

Ethnic Profiling: A Rising Challenge for European Human Rights Law

Olivier De Schutter* and Julie Ringelheim**

Ethnic profiling, defined as the use of racial, ethnic or religious background as a determining criterion for the adoption of law enforcement decisions, has been rising significantly in Europe, in particular in the wake of the terrorist attacks of 11 September 2001. This article examines whether European human rights law is well equipped to deal with this challenge, and if not, how it should be reformed. Against the widely held assumption that personal data protection legislation is insufficiently protective of 'sensitive' data relating to race or ethnicity, it explains instead why combating ethnic profiling has been made more difficult, rather than less, by an overly protective reading of the requirements of data protection laws. It then discusses the additional measures that European states could take to address more effectively the human rights concerns prompted by the development of ethnic profiling.

In 1999, Mr Timishev, a Chechen lawyer living in Nalchik, in the Kabardino-Balkaria Republic of the Russian Federation, travelled by car from the Ingushetia Republic to Nalchik. When reaching the administrative border of the Kabardino-Balkaria Republic, his car was stopped at a checkpoint and entry was refused to him: traffic police officers had received an oral instruction from the Ministry of the Interior of Kabardino-Balkaria Republic not to admit persons of Chechen ethnic origin. The Nalchik Town Court dismissed Mr Timishev's complaint that this was discriminatory: in its view, the order was aimed at preventing the penetration into towns and villages of persons having terrorist or antisocial aspirations. International litigation followed. Five years after Mr. Timishev filed an application against Russia, the European Court of Human Rights found that Russian officers had violated the non discrimination provision of Article 14 ECHR in combination with the freedom of movement guaranteed in Article 2 of Protocol n°4. The order, which barred passage to any person of Chechen ethnicity or perceived as such, 'represented a clear inequality of treatment in the enjoyment of the right to liberty of movement on account of one's ethnic origin'.¹

In July 2001, in response to an influx of asylum seekers of Czech nationality, the vast majority of whom were of Roma ethnic background, the United Kingdom organised an operation at Prague Airport. Following an agreement with the Czech Republic, British immigration officers were authorised to give or refuse leave to enter the country to passengers before they boarded flights to the UK.

*Professor of Law, University of Louvain (UCL) and College of Europe (Natolin).

**Senior Fellow, National Fund for Scientific Research, Centre for Legal Philosophy at the University of Louvain (UCL). The authors are grateful to Daniel Moeckli for provision of information and to the two anonymous reviewers for comments.

1 *Timishev v Russia* Eur Ct HR (2nd section), App Nos 55762/00 and 55974/00, judgment of 13 December 2005 (final on 13 March 2006) § 54.

The avowed aim of the exercise was to bar from entry travellers who intended to visit the country for a purpose not within the Immigration Rules, including those who wished to claim asylum in the UK. In practice, immigration officers operating at Prague Airport had a different attitude depending on whether passengers appeared to be of a Roma background: Roma were subjected to longer and more intrusive questioning, they were required to provide proof of matters which were taken on trust from non-Roma, and a large proportion of them were refused leave to enter. In effect, the overwhelming majority of those who were barred from entering the country were Roma. On 9 December 2004, the House of Lords held that British immigration officers operating at Prague Airport had discriminated on racial grounds, contrary to section 1(1)(a) of the Race Relations Act 1976, 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 country.²

In the wake of the 11 September 2001 terrorist attacks against New York and Washington, the German authorities, in an attempt to identify 'sleepers' of terrorist organisations, decided to resort to the so-called *Rasterfahndung* method, ie the screening by the police of personal data sets of public or private bodies in order to track individuals presenting suspects' features. The criteria established at the national level for this operation included being male, Muslim, national of or born in one of 26 listed countries with predominantly Muslim population, a current or former student, and legal resident in Germany. Numerous institutions, including universities, employers, health and social insurance agencies, were required to provide to the police the personal records of all individuals corresponding to the defined profile. The operation did not result in any arrest or criminal charge for terrorism-related offences.³ On 4 April 2006, the Federal Constitutional Court ruled that the *Rasterfahndung* was in breach of the individual's fundamental right of self-determination over personal information (Article 2(1) and 1 of the *Grundgesetz*) and therefore was unconstitutional.⁴

All these incidents have in common that in all three cases, persons were singled out by law enforcement officers not because of their individual behaviour but rather because of their ethnicity or religion. Ethnic or religious background was used as a determining criterion for law enforcement decisions. Officers assumed that there was a correlation between membership in a particular ethnic or religious group and propensity to commit certain crimes or act in a way considered undesirable. These incidents are but a few instances of a rising phenomenon in Europe, that of 'ethnic profiling'. Increasingly, certain individuals come to be

2 *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55.

3 See D. Moeckli, 'Discrimination Profiles: Law Enforcement After 9/11 and 7/7' (2005) 5 *European Human Rights Law Review* 517; D. Moeckli, 'Terrorist profiling and the importance of a proactive approach to human rights protection' (16 December 2006), available at the Social Science Research Network (SSRN): <http://ssrn.com/abstract=952163> (last visited 18 February 2008); J. Goldston, 'Ethnic Profiling and Counter-Terrorism: Trends, Dangers and Alternatives' (2006), at 5–6. Available at <http://www.soros.org/resources/articles/publications/articles/counterterrorism.20060606> (last visited 18 February 2008).

4 Decision of 4 April 2006 (1 BvR 518/02) (2006) 59 *Neue Juristische Wochenschrift* 1939.

targeted in law enforcement activities solely or partly on the ground of their ethnicity or religion. Certainly, suspicious or discriminatory attitudes of the police towards ethnic or religious minorities have long been observed in European countries as elsewhere. However, in the context of the 'war on terror' and the continuous reinforcement of the fight against illegal immigration, the influence of ethnicity and religion on law enforcement activities has reached new proportions, raising new concerns about the risks of interference with fundamental rights of people belonging to certain ethnic or religious minorities – who, more often than not, already suffer from disadvantage and stigmatisation.

Ethnic or 'racial' profiling has been widely studied and debated in the United States since the 1990s. In Europe, by contrast, reflection on this question and its legal implications is just emerging. European and domestic case law is still scarce and sometimes contradictory. This article aims to shed light on the legal challenges raised by the development of 'ethnic profiling' for European human rights law and to reflect on the adequate responses to this phenomenon. We argue that ethnic profiling is a form of discrimination prohibited under European human rights law, whether or not a statistically significant relationship could be established between membership in a particular racial or ethnic group and certain forms of criminal behaviour. We also question the widely held assumption that personal data protection legislation is insufficiently protective of 'sensitive' data relating to race or ethnicity. Instead, we explain why combating ethnic profiling has been made more difficult, rather than less, by an overly protective reading of the requirements of data protection laws. In order to arrive at these conclusions, we reflect, first, on the notion of 'ethnic profiling' itself. Second, we analyse the legal framework stemming from present-day European human rights law, on the basis of which the legality of ethnic profiling practices must be assessed. Three bodies of laws are essential in this regard: antidiscrimination law, personal data protection, and the regulation of police stop and search powers. The main legal sources taken into account are European Community law and the law of the European Convention on Human Rights. In addition, we consider the case-law of certain domestic high courts. Third, we ask whether this framework provides sufficient protection against potential human rights violations resulting from the targeting of individuals on the basis of their ethnicity or religion in law enforcement decisions. We conclude that it does not. The final section, therefore, will discuss the additional measures that European states could take to address more effectively the human rights concerns prompted by the development of ethnic profiling.

THE NOTION OF ETHNIC PROFILING

The debate on ethnic or 'racial' profiling first arose in the United States. The phrase 'racial profiling', together with the more colloquial expression 'driving while black',⁵ was popularized in the 1990s to describe the police practice of stop-

5 'Driving while black' is an ironic allusion to the crime of 'driving while intoxicated'. See D. Harris, 'When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies' (2001)

6 *Michigan Journal of Race and Law* 237, 237.

ping African American or Hispanic drivers in disproportionate numbers, under the pretext of a minor traffic infraction in order to look for evidence of other crimes, in particular drug trafficking. Such practice rested on the assumption that these drivers were more likely than white motorists to be involved in criminal activities.⁶ The term then came to be used more generally to refer to the influence of racial or ethnic factors in law enforcement decisions, whether in common stop and search practices, anti-terrorism or other areas.⁷

