

# ENAR Fact Sheet 40



European Network Against Racism

Réseau européen contre le racisme

Europäisches Netz gegen Rassismus

## Ethnic Profiling

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This fact sheet explains the concept and practice of ethnic profiling: the use by law enforcement officials of generalisations based on race, ethnicity, religion or national origin, rather than individual behaviour or objective evidence, as the basis for directing discretionary law enforcement actions. Ethnic profiling is a form of discrimination that undermines the commitment to non-discrimination as a fundamental value of the European Union.

The fact sheet will enhance the capacity of ENAR members to develop mechanisms to document and address ethnic profiling in their work. It begins by defining ethnic profiling, and outlines the applicable European and international non-discrimination standards. Following sections outline key themes in the debates surrounding the issue and explore why this debate is both controversial and topical. The fact sheet then describes different types of ethnic profiling practices in more detail, and explores the impact of ethnic profiling on individuals, communities and policing, also providing two cases studies on ways to address ethnic profiling.

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## Introduction

“Ethnic profiling” is defined as the use by the police, security, immigration or customs officials of generalisations based on race, ethnicity, religion or national origin - rather than individual behaviour or objective evidence - as the basis for suspicion in directing discretionary law enforcement actions. It is most often manifest in police officers’ decisions about who to stop for identity checks, questioning, searches and sometimes arrest. Ethnic profiling can also be used to “mine” or undertake computerised searches of databases for potential terrorist suspects or in targeting surveillance and anti-radicalisation policies.

Although ethnic profiling is not a new tactic, its use appears to have intensified in the aftermath of the terrorist attacks on New York (2001), Madrid (2004) and London (2005). Evidence shows that police officers across Europe have long used generalisations about race, ethnicity, religion or national origin in targeting minority communities for inquiries.

Today, several dynamics combine to drive both new and ongoing forms of ethnic profiling. Europe is confronting a new terrorist threat in the form of potential attacks by Al Qaeda or in the phenomenon of the “home-grown terrorist” inspired by Al Qaeda. Simultaneously, xenophobic attitudes are increasing across Europe, as are campaigns against undocumented migration. These developments have led to an intensification of ethnic and religious profiling as a means to target police and intelligence resources more effectively and detect potential terror suspects, and seek out illegal immigrants.

Ethnic profiling violates the principle of equal treatment under the law and is a form of race discrimination that is prohibited under international law. Indeed, it is a form of discrimination that undermines the commitment to non-discrimination as a fundamental value of the European Union. It is also ineffective and counter-productive in that it alienates the very communities whose support is necessary for fighting crime and terrorism.

Despite the prevalence of ethnic profiling across Europe, there remains a lack of clarity as to what practices constitute ethnic profiling and under what circumstances it is permissible to use sensitive personal data to take law enforcement decisions. Many European governments share a misperception about what is permitted under data protection laws, as well as rejecting the need to collect aggregated ethnic statistics due to a perceived incompatibility with notions of citizenship and privacy. This is further complicated by a concern on the part of European policy-makers that attempts to address ethnic profiling will hinder law enforcement’s ability to fight crime and terrorism. As this fact sheet demonstrates, this is not the case - recognising and addressing ethnic profiling is possible and doing so can improve both the effectiveness of policing and security.

## What is ethnic profiling?

Much of the conceptual confusion around the concept of ethnic profiling comes as a result of the conflation of “**ethnic profiling**” with “**criminal profiling**.” Not all profiling is ethnic profiling. “Criminal profiling” is an explicit investigative tool in which law enforcement use a defined set of characteristics to identify people likely to engage in criminal activity. Criminal profiling is an accepted and lawful law enforcement tool designed to allow the most efficient allocation of scarce law enforcement resources. Through analysing the nature of a crime and the manner in which was conducted, an offender profile can be constructed with some predictive value to aid police investigations. The “serial killer profile” or “drug courier profile” are classic examples. As long as the profiles used by police are based on factors that are objective and statistically proven to be significant indicators of criminal activity, criminal profiling is legal. The use of criminal profiling has not generated public controversy although many criminologists question its efficacy.

Ethnic profiling is sometimes confused with “**suspect profiles**” or “**suspect descriptions**” which use victim or witness reports to describe a particular person or persons being sought in connection with a

particular crime at a particular time and place. Personal appearance, which almost invariably includes racial or ethnic characteristics, is a core component of a suspect description. For example, a suspect description might state that the suspect was a “white male about six feet tall with a heavy build, that he was wearing a leather jacket and blue jeans and had brown hair and blue eyes and was seen in the proximity of Green Street at 15:45.” When suspect descriptions are too general, however, there is a danger that they may be used to over-target individuals who are perceived to share the same ethnicity as the suspect being sought by law enforcement agencies.

Law enforcement officers may also use ethnicity and other personal factors when they have specific, concrete intelligence regarding crimes involving a particular group of potential suspects at a specific location for a short, specified duration - in effect, a suspect profile of a specific group. Law enforcement agencies often create special temporary task forces to address crime organisations or problems with national or ethnic links. Immigration, customs and border guards may use profiles that include ethnicity or national origin when seeking to detect illegal migration, smuggling and organised crime. As with vague suspect descriptions, the operational use of broad concepts such as an “ethnic gang” or “nationality-based crime ring” must be treated with great caution. Such profiles risk being over-inclusive, perpetuating harmful stereotypes and may undermine police efficacy if they are not based on up-to-date and accurate intelligence. Crime patterns often adapt to law enforcement practices in an effort not to be detected.

### Definitions of ethnic profiling

#### Simple

“Police and law enforcement officers are using ethnic profiling when they view people as suspicious because of who they are, what they look like, or where they pray, rather than because of what they have done.”

