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ANALYSIS OF THE RIGHT TO EQUALITY AND NON-  
DISCRIMINATION WITH REGARD TO ETHNIC PROFILING.  
BELGIAN PERSPECTIVES.

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Ingediend door

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# Introduction

## PROBLEM DEFINITION

*On the street and in public places, when entering a club, a stadium or an airport, I am likely to be targeted, controlled and checked...because of the way I look, because of my (North) African roots (“my terrorist face”) or because of the religious symbols I’m wearing. So because some people in law enforcement denominate me and many other people as the suspect ‘ethnic other’ through my appearance or name. Confronted with such testimonies and stories, the human(ist) and the law student in me were triggered. Is this practice legal? Why is the practice recurring and apparently ‘tolerated’? What can be done about it – from a legal point of view? What are the rights of the individuals involved, and how can these rights be enforced?*

A classic legal review of the condition of ethnic profiling in Belgium from the perspective of the right to equality yielded insight, but the topic solicited for complementary and alternative points of view.

Ethnic profiling is defined in various ways and contexts. For the purpose of this thesis, ethnic profiling is the use of generalizations based on ethnicity, (supposed) race, national origin or religion as the basis for suspicion in law enforcement decisions and actions without objective justification.<sup>1</sup> Ethnic profiling might be a formal policy or an informal practice in the discretionary decisions of individual law enforcement officials. Typical circumstances where ethnic profiling arises are police initiated actions such as stop and search and identity checks, but it might also appear in asylum procedures, data mining operations and other situations.<sup>2</sup>

The notion of racial profiling, also denominated ‘driving/ walking while black’, was first used in the USA in the 1990’s. Statistics showed that American police stopped African American and Hispanic drivers and pedestrians disproportionately under the pretext of minor infractions.<sup>3</sup> Belonging to an ethnic minority is thus used as predictive factor for crime, like being intoxicated or acting suspiciously. The debate on racial profiling in the USA is still going on and led to civil unrest.

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<sup>1</sup> I elaborated the definition in O. DE SCHUTTER AND J. RINGELHEIM, “Ethnic Profiling: A rising Challenge for European Human Rights Law”, 71 (3) *Modern Law Review* 2008, 358.

<sup>2</sup> Not only generalisations on the basis of visual features are discussed under the concept of ethnic profiling, but also on the basis of data. See also P. BOU-HABIB, “Security, Profiling and Equality”, 11 *Ethic Theory Moral Practice* 2008, 150.

<sup>3</sup> De Schutter and Ringelheim, *supra* note 1, 361.

Whereas racial profiling in USA is scrutinized in the courts mainly with respect to the right to free movement, practices of ethnic profiling in Europe are studied and denounced rather from the perspective of discrimination.<sup>4</sup>

Belgium is not one of the countries where ethnic profiling lists high on the political or judicial agenda. There are more reasons why it is necessary and useful to study the right to non-discrimination and ethnic profiling in Belgium, such as the current climate of threat in the slipstream of terrorist attacks<sup>5</sup>, the ethnically diverse population and a rather elaborated anti-discrimination legislation. Furthermore, I am better acquainted with the Belgian legal system and society than with any other system. For these reasons, Belgium will be focal point of this research.

Ethnic profiling arises when the link between a certain crime and ethnicity related features is established by statistics, by the media or because of subjective experiences and stereotypes. As from 2014, the alertness for so-called ‘Islamic terrorism’ increased in Belgium and reports on ethnic profiling of individuals who look like Muslims (e.g. Arab origin) are more published in Belgian popular media. Also other ethnic groups are also vulnerable to ethnic profiling, such as people of Roma origin. It emerged that Belgian police registered the categorical ‘gypsy’ (zigeuner) when someone of Roma origin was arrested; the procedure raised protest, was linked to ethnic profiling and is cancelled now.<sup>6</sup>

There is a thin line between biased policing and discrimination on the one hand and criminal profiling and the normal decision taking process of police on the other hand. Since the police possess discretionary power to control, search or arrest a person when the threshold of ‘reasonable suspicion’ is reached, the use of ethnic profiling is hard to prove, just like other forms of discrimination. Common sense and academic analysis provide many reasons for distrusting ethnic profiling, related with human rights, effective policing and social cohesion. Several reputable international and non-governmental human rights institutions<sup>7</sup> disapprove

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<sup>4</sup> In this thesis, I will use the term “ethnic” as in “ethnic profiling” as a generic term for national, racial or ethnic origin and religious belief; it denominates belonging to a specific minority.

<sup>5</sup> Ethnic profiling gained particular attention after a series of violent terrorist attacks (New York and Washington, 11 September 2001, Madrid, 11 March 2004; London, 7 July 2005; Paris, 6 January 2015 and 13 November 2015; Brussels 22 March 2016). The ethnic background and religion of the terrorists are often considered a proxy for possible danger. In the aftermath of these events, the prerogatives of police were sometimes extended and counter-terrorism measures were implemented. See European Network against Racism (hereafter ENAR), “Fact Sheet 40. Ethnic Profiling”, June 2009, 2.

<sup>6</sup> Y.DELEPELEIRE, “Er is gewoon geen plaats voor het woord zigeuner”, De Standaard, 15 April

<sup>7</sup> Such as European Union Agency for Fundamental Rights (hereafter FRA), Open Society Justice Initiative (hereafter OSJI), Amnesty International and Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. FRA, “Data in Focus Report: Police Stops and Minorities”, 2010; OSJI, *Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory*, New York, 2009; Amnesty International, *Proactief optreden vormt een risico voor mensenrechten. Etnisch profileren onderkennen en aanpakken*, Amsterdam, Amnesty International Afdeling Nederland, 2013 and M. RUTEERE and

ethnic profiling, also specifically for Belgium. Case law on ethnic profiling is rather underdeveloped.

This master thesis will deal with the relation between the right to equality and ethnic profiling in the case of Belgium. The nature of the problem naturally leads to a wider approach, i.e. to the use of insights from criminology, ethics and sociology for explaining the rationales behind the discriminatory practice. Many questions were evoked in the study of these sources: is the current counter-discrimination framework sufficient to rule out ethnic profiling? Which measures should be taken to challenge ethnic profiling in Belgium? How can a higher level of legal certainty and effectiveness of the right to equality be achieved in the given context, for both subjects of law and law enforcers? (...)

### **RESEARCH QUESTIONS AND METHODOLOGY**

Relevant research into ethnic profiling is increasingly published on an international platform; for the Belgian case however the phenomenon and the study of it is relatively new. Janssens and Forrez published an exploratory *status questionis* of ethnic profiling in Belgium from a human rights perspective in 2015, emphasizing the need for more research, but also calling for awareness raising and legislative action.<sup>8</sup> The thesis takes on a wider approach and seeks to elaborate some elements and recommendations pointed out.

It is widely assumed that law enforcement agents use ethnic profiling techniques, also in Belgium. The main hypothesis is that ethnic profiling constitutes illegitimate discrimination. This hypothesis will be thoroughly studied, from multiple perspectives and with due regard to the justifications. ‘What is the relation between the use of ethnic profiling and the (Belgian) anti-discrimination framework?’ and ‘What are the perspectives for eliminating this practice?’ are the central research questions. The study of the appearance and extent of ethnic profiling in Belgium is mainly based on secondary research, for there is a lack of reliable primary sources such as statistics and police data.

I adopted a descriptive method of legal review for an overview of the legal status of ethnic profiling in Belgium on the basis of international and national sources of law (e.g. the jurisprudence of the European Court for Human Rights), soft law instruments, NGO reports and the Belgian anti-discrimination policies. Media coverage and academic publications were

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United Nations (UN) General Assembly, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, A/HRC/29/46, Geneva, UN Office of the High Commissioner for Human Rights (UNOHCHR), 20 April 2015.

<sup>8</sup> Y. JANSSENS AND S. FORREZ, “Ethnic profiling in België. Een verkennende wandeling op braakliggend terrein”, 35 (2) Cahiers Politiestudies 2015, 59-74.

taken into consideration for a more complete understanding. With regard relevant data from other jurisdictions, a functional comparative approach was used. The qualitative study of ethnic profiling includes review criminological and sociological literature on equality, policing and security.<sup>9</sup> Ethnic profiling is decidedly a problem that displays the reciprocal influence between the legal system and society. The different perspectives and wider angle contribute to clarifying the existing inaudibility of human rights and certain police initiated actions.

In answering the second part of the research question, a more direct approach is adopted by sampling the view of relevant actors on the propositions for reducing ethnic profiling, by means of a questionnaire addressing the political parties in Belgium and Unia, Committee P and the Federal Police Diversity department. In this inquiry, the main questions asked the opinion on the recommendations of legal prohibition of ethnic profiling and data collection through stop forms, without however providing conclusive answers on the feasibility of some measures.

This thesis offers a general overview of ethnic profiling as a discriminatory practice in Belgium as an introduction into the topic aimed at stimulating professional discourse.

## **STRUCTURE OF THE RESEARCH**

The study provides a conceptual analysis of the key notions ethnic profiling and non-discrimination (chapter 1). This chapter describes the most important court decisions with a focus on how effective the tools of the anti-discrimination framework are in challenging the illegitimate policing technique before the international and national courts. Chapter 2 elaborates on the status of ethnic profiling and the right to equality in Belgium. In chapter 3, the problem of ethnic profiling is framed from an interdisciplinary perspective, while the fourth chapter discusses the impact of ethnic profiling and the feasibility of counter-measures in Belgium. The conclusions and recommendations on the measures to ensure better Belgian compliance with international and European standards on ethnic profiling are formulated in the last chapter of this thesis, followed by the classic ‘recommendations for further research’.

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<sup>9</sup> “Human Rights law is in particular need of a richer exchange between jurisprudential approaches and social science theory and methods.” “Scholars and judges must remove the blindfold and explore law at work in the social and political world”: A. HUNEEUS, “Human Rights between Jurisprudence and Social Science”, 28(2) *Leiden Journal of International Law*, 2015, 255.



# 1 Ethnic profiling and the right to equality and non-discrimination

## 1.1 Ethnic profiling

### 1.1.1 Definition and scope of ethnic profiling

#### 1.1.1.1 Definition

There is no legal definition or binding legal provision dealing explicitly with the concept of ethnic profiling in Belgium.<sup>10</sup> This observation applies equally to the European and international legal frameworks.<sup>11</sup> Ethnic or racial profiling is defined in several ways in criminological and juridical literature, policy documents and soft law instruments. There are approximately two types of ethnic or racial profiling definitions. The first, more ‘rigorous’ approach is primarily found in sources with a human rights perspective; any use of generalizations based on ethnicity as a criterion for police attention is considered as unjustified profiling. In a second approach, ethnic profiling is the suspicion of persons solely on the basis of their ethnic background or appearance.<sup>12</sup>

In this thesis, ethnic profiling is defined as the use of generalizations based on ethnicity, (supposed) race, national origin or religion as a source of suspicion in law enforcement decisions, without objective justification. This broad definition is adequate for the context of Belgium and it is the most operational approach in the context of the right to equality. In daily police practices, decisions and actions are usually based on a combination of parameters like behaviour, the possession of certain items, place and time, age and gender. When stereotypes about ethnicity are decisive in the suspicion, it constitutes ethnic profiling.<sup>13</sup> Individual behaviour and objective evidence should be the basis of reasonable suspicion, not the way people look and who they are. ‘Without objective justification’ is included in the definition because misconceptions about the correct use of data related to ethnicity in policing might

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<sup>10</sup> De Schutter and Ringelheim, *supra* note 1, 363.

<sup>11</sup> “Racial profiling is a political moniker, not a legal concept.” in M.R. SMITH AND G.P. ALPERT, “Searching for direction: Courts, social science, and the adjudication of racial profiling claims”, 19(4) *Justice Quarterly* 2002, 683.

<sup>12</sup> A. BAKER AND G. PHILLIPSON, “Policing, profiling and discrimination law: US and European approaches compared”, 7 *Journal of Global Ethics* 2011, 121 and ENAR “Fact Sheet 40. Ethnic Profiling”, 2009, 3.

<sup>13</sup> See also Unia: “Police should be able to take race, ethnicity or religion into account in the employment of their tasks, but these factors shouldn’t be the main reason for action – to the contrary, a police officers should found its decision on multiple factors” Interfederaal Gelijkekansencentrum, Jaarverslag 2013. Conventie tussen het Centrum voor gelijkheid van kansen en voor racismebestrijding en de Federale Politie, Brussel, May 2014, 49-50.

arise. It is obviously justifiable to include appearance –including ethnic features- in suspect descriptions.

#### 1.1.1.2 Terminology

There is no univocal definition of ethnic profiling, and the terminology is likewise an amalgam. The terms ethnic profiling and racial profiling<sup>14</sup> are both used and are broadly interchangeable. Some authors prefer to use the notion of ‘racially biased policing’ or consider the practice of using ethnic stereotypes in policing decision under the concept of institutional racism. Ethnic profiling and racial profiling are considered as synonyms in the context of this research, but the use of the denominator ethnic profiling is preferable because it refers to a wider range of group features and is more accurate in a Belgian/European context.<sup>15</sup> In the judgment *Timishev v Russia* before the European Court of Human Rights (hereafter ECt.HR), the Judge held that language, religion, nationality and culture may be indissociable from ethnicity: “ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language or cultural and traditional origins and backgrounds.” In the context of this research, the notions ‘ethnicity’ and ‘ethnic’ are always understood in this wide interpretation.<sup>16</sup>

#### 1.1.1.3 Scope

Ethnic profiling arises in law enforcement and policing and particularly in the following tasks: maintaining public order through identity checks and stops and searches (i.e. general policing), monitoring security and counter-terrorism as well as the activities of the prevention, detection, and investigation of crime and the apprehension of criminals. Immigration officers and other law enforcement agents may furthermore use their powers to subject people to extra interviews and investigations ostensibly addressing illegal immigration, which might involve ethnic profiling.<sup>17</sup> Also during the decision-making in asylum procedures<sup>18</sup> and the use of

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<sup>14</sup> Racial profiling is the term used since the 1990’s in the USA to refer to the use of (...) “racial or ethnic factors in law enforcement decisions whether in common stop and search practices, anti-terrorism or other areas.” DE SCHUTTER AND RINGELHEIM, *supra* note 1, 361.

<sup>15</sup> In the context of this research the element ‘ethnic’ as in ethnic profiling covers every aspect related to (but not limited to) ethnicity, race, religion or national origin. The term ‘race’ is used less and less in the (European) literature, in favour of the term ‘ethnicity’, because of the political charge of the former. This explains the shift from the use of the term racial profiling to the general usage of the moniker ethnic profiling.

<sup>16</sup> ECtHR, *Timishev v Russia*, App. No. 55762/00 and 55974/00, 13 December 2005, para. 55.

<sup>17</sup> The interrelatedness of immigration status and nationality, race or ethnicity serves as a perfect alibi for ethnic profiling, see also M. RUTEERE, *supra* note 7, 7.

<sup>18</sup> ENAR, “Fact Sheet 40. Ethnic Profiling”, 2009, 10.

databases as a contemporary tool for immigration control and countering crime and terrorism, ethnic profiling might occur.<sup>19</sup>

In the definition of ethnic profiling there is no limitation *ratione personae* or *ratione materiae*. The enforcement of law and maintenance of order is generally conducted by police, but encompasses in some circumstances the army (military police), research judges, the public services regarding customs and immigration services, as well as state security and even private security forces.<sup>20</sup> Many scholars and reviewing bodies choose to refer to police and to stop and search powers only in their interpretation of ethnic profiling, sometimes for practical reasons.<sup>21</sup> This thesis aims to encompass all the situations of (potential) ethnic profiling in the study from a human rights perspective. Moreover, ethnic profiling accounts for both direct and indirect and formal and informal decisions and actions.<sup>22</sup> The use of non-objective generalizations in law enforcement is sometimes a formal policy but more often an informal or even subconscious practice.

### 1.1.2 Connotations of profiling

The term profiling covers multiple meanings, which is partly responsible for the confusion and misconception around ‘ethnic profiling’.<sup>23</sup> Suspect profiling is the use of a description of a particular person in connection with a crime; the description might include ethnic characteristics. In the design of suspect descriptions, too general descriptions might however lead to over-targeting of individuals “who are perceived to share the same ethnicity as the suspect being sought (...)”. Such profiles should be handled cautiously.<sup>24</sup> Criminal profiling is an investigative tool in which a defined set of characteristics is used to identify people likely to engage in criminal activity.<sup>25</sup> These profiling methods are considered as a legal and explicit investigation tool in contrast to ethnic profiling, which is also described as the

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<sup>19</sup> A. ROMEI AND S. RUGGIERI, “Discrimination Data Analysis: A Multi-disciplinary Bibliography” in B. CUSTERS, T. CALDERS, B. SCHERMER AND T. ZARSKY (eds.), *Discrimination and Privacy in the Information Society. Data Mining and Profiling in Large Databases*, Berlin, Springer, 2013, 118.

<sup>20</sup> Security guards on public transportation and other private guards bear certain authority that might entail ethnic profiling. There is a global tendency towards privatization of security responsibilities; I include these job groups. See also: M. DEN BOER, “Revolving doors: ethics in a shifting security paradigm”, in M. DEN BOER AND E. KOLTHOFF (eds.), *Ethics and Security*, The Hague, Eleven International Publishing, 2010, 15-37.

<sup>21</sup> JANSSENS AND FORREZ, *supra* note 8, 61.

<sup>22</sup> *Ibidem* and DE SCHUTTER AND RINGELHEIM, *supra* note 1, 362.

<sup>23</sup> The term ethnic profiling is used in this master thesis despite some misconceptions. A larger number of publications using the term ethnic profiling should strengthen the understanding and proper use of the term. Racially/ ethnically biased policing is used as an umbrella term, encompassing other practices than just ethnic profiling, e.g. ethnically motivated police violence and hate speech.

<sup>24</sup> ENAR, “Fact Sheet 40. Ethnic Profiling”, 2009, 2-3.

<sup>25</sup> E.g. serial killer profiles. In the legal criminal profiles, objective and statistically proven indicators lie at the heart of the profile, unlike ethnic profiling, which is based on assumptions and prejudices.

discriminatory use of negative stereotypes of a certain group or groups for the prediction of suspects.

Terrorist profiling is the use of predictive instruments based on ethnic information and other elements in the context of counter-terrorism.<sup>26</sup> This practice might as well constitute ethnic profiling when law enforcement agents use broad profiles that reflect unexamined generalizations. The United Nations High Commissioner for Human Rights recognized that terrorist profiling might constitute a disproportionate interference with human rights, particularly the principle of non-discrimination.<sup>27</sup>

One of the overt problems with ethnic profiling is that there is no individualized element for control, but a group element. Certain ethnic groups are linked with a certain type of crime but without reliance on correct information or without assessing the effectiveness of using these assumptions in policing. Ethnic profiling is condemned in academic publications and policy instruments as a forbidden form of discrimination since its use affects the core democratic values and respect for the individual.<sup>28</sup> The real impact of ethnic profiling practices will be discussed in chapter four.

## 1.2 Right to equality and the prohibition of discrimination

### 1.2.1 The concepts equality and discrimination

The right to non-discrimination and equal treatment before the law is a guiding principle in human rights instruments and in the constitutions of democratic states; it is recognized as a norm of *ius cogens*.<sup>29</sup> Equality is considered a fundamental value in many fields such as philosophy and ethics, social and political sciences and law. The concept is open-ended and has a divergent application scope.<sup>30</sup> Because focusing on positive characteristics of equality is endless, many advocate the use of a negative definition of equality for an effective prevention of discrimination by legal means: “the legal understanding of the right to equality should be built around our developing understanding of disadvantage, discrimination and inequality, rather than abstract concepts of equal treatment”.<sup>31</sup>

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<sup>26</sup> DE SCHUTTER AND RINGELHEIM, *supra* note 1, 361 and EU NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS (CFR-CDF), “The balance of freedom and security in the response by the European Union and its member states to the terrorist threat”, thematic comment, 2003, 21.

<sup>27</sup> “Human Rights, Terrorism and Counter-terrorism, Fact Sheet No. 32”, Geneva, UNOHCHR, 2007, 37.

<sup>28</sup> De Schutter and Ringelheim, *supra* note 1, 369.

<sup>29</sup> “Human Rights, Terrorism and Counter-terrorism. Fact Sheet No. 32”, *supra* note 29.

<sup>30</sup> C. O’ CINNEIDE, “The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?” 1 University College London Human Rights Revue 2008, 81.

<sup>31</sup> It is a risk of many equality protections that they remain “empty vessels”. *Ibidem* 83.

The question underlying the different interpretations is: “what is treating people equally?”<sup>32</sup> The notions of formal equality, substantive equality and dignity<sup>33</sup> are steps in the development of an operational normative framework of equality. In the philosophical analysis of equality, libertarian schools tend to support a formal equality interpretation, whereas egalitarians support equality of opportunity and gravitate towards anti-discrimination or substantive equality.<sup>34</sup> Formal equality is derived from an Aristotelian equality concept: the treatment of alike cases in an alike manner and unlike cases in an unlike manner. This is useful in addressing the obvious, direct forms of discrimination. However for egalitarians substantive equality is necessary to ensure concrete equality of status and respect for all citizens without discriminatory impact.<sup>35</sup> The opposition between schools of equality takes place in a wider discussion on social engineering through equality law and on bigger issues as the relation between equality, liberty and other values.

Jurisdictional systems are oscillating between the different takes on the equality issue. For a long period, the discrimination jurisprudence of the ECtHR was relatively underdeveloped and heavily oriented to a formal equality model though with stricter standards of scrutiny to certain types of discrimination. Recent case law shows a hesitant shift towards a more powerful and effective protection against the discriminatory impact of state law and state policies. Notably in the path breaking case of *D.H. and others v Czech Republic* a reasonably strong anti-discrimination approach with even touches of substantive equality is established, see *infra*.<sup>36</sup>

The relation between equality and non-discrimination is very close and in jurisprudence they are often used interchangeable or cited together. Non-discrimination is actually a more technical and operational denominator than the right to equality.<sup>37</sup> The ‘right to equal treatment’ or the ‘right to be treated equally’ are also considered as more viable variations on the theoretical right to equality. In the important provisions in the European Convention on

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<sup>32</sup> *Ibidem* 94.

<sup>33</sup> The principle of equal dignity and respect is accepted as a minimum standard throughout mainstream Western culture; dignity reflects the universality, indivisibility, and inter-relatedness of all human rights. The relation between dignity and the practice of ethnic profiling won’t be researched in the scope of this thesis.

<sup>34</sup> O’CONNELL, *supra* note 30, 97.

<sup>35</sup> Substantive equality is the equal enjoyment of opportunities to access benefits available in society, rather than mere ‘formal equality’. European Union Agency for Fundamental Rights (FRA), Handbook on European non-discrimination law, Luxemburg, Publications Office of the European Union, 2010, 35.

<sup>36</sup> R. O’CONNELL, “Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR”, 29 (2) Legal Studies: The Journal of the Society of Legal Scholars 2009, 211-229.

<sup>37</sup> F. SUDRE, AND UNIA. SURREL (eds.), *Le droit à la non-discrimination au sens de la Convention européenne des droits de l’homme. Actes du colloque des 9 et 10 novembre 2007*, Brussels, Etablissements Emile Bruylant, 2008, 19.

Human Rights (article 14 and Protocol No. 12) the term ‘discrimination’ is used, but the preamble of Protocol 12 makes the connection between the right to equality to the principle of non-discrimination: “(...) Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law; (...)”

### 1.2.2 Equality protection

The protection of the right to equality and against discrimination in Belgium is found in different sources, ranging from general, constitutional equality clauses to statutory laws that explicitly protect certain grounds of discrimination on both federal level and the level of federated entities. The relevant international treaties with regard to the equality protections are mentioned in the preamble of the EU Racial Equality Directive:

“The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognized by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories”<sup>38</sup>

In the International Convention on the Elimination of All Forms of Racial Discrimination (hereafter ICERD) racial discrimination is “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” The Convention also explicitly states that State Parties should ensure that public authorities and institutions do not engage in racial discrimination.<sup>39</sup>

The equality protection under the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR) and under EU law and national legislation will be reviewed hereafter, as they are most developed and functional for the context of ethnic profiling. European anti-discrimination law has direct applicability (ECHR) and direct effect (EU Law) in the member states. The ECHR moreover imposes binding obligations on its members to guarantee the human rights to everyone under its jurisdiction, not just citizens.<sup>40</sup>

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<sup>38</sup> EU Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19 July 2000, preamble.

<sup>39</sup> International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 21 December 1965, resolution 2106 (XX), entered into force 4 January 1969, article 1.

<sup>40</sup> FRA, *supra* note 35, 11-12.

### 1.2.3 Equality protection under ECHR

The Convention contains a truncated anti-discrimination clause in article 14 and a stand-alone right in Protocol No. 12.<sup>41</sup> The interpretation of the right to non-discrimination has been significantly expanded in the case law of the European Court of Human Rights (hereafter ECt.HR).

#### 1.2.3.1 Article 14

Article 14 ECHR is the non-discrimination principle in the ECHR.<sup>42</sup> The Article should be evoked in conjunction with one or more of the substantive guarantees contained in articles 2 to 12 of the Convention or in one of the Protocols. The challenged measure must ostensibly affect another right within the protection of ECHR. In the case of ethnic profiling there are generally claims that other rights are violated such as the right to liberty (article 5), the right to privacy (article 8) or the freedom of association (article 11).<sup>43</sup> The connection with the infringement of a second article of ECHR is not always easy to establish and proving difficulties might show up. As Article 14 is very concise, it does not stipulate anything on the nature of discrimination, the burden of proof for prima facie discrimination or on what may constitute objective and reasonable justification.<sup>44</sup> Some authors consider the Article through its wordings rather a protector of equality than a prosecutor of discriminatory conduct.<sup>45</sup> The open structure and concise phrasing of Article 14 diffuse the interpretation and the criteria of application.<sup>46</sup> The application scope of article 14 ECHR is extended by the Court: it suffices when the facts of the case broadly relate to issues that are protected under the ECHR.<sup>47</sup> The

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<sup>41</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 2000, CETS No. 177, entered into force 1 April 2005.

<sup>42</sup> “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Art. 14 of European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 005, entered into force 3 September 1953.

<sup>43</sup> A. Baker and G. Philipsson, *supra* note 12, 112.

<sup>44</sup> O.M. ARNARDÓTTIR, “Non-discrimination Under Article 14 ECHR: the Burden of Proof”, 51 *Scandinavian Studies in Law* 2007, 14.

<sup>45</sup> The preparatory works of the ECHR show a shift from the obligations of the parties to the individual concerned. “Had the provision stated that rights ‘shall be protected without discrimination’, the implication would have been that state actors must not commit discrimination when protecting Convention rights.” BAKER AND PHILLIPSON 2011, *supra* note 12, 112.

<sup>46</sup> It is *inter alia* unclear what the ambit is of the other Convention right invoked and what is the yardstick for comparison of the discrimination (i.e. which individuals or groups are in similar situations). Another dimness is the discrimination ground “other status”. O’CINNEIDE, *supra* note 30, 86.

<sup>47</sup> FRA, *supra* note 35, 61.

ECt.HR has also made clear that it may examine claims under Article 14 taken in conjunction with a substantive right, even if there has been no violation of the substantive right itself.<sup>48</sup>

The Court was however criticised on its hesitant approach towards Article 14, particularly in cases of ethnic discrimination by state actors.<sup>49</sup> In the Grand Chamber case of *Georgia v Russia* (2014), an inter-state case of collective expulsion, dissenting Judge Tsotsoria claims that the Court too often fails to examine Article 14 on account of the breaches of substantive right unless “inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case” – which is however rarely the case. This approach artificially reduces the scope of the non-discrimination provision of the Convention.<sup>50</sup>

### 1.2.3.2 Direct and indirect discrimination

Direct discrimination is ostensible less favourable treatment or disadvantage, on the basis of a particular protected characteristic. Indirect discrimination consists of unfavourable treatment hidden under an apparently neutral measure but with unequal effect on a part of the population, which should be proven through the use of a comparator like statistics.<sup>51</sup> In the meaning of indirect discrimination the focus moves away from differential treatment to differential effects.<sup>52</sup>

In *inter alia* the case *Hugh Jordan v United Kingdom*, the ECt.HR officially recognized indirect discrimination as a violation of article 14 ECHR: “Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory, notwithstanding that it is not specifically aimed or directed at that group.”<sup>53</sup>

In the landmark case *D.H. and others v Czech Republic* (2007), the Grand Chamber accepted statistical evidence of the disparate impact of the Czech educational policies on Roma

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<sup>48</sup> ECtHR (GC), *Andrejeva v. Latvia*, App. No. 55707/00, 18 February 2009, § 74.