Still, some confusion surrounds this notion. A few words about the concept of 'profiling' itself will help clarify the issue. 'Criminal profiling' is an investigative method designed to facilitate the identification of criminals: it aims at determining the physical, behavioural or psychological characteristics of the perpetrator of a specific crime or of a group of crimes, and thus at constructing a practical description of the criminal, on the basis of an analysis of hosts of elements, including the nature of the offence, the manner in which it was committed, as well as information gathered on perpetrators of similar crimes in the past.⁸ This technique, developed initially in the US, was especially used from the 1970s onwards in investigations concerning serial killers. In the 1980s, it was decided to apply it to a broader category of crime, namely drug offences. Law enforcement authorities endeavoured in particular to develop profiles of 'drug couriers', ie people involved in the transportation of drugs, in order to help officers deciding whom to consider as suspects and stop on the road or on the street.⁹ This new application of profiling marked a significant change compared to its use in relation to serial killers: while in the latter case, profiles are *descriptive* of a particular criminal and based on analysis of a specific crime *which has already been committed and discovered* by the police, in the context of drug dealing or transporting, profiles are designed for proactive detection of *offences as yet unknown* to the police; they are meant to be *predictive* of crime.¹⁰ More recently, the technique of profiling has started to be applied in the area of counter-terrorism. As noted by the Special Rapporteur on the protection of human rights while countering terrorism, 'in recent years, so-called terrorist profiling has become an increasingly significant component of States' counter-terrorism efforts.'¹¹ Significantly, the European Union has recommended to members states to construct 'terrorist profiles' on the basis of characteristics such as nationality, age, education, birthplace, 'psycho-sociological characteristics', or family situation, with a view to identifying terrorists before the execution of terrorist acts as well as to prevent or reveal the presence of terrorists in their territory,

6 K. Meeks, *Driving While Black – What To Do if You Are a Victim of Racial Profiling* (New York: Broadway Books, 2000) 4–7; D. Harris, 'Law Enforcement Stake in Coming to Grips with Racial Profiling' (2001) 3 *Rutgers Race and Law Review* 9, 9–10.

7 K. K. Russell, 'Racial Profiling: A Status Report of the Legal, Legislative and Empirical Literature' (2001) 3 *Rutgers Race and Law Review* 61.

8 D. A. Harris, *Profiles in Injustice – Why Racial Profiling Cannot Work* (New York: The New Press, 2002) 16–18.

9 *ibid* 18–26; R. S. Engel J. M. Calnon and T. J. Bernard, 'Theory and Racial Profiling: Shortcomings and Future Directions in Research' (2002) 19 *Justice Quarterly* 249, 250–251.

10 Harris, *Profiles in Injustice*, n 8 above, 19–20.

11 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 29 January 2007, A/HRC/4/26, § 32 (hereinafter 29 January 2007 Report).

in cooperation with the immigration services and the police.¹² Here too, profiles have a predictive function: unlike serial killer profiles, they are not based on a specific, existing crime, but are designed to permit the discovery of those who may be involved in *future* crimes, even before they commit a criminal act. Thus, like most predictive profiles, they are based on generalisations about groups of people.¹³

When one of a profile's components is ethnicity or a related criterion, ie skin colour, national origin or religion, 'ethnic profiling' can be said to occur.¹⁴ 'Ethnic profiling' is not necessarily a formalised policy: it may be based on a profile formally established by competent authorities (*formal ethnic profiling*), but it may also take the form of a *de facto*, informal, practice, based on officers' subjective memories of significant experiences or assumptions about the typical features of offenders (*informal ethnic profiling*).¹⁵ When a profile is formally defined, it may be used in two ways by law enforcement officers: depending on the circumstances, they will seek to identify people meeting these characteristics either by automatic means, through the screening of a vast number of individuals' personal data, or directly on the ground, on the basis of identity checks or visual observation.

Some authors or organisations define 'ethnic profiling' in a way that suggests that it would be limited to cases where ethnicity, skin colour, religion, or national origin, are the *only* criteria taken into account for considering a person as suspect. The American Civil Liberties Union, for instance, understands 'racial profiling' as 'any police or private security practice in which a person is treated as a suspect because of his or her race, ethnicity, nationality, or religion. This occurs when police investigate, stop, frisk, search, or use force against a person based on such characteristics instead of evidence of a person's criminal behaviour'.¹⁶ Similarly, before Canadian courts, racial profiling has been described 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. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.¹⁷

12 JHA Council of 28 and 29 November 2002, Council of the EU doc 14817/02 (press 875), Annex II, 21. For the recommendation itself, which is not mentioned in the summary of the conclusions, see Council of the EU doc. 11/11858/02. 'Terrorist profile' is defined in this document as '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'.

13 D. Moeckli (2006), n 3 above, 6.

14 *ibid* 6–7; Harris, n 8 above, 11; Russell, n 7 above, 68.

15 On formal and informal profiling, see Harris, *ibid* 26–30. See also J. D. Castiglione, 'Reconceptualizing "Racial Profiling"' 1 November 2006. Available at Social Science Research Network Library <http://papers.ssrn.com/sol3/papers.cfm?abstractid=942774> (last visited 18 February 2008).

16 The Union adds that 'racial profiling' ... 'often involves the stopping and searching of people of color for traffic violations, known as 'DWB' or 'driving while black or brown'. Although normally associated with African Americans and Latinos, racial profiling and 'DWB' have also become shorthand phrases for police stops of Asians, Native Americans, and, increasingly after 9/11, Arabs, Muslims and South Asians'. See <http://www.aclu.org/racialjustice/racialprofiling/index.html> (last visited 18 February 2008).

17 *R v Richards* (1999), 26 CR. (5th) 286 (Ont CA). This definition was proposed by the African Canadian Legal Clinic before the Ontario Court of Appeals.

To be sure, treating a person as a suspect solely because of his or her ethnicity or religion is discriminatory. However, when ethnic, racial, national, or religious background constitutes only one component of a profile and is used in combination with other factors by law enforcement officers when deciding to stop, search, arrest, or put under surveillance a person, the risk of discrimination is no less present.¹⁸ Indeed, 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.¹⁹ For the purpose of this article, therefore, 'ethnic profiling' will be understood as the practice of using 'race' or ethnic origin, religion, or national origin, as either the sole factor, or one of several factors, in law enforcement decision, on a systematic basis, whether or not concerned individuals are identified by automatic means.

Whether formal or informal, based on the use of automatic means of processing information or not, 'ethnic profiling' presupposes classifying people, implicitly or explicitly, along ethnic or related criteria. Yet, it is important to stress that classifying individuals on the basis of such factors is not necessarily unlawful or discriminatory. Such classification may serve a variety of purposes, including monitoring the behaviour of public agents in order to ensure that they do not commit direct or indirect discrimination. Similarly, the processing of sensitive data that such procedures entail may or may not be compatible with legislation on personal data protection: the legality of data processing depends on the objectives pursued and the means used. Importantly, as will be argued in the last section, the collection of data on the ethnic background of those who are stopped, searched, or arrested, may be a crucial tool to unmask discriminatory practices of law enforcement officers, especially when they remain informal.²⁰

THE EXISTING LEGAL FRAMEWORK

Present-day European and international law contain no legally binding provision dealing explicitly with the concept of 'ethnic profiling'. However, several human rights guarantees, enshrined in European or international instruments, contribute to defining the legal framework against which the legality of such practices or procedures must be assessed. Depending on the circumstances, ethnic profiling is likely to conflict either with the right to privacy and personal data protection, or with rules regulating the exercise by law enforcement officers of their powers, in particular in stop-and-search procedures or in identity checks. In all cases, it involves a differential treatment based, in whole or in part, on ethnic or religious criteria, thereby bringing into play antidiscrimination norms. We argue, however, that the prohibition of ethnic profiling as a specific form of discrimination will remain ineffective in a number of EU Member States as long as they adhere to an overly rigid understanding of the requirements of data protection legislation,

¹⁸ See Russell, n 7 above, 65–68; Castiglione, n 15 above, 30–32.

¹⁹ E.U. Network of Independent Experts on Fundamental Rights, Opinion No. 4 'Ethnic Profiling' (December 2006), at 10. Available at: <http://ec.europa.eu/justice/home/cfr.cdf/index.en.htm> (last visited 18 February 2008).

²⁰ *ibid* 9–12.

which may result in an obstacle to the monitoring of the behaviour of law enforcement authorities.

It is significant in this regard that, in its recent General Policy Recommendation N°11 on combating racism and racial discrimination in policing (the recommendation),²¹ the Council of Europe Commission against Racism and Intolerance (ECRI) does not mention the need to reinforce data protection against the risks of 'racial profiling',²² but that it insists, rather, on the need to 'monitor police activities in order to identify racial profiling practices, including by collecting data broken down by grounds such as national or ethnic origin, language, religion and nationality in respect of relevant police activities'.²³ In addition, the General Policy Recommendation n°11 encourages the Member States 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'.²⁴ While they build on the existing rules of international and European human rights law, these recommendations make explicit, in addition, that the prohibition of ethnic profiling as a form of discrimination will only be effective if certain supplementary conditions are met, which the existing national rules do not always satisfy. We explore in this section what these conditions are, and how, by taking them into account, we can better combat the practice of ethnic profiling. It is with this aim in mind that we examine the content of the non-discrimination requirement, the regulation of the power of law enforcement authorities to arrest individuals for the purpose of identity searches, and data protection legislation in the EU Member States. In relating these different bodies of law to the practice of ethnic profiling, we seek both to identify potential gaps in the existing legal framework and – where promising developments did take place under certain jurisdictions – where inspiration may be found to identify solutions for these gaps.