#### Comprehensive

“Ethnic profiling is the use by the police, security, immigration or customs officials of generalisations based on race, ethnicity, religion or national origin - rather than individual behaviour or objective evidence - as the basis for suspicion in directing discretionary law enforcement actions. It can also include situations where law enforcement policies and practices, although not themselves defined either wholly or in part by reference to ethnicity, race, national origin or religion, nevertheless do have a disproportionate impact on such groups within the population and where this cannot otherwise be justified in terms of legitimate law enforcement objectives and outcomes.”

Specific definitions of ethnic profiling vary along a continuum ranging from the use of ethnicity alone as the reason for the police action to those using ethnicity along with other factors as the reason for the action. Using a narrow definition, ethnic profiling occurs when a police officer makes a decision *solely* on the basis of a person’s perceived race or ethnicity. This excludes practices which may be legally permissible but are nonetheless racially biased, such as pretextual stops,<sup>1</sup> or stops under youth loitering laws or immigration regulations that are based on an individual’s appearance. A broader definition of ethnic profiling acknowledges that race may be one of several factors involved in an officer’s decision to

<sup>1</sup> A pretextual stop is when police or law enforcement officers use traffic violations or other powers that give them vast discretion as a pretext for investigating other crimes. For example, in the US, traffic laws are so extensive that no one can drive very far without violating a law. This gives police officers freedom to use traffic violations as a pretext for investigating other crimes, in particular drug offences and blacks and Latino/as are disproportionately targeted by the practice. See Harris, David, *Profiles in Injustice - Why Racial Profiling Cannot Work*, New York: The New Press (2002).

take action. For example, a pedestrian stop is likely to be made on the basis of a confluence of several factors including race and ethnicity, dress (for example, hooded sweatshirts, baggy trousers, perceived “gang dress”), time of the day, and/or geography (for example, looking “out of place” in an area or being in a designated “high crime area”).

This broader definition acknowledges that ethnic profiling can take both direct and explicit forms as well as indirect and even unintentional forms. Ethnic profiling may reflect purposefully racist behaviour of individual officers or the cumulative effects of unconscious use of racial stereotypes, but it may also result from institutional factors such as the use of certain police tactics or a focus on specific areas or neighbourhoods that impact different ethnic groups unequally.

Establishing the use ethnic profiling practices is straightforward when there is proof that superiors specifically order officers to target certain ethnic groups, as sometimes occurs in respect of airport searches or immigration stops aimed at rounding people up for deportation. In these situations, a profile may be a written formula distributed to customs or immigration officers or an oral instruction issued by senior officers. However, ethnic profiling frequently results from the cumulative effect of decisions by individual officers, some of whom may hold racist beliefs but many of whom do not and are unaware of the degree to which generalisations and ethnic stereotypes are driving their subjective decision-making about which individuals to subject to law enforcement action. For example, interviews with police officers in Bulgaria, Hungary and Spain in 2005 revealed that some police officers held generalised beliefs that young black immigrant males were responsible for drug dealing; that Roma were more likely to be involved with robberies or that those who “looked foreign” were most likely to be illegal migrants.<sup>2</sup> Ethnic profiling remains persistent and pervasive precisely because it is the result of habitual, and often subconscious, use of widely-accepted negative stereotypes in making decisions about who appears suspicious.<sup>3</sup>

Ethnic profiling may also result from institutional policies targeting certain forms of crime and/or certain areas without consideration for the disproportionate impact such policies and resource allocations may have on minority communities. Policy decisions of this sort often reflect larger public and political concerns and, in some cases, public prejudices. However, they can also arise from the institutional culture of law enforcement organisations as a whole, which build up a tradition of policing in certain ways, especially in relation to particular localities or groups within their areas. There is evidence to show, for example, that even when dealing with similar types of populations and profiles of crime, police in one city may make far greater use of tactics such as stop and search than those in another city within the same country. Many of these practices would not be captured by a narrow definition of ethnic profiling as the use of ethnicity, race, religion or nationality as the sole or exclusive basis for targeting suspicion.

## Legal framework

Ethnic profiling casts suspicion on individuals because of the colour of their skin or perceived religious beliefs rather than their actions, thus violating a basic principle of the rule of law that law enforcement should respond to an individual’s conduct.

There is no international or European standard which expressly forbids ethnic profiling as such. Nevertheless, both the United Nations Committee on the Elimination of Racial Discrimination (CERD) and the Council of Europe European Commission against Racism and Intolerance (ECRI) have made clear that

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<sup>2</sup> Open Society Justice Initiative, *I can stop and search whoever I want: ethnic profiling by police in Bulgaria, Hungary and Spain*, New York: Open Society Institute (2006).

<sup>3</sup> “As with other systemic practices, racial profiling can be conscious or unconscious, intentional or unintentional. Racial profiling by police officers may be unconscious.” See *The Queen v. Campbell*, Court of Quebec (Criminal Division) (no. 500-01-004657-042-001), Judgment of Jan. 27, 2006, *quoted in* European Union Network of Independent Experts on Fundamental Rights, “Ethnic Profiling,” CFR-CDF. Opinion 4. 2006, at 7.

ethnic profiling violates the international prohibition against discrimination.<sup>4</sup> Similar conclusions have been drawn from within the European Union. The EU Fundamental Rights Agency has affirmed that:

*“Any form of ethnic profiling is likely to be illegal also in terms of international law because it infringes the guarantees of the International Convention on the Elimination of all Forms of Racial Discrimination. All Member States of the EU are bound by this Convention.”*<sup>5</sup>

The principle test of the legality of ethnic profiling in the European Union is the non-discrimination standard of the European Convention on Human Rights (ECHR), embodied in Article 14, which prohibits discrimination in the enjoyment of the rights protected by the Convention, such as the right to privacy, freedom of movement, freedom of religion, and freedom from cruel and inhuman treatment. Under the discrimination test established by the jurisprudence of the ECHR, if two similarly situated individuals are treated differently in the absence of an objective and reasonable justification, one of them has been subjected to unlawful discrimination.<sup>6</sup>

Ethnic profiling practices must pass three scrutiny tests if they are to constitute a legitimate difference of treatment that does not constitute discrimination: effectiveness, proportionality, and necessity. Preventing, detecting and investigation crime and terrorism represent a legitimate aim of law enforcement and key function of the state. However, given its reliance on ethnic or racial criteria, it will rarely, if ever, be possible to show that ethnic profiling is objectively and reasonably justified. The crucial questions are whether ethnic profiling is a proportionate and necessary tool. In other words, do the benefits in terms of law enforcement efficiency outweigh the costs of using ethnic profiling? And could the same objectives be produced using an alternative, less harmful approach?

