

Ghent,
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Section President Helena Jäderblom
European Court of Human Rights
Council of Europe
F-67075 Strasbourg Cedex
France

**Submission of written comments by third party intervener in *Zeshan Muhammad against Spain*
(Application no. 34085/17)**

Honourable President Jäderblom,

The Human Rights Centre of Ghent University hereby respectfully submits its written comments, by way of a third party intervention, in the case of *Zeshan Muhammad against Spain* (Application no. 34085/17), pursuant to leave granted on 10 April 2018, and in accordance with rule 44 §5 of the Rules of the Court. The address for correspondence is Human Rights Centre, Faculty of Law and Criminology, Ghent University, Universiteitstraat 4, 9000 Ghent, Belgium.

Yours sincerely,



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Third party intervention by the Human Rights Centre of Ghent University to the European Court of Human Rights in the case of *Zeshan Muhammad against Spain*

These written comments are submitted by the Human Rights Centre of Ghent University¹, pursuant to leave granted by the President of the Third Section of the European Court of Human Rights in her letter dated 10 April 2018, and in accordance with rule 44 §5 of the Rules of the Court.

The present submission will discuss the characteristics and prevalence of ethnic profiling across Europe (1), as well as human rights approaches to ethnic profiling (2), before discussing ethnic profiling under the ECHR (3).

1. Characteristics and prevalence of ethnic profiling across Europe

The term 'ethnic profiling' generally refers to the use by law enforcement officers "of generalizations grounded in ethnicity, race, religion, or national origin - rather than objective evidence or individual behavior - as the basis for making law enforcement and/or investigative decisions about who has been or may be involved in criminal activity".²

Since the 1990s, ethnic profiling has been widely debated and studied in the United States. In Europe, however, debates are more recent. This does not mean that the practice did not exist before. Yet, it appears to be increasing under pressure of immigration and counter-terrorism. Furthermore, as societies become more multi-ethnic, ethnic profiling has now become an urgent challenge across Europe.³

In what follows, we will delineate the harmful effects of ethnic profiling, its prevalence in Europe and how it arises in various patterns of facts.

1.1. Harmful effects of ethnic profiling

Intergovernmental organizations such as the UN, the COE and the EU as well as non-governmental organizations working on human rights protection have raised concerns about ethnic profiling, on account of both its discriminatory character, and its damaging social effects.⁴ Ethnic profiling is described as an offence against human dignity.⁵ Victims targeted by ethnic profiling have described such encounters as a frightening, humiliating, or even traumatic experiences.⁶ Worse, it creates tension and mistrust between different communities⁷ as it feeds stereotypes about minorities. Police officers, consciously or unconsciously⁸, assume that there is a correlation between membership of a particular ethnic or religious group and propensity to commit certain crimes or act in a way considered undesirable.⁹ This results in a self-fulfilling relationship between intensive policing and

¹ Address of correspondence: Human Rights Centre, Faculty of Law & Criminology, Ghent University, Universiteitstraat 4, B-9000 Ghent, Belgium. The team for this intervention consisted of Prof. Dr. Eva Brems, Dr. Laurens Lavrysen, Tess Heirwegh, Yaiza Janssens, Dr. Valeska David and Sien Devriendt.

² Open Society Foundations, *Reducing Ethnic Profiling in the European Union: A Handbook of Good Practices*, Open Society Foundations, New York, 2012, pp. 13-14 and 17-21.

³ www.enar-eu.org/EU-must-address-widespread-ethnic-profiling-by-police.

⁴ FRA, *Towards More Effective Policing. Understanding and preventing Discriminatory Ethnic Profiling: A guide*, 2011, p. 5.

⁵ FRA, *Towards More Effective Policing*, 2011, p. 18.

⁶ *Ibid.*, p. 38.

⁷ *Ibid.*, p. 18.

⁸ O. De Schutter and J. Ringelheim, *Ethnic Profiling: A Rising Challenge for European Human Rights Law*, p. 383.

⁹ *Ibid.*, p. 349.

higher arrest rates.¹⁰ Moreover, this negatively contributes to stigmatization, discriminatory attitudes and to the spread of xenophobia in the public.¹¹ Finally, there is no evidence that ethnic profiling has in fact increased law enforcement effectiveness¹² since it results in increasing racial tensions and resentment towards the police¹³, which alienates persons and groups whose assistance is needed to prevent, detect and investigate crime and terror threats.¹⁴