Anti-discrimination law

Articles 2 and 26 of the International Covenant on Civil and Political Rights, Protocol n°12 to the European Convention on Human Rights (ECHR), as well as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) all formulate a general prohibition of discrimination. Article 14 of the ECHR also precludes discrimination based, *inter alia*, on race, religion, national origin, or association with a national minority, in the enjoyment of the rights and freedoms set forth in the Convention. ICERD specifically prohibits racial discrimination in the enjoyment of 'the right to security of person and protection by the State against violence or bodily harm, whether inflicted

²¹ Adopted on 29 June 2007.

²² The ECRI defines 'racial profiling' as: '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'. It recommends that the Member States clearly define and prohibit racial profiling by law.

²³ Para 2 of the recommendation.

²⁴ Para 3 of the recommendation.

by government officials or by any individual group or institution' (article 5(b)), 'the right to freedom of movement and residence within the border of the State', and 'the right to leave any country, including one's own, and to return to one's country' (article 5(d) i and ii). The Committee for the Elimination of Racial Discrimination, tasked with monitoring this Convention, has explicitly stated that racial or ethnic profiling can result in a discrimination prohibited by the ICERD.²⁵ In its General Recommendation No 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2005), the Committee highlights an increase in the risks of discrimination in the administration and functioning of the criminal justice system 'partly as a result of the rise in immigration and population movements, which have prompted prejudice and feelings of xenophobia or intolerance among certain sections of the population and certain law enforcement officials, and partly as a result of the security policies and anti-terrorism measures adopted by many States, which among other things have encouraged the emergence of anti-Arab or anti-Muslim feelings, or, as a reaction, anti-Semitic feelings, in a number of countries'. To counter this phenomenon, the Committee recommends that states take measures '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'.²⁶

The question of ethnic profiling has recently been the focus of renewed attention at international level. In his 2007 report, Martin Scheinin, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms, while countering terrorism, undertakes to assess whether ethnic profiling practiced in the area of counter-terrorism is compatible with the principle of equal treatment. His analysis is based on the criteria set out by the anti-discrimination jurisprudence of the UN Human Rights Committee and the ICERD but also of the European Court of Human Rights (ECtHR). According to the latter's well-known case-law, a difference in treatment constitutes a discrimination either when it lacks objective and reasonable justification, or when there is no reasonable relationship of proportionality between the means employed and the legitimate aim sought to be realised.²⁷ Applying these notions to profiling in the context of counterterrorism, the Special Rapporteur first asserts that insofar as it aims at preventing terrorist attacks, the use of terrorist profiles based *inter alia* on ethnicity,

25 Committee on the Elimination of Racial Discrimination, *Concluding Observations: Canada*, UN Doc CERD C/61/CO/3, para 338 (2002) (calling 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').

26 Committee on the Elimination of Racial Discrimination, General recommendation No 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2005) para 20. Already in its General Recommendation No 30 on discrimination against non-citizens (2004), the Committee recommends that states ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping' (para 10).

27 Eur Ct HR, *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium'* (Belgian Linguistic Case) (Appl nos 1474/62 et al) Judgment of 14 July 1968, 1 EHRR 252 § 10.

national origin or religion, can be said to pursue a legitimate and compelling social need.²⁸ But the bulk of his analysis consists in determining whether such measure is proportionate to the objective pursued. Roughly said, the notion of proportionality, as understood by the ECtHR, requires that a fair balance be preserved between the respect for individual rights and the protection of the public interests at stake. This entails, in particular, that the means used are suitable to advance the attainment of the objectives pursued,²⁹ and that among various means to achieve these goals, the measure that entails the least restriction of rights and freedoms is adopted.³⁰ In this regard, the Special Rapporteur observes that terrorist profiles based on characteristics such as ethnicity, national origin and religion are regularly inaccurate and both over- and under-inclusive. In practice, most terrorist profiles use ethnic appearance and national origin as proxies for religion, typically Muslim religion, given that religious background is usually not readily identifiable. But ethnicity and national origin are poor proxies for religion: many of those targeted on the ground of their physical appearance will not be Muslims. And among those who are indeed Muslims, the overwhelming majority are in no way involved in terrorism. Terrorist profiles that rely on this type of criteria will thus affect a great number of individuals who have nothing to do with terrorism. Further, by increasing the number of people considered as suspects by the police, they divert important law-enforcement resources from more effective work. At the same time, terrorist profiles are under-inclusive: there are potential terrorists who do not fit the pre-determined criteria and will therefore escape the attention of law-enforcement agents working on the basis of such profile. For the Special Rapporteur, evidence suggests that ethnic or religious profiling practices are 'an unsuitable and ineffective, and therefore a disproportionate means of countering terrorism: they affect thousands of innocent people, without producing concrete results'.³¹ In addition to its lack of effectiveness, this method also entails adverse effects: by singling out certain people on the basis of their real or supposed ethnicity, national origin, or religion in counter-terrorism actions, the authorities foster stigmatisation of these groups of people which, in turn, is likely to increase their feeling of alienation and induce deep mistrust of the police.³² All these elements together convince the Special Rapporteur that terrorist profiling based on ethnic, religious, or national origin factors is a disproportionate measure to combat terrorism, and therefore constitutes discrimination.

Somewhat paradoxically, the European Court of Human Rights itself proved hesitant to condemn as discriminatory law enforcement actions that could be deemed instances of 'ethnic profiling', at least when it was confronted with an informal practice, rather than a formalised policy. *Cissé v France* is a case in point. A group of some two hundred illegal migrants, most of whom were of African origin, had been occupying the St Bernard's Church in Paris in June 1996. They received the support of several human-rights organisations, some of whose activists

²⁸ 29 January 2007 Report, para 46.

²⁹ Eur Ct HR, *Observer and Guardian v UK* (Appl no 13585/88) Judgment of 29 November 1991 § 69.

³⁰ Eur Ct HR, *Informationsverein Lentia v Austria* (Appl nos 13914/88 et al) Judgment of 24 November 1993 §§ 39 and 43. See also Moeckli (2005), n 3 above, 525.

³¹ 29 January 2007 Report, § 54.

³² *Id.*, §§ 56–58.

decided to sleep on the premises in a demonstration of solidarity with their predicament. When, on 23 August 1996, the police executed an order for the total evacuation of the premises, they set up a checkpoint at the church exit to verify whether the aliens evacuated from the church had documentation authorising them to stay and circulate in the territory. As described in the judgement of the Court:

All the occupants of the church were stopped and questioned. Whites were immediately released while the police assembled all the dark-skinned occupants, apart from those on hunger strike, and sent them by coach to an aliens' detention centre at Vincennes. Orders were made for the detention and deportation of almost all of those concerned. More than a hundred were subsequently released by the courts on a account of certain irregularities on the part of the police, which even extended to making false reports regarding the stopping and questioning procedure.³³

This is a euphemistic description. In fact, it would seem that, as explained by the applicant, 'only "blacks" had had their identities checked while "whites" had been shown to the exit', without the legality of their administrative situation being checked.³⁴ In spite of this, the submission that the arrests were discriminatory because the identity verifications had allegedly been decided on the basis of the skin colour of the individuals concerned, was dismissed at the admissibility stage. The European Court contents itself with noting that: 'the system set up at the church exit for checking identities was intended to ascertain the identity of persons suspected of being illegal immigrants. In these circumstances, it cannot conclude that the applicant was subjected to discrimination based on race or colour'.³⁵ This conclusion appears to follow from the choice of the Court, following the submissions of the French government, to frame the issue as concerning exclusively the deprivation of liberty of the individual applicant, without considering, more broadly, how the screening was practiced by the French police on all the occupants of the church.

The Court took a comparable stance a few months later in *Čonka v Belgium*.³⁶ At stake was an operation organised by the Belgian police to arrest dozens of families of asylum seekers from Slovakia whose claim for asylum had been dismissed, in order to expel them from the country. Even though those targeted by this operation were exclusively of a Roma ethnic background, the allegation of discrimination was held inadmissible, on the ground that people subject to the expulsion measure had not been selected on the basis of their nationality or ethnic origin, but rather on the basis of their belonging to a specific immigration channel. Nevertheless, in its judgment, adopted by the shortest of margins (4 judges against 3), one Chamber of the Court found Belgium guilty of having proceeded

³³ Eur Ct HR (2nd sect), *Cissé v France* (Appl No 51346/99) Judgment of 9 April 2002 (final on 9 July 2002), § 13.