ECHR case law has established that where race constitutes an *exclusive* or *decisive* factor for law enforcement action, it amounts to prohibited discrimination.<sup>7</sup> In practice, it is difficult to establish a racist intent - ethnic profiling is often the result of **indirect discrimination**; when an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a disadvantage when compared with other persons. In *D.H. and Others v. the Czech Republic*,<sup>8</sup> the European Court affirmed that patterns of discriminatory impact resulting from a policy that is not necessarily designed with discriminatory intent are a form of “indirect discrimination” prohibited by Article 14. Although *D.H* did not involve police actions, the concept of indirect discrimination as elaborated by the Court is equally relevant to patterns of discriminatory stops stemming from ethnic profiling by police. Thus even when ethnic profiling is established through inferences derived from broad patterns of police behaviour and regardless of whether it can be proven to result from intentionally racist policies, it will amount to unlawful discrimination if shown to be neither proportionate nor necessary.

It is important to note that, even in the context of the post 9/11 terror threat, the UN CERD has emphasised that the prohibition against racial discrimination is a peremptory and non-derogable norm, and that states must ensure that counter-terrorism programmes do “*not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping.*”<sup>9</sup> When the considerable harms caused by

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<sup>4</sup> Committee for the Elimination of Racial Discrimination (CERD), *General Recommendation No. 31: Administration of the Criminal Justice System*, para. 20.; European Commission against Racism and Intolerance (ECRI), *General Policy Recommendation No. 11 on combating racism and racial discrimination in policing (adopted on 29 June 2007)*, CRI/Council of Europe (2007).

<sup>5</sup> Opinion of the European Union Agency for Fundamental Rights on the Council Framework Decision for a Passenger Name Record (PNR) data for law enforcement purposes, at 39.

<sup>6</sup> *Timishev v. Russia*, App. Nos. 55762/00, 55974/00, Eur. Ct. Hum. Rts., Judgment of December 13, 2005

<sup>7</sup> *Timishev v. Russia*, App. Nos. 55762/00, 55974/00, Eur. Ct. Hum. Rts., Judgment of December 13, 2005, at 58-59; *Hoffmann v. Austria*, Eur. Ct. Hum. Rts., Judgment of June 23, 1993, at 36 (religion); *Gaygusuz v. Austria*, Eur. Ct. Hum. Rts., Judgment of September 16, 1996, at 42 (nationality).

<sup>8</sup> *D.H. and Others v. the Czech Republic*, App. No. 57325/00. Eur. Ct. Hum. Rts., Grand Chamber, judgment of November 13, 2007.

<sup>9</sup> CERD, General Recommendation No. 30 (Non-Citizens), para. 6. CERD has also urged states to “take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that

measures that rely on ethnic profiling are weighed against their limited success in actually preventing terrorism, there is little doubt that they are disproportionate and fall outside non-discrimination standards.

Immigration decision-making is by definition based on the nationality and the visa status of the person seeking to cross the border. Different treatment on the basis of nationality does not constitute illegal ethnic profiling in immigration matters, to the extent that these pertain to decisions relating to the tightly circumscribed issues of entry and residence and that this treatment is proportionate. Where different groups of persons of the same nationality are treated differently on such grounds, this is clear ethnic profiling and has been found to be unlawful in the UK courts. This was the judgment of the United Kingdom House of Lords in the *Prague Airport Case* which ruled that UK immigration officials were unlawfully singling out Czech Roma travellers to the UK.<sup>10</sup>

European courts have yet conclusively to resolve whether there may be greater scope for the use of ethnic profiling in the context of immigration enforcement. The *Cisse Case* also allowed the use of appearance, but in tightly circumscribed circumstances of immigration enforcement at a demonstration of illegal migrants.<sup>11</sup> National courts have taken divergent approaches to the question of whether ethnic profiling is acceptable in the ambit of immigration policy enforcement. For example, a Spanish Constitutional Court ruling of 2001 accorded the police broad latitude in this respect, ruling that it is permissible for the police to “use the racial criterion as merely indicative of a greater probability that the interested party was not Spanish.”<sup>12</sup>

Immigration enforcement also constitutes a major gap in the protections afforded by the EU’s keystone non-discrimination standard - Council Racial Equality Directive 2000/43/EC. Commonly known as “the Race Directive,” this establishes in EU law the principle of equal treatment between persons irrespective of racial or ethnic origin.<sup>13</sup> It applies in regard to “goods and services.”<sup>14</sup> The Preamble states that discrimination may undermine the EU objective of an area of freedom, security and justice, leading some to claim that policing and law enforcement constitute “public goods and services” and thus should fall within the scope of the Directive. To date, that assertion has not yet been assessed either by national courts or by the European Court of Justice.