<sup>49</sup> A, TIMMER, “The Court on Racial Discrimination (Part I): M. and Others v. Italy and Bulgaria”, 9 October 2012, <[strasbourgobservers.com/2012/10/09/the-court-on-racial-discrimination-part-i-m-and-others-v-italy-and-bulgaria/](http://strasbourgobservers.com/2012/10/09/the-court-on-racial-discrimination-part-i-m-and-others-v-italy-and-bulgaria/)>

<sup>50</sup> The dissenting opinion of judge Tsotsoria discussed the institutionalised problem of racial discrimination, xenophobia and intolerance in the Russian Federation, which is also apparent in the widespread use of ethnic profiling of vulnerable groups (including “Georgian”, and the term covers both ethnicity and nationality) as well as racially targeted inspections and unlawful practices by law-enforcement bodies. “The violation of the rights of Georgians based on their nationality and ethnic origin was deeply rooted in discrimination, which is the fundamental aspect of the present case.”: ECtHR Grand Chamber, *Georgia v. Russia*, App. No 13255/07, 3 July 2014, partly dissenting opinion of judge Tsotsoria, 69 and 72.

<sup>51</sup> FRA, *supra* note 35, 22.

<sup>52</sup> *Ibidem*, 30.

<sup>53</sup> ECtHR, *Hugh Jordan v United Kingdom*, App. no. 24746/94, 4 May 2001, §154; see also ““The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.” ECt.HR (GC), *Thlimmenos v Greece*, App. No. 34369/97, 6 April 2000, § 44.



children as a proof for indirect discrimination, taking into consideration the historical disadvantaged situation of Roma. Czech Republic had to take steps to adjust current policy and to justify the practices of ethnic segregation in education systems. The Court confirmed that article 14 ECHR prohibits indirect discrimination and gave the first kick for reversal of burden of proof in case of discrimination of individuals and groups, when the claimant shows proof of a prima facie discrimination.<sup>54</sup> According to the European Network against Racism, the reversal of the burden of proof is “equally relevant to patterns of discriminatory stops stemming from ethnic profiling by police”.<sup>55</sup>

### 1.2.3.3 Proportionality test

Discriminatory State measures can be defended against discrimination claims with a reasonable justification. The moral duty of justification in case of limitation of freedoms derives from Locke’s contract theory.<sup>56</sup> The proportionality test was developed in the *Belgian Linguistics* case (1968) and is a particular influential element in the anti-discrimination jurisprudence of the European Human Rights Court.<sup>57</sup> Article 14 is violated when a different treatment of persons in analogous or relevantly similar situations is proven and the State cannot prove that it is a proportionate means of achieving a legitimate aim. ‘Margin of appreciation’ is the terminology ECt.HR uses for the State’s sphere of discretion in determining whether differential treatment is justified. The proportionality test is used to strike a balance between the harm of the contested measure to an individual’s right and the common interests of equal dignity and social inclusion and the benefits of the measure for a compelling state’s interest.<sup>58</sup> Throughout the case law of the European Court of Human Rights racial and religious equality are notably identified as common interests of the Contracting States of the ECHR.

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<sup>54</sup> ECt.HR (GC) *D.H. and Others v Czech Republic*, App. No. 57325/0013, November 2007. This judgment also marks the introduction of the notion of collective discrimination.

<sup>55</sup> ENAR, “Fact Sheet 40. Ethnic Profiling”, 2009, 5.

<sup>56</sup> BOWLING AND WEBER, *supra* not. , 482.

<sup>57</sup> Proportionality became part of European law through German law; the concept is first adopted and interpreted by the Strasbourg Court in the *Belgian Linguistics* case of 1968; “A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 ECHR is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised”: EHRR (Judgment) case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium (merits), App. no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, 23 July 1968, para 10.

<sup>58</sup> BAKER AND PHILLIPSON, *supra* note 12, 112.

#### 1.2.3.4 Protocol No. 12

Protocol No. 12 to the ECHR (2000) contains a freestanding equality right; it expands the scope of the discrimination prohibition through the guarantee of equal treatment in the enjoyment of every right, also rights protected under national law.<sup>59</sup> Article one of the Protocol No. 12 established the prohibition of discrimination in relation to the ‘enjoyment of any right set forth by law’. The decisive reason to adopt the Protocol was to strengthen the combat against sexual and racial discrimination, as is explained in the Explanatory Report to the Protocol. The Protocol principally protects individuals against discrimination from the State, but the protections also relates to those relations between private persons, which the State is normally expected to regulate, such as public available goods and services.<sup>60</sup> The Explanatory Report explicitly states that the Protocol is applicable on public authority in the exercise of discretionary power, which opens perspectives for action against ethnic profiling.<sup>61</sup>

Only 19 Member States of the Council of Europe ratified this Protocol, 19 signatories show reluctance to ratify.<sup>62</sup> Among them is Belgium, which is urged in the recommendation of ECRI and other human rights bodies to complete the ratification finally.<sup>63</sup> Behind the lack of readiness of Council of Europe member states to sign or ratify the Twelfth Protocol lays the broad scope and possible impact of the Protocol on discrimination cases. In the case of Belgium, the ratification is inhibited by the Flemish Parliament, waiting for the development of case law based on this general anti-discrimination protection.<sup>64</sup>

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<sup>59</sup> “(1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. (2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.” Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 2000, CETS No. 177, entered into force 1 April 2005, art. 1.

<sup>60</sup> FRA, *supra* note 35, 63-64.

<sup>61</sup> Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 2000, 5.

<sup>62</sup> Protocol No. 12 to the ECHR: 19 ratifications; 19 signatures without ratification (Belgium included). [www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p\\_auth=g6sGduJ5](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=g6sGduJ5)

<sup>63</sup> European Commission against Racism and Intolerance, ECRI Report on Belgium (fifth monitoring cycle), Strasbourg, Council of Europe, 25 February 2014, 11.

<sup>64</sup> Protocol No. 12 to the ECHR is a so-called mixed treaty. The Belgian federal level and the regions and communities all have the *ius tractati* and need to sign and ratify the convention. [www.diplomatie.belgium.be/en/treaties/conclusion\\_of\\_treaties](http://www.diplomatie.belgium.be/en/treaties/conclusion_of_treaties).

In his answer on a submitted question (in the Flemish parliament), minister-president Peeters answered in 2012 that Flanders waits the outcome of jurisprudence, considering the Belgian constitutional balance. He adds that ‘bigger countries’ like France, UK and Germany, are also hesitant to ratify. Vlaams Parlement 2011-2012, Schriftelijke vragen Mensenrechten - Kernverdragen. Antwoord van minister-president van de Vlaamse regering Kris Peeters, vraag nr. 327 van Danielle Godderis-T’jonck, 23 april 2012.

#### 1.2.4 Equality protection in EU law

The non-discrimination principle of EU law is enshrined in article 21 of the Charter of Fundamental Rights of the European Union and in article 29 of the Treaty on the European Union. The Racial Equality Directive provides a statutory equality protection that might be applicable in situations of ethnic profiling; discrimination claims under this Directive against police are not yet tested in the European Court of Justice or before a national judge.<sup>65</sup>

The scope of application of the Directive is *ratione materiae* limited to the free movement of persons (accessing the welfare system, social security and goods and services) and *ratione personae* to the citizens of the Member States. Discrimination on the basis of nationality is explicitly excluded from the scope of the Racial Equality Directive in Article 3(2).<sup>66</sup> Religious belief is only protected against discrimination in the context of employment in the Employment Equality Directive, but through the close association with ethnicity, religion might enjoy wider protection under the Race Equality Directive.<sup>67</sup>

Both direct and indirect discrimination are described and forbidden in the Directive.<sup>68</sup> Under EU law, the conditions for justification of direct discrimination are very strict. For indirect discrimination the same proportionality test as developed in case law of the ECt.HR applies.<sup>69</sup>

The third form of forbidden discrimination in the EU Directive is harassment: “when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.”<sup>70</sup> This provision is potentially relevant for ethnic

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<sup>65</sup> In the evaluation of the RE Directive, the Rapporteur asked from the European Commission if the Directive also covers activities of the police authorities in the Member States, such as ethnic profiling. Committee on Civil Liberties, Justice and Home Affairs and K. M. BUITENWEG, “Report of 6 July 2007 on the application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin”, 2007/2094(INI), 30.

<sup>66</sup> EU Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19 July 2000, article 1 (beginning).

<sup>67</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 27 November 2000.

<sup>68</sup> Direct discrimination occurs where one person is treated less favourably than another in a comparable situation on grounds of racial or ethnic origin; EU Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive), Official Journal L 180, 19 July 2000, article 2 (2a).

<sup>69</sup> Indirect discrimination is prohibited by providing protection from apparently neutral provisions, criteria or practices which have the ‘side effect’ of discriminating against one of the specific forbidden grounds “unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”: Racial Equality Directive, *supra* not. , art. 2 (2, b).

<sup>70</sup> Racial Equality Directive, *supra* not. , article 2(3) and R. GELLERT, K. DE VRIES, P. DE HERT AND S. GUTWIRTH, “A Comparative Analysis of Anti-Discrimination and Data Protection Legislations” in B. CUSTERS, T. CALDERS, B. SCHERMER AND T. ZARSKY, *Discrimination and Privacy in the Information Society*, Volume 3 of the series *Studies in Applied Philosophy, Epistemology and Rational Ethics*, Berlin, Springer, 2003, 61-89.

profiling. The Racial Equality Directive also provides for the reversal of burden of proof once the claimant establishes a presumption of discrimination. For indirect discrimination statistical data are accepted and for some national jurisdictions also situation tests.<sup>71</sup>

Although the Racial Equality Directive and Employment Equality Directive contribute to the protection against discrimination in the EU, the so-called Horizontal Directive (a general anti-discrimination Directive) is expected for better protection as from 2010.<sup>72</sup> The proposed general Anti-Discrimination Directive would implement the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. The Equality Bodies of 32 European States consider the Horizontal Directive highly necessary and long overdue.<sup>73</sup>

### **1.2.5 Equality protection in Belgian law**

Articles 10 and 11 of the Belgian Constitution enshrine the principle of equal treatment of all Belgians before the law, prohibiting discrimination in the enjoyment of rights and freedoms.<sup>74</sup> These articles can be invoked against either legislative norms or administrative acts that violate the principles of equality and non-discrimination. The anti-discrimination legislation is scattered in a number of laws at federal and federated entities level. In this thesis, only the significant statutory laws, the Anti-Racism Law and Anti-Discrimination Law, will be covered as ethnic profiling refers to federal matters such as justice, home affairs and police, civil security and the policy regarding non-Belgian nationals. Both laws are implementations of the aforementioned EU Directive concerning discrimination, although the Belgian anti-discrimination legislation is more comprehensive and also stricter than the original.

There are almost identical provisions for 19 protected discrimination grounds, of which seven are relevant in the case of ethnic profiling. Citizenship, alleged race, colour, descent (Jewish ancestry) and national or ethnic origin are protected against discrimination in the Anti-Racism

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<sup>71</sup> There is no need to prove that the discrimination is intended or that the perpetrator is motivated by prejudices like racist or sexist opinions, in order to prove race or sex discrimination, hence these attitudes are purely internal and the general law can only regulate actions. FRA, *supra*, note 35, 124.

<sup>72</sup> *Ibidem*, 14.

<sup>73</sup> European Network for Equality Bodies (Equinet), "Note on the on-going negotiations on the Horizontal Directive", March 2015, <[www.equineteurope.org/FADAMeetingHorizontalDirective](http://www.equineteurope.org/FADAMeetingHorizontalDirective)>.

<sup>74</sup> "Belgians are equal before the law," and "enjoyment of the rights and freedoms recognized for Belgians must be provided without discrimination," but the Belgian Constitution does not specify a list of protected characteristics. The Constitution does, however, declare that "[n]o class distinctions exist in the state," and "[e]quality between women and men is guaranteed." Because of their general nature, these provisions are rarely invoked in private relationships, such as employment discrimination. Rather, they have been most effective when invoked against legislative or administrative acts that violate the principles of equality and non-discrimination.

Law (article 3), while discrimination on grounds of religion *inter alia* is prohibited by the Anti-Discrimination Law (article 3)”.

The sphere of application of the anti-discrimination legislation includes all areas of public life and discrimination by public officers is explicitly mentioned and prosecutable.<sup>75</sup> The Laws allow for the alleged victim of ethnic profiling, Unia or a human rights organisation defending the rights of victims to take legal action before a court. If the judge recognizes the discrimination, he has the power to order standard compensation in favour of the victim. In the civil procedure of the Anti-Racism Law (article 18) and Anti-Discrimination Law (article 20), the discrimination can be stopped immediately; the burden of proof or justification for different treatment shifts to the defendant if the alleged victim can demonstrate sufficient evidence of discrimination, such as facts known by Unia or statistics on discrimination (in the case of indirect discrimination).<sup>76</sup> Both federal laws also address criminal matters as hate speech and hate crimes.<sup>77</sup> The laws provide for criminal sanctions against civil servants - this includes law enforcement agents – who commit acts of discrimination.

Complementary to the anti-discrimination legislation, the Board of Prosecutors issued a circular COL13/2013 aimed at fine-tuning the codes used to register “racist and xenophobic” criminal offences. Four targets were designated for the police: inducing a more efficient registration of facts related to discrimination and hate offenses, raising awareness for the problems and legislation related to discrimination, providing more guidance to police on the terrain regarding the identification and persecution of discrimination; lastly the Circular aimed at enhancing the cooperation between police and judicial services.<sup>78</sup> One of the measures was the appointment of first line reference persons for anti-discrimination matters and hate crimes within the integrated police service and judicial; they are the first point of contact for the public prosecutors and colleagues and they control the application of the initiatives in the curricular, especially the registration of discrimination complaints and hate speech/ hate crime.

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<sup>75</sup> Wet van 10 mei 2007 tot wijziging van de wet van 30 juli 1981 tot bestraffing van bepaalde door racisme of xenofobie ingegeven daden (Anti-Racism Law), BS 30 May 2007, 29046, article 23 en wet van 10 mei 2007 ter bestrijding van bepaalde vormen van discriminatie (Anti-Discrimination Law), BS 30 May 2007, 29016, art. 5§1.

<sup>76</sup> Article 30 Anti-Racism Law; article 28 Anti-Discrimination Law.

<sup>77</sup> Articles 20 -25 Anti-Racism Law and articles 22 -24 Anti-Discrimination Law.

<sup>78</sup> Gemeenschappelijke omzendbrief nr. Col 13/2013 van de minister van justitie, de minister van binnenlandse zaken, en het college van procureurs-generaal bij de hoven van beroep, betreffende het opsporings- en vervolgingsbeleid inzake discriminatie en haatmisdrijven (met inbegrip van discriminaties op grond van het geslacht) (Circular 13/2013), college van procureurs-generaal, 17 juni 2013.

In the next chapter, the assessments of the effectiveness of the national anti-discrimination will be reviewed.

### 1.3 Ethnic profiling is unlawful discrimination

The legislative framework gives indications that ethnic profiling is an unjustified form of discrimination. This is confirmed in a few judgments in cases related to ethnic profiling and non-discrimination in the ECt.HR and in some national jurisdictions outside Belgium. The practice of ethnic profiling is not yet expressly challenged before a Belgian court, according to my information. Various soft law instruments and research reports also denounced ethnic profiling as unlawful discrimination.

Ethnic profiling amounts to direct discrimination when it involves formal differential treatment of individuals based on their ethnic identity. When an immigration officer stops only individuals with Roma background and not the other people with the same nationality, this constitutes unlawful, direct discrimination, as is established in the British case of *R (European Roma Rights Centre) v Immigration Officer at Prague Airport*.<sup>79</sup> Ethnic profiling is also a form of indirect discrimination: the use of ethnic stereotypes in the exercise of discretionary police powers shows a differential effects between minority and majority groups. In its only merit decision on ethnic profiling under Article 14, a case of direct discrimination, the ECt.HR gave indications that informal forms of ethnic profiling could equally be considered unlawful.<sup>80</sup> Harassment is recognized as a third form of discrimination in the EU Racial Equality Directive and the Belgian transposition. Further research should clarify whether ethnic profiling could constitute harassment in certain cases. The main impediments for countering ethnic profiling and other forms of discrimination in courts are the evidentiary difficulties.<sup>81</sup> “Unfortunately, establishing the extent of unequal treatment in policing is a notoriously difficult task.”<sup>82</sup> Social scientists face with methodological and analytical weaknesses in researching ethnic profiling, which result in a lack of strongly backed statistics.

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<sup>79</sup> UKHL (United Kingdom), *R (European Roma Rights Centre) v Immigration Officer at Prague Airport*, UKHL 55, 9 December 2004, para 73.

<sup>80</sup> S. VROMEN, “Ethnic profiling in the Netherlands and England and Wales: Compliance with international and European standards”, Public Interest Litigation Project (PILP-NJCM), Utrecht, Utrecht University, 2015, 7.

<sup>81</sup> DE SCHUTTER AND RINGELHEIM, *supra* note 1, 382

<sup>82</sup> J. S. SVENSSON AND S. SAHARSO, “Proactive policing and equal treatment of ethnic-minority youths”, 24 *Policing and Society* 2014, 4.

### 1.3.1 Case law of ECt.HR

#### 1.3.1.1 Ethnic profiling

Ethnic profiling and ethnic police discrimination has been dealt with by the Court under Article 14; under Protocol No. 12, no cases relevant for ethnic profiling have been decided. The jurisprudence of the Strasbourg Court is influential for the judgments are binding on the 47 Member States of the Council of Europe.<sup>83</sup> The two important judgments on ethnic profiling and some other tendencies are reviewed hereunder, followed by some observations on the jurisprudence with regard to ethnic discrimination by police.

The decision of the Court in *Cissé v France* (2002) shows the hesitant reaction of the ECt.HR when confronted with the informal practice of ethnic profiling.<sup>84</sup> The Court tolerated in its judgment the use of appearance in tightly circumscribed contexts in immigration enforcement.<sup>85</sup>

The standard setting case for ethnic profiling is *Timishev v Russia* (2005) – although the Court Chamber did not use the term profiling in its judgment. Russian border police prevented the complainant from passing a checkpoint into a particular region because of his Chechen origin. The ECt.HR found corroboration in official documents, which noted the existence of a policy to restrict the movement of ethnic Chechens, which amounts to direct discrimination. The case shows that law enforcement agents fall under the anti-discrimination regime of the ECHR. The Court found a violation of article 14 ECHR in combination with freedom of movement article 2 of Protocol n°4. The reversal of burden of proof was also applied given that the applicant established an unfavourable different treatment. “As regards the burden of proof in such matters, the Court has held that once an applicant has shown that there has been a difference in treatment, it is for the government to show that the difference in treatment was justified.”<sup>86</sup> During the balancing of interests, the Court decided that the government failed to give an objective justification for the difference in treatment in the enjoyment of the right to move freely. Accordingly, the ECt.HR accepted that the claimant had been discriminated against on the basis of his ethnicity. The Court highlighted that “no difference in treatment

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<sup>83</sup> If a country is sentenced, it has to take measures to remedy the injustice and to prevent repetition of the events. This also applies to the Member States not directly affected by the sentence; they have to ensure that the judgments of the Court are enforced and prevent similar complaints. A special Human Rights committee supervises the enforcement of the judgments. <[www.coe.int/en/web/portal/belgianchairmanship-echr](http://www.coe.int/en/web/portal/belgianchairmanship-echr)>

<sup>84</sup> ECtHR, *Cissé v. France*, App. No. 51346/99, 9 August 2002; DE SCHUTTER AND RINGELHEIM, *supra* note 1, 366.

<sup>85</sup> ENAR, “Fact Sheet 40. Ethnic Profiling”, 2009, 6.

<sup>86</sup> ECtHR, *Timishev v Russia*, App. No. 55762/00, 13 December 2005, §57.

based exclusively or to a decisive extent on a person's ethnic origin [was] capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.”<sup>87</sup> In this case, the facts and the evidence were exceptionally obvious and the lack of valid defence by the State made it more easy for the judge to decide on discriminatory profiling.

In the judgment *Gillan and Quinton v United Kingdom* (2010), the ECtHR ruled for stop and search powers without reasonable suspicion violates the right to privacy and respect for private life. “(...) the use of coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life.”<sup>88</sup> The Court decided that the criteria for the use of discretionary powers in the 2000 Counter-Terrorism Act were not sufficiently circumscribed, that the necessity test was not applied and that there were insufficient legal safeguards against abuse. The Judge brought up the risks of ethnic profiling on its own account. “While the present cases do not concern black applicants or those of Asian origin, the risk of discriminatory use of the powers against such persons is a very real consideration, (...)”<sup>89</sup> The available statistics on racism are used as support for its claim, which underlines the importance of statistical evidence in swaying the Court in favour of a decision against ethnic profiling.<sup>90</sup>

#### 1.3.1.2 Case law on ethnic discrimination by police

The European Court of Human Rights ruled that a difference in treatment based on race or ethnic origin is extra closely scrutinized: “the notion of objective and reasonable justification must be interpreted as strictly as possible”.<sup>91</sup> It is thus paradoxical that the Court has circumvented dealing with the substance of claims of discrimination on the ground of ethnic origin. Only as late as 2004 did the Court for the first time find that a State was guilty of

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<sup>87</sup> ECtHR, *Timishev v Russia*, *supra* not., §58.

<sup>88</sup> ECtHR, *Gillan and Quinton v. United Kingdom*, App. No. 4158/05, 12 January 2010, § 63. See also *Aziz Melki and Selim Abdeli v. France* (2010) in which the Court of Justice of the European Union examined if checks carried out irrespective of a person's behaviour and of specific circumstances ('suspicionless spot check') gave rise to a risk of breach of human rights. The decision underlines the necessity of a very strict legislative framework for identity controls. CJEU (judgment), *Aziz Melki and Selim Abdeli v. France*, Cases C-188/10 and C-189/10, 22 June 2010.

<sup>89</sup> ECtHR, *Gillan and Quinton v. United Kingdom*, *supra* not x, § 85.

<sup>90</sup> Open Society Justice Initiative, *Human Rights Digests: European Standards on Ethnic Profiling*, New York, Open Society Foundation November 2013, 24.

<sup>91</sup> ECtHR, *D.H. and Others v Czech Republic*, App. No. 57325/00, 13 November 2007, para. 176.



racial discrimination.<sup>92</sup> The seriousness of the allegation of ethnic discrimination acts to the detriment of effective protection, as most such claims have been frustrated by the lack of proof of prima facie discrimination and have not reached the level of objective justification scrutiny at all.<sup>93</sup> A vast number of cases are related to allegations of racially biased police investigations and police violence against Roma, in which often breaches on Article 2 and 3 ECHR are established.<sup>94</sup> The Strasbourg Court didn't decide (yet) on ethnic profiling accusations in cases related to violence against Roma.<sup>95</sup> Allegations of the use of ethnic profiling were not upheld for inadmissibility or evidentiary problems, such as in *Čonka v Belgium* (2001).<sup>96</sup> Claims of unlawful ethnic discrimination against Roma prove hard to establish, notably in the context of law enforcement.<sup>97</sup>

The Judgments in cases as *Balogh v Hungary* (2004) and *Turan Cakir v Belgium* (2009) show also that it is easier to establish actual ill-treatment by police than it is to show that this was inflicted on account of the individual's membership of a minority group, even though it was recognised that discriminatory treatment reflects ingrained attitudes prevalent in a police service.<sup>98</sup> In a more recent case of unlawful detainment and ill-treatment, *Makhashevy v Russia* (2012), police discrimination on account of ethnic origin was upheld is; this might be a sign of a more strict interpretation of the prohibition of ethnic discrimination in policing.<sup>99</sup>

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<sup>92</sup> ECtHR, *Nachova v Bulgaria*, 26 February 2004. This Chamber judgment was later partly revoked by the Grand Chamber in 2005.

<sup>93</sup> ARNARDÓTTIR, *supra* note 46, 38.

<sup>94</sup> Inter alia ECtHR, *Stoica v Romania*, App. No. 42722/02, 4 March 2008, §131; ECtHR, *Nachova and others v Bulgaria*, App. Nos. 43577/98 and 43579/98, 6 July 2005; ECtHR, *Boaca and others v. Romania*, App. No. 40355/11, 12 January 2016;

<sup>95</sup> In the judgment *Stefanou v. Greece*, police violence against a young man of Roma origin was held a violation of article 3 ECHR. The applicant additionally submitted a complaint that included inter alia that the commander of a police station had used racial profiling when he admitted having used the applicant as a “visual suspect” only because he was “of the same age and appearance as the other Roma youths”. However, the six-month period for lodging a complaint with the Court had passed so the ECtHR couldn't decide on the allegations of ethnic profiling. ECtHR, *Stefanou v. Greece*, App. No. 2954/07, 4 October 2010, §24 and §59.

<sup>96</sup> ECtHR, *Conka and others, the Ligue des droits de l'homme v. Belgium*, App. No. 51564/99, admissibility decision of 13 March 2001; and DE SCHUTTER AND RINGELHEIM, *supra* note 1, 367.

<sup>97</sup> In a recent case the Court stated: “Whilst the planning of the operation and the State agents' conduct calls for serious criticism, the Court considers, however, that these elements are of themselves an insufficient basis for concluding that the treatment inflicted on Ms Ciorcan and the applicants was racially motivated. It has thus not been established beyond reasonable doubt that racist attitudes played a role in Ms Ciorcan's and the applicants' treatment by the State agents.” ECtHR, *Ciorcan and others v. Romania*, App. Nos. 29414/09 44841/09, 27 January 2015, §163.

<sup>98</sup> ECtHR, *Balogh v Hungary*, App. No. 47940/99, 20 July 2004, §79.

<sup>99</sup> “As for the applicants' complaint under Article 14 of the Convention, the Court observes that the applicants' allegations of the verbal ethnic insults were supported by witness statements and documents the contents of which were not contested by the Government (...). The Court finds that this evidence is sufficient to prove that there were racial motives behind the police officers' actions.” Additionally the authorities had failed to conduct an investigation into their allegations of racially motivated ill-treatment. ECtHR, *Makhashevy v Russia*, App. No. 20546/07, 31 July 2012 § 176 and §145 (procedural obligations under Article 14).

In *Turan Cakir v Belgium*, the Belgian authorities were also condemned for failure to investigate and expose whether the police officers' conduct had been motivated by racism, not only as a procedural obligation but also under Article 14 (prohibition of discrimination under Article 14 in combination with Article 3).<sup>100</sup> It is part of the standard Strasbourg Court interpretation of Article 14 since *Nachova v Bulgaria* that when investigating violent incidents, state authorities must 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 event.<sup>101</sup>

When evidence of racist verbal abuse uttered by law enforcement agents emerged, like in *Nachova* and *Turan Cakir* cases, the obligation to investigate whether police violence has racist or discriminatory motives is always established.<sup>102</sup> But can and should the Court rely only – or at least largely – on reports of international organizations to establish states' procedural responsibility under Article 14?<sup>103</sup> In *Fedorchenko and Lozenko v Ukraine* (2012), the Court states that verification of racist bias in the contested events is necessitated given the information on the widespread discrimination and violence against Roma in Ukraine as noted, in particular, by the report of the ECRI.<sup>104</sup> It is arguable that this obligation could extend to situations involving violations of other articles such as ethnic profiling cases. Another relevant case law development is the recognition of the phenomenon of intersectional discrimination in a case of discriminatory police violence (*B.S. v Spain*, 2012).<sup>105</sup>

The few examples of legal assessment of ethnic profiling by the ECtHR concern forms of direct discrimination where the usual reasoning of the Court in cases of racial discrimination is followed. I believe that direct and indirect discrimination by ethnic profiling can be denounced in individual cases when there are strongly backed statistics to rely on. There is no problem of scope of application of article 14 or Protocol No. 12 and the proportionality test will be negative as there are no proofs of the efficiency of ethnic profiling practices. The evidentiary problem is more insuperable in the current situation and makes the call for statistics to rely on very tangible.

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<sup>100</sup> ECtHR, *Turan Cakir v Belgium*, App. No 44256/06, 10 June 2009, § 77-82.

<sup>101</sup> See ECtHR (GC), *Nachova and Others v. Bulgaria*, nos. 43577/98 and 43579/98, 6 July 2005, §164 and inter alia ECtHR, *Bekos and Koutropoulos v Greece*, App no 15250/02, 13th December 2005, §§69 -75; ECtHR, *Ciorcan and others v. Romania*, App. Nos 29414/09 44841/09, 27 January 2015, §§166-167.

<sup>102</sup> Although problems of providing evidence of discrimination might show up – face value discrimination is necessary to trigger the obligation to investigate. See also Open Society Justice Initiative, *Human Rights Digests: European Standards on Ethnic Profiling*, New York, Open Society Foundation November 2013, 23.