³⁴ Eur Ct HR (2nd sect), *Cissé v France* (Appl No 51346/99), admissibility decision of 16 January 2001. This presentation of the facts by the applicant, while it does not correspond precisely to the description given by the Court, was not contradicted in the procedure by the defending State.

³⁵ *ibid.*

³⁶ Eur Ct HR (3d sect), *Čonka and others, the Ligue des droits de l'homme v Belgium* (Appl No 51564/99) admissibility decision of 13 March 2001.

to a collective expulsion of aliens, prohibited by article 4 of Protocol No 4, as the contested measure had not been taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.³⁷ The procedure, therefore, did not 'afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account'.³⁸

Yet, as we have seen, in the later case of *Timishev v Russia*, decided on 13 December 2005, the Court took a much firmer position. Here, the Court found that by refusing entry to the Kabardino-Balkaria Republic to Mr Timishev because of his ethnic origin, Russian police officers violated the non-discrimination provision of Article 14 ECHR, in combination with the freedom of movement guaranteed in Article 2 of Protocol n°4. The order issued by senior police officers, which barred the passage of any person who actually was of Chechen ethnicity or was perceived as such, represented a clear inequality of treatment in the enjoyment of the right to liberty of movement, as no other ethnic communities were subject to similar restriction. For the Court, discrimination on account of one's actual or perceived ethnicity has to be considered a form of racial discrimination; it is thus 'a particularly invidious kind of discrimination', one which 'in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction'.³⁹ The Court further observes:

The Government did not offer any justification for the difference in treatment between persons of Chechen and non-Chechen ethnic origin in the enjoyment of their right to liberty of movement. In any event, the Court considers that 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.⁴⁰

In this important passage, the Court seems to exclude that any difference in treatment on account of ethnicity could be justified, where this leads to imposing disadvantages on the basis of this criterion *alone or to a decisive extent*. This entails that when ethnicity is one among several factors that prompt law enforcement officials to target a person, the measure will be held discriminatory if the ethnic background had a decisive (although not necessarily exclusive) influence on the decision-making process. Besides, while the Court in this case could dispense with determining whether the measure was justified by a legitimate aim and proportionate to it, since the government did not advance any justification for the officials' decision, it nonetheless takes this opportunity to affirm in unambiguous terms that a difference in treatment based on a person's ethnic origin can never be justified if it is detrimental to this person. This suggests that the proportionality test becomes irrelevant in this context: treating individuals similarly situated differently according to their real or supposed ethnicity should be considered as hav-

37 Eur Ct HR (3d sect), *Čonka v Belgium* (Appl No 51564/99) Judgment 5 February 2002 § 59.

38 *ibid* § 63.

39 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) §§ 54–57.

40 *ibid* § 58.

ing such serious consequences in stigmatising ethnic minorities; feeding stereotypes, prejudice, and exclusion; and creating divisiveness and resentment, that differential treatment on this ground should in principle be deemed unlawful under any circumstances.⁴¹

The fundamental conflict between ethnic profiling and the core democratic values of equality and respect for the individual, is well expressed by Baroness Hale of Richmond, in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport*,⁴² where the House of Lords held that immigration officers operating at Prague had discriminated on racial grounds against Roma seeking to travel to the United Kingdom by treating them more sceptically than non-Roma:

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.⁴³

Thus, instead of considering Roma travellers as inherently suspects:

Immigration officials should have been given careful instructions in how to treat all would-be passengers in the same way, only subjecting them to more intrusive questioning if there was specific reason to suspect their intentions from the answers they had given to standard questions which were put to everyone. The system operated by immigration officers at Prague Airport was inherently and systemically discriminatory on racial grounds.⁴⁴

What should be noted at this stage is the contrast between the prohibition of ethnic profiling as a form of discrimination on the one hand – as in the leading case of *Timishev* – and, on the other hand, the considerable difficulties victims face when having to prove any discrimination which they suspect has taken place – as in *Cissé* or *Conka*. It is in this regard noteworthy that, in a recent judgment where it was asked to find a violation of the non-discrimination requirement with the right to education, the Grand Chamber of the European Court of Human Rights has taken the view that ‘when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce’, resulting in shifting the burden of proof to the respondent State, which – if presented with such

41 EU Network of Independent Experts on Fundamental Rights, n 19 above at 11.

42 *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55.

43 *ibid* at [74]. This point is restated by Lord Hope of Craighead in *Gillan v Commissioner of Police for the Metropolis* [2006] UKHL 12: ‘The whole point of making it unlawful for a public authority to discriminate on racial grounds is that impressions about the behaviour of some individuals of a racial group may not be true of the group as a whole. Discrimination on racial grounds is unlawful whether or not, in any given case, the assumptions on which it was based turn out to be justified (§ 43).

44 *ibid* Baroness Hale of Richmond, at [97].

statistics – would then have to show that the difference in treatment is not discriminatory.⁴⁵ However, for victims of discrimination to use this possibility, they must have statistics to rely upon. The collection of data relating to the behaviour of police officers, allowing identification, in particular, of the impacts of their activities on different racial or ethnic groups, may therefore progressively be seen as a condition for the effective enforcement of the anti-discrimination norm itself. The European Commission against Racism and Intolerance therefore recommends the collection of data allowing the measurement of such impacts: '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'.⁴⁶ We return below to the importance of such data collection for an effective policy aiming at combating ethnic profiling.⁴⁷

One final remark may be in order. In contrast with the UN and Council of Europe instruments mentioned above, EU law has not yet addressed the issue of ethnic profiling. This may seem paradoxical, since, after the 1997 Amsterdam Treaty inserted the new article 13 in the EC Treaty, the fight against discrimination based *inter alia* on ethnic origin and religion has become a priority of the European Union. The two Equality directives adopted in 2000 on the basis of article 13 have led all EU member states to improve significantly their anti-discrimination legislation. While the Racial Equality Directive (Council Directive 2000/43/EC⁴⁸), prohibits discrimination based on racial or ethnic origin in various areas (employment and occupation, social protection, social advantages, education, and access to goods and services available to the public), the Employment Equality Directive (Council Directive 2000/78/EC⁴⁹) prohibits discrimination in employment and occupation on various grounds, including religion or belief. Each directive applies to both the public and private sectors, including public bodies. However, their scope of application *ratione materiae* is limited and excludes policing functions exercised by the law enforcement authorities.⁵⁰ Hence, these

45 Eur Ct HR (GC), *D. H. and Others v Czech Republic* (Appl no 57325/00) judgment of 13 November 2007 §§ 189–190. This judgment builds on earlier case-law in which the Court had recognized the need to allow for a shifting of the burden of proof in anti-discrimination cases where circumstantial evidence allows for the establishment of a presumption of discrimination (Eur Ct HR (GC) *Nachova and Others v Bulgaria* (Appl n° 43577/98 and 43579/98) judgment of 6 July 2005 §§ 147 and 157); and where the Court had agreed to identify indirect discrimination on the basis of statistical evidence (*Hoogendijk v the Netherlands* (dec) no 58461/00, 6 January 2005).

46 Explanatory Memorandum to General Policy Recommendation n°11, at [42].

47 See section headed: Strengthening the Means to Counter Ethnic Profiling, below.

48 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 of 19 July 2000 at 22).

49 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 of 2 December 2000 at 16).

50 This restriction to the scope of application of these instruments seems to follow from their legal basis in Article 13 of the EC Treaty. This provision empowers the Council of the European Union

directives have no bearing on the question of ethnic profiling in the context of law enforcement activities.

The regulation of stop and search powers

As we have seen, General Policy Recommendation n°11 adopted by the European Commission against Racism and Intolerance recommends in paragraph 3 the introduction of a 'reasonable suspicion' standard, according to which 'powers relating to control, surveillance or investigation activities can only be exercised on the basis of a suspicion that is founded on objective criteria'.⁵¹ If followed, this recommendation would have a significant impact on many instances of ethnic profiling as documented in existing studies; and it would bring about a culture change in the practices of law enforcement authorities. In many European states, law enforcement officers enjoy a large discretion in the fulfilment of duties such as identity checks and 'stop-and-search' arrests. This situation obviously increases the risk of discriminatory profiling being practiced by officers acting on the ground insofar as this discretion could enable them to target disproportionately or arbitrarily persons of certain ethnic appearances when exercising their powers. Only the power to arrest individuals is explicitly regulated by the European Convention on Human Rights: under Article 5(1), it must be subject to strict safeguards. No one can be deprived of his liberty save in certain well-defined situations and 'in accordance with a procedure prescribed by law.' The ECtHR has recently insisted that 'where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied'.⁵² This entails that the conditions for the deprivation of liberty must be clearly defined under domestic law, and that the law itself must be foreseeable in its application. The standard of 'lawfulness' set by the Convention requires that the law be sufficiently accessible and precise to allow people to reasonably foresee the consequences a given action may yield. Furthermore, an essential element of the lawfulness of a detention within the meaning of Article 5(1) is the absence of arbitrariness.⁵³

In a remarkable decision dated 23 March 2006,⁵⁴ the Constitutional Court of Slovenia developed the view that similar requirements apply to the exercise by

to legislate in order to combat discrimination on the grounds listed 'within the limits of the powers conferred by it upon the Community' (Art 13(1) of the EC Treaty).