Even if its applicability to law enforcement action is accepted, an important exception to the protection offered by the Race Equality Directive is created by Article 3(2) which allows differential treatment on ground of nationality. While immigration decisions have to be made on the basis of nationality, this broad exclusion of nationality discrimination leaves a significant gap in protection and can ‘mask’ forms of discrimination based on race or ethnic origin as supposedly legitimate differences based on nationality. For example, stops conducted for the purpose of immigration control often fall on those people who “look foreign” to police, which in practice generally means non-white European appearance. In an increasingly multi-ethnic Europe, this practice imposes an unfair burden of law enforcement attention on minority groups, particularly when police officers in many countries are ordered to identify and detain illegal immigrants for deportation.<sup>15</sup>

While the Race Directive fails to protect against discrimination on the basis of nationality, and has yet to be applied to domestic law enforcement, greater cooperation among Europe’s law enforcement agencies is advancing rapidly under *Article 29* of the Treaty on the European Union which states that the Union’s objective shall be “to provide citizens with a high level of safety within an area of freedom,

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person’s colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion.” CERD, General Recommendation No. 31 (Administration of the Criminal Justice System), para. 20.

<sup>10</sup> R v. Immigration Officer at Prague Airport ex parte Roma Rights Centre and Others (“Roma Rights”), UKHL 55, Judgment of Sept. 17, 2004.

<sup>11</sup> *Cisse v. France*, App. Nos. 51346/99, Eur. Ct. Hum. Rts., final judgement 9 August 2002.

<sup>12</sup> *Rosalind Williams*, Spanish Constitutional Court Decision No. 13/2001, January 29, 2001 (STC 13/2001).

<sup>13</sup> Directive 2000/43/EC, the Race Directive, OJ L 180 19.7.2000, p.22.

<sup>14</sup> Directive 2000/43/EC, the Race Directive, OJ L 180 19.7.2000, article 3(1)h.

<sup>15</sup> See for example: Victor Mallet “Madrid police told to target illegal migrants” in *Financial Times*, February, 16 2009.

*security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.”* On this basis, an increasing number of operational agreements have been developed to facilitate law enforcement cooperation and automated access to law enforcement information between member states in order to fight terrorism and serious crime.<sup>16</sup> Furthermore, the EU is rapidly building vast databases for immigration and border control and allowing law enforcement access to these resources to assist in fighting terrorism and crime.<sup>17</sup>

Transnational operational capacity and cooperation is being developed at a pace that far outstrips the development of accountability standards and oversight mechanisms. It is troubling that these initiatives fall within the scope of EU action, but outside the scope of EU protections against discrimination. It is even more troubling when the inadequate state of data protection standards for law enforcement cooperation is added to the equation. One aspect of this complexity is the fact that data for the SIS, VIS, and entry/exit system would be collected under the authority of the Schengen Border Code but would be used by Member States in accordance with national regulations. This creates multiple frameworks for the use of sensitive data with little oversight or accountability. The Framework Decision on the Protection of Personal Data in the context of law enforcement cooperation has been criticised as establishing lesser standards than those set out in the 2005 European Data Protection Directive.

## Ethnic profiling in practice: from stops and ID checks to data-mining

International and regional organisations as well as nongovernmental organisations (NGOs) have consistently raised concerns that stop powers are being used in a discriminatory manner across Europe. This concern has been raised by the EU Network of independent experts on fundamental rights, documenting the broad police powers in many EU member states, they note: *“the wide discretionary powers of the police in ‘stop and search’ procedures and the absence of any monitoring of the behaviour of the police [...] are particularly problematic, since they create a sense of impunity within the police and of powerlessness - but also resentment - among the targeted minorities.”*<sup>18</sup>

The most systematic documentation of ethnic profiling practices appears in the regular country reports of the European Commission against Racism and Intolerance (ECRI), which in recent years has expressed concern about ethnic profiling in Austria, Germany, Greece, Hungary, Romania, Russia, Spain, Sweden, Switzerland, Ukraine, and the United Kingdom.<sup>19</sup> Ethnic profiling in stops and ID checks has also been identified in ENAR shadow reports; in 2007 it was named as a significant issue in reports from Cyprus, Denmark, Estonia, Finland, France, Italy, Luxembourg, Slovakia and Sweden.<sup>20</sup> It is difficult to measure with any precision the extent of ethnic profiling in Europe as only the United Kingdom systematically gathers data on policing and ethnicity. In the UK, official data on stop and search practices in England and Wales show significant disparities in the rates at which police stop different ethnic groups. The most

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<sup>16</sup> For example the EU arrest warrant, and data exchange under Treaty of Prüm (Schengen III) 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

<sup>17</sup> These include the Visa Information System (VIS), the Schengen Information System (SIS I and SIS II), and Eurodac, an asylum database. EU authorities are proposing to create operational links between the VIS, SIS II, and Eurodac, and the European Commission recently presented proposals for the development of a new entry/exit system. Still pending but anticipated is a Commission call for the creation of a European Union database of residence permits and passports. In June 2008, the European Council adopted a Council Decision allowing law enforcement access to VIS records for the prevention, detection, and investigation of terrorist offenses and other serious crime.

<sup>18</sup> European Commission, EU Network of Independent experts in fundamental rights, December 2006, CFR CDF. Opinion 4, 2006. (In 2007, the network was incorporated into the new EU Fundamental Rights Agency.)

<sup>19</sup> European Commission against Racism and Intolerance, *Second Report on Austria*, (Strasbourg: ECRI, 2000), para. 39; *Second Report on Romania*, (Strasbourg: ECRI, 2001), para. 46; *Second Report on the Russian Federation*, (Strasbourg: ECRI, 2001), para. 62; *Second Report on Spain*, (Strasbourg: ECRI, 2002), para. 38; *Third Report on Switzerland*, (Strasbourg: ECRI, 2003), at 29; *Second Report on Ukraine*, (Strasbourg: ECRI, 2003), para. 42; *Second Report on the United Kingdom*, (Strasbourg: ECRI, 2000), para. 45. For a summary of this reporting, see Misti Duvall, “Ethnic Profiling by Police in Europe,” *Justice Initiatives*, (New York: Open Society Institute, June 2005), at 14–25.