<sup>103</sup> See: “L. PERONI, *Racial Discrimination in Strasbourg (Part II): Intersectionality and Context*, 17 October 2012, blog post, <[strasbourgobservers.com/2012/10/17/racial-discrimination-in-strasbourg-part-ii-intersectionality-and-context](http://strasbourgobservers.com/2012/10/17/racial-discrimination-in-strasbourg-part-ii-intersectionality-and-context)>.

<sup>104</sup> ECtHR, *Fedorchenko and Lozenko v Ukraine*, App. No. 387/03, 20 September 2012, §68.

<sup>105</sup> ECtHR, *B.S. V Spain*, App. no. 47159/08, 24 July 2012.

### 1.3.2 Other case law

#### 1.3.2.1 United Nations Human Rights Committee<sup>106</sup>

The ruling in *Rosalind Williams Lecraft v Spain* (2006) had a landmark impact as the only rejection of ethnic profiling by a UN treaty body. The UN Human Rights Committee (hereafter HRC) concluded that the practice of ethnic profiling (without naming it ‘profiling’) in the context of immigration control constituted unlawful discrimination on the basis of articles 26 in conjunction with article 2(3) of the International Covenant on Civil and Political Rights (hereafter: the ICCPR): “(...) the physical or ethnic characteristics of the people subjected (to identity checks, ed), should not by themselves be deemed indicative of their possible illegal presence in the country. (...).”

The HRC refers to the negative impact of ethnic profiling on the dignity of the people concerned, the risk of spreading xenophobia in the public at large and the contra-effectiveness of the practice for combating racial discrimination.<sup>107</sup>

#### 1.3.2.2 Court of Justice of the European Union

The European Court of Justice (CJEU) did not decide on cases related with ethnic profiling under the Racial Equality Directive. Some decisions however give a brief on the reasoning of the EU Court when it comes to discrimination on ethnic criteria by state agents.

The Court of Justice sanctioned discrimination on the basis of nationality in the systematic processing and storage of personal data in *Huber v Federal Republic of Germany* (2008), even when the fight against crime is named as purpose, constitutes discrimination on grounds of nationality, which is prohibited by Article 12 EC.<sup>108</sup>

The Court of Justice made an important preliminary ruling on indirect discrimination in the case *CHEZ v Nikolova* (2015). The powerful electricity company failed to justify a measure disadvantaging a Roma majority district, which was not applied to non-Roma majority districts.<sup>109</sup> The Court reiterated that the scope of that directive cannot be defined restrictively in the light of “the objective of Directive 2000/43 and the nature of the rights that it seeks to safeguard”.<sup>110</sup> The judgment is important as it denounces indirect discrimination; furthermore

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<sup>106</sup> The Optional Protocol to the International Covenant on Civil and Political Rights allows individuals to send a complaint about a State violation of their rights to the United Nations Human Rights Committee.

<sup>107</sup> Human Rights Council, *Rosalind Williams Lecraft v. Spain*, No 1493/2006, views adopted on 27 July 2009, §7.2.

<sup>108</sup> CJEU, *Huber v Federal Republic of Germany*, C-524/06, 16 December 2008.

<sup>109</sup> CJEU, *Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia, (Chez v Nikolova)* Case C-83/14, 16 juli 2015, § 36.

<sup>110</sup> *Chez v Nikolova*, *supra* not., §42.

the CJEU ruled that the measure was seriously harmful in the context of anti-Roma stereotypes, and such a practice is incapable of justification. This judgment might provide direction when the CJEU would decide over claims of ethnic profiling in breach of the RE directive.

### 1.3.2.3 National case law outside Belgium

Some judicial decisions from other national courts might offer an idea for possible ethnic profiling jurisprudence in Belgian jurisdiction.

In Germany, it is commonly admitted that racial and ethnic minorities should enjoy better protection against profiling as a case showed that identity checks based on skin colour are contrary to the German constitution.<sup>111</sup> The Büro zur Umsetzung der Gleichbehandlung e.V. (the Bureau for the Implementation of Equal Treatment NGO) has successfully challenged the practice of identity checks in trains solely on the basis of ethnic criteria. The hearing on 29 October 2012 at the Higher Administrative Court of Koblenz led to the police acknowledging racial bias in the stop and search procedure. Stop and search based exclusively on ‘skin colour’ violates the principal of equal treatment (article 3, paragraph 3) of the German Basic Law, according to the decision. In the slipstream of this so-called Koblenz case, the NGO is involved in several cases against the police for ethnic profiling.<sup>112</sup>

Also in France, ethnic profiling has led to reaction on judicial level. A decision of the Court of Appeal in Paris established that unnecessary identity controls, based on ethnic background or appearance are contrary to the right to equality as embedded in the French Constitution and in International and European treaties.<sup>113</sup> It contributed to the unlawfulness that the controls were conducted without motivation in a written report or *procès-verbal*. “Now, the French State will need to modify the legal framework regulating identity checks to ensure that checks may only be carried out based on objective and individual grounds; individuals checked must also be provided with a record of the check stating on what grounds it occurred.”<sup>114</sup>

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<sup>111</sup> T. HUDDLESTON, Ö. BILGILI, A-L JOKI, AND Z. VANKOVA, Migrant Integration Policy Index, Barcelona, CIDOB, 2015,; Oberverwaltungsgericht Rheinland-Pfalz (Germany), Az.: 7 A 10532/12.OVG, 29.10.2012 and RUTEERE, *supra* note 7, 16.

<sup>112</sup> [www.bug-ev.org/en/activities/lawsuits/discriminatory-stop-and-search-cases.html](http://www.bug-ev.org/en/activities/lawsuits/discriminatory-stop-and-search-cases.html)

<sup>113</sup> Cour d’appel de Paris (France), RG n° 13/24277, arrêt du 24 juin 2015.

<sup>114</sup> In total there were 13 applicants, all of Arab or African descent, who were stopped while carrying out routine activities. None of the checks resulted in any legal action against the individuals, such as tickets or fines. Despite victory in five of the thirteen cases, the eight negative decisions on stops that took place in poor suburbs, raise serious concerns. The claimants received legal support of the Open Society Justice Initiative. <[www.opensocietyfoundations.org/press-releases/paris-court-accepts-appeal-french-police-ethnic-profiling-case](http://www.opensocietyfoundations.org/press-releases/paris-court-accepts-appeal-french-police-ethnic-profiling-case)>

The State Council of the Netherlands decided on a breach of the constitutional anti-discrimination provision: only labourers with a ‘foreign, non-Dutch appearance’ were profiled and selected for further control by the labour inspection officials, which constitutes direct discrimination on the basis of ethnic features.<sup>115</sup>

In the landmark decision of *United States v Brignoni-Ponce* (1975), the Supreme Court decided that the use of ethnic features for countering illegal immigration is unjustified discrimination.<sup>116</sup> The majority of the American jurisprudence on racial profiling (which is the preferred notion in American jurisprudence and literature) is yet based on the rights of liberty and security of a person (Fourth Amendment of the US Constitution and Section 9 of the Canadian Charter of Rights and Freedoms) rather than on the right to equal treatment.<sup>117</sup>

Evidentiary burden related to establishing prima facie discrimination inhibits also in the American continent the successful denouncement of ethnic profiling.<sup>118</sup>

Most Canadian courts tolerated ethnic profiling except in cases where race is the only rationale or when profiling is effectuated for purposes of racial harassment.<sup>119</sup> The debate and jurisprudence on racial in America has a long history and is more elaborated than in Europe, although it is not yet ‘settled’.<sup>120</sup>

### 1.3.3 Soft law and reports

Soft law instruments, (country) reports and studies by international organisations and NGO’s that explicitly link ethnic profiling with the right to equality and expose ways for preventing and tackling ethnic profiling are published on a bigger scale than the case law. The reports and

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<sup>115</sup> Raad van State (Nederland), 201400946/1/V6, 3 June 2015.

<sup>116</sup> A landmark case in jurisprudence related with racial profiling: Supreme Court (US), Judgment, *United States v. Brignoni-Ponce*, 1975, 422 US 873. The Supreme Court held that the Hispanic appearance of two men who were driving near the California-Mexico border did not, by itself, provide U.S. Border Patrol agents with legal grounds to make a traffic stop. In this and succeeding cases, the Court defined that stops that are based solely on a person's race or ethnic appearance constitute unconstitutional racial profiling. However, if race is just one of the descriptors in police’s research action, courts do not consider the profiling unconstitutional racial profiling. The main element of difference is the discriminatory intent, which is allegedly absent in the latter cases.

<sup>117</sup> J.S. GILL, "Permissibility of Colour and Racial Profiling", 5(3) *UWO Western Journal of Legal Studies* 2014, 4-5.

<sup>118</sup> Baker and Phillipson explain that the anti-discrimination clause of the ECHR (Article 14) has a more protective scope in the context of counter-terrorism than the Equal Protection Clause (EPC) of the 14th Amendment to the US Constitution, as the European judges do not need a discriminatory motive or intent to find that discrimination has occurred and Article 14 provides the judiciary with the key tool of proportionality, which, when properly applied, should lead to scrutiny over discrimination in most cases. BAKER AND PHILLIPSON, *supra* note 12, 199.

<sup>119</sup> DE SCHUTTER AND RINGELHEIM, *supra* note 1, 362.

<sup>120</sup> The use of race in crime and law is still debated vehemently. Certain authors consider the use of racial profiling a useful tool in detecting criminal behaviour. See J.FAGAN AND G. DAVIES, “Street stops and broken windows: Terry, race and disorder in New York City” in W.T. JR. LYONS, *Crime and criminal justice*, London, Ashgate, 2006, 3-5.

recommendations of the human rights bodies are not binding, but serve as guidelines for policy makers and public authorities in the Member States.

In April 2015, the Special UN Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere, published a report that predominantly discusses ethnic profiling.<sup>121</sup> The report shows inter alia the evolution of ethnic profiling from a little known phenomenon in the Durban Declaration against Racism, Racial Discrimination, Xenophobia and related violence (2001)<sup>122</sup> to the widely known persistent, pervasive and recurrent form of discrimination with negative impact on different levels. The report provides a comprehensive summary of the status quo of ethnic profiling, its effects and ways to challenge the practice; it reaffirms mainly recommendations already formulated in other reports. Ruteere acknowledges that ethnic profiling is on the rise in Europe since the economic crisis, accumulated by the effect of the contemporary counter-terrorism measures and concordant Islamophobia.<sup>123</sup>

On EU level the recommendations of the European Parliament (EP), the opinions and comments of the EU Network of Independent Experts on Fundamental Rights (EU experts) and the handbooks and studies conducted by the European Union Agency for Fundamental Rights (FRA) are most revelatory and relevant; The EU Experts were forerunner in the objection of ethnic profiling on EU level, while balancing freedom and security in the context of counter-terrorism.<sup>124</sup> FRA carried out the EU-MIDIS survey on minorities and discrimination in the EU, which also resulted in the Data in Focus Report on Police Stops and Minorities, the most comprehensive research related to ethnic profiling in EU. FRA also published the guide ‘Towards More Effective Policing. Understanding and Preventing Discriminatory Ethnic Profiling’ which is the operational instrument resulting from the survey. The results of the study for Belgium will be explored in the next chapter.

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<sup>121</sup> The Special UN Rapporteur received in 2008 a mandate from the UN Human Rights Council to address the practice of profiling in its relation with counter-terrorism, by means of country visits and communications to Member States. M. RUTEERE, *supra* note 7.

<sup>122</sup> The 2001 Durban Declaration is one of the early international documents warning against ethnic profiling, notably before the 9/11 terroristic attacks and consequent measures in USA and Europe. “(...) Urges States to design, implement and enforce effective measures to eliminate the phenomenon popularly known as “racial profiling” and comprising the practice of police and other law enforcement officers relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity”. United Nations, Durban Declaration and Plan of Action, Adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and related violence, 8 September 2001, §72.

<sup>123</sup> RUTEERE, *supra* note 7, 4.

<sup>124</sup> E.U. Network Of Independent Experts On Fundamental Rights, The balance of freedom and security in the response by the European Union and its member states to the terrorist threat, thematic comment, 31 March 2003 and E.U. Network Of Independent Experts On Fundamental Rights, Ethnic Profiling, Ref.: CFR-CDF.Opinion4.2006, December 2006.

Within the Council of Europe, several reports and policy recommendations are published by the European Commission against Racism and Intolerance of the Council of Europe (ECRI) as well as country reports by the Commissioner for Human Rights. The definition of racial (sic) profiling by the Council Of Europe Commission against Racism and Intolerance (hereafter ECRI) is one of the sources of inspiration for the definition in this thesis: “Racial profiling is the use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities”.<sup>125</sup> The ECRI issued a recommendation that Member States should clearly define and prohibit racial and ethnic profiling by law.

Furthermore, the European Network against Racism (ENAR) released a well-informed fact sheet and the NGO Open Society Justice Initiative published a comprehensive report and handbook of good practices. Also the publication on acknowledging and tackling ethnic profiling by Amnesty International Netherlands should be mentioned here.

Many of these were already cited or referred throughout this thesis. The reports on Belgium (such as the UPR) will be mentioned in the next chapter and the recommendations are evaluated in chapter four.

#### **1.4 Conclusion**

It is established that ethnic profiling falls within the scope of the right to equality. International and national courts outside Belgium confirmed that formal ethnic profiling constitutes forbidden direct discrimination. The subconscious use of generalizations based on ethnic features in law enforcement decision might also constitute unfavourable treatment for individuals, but this is not yet tested before a judge. As the effectiveness of ethnic profiling for fighting crime has never been proven, the practice will probably not pass the proportionality test.<sup>126</sup>

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<sup>125</sup> European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No 11 on Combating racism and racial discrimination in policing, Strasbourg, Council of Europe, 2007, para 1.

<sup>126</sup> S. VROMEN, *supra* note 80, 29.

## 2 Ethnic profiling and the right to equality in Belgium

### 2.1 Belgium as case study

Belgium is an interesting case in the legal study of ethnic profiling and discrimination, for there is a highly diverse population in terms of ethnicity and related parameters such as language, nationality, religion or skin colour. “Belgium is an important country of net immigration since the 1950s, with an estimated 11% of the population foreign born and 8% second generation.”<sup>127</sup> These figures give only an indication of the ethno-cultural diversity in Belgium.<sup>128</sup> Only in recent years more consistent policies and legislation on migration are developed, partly under impulse of heated immigration debates and the rise of right-wing parties. Since ‘Black Sunday’ in 1991, marked by the electoral success of anti-immigration and secessionist party Vlaams Blok, xenophobia and Islamophobia are on the political agenda. The so-called ‘migration crisis’ that strikes the European Union as from summer 2015, feeds the on-going debate in a society characterized by ‘superdiversity’.<sup>129</sup>

There is a rather strong anti-discrimination legislation established<sup>130</sup> but it is furthermore acknowledged that racial discrimination is a persisting problem in Belgium, also among law enforcement agents. According to the latest comparable data (2012), 7,7% of people in Belgium felt that last year they had been discriminated against or harassed based on their ethnic origin (5%) and/or religion (3,6%), while the EU average was around 4,2% for ethnic and/or religious discrimination.<sup>131</sup> In the special 2015 Eurobarometer on discrimination, it also appears that 74% of Belgian respondents think that discrimination on the basis of ethnic origin is widespread in the Belgian society (versus 64% of respondents on EU level), for

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<sup>127</sup> T. HUDDLESTON, Ö. BILGILI, A-L JOKI, AND Z. VANKOVA, Migrant Integration Policy Index (hereafter MIPEX), Anti-Discrimination, Belgium, Barcelona, CIDOB, 2015, 19. The Migrant Integration Policy Index (hereafter MIPEX) bases these figures on Eurostat data. There are no comprehensive figures for immigration in Belgium, as methodologies and measurements vary. In addition to high naturalization rates in the past decades, information on the nationality or birthplace of parents is not collected, which makes it difficult to ascertain the exact size of the second and third generation of immigrants. <[www.migrationpolicy.org/article/belgium-country-permanent-immigration](http://www.migrationpolicy.org/article/belgium-country-permanent-immigration)>

<sup>128</sup> Belgium met with immigration within the framework of bilateral employment agreements. Labourers migrated from Turkey and Southern European and Northern African countries, enjoying flexible family reunion conditions. In 1974 a formal cap on economic migration was introduced. Despite the immigration stop policy Belgium has become a permanent country of settlement for many different types of migrants over the past decades: family reunion immigrants, refugees, students and a large share of EU citizens.

<sup>129</sup> D.GELDOF, *Superdiversity in the heart of Europe. How migration changes our society*, Leuven, Acco, 2015.

<sup>130</sup> The Anti-Racism law was formed in 1981 and in 1993 the Centre for Equal Opportunities and Opposition to Racism was established. The anti-discrimination laws of were implemented and adapted following EU Directives in 2003 and 2007.

<sup>131</sup> MIPEX, *supra* note 127, 47.



discrimination on religious basis, a similar trend is shown (67% versus 50%).<sup>132</sup> Additionally, respondents are least likely to know their rights in case of discrimination in inter alia Belgium (34%).<sup>133</sup> This is confirmed in reports by international organisations and national monitoring body, as will be set out further.

The country lives under imminent threat of terrorist attacks, so police and security services are extra scrutinized, particularly since May 2014<sup>134</sup> until currently. In May 2016, the terrorism threat is continuously ‘serious’ and ‘probable’ (level three).<sup>135</sup> In the slipstream of terroristic events, the National Security Council issued counter-terrorism measures, such as the deployment of military forces around strategic potential targets. In November/December 2015, several cases of alleged ethnic profiling of men with Arabic roots, received attention in the national mass media and social media.<sup>136</sup> The articles and testimonies led to more awareness and outrage among the public about the practice of ethnic profiling. Several politicians made public statements on ethnic profiling at that time.<sup>137</sup> The bibliography contains a selection of Belgian newspaper articles on the issue.

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<sup>132</sup> European Commission, Special Eurobarometer 437 Discrimination in the EU in 2015, fact sheet Belgium.

<sup>133</sup> Special Eurobarometer 437, supra n., 72.

<sup>134</sup> As from May 2014, marked by terrorist killings in Brussels (Jewish museum), Belgium remained at risk of a new attack (high level of threat by terrorism): such as in the aftermath of terroristic attacks in Paris (‘Charlie Hebdo’ and Jewish supermarket, 7 January 2015), which was followed by a deadly anti-terrorism operation in Verviers on 15 January 2015. The so-called “Bataclan” attacks, in which Belgian kamikazes were involved (Paris, 13 November 2015) and the attacks in Zaventem and Brussels (22 March 2016), led to the highest ‘imminent’ threat level for several periods. “Terreurdreiging Joodse gemeenschap tot hoogste niveau opgetrokken”, standaard.be, 25 May 2014.

<sup>135</sup> Level 3 indicates that a terrorist attack is possible and probable; level 4 means that terror threat is imminent and very serious. Infographics on [www.lokalepolitie.be/5888/nieuws/3140-dreigingsniveau-3](http://www.lokalepolitie.be/5888/nieuws/3140-dreigingsniveau-3); decision on the threat taken by the Belgian Coordination Unit For Threat Analysis (CUTA) and communicated by National Crisis Centre on <centredecrise.be> and communication by OCAD, Belgian Coordination Unit For Threat Analysis, 18 April 2016. <centredecrise.be/nl/news/crisisbeheer/waakzaamheid-tegen-terrorisme-blijft-0>.

<sup>136</sup> E.g. the stop and search on jihad expert Montasser Alde’emeh in Brussels and the frisking of Flemish actor Zouzou Ben Chikha in Ghent. Student Yassine Boubout was stopped and arrested by heavy armed policemen and five minors were stopped and searched in Kortrijk, as an excessive reaction on suspicion of stealing a bike. J. NAERT AND P. DEBRUYNE, “Racisme en ethnic profiling is niet ingebeeld, zoals wordt beweerd”, De Morgen, 15 december 2015; D. BAUWENS, “Opgepakt wegens verdachte jogging”, www.demorgen.be, 26 November 2015. More on ethnic profiling in national media: D.A. JAHJAH, “Voor altijd niveau 4”, column, De Standaard, 27 november 2015; K. DE RAEDT, “Niet alle moslims zijn terroristen”, www.standaard.be, 25 November 2015; Y. DELEPELEIRE, “Er is gewoon geen plaats voor het woord zigeuner”, De Standaard, 15 April 2015; J. VANDAELE, “De politie moet van iedereen zijn”, opinie, De Standaard, 3 December 2015.

<sup>137</sup> Guido De Padt (Open VLD) advocates the registration of ethnicity in any contact of citizens with the police: “De Padt pleit voor registratie etnische afkomst bij contacten met politie”, www.knack.be, 20 December 2015; “Jambon over ethnic profiling: ‘Logisch dat mensen met bepaald profiel eerst gecontroleerd worden’”, www.standaard.be, 21 December 2015.

## 2.2 The use of ethnic profiling in Belgium

### 2.2.1 Valid indications

There is little empirical research to inform the legal debate over ethnic profiling in Belgium. Statistical data on ethnic profiling and on racism and discrimination in general are however necessary for monitoring the situation of minority groups and for identifying possible patterns of direct or indirect discrimination. “Policing and, more generally, the criminal justice system are crucial areas in respect of which ECRI has called for this type of data to be collected in order to foster accountability and provide a common foundation of knowledge for policy making.”<sup>138</sup> The focus of scholars, police and civil society partners in Belgium rose to a higher level only in 2015 with a seminar and a publication (Cahiers Politiestudies).<sup>139</sup>

There are however valid indications of the use of ethnic profiling in Belgium, by police and in other fields where individuals are subjected to control at face value. Two older studies on police and minorities in Belgium (published in 1988 and 2000) show that young men with North-African roots are ‘targeted’ by the police; the term ethnic profiling was not yet in use.<sup>140</sup> A small-scale survey was conducted in Kortrijk, showing the reality and perception of ethnic profiling and police behaviour by young people of ethnic minorities (2015).<sup>141</sup> Reports on presumed ethnic profiling appeared on popular media, notably in the aftermath of the Paris attacks in 13 November 2015.<sup>142</sup> The former head commissioner of Committee P acclaimed the problem of ethnic profiling among Belgian police.<sup>143</sup>

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<sup>138</sup> ECRI, General Policy Recommendation No 11 on Combating racism and racial discrimination in policing, Strasbourg, Council of Europe, 2007, §41.

<sup>139</sup> The first prominent article on ethnic profiling in Belgium with focus on human rights was published in 2015 (in Dutch). JANSSENS AND FORREZ, *supra* note 8, Both the seminar of 21 May 2015 “Ethnic profiling: gelijkheid onder druk” and the publication - Cahiers Politiestudies, ‘Ethnic profiling en interne diversiteit bij politie’, 35 (2) Antwerpen Maklu 2015- were developed in collaboration with the Centre for Policing and Security.

<sup>140</sup> C. DE VALKENEER, *Police et public: un rendez-vous manqué?*, Brussels, La Charte, 1988 and V. FRANCIS, “L'étranger, objet de toutes les attentions : étude des pratiques de ciblage policier”, in F. BRION, A. RÉA, C. SCHAUT, CHRISTINE AND A. TIXHION (eds.), *Mon délit ? Mon origine. Criminalité et criminalisation de l'immigration*, Brussels, De Boeck/Pol-His, 2001. A summary of both studies appeared in: R. BOUHLAL AND I. AKROUH *European Network against Racism (ENAR), Rapport alternatif d'ENAR 2009/2010. Rapport supplément: Le profilage ethnique en Belgique*, Brussels, March 2011, 6.

<sup>141</sup> N. VANASSCHE AND A. VERHAGE, “Racisme en etnisch profileren door politie: in België?” 35 *Cahiers Politiestudies* 2015, 47.

<sup>142</sup> See *Supra* note 136 and *inter alia* P. PONSAERS, “Opinie: Etnisch profileren, hoe ver kun je gaan?”, *De Morgen*, 15 December 2015; S. VANLOMMEL, “Bij IS zitten geen Chinezen”, *De Morgen*, 3 December 2015; “Jambon over ethnic profiling: ‘Logisch dat mensen met bepaald profiel eerst gecontroleerd worden’”, [www.standaard.be](http://www.standaard.be), 21 December 2015.

<sup>143</sup> Paul Jacobs (former Committee P commissioner) assumes that there is now more racism among Belgian police than before: D. DE CONINCK, “Voormalig racismebestrijder bij de politie slaat mea culpa: ‘Ja, wij hebben gefaald’”, *De Morgen*, 19 December 2015; See also P. CHARLIER, “Opinie: Islamofobie is een prangend aandachtspunt bij de politie”, *De Morgen*, 8 December 2015.

Moreover, the extensive European Union Minorities and Discrimination Survey (EU-MIDIS)<sup>144</sup> by the FRA displays the quantitative and qualitative differences in police stops between minority groups and majority population.<sup>145</sup> At the time of the publication, Home Affairs Minister Turtelboom did not take this survey into account for its ‘debatable statistical value’.<sup>146</sup> Certainly “the findings from the EU-MIDIS survey cannot be read as conclusive evidence that discriminatory police profiling practices are occurring.”<sup>147</sup> But the results (presented in the next section) combined with other sources are at least indicative for the use of ethnic profiling in Belgium.

### 2.2.2 EU-MIDIS: police stops and minorities

The important conclusions from the authoritative EU-MIDIS survey on the level of EU are that racist crime and discrimination prove grossly under-reported and there is a sense of resignation among minorities and migrants.”<sup>148</sup> It shows also that Roma and North Africans are the most heavily policed minority groups.

The ‘data in focus’ report on minorities and police stops was published in 2010. In Belgium, interviews (which lasted averagely 29 minutes) were conducted with two vulnerable minority groups: people of Turkish (532 respondents) and North African descent (500 respondents). There were also 527 interviews with people from the majority ‘control group’; all interviews took place in randomized parts of Liege, Antwerp and Brussels, which are the most ethnically

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<sup>144</sup> EU-MIDIS provided the most extensive data set on discrimination and victimisation faced by ethnic minorities and immigrants in the EU to date. The survey is the first of its kind to systematically survey minority groups across the EU through face-to-face interviews using the same standard questionnaire. The study compiles face-to-face interviews with 23 500 immigrants and members of ethnic minorities throughout the European Union in 2008. In Belgium and 9 other member states, comparator data were gathered among members of the majority populations with similar background features. European Union Agency for Fundamental Rights (FRA), *Towards More Effective Policing. Understanding and Preventing Discriminatory Ethnic Profiling: A Guide*, Luxembourg, Publications Office of the European Union, 2010, 27.

<sup>145</sup> The number of people being stopped in a period of a year, the frequency of these stops and the nature of the stops by the police (the place, the action of the police and the way the people felt treated).

<sup>146</sup> The Minister of Interior Affairs at the time of the publication of the EU-MIDIS study (Ms. Annemie Turtelboom) denounced the study as being not trustworthy because the number of respondents would be not representative and the figures are based on the perception of people. JANSSENS AND FORREZ, *supra* note 8, 67 and Federal Chamber 2010-2011 Questions and Answers, Question nr. 109 by E. Brems, 14 October 2010, nr. 53/018,

<sup>147</sup> FRA, *supra* note 149, 28.

<sup>148</sup> “82% of respondents who said that they had been discriminated against did not report their most recent experience. When asked for the main reason for not reporting discrimination, 63% of respondents said that they believed nothing would happen or change if they reported the incident. At the same time, 80% did not know of any organisation that could offer support or advice to victims of discrimination. This reveals an urgent need for better information, but could also reflect a real absence of support services in some Member States.” <fra.europa.eu/en/press-release/2010/eu-survey-minorities-and-immigrants-sheds-new-light-extent-racism-eu>

diverse cities in the country.<sup>149</sup> In the Belgian part of the research, 12% of the majority control group was stopped the past twelve months compared to 18% of the Turkish minority and 24% of the North-African minority. The latter group seems more heavily ‘policed’ since they were the only group who reported being stopped 2.6 times over the past year versus 1.9 times for Turks and majority group. This is in line with the conclusion that EU-wide; North Africans are more policed than other groups.<sup>150</sup>

Qualitative differences are also perceived in the police behaviour during stops: 85% of the respondents of majority population said that police treated them with respect during the last control, versus 42% of the North-African Belgian citizens and 55% of the Belgo-Turkish respondents. The likelihood of being stopped as a minority member without a private vehicle is significantly higher than amongst the control group.<sup>151</sup> Ethnic profiling allegedly lies at the basis of these stops in one out of three stops of respondent with Turkish background, nearly half of the stops of respondents with roots in North Africa.<sup>152</sup> The results of the ‘police stops and minorities’ survey in Belgium show disparities that are disproportionate. Ethnic profiling is a probable explanation for statistical differences between results for majority and minority respondents. The divergent experiences of police stops are not occurring by chance: the results over the EU show a pattern that needs explaining through further research.”<sup>153</sup>

### **2.2.3 Reports by complaint mechanisms**

Ethnic profiling is not defined nor used as a functional concept in Belgian monitoring bodies; therefore it does not feature as such in the published figures on complaints collected by Unia, the police or Committee P. The way individual police agents execute identification controls and stop and search is part of their discretionary power and remains largely invisible, as it is not subject to police reporting.<sup>154</sup> Close scrutiny of the available charts and reports on complaints of racial discrimination by police can suggest the extent of the phenomenon.