51 This is inspired by the European Code of Police Ethics, which provides that '[p]olice investigations shall, as a minimum, be based upon reasonable suspicion of an actual or possible offence or crime' (para 47). The European Code of Police Ethics was the subject of Recommendation (2001)10 of the Committee of Ministers of the Council of Europe, adopted on 19 September 2001 at the 765th meeting of Ministers' Deputies. See also, for a similar recommendation, EU Network of Independent Experts on Fundamental Rights, *Opinion No 4 'Ethnic Profiling'* (December 2006) at 26, stating that the EU Member States should 'define 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 procedures'.

52 Eur Ct HR (2nd section) *Enhorn v Sweden* (Appl No 56529/00) Judgment of 25 January 2005 § 36.

53 *ibid*; Eur Ct HR (Grand Chamber) *Chahal v United Kingdom* (22414/93) Judgment of 15 November 1996 § 118.

54 Judgment U-I-152/03. The text of the judgment, which includes the opinion of the Ombudsman, is available in English on the website of the Slovenian Constitutional Court: <http://www.us-rs.si/en/index.php> (last visited 18 February 2008).

the police of its power to stop individuals for the purpose of checking their identity. The case originated in a petition of the Ombudsman for Human Rights, who challenged a provision of the Police Act (Zpol) allowing policemen to establish the identity of a person 'who by his or her behaviour, conduct, and appearance or by being situated in a certain place or at a certain time arouses the suspicion that they will perpetrate, are perpetrating, or have perpetrated a minor or criminal offence . . .'.⁵⁵ The Ombudsman argued that when the police oblige a person to show her personal identity documents, they interfere with her freedom of movement and rights to privacy. Hence, such power must conform to the principle of legal certainty. The view of the Ombudsman was that: 'Police authority must . . . be defined precisely in the law such that the police officer and the individual clearly understand what the conditions are on the basis of which the use of police authority is allowed for the establishment of identity'. For the Ombudsman, the impugned provision did not meet this condition. Its formulation was so general and imprecise that it enabled the police to use their power in an arbitrary manner. In particular, the rule that a person could be suspected merely for reasons of his or her appearance could easily give rise to abuse by the police.

The Court fully endorsed the position of the Ombudsman: it held that the statute did not determine with sufficient precision when an individual circumstance can constitute a sufficient basis to give rise to suspicion. Consequently, the provision did not permit clearly discerning the limits between admissible and inadmissible conduct of state authorities. In practice, this indeterminacy permitted the police authority to establish identity without justification.⁵⁶ The Court, therefore, declared the provision unconstitutional and ordered the legislature to remedy the unconstitutionality within a year of the publication of its decision by specifying the criteria which enable the police to suspect that a person will 'perpetrate, is perpetrating, or has perpetrated a minor or criminal offence', in particular when the suspicion is based on a person's appearance or his or her being situated in a certain place.⁵⁷ This case-law thus offers a reading of the requirements of the principle of legality in the exercise of the powers of the police to stop a person which closely corresponds to that recommended by the European Commission against Racism and Intolerance when, citing the 2001 European Code of Police Ethics, it insists on the introduction of a 'reasonable suspicion' standard, prior to a person being stopped, searched, put under surveillance or investigated.

Personal data protection

In the context of counterterrorism strategies, police and intelligence services are increasingly resorting to data mining techniques, ie the computerised analysis of vast databases of personal information in order to identify people whose data

55 Article 35.1 of the Police Act (Official Gazette RS, Nos 49/98, 66/98 – corr, 93/01, 56/02, 79/03, 43/04 – off consol text, 50/04, 102/04 – off consol text, 14/05 – corr off consol text, 53/05, 70/05 – off consol text, 98/05 and 3/06 – off consol text) (SPol).

56 Judgment U-I-152/03 at [15].

57 *ibid* at [18].

match a pre-defined suspects' profile.⁵⁸ Such operations, which entail the collection, analysis and storage of information on a large number of individuals by public authorities, raise many concerns as to the dangers of misuse, manipulation, or unwanted disclosure of the data processed. In the case of antiterrorism these concerns are heightened by the fact that terrorist profiles typically include criteria related to religion and national origin, which are especially sensitive data.

In all EU countries, however, the legislation imposes restrictions on the circumstances and the way in which personal data can be processed by states' authorities. These rules, designed to protect the individuals' private life vis-à-vis the processing of personal data concerning them, provide critical safeguards against ethnic profiling carried out through automatic means. At the European level, the main piece of EU legislation regarding personal data protection is Directive 95/46/EC 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.⁵⁹ This instrument, however, does not cover processing operations concerning public security, defence, State security and the activities of the State in areas of criminal law.⁶⁰ But the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data,⁶¹ which all EU member states are party to, applies generally to the private and public sectors, including law enforcement authorities. Moreover, the ECtHR has made clear that article 8 of the European Convention on Human Rights, which guarantees the right to respect for private life, is applicable to instances of processing of personal data.⁶²

The 1981 Convention sets out fundamental safeguards that must be ensured to preserve the rights of individuals whose personal data are being processed by automatic means. Although the Convention applies only to the automatic processing of personal data and does not include the mere collection of data within the notion of 'processing' where not accompanied by the storage of the data collected,⁶³ it has laid the foundations for the later developments of personal

58 D. J. Solove, 'Data Mining and the Security-Liberty Debate' (2007–08) 74 *University of Chicago Law Review* 278.

59 OJL 281 of 23 November 1995, 31.

60 Article 3(2) and Preamble, Recital 13.

61 CETS, No 108.

62 See eg Eur Ct HR, *Leander v Sweden* 26 March 1987, S A 116, 22 § 48; Eur Ct HR (GC), *Rotaru v Romania* (Appl n°28341/95) Judgement of 4 May 2000 §§ 43–45. But see, for the limits of this protection, Eur Ct HR, *Zdanoka v Latvia* (Appl n°58278/00) partial inadmissibility decision of 6 March 2003.

63 In both these respects, the EU Data Protection Directive has a broader scope of application: this instrument applies to the processing of personal data, which is defined as 'any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction' (Art 2(b)) of Directive 95/46/CE of the European Parliament and the Council 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, OJL 28 of 23 November 1995, 31). It is not required that the processing take place by automatic means; nor is it required that the data, once collected, are stored for further use: the mere 'collection' of data constitutes processing covered by the directive.

data protection in European legislation. The basic requirements defined in this instrument include the following: personal data must be processed fairly and lawfully;⁶⁴ they must be collected for specified, explicit and legitimate purposes, and cannot be used in a way incompatible with those purposes;⁶⁵ the data collected must be adequate, relevant and not excessive in relation to the purpose for which they are processed;⁶⁶ they must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which they were collected or for which they are further processed;⁶⁷ and the data subject should have the right to access to and rectify data concerning him or her.⁶⁸ In addition, a key principle established by the 1981 Convention, and restated in Directive 95/46/EC, is that data relating to religion or racial or ethnic origin are part of a special category of so-called 'sensitive' data, which call for a higher level of protection, given the risks of discrimination entailed by the processing of such data. Accordingly, under article 6 of the 1981 Convention, personal data revealing racial origin or religious beliefs, as well as personal data concerning political opinions, health or sexual life 'may not be processed automatically unless domestic law provides appropriate safeguards'. Article 9 allows for derogations to this guarantee provided that they are defined in national legislation and are necessary in a democratic society *inter alia* in the interests of public safety, the elimination of criminal offences, or of protecting the rights and freedoms of others. Nonetheless, the Committee of Ministers of the Council of Europe has defined more specific requirements for the processing of sensitive data carried out by the police: its 1987 Recommendation regulating the use of personal data in the police sector prohibits the collection of data on individuals solely on the basis that they have a particular racial origin, particular religious convictions or belong to particular movements or organisations which are not illegal. Furthermore, collection of data concerning these factors should only be carried out if it is '*absolutely necessary* for the purposes of a particular inquiry.'⁶⁹

More recently, the European Commission has also recognised the necessity of specifying further the rules applying to the processing of personal data in the context of law enforcement activities under Title VI of the EU Treaty, which relates to police cooperation and judicial cooperation in criminal matters. In October 2005, it proposed the adoption of a Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters. Such Decision is designed to apply to the processing, by automatic means or by other means, of personal data which form part (or are intended to form part) of a filing system, by a competent authority and for the purpose of the prevention, investigation, detection and prosecution of criminal

64 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS, No 108), article 5(a).