1.2. The widespread nature of ethnic profiling across Europe

The results of the FRA EU-MIDIS II survey in 2017 reveal that ethnic profiling is a widespread phenomenon across Europe. The researchers collected information from a sample of 25,515 ethnic minority and immigrant people in all EU Member States. Although results vary among target groups and EU Member States, of all respondents, 14 % were stopped by the police at least once in the 12 months preceding the survey. Of those respondents, 40 % say the last stop was because of their immigrant or ethnic minority background. In the five years preceding the survey, 26 % of all respondents were stopped by the police. Of those respondents, 33 % believe that the most recent stop was because of their immigrant or ethnic minority background. Among all groups surveyed, the results show that 34 % of the Roma respondents and 44 % of the respondents with Sub-Saharan African background are stopped on the street more often than respondents from other target groups.¹⁵

1.3. Different types of patterns of facts

There are different types of ethnic profiling that are used for law enforcement purposes. A practice “may be based on a profile formally established by competent authorities.”¹⁶ However, 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.”¹⁷ Furthermore, ethnic profiling is not only limited to cases where race, ethnicity, nationality or religion are the *only* criteria to engage in certain conduct or activities. Even if these characteristics are used *in combination* with other factors, “the risk of discrimination is no less present.”¹⁸ Another distinction that can be made is that sometimes, it is clear that ethnic profiling takes place, e.g. in cases where the law enforcement

¹⁰ FRA, *Towards More Effective Policing*, 2011, p. 41; B. Harcourt, Rethinking racial profiling: a critique of the economics, civil liberties and constitutional literature, and of criminal profiling more generally, *University of Chicago Law Review* (2004), 71(4), pp. 1329-30; M. Scheinin (UN Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism), Report of the Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism, *UN Doc A/HRC/4/26*, 29 January 2007, § 57.

¹¹ FRA, *Towards More Effective Policing*, 2011, p. 40; European Monitoring Centre on Racism and Xenophobia, ‘Perceptions of Discrimination and Islamophobia – Voices from members of Muslim Communities in the European Union’, 2006, available at fra.europa.eu, p. 54; Open Society Justice Initiative, *International Standards on Ethnic Profiling*, p. 4.

¹² Open Society Justice Initiative, *Ethnic profiling in France*, Statement Submitted, For consideration by the United Nations Commission on the Elimination of Racial Discrimination, at its 77th Session, on the occasion of its Periodic Review of France August 11-12, 2010, see tbinternet.ohchr.org/.../INT_CERD_NGO_FRA_77_8790_E.doc.

¹³ FRA, *Towards More Effective Policing*, 2011, p. 19; S.L. Davies, Profiling Terror, 1 *Ohio St. J. Crim. L.* 45 (2003), pp. 92-93.

¹⁴ Open Society Justice Initiative, *International Standards on Ethnic Profiling*, p. 4; S.L. Davies, ‘Profiling Terror’, 1 *Ohio St. J. Crim. L.* 45 (2003), pp. 92-93.

¹⁵ *Ibid.*, p. 74.

¹⁶ O. De Schutter and J. Ringelheim, *Ethnic Profiling: A Rising Challenge for European Human Rights Law*, p. 362.

¹⁷ *Ibid.*, p. 362.

¹⁸ *Ibid.*, p. 363; K. K. Russell, ‘Racial Profiling: A Status Report of the Legal, Legislative and Empirical Literature’ (2001) 3, *Rutgers Race and Law Review* 61, pp. 65-68.

officer explicitly refers to ethnic characteristics to legitimate his actions or uses racist language. Often, however, ethnic profiling occurs in a more implicit manner, making it more difficult for victims to prove that they have been subjected to it and for law enforcement officers to be held accountable. We respectfully submit that if the Court were to name the practice of ethnic profiling and label it a Convention violation, it is of importance to include these different patterns of ethnic profiling.

2. Human rights approaches to ethnic profiling

A number of organizations recognize that ethnic profiling is a serious human rights problem. The European Parliament e.g. has addressed the problem of ethnic profiling by identifying it as a pressing issue in the areas of law enforcement, counter-terrorism, immigration, customs and border control.¹⁹ Furthermore, there seems to be a consensus that ethnic profiling is a form of racial discrimination and is consequently unlawful according to international and European law.²⁰ The EU Network of Independent Experts on Fundamental Rights emphasized in its opinion on ethnic profiling that “[t]he consequences of treating individuals similarly situated differently according to their supposed ‘race’ or to their ethnicity has [such] [...] far-reaching consequences [...] that differential treatment on this ground should in principle be considered unlawful under any circumstance.”²¹ In 2009, this was further acknowledged by the UN Human Rights Committee in its landmark case of *Williams Lecraft v. Spain*. Here, the Committee considered that when the authorities carry out checks, “the physical or ethnic characteristics of the persons subjected thereto should not by themselves be deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics.”²² The Committee found that, even though there was no written order in this case to carry out identity checks on the basis of skin colour, “it appears that the police officer considered himself to be acting in accordance with that criterion, a criterion considered justified by the courts which heard the case. The responsibility of the State party is evidently engaged.”²³ It stated that not every differentiation of treatment will constitute discrimination. However, in this case, it was of the view that “the criteria of reasonableness and objectivity were not met.”²⁴ Furthermore, in its General Recommendation XXXI, the Committee on the Elimination of Racial Discrimination held that ethnic profiling constitutes per se a form of racial discrimination.²⁵ Moreover, the European Commission against Racism and Intolerance’ General Policy Recommendation No. 11 on Combating Racism and Racial Discrimination mentions racial profiling as a specific form of racial discrimination.²⁶ Also the Council of Europe Commissioner for Human Rights has consistently condemned the practice of ethnic profiling.²⁷