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<sup>149</sup> European Union Agency for Fundamental Rights, EU-MIDIS Technical Report Methodology, Sampling and Fieldwork, 2009, 41.

<sup>150</sup> FRA, *supra* note 149, 31.

<sup>151</sup> Whereas only 17% of the majority group is stopped in public space or on public transportation, this is true for 24% the Turkish minority group and for 40% North-African minority group, FRA, Data in Focus Report 4: Police Stops and Minorities 2010, 10.

<sup>152</sup> FRA, Data in Focus Report 4: Police Stops and Minorities. Luxembourg, Publications Office of the European Union, 2010, 7.

<sup>153</sup> FRA, *supra* note 149, 31.

<sup>154</sup> A prominent reason for the lack of official figures on the use of ethnic profiling in Belgium is that the police or other law enforcement agents do not need to record or report any data on identification controls, stop-and-frisk, long interviews at immigration control and other situations where ethnic profiling likely occurs. In France and United Kingdom administrative controls are reported and motivated; in the UK also the ethnicity of the

A person who wants to rebut a police action that is deemed unlawful, arbitrary or discriminatory can file a complaint to Unia, the Committee P or the local police. Many people who declare being victim of discrimination refrain from filing a complaint because of the difficulty to prove discrimination and the intimidating effect of law enforcement agents or institutes; people easily assume that the police have the law at their side (asymmetry of power). There are however specific provisions in the Penal Code for public officers who violate of fundamental rights; civil servants ordering or committing an arbitrary act or an act constituting a violation of the constitutional rights and freedoms may be convicted to an imprisonment of 15 days to a year.<sup>155</sup> The Anti-Racism (article 23) and Anti-Discrimination (article 23) Law contain also provisions on deliberate discrimination and arbitrariness in the use of police powers which is punished with imprisonment (between 2 months and 2 years). On the basis of analysis of all the complaints about discrimination in police interventions between 2011 and March 2013 it appeared that citizens contact Unia mostly when a certain amount of violence was involved in police intervention, which might explain partly why ethnic profiling is hardly reported.<sup>156</sup> Police officers might also refuse to take into account cases of discrimination and specifically ethnic profiling in their daily work, e.g. by not agreeing to write a police report.

### 2.2.3.1 Unia

The Interfederal Centre for Equal Opportunities (going under the new moniker Unia as from February 2016) is established as independent public institution in a partnership agreement with the federal government, the regions and the communities.<sup>157</sup> The aim of the Centre is promoting equal opportunities and participation for all in all areas of society, combatting discrimination, promoting knowledge and respect of constitutional rights, more particularly anti-discrimination law. In realizing this mission, Unia cooperates with the major actors in the

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controlled persons registered, so data regarding eventual ethnic profiling are ready available. JANSSENS AND FORREZ, *supra* note 8, 70.

<sup>155</sup> Article 147 and art. 151 of Strafwetboek of 8 juni 1867 (Penal Code), BS 9 June 1867, 3133 and EU Network Of Independent Experts On Fundamental Rights, Ethnic Profiling, December 2006, 29.

<sup>156</sup> Interfederaal Gelijkekansencentrum, Jaarverslag 2013. Conventie tussen het Centrum voor gelijkheid van kansen en voor racismebestrijding en de Federale Politie, Brussel, May 2014, 49-50.

<sup>157</sup> The Centre for Equal Opportunities and Opposition to Racism is created in February 1993, originally in a joint construction with the Federal Migration Centre. Koninklijk besluit van 8 februari 1993 tot vaststelling van het organiek statuut van het Centrum voor gelijkheid van kansen en voor racismebestrijding, (Centre for Equal Opportunities and Opposition to Racism), BS 02 March 1993, 4417 and Cooperation agreement between the federal authority, the Regions and the Communities aimed at creating an Interfederal Centre for Equal Opportunities and Opposition to Racism and Discrimination in the form of a joint institution, in the sense of article 92bis of the Special Act of 8 August 1980 on the Reform of the Institutions, 12 June 2013, unofficial translation.

Belgian society, e.g. police.<sup>158</sup> The Centre monitors discrimination by receiving Discrimination complaints<sup>159</sup> for all protected grounds except language and by assisting victims; Unia tries to establish a constructive dialogue together with the alleged offender and the victim and settle the matter out of court. In cases where dialogue is impossible or the case has a symbolical importance for the broad society, the Centre will take juridical steps against the person, business or institution accused of discrimination.<sup>160</sup>

Although discrimination on racial criteria (comprising nationality, so-called race, skin-color and national or ethnical descent) is still predominant in the figures,<sup>161</sup> a growth of cases in religious discrimination is shown. Muslims make out 90% of complainants of discrimination: “nowadays, people no longer target “the Arab” but “the Muslim.”<sup>162</sup> There is rather a shift in the phenomenon of racism (towards ‘cultural racism’) than a decrease in racism itself. The topicality of so-called ‘jihadi-terrorism’ affects the risk of discrimination of all Muslims.<sup>163</sup>

This context might play a role in the use of ethnic profiling by law enforcement officers.

Of the new cases in 2014 opened by the Centre, officials in the field of police and justice related 5% of the cases on discriminatory practices. Among 83 new dossiers for police and justice, 47 dossiers dealt with racial discrimination by police officers; supposed religious discrimination by the police constituted 8% of the cases opened on the basis of admissible

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<sup>158</sup> A partnership between Unia and the integrated police (governed by an agreement between the minister of the interior and Unia) has created a clear framework in which the police and the Centre can work together to combat discrimination, hate messages and hate speech. This agreement also includes a section devoted entirely to training.

<sup>159</sup> In the year reports of Unia, the numbers on allegations of discrimination are aggregated by sector such as media, education, goods and services, society, labour situation, social security and police and justice. In 2014, the Centre received inter alia 1656 complaints for racial/ethnic discrimination and 692 complaints for religious discrimination. A dossier is opened when the Centre is competent for the criteria of alleged discrimination and sufficiently elements prove discrimination or a conjecture of discrimination, which might lead to a complaint at the Court. 46% of the dossiers opened after complaints contained sufficiently elements to prove discrimination or a conjecture of discrimination. Around a dozen dossiers were closed through negotiated solutions. Interfederaal Gelijkekansencentrum, *Het werk van het centrum in 2014, uitgedrukt in cijfers, oktober 2015*, 19 and 37.

<sup>160</sup> Unia brought 14 cases to court (2014), involving discrimination (7) and hate messages (3) and hate crimes (4); ethnic criteria represented the bigger share. In 2014, the Centre filed a complaint to the Court for further judicial review in four cases of police inflicted violence with alleged racial inspiration. Interfederaal Gelijkekansencentrum, *Jaarverslag 2014, conventie tussen het interfederaal gelijkekansencentrum en de federale politie*, 28 May 2015, 37.

<sup>161</sup> The share of racial related dossiers fell from more than 70% to 41%. Unia explains this by the fact that the Centre was only in 2003 qualified to open cases in other discrimination with a steady growth in these dossiers.

<sup>162</sup> Religious discrimination counts for 16% of all the newly opened dossiers in 2014, which is after racial grounds and handicaps the third most recurrent form of discrimination. In 21% of the cases concerning Islamophobia, a breach of anti-discrimination legislation was established. Interfederaal Gelijkekansencentrum, *Het werk van het centrum in 2014, uitgedrukt in cijfers, oktober 2015*, 30.

<sup>163</sup> This is reported repeatedly in national mass media: M. ECKERT, “Getuigenis: verbaal en fysiek geweld tegen moslims neemt toe ‘Plots begon die man te schelden omdat ik een hoofddoek draag’”, *De Standaard*, 25 February 2016 and P. CHARLIER, “Opinie: Islamofobie is een prangend aandachtspunt bij de politie”, *De Morgen*, 8 December 2015.

complaints. Unia estimates that in 2014 less than ten discrimination records under the motive of ‘ethnic profiling’ were opened following complaints of racist comments, reproaches and other speech and also arbitrary, discriminating interventions and actions by police officers. This number and the other reported facts of ethnic profiling are rather constant throughout the years.<sup>164</sup>

Because of the criminal dimension of the mandate, Unia is an important partner of the police in the fight against criminal forms of discrimination, hate speech and hate crimes. The Centre is responsible for the diversity training given to enhance knowledge of anti-discrimination legislation by police officers. The Centre pointed out that the officers are hardly acquainted with the legal meaning of discrimination, hate speech and hate crimes; they often deny the impact of discrimination and officers admit not always writing a police report on claims of discrimination.<sup>165</sup> In some police trainings, Unia addressed ethnic profiling with practical exercises and situational analyses to deconstruct stereotypes and prejudices. It appeared also that many police officers feel squelched between the expectation of community oriented policing and the pressure to attain productivity targets.<sup>166</sup>

Unia addressed ethnic profiling in its cooperation with the Diversity department of the Federal Police in 2014; the Centre considers ethnic profiling as contradictory to the aims of excellent police service and community oriented policing and acknowledged that ethnic profiling contributes to the negative imagery of police. Unia approves that there is lack of knowledge and tools to challenge ethnic profiling.<sup>167</sup>

Unia also reports that the registration of discrimination by police has not ameliorated, despite circular letter COL 13/2013. Registration is an essential condition for understanding the extent in which discrimination is practised. Police should report both criminal discrimination cases and civil cases with a discriminatory motive, but it is common practice to register only the weightiest misdemeanour and not the discrimination. Police officers are not well trained in recognizing the discriminatory elements in hate crimes.<sup>168</sup> Unia furthermore recommends

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<sup>164</sup> Interfederaal Gelijkekansencentrum, Standpunt van het Interfederaal Gelijkekansencentrum over de praktijk van etnische profilering: inzet en gevolgen. Undated, not-published document received from UNIA, 2.

<sup>165</sup> Interfederaal Gelijkekansencentrum, Jaarverslag 2014 (Conventie Politie), 7.

<sup>166</sup> Interfederaal Gelijkekansencentrum, Jaarverslag 2013. Conventie tussen het Centrum voor gelijkheid van kansen en voor racismebestrijding en de Federale Politie, Brussel, May 2014, 16.

<sup>167</sup> Ibidem, 49-50.

<sup>168</sup> Interfederaal Gelijkekansencentrum, Jaarverslag 2014 (Conventie Politie), *supra* not x, 24.

better disciplinary procedures inside police services, independent from the outcome of the criminal procedure.<sup>169</sup>

### 2.2.3.2 *Police oversight mechanisms*

The Belgian police are controlled by an internal mechanism ‘General Inspectorate of the Federal and Local Police (hereafter AIG)<sup>170</sup> and an external mechanism ‘Standing Police Monitoring Committee’ (Committee P for short).<sup>171</sup> Supervision of the Anti-Racism Law is a priority of the external Committee P.

The Committee P is the organ for control and supervision of the federal and the local police services and reports to the Federal government and the Chamber of Representatives, e.g. through advises the need of reforms to ameliorate the functioning and accountability of police services. The Inquiry Service may also initiate inquiries about criminal offences which members of police services are suspected of. Relatively few Committee P inquiries are related to breach of a provision in the Anti-Racism Law or the Act on the Police Function.<sup>172</sup>

In 2005, the Committee P mentioned the use of ethnic profiling during the activities of the Belgian police in a systematic analysis of the discrimination claims against the police on grounds of ‘race’ or ethnic origin. In 2008, Committee P reports on ethnic diversity in the police services: “The term ethnic profiling appears to be totally unknown in a random survey among Belgian police services.”<sup>173</sup>

An important aspect of the work of the Inquiry Service of the Committee P is the treatment of individual complaints.<sup>174</sup> The author of the complaint may request anonymity. In the 2007 report of the Committee on external discrimination and racism by the police, most complaints are of racist speech, but the Committee received also complaints on discriminatory treatment

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<sup>169</sup> The Council of State and the Standing Police Monitoring Committee join Unia in the criticism on the internal disciplinary procedures for police services, and suggest taking legislative action.

<sup>170</sup> The AIG monitors and audits police units under the authority of the Minister of the Interior and the Minister of Justice, but benefits however of a certain degree of independence. Algemene Inspectie van de federale politie en van de lokale politie (AIG), Jaarverslag van de werkingsjaren 2011-2012, Brussel, 26.

<sup>171</sup> The Committee P comprises five members, all nominated by the House of Representatives for a mandate of five years renewable twice. The Standing Police Monitoring Committee is established by the Wet van 8 juli 1991 tot regeling van het toezicht op politie- en inlichtingendiensten en op het Coördinatieorgaan voor de dreigingsanalyse (The Organic Law on monitoring police forces, intelligence services and the Coordinating Body for Threat Analysis), BS 16 July 1991, 16576.

<sup>172</sup> The Committee inquired in 2014 *inter alia* five cases of racism and 8 cases of arbitrary actions (on 113 total criminal inquiries). The Standing Police Monitoring Committee, Year report 2014 (not yet adopted by the Federal Parliament), 143.

<sup>173</sup> Own translation, Vast Committee van Toezicht, Diversiteitsbeleid met betrekking tot allochtone politieambtenaren, interim report, 2008, 1.

<sup>174</sup> The Standing Police Monitoring Committee, Year report 2014 (not yet adopted by the Federal Parliament), 15.



and ‘discrimination as underlying reason for the legitimate measures such as identity controls, arrest, vehicle searches’. The two last categories might constitute ethnic profiling.<sup>175</sup> Ethnicity, colour and religion made up the majority of the dossiers on discrimination by the Committee in 2007, and the complaints are usually paired with complaints of other irregularities such as denying of procedures, arbitrary interventions, abuse of power. Anno 2016, the Committee accused the Antwerp local police of imminent racism.<sup>176</sup>

The Standing Intelligence Agencies Review Committee (Standing Committee I) is a permanent and independent review body, set up by the Act of 18 July 1991; it deals with complaints lodged by any citizen who considers that his/her individual rights have not been respected by State Security, the General Intelligence and Security Service, the Coordination Unit for Threat Assessment or by a supporting service acting in this capacity. This complaint body could provide scrutiny in the case of alleged ethnic profiling in data collection or processing, as the Committee I acts as a judicial body. The Committee also supplies prejudicial advice on the legality of used methods. There are no investigations into ethnic profiling practices published.<sup>177</sup>

## 2.3 Assessment of counter-discrimination in Belgium

### 2.3.1 Unia

The ECRI report on Belgium in 2014 says “Ethnic and religious groups, in particular Muslims, continue to face in general many disadvantages, including discrimination in key fields of life.”<sup>178</sup> In February 2016, Unia published an evaluation of the Belgian federal anti-discrimination legislation, in line with article 52 of the Anti-Discrimination Law. Due to the timing, the conclusions could not be reviewed in detail. The main critiques in the context of effective law enforcement and victim protection are that:

- Providing evidences is nearly impossible in many cases;
- The implementation of the shift of burden of proof is unequal;
- The access to justice and redress is not faster or better;

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<sup>175</sup> Vast Comité van Toezicht op de politiediensten, Externe discriminatie: racisme/discriminatie, interim report, 2007.

<sup>176</sup> R.LEGRAND, “Comité P klaagt racisme aan in Antwerps politiekorps”, [www.detijd.be](http://www.detijd.be), 25 April 2016. [http://www.tijd.be/politiek\\_economie/belgie\\_vlaanderen/Comite\\_P\\_klaagt\\_racisme\\_aan\\_in\\_Antwerps\\_politiekorps.9758421-3137.art](http://www.tijd.be/politiek_economie/belgie_vlaanderen/Comite_P_klaagt_racisme_aan_in_Antwerps_politiekorps.9758421-3137.art)

<sup>177</sup> In one of the investigation reports, the Committee found that “the State Security does not supervises Muslims or the practice of Islam religion as such”: Vast Comité van Toezicht op de inlichtingen- en veiligheidsdiensten (Committee I), Verslag naar het onderzoek betreffende de opvolging van het radicale islamisme door de inlichtingendiensten, 2007, 1.

<sup>178</sup> ECRI, Report on Belgium, *infra* note 63, 10.

- There are financial burdens for a significant number of victims ;
- The limited provisional damage compensation seems to discourage victims to file a complaint;
- Combating discrimination is generally speaking no priority for the judicial, administrative and disciplinary instances; the enforcement of the law is weak;
- Disciplinary procedures, as far as they are actually carried out, remain entirely internal, without involvement of victims, or communication or redress for victims.
- Sanctions are ostensibly not dismaying and the risk of denouncement is minimal.<sup>179</sup>

Unia urges the federal and local police and the public prosecutor's office to implement the directions in circular COL 13/2013. The provisional compensation for damage should also be elevated and there should be a special time limitation of five years for complaints related with the 19 protected criteria is introduced. The complaint procedures against the police are considered as non-transparent, e.g. the internal disciplinary procedures.<sup>180</sup>

Unia also points out that the frequent complaints of discrimination by police are detrimental for the trust relation between citizens and police. Furthermore, the closed organisational culture of police amounts to the silence about discrimination by police. The enforcement of anti-discrimination legislation is not considered a compelling need and accordingly there are less available resources.<sup>181</sup> Unia acknowledged earlier the persistence of strong stereotypes on gender, handicap, and sexual orientation but also on religion and ethnic origin within the police; some police officers also openly express their doubt about the pertinence of anti-discrimination legislation.<sup>182</sup>

ECRI also found that the data on criminal offences in the category of racism, xenophobia, discrimination and homophobia and the criminal offences with a “racist or xenophobic” collected by the Federal Police and the Prosecution Service are not very reliable; there were no data available on local police level available and the data produced are not always

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<sup>179</sup> Own translation; Unia, Evaluatie: Wet van 10 mei 2007 tot wijziging van de wet van 30 juli 1981 tot bestraffing van bepaalde door racisme of xenofobie ingegeven daden (B.S. 30 mei 2007) (Antiracismewet) en wet van 10 mei 2007 ter bestrijding van bepaalde vormen van discriminatie (B.S. 30 mei 2007) (Antidiscriminatiewet). Verslag van Unia (assessment report anti-discrimination laws), February 2016, 10.

<sup>180</sup> Interfederaal Gelijkekansencentrum, Standpunt van het iNterfederaal Gelijkekansencentrum over de praktijk van etnische profilering: inzet en gevolgen. Undated, not-published document received from UNIA (formerly Interfederaal Gelijkekansencentrum).

<sup>181</sup> Unia, assessment report anti-discrimination laws, *supra* not, 50.

<sup>182</sup> Interfederaal Gelijkekansencentrum, Jaarverslag 2014, conventie tussen het interfederaal gelijkekansencentrum en de federale politie, May 2015, 21.

consistent with the number of cases transmitted by individual prosecutors.<sup>183</sup> The statistics indicate also that prosecutors drop a large number of cases in “racism, xenophobia, discrimination and homophobia”.<sup>184</sup>

### 2.3.2 Migration Policy Integration Index

The Migration Integration Policy Index (hereafter MIPEX) compiled official statistics and research in order to measure policies of integrating migrants in Belgium and many other countries. Overall, Belgian anti-discrimination system is characterized by rather robust legislative tools but substantial gaps might affect *inter alia* victims of ethnic profiling. Few complaints are made compared to the large number of people reportedly experiencing incidents of racial/ethnic or religious discrimination.<sup>185</sup> According to MIPEX, Belgium needs an explicit prohibition of double or multiple discrimination and data on ethnic profiling in order to break the ‘legal silence’ about this practice and to raise awareness among police and potential victims.<sup>186</sup> MIPEX shows also the under-usage of situation testing and statistics as potential evidence in court; class actions and/or *actio popularis* by NGO’s are recommended for supporting victims of discrimination.

### 2.3.3 Universal Periodic Review

From 18 to 29 January 2016, the Human Rights Committee reviewed for the second time the state of the human rights in Belgium in the Universal Periodic Review on the basis of questions by other member states, a national report and recommendations by the civil society.<sup>187</sup> The final report of 2016 UPR is not available yet.

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<sup>183</sup> *ECRI Report on Belgium (fifth monitoring cycle)*, Strasbourg, Council of Europe, 25 February 2014, 17.

<sup>184</sup> Cases of “racism, xenophobia, discrimination and homophobia” recorded by the Prosecution Service: 1,067 cases in 2007, 1,047 in 2008, 987 in 2009, 865 in 2010, 873 in 2011 and 893 in 2012. ECRI European Commission against Racism and Intolerance, *ECRI Report on Belgium (fifth monitoring cycle)*, Strasbourg, Council of Europe, 25 February 2014, 17.

For comparison: In the police statistics for registered criminal facts, the number of reports in the category of racism and xenophobia is 487 for the first semester of 2016 versus 1046 in 2014 and 819 in 2013. The charts show a disparate image. The number of registrations of discrimination rose rapidly in the first semester of 2014 but decreased in the first semester of 2015 with 10% (-74 facts); for racism and xenophobia, a decrease of 12,9% is shown. Politie (FPF/DGR/DRI/BIPOL), *Politiële Criminaliteitsstatistieken België Semester 1 2015, “Criminaliteitsbarometer”*, 22 and Politie (FPF/DGR/DRI/BIPOL), *Politiële Criminaliteitsstatistieken België 2000 , Semester 1 2015, geregistreerde criminaliteit op het nationaal niveau*, 5.

<sup>185</sup> *Ibidem*, 4.

<sup>186</sup> MIPEX refers to France, Ireland, United Kingdom, United States and Germany, countries where ethnic profiling is more explicitly part of the legal framework. T. HUDDLESTON, Ö. BILGILI, A-L JOKI, AND Z. VANKOVA, *Migrant Integration Policy Index, Barcelona (MIPEX Belgium)*, CIDOB, 2015 <[www.mipex.eu/belgium](http://www.mipex.eu/belgium)>

<sup>187</sup> “The UPR will assess the extent to which States respect their human rights obligations. The documents on which the reviews are based are: 1) information provided by the State under review, which can take the form of a “national report”; 2) information contained in the reports of independent human rights experts and groups,

The first UPR of Belgium was conducted in 2011 and provide human rights training for police the recommendations on reducing ethnic profiling, were not adopted then.<sup>188</sup> Ethnic profiling by law enforcement agents was not considered as an existing or serious problem of respect of human rights. However, the Belgian government refers on its own account to the practice of ethnic profiling as a point of improvement in the national report in preparation for the UPR of 2016.<sup>189</sup> In the context of the 2016 UPR of Belgium, several States questioned the effect of the terrorist threat in ethnic profiling; e.g. Netherlands.<sup>190</sup>

National civil society stakeholders (Unia, Myria, Droits de l'enfant and Commissariaat Kinderrechten), address the issue of ethnic profiling by Belgian police again in their contribution to the second UPR, particularly awareness raising, training, monitoring and access to police services in complaint procedures.<sup>191</sup>

## 2.4 Good practices

Lastly, there are also reports of good practices related to ethnic profiling in Belgium. Open Society Justice Initiative (2012) referred several times to good practices in Belgium, such as the profiling system in Brussels Airport that is based on geographical and behavioural information instead of physical appearance, name and nationality.<sup>192</sup> However, in May 2016, the new 'pre-checking' procedure at Brussels Airport in the aftermath of the terrorist attacks

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known as the Special Procedures, human rights treaty bodies, and other UN entities; 3) information from other stakeholders including national human rights institutions and non-governmental organizations.” [www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx](http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx)

<sup>188</sup> Ecuador submitted recommendation 101.21; Egypt addressed the problem of racial profiling in recommendation 103.11: UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Belgium, 11 July 2011, A/HRC/18/3, §101.21 and §103.11.

<sup>189</sup> “With reference more specifically to the police, safeguards concerning respect for fundamental rights and, in particular, the prohibition of carrying out inquiries, arbitrary detentions, searches and questioning motivated by physical appearance, skin colour or racial or ethnic origin, are provided by the legal, regulatory and ethical frameworks relating to police action and by preventive and a posteriori control mechanisms that exist, both internally and externally. (...)” Working Group on the Universal Periodic Review Twenty-fourth session Geneva, Human Rights Council, United Nations, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21\* Belgium, A/HRC/WG.6/24/BEL/1, 9 November 2015, §23.

<sup>190</sup> “Could Belgium indicate if the terrorist threat has led to ethnic profiling within the police organization? And if so, is Belgium willing to develop, in consultation with stakeholders, measures to prevent and combat ethnic profiling? The Netherlands is willing to share experiences in this regard”: UPR, advance questions to Belgium, 2.

<sup>191</sup> Interfederaal Gelijkekansencentrum, *Compilatie van de bijdragen Universeel periodiek onderzoek door de Mensenrechtenraad van de Verenigde Naties Tweede cyclus – 24e zitting, Juni 2015*, §§ 26-32, recommendations 101.16, 101.21.

<sup>192</sup> The Special UN Rapporteur also reports on this good practice: RUTEERE, *supra* note 7, 14 and Open Society Justice Initiative (OSJI), *Reducing ethnic profiling in the European Union: A Handbook of good practices*, New York, 2012, 46-47. Another praised effort in reducing ethnic profiling is the appointment of two Islam-experts (Belgian Federal Judicial Police) for the training of counter-terrorism police officers and the teaching ‘not to rely on stereotypes or ethnic profiling when assessing individuals and organisations’.

in the same airport, raised concerns on the formal or informal use of ethnic profiling.<sup>193</sup> The judicial control of the use of special investigative techniques in Belgium is likewise praised, because it involves checks on the legality, subsidiarity, opportunity and feasibility of every measure.<sup>194</sup>

The most interesting project in reducing ethnic profiling is the pilot project initiated by the local police of the zone Brussels North, Unia and NICC (National Institute for Criminalistics and Criminology). It involves a study on the impact of ethnic profiling on the society and on the relations between police and citizens. The partners consciously keep the project far from public exposure so to be able to work on a trust base between researchers and police officers. The aim is to enable the responsible police officers of the zone to recognize discriminatory practices that are used consciously or subconsciously. The hypothesis is that ethnic profiling by police officers is rarely in the hands of the individual officer, but might be located on a meso level, within the institution or a certain team, as part of the policing culture. From this point of view, the main aim is to further research the appearance, extent and seriousness of the problem of the use of ethnic profiling, in cooperation with police officers and chefs, with an eye on creating support within the team, from the different ranks on the hierarchy to reduce the practice if needed.<sup>195</sup>

The specific goals of this project are: establishing whether there is ethnic profiling in de policing zone Brussels North (through data collection); assessing the efficiency of ethnic profiling for police research and the fight against crime and reflecting in efficient instruments; evaluating the risk of discrimination and the negative impact on the relation between police and citizens; if necessary, creating measures to change the practices of police officers.<sup>196</sup> This type of bottom-up projects based on cooperation and awareness-raising within the police corpses, are preferable over ‘copying measures’ as the use of stop forms. For Unia, the adaptation of legislation seems superfluous in Belgium, for an article in the Anti-

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<sup>193</sup> Y. BENFQUIH, “Opinie: Ik wil best eenmaal verdacht lijken, maar niet telkens weer”, De Morgen, 4 May 2016;

A. DE BOECK, “ Jambon: "We gaan niet enkel mensen met een bruine huidskleur uit de rij halen”, www.demorgen.be, 3 May 2016.

<sup>194</sup> Article 18/3 §2, Wet van 30 november 1998 houdende regeling van de inlichtingen- en veiligheidsdiensten (Law on intelligence and security services), BS 18 December 1998, 40312.

<sup>195</sup> In a telephone conversation with the project responsible for UNIA, the preference for working independent with police commissioners who are willing to cooperate in research and change stands out. Building a relation of cooperation is the first step, rather than the top-down introduction of data forms or legislation. Unia is –through their statute - independent from funding and lobbying, which favours this working style.

<sup>196</sup> Programma van 17 februari 2016, Naar een efficiënter politieoptreden in de politiezone Brussel-Noord, studiedag georganiseerd door Interfederaal Gelijkekansencentrum; program of seminar on “More efficient policing in Brussels North, organised by Unia, 17 February 2016.

Discrimination Act explicitly refers to the prohibition of discrimination by public officers. It is more a matter of implementing the existing legislation by making public aware of the problem around ethnic profiling; victims should be encouraged to file a complaint. Another leg of desired action would be awareness raising among police officers, commissioners and officials, chiefs and heads of policing zones on the negative effects of a discriminatory practice and how to challenge this.