65 Article 5(b).

66 Article 5(c).

67 Article 5(d).

68 Article 8(c).

69 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, adopted by the Committee of Ministers on 17 September 1987, at the 401st meeting of the Ministers' Deputies (our emphasis).

offences.⁷⁰ It would require the EU member states to prohibit the processing of personal data revealing racial or ethnic origin as well as religious beliefs, except where it is provided by a law and is absolutely necessary for the fulfilment of the legitimate task of the authority concerned for the purpose of the prevention, investigation, detection or prosecution of criminal offences or if the data subject has given his or her explicit consent to the processing, and suitable safeguards are provided.⁷¹ But, apart from the fact that this framework decision is yet to be approved by the Council, it allows for the processing of sensitive data, including data relating to the race, ethnic origin, or religion of individuals, for the prevention of criminal offences *in general*, without this having to relate to specific inquiries into offences which have been committed, as would be required under the Basic Principles regulating the use of personal data in the police sector, adopted by the Committee of Ministers of the Council of Europe in 1987.⁷² Therefore, under the draft framework decision, ethnic profiling as defined above is not *per se* illegal; it merely has to be accompanied by adequate legal safeguards if resorted to by the EU Member States' law enforcement authorities.

The question whether profiling based on automatic means and involving ethnic or religious criteria is compatible with the right to privacy has been raised before the German Federal Constitutional Court (*Bundesverfassungsgericht*) in the *Rasterfahndung* case. As mentioned above, between 2001 and 2003, the German police authorities conducted a nationwide dragnet investigation for Islamic terrorist 'sleepers'. The operation involved the screening of a huge amount of personal data held by various public or private institutions, with a view to identifying people corresponding to a defined profile, which included mainly being male, aged 18 to 40, a student or former student, Muslim, and native or national of specified countries with a predominantly Muslim population. These data were combined with personal information available on general registers, and a nationwide file listing all individuals corresponding to the 'terrorist sleepers' profile was established. This operation mobilised an enormous amount of personnel and time within the police force. According to certain sources, data of 8.3 million persons were analysed by the German police.⁷³ Approximately 32,000 persons were identified as potential terrorist 'sleepers' and subject to closer examination. However, this programme did not lead to the arrest of any single terrorist suspect.⁷⁴

70 Proposal for a Council framework decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (COM(2005) 475 final), article 3(1).

71 *ibid* article 6.

72 See above n 69.

73 D. Moeckli, 'Terrorist profiling and the importance of a proactive approach to human rights protection' 16 December 2006 available at the Social Science Research Network (SSRN): <http://ssrn.com/abstract=952163> (last visited 18 February 2008).

74 G. Kett-Straub, 'Data Screening of Muslim Sleepers Unconstitutional' (2006) 7 *German Law Journal* 967, 970–971; D. Moeckli, 'Discriminatory Profiles: Law Enforcement After 9/11 and 7/7' (2005) 5 *European Human Rights Law Review* 517, 520–522. See also F. Bignami, 'European versus American Liberty: A Comparative Privacy Analysis of Anti-Terrorism Data-Mining' *Duke Law School Legal Studies Research Paper Series* Research Paper No 135, January 2007, 31–32, available at the Social Science Research Network (SSRN): <http://papers.ssrn.com/sol3/papers.cfm?abstractid=955024> (last visited 18 February 2008). (Hereinafter: Resource Guide).

In its landmark judgment of 4 April 2006, the German Constitutional Court found the programme to be unconstitutional. It declared it incompatible with the fundamental right of self-determination over personal information, which protects individuals against the collection, transfer, storage or processing of personal information by state authorities, including the police. The Court admitted that the operation pursued a legitimate aim, namely safeguarding the national security, and that in theory data-mining could be a suitable means to achieve this goal. But, in the present context, it held that the interference with the right of informational self-determination resulting from this operation was disproportionate. The burden imposed on constitutional rights was particularly serious, among other reasons because the screening exercise focused on a specific religious community, namely the Muslim community, and was therefore likely to have a 'stigmatising impact' on those concerned and to 'increase the risk of being discriminated against in working and everyday life'.⁷⁵ In the view of the Court, such far-reaching consequences for individuals' rights could only be considered acceptable if there were actual facts demonstrating a concrete, ie imminent and specific, endangerment (*konkrete Gefahr*) of national security or individual rights.⁷⁶ By contrast, a general and indeterminate threat as the one constantly existing since 11 September 2001, did not provide a sufficient basis for justifying the operation.⁷⁷

We have serious doubts, however, whether this episode, regrettable as it is, should be seen as calling for the reinforcement of personal data protection laws in Europe. Not only did the legal safeguards existing in Germany suffice, in the final instance, to protect the victims of such data-mining. But, in addition, we have mentioned the need for a monitoring of law enforcement officers which includes the collection of data on the impact of their activities on racial or ethnic minorities.⁷⁸ In the context of Europe today, any further reinforcement of the protection of personal data, especially if it leads to a form of 'sanctuarization' of sensitive data relating to race or ethnicity, could discourage such monitoring: far from ensuring a reinforced protection from discrimination, it could constitute a step backwards in such protection, by depriving victims from having access to statistical data which may in many instances be crucial to proving the existence of discrimination, whether direct or indirect.⁷⁹ It is with this concern in mind that

75 Kett-Straub, *ibid* citing the Constitutional Court's judgment, at 971, n 24.

76 *ibid* at 973; Bignami, n 74 above, 32.

77 Kett-Straub, *ibid* 968.

78 See above, text corresponding to n 45–46.

79 In the case of *Hoogendijk v the Netherlands* the European Court of Human Rights recognized that, unless the victim is allowed to bring forward statistics establishing a presumption of discrimination and shifting the burden of proof on the shoulders of the defendant, discrimination may in certain instances be difficult or impossible to prove: '[W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a *prima facie* indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination' (*Hoogendijk v the Netherlands* (dec) no 58461/00 6 January 2005). This in turn influenced the position of the Court in the case of *D. H. and Others v Czech Republic*, referred to above n 45.

we examine, in the next section, how the fight against ethnic profiling in Europe can be strengthened further.

STRENGTHENING THE MEANS TO COUNTER ETHNIC PROFILING

The discussion in the last section reveals that the use of ethnic profiling strategies by law enforcement officers is in potential conflict with several European human rights norms. But it also emerges that the present European legal framework presents certain gaps and limitations, and only partially responds to the challenges raised by these expanding practices. Despite the encouraging statement made by the European Court of Human Rights in the *Timishev* case, we still lack a clear and specific prohibition of using ethnicity or religion as a proxy for propensity to commit crimes, either in general or in the specific area of counter-terrorism. With respect to ethnic profiling carried out by automatic means, typically through data mining operations, while the current framework is in general satisfactory, its implications in the context of law enforcement activities could be made more explicit, especially since the aforementioned Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters when it will be adopted, will still be insufficient in protecting people belonging to ethnic, religious or national groups, in the face of counter-terrorism strategies which, all too often, are tempted to rely on ethnic, religious or national stereotyping: this, indeed, could undermine the protection currently provided under the Council of Europe standards whose level of protection is higher.⁸⁰ In addition, in order to counter *informal* ethnic profiling practices, carried out by officers acting on the ground, which probably represents the most frequent occurrence of ethnic profiling as defined above, it is essential that states define with the greatest clarity possible the conditions under which law enforcement authorities may use their powers in areas such as identity checks and stop-and-search procedures. Yet, the problem with informal types of ethnic profiling, by contrast with formalised profiling programmes, is not merely one of having adequate legislation prohibiting it: because it takes the form of a *de facto* practice, it may be extremely difficult to detect and prove that law enforcement officers are in fact targeting certain people on account of their ethnic or religious background. From this perspective, a critical aspect of the development of a strategy effectively tackling this phenomenon lies with the ability of public authorities to have sufficient information about how law enforcement officers use their powers on the

80 As mentioned above (text corresponding to n 69–70), the draft EU Framework Decision allows for the processing of sensitive data, including data relating to the race, ethnic origin, or religion of individuals, for the prevention of criminal offences *in general*, without this having to relate to specific inquiries into offences which have been committed. In contrast, the Basic Principles regulating the use of personal data in the police sector, adopted by the Committee of Ministers of the Council of Europe in 1987, only allow such processing of sensitive data in the police sector for specific inquiries into past offences. The ‘reasonable suspicion’ standard recommended in para 3 of General Policy Recommendation n°11 of the European Commission against Racism and Intolerance constitutes a mere transposition, in the exercise of the powers of the police relating to control, surveillance or investigation activities, of this more general principle.

ground *vis-à-vis* people belonging to different ethnic groups. Furthermore, in order to facilitate the bringing of judicial complaints by victims, certain measures can be envisaged to facilitate the task of the complainant in proving that he or she has been subject to ethnic profiling.