¹⁹ European Parliament (2009), 'Recommendation to the Council of 24 April 2009 on the problem of profiling, notably on the basis of ethnicity and race, in counterterrorism, law enforcement, immigration, customs and border control', EP 121-p3, INI/2008/2020, no. LIBE/6/58595, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2009-314>.

²⁰ A. Kadar and A.L. Pap, Police Ethnic Profiling in Hungary - An Empirical Research, *Acta Juridica Hungarica*, Vol. 50, Issue 3 (2009), p. 254.

²¹ European Network of Independent Experts on Fundamental Rights (2006), 'Opinion on Ethnic Profiling', CFR_CDF.Opinion4.2006, § 54.

²² UN Human Rights Committee, *Williams Lecraft v. Spain* (2009), Communication No. 1493/2006, § 7.2.

²³ *Ibid.*, § 7.3.

²⁴ *Ibid.*, § 7.4.

²⁵ CERD (2005), *General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, <http://www.refworld.org/docid/48abd56dd.html>.

²⁶ ECRI (2007), General Policy Recommendation no. 11 on combating racism and racial discrimination in policing.

²⁷ See e.g. Human Rights Comment, *Afrophobia: Europe should confront this legacy of colonialism and the slave trade*, 2017,

Several organizations, such as the Committee on the Elimination of Racial Discrimination²⁸, the European Commission against Racism and Intolerance²⁹ and the European Parliament³⁰, refer to the importance of a preventive approach to ethnic profiling by giving a broad range of recommendations to states, e.g. to educate police officers on ethnic profiling and human rights in general, to carry out research and monitor police activities in order to identify certain indicators of this practice and so on. Next to these preventive measures, they also emphasize that it is essential to provide a strong legal framework and to investigate, prosecute and punish cases of ethnic profiling in an thorough and effective manner.

3. Ethnic Profiling under the ECHR

3.1. Bringing ethnic profiling under the scope of the ECHR

As discussed above, ethnic profiling raises important human rights concerns in the field of racial discrimination. We are convinced that the Court is well equipped to deal with this challenge. Therefore, we respectfully argue that the case at hand provides an excellent opportunity for the Court to name and recognize the seriousness of ethnic profiling as well as the harm it entails, and to develop the different state obligations under the Convention in regard of this violation.

In the past, the Court has already dealt with law enforcement actions that could be deemed instances of ethnic profiling.³¹ In the most recent case of *Timishev v. Russia*, it took a firm position against this practice. Here, the Court found a violation of Article 14 in conjunction with Article 2 of Protocol No. 4 ECHR because Russian police officers refused to allow persons to enter the territory of Kabardino-Balkaria because of their (perceived) Chechen ethnic origin. In the Court's view, this "[...] represented a clear inequality of treatment in the enjoyment of the right to liberty of movement on account of one's ethnic origin".³² Furthermore, it stated the following: "In any event, [...] 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."³³

In this important passage, the Court considered 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 an exclusive or decisive influence on the decision-making process.³⁴ Commentators have argued that this suggests that the proportionality test becomes irrelevant in this context and that ethnic profiling should in principle be deemed unlawful under any circumstances.³⁵

<https://www.coe.int/en/web/commissioner/-/afrophobia-europe-should-confront-this-legacy-of-colonialism-and-the-slave-trade?desktop=true>; Human Rights Comment, Time to cure amnesia about the history of Roma in Europe, 2015, <https://www.coe.int/en/web/commissioner/-/time-to-cure-amnesia-about-the-history-of-roma-in-europe?desktop=true>.

²⁸ CERD (2005), *General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, <http://www.refworld.org/docid/48abd56dd.html>.

²⁹ ECRI (2007), *General Policy Recommendation no. 11*, o.c.

³⁰ European Parliament (2009), 'Recommendation to the Council of 24 April 2009 on the problem of profiling, notably on the basis of ethnicity and race, in counterterrorism, law enforcement, immigration, customs and border control', EP 121-p3, INI/2008/2020, no. LIBE/6/58595, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2009-314>.

