simonovits, Bori - Wagman, Dan: “And I can stop and search whoever I want’: Police stops of ethnic minorities in Bulgaria, Hungary and Spain, *Open Society Justice Initiative*, New York, 2007

Nojeim, Gregory Aviation Security Profiling and Passengers’ Civil Liberties, *Air and Space Lawyer*, Summer, 1998,

O’Rawe, Mary: Ethnic Profiling, Policing, and Suspect Communities: Lessons from Northern Ireland, *Justice Initiatives*, Open Society Justice Initiative, June 2005

Opinion 2006/4 of the Network of Independent Experts on Fundamental Rights on ethnic profiling

Osler, Mark Capone and Bin Laden: The failure of government at the cusp of war and crime, *Baylor Law Review*, Spring 2003.

Padieu, R. (2000) «Mobiliser les données existantes : enjeux et conditions», in *L'utilisation des sources administratives en démographie, sociologie et statistique sociale*, Dossiers et recherches No. 86, INED

Pap, Andras L.: Constitutional Ambiguities Regarding Anti-Terrorist Financial Enforcement Measures– The Case of Hungary, *Acta Juridica Hungarica*, 47, No. 4, (2006)

Pap, Andras L.: Criminal Justice and Ethnic Data Collection in Hungary, *Acta Juridica Hungarica*, *Hungarian Journal of Legal Studies*, 2006/2 (Vol. 47. No. 2.)

Pap, Andras L.: Ethnic discrimination and the war against terrorism — The case of Hungary In: Gábor Halmai, (ed) *Hungary: Human Rights in the Face of Terrorism*, Special English Edition of *Fundamentum*, Human Rights Quarterly, Vandeplass Publishing: Human Rights Series 1, USA, 2006

Pap, Andras L.: Human Rights and Ethnic Data Collection in Hungary, *Human Rights Review*, Vol. 9, Issue 1, March 2008

Pap, Andras L.: Police ethnic profiling in Hungary – Lessons from an international research, *Regio, A review of Studies on Minorities, Politics, Society*, 2007, Vol. 10. pp. 117-140

Ramirez, Deborah – Hoopes, Jennifer -Quinlan, Tara Lai: Defining Racial Profiling in a Post-September 11 World, *American Criminal Law Review*, Summer, 2003,

Recommendation (2001)10 of the Committee of Ministers to member states on the European Code of Police Ethics, Part V. Para 16 and 18.

Recommendations on Policing in Multi-Ethnic Societies by the High Commissioner on National Minorities

Ringold, Dena –Orenstein, Mitchell A. –Wilkens, Erika: Roma in an expanding Europe. Breaking the poverty cycle. (A World Bank Study 2003)

Simon, Patrick: “Ethnic” statistics and data protection in the Council of Europe countries Study Report, Institut National d'Etudes Démographiques Strasbourg, 2007

Sinha, Priyamvada: Police Use of Race in Suspect Descriptions: Constitutional Considerations, 31 *New York University Review of Law and Social Change* (2006)

Stone, Christopher: Preparing a Fresh Assault on Ethnic Profiling, *Justice Initiatives*, Open Society Justice Initiative, June 2005

Stuntz, William J.: Local Policing After the Terror, *Yale Law Review*, June 2002.,

Thompson, Anthony Stopping the Usual Suspects: Race and the Fourth Amendment, New York University Law Review, October, 1999

Vlcek, William: The European Court of Justice and Acts to Combat the Financing of Terrorism by the European Community, Challenge Research Note Work Package 2 – Securitization beyond borders: Exceptionalism inside the EU and impact on policing beyond borders, November 2005.