Monitoring law enforcement officers' behaviour

That ethnic profiling exists and is a serious problem in various EU countries is attested by many individual testimonies and several NGO's reports.⁸¹ However, in order to adequately address the issue, national authorities cannot rely on anecdotal evidence; they need to have information as precise and comprehensive as possible about how police and other law enforcement officers behave with regard to people from different ethnic backgrounds. This is essential in enabling them to detect whether and when ethnic profiling is practiced in the first place. The Committee on the Elimination of Racial Discrimination thus encourages states parties to the Convention on the Elimination of All Forms of Racial Discrimination to adopt a set of factual indicators facilitating the identification of racial discrimination in the administration and functioning of the criminal justice system. Its General Recommendation n°31 (2005) invites them, in particular, to 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'.⁸² Thus, where the European Commission against Racism and Intolerance recommends in its General Policy Recommendation n°11 that data be broken down by grounds such as national or ethnic origin, language, religion and nationality in order to improve the monitoring of police activities and to detect instances of what it refers to as 'racial profiling', it is hardly on uncharted territory.⁸³

Indeed, this has been the response of many municipalities and states in the United States to the allegations that their law enforcement authorities were disproportionately targeting Blacks and Hispanics in traffic or pedestrian stops: they have set up systems to collect and analyse statistical data on motorists who are stopped, detained, and searched by police patrols, including on their racial and ethnic background, with a view to monitoring the officers' behaviour.⁸⁴ In Europe, only the

81 See, in particular, the work done by the Open Society Justice Initiative, including the reports *Justice Initiatives: Ethnic Profiling by Police in Europe* (New York: Open Society Institute, 2005); *Ethnic Profiling in the Moscow Metro* (New York: Open Society Institute, 2006); *'I Can Stop and Search Whoever I Want': Police Stops of Ethnic Minorities in Bulgaria, Hungary, and Spain* (New York: Open Society Institute, 2007).

82 General recommendation No 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2005) para 1(2), available on <http://www2.ohchr.org/english/bodies/cerd/comments.htm> (last visited 18 February 2008).

83 See above, text corresponding to nn 45–46.

84 See F. Weatherspoon, 'Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: in Search of Viable Remedies' (2004) 65 *University of Pittsburgh Law Review* 721, 743.; D. A. Ramirez, J. McDevitt, A. Farrell, *A Resource Guide on Racial Profiling Data Collection Systems – Promising Practices and Lessons Learned* November 2000 Document prepared with the financial support of the US Department of Justice, available at <http://www.ncjrs.gov/txtfiles1/bja/184768.txt> (last visited 18 February 2008) 2.

United Kingdom has implemented a similar programme. The Criminal Justice Act passed in 1991 contains a section 95 which requires the Home Secretary to publish each year such information as he considers expedient for the purpose of 'a) enabling persons engaged in the administration of criminal justice to become aware of the financial implications of their decisions, or b) facilitating the performance by such person of their duty to avoid discriminating against any persons on the grounds of race or sex or any other improper ground.' In order to fulfil this provision, it was decided a few years later to introduce mandatory ethnic monitoring in police services from April 1996.⁸⁵ According to the system established by the Home Office, each time a search is conducted on a person, the officer must complete a form and record various information, including the self-defined ethnic origin of the person searched,⁸⁶ but also his or her name; the object of and the grounds for the search and its outcome; the date, time and place; and the identities of the officers involved.⁸⁷ This obligation is valid unless there are exceptional circumstances that would make this wholly impracticable, and the person has the right to receive a copy of the search record immediately or at the police station within a year.⁸⁸ The data thereby recorded are then used by the Home Office to produce and publish statistics about stops and searches, broken down by ethnic categories.⁸⁹

Rather than, or in addition to, requiring officers themselves to record data on all the persons against whom they use their powers, the promotion of empirical scholarly research based on the observation of a series of police encounters with citizens and interviews with citizens or officers, can also be envisaged as an alternative means to gauge the existence and extent of discriminatory practices in the police. Systematic and regular data collection, however, presents the advantage of providing state authorities with an overall picture of police officers' conduct in the whole country and of enabling them to follow the evolution of the situation in the long run; in addition, having the law enforcement officers themselves collect the information may encourage raising awareness within the police force of the risks of discrimination, and lead the officers concerned to realize that they are acting on the basis of stereotypes which hitherto may have been unconscious rather than deliberate. The main purpose of such data collection efforts, however, is to highlight potential police misconduct and deter it. Having statistics on the ethnic

85 M. FitzGerald and R. Sibbitt, 'Ethnic Monitoring in Police Forces: A Beginning' *Home Office Research Study* (1997) 173, 9–13; P. Hillyard, 'New Labour and Ethnic Monitoring in Policing' (1999) 70 *Radical Statistics*, available at: <http://www.radstats.org.uk/no070/article6.htm> (last visited 18 February 2008).

86 Originally, it had been decided that officers would record the person's ethnic origin on the basis of their own determination. However, following a recommendation to this effect of the McPherson Report (Sir William McPherson, *The Stephen Lawrence Inquiry* (London, England: The Stationary Office, 1999)), the system was changed in favour of the self-defined ethnic identity (Resource Guide, n 74 above, 39–40). Nonetheless, officers must continue to include their own perception of the ethnic background of the persons stopped and searched (Police and Criminal Evidence Act 1984, Code A, note 18).

87 Police and Criminal Evidence Act 1984, Code A, para 4.3.

88 Police and Criminal Evidence Act 1984, Code A, para 4.1. and 4.2; FitzGerald and Sibbitt n 85 above, 43–44.

89 See *Statistics and Race and the Criminal Justice System* (2005) Home Office publication under section 95 of the Criminal Justice Act 1991, available at <http://www.homeoffice.gov.uk/rds/index.html> (last visited 18 February 2008).

background of the persons stopped, searched, or arrested makes it possible to detect if people of a specific ethnic origin are disproportionately affected by these decisions. These statistics, therefore, permit the authorities to have some degree of control over how police officers use their margin of discretion when performing such duties. When a disproportion is observed, further investigation is needed to verify if it can be justified by objective and legitimate factors. Absent such justification, it should be taken as a sign that police forces are unfairly targeting the members of certain ethnic groups. Furthermore, insofar as the identity of officers conducting the search or arrest is recorded, public authorities can determine if discriminatory behaviours are limited to some individual officers, or whether they reflect a general trend in the police institution – what the Stephen Lawrence inquiry in the United Kingdom referred to as ‘institutional racism’.⁹⁰ More generally, the information on police attitudes towards ethnic minorities provided by these data collection systems will help the authorities in defining adequate responses to ethnic profiling practices where they are observed. Such responses may include, in particular, individual sanctions, the formulation of appropriate internal procedures or training programmes to educate officers about prejudice and stereotypes that may influence their decisions and the promotion of more respectful police–citizens encounters.⁹¹

To be sure, in the European context, the processing of personal data for the purpose of monitoring law enforcement officers’ behaviour would have to comply with the norms relating to the protection of personal data, which were outlined in the previous section. Yet, it should be emphasised that these norms are only concerned with ‘personal data’, namely ‘any information relating to an identified or identifiable individual’.⁹² Hence, no personal data is involved where information is collected on an anonymous basis or once the information collected is made anonymous in order to be used in statistics, since such data cannot be traced to any specific person. In the United States, in some of the jurisdictions where a data collection system was put in place, it was decided that the identity of the citizens stopped and whose racial or ethnic affiliation is recorded, would remain anonymous.⁹³ In most other places however, including in the United Kingdom, the authorities opted for the inclusion, in the initial collection, of data permitting the identification of the person concerned, in order to render it possible to verify the information and/or to determine if the person searched or arrested was eventually charged with any offence. In European states, the legal requirements of the 1981 Council of Europe Convention pertaining to the

90 In the Stephen Lawrence Inquiry, ‘institutional racism’ was defined as ‘the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people. It persists because of the failure of the organisation openly and adequately to recognise and address its existence and causes by policy, example and leadership’ (*Report of an Inquiry by Sir William McPherson of Cluny*, February 1999, cm 4262-I, para 6.34).

91 Weatherspoon, n 84 above, 745–746; Resource Guide, n 74 above, 13.

92 The Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (1981), Article 2.

93 See the experience of the city of San Jose, described in Resource Guide, n 74 above, 21.

automatic processing of personal data and, more specifically, of sensitive data, are therefore applicable. But as we have seen above, whilst these rules restrict the circumstances in which sensitive data, such as information on one's ethnic or racial origins, can be processed, they do not impose an absolute prohibition on the processing of such data.⁹⁴ Combating discriminatory behaviour within the police appears as a legitimate public interest for the pursuance of which such treatment could be allowed, subject to adequate safeguards. In addition, given that the data collected in the framework of ethnic monitoring programmes are used to constitute statistics, the principles enumerated in the Recommendation No R (97) 18 of the Committee of Ministers of the Council of Europe on the protection of personal data collected and processed for statistical purposes⁹⁵ also should be taken into account. This Recommendation provides in particular that the data collected and processed shall be made anonymous as soon as they are no longer necessary in an identifiable form.⁹⁶ It also states that where personal data have been collected and processed for statistical purposes, they shall serve only those purposes, and shall not be used to take a decision in respect of the data subject, nor to supplement or correct files containing personal data which are processed for non-statistical purposes.⁹⁷ In addition, in order for the processing of personal data for statistical purposes to remain proportionate, the principle of finality should be strictly observed: only those personal data shall be collected and processed which are necessary for the statistical purposes to be achieved.⁹⁸ These are important safeguards, but they are safeguards, again, which do not impose insuperable obstacles to an improved monitoring of the practices of law enforcement authorities in order to identify patterns of discrimination.