³¹ See e.g. ECtHR, 9 April 2002; no. 51346/99, *Cisse v. France*; and ECtHR, 5 February 2002, no. 51564/99, *Čonka v and others v. Belgium*.

³² ECtHR, 13 December 2005, nos. 55762/00 and 55974/00, *Timishev v. Russia*, para. 54.

³³ *Ibid.*, para 58.

³⁴ O. De Schutter and J. Ringelheim, 'Ethnic Profiling: A Rising Challenge for European Human Rights Law', *Mod. L. Rev.* (2008), 368-369.

³⁵ *Ibid.*

Building on *Timishev*, the Court can further develop its case law and explicitly name ethnic profiling as a violation of the ECHR.

In sections 3.3. to 3.4, we will develop some potential lines of reasoning regarding positive as well as negative state obligations in this regard. First, we discuss the matter of the applicable ECHR provisions.

3.2. On the applicability of Article 1 Protocol 12 or, alternatively, Article 14 in conjunction with Articles 3 and 8 ECHR

It is submitted that when race, ethnicity or a related factor is the main ground for law enforcement officials to single out one or more persons for identity checks, search or arrest, a different treatment is dispensed on the basis of race or ethnic criteria. The same can be said of law enforcement procedures that are carried out in such a manner that persons of a certain ethnic or racial background are disproportionately targeted. Unlike people of different origin and appearance subjected to police control in such cases, those who do not match the ethnic criteria escape the authorities' attention. Such differential and detrimental treatment necessarily brings into play the prohibition of discrimination.³⁶

In the first place, it raises an issue of **Article 1 Protocol No 12**,³⁷ which protects against discrimination in the enjoyment of any right set forth by law and against discrimination "by a public authority in the exercise of discretionary power or by any other act or omission by a public authority", such as those performed by law enforcement officers.³⁸ In the second place, since other convention rights are affected in this context – as argued below– the prohibition of discrimination set out in **Article 14 ECHR** is likewise engaged.³⁹ In this vein, it should be recalled that the scope of application of Article 1 Protocol No. 12 is wider than the scope of Article 14 ECHR, for which their application is likely to overlap.⁴⁰

The Court has already dealt with the question of racial discrimination under Article 14 ECHR in conjunction with other Convention Articles.⁴¹ It is submitted that ethnic profiling affects the enjoyment of the rights to be free from torture, inhuman and degrading treatment and private life.

In its memorial case *East African Asians v. the United Kingdom*⁴², the Commission has examined the applicability of **Article 3 ECHR** in relation to racism and held that: "[...] discrimination based on race

³⁶ European Parliament recommendation to the Council of 24 April 2009 on the problem of profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control (2008/2020(INI)), para. W. See also HRC, Communication No. 1493/2006, *Williams Lecraft v. Spain* (Views adopted on 27 July 2009), para. 7.2; Committee for the Elimination of Racial Discrimination (CERD), *General Recommendation No. 31: Administration of the Criminal Justice System*, para. 20.

³⁷ Ratified by Spain in 2008 and entered into force in the same year.

³⁸ Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series - No. 177, Rome, 4.XI.2000, para. 22, iii and iv.

³⁹ Article 14 comes into play whenever "the subject-matter of the disadvantage constitutes one of the modalities of the exercise of a right guaranteed", or the measures complained of are "linked to the exercise of a right guaranteed" or "fall within the ambit of one or more of the Convention Articles." See, ECtHR, 27 March 1998, no. 20458/92, *Petrovic v. Austria*, para. 28; ECtHR (Grand Chamber), 6 April 2000, no. 34369/97, *Thlimmenos v. Greece*, para. 40; ECtHR, 8 December 2009, no. 49151/07, *Munoz Diaz v. Spain*, para. 42.

⁴⁰ Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series - No. 177, Rome, 4.XI.2000, para. 33.

⁴¹ See e.g. ECtHR (Grand Chamber), 6 July 2005, nos. 43577/98 and 43579/98, *Nachova and Others v. Bulgaria*; ECtHR, 14 December 2010, no. 74832/01, *Mižigárová v. Slovakia*; ECtHR, 20 September 2010, no. 387/03, *Fedorchenko and Lozenko v. Ukraine*; ECtHR, 13 December 2005, nos. 55762/00 and 55974/00, *Timishev v. Russia*; ECtHR (Grand Chamber), 22 December 2009, nos. 27996/06 and 34836/06, *Sejdić and Finci v. Bosnia and Herzegovina*, ECtHR, 11 March 2014, no. 26827/08, *Abdu v. Bulgaria*.

could, in certain circumstances, of itself amount to “degrading treatment” within the meaning of Article 3.” Moreover, in *Abdulaziz, Cabales and Balkandali v. the United Kingdom*⁴³, the Commission had found that institutional racism amounted to degrading treatment. This was accepted by the Court.⁴⁴