## **2.5 Conclusion**

There are valid arguments for the use of ethnic profiling in Belgium by Belgian police and probably also by other agents of law enforcement. A lack of knowledge, skills and attitudes for action against discrimination and hate crimes among Belgian police is also found. These elements presumably contribute to the inadvertent use of ethnic profiling. The topicality of terrorism and the fight against radicalisation of Muslims in Belgium probably elevates the risk of ethnic profiling. The civil society in Belgium considers ethnic profiling as a serious threat to fundamental rights; it is brought up on several occasions, notably in the context of the Universal Periodic Review. The implementation of the anti-discrimination framework displayed furthermore serious shortcomings. It is only logical that improvements made on that area would affect the strength of the Belgian framework in fighting ethnic profiling. The close collaboration of Unia with the police opens perspectives for better acknowledgement of the discriminatory impact.

### 3 Other legislation and theories in the ethnic profiling debate

Three bodies of laws are critical in combating ethnic profiling. The first and most prominent is the anti-discrimination legislation, which I clarified in the former chapters. Also crucial for understanding ethnic profiling is the regulation of law enforcement by police and other security agents. The third legal principle in this topic is personal data protection. In this chapter a brief literature review of the Belgian regulations and some criminological and sociological perspectives in the debate on ethnic profiling are developed.

#### 3.1 Policing and ethnic profiling

##### 3.1.1 Policing and human rights

The essential dilemma of policing is striking a balance between on the one hand effectiveness in fighting crime and disorder and maintaining public order and on the other hand maintaining legitimacy and the standards of equity, fairness and the values of human rights. The exercise of certain powers regarding policing and terrorism potentially stands at odds with fundamental freedoms as the non-discrimination principle, the presumption of innocence,<sup>197</sup> the right to liberty and security<sup>198</sup> and freedom of movement. Law enforcement officers in many states, including Belgium, enjoy a large discretion when using non-negotiable coercive powers, e.g. in conducting identity checks and stop and frisk activities. Some authors consider ethnic profiling as contrary to the right to an effective remedy and to the legality principle, for individuals who are being stopped and controlled are not informed on the reasons.<sup>199</sup> The exercise of certain discretionary powers of control might also constitute an interference with the right to respect for private life.<sup>200</sup> Restrictions on this freedom can only be validated on the basis of ‘accordance with the law’ and when ‘necessary in a democratic society’.

The European Court of Human Rights took a spread between a strict and a lenient necessity test when it comes to discretionary police acts; in cases regarding identification and preventive stop and search the wide interpretation of necessity and proportionality seems

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<sup>197</sup> The presumption of innocence is even defended as the best option to analyse racial profiling as ‘wrong’ by DeAngelis. However the author adds that the standard of proof and the scope of the presumption of innocence are burdens on the operationalization. P. DEANGELIS, Racial Profiling and the Presumption of Innocence, (43) 1 Netherlands Journal of Legal Philosophy 2014, 57.

<sup>198</sup> De Schutter and Ringelheim note that identity checks, stops and frisks, and practices such as a long interview in the airport risk also being an infringement on the principle of legal certainty and absence of arbitrariness: DE SCHUTTER AND RINGELHEIM, *supra* note 1, 371.

<sup>199</sup> DEN BOER AND KOLTHOFF, *supra* note 20, 27-28.

<sup>200</sup> This is confirmed by the Strasbourg Court in: ECtHR GC, *Gillan and Quinton v United Kingdom*, App. No. 4158/05, 12 January 2010, §65.

normative.<sup>201</sup> The Court acknowledges that a degree of latitude must be given to the police authorities since policing in modern societies is difficult, human conduct is unpredictable and there are operational choices regarding priorities and resources.<sup>202</sup> The interpretation of reasonable suspicion in Belgian case law is also rather wide.<sup>203</sup>

### 3.1.2 Law on the Police Function

In light of the police monopoly on the use of force is it necessary in a democratic society ruled by law that the authority of police is sharply circumscribed.<sup>204</sup> Broad police powers and the absence of monitoring can create a sense of impunity between police officers and powerlessness and resentment among minorities.<sup>205</sup>

The fundamental Belgian law delimiting the powers of federal and local police is the Police Function Act. Article 34 declares that a police officer may ask identification in case of reasonable grounds of suspicion<sup>206</sup> based on ‘behaviour’, ‘material indications’ and ‘circumstances related to time and place’. The same grounds of reasonable suspicion are valid for the safety checks of persons and luggage (article 28)<sup>207</sup> or the control of a vehicle (article 29).<sup>208</sup> The rather vague description and lack of clear definition of suspicion criteria allows a wide interpretation: almost anything can be considered suspicious, including personal characteristics. De Hert and Gutwirth assume that the powers to ask identification in article 34 are used as a ‘classic instrument for bullying minority groups’. The criterion of ‘circumstances related to time and place’ is too easily used for justifying any motive and for controlling ‘legal behaviour that diverges from the norm’.<sup>209</sup> In light of the European case law, the phrasing of reasonable suspicion in the Belgian law seems not problematic *an sich*. Nonetheless, experts proposed the introduction of a proportionality and subsidiarity test in

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<sup>201</sup> P. DE HERT AND S. GUTWIRTH, “Politie-accountability tussen crime control en due process” In: J. CHRISTIAENS, E. ENHUS, A. NUYTIENS, S. SNACKEN AND P. VAN CALSTER (eds.), *Criminologie: tussen kritiek en realisme. Liber amicorum Christan Eliaerts*, Brussel, VUBPress, 2007, 110.

<sup>202</sup> J. MURDOCH AND R. ROCHE, *The European Convention On Human Rights And Policing. A handbook for police officers and other law enforcement officials*, Council of Europe Publishing, 2013, 102.

<sup>203</sup> F. GOOSSENS, *Politiebevoegdheden en mensenrechten in België een rechtsvergelijkend en internationaal onderzoek*, masterproef KULeuven, 2006, 543.

<sup>204</sup> B.W. SMITH AND M.D. HOLMES, “Community accountability, minority threat, and police brutality: an examination of civil rights criminal complaints”, 41(4) *Criminology*, 2003, 1036.

<sup>205</sup> E.U. Network Of Independent Experts On Fundamental Rights, *Ethnic Profiling*, December 2006, 8.

<sup>206</sup> Suspicion that a person committed a crime, disturbed public order or is intending to do so. Article 34§1 of the *Wet van 5 augustus 1992 op het politieambt* (Law on the Police Function), BS 22 December 1992, 27124.

<sup>207</sup> Article 28 applies in case of suspicion that a person carries a weapon and at the entrance of places or gatherings where public order is in danger and also encompasses tasks of administrative police: Article 28 §1 *Law on the Police Function*, *ibidem*.

<sup>208</sup> Suspicion of involvement in (potential) crime, suspicion of hiding people who avoid an identity check or of hiding weapons and dangerous goods or evidentiary material: Article 29 lid 1, *ibidem*.

<sup>209</sup> DE HERT AND GUTWIRTH, *supra* note 200, 109.



article 34 of the Law on the Police Function (parallel with article 37 on the use of force) for reducing abuses in the execution of discretionary powers regarding identity controls.<sup>210</sup> In the Handbook for Police of the Council Of Europe, police officers are advised to consider seven issues before taking a certain action, which includes a proportionality and subsidiarity test and should lead to transparency and accountability.<sup>211</sup>

Another element contributing to allegations of ethnic profiling is that the reasoning behind the action taken by a police officer, such as an identity control or search, remains entirely implicit, as police officers are not obliged to write a report or communicate the reason in a certificate.<sup>212</sup> Goossens points out that it is recommended to inform the controlled individual on the reason for the identification control. These characteristics of the Belgian law are pointed out as the permissive basis for the use of generalizations about ethnic features in law enforcement; a wide interpretation of reasonable suspicion increases problems of accountability, fairness and procedural justice.<sup>213</sup>

### 3.1.3 Code of Ethics

The Belgian Code of Police Ethics (2006) is developed as an instrument for enhancing accountability and integrity in the police function complementary to the Police Function Act.<sup>214</sup> Principles and norms for the use of coercion and force are set out, including norms of

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<sup>210</sup> F. GOOSSENS, *supra* note, 202. The source is also cited and acclaimed by JANSSENS AND FORREZ, *supra* note 8, 72 and DE HERT AND GUTWIRTH, *supra* note 200, 126 and MEERSCHAUT AND DE HERT, *infra* note 212, 15.

<sup>211</sup> “(1) the reason(s) for the action taken; (2) whether other, less intrusive means could have been taken to achieve the same aim; (3) details of relevant legal and administrative provisions and how they have been complied with; (4) the necessity for the action to be taken and the foreseeable consequences; (5) how the action is likely to impact upon others; (6) confirmation, including reasons specific to the decision concerned, that the action is being taken for a legitimate reason and is non-discriminatory and (7) whether the decision has been taken on the basis of all relevant information.” The considerations can help in demonstrating that decisions are transparent, non-discriminatory and accountable. J. MURDOCH AND R. ROCHE, *The European Convention On Human Rights And Policing. A handbook for police officers and other law enforcement officials*, Council of Europe Publishing, 2013, 101-102.

<sup>212</sup> This is not conform the ECHR, as is concluded in a research by F. GOOSSENS, “Politiebevoegdheden en mensenrechten in België. Een rechtsvergelijkend en international onderzoek”, 6 *Panopticon* 2006, 99-101, cited in P. DE HERT AND S. GUTWIRTH, “Politie-accountability tussen crime control en due process” In: J. CHRISTIAENS, E. ENHUS, A. NUYTIENS, S. SNACKEN AND P. VAN CALSTER (eds.), *Criminologie: tussen kritiek en realisme. Liber amicorum Christan Eliaerts*, Brussel, VUBPress, 2007, 111.

<sup>213</sup> The wording of reasonable suspicion show that the ethical and human rights test is not sufficiently included in the Police Function Act: K. MEERSCHAUT AND P. DE HERT, “Identiteitscontroles in rechtsvergelijkend perspectief. Moet controle op kleur worden gemeten?” 40 *Orde van de dag* 2007, 15. The European Parliament considers that “when profiling is based on stereotypes or prejudice, a likelihood of breach of human rights threatening individuals and society arises in the absence of reasonable suspicion: 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), A6-0222/2009, 2009, para M. See also G. MEERSHOCK, “Over de bestrijding van politieke discriminatie. Kanttekeningen bij de beschuldiging van etnisch profileren”, 93 (1) *Proces* 2014, 46.

<sup>214</sup> Koninklijk Besluit van 10 mei 2006 houdende vaststelling van de deontologische code van de politiediensten, B.S. 30 mei 2006, 27086-27109.

reporting, collecting and managing data and the legitimate use of personal discretionary decision.<sup>215</sup> Article 24 of the Code of Ethics of police services explicitly prohibits every form of discrimination on the basis of race, colour, national origin, descent, language and religion.<sup>216</sup> In both the Ethical Code and the Act on the Police Function, the link between policing and the protection of individual rights and freedoms and the respect for legality is explicitly acknowledged.<sup>217</sup> The Belgian Code refers also to the European Code of Police Ethics, which accentuates the need of a fair police process, particularly with regard to (inter alia) ethnic minorities.<sup>218</sup> I could not assess the knowledge and influence of the Code and the Law on the Police Function among Belgian officers within the scope of the thesis research.

### **3.1.4 Law on Private Security Services and Private Guards**

The protection of security gradually becomes more privatized. Consequently, rather invasive controlling powers in the hands of private security officers also contain a risk of ethnic profiling. A documented example is the ‘strict door policy’ enforced by security guards against people with a North African or Muslim connotation at a cinema complex in the context of a Muslim holy day. After many complaints against the discrimination a negotiated solution was found in dialogue with the Centre for Equal Opportunities and MRAX representing the victims (2004).<sup>219</sup> In 2015, the Interfederal for Equal Opportunities negotiated another solution between the owner of a nightclub and the victims after complaints about discriminatory (racist) door policy in a nightclub in Antwerp.<sup>220</sup>

The competences of security guards in controlling people are ruled by the Law of 10 April 1990 Regulating Private Security Services and Private Guards. In article 8 § 6bis of this law the reasonable suspicion criteria of the Police Function Act are restated. Article 8 §7 of the Law Regulating Private Security Services and Private Guards additionally forbids the use of

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<sup>215</sup> P. DE HERT AND S. GUTWIRTH, *Politie-accountability tussen crime control en due process*. In: J. CHRISTIAENS, E. ENHUS, A. NUYTIENS, S. SNACKEN AND P. VAN CALSTER (eds.), *Criminologie: tussen kritiek en realisme*. Liber amicorum Christan Eliaerts, Brussel, VUBPress, 2007, 104-105.

<sup>216</sup> *Deontologische code van de politiediensten van 10 mei 2006 (Code of Police Ethics)*, BS 30 May 2006, 27086.

<sup>217</sup> Article 1(2) and (3), Police Function Act.

<sup>218</sup> Art. 24, European Police Code of Ethics, Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001, and explanatory memorandum, Strasbourg, Council of Europe publishing, March 2002, §49 (commentary).

<sup>219</sup> R. BOUHLAL AND IAKROUH; European Network against Racism (ENAR), *Rapport alternatif d'ENAR 2009/2010. Rapport supplément: Le profilage ethnique en Belgique*, Brussels, March 2011, 11.

<sup>220</sup> P. CHARLIER, “Opinie: Feesten zonder te discrimineren? Onze deur staat open”, [www.demorgen.be](http://www.demorgen.be), 26 August 2015 and <[unia.be/nl/rechtspraak-alternatieven/onderhandelde-oplossingen/la-gare-27-samen-werken-aan-een-oplossing](http://unia.be/nl/rechtspraak-alternatieven/onderhandelde-oplossingen/la-gare-27-samen-werken-aan-een-oplossing)>

direct or indirect discrimination when preventing an individual of entering the premises.<sup>221</sup> As there is no case law nor figures on breach of anti-discrimination legislation or specific: ethnic profiling by Belgian security forces found, it is within the scope of this master's thesis not possible to assess the compliance with the law.

### 3.1.5 Proactive policing and counter-terrorism

#### 3.1.5.1 Counter-terrorism and ethnic profiling

Ethnic profiling is often cited in the context of proactive policing.<sup>222</sup> Towards the end of 20th century a trend towards community oriented policing emerged, first in the Anglo-Saxon part of the world and later in Europe.<sup>223</sup> However, after the terrorist attacks of 9/11 the public became more focused on the effectiveness of police performance and less concerned about processes and rights.<sup>224</sup> The public expects terrorists to be identified before they take action, through 'proactive policing' such as the use of proactive researches.<sup>225</sup> A new task of police officers consists of recognizing early signs of radicalization; this heavy duty puts the officers in a power position and when combined with misconceptions about effective policing, it might also result in ethnic profiling. If discretionary decision taking process granted to the police is considered indubitable, the risk of eventual racial discrimination might be viewed as "collateral damage". Combating terrorism is often considered (by states) as a compelling interest and a legitimate social need, which might outweigh the individual's right to non-

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<sup>221</sup> Security personnel cannot carry out superficial entry controls of clothing and luggage systematically, but only if there are reasonable grounds for believing that the person is traced or has tried or prepares to commit a crime or disturb public order on the basis of behaviour, material indications or circumstances: Articles 8 § 6 and 8 § 7 of Wet van 10 April 1990 tot regeling van de private en bijzondere veiligheid (Private Security Act), BS 29 May 1990, 10963.

<sup>222</sup> Amnesty International, Proactief optreden vormt een risico voor mensenrechten.

Etnisch profileren onderkennen en aanpakken, Amsterdam, Amnesty International Afdeling Nederland, 2013, 1.

<sup>223</sup> The Belgian Federal Police aims at providing 'excellent police service'. The Belgian interpretation of 'community policing' is understood as a balance between 'community oriented policing' and 'problem oriented policing'. A second cornerstone and working method is a version of Information Led Policing. <[www.jobpol.be/home/politie\\_politiezorg\\_pijlers/](http://www.jobpol.be/home/politie_politiezorg_pijlers/)> and omzendbrief CP 1 van 27 mei 2003 betreffende Community Policing, definitie van de Belgische interpretatie van toepassing op de geïntegreerde politiedienst, gestructureerd op twee niveaus (Community Policing circular), BS 9 July 2003, 37049.

<sup>224</sup> Justice, human rights, ethics and accountability are taken less seriously in a hardening security climate. See also J. SUNSHINE AND T.W. TYLER, "The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing" in W.T. JR. LYONS, Crime and criminal justice, London, Ashgate, 2006, 87. See also SVENSSON AND SAHARSO, *supra* note 82, 2.

<sup>225</sup> The Belgian Criminal Procedure Code refers to proactive policing: 'proactive research' which is 'based on a reasonable presumption of criminal facts that will be committed or that are already committed but not yet known'. Article 28bis § 2 Wetboek van strafvordering van 7 november 1808 (Criminal Procedure Code), BS 27 November 1808.

discrimination, more than the general aims of public security and crime control.<sup>226</sup> At the proportionality test however, ethnic profiling fails as means for the pursued objective. “The available evidence suggests that profiling practices based on ethnicity, national origin or religion are an unsuitable and ineffective, and therefore a disproportionate, means of countering terrorism: they affect thousands of innocent people, without producing concrete results.”<sup>227</sup>

A quote the Chief Constable of the British Transport Police in the wake of the 7 July 2005 bombings in the London Underground refers directly to the disproportionate character of ethnic profiling: “(...) We should not waste time searching old white ladies. It is going to be disproportionate. It is going to be young men, not exclusively, but it may be disproportionate when it comes to ethnic groups.”<sup>228</sup>

The reports on the tense reactions among Belgian police in the wake of terroristic threats and attacks (chapter 2) reveal a similar thinking pattern.<sup>229</sup> Men were singled out on the basis of their appearance and sometimes threatened by heavily armed police officers.<sup>230</sup> Security measures mushroomed in the aftermath of terrorist attacks.<sup>231</sup> The deployment of soldiers in Belgian streets is a very visible exponent of the pre-emptive security logic in the context of terrorist threat. The risk is that fundamental changes under pressure of counter-terrorism will be transmitted from exceptional situations to crime in general.<sup>232</sup>

The fight against terrorism has led to several changes in the task and methods of police officers, particularly the shift to an intelligence-led policing. Baker and Phillipson give a sharp description of the problem that intelligence-led policing entails in relation to ethnic profiling:

‘Intelligence-led policing’ includes a number of unobjectionable and obvious techniques such as the use of tips, informants, and surveillance to identify individuals engaged in, or preparing for, criminal activity. However, it also seems to carry the implication that if the police have information suggesting that a terrorist act is more likely

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<sup>226</sup> “Preventing, detecting and investigation of crime and terrorism represent a legitimate and aim of law enforcement and key function of the state.” ENAR, “Fact Sheet 40. Ethnic Profiling”, June 2009, 5.

<sup>227</sup> M. SCHEININ, United Nations General Assembly, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/4/26, 29 April 2007, Geneva, UN Office of the High Commissioner for Human Rights (UNOHCHR), 2007, para 54.

<sup>228</sup> BAKER AND PHILLIPSON, *supra* note 12, 106.

<sup>229</sup> See also: S. VANLOMMEL, “Bij IS zitten geen Chinezen”, *De Morgen*, 3 December 2015.

<sup>230</sup> Examples: “België: Amnesty roept agenten op tot kalmte en politiek tot actie”, [www.aivl.be](http://www.aivl.be), 2 December 2015. K. DE RAEDT, “Niet alle moslims zijn terroristen”, [www.standaard.be](http://www.standaard.be), 25 November 2015.

<sup>231</sup> An overview of the Belgian counter-terrorism framework, including proactive investigations methods: Council of Europe Committee of Experts on Terrorism (Codexter), Profiles on counter-terrorism capacity. Belgium, February 2014.

<sup>232</sup> S. PALIDDA, *Racial Criminalization of Migrants in the 21st Century*, Farnham, Ashgate Publishing, 2011, 260.

to be committed by, say, an Asian than a non-Asian, it is not discrimination to subject individual Asians to more 'policing' than individual non-Asians.<sup>233</sup>

Several international organisations issued warnings and human rights safeguards in the fight against terrorism, notably after 9/11.<sup>234</sup> The profiles of potential terrorists built on sensitive data such as ethnic features were considered over- and under-inclusive and not matching the proportional anti-discrimination test.<sup>235</sup>

### 3.1.5.2 Proactive street poling and ethic profiling

Proactive policing also aims at controlling visible street activities with the intention of suppressing delinquent behaviour at an early stage, particularly with regard to youths, and entails; the assumption is that making arrests for 'quality of life' crimes increases (the perception of) security.<sup>236</sup> Targeted misdemeanours are 'being homeless', loitering and drinking beer in public. Administrative instruments such as municipal decrees<sup>237</sup> and bans on alcohol consumption in public places are supportive for proactive policing.<sup>238</sup> Individual police officers enjoy a high level of autonomy in giving warnings, asking for identification, sending away youths from certain places and conducting stop-and-search activities.<sup>239</sup> This type of proactive policing might entail ethnic profiling.

Svensson and Saharso carried out empirical research on proactive policing and the effect on equal treatment in the Netherlands.<sup>240</sup> Svensson and Saharso concluded that police uses significantly more often proactive instruments against youngsters with perceived non-Dutch

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<sup>233</sup> BAKER AND PHILIPSSON, *supra* note 12, 106.

<sup>234</sup> Examples: "All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision." Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies, Strasbourg, Council of Europe, 2005, Guideline No. II; see also CERD, General recommendation N°31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, 2005.

<sup>235</sup> The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism condemned the practice of using sensitive data such as ethnic features in terrorist profiles in his 2007 report. DE SCHUTTER AND RINGELHEIM, *supra* note 1, 365-366.

<sup>236</sup> One of the founding articles for proactive policing is Wilson and Kelling's Broken Window (1982). Others consider the article rather a programmatic statement. P.K. MANNING, *Theorizing policing*, in W.T. JR. LYONS, *Crime and criminal justice*, Ashgate: London, 2006, 52-80.

<sup>237</sup> The Belgian municipal administrative sanctions (GAS fines) allow for local authorities to take action themselves against anti-social behaviour and petty nuisances as vandalism, litter and noise. Every municipality decides on what is considered as unwanted behaviour (nuisance assessment). The application scope of the original 1999 law has been gradually broadened, e.g. *materiae personae*, which faced criticism from inter alia the Kinderrechtcoalitie (children's rights) and the Liga voor mensenrechten (division of power, legal certainty). *Wet van 13 mei 1999 tot invoering van gemeentelijke administratieve sancties* (Municipal Administrative Sanctions Act), BS 10 June 1999, 21629.

<sup>238</sup> J.S. SVENSSON AND S. SAHARSO, *Proactive policing and equal treatment of ethnic-minority youths*. 24 *Policing and Society* 2014, 3-4.

<sup>239</sup> *Ibidem*, 1.

<sup>240</sup> In 2011, 231 youngsters in three neighbourhoods in Amsterdam and Twente answered the questions on being sent away from places, identity checks and stop-and-search by police.

appearance and treats them differently than the ‘white’ control group but that the proactive policing style induces a better understanding by police officers of youth, regardless of ethnic background. “Thus, whereas several authors have warned against the risks of police discretion, we propose that, depending on its implementation, proactive policing may actually help to reduce unequal treatment.”<sup>241</sup> The researchers display that other variables explain and justify the outcome inequality in the specific Dutch research: availability on the street, individual delinquency, involvement in delinquent groups and co-operative behaviour with police. Nevertheless, Svensson and Saharso punctuate the need for more multi-level research that might reveal discriminatory mechanisms on a higher (meso) level, as they found a strong neighbourhood effect, which probably amounts to over-controlling or selective policing.<sup>242</sup>

### 3.1.5.3 *Pre-emptive justice and the security paradigm*

Proactive policing is aimed at advancing the investigation towards the premeditated phase of offences;<sup>243</sup> profiling is used as a predictive tool, far from the original descriptive use.<sup>244</sup> Proactive police actions supposedly imply a deterring effect, which made it attractive for the political level<sup>245</sup> but it might lead to tension between legislative, judiciary and executive powers, as the legitimacy of proactive policing is far less than the legitimacy of traditional policing building on good community relations. Public accountability and wider understanding of policing by the public are precisely important when using proactive policing techniques.<sup>246</sup>

Proactive policing, selective repression, pre-emptive and exceptional justice on the basis of anticipated behaviour arise in the negative, apocalyptic discourse nurtured by anxiety about

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<sup>241</sup> SVENSSON AND SAHARSO, see not. 82, p. 14.

<sup>242</sup> Other (American) research shows that neighbourhood characteristics as racial composition and poverty level are strong predictors of race- and crime-specific stops; in neighbourhoods with higher risk of these lesser offenses order maintenance police patrolled more often than in other boroughs and racial profiling was applied;

<sup>242</sup> J.FAGAN AND G. DAVIES, “Street stops and broken windows: Terry, race and disorder in New York City” in W.T. JR. LYONS, *Crime and criminal justice*, Ashgate: London, 2006.

<sup>243</sup> Some of the ‘proactive’ measures proposed in the context of counter-terrorism and crime control seem unrefined and mainly symbolic; such as the proposal of Belgian Home Affairs Minister Jambon to create a database of fingerprints of all the citizens of Belgium. He calls it presumably an effective measure in the fight against crime, although the Privacy Commission seem to denounce the idea, conform Council Of Europe guidelines. The Minister of Home Affairs and Security states “I know there are legal concerns; but the advantages are countless”: “Jambon onderzoekt Belgische databank voor vingerafdrukken”, [www.standaard.be](http://www.standaard.be), 1 March 2016.

<sup>244</sup> DE SCHUTTER AND RINGELHEIM, *supra* note 1, 362.

<sup>245</sup> Weber and Bowling note that proactive policing might be objected by the concept that no individual can be used as a means to an end (Kant). L.BOWLING AND B. WEBER, “Stop and search in global context”, 21 (4) *Policing and Society* 2011, 485.

<sup>246</sup> G. MEERSHOEK, “Over de bestrijding van politieële discriminatie. Kanttekeningen bij de beschuldiging van etnisch profileren”, 93 (1) *Proces* 2014, 50.

terrorism, organized crime and public disorder.<sup>247</sup> The relation between ethics and security is put under pressure. In this sociological climate, the precautionary principle, derived from the international environmental law, became the new discursive practice in policing.<sup>248</sup> The security logic prefers effectiveness and efficiency, to the detriment of distribution of human rights and justice, particularly the presumption of innocence.<sup>249</sup>

### 3.1.6 Policing and migration

In the Belgian Law on the Police Function, it is also stipulated that the police officers can take action to identify people according to the powers to supervise the Aliens Act.<sup>250</sup> The task of the police in countering illegal immigration is often considered as a ground for the use of ethnic profiling as e.g. identification controls are used for targeting aliens or ‘pretextual’ stops.<sup>251</sup> There are however very few studies on ethnic profiling at borders.

Migration itself is considered increasingly as a threat and is considered a factor in the ‘negative discourse’ and ‘security logic which is explained above. Therefore indications of migratory status, particularly those pointing to irregularity and marginality such as ethnic features, might trigger police intervention.<sup>252</sup> The UN Human Rights Committee established in *Rosalind Williams Lecraft v Spain* that the use of ethnic profiling to monitor and catch illegally residing people is not proportionate, according to article 26 of ICCPR (cfr. supra).

Categorical suspicion lies at the core of ethnic profiling. The ‘refugee’ crisis (see chapter three) even led to a contested deal of EU with Turkey, which probably infringes upon the Geneva Convention relating to the status of refugees.<sup>253</sup>

## 3.2 Sociological perspectives

Ethnic minority groups and migrants typically struggle with lower incomes, higher unemployment, lesser social acceptance, higher levels of school dropout and higher levels of

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<sup>247</sup> The public misperception of danger and the security logic lay at the basis of policies legitimizing ethnic profiling; the public accepts the state of exceptionalism as the conflict of human rights and security seems insuperable. See BAKER AND PHILIPSSON, *supra* note 12, 108.

<sup>248</sup> M. DEN BOER, “Revolving Doors: Ethics in a Shifting Security Paradigm”, in M. DEN BOER AND E. KOLTHOFF (eds.), *Ethics and Security*, The Hague, Eleven International Publishing, 2010, 11 and 16.

<sup>249</sup> *Ibidem*, 31.

<sup>250</sup> Art. 21 and art. 34 §3 Police Function Act.

<sup>251</sup> Open Society Justice Initiative, *Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory*, New York, Open Society Institute, 2009, 124 and ENAR, “Fact Sheet 40. Ethnic Profiling,” 2009, 3.