<sup>20</sup> European Network Against Racism (ENAR) “Racism in Europe: ENAR Shadow Report” (Belgium, ENAR, 2007), at 17.

recent data, covering 1 April 2007 through 31 March 2008, show that black people were 7.4 times more likely to be stopped and searched than white people and that Asian people were 2.3 times more likely to be stopped and searched than white people.<sup>21</sup>

UK data also shows the relation between discretion and ethnic profiling. Stops conducted pursuant to Section 1 of the Police and Criminal Evidence (PACE) Act 1984 must be based on a reasonable suspicion that the individual stopped is likely to be involved in criminal activity. In contrast, stops conducted under Section 60 of the Criminal Justice and Public Order Act 1994 do not have to be based on a reasonable suspicion.<sup>22</sup> Data for 2007-2008 show that when UK police exercised their authority under Section 60, black people were 10.7 times more likely to be stopped and searched than white people, while Asian people were 2.2 times more likely to be stopped and searched than whites.<sup>23</sup> Where officers have the broadest discretion and are able to use their own beliefs about who is involved in crime or who is worth stopping - discrimination is likely to be greatest.

Unlike routine police contacts on the street or in public places, **raids** represent perhaps the most intrusive police tactic, often involving a sudden invasion of a building or area, often timed to maximise the element of surprise. Raids frequently involve an intrusion into private spaces such as homes, places of worship or association, or work places. They may target individual addresses or whole neighbourhoods. Raids can be a proper exercise of police power and an important law enforcement tactic. Legitimate objectives of raids include: apprehending wanted offenders, obtaining evidence of illegal activity, recovering property, preventing commission of a crime, and/or confiscating contraband. Yet raids can move into the category of impermissible ethnic profiling when police determine targets based on stereotypes associating ethnic or religious groups with crime, or when they target entire communities based on evidence related to the criminal activities of one or two residents. In practice, some police raids appear to stray from legitimate objectives and constitute the illegal harassment of minority communities. Such harassment is particularly clear in raids on Roma communities. Roma camps have been the targets of police raids in many countries and Roma rights advocates view raids as an “egregious form of ethnic profiling” that subject entire communities to a form of collective guilt.<sup>24</sup>

Much ethnic profiling takes place in the name of immigration control both at international borders and within national territory. Many European citizens of minority ethnic origin have experienced being singled out for extra attention by police and/or immigration or customs officials in airports and train stations. The extent of the problem has been hard to quantify because research on law enforcement practices at national borders is complicated by the limited access offered to researchers and governments’ desire to maintain secrecy about security practices. In many Member States of the European Union, ethnic profiling is driven by the domestic enforcement of immigration law. Indeed, as noted, in Spain the Constitutional Court has ruled that police officers may use ethnicity as a factor in making decisions about immigration enforcement. Police in Madrid, for example have been set weekly quotas for arresting illegal immigrants and told to hunt for potential detainees outside their own districts if they cannot meet the targets. ID checks inevitably become based on ethnic profiling as officers attempt to meet their quotas.<sup>25</sup> Similar targets are set in France.<sup>26</sup>

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<sup>21</sup> Ministry of Justice, “Statistics on Race and the Criminal Justice System – 2007/8,” (London: Ministry of Justice, 2009,) at 28.

<sup>22</sup> Home Office, Police and Criminal Evidence Act 1984, Code of Practice A, (Amended 1<sup>st</sup> January 2009). Section 60 of the Criminal Justice and Public Order Act 1994 as amended by Section 8 of the Knives Act 1997 allows an Inspector or higher ranked officer who reasonably fears serious violence or the carrying of weapons in a particular locality to authorize uniformed officers to search any person or vehicle in that locality for weapons for a period of 24 hours.

<sup>23</sup> Ministry of Justice (2009), 29, 49, 205.

<sup>24</sup> Iulius Costas, “ID checks and police raids: Ethnic profiling in Central Europe” in “Ethnic Profiling by Police in Europe,” *Justice Initiatives*, June 2005, at 27. Also see: European Roma Rights Centre and Greek Helsinki Monitor, “*Cleaning Operations: Excluding Roma in Greece*,” (2003); European Roma Rights Centre: *Always somewhere else: Anti-Gypsyism in France* (Budapest: ERRC, Country Report Series No. 15, 2005); *The Non-Constituents: Rights deprivation of Roma in post-genocide Bosnia-Herzegovina*, (Budapest: ERRC, Country Report Series 13, 2004); *The Limits of Solidarity: Roma in Poland after 1989*, (Budapest: ERRC, 2002). OSCE Human Dimension Implementation Meeting, *Statements by the International Helsinki Federation for Human Rights (IHF)* (Warsaw, September 9–19 2002). European Roma Rights Centre, *Campland: Racial Segregation of Roma in Italy*.

<sup>25</sup> *Rosalind Williams*, Spanish Constitutional Court Decision No. 13/2001, January 29, 2001 (STC 13/2001).

Beyond the standard immigration and security checks at borders and ports of entry, modern technology has created a new capacity to register, store and review vast amounts of personal data - including the personal data required of Travellers upon entry to the European Union. Recently created European Union databases include the Visa Information System (VIS), the Schengen Information System (SIS I and SIS II) and Eurodac, an asylum database. These databases are viewed not only as a tool of immigration control, but also as a resource for criminal and counter-terror investigations, as reflected in proposals to grant law enforcement access to these data bases, and create operational links between the VIS, SIS II, and Eurodac. The new proposed EU entry-exit system is the most recent addition to these systems. In addition to checks by immigration officers at borders, this system would allow law enforcement to perform non-border identity checks based upon biometric data, but does not detail under what circumstances such searches would be permitted. Still pending, but anticipated, is a European Commission call for the creation of a database of residence permits and passports. The expanded use of data collected for immigration and border control purposes by law enforcement bodies is governed by a complex data protection regime and lacks adequate protection of fundamental right to non-discrimination, thus creating the possibility for ethnic profiling (and grave intrusions on privacy) through the use of data mining.