With regard to the applicability of **Article 8 ECHR**, some parallels can be drawn between the case at hand and *Aksu v. Turkey*. In the latter case, the Court examined the link between stereotyping, group identity and the notion of “private life” within the meaning of this provision. In this regard, the Grand Chamber stated the following: “The Court reiterates that the notion of “private life” within the meaning of Article 8 of the Convention is a broad term not susceptible to exhaustive definition. The notion of personal autonomy is an important principle underlying the interpretation of the guarantees provided for by Article 8. It can therefore embrace multiple aspects of the person’s physical and social identity. The Court further reiterates that it has accepted in the past that an individual’s ethnic identity must be regarded as another such element (see *S. and Marper v. the United Kingdom [GC]*, nos. 30562/04 and 30566/04, § 66, ECHR 2008, and *Ciubotaru v. Moldova*, no. 27138/04, § 49, 27 April 2010). In particular, any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group’s sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group.”⁴⁵

Therefore, we respectfully invite the Court to examine the applicant’s claim from the viewpoint of Article 1 Protocol 12 or, alternatively, Article 14 in conjunction with Articles 3 and 8 of the Convention.

3.3. Negative obligations: the prohibition for state agents to discriminate

In what follows, we invite the Court to examine the present case from the standpoint of both direct and indirect discrimination. As regards these two forms of discrimination, it is argued that, under Articles 1 Protocol No. 12 and 14 ECHR, any justification to be provided by the State should be subjected to the strictest scrutiny.⁴⁶

3.3.1. Ethnic profiling as direct and indirect discrimination

It is submitted that direct racial discrimination is at stake where an actual or perceived racial or ethnic trait serves as the main basis for differential treatment in identity checks or in search and stop procedures. This is notably the case when the sole association with a racial or ethnic group—usually a minority or non-dominant group—gives rise to a greater suspicion of illegality or criminality. While this may be evidenced by the terms of a formal policy or instruction, it may also be reflected in informal procedures or choices. We argue that in the absence of a policy or instruction explicitly based on race, the Court should scrutinize practices that are nonetheless indicative of direct racial discrimination, to know: (1) whether the agent(s) performing identity checks had used racially charged language and whether any such allegation was duly investigated by the competent authorities. In this connection, it should be noted that because racial discrimination is ‘particularly invidious’ and has ‘perilous consequences’, state authorities ‘must use all available means to combat

⁴² EComHR (Report), 15 December 1973, nos. 9214/80 etc., *East African Asians v. United Kingdom*.

⁴³ EComHR (Report), 12 May 1983, nos. 9214/80 etc., *Abdulaziz, Cabales, and Balkandali v. United Kingdom*.

⁴⁴ ECtHR (Plenary), 28 May 1985, nos. 9214/80 etc., *Abdulaziz, Cabales, and Balkandali v. United Kingdom*, para. 91; A. Reidy, *The prohibition of Torture - A guide to the implementation of Article 3 of the European Convention on Human Rights*, Human rights handbooks, No. 6, Council of Europe, 2002, 80.

⁴⁵ ECtHR (Grand Chamber), 15 March 2012, nos. 4149/04 and 41029/04, *Aksu v. Turkey*, para. 58.

⁴⁶ Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series - No. 177, Rome, 4.XI.2000, para. 33.

racism.⁴⁷ This obviously includes the obligation to investigate racist motives behind violent incidents,⁴⁸ which is the most extreme expression of racism. Yet, there is no reason to think that the obligation to combat racism does not include racist overtones in police agents' non-violent acts.⁴⁹ Secondly, we also invite the Court to consider (2) whether in implementing the relevant domestic law the law-enforcement agent(s) had solely or mainly targeted members of a group defined along ethnic or racial lines. We submit that either of the aforesaid conducts, however unintended and guided by practice, may amount to direct discrimination.

Should the Court find that the use of ethnic profiling in this case does not amount to direct discrimination, we respectfully invite the Court to carefully examine the contested measure from the perspective of **indirect** racial discrimination. In the words of the Court, 'a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group'.⁵⁰ It is submitted that ethnic profiling often fits this characterization of indirect discrimination. This is particularly so when identity-checks and other law enforcement procedures, though formulated or instructed in general terms and applied to everyone in a given area or situation, produce a disparate negative impact on persons of a particular ethnic group as compared to other persons.