<sup>252</sup> At face value, it is impossible to determine whether someone is residing legally or not. The unlawfulness of illegal residence induces a spill-over effect on all people with suspected ethnic feature -

<sup>253</sup> United Nations High Commissioner for Refugees, *Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept*, online, 23 March 2016.

crime and disorder.<sup>254</sup> Over-policing, more severe sentencing and socio-economic circumstances are often cited as explanations for the overrepresentation of minorities in crime statistics. Statistics on the relation between crime and ethnicity are used as an argument in favour of ethnic profiling but their interpretation is ambivalent: the charts often tell more about the modus operandi of police than about the link between certain groups and a tendency to commit crimes. Discrimination at the “gate” of the criminal justice system can result in ethnic disproportionality at the “exit” of the system (the penitentiary institutions). When a characteristic like ethnicity is highlighted and considered as a risk factor for a given situation (crime), it is left out that it actually points at other parameters such as low income, difficult living conditions, social and urban exclusion.<sup>255</sup> The falsity of a racial approach towards crime is moreover proven by the fact that there is no arithmetic relationship between trend of crimes and increase of immigrants.

Our empirical findings show that an increase in immigration does not affect crime victimization, but it is associated with an increase in the fear of crime, the latter being consistently and positively correlated with the natives’ unfavourable attitude toward immigrants. Our results reveal a misconception of the link between immigration and crime among European natives.<sup>256</sup>

In many jurisdictions, stop-and-search powers are used extensively and aggressively against particular groups, such as urban, male, working-class/poor communities and ethnic minorities.<sup>257</sup> From a sociological perspective, the practice of ethnic profiling is framed as a war against outsiders. Çankaya, a Dutch cultural anthropologist describes ethnic profiling as a part of the surveillance of race and ethnicity by police.<sup>258</sup> In most societies migrants are considered a distinct group marked out by otherness, which is easy to identify as responsible for disorder and insecurity.<sup>259</sup> Resort to ethnic features has a functional character: policing in the streets refers to conception of normality, which means conformity of a type of population, space and a given moment to a norm. The core function of legal authorities is indeed to bring

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<sup>254</sup> SVENSSON AND SAHARSO, *supra* note 82, 1.

<sup>255</sup> P. SIMON AND European Commission against Racism and Intolerance (ECRI), “Ethnic” statistics and data protection in the Council of Europe countries. Study Report, Strasbourg, Council of Europe, 2007, 15.

<sup>256</sup> L. NUNZIATA, “Immigration and crime: evidence from victimization data”, 28 (3), *Journal of Population Economics*, 2015, 697–736.

<sup>257</sup> WEBER AND BOWLING, *supra* note 244, 356.

<sup>258</sup> S. ÇANKAYA, “De politie surveillance van ras en etniciteit”, 35 *Cahiers Politiestudies* 2015, p. 28.

<sup>259</sup> More in the interesting paper from an anthropologist perspective: P. MUTSAERS, “Ethnic profiling from an anthropological perspective. Policing internal borders in the Netherlands”, 88 *Tilburg papers in Culture Studies* 2013, 11.



behaviour of members of the public into line with norms, rules and laws.<sup>260</sup> Any deviation of these parameters primes police suspicion and may lead to an intervention.<sup>261</sup>

Palidda defines the criminalisation of migrants as “all the discourses, facts and practices made by the police, judicial authorities and local government, media and a part of the population that hold immigrants or aliens responsible for a large share of criminal offences.”<sup>262</sup> A generalized racist discourse is often said to be part of the professional socialization and the policing culture.<sup>263</sup> This point of view is echoed in the assessment of racist attitudes and actions by the Antwerp police; this is also considered as deep-rooted and intertwined with the culture.

For a period of time, institutional racism<sup>264</sup> was the most common paradigm to relate to problems between minorities and police, especially in the US (1960'S) and UK (1990's). However, the use of the term institutional racism raised protest among police officials. Rowe explains that the word racism is so powerful and emotive, and refers to essentialism or deterministic, unsophisticated and stereotypical ideas.<sup>265</sup> Phillips also considers institutional racism as a problematic concept. She underscores the need for a conceptual multilevel framework of racialization (instead of racism) at three levels. The micro level consists of racist ideas and behaviour of individuals; the meso level is largely institutional racialization and the macro level refers to ‘the modern racial state’.<sup>266</sup> It is acceptable that the increase in racialization in mass media and other public platforms, e.g. by systematically mentioning the ethnic background of offenders, contributes to the linking of crime and ethnic features<sup>267</sup>,

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<sup>260</sup> J. SUNSHINE AND T.W. TYLER, “The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing” in W.T. JR. LYONS, *Crime and criminal justice*, London, Ashgate, 2006, 81.

<sup>261</sup> S. PALIDDA, *Racial Criminalization of Migrants in the 21st Century*, Farnham, Ashgate Publishing, 2011, 175

<sup>262</sup> Besides criminalization of migrants, Palidda also uses concepts as colonization of people, the crime deal, governmental xenophobia, scapegoating and the human surplus in relation to the repression of illegal immigration. *Ibidem*, 3-4; 24.

<sup>263</sup> Echoes of the research by Palidda in the Belgian news anno 2016: R.LEGRAND, “Comité P klaagt racisme aan in Antwerps politiekorps”, *detijd.be*, 25 April 2016 and “Groen: ‘Racisme al jaren vast onderdeel binnen politie. Ontoelaatbaar’”, *standaard.be*, 25 April 2016.

<sup>264</sup> In a report by Sir MacPherson in the UK in 1999, the term institutional racism was explained as a systemic bias caused by the decades of over-policing, notably a discriminatory over-use of stop and search - especially in the context of anti-social behaviour disorders, and failure of the police to protect ethnic minorities from criminal or racist attacks.<sup>264</sup> It encompasses inter alia ethnic profiling. The MacPherson report was one of the foundations for the adoption of the Race relations Amendment Act (UK, 2000). ROWE, *supra* not., 133.

<sup>265</sup> ROWE, *supra* not., p. 85 and 97

<sup>266</sup> Some critical factors in meso level racialization are socio-economic disadvantage, neighbourhood composition, media and and effects, political, media popular discourses, political incorporation and empowerment and institutional processes and practices. C. PHILLIPS, “Institutional racism and ethnic inequalities: an expanded multilevel framework”, 40(1) *Journal of social policy*, 2011, 175-178.

<sup>267</sup> Until 1980's it was a taboo to mention the ethnic background of an offender, whereas it now becomes a focal point in crime reporting; SVENSSON AND SAHARSO, *supra* note 82, p. 3. More in: J. TER WAL (ed.), *European Research Centre on Migration and Ethnic Relations (ERCOMER), Racism And Cultural Diversity In The Mass Media. An overview of research and examples of good practice in the EU Member States, 1995-2000 on behalf of the European Monitoring Centre on Racism and Xenophobia, Vienna (EUMC) Vienna, February 2002, 91-93.*

which also is a partly explanation for the persistence of ethnic profiling. These concepts provide useful background for the analysis of measures in the next chapter.

### 3.3 Personal data protection and ethnic profiling

#### 3.3.1 Regulation of personal data protection

Personal data are understood as any information relating to an identified or identifiable natural person, such as a person's name, a picture, a telephone number, a fingerprint, information on religion or sexual orientation. Personal data can be processed and thus certain profiles can be targeted. This is where ethnic profiling might appear. The data protection legislation is linked with ethnic profiling in two ways: it might function as a constraint on the use of ethnic profiling (through the protected status of sensitive data), but is also considered as an impediment on the collection of (sensitive) data by law enforcement agents.

There are sources for protection of personal data on different levels. The 1981 Council of Europe Convention for the Protection of individuals with regard to Automatic Processing of Personal Data contains fundamental safeguards and applies on law enforcement authorities and all other sectors. The ECHR protects the right to respect for private and family life in article 8; in the jurisprudence of the Court is confirmed that the protection is also applicable on the processing of personal data.<sup>268</sup> Moreover, the EU Charter of Fundamental Rights recognises that respect for private life (article 7) and the protection of personal data (article 8) are closely related but separate fundamental rights. The Uruguay Declaration on Profiling (2012) is a soft law instrument containing safeguards on profiling, with relation to dangers such as ethnic profiling.<sup>269</sup>

The EU Data Protection Directive<sup>270</sup> is implemented in Belgian legislation through the Privacy Law. The directive itself is not applicable in areas of public security, defence, State security and the areas of criminal law.<sup>271</sup> The Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters might be applicable for some uses of ethnic profiling but it contains lesser standards

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<sup>268</sup> For instance in ECtHR, *S. and Marper v the United Kingdom*, App. No. 30562/04 and 30566/04, 4 December 2008, (cited earlier in the context of non-discrimination). More examples in European Union Agency for Fundamental Rights (FRA), *Handbook on European data protection law*, Luxembourg, Publications Office of the European Union, 2014.

<sup>269</sup> Uruguay Declaration on Profiling, 26 October 2016.

<sup>270</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281, 23 November 1995, 31 – 50.

<sup>271</sup> DE SCHUTTER AND RINGELHEIM, *supra* note 1, 373.

than the Directive.<sup>272</sup> For matters related to national security services and police, the Belgian Privacy Law (1992) is applicable, which encompasses most situations relevant for the topic ethnic profiling on national level. Prior to a completely or partially automatic processing operation, the controller has to notify the Privacy Commission, the national independent supervisory authority in matters of data protection, under the auspices of the Federal Chamber of Representatives.<sup>273</sup>

### 3.3.2 Sensitive data

Data related to religion or ethnic origin are part of a special category of so-called sensitive data, which receive a higher level of protection.<sup>274</sup> It is forbidden to process these data, with a few exceptions such as measures with a legal basis, necessary in a democratic society in the interests of inter alia protecting State security and public safety.<sup>275</sup>

Processing of sensitive personal data by the State Security Service, the General Intelligence and Security Service of the Armed Forces is not restricted in the Belgian Privacy Law; this provision might allow for the use of ethnic profiling by these actors.<sup>276</sup> More exemptions on the ban on processing sensitive data apply, but only after authorization by Royal Decree and after consultation of the Privacy Commission. These options create perspectives for data

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<sup>272</sup> Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters Official Journal L 350, 30 December 2008, 60–71 and ENAR, “Fact Sheet 40. Ethnic Profiling”, 2009, 7.

A new directive is adopted: Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, Official Journal, L 119, 4 May 2016, 89-131.

<sup>273</sup> Personal data may be processed under certain circumstances, such as the unambiguous informed consent by the data subject or if the processing is necessary to perform a task of legitimate interest, public interest or a task which is part of the exercise of public authority. The processing is authorised if the controller's interest in processing the data is greater than the data subject's interest in not processing the data.

Privacy Commission, Protection of Personal Data in Belgium, <[www.privacycommission.be/sites/privacycommission/files/documents/protection-of-personal-data-in-belgium.pdf](http://www.privacycommission.be/sites/privacycommission/files/documents/protection-of-personal-data-in-belgium.pdf)

<sup>274</sup> Article 8 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data, Official Journal L 281, 23 November 1995, article 6 of the Convention on Automatic Processing of Data; article 6 of Wet van 8 december 1992 voor de bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens (Privacy Act), BS 18 March 1993, 5801, Consolidated version 28 December 2015. See also G. GONZALEZ-FUSTER, S. GUTWIRTH, AND E. ELLYNE, Profiling in the European Union: A high-risk practice. In: *ex Policy Brief*, 10, 2010, 6 and DE SCHUTTER AND RINGELHEIM, *supra* note 1, 374;

<sup>275</sup> Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 28 January 1981, ETS 108, entered into force 1 October 1985, article 9, punt g), k) and l)

<sup>276</sup> Article 6§1 The processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade-union membership as well as the processing of data concerning sex life, is prohibited; Wet van 8 december 1992 voor de bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens (Privacy Act), BS 18 March 1993, 5801.

collection with the purpose of quantitative research on ethnic profiling in Belgium. Processing of sensitive data is notably authorized when carried out for the purposes of scientific research or when the main objective is the protection and promotion of human rights and fundamental freedoms; lastly “the processing of personal data referred to in § 1 is authorized by an act, decree or ordinance for another reason of substantial public interest.”<sup>277</sup>

### 3.3.3 Data mining

Data mining is the massive processing of personal data in order to identify patterns for automatic registration of individuals.<sup>278</sup> The problem is that the fundamental right of everyone who appears in that data set are possibly infringed upon, not just the high risk-marked ones or the ones who are profiled as risk-factors but who are innocent.<sup>279</sup>

Data mining is adopted by policymakers and used by governments including EU institutions, e.g. in the EU Passenger Name Record (PNR) Agreements with the United States, Canada and Australia. Law enforcement authorities can use PNR data to combat serious crime and terrorism. Data profiling can identify categories such as high-risk passengers, but it is contested, as there is no guarantee that ethnic profiling is not used on these data.<sup>280</sup> Despite criticism in the European Parliament, a contested directive on the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (EU PNR) is adopted in the slipstream of the terrorist events in Paris in 2015.<sup>281</sup> It will oblige airlines to hand national authorities passengers' data for all flights from third countries to the

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<sup>277</sup> The prohibition to process the data referred to in § 1 does not apply in the following cases: (...) g) the processing is necessary for the purposes of scientific research and is carried out under the conditions established by the King by decree after deliberation in the Council of Ministers, having received the opinion of the Commission for the Protection of Privacy); k) the processing is carried out by associations with a legal personality or organizations of public interest whose main objective is the protection and promotion of human rights and fundamental freedoms, with a view to achieving that objective, provided that the processing has been authorized by the King, by decree after deliberation in the Council of Ministers, having received the opinion of the Commission for the Protection of Privacy; and l) the processing of personal data referred to in § 1 is authorized by an act, decree or ordinance for another reason of substantial public interest. Art. 6 §2 Privacy Act.

<sup>278</sup> GONZALEZ-FUSTER GUTWIRTH AND ELLYNE, *supra* note 273, 6.

<sup>279</sup> *Ibidem*, 4.

<sup>280</sup> There was a case before the Belgian Constitutional Court, initiated by the Human Rights League, in which a law regarding an agreement between EU and USA on the processing and transfer of private data (PNR agreement 2007) was contested. One of the appellants (interpellant European Center for Constitutional and Human Rights) argued that the PNR-agreement violates article 14 of the ECHR as there are no explicit provisions to prevent ethnic profiling by police on the basis of automatized processing of PNR-data. Grondwettelijk Hof, arrest inzake PNR-Overeenkomst 2007, ingesteld door de vzw Ligue des Droits de l'Homme, nr. 42/2011, 24 March 2011.

<sup>281</sup> Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, L 119, 4 May 2016, 132.

EU and vice versa and contains an explicit prohibition of processing personal data revealing inter alia a person's race, ethnic origin and religion (preamble para 15).

Due to an increase of cross-border personal data flows and rapid technological developments, every citizen is anno 2016 virtually exposed to data profiling in daily life, which threatens the presumption of innocence and the protection of personal data, despite the legal safeguards. The EU Parliament and Council adopted on 27 April 2016 a General Data Protection Regulation that should provide more comprehensive answers and remove legal uncertainty on these matters.<sup>282</sup>

An interesting case related to data mining is the so-called Rasterfandung case (fishing net data mining, 2006). Germany collected sensitive data such as national origin, religion, etc. of 8.3 million people in order to trawl on the basis of the profile of a cell of supposedly homegrown radical Islam terrorist's cells.<sup>283</sup> The massive and costly data mining operation failed to dig up a single terrorist.<sup>284</sup> The German Constitutional Court found that the screening of the data from both public and private sources is a breach of the constitutional right to self-determination over personal information; the data profiling which was not justified by a concrete danger to 'the most valued legal interests'. The right to non-discrimination was not touched upon in the decision.

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<sup>282</sup> "The likelihood and severity of the risk to the rights and freedoms of the data subject should be determined by reference to the nature, scope, context and purposes of the processing. Risk should be evaluated on the basis of an objective assessment, by which it is established whether data processing operations involve a risk or a high risk." Preamble para 76 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Official Journal, L 119, 4 May 2016, 1-88.

<sup>283</sup> Amnesty International, *supra* note 221, 17.

<sup>284</sup> PAP, *infra* note 289, 8.

## 4 Impact of ethnic profiling and counter-strategies

There is a form of interdependence between ethnic profiling, a wide interpretation of reasonable suspicion, proactive policing, counter-terrorism, immigration control and institutional racism. I pointed in the former chapter also at the relevance of personal data protection as a restraint to ethnic profiling and as a false inhibitor for the collection of information on the practice in Belgium. I will conclude the exploration of ethnic profiling with a review of the impact and the proposed actions for reducing ethnic profiling in a Belgian context.

### 4.1 Impact of ethnic profiling

#### 4.1.1 Human rights

The use of ethnic profiling constitutes direct or indirect discrimination and it needs to be researched whether in some circumstances it amounts to harassment.<sup>285</sup> Additionally, the right to personal data protection might be endangered by the use of ethnic profiling, as data related to religious belief or ethnic background are part of a protected category of sensitive information.<sup>286</sup> Both violations are established in case law of a higher national or European court.

Fuster, Gutwirth and Ellyne articulate the problem with profiling in general in a striking way: (...), through profiling practices, a series of features or conducts, which by themselves are fully legitimate and fall within the area of an individual's freedom, are transformed into signs pertaining to a pre-defined mistrusted category. Thus, forms of behaviour that are per se not only innocent, but also constitutionally protected, are obliquely transformed into indications of criminal activity, or at least of undesirability. This requires major reflection, both from a legal (notably in relation with the right to non-discrimination) and an ethical perspective.<sup>287</sup>

Ethnic profiling is contrary to the central values of respect for diversity, fairness, human dignity and the fundamental expectation of equal treatment under the law. Also legitimacy and accountability, central notions in democratic policing, are undermined when ethnic profiling is used.

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<sup>285</sup> Harassment as a form of forbidden discrimination is described in the article 2, 3<sup>rd</sup> part, Racial Equality Directive Council; in article 12 of Anti-Racism Law and article 14 of the Anti-Discrimination Law.

<sup>286</sup> Wet van 8 december 1992 voor de bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens (Privacy Act), article 6.

<sup>287</sup> G. GONZALEZ-FUSTER, S. GUTWIRTH, AND E. ELLYNE, Profiling in the European Union: A high-risk practice, 10 INEX Policy Brief 2010, 8.

#### 4.1.2 Police effectiveness

The critical question in the debate on proactive policing and ethnic profiling is related to proportionality: is preventive stop and search an effective way of policing?<sup>288</sup> In the criminological research on ethnic profiling, there is very little support or evidence for the effectiveness of the practice.<sup>289</sup> Ethnic profiling is considered as ineffective or counter-productive, not only because there is lack of proof for the connection between tendency to commit crimes and ethnic background.<sup>290</sup> The use of ethnic profiling is both under-inclusive and overbroad, thus disproportionate by nature. While targeting member of a large group, identifiable through wide descriptors as ethnicity, national descent or indications of religion, police and other security forces risk focusing undue law enforcement attention and resources on those who fit the profile, while overlooking others who don't. The predictability of ethnic profiling permits that criminals without the 'suspicious' ethnic features stay more easily under the radar and police may fail to catch dangerous individuals.<sup>291</sup> Searches based on accurate and current intelligence are more likely to be effective and minimise the inconvenience to law-abiding members of the public. The use of searches is also more easily justified for the public when generalizations are irrelevant in policing.<sup>292</sup>

#### 4.1.3 Stereotypes and social boundaries

Reliance on ethnic profiling also victimizes innocent people as a disproportionate number of false negatives appear.<sup>293</sup> This policing practice, although often used subconsciously, has the power to influence public attitudes and official policy; it might contribute to legitimizing and reinforcing stereotypes and racism.<sup>294</sup> The use of ethnic stereotypes in law enforcement decisions has an impact on social solidarity and it explicitly reinforces social boundaries. The

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<sup>288</sup> A.L. PAP, *Profiling In Counter-Terrorism, Law Enforcement and Border Control (study)*, Brussels, European Parliament, November 2008, 10.

<sup>289</sup> *Ibidem*, 42 and the various sources cited in the report of the Special UN Rapporteur on Racism in 2015: RUTEERE, *supra* note 7.

There are some authors voicing more nuanced on the (non)-effectiveness of ethnic profiling, such as Meershoek: stop and search without specific targets proves ineffective, whereas targeted stop and search might have a positive impact in G. MEERSHOEK, "Over de bestrijding van politieke discriminatie. Kanttekeningen bij de beschuldiging van etnisch profileren", 93 (1) *Proces* 2014, 49.

<sup>290</sup> "Ethnic profiling leads to disproportionate targeting of a certain group, which gives way to individuals or groups outside the profiled group to commit crimes that stay under the radar": Amnesty International, "Proactief optreden vormt een risico voor mensenrechten. Etnisch profileren onderkennen en aanpakken", Amsterdam, Amnesty International Afdeling Nederland, 2013, 12.

<sup>291</sup> ENAR, "Fact Sheet 40. Ethnic Profiling", 2009, 11.

<sup>292</sup> PACE, *Codes of Practice, Code A*, *supra* not., para 2.4A.

<sup>293</sup> Open Society Justice Initiative, *Reducing ethnic profiling in the European Union: A Handbook of good practices*, New York, Open Society Foundations, 2012, 26-27; ethnic profiling is also contraproductive because it might be criminogenic in some cases. BOWLING AND WEBER, *supra* note 244, 485.

<sup>294</sup> Amnesty International, *supra* note 221, 11 en 12.

European Parliament has warned: “profiling based on stereotypical assumptions may exacerbate sentiments of hostility and xenophobia in the general public.”<sup>295</sup>

Ethnic profiling alienates communities from police, and from the aims of fighting crime and terrorism, and reduces police legitimacy.<sup>296</sup> Moreover, it is proven that ethnic minorities suffering racism and discrimination particularly lack trust and confidence in police.<sup>297</sup> Consequently, large groups of the society might refuse to cooperate with police, which amounts to a lower law enforcement efficacy.

The application of ethnic profiling is also humiliating and stigmatizing for the targeted individuals and groups. Moreover, it leads to overrepresentation of ethnic minorities in the criminal justice system.<sup>298</sup> Discrimination and racial violence by law enforcement agents may be a factor in increasing ethnic tensions and in inciting urban riots.<sup>299</sup> “Racial and ethnic profiling often exacerbates discrimination already suffered as a result of ethnic origin or minority status and remains a serious challenge to realization of the rights of various racial, ethnic and religious groups across the world.”<sup>300</sup>

## 4.2 Countering ethnic profiling

### 4.2.1 The necessity of challenging ethnic profiling

The assessment of the impact must lead to the conclusion that ethnic profiling ought to be reduced. In a few countries, legislative measures against the use of ethnic profiling have been implemented, data are collected for further research or small-scale projects have been initiated. The action against ethnic profiling is scarce. Unia, the independent centre fighting discrimination in Belgium, set up a low-profile research project in cooperation with a local police community (more in chapter two) and ethnic profiling dealt with in some police trainings by Unia.

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<sup>295</sup> 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 and OSJI, Open Society Justice Initiative, *Human Rights Digests: European Standards on Ethnic Profiling*, New York, Open Society Foundation November 2013, 47.

<sup>296</sup> ENAR, “Fact Sheet 40. Ethnic Profiling”, 2009, 2.

<sup>297</sup> M. ROWE (ed.), *Policing beyond Macpherson. Issues in policing, race and society*. Devon, Willan Publishing, 2007, 21.

<sup>298</sup> Accumulatively: “Studies have identified a strong correlation between minority status and harsher criminal sentences” in RUTEERE, *supra* note 7, 8.

<sup>299</sup> SVENSON AND SAHARSO, *supra* note 82 1.

<sup>300</sup> RUTEERE, *supra* note 7, 1.



I agree with Janssens and Forrez that the current status quo around ethnic profiling in Belgium might boost the use of ethnic profiling.<sup>301</sup> 62% of Belgian respondents in the Eurobarometer also believe that new measures should be introduced to raise level of protection of groups at risk of discrimination.<sup>302</sup>

#### **4.2.2 Paths for challenging ethnic profiling**

Options and recommendations for elimination of ethnic profiling are found in the many articles, soft law and NGO reports, as well as in practices in other countries. The actions aimed at reducing ethnic profiling can be understood in different phases and on various levels such as further quantitative and qualitative research, e.g. through (obligatory) collection of data at the source; police training on the reasonable suspicion criteria and discrimination; community-outreach; enhancing legal effect of anti-discrimination legislation and reinforcement of possibilities for real relief.

Some of the recommendations for action (the introduction of compulsory stop forms or reports, the reformulation of the reasonable description provision and the legal description and ban on ethnic profiling) imply adaptations of the current legal framework. Another approach focuses on strengthening the current anti-discrimination framework, enhancing community oriented policing style and campaigns for public and law enforcers explaining ethnic profiling as discrimination, bad policing and estranging communities.

As the implementation of some of the actions requires new legislation or minimal political support, the Chamber of Representatives and the Federal Government and their policy-making bodies are critical actors of change. Ethnic profiling is connected with the federal competences of home affairs, security issues and policing matters (Vice Prime Minister Jambon, N-VA), with the justice department (Minister Geens, CD&V) and the competence 'equal opportunities' (State secretary Sleurs, N-VA). Therefore I prepared some questions for the relevant Belgian actors, in order to have an idea of their viewpoint on the use of ethnic profiling and for estimating the feasibility of change in the way ethnic profiling is dealt with on a political level. A questionnaire (in Annex I) was sent to the political parties and the competent ministers as well as to Committee P, Unia, and the police services. In the following review of propositions, mention will be made of the remarkable reactions of Belgian 'actors of change' who took the effort to answer (see Annex II en III). Amongst the respondents,

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<sup>301</sup> JANSSENS AND FORREZ, *supra* note 8, 71.

<sup>302</sup> European Commission, Special Eurobarometer 437 Discrimination in the EU in 2015, fact sheet Belgium, 4.

there is very little dynamism for (legislative) action although several actors agree on the need for more research and data.

### 4.2.3 Data collection

In present research we relied on secondary sources such as media stories, review of official data from annual reports, soft law and academic literature, because there is very little statistical information on ethnic profiling in Belgium. A proactive method of documenting ethnic profiling is required in order to have quantitative information available on the frequency of ethnic profiling and qualitative data related to the targeted groups and circumstantial parameters. The collection of data on the practice is widely seen as central for challenging ethnic profiling; it is notably a prerequisite for further research on ethnic profiling. The lack of figures and statistics contributes to the legal silence and general reluctance to act upon ethnic profiling.

Data collection regarding the suspicion decision of police officers is a way to detect the existence and extent of ethnic profiling.<sup>303</sup> Further research should also give insight in the mechanism of ethnic profiling and reveal the source. Ethnic profiling might be mainly rooted in presumptions about minorities by individual police officers (micro level), or in the police culture and in the current framework for policing and media framing (meso level) or rather in a racialization on a societal macro level. More research is a must, especially for insight in the mechanism of ethnic profiling. Data and statistics are the cornerstone for development of new policies and practices to eliminate ethnic profiling. Rubel developed the ‘value of rights argument’, which implies that citizens have a right to information on possible discrimination and unfair policing through ethnic profiling, and governments have the duty to collect data on ethnicity and motivation during stops and controls.<sup>304</sup>

Data collected on the level of policing zones can act as a tool for monitoring the efficiency of identity controls and searches and supervising the levels and trends of the use of ethnic profiling. It provides guidance in preventing and tackling the practice.<sup>305</sup> Statistics are furthermore necessary evidence of prima facie discrimination in court. The availability of data

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<sup>303</sup> De Schutter and Ringelheim, *supra* note 1, 379.

<sup>304</sup> A. RUBEL, “Profiling, Information Collection and the Value of Rights Argument”, 32 (3) *Criminal Justice Ethics* 2003, 226.

<sup>305</sup> European Commission against Racism and Intolerance (ECRI), *General Policy Recommendation No 11 on Combating racism and racial discrimination in policing*, Strasbourg, Council of Europe, 2007, para 2.

could also serve for awareness raising on the practice and the detrimental effects of using generalisations in police suspicion, among law enforcers and the public.<sup>306</sup>

#### 4.2.3.1 *Methods*

The obligation for law enforcement officers to write a report or a ‘stop form’ with the name of the controlled individual and self-defined ethnical origin, the name of the officer and the reason for the stop is the most complete (and invasive) approach to gathering data, and is *mutatis mutandis* used in the UK. The data collection in that manner provides information for statistics and further research and might have an effect on the use of ethnic profiling because it makes officers reflect on the real motives for reasonable suspicion and the accordance with the law.

If the data are collected purely for statistical purposes and further research, other methods for collecting can be adopted, such as anonymous data registration or letting targeted people collect data themselves, as in Egypt is done in a survey regarding sexual abuse.<sup>307</sup>

In the Belgian context, Meerschaut and De Hert defend the introduction of a compulsory report, which includes the motives behind the identity control. The Belgian Law on the Explicit Motivation of Administrative Actions should be applicable when police officers stop and control an individual.<sup>308</sup> With this measure, the legality of the stop can be more easily controlled<sup>309</sup> and under the conditions of the Privacy Law, the data might be used to demonstrate discriminatory practices. Currently, police officers have the option to register ethnicity, but these data are not structured and cannot be used for statistical purposes.<sup>310</sup>

Open VLD is the only clear political proponent of ‘ethnic registration’ in contacts of citizens with police. In the answers on the questionnaire, the party points at the many advantages.