“Data-mining” is a technique that frequently - but not always - uses profiles. Recent EU discussions have sometimes incorrectly conflated data-mining with criminal profiling more generally, but it is in fact only one technique out of many (listed below) that utilise profiles. Usually, data-mining involves automated searches large databases of personal information, such as immigration, student records, health and housing records using a predetermined set of characteristics. Some forms of data-mining do not use profiles, but rather seek connections between an original suspect and other persons that suspect has been in contact with often via telephone or internet records. When data-mining does use profiles, these often - but not always - include ethnicity, religion or national origin. In cases where sensitive personal information is included in the profile for data-mining, the mining may be legitimate and meet legal standards requiring lawful purpose, proportionality and necessity if there is a proven statistical correlation that increases the effectiveness of law enforcement to the degree that this outweighs any harms that may be done.<sup>27</sup>

One example of data-mining took place in Germany between 2001 until early 2003. After it was discovered that several of the perpetrators of the 9/11 terrorist attacks had lived and studied in Hamburg, German officials sought to identify other potential terrorist cells. The German federal government tasked the state governments to collect and process personal data in a massive data mining operation (known as *Rasterfahndung* in German).<sup>28</sup> German state police collected sensitive personal data from approximately 8.3 million persons, who were selected using three broad criteria, including national origin. Their data was then “trawled” - searched using a computer programme that identified pertinent information from the database, using a profile based upon common characteristics of members of the “Hamburg cell”.<sup>29</sup>

Efforts to prevent terrorism have also led to an intensification ethnic profiling based on both ethnicity and religion. While the police practices involved include those used in the policing of ordinary crime - such as stop and search, the explicit use of ethnic profiles has also been evident in mass ID checks of people in public places; raids on mosques and other institutions associated with Muslims; in data-mining; and arresting Muslims on the basis of circumstantial evidence that would not lead to the detention of

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<sup>26</sup> Open Society Justice Initiative, *Profiling Minorities: A Study of Stop-and-Search Practices in Paris*, New York: Open Society Institute (2009).

<sup>27</sup> European Union Network of Independent Experts on Fundamental Rights, *Opinion on Ethnic Profiling*, 2006. Similar standards govern the right to intrude on privacy, see: *Marper Vs. UK* REF

<sup>28</sup> Daniel Moeckli, “Discriminatory Profiles: Law Enforcement after 9/11 and 7/7,” *European Human Rights Law Review*, No. 5, 517–532, 2005. See also Andreas Hieronymus “Aspects of profiling of ethnic and religious minorities in Germany,” *ENARgy*, issue 23, January 2008.

<sup>29</sup> Open Society Justice Initiative, “Ethnic Profiling in the European Union: Pervasive, Ineffective and Discriminatory,” (New York and Budapest: Open Society Institute, 2009).

similarly situated non-Muslims; and surveillance activities.<sup>30</sup> Increasingly, these activities are driven by theories of “**radicalisation**,” which has emerged in response to the phenomenon of so-called “home-grown terrorists” in the Netherlands, United Kingdom, and other countries. According to these theories, certain types of Islam can be linked to the radicalisation process. Police and intelligence services, therefore, target practitioners of these types of Islam, even when there is no evidence that individual practitioners are involved in terrorism.

### **Examples of activities may involve ethnic profiling:**

#### **General policing**

- Identity checks
- Stops and searches of pedestrians on the street
- Stops and searches of vehicles
- Disproportionate use of force (such as handcuffing or drawing of weapons) during a stop
- Sweeps of buses or trains
- Dispersal of groups of youths on the street
- Issuing of citations or arrests for petty offences after stops
- Disproportionate police focus on particular areas or certain types of crimes

#### **Security and counter-terrorism**

- Mass stop and search
- Identity checks outside of places of worship (e.g. mosques)
- Raids on places of worship
- Raids on places of business
- Surveillance
- Data-mining based on ethnic or religious criteria
- Anti-radicalisation policies
- Arrest and detention
- Deportations

#### **Immigration control and asylum decision-making**

- Questioning, searching and detaining of persons at airports and ports
- Pre-screening and removal of persons from flights
- Pre-screening and screening of immigration applications
- Screening of asylum applications
- Decision-making about immigration and asylum applications
- Stops aimed at rounding people up for deportation

#### **Customs**

- Stopping and searching of people and baggage in airports and ports
- Stopping and searching of vehicles in ports
- Explicit association of certain nationalities / ethnicities with drug trafficking or other crimes and targeting actions on that basis
- Raids on businesses

## **How does ethnic profiling impact communities and policing?**

Ethnic profiling, whether it is explicit and deliberate, or unintended, has direct and harmful consequences for individuals and communities. For individuals stopped, searched and even detained the experience, sometimes of frequent repeat encounters with the police, can be frightening and humiliating. During focus groups in Spain in 2005, one Moroccan youth said:

<sup>30</sup> Open Society Justice Initiative, “Ethnic Profiling in the European Union: Pervasive, Ineffective and Discriminatory.”

*"I often get body searched, and it is very humiliating. They sometimes take my pants down in the street."<sup>31</sup>*

Another participant added that:

*"the police always come and in the end the kid thinks that he is guilty. They feel bad, they feel insecure, they feel like criminals and they feel that they are bad."<sup>32</sup>*

Ethnic profiling stigmatises entire groups of people as criminals, potential terrorists or illegal immigrants. Ethnic profiling legitimates and reinforces racism and ethnic stereotyping in the wider society, leading to heightened suspicion of minority communities amongst the majority population, and to demands for further restrictive measures against them. Such stigmatisation contributes to the overrepresentation of ethnic minorities in the criminal justice system. Disproportionate criminal supervision and incarceration reduces education and work opportunities and breaks down families and communities.