Casting suspicion on and treating differently an individual, directly or indirectly, because of his or her ethnic or racial characteristics implies to evaluate such a person not as an individual, but as a mere incarnation of generalizations or assumptions about an ethnic or racial group.⁵¹ It constitutes an unacceptable use of negative stereotypes and an affront to human dignity, which is furthermore aggravated by the stigmatization and humiliation experienced by those subjected to discriminatory ethnic profiling.⁵² The seriousness of the violations at stake (Articles 1 Protocol 1 and 14 in conjunction with Articles 3 and 8 ECHR) reinforces the need for a Court ruling that offers guidance for States to address ethnic profiling not only as manifested in the present case, but in its multiple manifestations.

3.3.2. Burden of proof and justification of prima facie discriminatory ethnic profiling

According to established case law of the Court, "once the applicant has shown that there has been a difference in treatment, it is then for the respondent Government to show that the difference in treatment could be justified."⁵³ However, as noted above (*supra* 3.1) "no difference in treatment

⁴⁷ ECtHR, 13 December 2005, nos. 55762/00 and 55974/00, *Timishev v. Russia*, para. 56; ECtHR (Grand Chamber), 15 March 2012, nos. 4149/04 and 41029/04, *Aksu v. Turkey*, para. 44; ECtHR (Grand Chamber), 6 July 2005, nos. 43577/98 and 43579/98, *Nachova and Others v. Bulgaria*, para. 145.

⁴⁸ ECtHR, 24 July 2012, no. 47159/08, *B.S. v. Spain*, para. 58. See also, ECtHR, 10 March 2009, no. 44256/06, *Turan Cakir v. Belgium*, paras. 77-78, 80-81.

⁴⁹ In this vein, Open Society Justice Initiative, *International Standards on Ethnic Profiling: Standards and Decisions from the European Systems*, November 2013, at 23 (particularly where the police engage in the use of racist epithets).

⁵⁰ ECtHR (Grand Chamber), 24 May 2016, no. 38590/10, *Biao v. Denmark*, para. 103; ECtHR (Grand Chamber), 13 November 2007, no. 57325/00, *D.H. and Others v. the Czech Republic*, para. 184.

⁵¹ European Network against Racism (ENAR), *Ethnic Profiling*, Fact Sheet 40, June 2009, at 4; European Union Agency for Fundamental Rights, *Towards More Effective Policing Understanding and Preventing Discriminatory Ethnic Profiling: A Guide*, 2010, at 19. See also ECRI, General Policy Recommendation No. 111 on combating racism and racial discrimination in policing (2007), which encourages 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.'

⁵² CERD, General recommendation No. 34 adopted by the Committee Racial discrimination against people of African descent, CERD/C/GC/34, 3 October 2011, para. 31.

⁵³ ECtHR, 13 December 2005, nos. 55762/00 and 55974/00, *Timishev v. Russia*, para. 57; ECtHR (Grand Chamber), 29 April 1999, nos. 25088/94 etc., *Chassagnou and Others v. France*, paras. 91-92; ECtHR, 8

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.”⁵⁴

It is also important to bear in mind that in cases of alleged indirect discrimination, “less strict evidential rules should apply.”⁵⁵ When it comes to assessing the impact of a measure on an individual or group, reliable and significant statistics “will be sufficient to constitute the *prima facie* evidence that the applicant is required to produce”⁵⁶ in order to shift the burden of proof. However, as the Court’s case law reveals, indirect discrimination can also be proven without statistical evidence.⁵⁷ The use of alternative means of evidence is all the more needed when countries lack mechanisms for the collection of data disaggregated by ethnic background and when allegations of indirect discrimination concern law enforcement actions. On this latter point, we should recall that events concerning police actions (such as identity checks or other events while in police custody) usually “lie wholly, or in a large part, within the exclusive knowledge of the authorities.”⁵⁸ For this reason, it is for the State to provide a satisfactory account of allegations over those events, failing which the Court can draw inferences unfavorable to the government.⁵⁹ This appears particularly important whenever police officers are granted broad discretionary power giving rise to a high risk of arbitrariness.⁶⁰

Once established or presumed that a measure indirectly places persons of a certain ethnic origin at disadvantage, the State must advance “compelling or very weighty reasons” to show that the measure “pursued a legitimate aim and was the result of objective factors unrelated to ethnic origin.”⁶¹ This involves an evaluation of the relationship of proportionality between the means employed and the aim sought.⁶² We respectfully argue that police ethnic profiling is likely to fail this test of reasonability. In the first place, ethnic profiling tends to be unsuitable to achieve legitimate aims such as protecting public safety, preventing crime and controlling illegal immigration.⁶³ Despite appearances of objectivity or reasonability, the use of ethnic profiling is normally both over-inclusive

December 2009, no. 49151/07, *Munoz Diaz v. Spain*, para. 50; ECtHR (Grand Chamber), 13 November 2007, no. 57325/00, *D.H. and Others v. the Czech Republic*, para. 177.