Other responding parties (CD&V and sp.a) as well as the Diversity department of the police, reacted in a nuanced way on the proposition of registration data in police stops, stressing the need for objective information but failing to provide an answer on the question whether registration by police is the best way.

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<sup>306</sup> Awareness raising preferably extends to a wider field than ethnic profiling: the effect of wide discretionary power and counter-terrorism measures. Since indirect ethnic profiling and other discrimination is very often an unconscious process, the role of data exists in showing the mechanism of ethnic profiling to potential users and victims.

<sup>307</sup> J. DEUTCH, Profiling (in)justice, Disaggregating Data by Race and Ethnicity to Curb Discriminatory Policing, video of presentation. [www.youtube.com/watch?v=eWY0kujvUw](http://www.youtube.com/watch?v=eWY0kujvUw).

<sup>308</sup> Wet van 29 juli 1991 betreffende de uitdrukkelijke motivering van de bestuurshandelingen (Law on Explicit Motivation of Administrative Actions), BS 12 September 1991, 19976.

<sup>309</sup> K. MEERSCHAUT AND P. DE HERT, “Identiteitscontroles in rechtsvergelijkend perspectief. Moet controle op kleur worden gemeten?”, 40 *Orde van de dag* 2007, 11 – 20.

<sup>310</sup> Article 55/1 §2 of the Police Function Act.

#### 4.2.3.2 Restraints

The collection of sensitive data in the context of policing raised some ethical and legal questions; the collected ethnic information must not serve as the basis for ethnic profiling or prosecution or strengthen ‘ethnic’ identities and racist policies.<sup>311</sup> Close scrutiny on collection, storage and access should guarantee that fundamental rights are preserved. ENAR explains one of the restraints for the data collection: “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.”<sup>312</sup>

A bigger burden is how to overcome the public distrust of sensitive data collection by government agencies, and the introduction of extra administrative workload for law enforcement officials (acclaimed by N-VA). This should be very well framed and embedded (see further: training). Another question is the determination of ‘ethnic categories’, as pointed out by CD&V and the present Home Affairs Minister, but self-definition complemented with eventual comments in the motivation of the law enforcement officer seems a way to overcome this, following the UK practice. N-VA takes position against the use of stop forms, because the reasonable suspicion judgement of police officers should be trusted.

#### 4.2.3.3 Data collection in other states

Many authors cite the practice in England and Wales of monitoring autonomous police actions through stop forms as the example to follow.<sup>313</sup> Several qualitative and quantitative researches had shown that the wide police competences regarding reasonable suspicion cause a risk of ethnic profiling. In reaction to this, the Police and Criminal Evidence Act (PACE) Codes of Practice implemented the collection of data in police initiated actions together with guidelines for the use of stop-and-searches.<sup>314</sup> The United Kingdom has the most advanced

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<sup>311</sup> SIMON, *supra* note 254 15.

<sup>312</sup> ENAR, “Fact Sheet 40. Ethnic Profiling”, 2009, 2; and De Schutter and Ringelheim strongly defended the use of data in fighting ethnic profiling; “We argue, however, that the prohibition of ethnic profiling as a specific form of discrimination will remain ineffective in a number of EU Member States as long as they adhere to an overly rigid understanding of the requirements of data protection legislation which may result in an obstacle to the monitoring of the behaviour of law enforcement authorities.” in DE SCHUTTER AND RINGELHEIM, *supra* note 1, 363 - 364. It is explained earlier that the Privacy Law allows for data registration in cases of public interest, scientific purposes and aims related to the protection and promotion of human rights.

<sup>313</sup> S. VROMEN, Ethnic profiling in the Netherlands and England and Wales: Compliance with international and European standards. Public Interest Litigation Project (PILP-NJCM), Utrecht, Utrecht University, 2015, 29 and RUTEERE, *supra* note 7, 18.

<sup>314</sup> VROMEN, *ibidem*, 29; however: “However, it seems no more than a third of encounters are actually recorded according to Home Office’s Policing and Reducing Crime Unit, Police Stops and Searches: Lessons from a

regulation on data collection for police officers in the use of stop and search powers. In Code A of the PACE the recording requirements are set out: “(...)

4.1 When an officer carries out a search in the exercise of any power to which this Code applies (...) a record must be made of it, electronically or on paper, (...)

4.3 The record of a search must always include the following information: (a) A note of the self defined ethnicity, and if different, the ethnicity as perceived by the officer making the search, of the person searched or of the person in charge of the vehicle searched (as the case may be) (see Note 18); (b) The date, time and place the person or vehicle was searched (see Note 6); (c) The object of the search in terms of the article or articles for which there is a power to search; (...) there is no requirement to record the name, address and date of birth of the person searched (...).<sup>315</sup>

Different researches into ethnic profiling have been carried out in the Netherlands, showing that there is a problem with ethnic generalisations by police.<sup>316</sup> In June 2015, a small-scale project would have been launched in the Dutch town of Tilburg under the auspices of dr. Paul Mutsaers.<sup>317</sup> The project, in which 80 police officers use stop forms for analytical purposes aimed at analysis of the data and reduction of the use of ethnic stereotypes in street level policing, was eventually annulled. The use of ethnic profiling and the collection of sensitive data in proactive policing remain nevertheless on the political agenda in the Netherlands.<sup>318</sup>

#### **4.2.4 Acquainting police with ethnic profiling and anti-discrimination legislation**

Belgian police officers can optionally follow one day of in-service training on the anti-discrimination and anti-racism laws; for the reference officers, a training of two days in the matter of discrimination and racism is provided. Unia experienced that the knowledge of the legal framework regarding discrimination hate speech and hate crimes is very limited and

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Programme of Research, 2006, cited in E.U. Network Of Independent Experts On Fundamental Rights, Ethnic Profiling, December 2006, CFR-CDF.Opinion4.2006, 40.

<sup>315</sup> Codes of Practice, Code A, supra not., para 4.1-4.3.

<sup>316</sup> Amnesty International states in its 2013 report that ethnic profiling is applied in the Netherlands on a structural scale. The NGO calls for a better monitoring of police by using “stop forms”; however the ban on ethnic registration is named as a limitation. Amnesty International, Proactief optreden vormt een risico voor mensenrechten. Etnisch profileren onderkennen en aanpakken, Amsterdam, Amnesty International Afdeling Nederland, 2013, 46.

See also J. P. VAN DER LEUN AND M.A.H. VAN DER WOUDE, “Ethnic profiling in the Netherlands? A reflection on expanding preventive powers, ethnic profiling and a changing social and political context”, 21 (4) Policing and Society: An International Journal of Research and Policy 2011, 444-455; S. ÇANKAYA, “De politieële surveillance van ras en etniciteit”, 35 Cahiers Politieestudies 2015, p. 13-33; J.S. SVENSSON AND S. SAHARSO, “Proactive policing and equal treatment of ethnic-minority youths”, 24 Policing and Society, 2014, 1-16.

<sup>317</sup> M. HAENEN, “Proef met etnische registratie in strijd tegen politiediscriminatie”, NRC Handelsblad 10 juni 2015.

Dr. Mutsaers studied ethnic profiling in Tilburg from an anthropological perspective: P. MUTSAERS, A public anthropology of policing: Law enforcement and migrants in the Netherlands, PhD dissertation, s.l., s.n., 2015, 196 p.

<sup>318</sup> M. COUZY, “GroenLinks wil dat agent reden aanhouding bijhoudt”, www.parool.nl, 1 May 2016.

inadequate.<sup>319</sup> As these trainings are optional, the effect is limited. Consequently, the recognition and registration of discriminatory practices is far less than expected.

In the evaluation of the anti-discrimination legislation (chapter 3), it also appeared that COL 13/2013 is not well implemented.<sup>320</sup> Law enforcers are not acquainted with ethnic profiling and its negative impact.

“Police training should, whenever necessary, challenge any racist or xenophobic attitudes within the police organization, and also emphasize the importance of effective police action against crimes which are based on race hatred and target ethnic minorities.”<sup>321</sup>

Training and other actions for raising awareness among police are a must.<sup>322</sup> The link between ethnic profiling and discrimination, ineffective policing and improper use of reasonable suspicion should be clearly established. In the 2015 report, the Special Rapporteur on racism recommends that law enforcement agencies adopt a practical training linked to specific powers of law enforcement, which is more effective than a general diversity training.<sup>323</sup> The Vice Minister of the Interior and Safety and the political parties Open VLD and sp.a also highlighted the need for diversity training for Belgian police officers in their responses to the questionnaire.

#### **4.2.5 Redefining reasonable suspicion and prohibiting ethnic profiling**

It is believed that the introduction of the compulsory report and better monitoring of identity controls and other street level decisions in law enforcement could contribute to a better-informed debate on the current legal competences of the police officers.<sup>324</sup> Statistics provide government with tools to control how law enforcement officers use their discretionary power.

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<sup>319</sup> Interfederaal Gelijkekansencentrum, Jaarverslag 2014, Conventie tussen het interfederaal gelijkekansencentrum en de federale politie, May 2015, 7.

<sup>320</sup> The appointment of a reference person for racism and issues of discrimination in every Belgian policing zone and judicial district was a recommendation of the ECRI. The officer should be trained by Unia and monitors the complaint procedures on racism and related discrimination; the measure targets a reduction of the underreporting of racist discrimination, racist speech and crime as is provided for in circular COL 13/2013. Unia points out that the framework is strong, but in practice there seem to be insufficiently reference persons and limited options for training; there are also problems related to the registration of statistical data on discrimination and hate crimes. Interfederaal Gelijkekansencentrum, Jaarverslag 2014, een keerpunt voor het Centrum, Brussels, May 2015, 19.

<sup>321</sup> European Code of Police Ethics, *supra* n., §30 (commentary).

<sup>322</sup> The ECRI accentuates the need for advanced training of the police on the issue of racial (ethnic) profiling and on the use of a reasonable suspicion standard as well as on diversity and cultural sensitivity. European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 11 on Combating racism and racial discrimination in policing, Strasbourg, Council of Europe, 2007, para 3 en 4.

<sup>323</sup> RUTEERE, *supra* note 7, 19.

<sup>324</sup> MEERSCHAUT AND DE HERT *supra* not. x, 11 – 20.

Other active approaches for detection and reduction of ethnic profiling could also contribute, such as rigorous training and revision of the current reasonable suspicion standard.

The wide description of discretionary competences of police officers is repeatedly marked as a cause for the application of ethnic profiling. The Committee on the Elimination of Racial Discrimination (2005) advises that police, army personnel, customs authorities and persons working in airports, penal institutions and social, medical and psychiatric services don't take actions like questioning, arrests and searches that are solely based on the (physical) appearance of a person.<sup>325</sup> The description of reasonable suspicion as the basis for 'non-consensual' stops in the Police Function Act, gives too much way to police officers to use ethnic profiling. The European Network Against Racism (ENAR) points out that the lack of clarity about which sensitive personal data are allowed to use as a basis for law enforcement decisions is a problem that allows the persistence of ethnic profiling.<sup>326</sup>

De Schutter and Ringelheim advocate the specific prohibition of using ethnicity or religion as a proxy for propensity to commit crimes, either in general or in the specific area of counter-terrorism.<sup>327</sup> Also ECRI called for the introduction of a reasonable suspicion standard as a legislative basis for reducing ethnic profiling.<sup>328</sup> Patrol officers should place emphasis on specific factors that single an individual out as a concrete suspect; reasonable suspicion should be behaviour-centred and 'behaviour' should not be taken to include physical appearance.<sup>329</sup> A more objective and detailed description of reasonable suspicion criteria in fact results in a legal prohibition of the use of ethnic profiling. Training and other implementation measures are a must for a successful redefinition of reasonable suspicion.

The description of reasonable suspicion in the Code of Practice in the UK Police and Criminal Evidence Act 1984 (hereafter PACE) might be a good source of inspiration for amendments in Belgian soft law or legislation regarding grounds of suspicion; it points out that protected personal characteristics (such as race and religion) cannot support reasonable suspicion.<sup>330</sup>

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<sup>325</sup> International Committee on the Elimination of Racial Discrimination, General Policy Recommendation n°11 on combating racism and racial discrimination in policing, and General Recommendation n°31 on the prevention of racial discrimination, 2005.

<sup>326</sup> ENAR, "Fact Sheet 40. Ethnic Profiling", 2009, 2.

<sup>327</sup> "(...) we still lack a clear and specific prohibition of using ethnicity or religion as a proxy for propensity to commit crimes, either in general or in the specific area of counter-terrorism." in DE SCHUTTER AND RINGELHEIM, *supra* note 1, 377.

<sup>328</sup> European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No 11 on Combating racism and racial discrimination in policing, Strasbourg, Council of Europe, 2007, para 3 and DE SCHUTTER AND RINGELHEIM, *supra* note 1, 364.

<sup>329</sup> FRA, Towards More Effective Policing. Understanding and Preventing Discriminatory Ethnic Profiling: A Guide, Luxembourg, Publications Office of the European Union, 2010, 64 and RUTEERE, *supra* note 7, 20.

<sup>330</sup> "This code governs the exercise by police officers of statutory powers to search a person or a vehicle without first making an arrest", Police and Criminal Evidence Act 1984 (United Kingdom) codes of practice. CODE A.

The conditions for reasonable suspicion are explained in clear wordings: unless there is a clear description of a suspect, personal features such as race, religion cannot be used (alone or in combination) and also “generalisations or stereotypical images that certain groups or categories of people are more likely to be involved in criminal activity” cannot be used as a factor or reason for the decision to stop and search an individual or vehicle.”<sup>331</sup> In the explanations of the Code, the duty of police officers to eliminate unlawful discrimination is underlined.<sup>332</sup>

Also in some other countries, a (limited) ban on ethnic profiling exists, such as in Sweden. The *Ultanningsslag* (Aliens Act, 2005) prohibits stopping or checking on an individual solely on account of his or her skin colour, name, language etc.<sup>333</sup> In USA, ethnic profiling (under the moniker racial profiling) is since decades the subject of ethnic tensions, political statements and vivid academic debate. The End Racial Profiling Act, which is proposed but not yet accepted would induce a prohibition of racial profiling by law enforcement agencies and a framework for the collection of data related to ethnic profiling and systems to eliminate the practice.<sup>334</sup> Many American states already established anti-racial profiling laws.

Important sources recommend a legal definition and prohibition of ethnic profiling in order to tackle the problems in the courtroom, especially in relation to informal practices.<sup>335</sup> On national level, there are no pure proponents of special legislation prohibiting ethnic profiling. N-VA and others consider the current anti-discrimination law as sufficient; CD&V sees other profiling practices as useful, so a general prohibition of ethnic profiling is not desirable. Sp.a acknowledges that a legal prohibition might be functional in attracting attention, but warns for

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Revised Code of Practice for the exercise by: Police Officers of Statutory; Powers of stop and search; Police Officers and Police Staff of requirements to record public encounters, Home Office, 19 March 2015, para 1.03.

<sup>331</sup> *Ibidem*, para 2.2b.

<sup>332</sup> *Ibidem*, para 1.1.

<sup>333</sup> RUTEERE, *supra* note 7, 14.

<sup>334</sup> The End Racial Profiling Act was introduced in the House on 22 April 2015 and its latest action status was referred to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations on 15 May 2015: <[www.congress.gov/bill/114th-congress/house-bill/1933](http://www.congress.gov/bill/114th-congress/house-bill/1933)> and RUTEERE, *supra* note 7, 14.

<sup>335</sup> “The Special Rapporteur recommends a clear and unequivocal prohibition of the use of racial and ethnic profiling by law enforcement agencies. Outlawing racial and ethnic profiling would require modifying national legislation to incorporate an express prohibition on the use of such profiling. The outlawing of racial and ethnic profiling should also be considered at the regional level” in RUTEERE, *supra* note 7, 19; The E.U. Network Of Independent Experts On Fundamental Rights (later FRA) condemned ethnic profiling in a very thorough report in 2006 and called for four big legal measures to eliminate ethnic profiling: a clear legal prohibition, the use of statistics to facilitate proof, a clear definition of the conditions under which law enforcement authorities exercise their powers in identity checks and stop-and-search procedures and a good framework with criminal and civil or administrative sanctions for behaviour amounting to ethnic profiling, with an eye on protecting the victims. EU Network Of Independent Experts On Fundamental Rights, *Ethnic Profiling*, CFR-CDF.Opinion4.2006, December 2006, 7.

See also: JANSSENS AND FORREZ, *supra* note 8, 72; Amnesty International, *supra* note 221, 92; Open Society Justice Initiative, *supra* note 250, 131.



a lack of practical use. The Diversity department of the Federal Police emphasizes the need for a strong description of the concept of ethnic profiling, especially in the context of a prohibition.

Apart from the question whether a new law should implement the prohibition of ethnic profiling, the lack of clarity and knowledge about what practices constitute ethnic profiling is problematic and even makes the practice persist.<sup>336</sup> With the definition in this thesis, which is inspired by the definitions used by international instances, and the application of this definition on practical situations where ethnic profiling arises, I consider it sufficiently clear what it constitutes. But in the answers given by some political parties, it is clear that the definition is contested and the concept is not well known. N-VA and CD&V opposed the use of religion as part of the concept of ethnic profiling.

#### **4.2.6 Enhancing internal diversity and reaching out to minority communities**

The lack of diversity within the police team is traditionally criticised as a factor contributing to the existence of ethnic profiling and other forms of discriminatory practices.<sup>337</sup> The Special Rapporteur on racism assumes that recruitment of personnel of minority background,<sup>338</sup> together with community outreach and involvement of local communities, will influence the use of discriminatory policing and profiling.<sup>339</sup>

The political parties that answered the questionnaire all underline the need for more internal diversity in the Belgian police (as is also set out in the coalition agreement); the improvement of language proficiency for new citizens is considered as a critical step (MR, N-VA, sp.a). N-VA refers to the pilot project of two years in Antwerp where the local government shall recruit its own police officers instead of the long and bureaucratic way that regularly takes place in Brussels, the central recruitment office for police. The expectation is that more people with a more diverse background will be recruited. Both N-VA and Open VLD say that more internal diversity doesn't necessarily entail less ethnic profiling— as it might be practiced by police officers of all colours and races. The Diversity department of the Federal

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<sup>336</sup> ENAR, “Fact Sheet 40. Ethnic Profiling”, 2009, 2.

<sup>337</sup> The Belgian Federal Government Agreement of 9 October 2014 refers to the endeavour of the government to enhance diversity at the police services in: Interfederaal Gelijkekansencentrum, Jaarverslag 2014; conventie tussen het interfederaal gelijkekansencentrum en de federale politie, May 2015, 4.

<sup>338</sup> “Recruitment procedures shall be based on objective and non-discriminatory grounds, following the necessary screening of candidates. In addition, the policy shall aim at recruiting men and women from various sections of society, including ethnic minority groups, with the overall objective of making police personnel reflect the society they serve.” European Code of Police Ethics, *supra* not, §25 (commentary).

<sup>339</sup> RUTEERE, *supra* note 7, 17.

Police sheds light on the efforts that are made since end 2015 as recruitment officials received diversity training by Unia and a brochure on diversity was published.

The participation of minority communities is a prerequisite for the effective implementation of invasive measures as sensitive data collection.<sup>340</sup> It is important that the representatives of the community know the background of police measures, which will contribute to the legitimacy and efficacy. During a project on ethnic profiling in Fuenlabrada, Spain, supported by the European Commission, the involved police officers issued a receipt to an individual with the reason for the stop and identities of both the person and officer. Such actions can be a tool for reducing ethnic profiling and improving the trust relation between citizens of minority communities and police.<sup>341</sup> Enhancing positive contacts between local, ‘ethnic’ communities and associations and police is one of the backbones of the community-oriented policing which is also one of the fundamentals of the Belgian police service, as Vice-Minister of the Interior and Safety emphasised.<sup>342</sup>

#### 4.2.7 Enhancing victim redress

The Special Rapporteur on racism states that disaggregated data are important to measure the actions of law enforcement agencies, particularly in connection with discretionary powers. Officers patrolling on the streets stay usually far from hierarchic control. Increasing accountability and control could contribute to reducing the risk of ethnic profiling.<sup>343</sup> Civil society actors and international organizations ought to be given the necessary access to monitor effectively the checks and controls of the different types of law enforcement agencies.<sup>344</sup> Victims should be supported in seeking relief, which is preferably managed through negotiation and intermediation, or if necessary on the level of the court, invoking the anti-discrimination and anti-racism laws.

A failure to officially condemn practices of ethnic profiling might trigger the impunity and lack of accountability among law enforcement agents and security personnel on the topic of

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<sup>340</sup> The European Code of Police Ethics dictate “The police shall be organised in a way that promotes good police/public relations and, where appropriate, effective co-operation with other agencies, local communities, non-governmental organisations and other representatives of the public, including ethnic minority groups.”European Code of Police Ethics, *supra*, §18.

<sup>341</sup> Data collection as tool to reduce ethnic profiling and improve trust in the police, RUTEERE, *supra* note 7, 18.

<sup>342</sup> Omzendbrief CP 1 van 27 mei 2003 betreffende Community Policing, definitie van de Belgische interpretatie van toepassing op de geïntegreerde politiedienst, gestructureerd op twee niveaus, BS 9 July 2003, bl. 37049. In 2006-2007, the Centre for Police Studies organised roundtables with actors like police and community actors, which is also mentioned by Open Justice Society, OSJI *supra* note 250, 97.

<sup>343</sup> JANSSENS AND FORREZ, *supra* note 8, 70.

<sup>344</sup> RUTEERE, *supra* note 7, 20.

ethnic profiling; MIPEX showed that this is one of the weak points in Belgium, and sp.a also points at the role of officials (like police commissioners) in taking position against (latent) racism within the police corpse.

At face value, there are sufficient oversight mechanisms for ethnic profiling in Belgium (more in chapter two), but gaps in the anti-discrimination framework affect victims who are seeking redress. Unia also held that individuals are more reluctant to file a complaint for discrimination (by ethnic profiling) against law enforcement officials, except when violence is involved.

“Generally speaking there is a low number of case law on discrimination. Some might conclude that racism is not too big a problem, but research shows otherwise. A more realistic argument is that there are still many barriers to justice. The length and complexity of the procedures may act as deterrent to victims. On the contrary when it comes to filing a complaint the time is sometimes too short. (...) In a number of Member States insufficient financial means to pursue a case may be a real obstacle.”<sup>345</sup>

Unia reiterates most of these complaints in the assessment of Belgian anti-discrimination and anti-racism legislation.<sup>346</sup>

Statistics on the basis of aggregated data or results from situation tests are indispensable; bringing (prima facie) evidence of differential effects of alleged indirect discrimination is a difficult obstacle to overcome without (sensitive) data. The shift of the burden of proof in cases of indirect discrimination is rather an empty vessel when data discrimination from situation tests and statistics are not available.

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<sup>345</sup> BUITENWEG, K.M. and Committee on Civil Liberties, Justice and Home Affairs, Report of 6 July 2007 on the application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2007/2094(INI), A6-0278/200, 2007, 13.

<sup>346</sup> Unia, Evaluatie: Wet van 10 mei 2007 tot wijziging van de wet van 30 juli 1981 tot bestraffing van bepaalde door racisme of xenofobie ingegeven daden (B.S. 30 mei 2007) (Antiracismewet) en wet van 10 mei 2007 ter bestrijding van bepaalde vormen van discriminatie (B.S. 30 mei 2007) (Antidiscriminatiewet). Verslag van Unia, February 2016, 10 and 76.

## 5 Conclusion

### 5.1 The use and impact of ethnic profiling

The research goal was to understand ethnic profiling from the perspective of the right to equality with focus on Belgium. Ethnic profiling is one of the forms of forbidden discrimination “in key fields of life” that is persisting in Belgium.<sup>347</sup> A culture of silence on racial discrimination, especially when police is concerned, seems to aggravate the situation, although certain public awareness on ethnic profiling is raised since 2015.

Despite the lack of data and with only little research done, valid indications on the use of ethnic profiling in Belgium were found. This is confirmed in studies and figures on police discrimination, in testimonies and complaints of ethnic profiling and in international reports.<sup>348</sup> Under current Belgian legislation, the use of discretionary power to determine the reasons for suspicion does not need to be legitimated or reported. It can be assumed that generalizations rooted in race, ethnicity, religious or national features are used in the determination of suspicious behaviour, also in Belgium.<sup>349</sup> Moreover, in current times when counter-terrorism ranks high on the agenda of law enforcement agencies, disproportional attention is paid to potential terrorists and ethnic and religious background risk being used as a designator for (terroristic) crime. There is overt concern among the public, politicians and police about law enforcement’s ability to tackle terrorism, which is a fertile soil for use of ethnic profiling and reluctance in reducing this technique.

In the review of the legal framework regarding the right to equality and non-discrimination, it was obvious that ethnic profiling fails in the proportionality test. When governmental concerns as public security, crime control and counter-terrorism are balanced against the individual right to be treated equally and not discriminated against, there is no evidence for the use of ethnic profiling as a reasonable, effective and necessary means of increasing safety and decreasing criminality and specifically terrorism.<sup>350</sup> The use of ethnic stereotypes in crime control has a perverse impact on social cohesion, the rights of individuals and law enforcement effectiveness. The human rights approach is predominant in the evaluation, yet the sociological

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<sup>347</sup> European Commission against Racism and Intolerance, ECRI Report on Belgium fifth monitoring cycle, Strasbourg, Council of Europe, 2014, 10.

<sup>348</sup> Interfederaal Gelijkekansencentrum, Jaarverslag 2013 Conventie tussen het Centrum voor gelijkheid van kansen en voor racismebestrijding en de Federale Politie, Brussel, May 2014, 49-50.

<sup>349</sup> S. ÇANKAYA, “De politieke surveillance van ras en etniciteit”, 35 Cahiers Politiestudies 2015, 10.

<sup>350</sup> Open Society Justice Initiative, *Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory*, New York, Open Society Institute, 2009, 11.

and criminological framing is vital for a correct understanding of the phenomenon and its dislocating effects. The discussion on ethnic profiling takes place within the expanding public and academic debate about inter alia security and migration, which involves notions as discrimination, (ethnic) identity, social exclusion, criminalisation and effective policing too. The (false) opposition between the security paradigm and the enforcement of human rights as equality and security is prominent in public (and to some extent: political) evaluation of ethnic profiling despite knowledge on the perverse effects of the practice. In the relative wealth of international literature, I found sociological explanations, ethical considerations, political insinuations, and many human rights recommendations on how to deal with ethnic profiling.

## 5.2 Challenging ethnic profiling

The lack of quantitative and qualitative data on ethnic profiling in Belgium is the most important problem for action against the practice as public and police officers fail to acknowledge the existence and problematic impact of ethnic profiling and the government is prevented from taking action against the discriminatory practice. All consulted sources, including political parties, acclaim that more data are needed for research and evaluation of the practice.

In addressing the problem of ethnic profiling to the relevant services, the problem should be framed in the general prohibition of racism and discrimination, as several international reports point at the existence of e.g. racial violence by Belgian police.<sup>351</sup> In the research, it is demonstrated that ethnic profiling is not an isolated practice, but relates to many paradigms; further research should show the problem in specific policing zones. When measures for tackling ethnic profiling are implemented, the link to the effects on the level of an individual's right (non-discrimination), the quality of policing and the minority groups within the society as a whole should be put forward.

For that reason should action in Belgium encompass several elements, such as training and acquaintance with discrimination and the legislative framework; a more narrow interpretation of reasonable suspicion, which might be stimulated with a legislative adaptation, as well as better control and monitoring of the use of discretionary powers. The introduction of stop can be supportive, notably when the figures can be used for statistics. Ethnically disaggregated

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<sup>351</sup> “The Committee is concerned at reports that racially motivated violence and ill-treatment by police officers of persons with an immigrant background remains a problem.” Committee on the Elimination of Racial Discrimination, Concluding observations on the sixteenth to nineteenth periodic reports of Belgium, CERD/C/BEL/CO/16-19, 14 March 2014, §12.

statistical data are essential for demonstrating indirect discrimination, informing policy and developing positive action strategies, as is acclaimed by ECRI, FRA and more international human rights bodies. On the level of the society it is recommendable to enhance dialogue and collaboration between police (and other law enforcers or security agents) and local communities. For an objective analysis of the use of ethnic profiling in smaller policing zones (the mechanisms, the restraints, the legal framework and the negative impact on contact with citizens) the collaboration of the police officers and officials is indispensable.<sup>352</sup> With regard to the victims complaint procedures should be made more effective and transparent.