Ethnic profiling also has direct consequences for law enforcement efficacy. Policing depends on the cooperation from the public to report crime, provide suspect descriptions and give witness testimony. Research shows that poor police-citizen contacts can have a negative impact on public confidence in law enforcement, not only for the individual directly involved, but also for their family, friends and acquaintances.<sup>33</sup> Research also demonstrates that bad treatment by law enforcement officers is associated with reduced cooperation with the law enforcement.<sup>34</sup> The lack of public trust and cooperation reduces the effectiveness of law enforcement. Ethnic profiling can increase levels of hostility in encounters between individuals and police or other law enforcement officers. Greater hostility increases the chances that routine encounters will escalate into aggression and conflict, posing safety concerns for officers and community members alike.<sup>35</sup>

## Is ethnic profiling effective?

Police officers and other authorities often argue that ethnic profiling is simply "good policing." They say that for many reasons, including socio-economic and demographic factors, crime is higher in ethnic minority communities and, responding to this fact, law enforcement necessarily targets these persons, places and offences. The result appears as ethnic profiling, but the cause lies in an objective reality that law enforcement has little ability to change. In practice, there is little evidence that profiling is an effective approach to combating crime and considerable research finding that it reduces law enforcement effectiveness.

Ethnic profiling can only be justified based on the assumption that the race or ethnicity of the person being profiled is knowable and that there is a consistent and statistically significant relationship between race or ethnicity and propensity to commit crime. In fact, neither of these is consistently true. Racial profiles are both over-inclusive and under-inclusive - over-inclusive in the sense that many, indeed most, of the people who fit into the category are entirely innocent, and under-inclusive in the sense that many other types of criminals or terrorists who do not fit the profile will thereby escape police attention. Ethnic profiling also faces the problems of predictability and evasion; the more predictable police profiles become, the easier it is for perpetrators to adapt to circumvent the profile.

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<sup>31</sup> Open Society Justice Initiative, "I Can Stop and Search Whoever I Want" - Police Stops of Ethnic Minorities in Bulgaria, Hungary and Spain," (New York and Budapest: Open Society Institute, 2006), at 37.

<sup>32</sup> Open Society Justice Initiative, "I Can Stop and Search Whoever I Want," at 37.

<sup>33</sup> Joel Miller, Nick Bland and Paul Quinton, "The Impact of Stops and Searches on Crime and the Community," *Police Research Series Paper 127* London: Home Office, 2000; Dennis P. Rosenbaum, Amie M. Schuck, Sandra K. Costello, Darnell F. Hawkins, and Marianne K. Ring "Attitudes toward the police: The effects of direct and vicarious experience" *Police Quarterly No. 8* (3) 2005: 343-365.

<sup>34</sup> McCluskey, John D., Stephen D. Mastrofski, and Roger B. Parks, "To acquiesce or rebel: Predicting citizen compliance with police requests," *Police Quarterly No. 2*: 389-416.

<sup>35</sup> Ontario Human Rights Commission, "Inquiry Report, Paying the Price; The Human Cost of Racial Profiling," Toronto: Ontario Human Rights Commission, undated document; the inquiry started in Feb 2003.

In countries where they have monitored ethnic profiling, despite significant methodological differences in the collection of stop data, the salient feature of all the data that has been collected is its consistency in demonstrating similar “hit” or arrest rates across racial groups. In several studies ethnic minorities are statistically significantly less likely to have contraband or other “seizable” evidence found following a search.<sup>36</sup> This evidence refutes the proposition that minorities are more likely to be involved in crime and highlights that racial profiling is an ineffective use of police resources, by engaging in stopping and searching practices that are likely to be unproductive and alienation members of their community.

Indeed, despite the collection and trawling of the data of 8.3 million people, the *Rasterfahndung* operation in Germany failed to identify a single terrorist.<sup>37</sup> The data on arrest rates from stop and search in the UK show that disproportionate stopping and searching of minorities under Section 60 is the result of ethnic profiling rather than individualised suspicion and thus much less effective. In 2007-2008, only 4 percent of stops and searches conducted under Section 60 led to an arrest - significantly lower than the 12 percent arrest rate for stops conducted under the Section 1 power.<sup>38</sup>

There is some evidence that removing race or ethnicity from a criminal profile and mandating that officers look at specified non-ethnic criteria can help avoid discrimination and improve efficiency. In 1998, the U.S. Custom Service responded to allegations of racial and gender. At that time, 43% of searches that Customs performed were on African-Americans and Latino/as. US Customs changed its stop and search procedures removing race and ethnicity from the factors considered when stops were made and introduced observational techniques focusing on behaviours such as nervousness and inconsistencies in passenger explanations; and improved the supervision of stop and search decisions. By 2000, the racial disparities in Customs searches had nearly disappeared. Customs conducted 75% fewer searches and their hit rate improved from under 5% to over 13%, the hit rate for all ethnic groups had become almost even. Using intelligence-based, race-neutral criteria allowed Customs to improve its effectiveness while stopping fewer innocent people, the vast majority of whom were people of colour.<sup>39</sup> More recently, a project in Bulgaria, Hungary and Spain achieved similar results (see box below on STEPSS).

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<sup>36</sup> Harris, David, “Profiles in Injustice; Why Racial Profiling Cannot Work,” (New York, The New Press, 2002); Open Society Justice Initiative, “Addressing Ethnic Profiling by the Police: A Report on the Strategies for Effective Police Stop and Search (STEPSS) Project,” (New York and Budapest: Open Society Institute, 2009).