⁵⁴ ECtHR, 13 December 2005, nos. 55762/00 and 55974/00, *Timishev v. Russia*, para. 58.

⁵⁵ ECtHR (Grand Chamber), 13 November 2007, no. 57325/00, *D.H. and Others v. the Czech Republic*, para. 186.

⁵⁶ *Ibid.*, para. 188.

⁵⁷ *Ibid.*, para. 188 (acknowledging the important role of statistics but noting that this does not “mean that indirect discrimination cannot be proved without statistical evidence”); ECtHR (Grand Chamber), 24 May 2016, no. 38590/10, *Biao v. Denmark*, paras. 108-113 (where the grand Chamber drew reasonable inferences from various reliable materials other than official statistics). See also, Samantha Besson, ‘Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe’, 60 *The American Journal of Comparative Law* (2012) at 169.

⁵⁸ ECtHR (Grand Chamber), 28 September 2015, no. 23380/09, *Bouyid v. Belgium*, para. 83 (although the Court’s reasoning on this point was developed in the context of Article 3 ECHR, it can nonetheless be applied *mutatis mutandis* to allegations of violations of other convention rights, including the prohibition of discrimination).

⁵⁹ *Id.* See also para. 84 of the same judgment (“the principle set forth in paragraph 83 above applies to all cases in which a person is under the control of the police or a similar authority.”)

⁶⁰ In a similar vein, see ECtHR, 12 January 2010, no. 4158/05, *Gillan and Quinton v. the United Kingdom*, paras. 83-85.

⁶¹ ECtHR (Grand Chamber), 24 May 2016, no. 38590/10, *Biao v. Denmark*, paras. 114 and 138.

⁶² ECtHR (Grand Chamber), 13 November 2007, no. 57325/00, *D.H. and Others v. the Czech Republic*, para. 196.

⁶³ Several materials suggest that ethnic profiling is both ineffective and counter-productive. See e.g. Open Society Justice Initiative, *Ethnic Profiling in the European Union; Pervasive, Ineffective and Discriminatory*, 2009, at 51-55; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/4/26, 29 January 2007, para. 54 (“the available evidence suggests that profiling practices based on ethnicity, national origin or religion are unsuitable and ineffective”).

and under-inclusive.⁶⁴ It is over-inclusive in that it usually affects a large number of individuals who have nothing to do with illegal or criminal behavior. At the same time, it is under-inclusive, since many individuals who are in fact involved in illegal activities but who do not fit the ethnic criterion will escape the police's attention. These two problems are particularly evident when ethnic profiling is used in societies that are diverse or multi-ethnic. In the second place, ethnic profiling fosters the stigmatization and exclusion of ethnic minorities while also feeding mistrust among different groups in society.⁶⁵ This means that ethnic profiling is highly harmful to human rights, and therefore not strictly necessary or the least restrictive means to achieve the legitimate goals pursued.

3.4. Preventive positive obligations: the need for an adequate legal and administrative framework

In the previous section, we have argued that ethnic profiling in itself violates the ECHR. In this section, it will be argued that the Court should seize the opportunity offered by this case to develop a framework of preventive positive obligations under Article 8 in combination with Article 14 ECHR (or, alternatively, under Article 1 Protocol 12) to protect against these kinds of human rights violations.

Generally, in cases where the risk of a particular human rights violation is systemic in nature, mere *ad hoc* responses to instances of human rights violations fail to provide "practical and effective" protection of the Convention rights concerned.⁶⁶ In such contexts, the Court therefore requires the State to set up an adequate legal and administrative framework to prevent the occurrence of such violations in the first place. The Court has for example required such framework to be in place in a wide variety of contexts, such as sexual abuse of minors,⁶⁷ human trafficking,⁶⁸ hazardous activities⁶⁹ and occupational health risks.⁷⁰ The need for such an adequate legal and administrative framework applies *a fortiori* to the context of policing activities, where the systemic risk that law-enforcement personnel abuse their position of authority to violate human rights is self-evident. For this reason, in the case of *Giuliani and Gaggio*, the Grand Chamber had held that:

*"Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that policing operations must be sufficiently regulated by national law, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force."*⁷¹

Clearly, these considerations are not only relevant for the strict context of the use of firearms, but are more broadly applicable to any instance in which "unregulated and arbitrary action by State agents" entails a systemic risk of human rights violations. For this reason, as "[p]olice officers should not be left in a vacuum when performing their duties",⁷² it would be in line with the Court's case law to similarly impose a positive obligation on the State to put in place a "framework of a system of adequate and effective safeguards" against ethnic profiling.