### 5.3 Feasibility of measures

Belgium is not complying with the recommendations made by scholars, the Special VN Rapporteur on Racism, the ECRI, ENAR and other international human rights bodies and organisations. Among the most prominent propositions for change: registration of ethnic data in police stops and controls and the demand for a legal definition and prohibition of ethnic profiling. Samples of the opinions of policy makers in the field of ethnic profiling provided a (very brief) idea of the political status of the problem ‘ethnic profiling’ in Belgium; the mentioned measures are currently not strongly supported on a political level. The spirit for implementing measures seems rather low among political parties, probably due to (public and political) pressure in the current climate of terroristic threat.

### 5.4 Recommendations

Also in the assumption that the current anti-discrimination legislation is capacious<sup>353</sup> to act upon ethnic profiling, initiatives should be developed. For maximal impact on reducing ethnic profiling in the current political climate, strengthening the existing framework and the general legal protection against discrimination seems the logical and efficient choice; mainly bottom-up processes and small-scale local projects can yield results in the current context. Awareness raising in discriminatory practices is a long term process, which requires training, collaboration between civil society and police and a certain sense of political urgency. With regard to the slow development of case law on ethnic profiling, both on national level and on European level, it is recommended that Belgium ratifies Protocol No. 12 to the European

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<sup>352</sup> Interfederaal Gelijkekansencentrum, Standpunt van het Interfederaal Gelijkekansencentrum over de praktijk van etnische profilering: inzet en gevolgen. Undated, not-published document received from UNIA, 2.

<sup>353</sup> Without forgetting some important weaknesses Unia pointed out in a recent assessment : Unia, Evaluatie: Wet van 10 mei 2007 tot wijziging van de wet van 30 juli 1981 tot bestraffing van bepaalde door racisme of xenofobie ingegeven daden (B.S. 30 mei 2007) (Antiracismewet) en wet van 10 mei 2007 ter bestrijding van bepaalde vormen van discriminatie (B.S. 30 mei 2007) (Antidiscriminatiewet). Verslag van Unia, februari 2016, 7-10.

Convention on Human Rights<sup>354</sup> and that objective data are gathered for evidence in court, especially for indirect discrimination.

Internal diversity is regarded by many parties as a must and should be enhanced, just like the implementation of more community initiatives for raising accountability and legitimacy. Codifying ethnic profiling as a *sui generis* form of discrimination has a symbolic value and might contribute to the spread of awareness on and knowledge of the problem,<sup>355</sup> but it will be effective only when combined with local initiatives within the law enforcement agencies in full cooperation with minority communities.

1/ Organise small-scale studies on police behaviour during street patrols and in other situations giving leeway to ethnic profiling. The scale should be the level of police teams or security officer's units. Make police officers and supervisors question suspicion practices and detect eventual unconscious cognitive bias. Point at the negative impact for individual and society and the lack of policing effectiveness and frame this awareness-raising within the wider anti-discrimination framework.

2/ Work on removing stereotypes in the decision taking process; give clear instructions on reasonable suspicion criteria to police officers, based on proportionality and other safeguards and enforce this through training and control by supervisors. A circular or legal adjustment of article 34 Police Function Act can back this practice, as well as the introduction of stop forms.<sup>356</sup> Communicate on these measures with the local communities.

3/ Carry out quantitative and qualitative research on the use of ethnic profiling in Belgium.

4/ Remove existing borders to file a complaint against a police officer, but highlight the importance of mediated solutions such as promoted by Unia.

5/ Enhance internal diversity among police.

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<sup>354</sup> European Commission against Racism and Intolerance, ECRI Report on Belgium, fifth monitoring cycle, Strasbourg, Council of Europe, 2014, 9.

<sup>355</sup> JANSSENS AND FORREZ, *supra* note 8, 72 and Open Society Justice Initiative, *supra* note x, 13.

<sup>356</sup> I suggest to start with stop forms that just record reason for the control and –with permission- the names (also the name of the police officer). This way, the trust relation with local communities as well as the transparency of police decisions can be improved. In a next step sensitive data such as ethnicity and religion can be included, which will serve be better for monitoring and statistics.

## 5.5 Questions for further research

- Where, when and how does ethnic profiling arise, in the different policing zones and during other security interventions in Belgium?
- How can ethnic profiling be reduced on the micro/meso/macro level?
- What are the best practices of acquainting police with ethnic profiling?
- How can community outreach and diversity be improved in the present context?
- Can ethnic profiling be considered as harassment under the anti-discrimination legislation?



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## Annex I QUESTIONNAIRE ‘MEASURES FOR REDUCING ETHNIC PROFILING’

The questionnaire in Dutch was sent out to Unia, Comité P, the federal police, the Diversity department of the federal police, the Minister of the Interior and Safety, the Minister of Justice, and Secretary of State for Equal Opportunities, as well as the Flemish political parties and the representatives in the Chamber received the questionnaire. Annex II shows the reactions on the questionnaire. The parties PS, cdH, MR, ecole and the French-speaking political group leaders in the Chamber of Representatives received the same inquiry in French. The contextual framing of the questions was slightly adjusted including a quote, a memorandum or another individualised element with regard to ethnic profiling, discrimination or policing. Annex I shows the standard questionnaire with the questions sent to all the parties.

### Vragen aan de relevante actoren voor masterproef rechten rond etnisch profileren

#### CONTEXT EN SITUERING VAN DE VRAAGSTELLING

Mijn naam is Laetitia Parmentier en ik studeer rechten aan de Universiteit Gent. In het kader van mijn masterproef wens ik aan de relevante actoren een aantal vragen te stellen over etnisch profileren. Ik schrijf een masterproef met als werktitel “The right to equality and non-discrimination with regard to ethnic profiling in Belgium” waarbij professor Yves Haeck als promotor optreedt en dra. Yaiza Janssens als commissaris. Een van de onderdelen in mijn onderzoek is een bevraging van de wenselijkheid en haalbaarheid van maatregelen om etnisch profileren tegen te gaan bij de prominente actoren in het veld en op politiek niveau.

#### DEFINITIE

In het onderzoek gebruik ik de volgende definitie van etnisch profileren (ook bekend als raciaal profileren en ethnic/racial profiling): etnisch profileren is het gebruik van veralgemeningen over ‘ras’, huidskleur, etniciteit, nationaliteit, taal en religie als aanwijzing voor verdenking bij de opsporing en rechtshandhaving, op zowel operationeel als organisatorisch niveau, terwijl daarvoor geen objectieve rechtvaardiging bestaat. Etnisch profileren is een verboden vorm van discriminatie.

#### IMPACT EN VOORBEELDEN

ONDANKS anti-discriminatie wetgeving op nationaal, Europees en internationaal niveau leidt etnisch profileren zelden tot een klacht en nog minder tot vervolging of veroordeling. Etnisch profileren heeft niet enkel een impact op de gecontroleerde burgers maar draagt bij tot een negatieve beeldvorming van minderheden en het schaadt de legitimiteit van de politie. Het is ineffectief en zelfs contraproductief in de strijd tegen terrorisme.

Situaties waarbij etnisch profileren kan voorkomen zijn staandhoudingen, fouilleringen en identiteitscontroles door de politie, controles aan grensovergangen en het gebruik van datamining in

contraterrorisme en anti-radicaliseringsbeleid. Etnisch profileren is een praktijk die door de politie en andere ordehandhavers sinds lang en in vele landen toegepast wordt ondanks veroordeling door gezaghebbende organen van de VN (zoals de Mensenrechtenraad en het Comité voor uitbanning van raciale discriminatie), de Raad van Europa (Europese Commissie tegen Racisme en Intolerantie), de EU (het Europees Parlement, het Europese Netwerk tegen Racisme, het Bureau van de Europese Unie voor de Grondrechten), academici zoals Olivier De Schutter, Julie Ringelheim en Andras Pap) en ngo's (e.g. Open Society Justice Initiative, Amnesty International).

In België kreeg het fenomeen ethnic profiling opnieuw aandacht aan het einde van 2015 toen er in de context van verhoogde terreurdreiging verschillende gevallen van vermeende etnische profilering in de media kwamen, zoals de vernederende fouilleringen van radicaliseringsexpert Montasser Alde'eme in Brussel en acteur Zouzou Ben Chikha in Gent. Die laatste klacht zou door het Comité P onderzocht worden. Ook de getuigenissen van student Yassine Boubout, die op basis van vermeende etnische profilering door zwaarbewapende agenten werd aangehouden en opgesloten, en van vijf jongeren die in Kortrijk hard werden aangepakt, kregen veel weerklank in de klassieke en sociale media. Hierop volgden reacties van politici, racisme-experten en politiedeskundigen; er is dus zeker sprake van hernieuwde interesse voor het fenomeen van etnische profilering in de context van de Belgische politie. In deze actuele sfeer situeren zich de vragen die ik hieronder wil stellen.

#### CIJFERGEGEVENS

We beschikken niet over officiële cijfers met betrekking tot het gebruik van etnisch profileren in België; er zijn wel studies, voornamelijk met betrekking op politie, die aantonen dat er ook in België etnische profilering wordt toegepast. Een belangrijke bron is de enquête EU-MIDIS door het Bureau van de EU voor de Grondrechten (FRA), die aanwijst dat er frequentere controles zijn bij etnische minderheidsgroepen en dat er bij die personen minstens een perceptie van etnisch profileren bestaat. Tijdens het Universeel Periodiek Onderzoek (Universal Periodic Review) van België binnen de Mensenrechtenraad van de Verenigde Naties op 20 januari 2016 werd er nog door verschillende staten op gewezen dat etnisch profileren een probleem vormt in België.

Het voorbije decennium heeft men in andere landen ervaring opgedaan met bepaalde maatregelen die het gebruik van etnisch profileren in kaart brengen en kunnen indijken. Verder werden er op het niveau van o.a. de VN-mensenrechtenraad en de Europese Commissie tegen Racisme en Onverdraagzaamheid aanbevelingen gedaan om etnisch profileren in te dijken.

Mijn vragen peilen naar uw beoordeling van enkele voorstellen. Ik verwelkom natuurlijk ook andere opmerkingen en suggesties met betrekking tot deze vorm van discriminatie.

#### VRAGEN

##### 1. Data

Er wordt door kenners van etnisch profileren gesteld dat enkel een betere documentatie van het probleem kan leiden tot controle en oplossing.

Hoe staat u tegenover registratie van o.a. de etnische data bij het staande houden en fouilleren door politie en andere veiligheidsagenten, bijvoorbeeld door middel van stopformulieren?

De gegevensverzameling kan anoniem gebeuren, om de rechten op privacy niet te schenden. Een andere mogelijk praktijk is om bij iedere controle de identiteit van de beambte en de gecontroleerde

persoon te registreren samen met de reden van het stoppen en controleren. Dit werd bij een project in Fuenlabrada, Spanje, met succes toegepast.

In het Verenigd Koninkrijk werd gebruik gemaakt van *stop forms* en heeft men vastgesteld dat personen van etnische minderheden significant vaker werden gestopt zonder objectieve rechtvaardiging. Dit heeft geleid tot maatschappelijke zichtbaarheid van het probleem van etnisch profileren en bewustwording en gedragsaanpassing bij de politiemensen.

Bovendien kunnen de statistieken op basis van de verzamelde en gefilterde data gebruikt worden om indirecte discriminatie aan te tonen in de rechtbank.

## 2. Wettelijk verbod

Hoe staat u tegenover een wettelijk verbod op etnisch profileren, met de bedoeling om de praktijk effectiever aan te pakken op het terrein en in de rechtbank?

Dit initiatief wordt in verschillende rapporten en aanbevelingen voorgesteld als een sleutel tot verandering inzake etnisch profileren. In 2015 stond het verbieden van racial profiling nog op de agenda in het rapport van de speciale VN rapporteur voor hedendaagse vormen van racisme, raciale discriminatie, xenofobie en gerelateerde onverdraagzaamheid, Mutuma Ruteere. Momenteel is etnische profilering immers niet wettelijk omschreven, niet in België en ook (nog) niet elders.

## 3. Andere initiatieven

Welke andere voorstellen om het gebruik van etnisch profileren te reduceren heeft of steunt u? Ik denk hierbij aan het idee om de controle op de uitoefening van discretionaire bevoegdheden door de Belgische politie te versterken door bijvoorbeeld de opmaak van een proces verbaal bij een bestuurlijke identiteitscontrole te verplichten, naar het voorbeeld van Frankrijk.

Wat is uw standpunt over eventuele nieuwe maatregelen om diversiteit in het politiekorps te krijgen, zoals het versoepelen van de toegangsvoorwaarden tot het politieambt?

En ten slotte: wordt er door u of uw partijgenoten wetgevend initiatief genomen inzake etnisch profileren?

U kunt mij de antwoorden bezorgen per e-mail aan [laetitiaparmontier@gmail.com](mailto:laetitiaparmontier@gmail.com) of [laetitia.parmontier@ugent.be](mailto:laetitia.parmontier@ugent.be).

Ik dank u van harte voor uw medewerking,

Met vriendelijke groeten,

Laetitia Parmentier



## Annex II LIST OF CONTACTS AND REACTIONS ON QUESTIONNAIRE

- Three lists: 1 Actor answered the questions  
 2 Actor replied but couldn't answer the question  
 3 Actor didn't reply e-mail (even after telephone contact)

1 actor & date contacted (phone call + e-mail)	contact detail & date answered
Interfederal Centre for Equal Opportunities (Unia) 15/02/2016	Heidi.dierckxsens@cntr.be Paul. Borghs@unia.be - Elke.VanOyen@unia.be 02/03/2016 - 21/03/2016
Open Vld 18/02/2016 - 06/04/2016 - 02/05/2016	info@openvld.be Mathieu Nuytens (content coördination) 10/05/2016
Diversity Department of Federal Police 07/04/2016	DRP.Coordination.Diversity@police.belgium.eu 27/04/2016
CD&V 19/02/2016	ceder@cdenv.be - Jenny Renneboog (research departement) 15/04/2016
Justice Minister Geens 19/02/2016	Alfons Vanheusden (human rights consultant) 03/05/2016
N-VA 29/02/2016	info@n-va.be ombudsperson dept. 16/03/2016
sp.a 29/02/2016	Francine.debruyne@s-p-a.be (communication dept. sp.a) 09/03/2016
MR 21/03/2016	mr@mr.bepresident (Olivier Chastel) 20/04/2016
Minister of Home Affairs and Security Jambon 01/03/2016 - 06/04/2016	olivier.vanraemdonck@ibz.fgov.be (spokesman) 12/05/2016
2 actor & date contacted (phone call + e-mail)	contact detail & date of reaction & reason no answer
Federal police (Commissioner General) 19/02/2016	press@police.belgium.eu - Peter De Waele (spokesman) *"Seen the current situation on police level, the Commissioner General cannot reserve time for answering your questions" 07/04/2016
Comité P 19/02/2016	info@comitep.be * "Comité P cannot answer your question, as all the documents that they are able to publish are placed online" 14/03/2016
Secretary of State for Equal Opportunities 29/02/2016	info@elkesleurs.fed.be - Robin Chapman (ombudsperson dept.) *Secretary of State is not competent in these matters and sends on to Minister Jambon 01/03/2016
3 actor & date contacted (phone call + e-mail)	contact detail
Groen 18/02/2016 - 06/04/2016 - 02/05/2016 + 2 calls	info@groen.be studiedienst@groen.be
Vlaams Belang	info@vlaamsbelang.org

29/02/2016 - 06/04/2016 - 02/05/2016	
PS 20/03/2016 & 02/05/2016	info@email.ps.be
ECOLO 20/03/2016 – 02/05/2016	info@ecolo.be
CDH 20/03/2016 – 02/05/2016	info@lecdh.be
No useful answer after mailing to Chamber members (Dutchspeaking parties; mail addresses through <a href="http://www.dekamer.be">www.dekamer.be</a> ) and political group presidents (Frenchspeaking parties)	
<a href="mailto:denis.ducarme@lachambre.be">denis.ducarme@lachambre.be</a> (MR) 20/03/2016 - 14/04/2016	
<a href="mailto:laurette.onkelinx@lachambre.be">laurette.onkelinx@lachambre.be</a> (PS) 20/03/2016 - 14/04/2016	
<a href="mailto:jean-marc.nollet@lachambre.be">jean-marc.nollet@lachambre.be</a> (ECOLO) 20/03/2016 - 14/04/2016	

<a href="mailto:catherine.fonck@lachambre.be">catherine.fonck@lachambre.be</a> (CDh) 20/03/2016 – 14/02/2016	
<a href="mailto:raoul.hedebouw@lachambre.be">raoul.hedebouw@lachambre.be</a> (PTB) 20/03/2016	
33 Chamber members of N-VA 16/03/2016	Rita Gantois, N-VA 16/03/2016 “not competent”
13 Chamber members of sp.a 16/03/2016	Karin Temmerman sp.a 16/03/2016 “not competent -> Hans Bonte”
	Maya Detiège, sp.a (Jens Casiers) 16/03/2016 “sickness leave”
	Monica De Coninck, sp.a 22/03/2016 “not competent-> Hans Bonte”
18 Chamber members of CD&V 16/03/2016	Roel Deseyn, CD&V 15/03/2016 “not competent ->members in commissions of home affairs and justice”
6 Chamber members of groen 16/03/2016	Kristof Calvo, Groen 20/03/2016 “Stefaan Van Hecke will answer for Groen”
14 Chamber members of Open VLD 16/03/2016	
3 Chamber members of Vlaams Belang 16/03/2016	



## **Annex III** METHOD AND SUMMARIZED ANSWERS OF (POLITICAL) ACTORS ON QUESTIONNAIRE

### ***Actors of change in ethnic profiling***

As the implementation of some of the actions requires new legislation, the Chamber of Representatives and the Federal Government and their policy-making bodies are critical actors of change. Ethnic profiling is connected with the federal competences of home affairs, security issues and policing matters (Vice Prime Minister Jambon, N-VA), with the justice department (Minister Geens, CD&V) and the competence of ‘equal opportunities’ (State secretary Sleurs, N-VA).

In the Federal House of Representatives, the 150 seats in the 2014-2019 legislature are divided per political party:

N-VA (33 representatives)	CDh (9 Representatives)
PS (23 Representatives)	Groen (6 Representatives)
MR (20 Representatives)	Ecolo (6 Representatives)
CD&V (18 representatives)	Vlaams Belang (3 Representatives)
Open Vld (14 Representatives)	FDF (2 Representatives)
sp.a (13 Representatives)	Ptb-GO (2 Representatives)

Unia has the legal power to investigate practices, review policies and issue recommendations. Committee P monitors the police forces on behalf of the Federal Parliament and all citizens. It has the competence to receive complaints regarding the functioning of police services and to review and issue on policies regarding policing. Within the integrated police, the Diversity department organises campaigns and trainings on internal and external diversity.

### ***Methodology for feasibility sample***

After initial contact by telephone I sent a questionnaire (see Annex I) by e-mail to the actors mentioned in Annex II. The methodology demonstrates that the answers on the questions can be considered only as a sample for feasibility of some propositions; they only give a brief overview of the topicality of ethnic profiling among actors of change in the field of discrimination, policing and politics. The answers were furthermore dependent on the willingness to cooperate; there were no further interviews for explaining the answers. Within the scope of this master thesis it was not possible to convince every addressee to answer.

### *Questions and answers*

The questions focused on the propositions that were omnipresent throughout literature, i.e. the introduction of data collection during identity controls and stop and frisk measures by police and the explicit legal prohibition of ethnic profiling. A general question on measures to reduce ethnic profiling was also included in the mailing.

### *Reactions without answers*

The Secretary of State for Equal Chances Elke Sleurs answered that she was “against ethnic profiling” but did not consider it as her competence to answer questions on propositions to fight it. Committee P answered that they “are not able to answer the questions; all the documents that they are able to publish are placed online.” Annex II shows that most French-speaking parties did not react on the questionnaire. The majority parties in the federal government and parliament however sent their reaction.

### *On data collection*

**Unia** sent us a document with their position towards ethnic profiling, which provides useful information (see also ‘soft measures’ on the pilot project). Nevertheless, the Centre did not take a clear contention pro or against data collection as a means to end ethnic profiling. A bottom-up approach in close cooperation with the police unit is regarded as preferable and registration might be part of the program of understanding the use of ethnic profiling in a certain policing area, but it should be combined with other measures and further research on the level where ethnic profiling originates (micro, meso, macro).

The **Diversity Unit of the Federal Police** agrees that objective figures are a prerequisite for a correct assessment of ethnic profiling in Belgium, and that data collection should be organised before any other action is taken. When deciding to register data in some form, it should be well pondered which method is most suitable, in collaboration with all the actors.

Among political parties, New Flemish Alliance (**N-VA**) is the largest political group in the parliament with 33 representatives and inter alia the Vice Minister for Home Affairs and Security Issue. The party sent the most extensive answer. N-VA takes position against the use of stop forms. The judgement on reasonable suspicion of the police officers should be mainly trusted. Another argument against the data collection in street level policing is the administrative burden it imposes on the police officers, where N-VA favours reducing the bureaucracy in order to enhance ‘real policing work’ (sic).

Furthermore, N-VA acknowledges that there are currently sufficient instruments for supervising the use of ethnic profiling (Committee P, juridical steps) and that the police has the competence to issue rules regarding ethnic profiling (this is allegedly done in Antwerp).

**CD&V** (18 representatives and inter alia Minister of Justice Affairs) considers ‘a way of collecting data’ as useful in combating ethnic profiling but there are some practical restraints; they warn –as many other sources- against the discriminatory effect of this way of sampling the use of ethnic profiling; CD&V indicates that the description/definition of immigrant is difficult (just like in determining the number of ‘immigrant employees’) and could be considered as stigmatising ethnic minorities. It is furthermore forbidden in the Constitution to register religion. Moreover, data registration might create extra workload for police officers during routine controls.

**Home Affairs Minister Jambon** (spokesman) also speaks out against data collection, questions the use and legality of collecting ethnic data, notably in light of the difficulties in defining ethnic background.

In an answer by the human rights adviser of **Minister of Justice Geens**, it is mentioned that the data protection legislation (article 6 § 2 1 of the Privacy Law) allows for data collection for an important public interest when sufficient legal safeguards are provided (new Directive 2016/680 of 27 April 2016). The Minister acknowledges that objective figures are needed, but the way to collect these data should be studied.

The Flemish socialist party **sp.a** (13 Representatives in the Federal Parliament) provided a brief reaction, stating that the lack of statistical data on ethnic profiling amounts to the perception of the use of ethnic profiling by Belgian police. Sp.a supports the objective data collection on ethnic profiling, but in the scope of the present short sample research, they couldn’t provide us more detailed view on the implementation.

**Open VLD** (14 Representatives in the Federal Parliament) is the only responding party that supports of registration of ethnic data in contacts of citizens with police. The Flemish liberal party sees many advantages, such as statistical proofs for developing policies against discrimination, the positive effect of giving the reason for a control to individuals, the moment of reflection on reasonable suspicion it will entail for police officers, etc. Although anti-racist motives are the reason why current policy is opposed to ethnicity registration, Open VLD consider it as a tool for fighting racist attitudes.

### ***Legal definition and prohibition of ethnic profiling***

The **Diversity department of the federal police** accentuates the need for a strong description of the concept of ethnic profiling, especially in the context of a prohibition. Profiling is a part of policing, but when the police officer's decision to act is purely or mainly based on so-called race, origin or religion, it is discriminatory.

**N-VA** amended the definition<sup>357</sup> of ethnic profiling used in the context of the master thesis and in the questionnaire by excluding religion and language, in favour of a strict interpretation of ethnic profiling. N-VA warns for the vague meaning of a wide definition, which might have negative effects on the 'real victims'. The current anti-discrimination legislation should suffice in the fight against ethnic profiling. **MR** (20 Representatives) reiterates that ethnic profiling should be considered as a form of forbidden discrimination under the EU Charter of Fundamental Rights.

**CD&V** considers ethnic profiling as perverse when it is used as a general filter; as a form of 'suspect profiling' to the contrary, it might be useful. Also in the fight against terrorism by 'religious extremists' as we know it today, it might be an effective tool, as religion is part of the description of the suspects. A general prohibition of the use of ethnic profiling is not desirable because of above reasons.

**Justice Minister Geens** answers in the general terms that there is need for a better description of ethnic profiling – when there is differential treatment in the same situation and the decision for police action is purely or mainly based on race, origin of religion, than the profiling is discriminatory.

**Sp.a** acknowledges that a legal prohibition might be functional in attracting attention, but warns for a lack of practical use, as it also induces the need for procedures of control and an independent organ of control. However, sp.a imagines that Committee P can play the role of watchdog.<sup>358</sup>

### ***Other propositions in reducing ethnic profiling***

The last question sampled opinions on some other topics such as the role of diversity and training in police services, the context of terrorism, the discretionary powers of police and the complaint mechanisms for ethnic profiling

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<sup>357</sup> The definition used in this master thesis is "Ethnic profiling is the use of generalisations based on (so called) race, ethnicity, religion or national origin as the basis for suspicion in law enforcement decisions and actions without objective justification."

<sup>358</sup> In the Belgian context, it seems indeed logical to attribute the control function in the case of a legal prohibition of ethnic profiling to Committee P, as this control organism currently overviews all possible breaches of law by police officers.

The **Federal Police, Diversity department** highlights the efforts of the federal police to upgrade their diversity policy (end of 2015), through a more targeted training for personnel and a sized approach per police department. Diversity should be a *leitmotif* throughout the HR-process, e.g. with trainings for selection officials by Unia and an internal brochure. This is endorsed and reiterated in the answer of the **Minister of Justice**.

N-VA mentions an internal rule in Antwerp police to act very respectful to citizens, especially in times of terror threats. Nevertheless certain groups might perceive being targeted, but a mayor can act by enhancing dialogues with certain vulnerable communities as the Moroccan/Berber community and between police and youngsters, as is practiced in Antwerp.<sup>359</sup> N-VA says entry conditions for more diversity shouldn't be touched, for only the functioning of police matters, regardless the colour of the police officer.

NV-A and **MR** consider the improvement of language knowledge for newly arrived foreigners as a more relevant stimulus to encourage people from minority groups to join the police. N-VA refers to the pilot project of two years in Antwerp; the local government shall recruit its own police officers instead of the long and bureaucratic way that regularly takes place in Brussels, the central recruitment office for police. Decentralization should make the procedure more efficient and fast, alongside the same standards but with possible adjustments in the interpretation in the local context. The expectation is that the pilot project will result in a more diverse police corpse, which is however not expected to reflect on the use of ethnic profiling – as this might be practiced by police officers of all colours and races.

**MR** refers to the Fundamental Rights Agency's human rights training for police officers, and advocate the need to continue on that path, particularly in the context of radicalism and terrorism as 'amalgams' are easily made. The Federal Police deployed several diversity trainings, which also aimed at acquainting police with the anti-discrimination legislation. MR mentions the coalition agreement, which contains a paragraph on the promotion of diversity among police.

**Minister Jambon** relates to the importance of diversity training in both basis and in-service education. The aim should be to create a stereotype-free culture in the police organisation.

**CD&V** favours a better mapping and understanding of the practice of ethnic profiling, in cooperation with existing mechanisms of supervising police. Complaints at Committee P but also initiative of the Parliament or the Committee might start a research. CD&V claims that

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<sup>359</sup> In Antwerp, N-VA mayor Bart De Wever decided to increase the military presence in critical points in the city. Outside this topic but necessary as side information: a complaint is filed against mr. De Wever for his quote that "berber..."

neither Committee P, nor Committee I brought issues of ethnic profiling to the foreground. The Flemish Christian-Democrats are convinced that diversity in police services should be stimulated (more), for instance with targeted recruitment campaigns or organise preparatory courses, but certainly not by widening the entrance conditions.

**Open VLD** promotes education and training on diversity and says that the cooperation with police is critical in fighting ethnic profiling, and objective figures are expected again contribute to a better knowledge. Also qualitative research, based on survey among citizens on their attitudes and experiences with police should be carried out for more knowledge on the phenomenon. The party adds that although they favour more diversity among police, there is not necessary a link with reduction of ethnic profiling practices. The focus on positive contacts and the elimination of prejudices should be central in police trainings.

In the view of **sp.a**, enhancing diversity within the police services is a critical step, probably even more important than a legal prohibition of ethnic profiling. The party also sees an importance role for the training of police officers in dealing with diversity. Specific attention should be paid to improving the chances of officers with minority background the selection procedure for a policing job, particularly when it comes to language proficiency. However, sp.a does not favour a less stringent entry exam for the police function.

Lastly sp.a stresses the role of higher rank police officers (like police commissioners) in taking position against (latent) racism within the police corpse and for improving working conditions of minority police officers, as this may enhance the attractiveness of a policing job among minority groups.