<sup>37</sup> Daniel Moeckli, “Discriminatory Profiles: Law Enforcement after 9/11 and 7/7,” Open Society Justice Initiative, “Ethnic Profiling in the European Union: Pervasive, Ineffective and Discriminatory.

<sup>38</sup> Home Office (2009) *Police Powers and Procedures England and Wales 2007/08*. (London: Home Office Statistics).

<sup>39</sup> U.S. Customs Service, “Personal Searches of Air Passengers Results: Positive and Negative, Fiscal Year 1998,” (Washington DC: U.S. Customs Service, 1998).

## Case Study: Monitoring and Documenting Ethnic Profiling

This box reviews methods of documenting ethnic profiling, ranging from less rigorous approaches relying on secondary source data to rigorous field research and finally methods available when official data can be accessed.

Many forms of ethnic profiling are manifest in patterns of law enforcement practice that cannot be demonstrated through anecdotal information or individual case analysis. Such materials may be useful in understanding the impact that these practices have on individuals, but they do not provide persuasive evidence of ethnic profiling as a pervasive practice.

### Secondary sources:

Systematic tracking of media stories on the policing of ethnic minority communities can provide information on police operations that may be targeting specific groups or communities. It is important to build relations with key academics and journalists working on discrimination, migration and terrorism issues to track these issues and legal and policy developments. Reports of police abuse can also be followed to see if a disproportionate number of victims appear to be of ethnic minority or immigrant origin. Articles quoting officials may also reveal racist comments and attitudes on the part of police or political authorities.

Review of official data such as the annual reports and other information of non-discrimination bodies, ombudsmen's offices and specialised police oversight bodies. Complaints of police abuse should be reviewed to see if there is any pattern of disproportionate representation of persons of minority ethnic or immigrant origin among victims of police abuse.

### Primary research approaches:

Certain forms of profiling may be researched through traditional human rights research approaches, including visiting places and interviewing persons and then comparing their experiences with those of the majority population to the degree that this is possible. More sporadic actions such as raids and mass identity checks may be tracked through direct monitoring.

Qualitative studies provide a picture of the extent of ethnic profiling and where it is happening. This research is complemented by qualitative research approaches that explore why profiling is happening and what impact it has by examining police working practices in detail, and illuminating the subjective experiences and the perceptions of both operational officers and those persons who are subjected to their operations.

Quantitative analysis is necessary to demonstrate ethnic profiling in identity checks and stop and search practices. Two research approaches that have been used to generate quantitative data in settings where ethnic data is lacking are household surveys that ask about encounters with police and observational methodologies in which trained observers actually watch police operations, and measure the ethnicity of the persons they see stopped against a population benchmark (also obtained through observation) of the population in the places where police are working. Both of these approaches are technically complex and costly; they also provide only a snapshot picture of ethnic profiling at one time in one place. Despite these limitations, such quantitative data is vitally necessary to provide an objective picture of ethnic profiling in practices such as identity checks and stop and search.

Research using official police data may be possible in those settings where police authorities are interested to cooperate with researchers in order to better understand their own practices (see STEPSS).

### Case Study: The “STEPSS” Project

In January 2007, police forces and civil society worked together in Bulgaria, Hungary, Spain and the United Kingdom to monitor their use of ID checks and searches in the “Strategies for Effective Police Stop and Search” project. The project undertook an assessment of existing policy and practice, designed forms for recording stops, prepared and trained officers and community members on operational protocols, and collected stop data for six months in pilot sites in each country. Throughout the process, police met with local community consultation groups to share and discuss the stop data.

The data showed that police in every pilot site were ethnically profiling persons of ethnic minority and immigrant origin. Minorities and immigrants were more likely to be stopped, often more likely to be searched, but, almost without exception, were no more likely to be found to be offending than the majority group. In some cases, they were significantly less likely to be found offending than ethnic majority residents.

But the act of data gathering also increased the effectiveness of officers’ use of stop. In Hungary and Spain, officers in the STEPSS project tended to make fewer stops over the period that they were required to record stops, but the proportion of their stops that produced an arrest or other law enforcement outcome increased. It is clear that when officers focus on developing clear and individualised grounds for stops, and when their supervisors hold them to account, they are more effective.

In Fuenlabrada, the second Spanish pilot site, the police reduced the disproportionality in the rate at which they were stopping persons of immigrant origin of all groups. They achieved a dramatic decrease in stops of Moroccans from 9.6 times more often than Spaniards to 3.4 more often, largely because they ended a fruitless counter-terror operation. Furthermore, the rate at which officers’ conducted stops overall fell by well over half, while the percentage of their stops that produced positive outcomes increased by nearly three times. Fuenlabrada’s police managers and supervisors achieved these remarkable results by making systemic use of the STEPSS data both for closer supervision of individual patrol officers and in force-wide management of operations and personnel deployment. The data enabled them to factor disproportionate ethnic impacts into their strategic decision-making and reduce unfair policing while enhancing efficiency.

STEPSS also resulted in the forging of new relationships between the police and community representatives through the stops monitoring process. In Fuenlabrada, these discussions directly helped the Municipal Police in identifying and addressing crime patterns and other community concerns. In Hungary where the project used regular “ride-alongs” to monitor the data gathering, the police and Roma representatives developed new understandings and insights. One unanticipated outcome is that one of the Roma STEPSS participants has now joined the police force - he will be the first Roma police officer in the county.

## Resources on ethnic profiling

### Policy documents

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*ENAR is a network of more than 600 NGOs working to combat racism in all the EU member states and acts as the voice of the anti-racist movement in Europe. ENAR is determined to fight racism, racial discrimination, xenophobia and related intolerance, to promote equality of treatment between EU citizens and third country nationals, and to link local/regional/national and European initiatives.*