⁶⁴ In this vein, see e.g. J.G. Añón, B. Bradford *et al*, *Identificación policial por perfil étnico en España. Informe sobre experiencias y actitudes en relación con las actuaciones policiales*, Valencia 2013, at 49, 64-65; O. De Schutter and J. Ringelheim, 'Ethnic Profiling: A Rising Challenge for European Human Rights Law' Working paper series REFGOV-FR-22 (2008), at 366.

⁶⁵ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/4/26, 29 January 2007, paras. 56-58.

⁶⁶ For a discussion, see L. Lavrysen, *Human Rights in a Positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*, p. 118-123 and 131-137.

⁶⁷ ECHR (Grand Chamber), 28 January 2014, no. 35810/09, *O'Keeffe v. Ireland*.

⁶⁸ ECHR, 7 January 2010, no. 25965/04, *Rantsev v. Cyprus and Russia*.

⁶⁹ ECtHR (Grand Chamber), 30 November 2004, no. 48939/99, *Öneryildiz v. Turkey*.

⁷⁰ ECtHR, 24 July 2014, nos. 60908/11 etc., *Brincat and Others v. Malta*.

⁷¹ ECtHR (Grand Chamber), 24 March 2011, no. 23458/02, *Giuliani and Gaggio v. Italy*, para. 249.

⁷² *Id.*

The specific organisation of such framework is a matter that can be left to the State's margin of appreciation, on condition that it is capable of providing effective protection against the human rights violations involved in cases of ethnic profiling. As in the context of the use of firearms, it is however evident that "law-enforcement agents must be trained to assess" whether there are objective and reasonable grounds that are unrelated to a person's ethnic origin for performing a security check, "not only on the basis of the letter of the relevant regulations, but also with due regard to the pre-eminence" of the prohibition of racial discrimination "as a fundamental value."⁷³ In addition, important parallels can be drawn from the case law on sexual abuse of minors, as ethnic profiling is similarly characterised by its underreported character and by the fact that the perpetrator in these cases is in "a position of authority" over the victim.⁷⁴ For this reason, pure reactive responses to individual allegations of ethnic profiling are insufficient to provide effective protection against these abuses. As in the *O'Keeffe* case, the Court should therefore require States to put in place "useful detection and reporting mechanisms [that] are fundamental to the effective implementation of the relevant" legal and administrative framework.⁷⁵ While the *O'Keeffe* case concerned human rights violations committed by private individuals, these considerations apply *a fortiori* to human rights violations committed by State agents, such as instances of ethnic profiling.

3.5. Procedural positive obligations: the obligation to investigate allegations of ethnic profiling

Ethnic profiling amounts to racial discrimination, which "is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction."⁷⁶ Taking into account "the need to reassert continuously society's condemnation of racism and ethnic hatred and to maintain the confidence of minorities",⁷⁷ the Court should therefore require States to take allegations of ethnic profiling seriously. For this reason, as with cases of alleged racist violence, it would be in line with the Court's case law to similarly impose a procedural positive obligation on States to investigate allegations of ethnic profiling.

When an individual raises an arguable complaint that he or she was subjected to ethnic profiling, Article 14 in combination with Article 8, or, alternatively, Article 1 Protocol 12 should be interpreted as encompassing a "duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role" in the security check concerned.⁷⁸ As in cases of alleged racist violence, the State is under an obligation to "do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of" a racial motive for a security check.⁷⁹

⁷³ *Mutatis mutandis* ECtHR (Grand Chamber), 24 March 2011, no. 23458/02, *Giuliani and Gaggio v. Italy*, para. 250.

⁷⁴ ECHR (Grand Chamber), 28 January 2014, no. 35810/09, *O'Keeffe v. Ireland* 148.

⁷⁵ *Mutatis mutandis* ECHR (Grand Chamber), 28 January 2014, no. 35810/09, *O'Keeffe v. Ireland*, para. 148. Also in other contexts, the Court has required the State to put in place a monitoring system in order to supervise implementation of the relevant regulatory framework with respect to activities or situations that involve inherent risks of human rights violations: e.g. ECtHR (Grand Chamber), 30 November 2004, no. 48939/99, *Öneryildiz v. Turkey* (hazardous activities); and ECtHR, 26 July 2011, no. 9718/09, *Georgel and Georgeta Stoicescu v. Romania* (stray dogs).

⁷⁶ ECtHR, 13 December 2005, nos. 55762/00 and 55974/00, *Timishev v. Russia*, para. 56.

⁷⁷ ECtHR (Grand Chamber), 6 July 2005, nos. 43577/98 and 43579/98, *Nachova and Others v. Bulgaria*, para. 160.

⁷⁸ *Id.*

⁷⁹ *Mutatis mutandis* ECtHR (Grand Chamber), 6 July 2005, nos. 43577/98 and 43579/98, *Nachova and Others v. Bulgaria*, para. 160.