Proving ethnic profiling in courts

Like other forms of discrimination, that resulting from informal ethnic profiling is extremely difficult to prove in a judicial setting. It is especially so when the vic-

⁹⁴ In its resolution on *Non-discrimination and equal opportunities for all – A framework strategy* adopted on 8 May 2006 (2005/2191(INI), EP doc A6-0189/2006 (rapp T. Zdanoka)), the European Parliament called for a clarification of the requirements of data protection legislation on this issue, and asked in particular the Member States to 'develop their statistics tools with a view to ensuring that data relating to employment, housing, education and income are available for each of the categories of individual which are likely to suffer discrimination based on one of the criteria listed in Article 13 of the EC Treaty' (para 20). Following a suggestion of the EU Network of independent experts on fundamental rights (see EU Network of Independent Experts on Fundamental Rights, Thematic Comment n°3: the rights of minorities in the Union (April 2005), available at: <http://ec.europa.eu/justicehome/cfr.cdf/index.en.htm> (last visited 18 February 2008)), the European Parliament called for the Working Party established under Article 29 of Directive 95/46/CE of the European Parliament and the Council 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 to deliver an opinion on the question of how the use of statistical data for the purposes of combating discrimination could be reconciled with the requirements of data protection legislation.

⁹⁵ Adopted by the Committee of Ministers on 30 September 1997 at the 602nd meeting of the Ministers' Deputies.

⁹⁶ Para 3.3.

⁹⁷ Para 4.1.

⁹⁸ Para 4.7.

tim is required to put forward elements demonstrating, beyond reasonable doubt, that a discriminatory motive has been underlying a particular behaviour. Indeed, as highlighted by Canadian courts: 'As with other systemic practices, racial profiling can be conscious or unconscious, intentional or unintentional.'⁹⁹ Hence, '[f]ailing an admission on the part of the officers, which is unlikely, the proof of racial profiling will most often be indirect.' The Canadian courts thus consider that 'if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence.'¹⁰⁰ In the view of the Canadian judges, this reality needs to be taken into account when considering the evidence brought by a person claiming to be the victim of ethnic profiling. Accordingly, they have come to allow a shifting of the burden of proof in such contexts: a criminal defendant, arrested following a stop and search procedure alleged to constitute a form of ethnic profiling, may establish a presumption that such profiling has occurred by proving that 'it is more probable than not' that there was no articulable cause for the stop other than the fact of his or her racial or ethnic origin.¹⁰¹

This approach could be a source of inspiration for European jurisprudence or legislation. The EU member states are already familiar with the notion of shifting the burden of proof in antidiscrimination cases. Under the 2000 Equality directives, they are under the obligation to ensure that when persons claiming to be the victims of discrimination prohibited by these directives, establish before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.¹⁰² It is true that in the context of criminal proceedings, the presumption of innocence, as enshrined in Article 6(2) of the European Convention on Human Rights, may impose limits to such mechanism. These directives therefore do not impose the possibility of shifting the burden of proof in such proceedings. However, the European Court of Human Rights has made clear that the Convention does not prohibit presumptions of fact or law in principle, but rather requires states to confine them within reasonable limits, which maintain the rights of defence. Thus, the criminal law of a state party can establish a presumption of guilt in particular contexts, insofar as such presumption is not absolute and does not lead to depriving the defendant of every possibility of defence, for instance by establishing a case of *force majeure* or proving unavoidable error.¹⁰³ A shift of the burden of proof would significantly facilitate the task of the victims in proving that they have been subject to ethnic profiling. In addition, where statistics on stops, searches, or arrests by the police, broken down by ethnic background, are available, allowing the complainants to produce such statistics (or other types of reliable and relevant studies) in

99 *The Queen v Campbell, Alexer*, Court of Quebec (Criminal Division) (n°500-01-004657-042-001) (Judgment of 27 January 2005 by the Honourable Westmoreland-Traoré) at [34].

100 *ibid* at [35] (quoting from *R v Brown*, 173 CCC (3d) 23 at [44].

101 *ibid* at [25].

102 Directive 2000/43/EC, Article 8(1); Directive 2000/78/EC, article 10(1).

103 Eur Ct HR, *Salabiaku v France* (Appl No 10519/83) Judgment of 7 October 1988 § 28. See also Eur Ct HR (2nd section), *Radio-France and Others v France* (Appl No 53984/00) Judgment of 30 March 2004 § 24.

courts, could in many cases greatly help them establishing a presumption that they have been the victim of a discriminatory practice.

CONCLUSION

We have seen that ethnic profiling may take two forms: it can be formalized, and consist in the processing of data relating to race or ethnicity, religion, or nationality; and it can be informal, as in stop and search procedures which, because they are insufficiently regulated, are conducted in ways tainted by prejudice or stereotyping, conscious or unconscious. Whatever its form, ethnic profiling is not only inefficient. It is also counterproductive. It alienates minority communities at a time when social cohesion is needed more than ever, and when it is becoming widely recognized that intelligence – and, therefore, the maintenance of good relationships between law enforcement authorities and all communities – is crucial to combating crime effectively. And it reinforces in the public the very stereotypes which it stems from in the first place. In order to combat ethnic profiling, we must first have regard to the two forms it can take.

As regards the first of those two forms of ethnic profiling – which consists in the processing of data relating to race or ethnicity, religion or nationality, we submit that the existing regime of data protection in Europe is in principle adequate to the task it is asked to perform: to protect individuals from the improper use of such criteria in decisions relating to law enforcement. Of course, at the level of the EU, the Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters still has not been adopted, and when it will be, it will still present a number of gaps we have highlighted above.¹⁰⁴ But all the EU Member States are parties to the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data,¹⁰⁵ and this instrument should be implemented in conformity with the Recommendation regulating the use of personal data in the police sector which the Council of Europe's Committee of Ministers addressed to the Member States of the Council of Europe in 1987. This recommendation explicitly restricts the collection of data relating to race or ethnicity by law enforcement agencies to situations where it is '*absolutely necessary* for the purposes of a particular inquiry', thus excluding such processing of sensitive data in the police sector for general purposes or in the context of proactive policing.¹⁰⁶ Provided this is properly implemented in the national laws of the Council of Europe member States, this should ensure an adequate safeguard against the kind of data mining which took place in Germany in 2001–2003, before being condemned by the German Federal Constitutional Court.

The danger is not so much, then, that data protection legislation is insufficiently protective. It is, rather, that it could be interpreted too rigidly in certain cases, and turn into an obstacle to an improved monitoring of the behaviour of

¹⁰⁴ See above nn 70–72 and corresponding text.

¹⁰⁵ See above n 53.

¹⁰⁶ See above n 61.

law enforcement officers, in order to prevent and effectively prohibit the second form of ethnic profiling we have distinguished: the informal, often unconscious, use of race or ethnicity in the exercise of their powers by law enforcement authorities. The rise of ethnic profiling in policing requires that we document more systematically the impact on identified minorities of the practices of law enforcement officers, especially in identity stops. Contrary to a widely held assumption, data protection legislation in Europe – the principles of which are laid down in the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data – does not prohibit such monitoring. Only if we can adequately document a practice can we then reflect on the requirements of the principle of non-discrimination. Where it appears that law enforcement authorities are disproportionately targeting certain minority groups defined by their race or ethnicity, religion or nationality, this should be denounced as ethnic stereotyping, and remedial measures – including, in the most egregious cases, disciplinary or other sanctions – should be taken. It should not matter, in our view, that a statistically significant relationship can be shown to exist between certain criminal behaviours and membership in such targeted groups: ethnic profiling is not simply a misuse of the resources of law enforcement agencies, leading to the perverse effects mentioned above; because it consists in ‘the invidious use of race and ethnicity as markers of suspicion’,¹⁰⁷ it is a form of discrimination and should be prohibited as such, not only because it does not contribute to effective crime prevention or detection – but simply because race or ethnicity, religion or nationality should not be used in our societies as criteria for decision-making in law enforcement.

107 C. Stone, ‘Preparing a Fresh Assault on Ethnic Profiling’ *Justice Initiatives* June 2005, 1.