Racial Profiling in Europe: How well equipped is National, International and Supranational Human Rights Law to counter it?

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A. Introduction

Criminal profiling is a longstanding law enforcement practice. The European Parliament has further noticed that profiling is more and more frequently used in the area of counterterrorism.[1] However, if profiling is based on factors like race or ethnic origin, the problem of racial profiling arises. There are various opinions on the use of racial profiling and its conformity with the law. Although the concept itself has a long history, it became more important after the terrorist attack on the 11th of September 2001 in the United States. Some argue that racial profiling makes sense because it's a *'simple statistical fact'* that Arab Muslim men have been the perpetrators of most terrorist attacks.[2] Profiling, in this context, is regarded as *'smart business'*.[3] Others argue that racial profiling is not smart and should be regarded as ineffective in the context of counterterrorism because terrorists know how to change their appearance and behaviour in order to remain undiscovered.[4]

The leading question of this article is whether the law in Europe is equipped to deal with the issue of racial profiling and if there is a need for improvement. To answer this question the article will outline the existing legal framework and will discuss provisions of universal and regional international law, EU law and national law (with a focus on Germany and the United Kingdom). Finally, the relevant case law and means to counter racial profiling will be examined and a conclusion will be drawn.

B. Explanation of terms

Debate about racial profiling already arises when it comes to its definition. Questions requiring a response are: Where does permissible criminal profiling end and where

1 *European Parliament*, recommendation to the Council of 24/04/2009 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)), P6_TA(2009)0314, OJ C 184E of 08/07/2010, p. 119.

2 *Krauthammer*, 'Give Grandma A Pass', http://www.washingtonpost.com/wp-dyn/content/article/2005/07/28/AR2005072801786.html (30/09/2017).

3 *Sperry*, 'When the Profile Fits the Crime', http://www.nytimes.com/2005/07/28/opinion/28sperry.html (30/09/2017); *Harcout*, Muslim Profiles Post 9/11: Is Racial Profiling an Effective Counterterrorist Measure and Does It Violate the Right to Be Free from Discrimination?, p. 2.

4 *Gladwell*, 'Troublemakers: What pit bulls can teach us about profiling', http://www.newyorker.com/magazine/2006/02/06/troublemakers-2 (30/09/2017).

does impermissible racial profiling start? Is there a grey area? And is racial profiling impermissible per se?

In the economic system, corporations want to customise their products and services in the best way possible. This means that they are in need of a technique for finding out purchasing behaviour and customer wishes. The method of **profiling in general** involves '*categorising individuals according to their characteristics*'.[5] These characteristics can be '*unchangeable (such as gender, age, ethnicity, height) or changeable (such as habits, preferences and other elements of behaviour)*'.[6] Profiling works in three steps: data warehousing, data mining and interference.[7] The first step is observational. Data and information are collected and stored.[8] Secondly, the relevant variables are connected and correlated to create new data and information categories.[9] Lastly, the data is interpreted which leads to a behavioural assumption.[10] Often only the last step of interference is understood as profiling.[11] This technique facilitates coming up with an assumption of purchasing behaviour and is of great service to business enterprises.

Criminal profiling is a special form of profiling and an investigative method.[12] It is mostly regarded as a permissible and legitimate technique.[13] The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism from 2007, *Martin Scheinin*, defines criminal profiling '*as the systematic associations of sets of physical, behavioural or psychological characteristics with particular offences and their use as a basis for law making decisions*'.[14] Hence, profiling provides a practical description of criminal offenders and facilitates identification. The method can be applied at an organisational level (by an instructing government or higher officer) and at an operational level (by individual officers).[15]

However, there is a difference between descriptive and predictive profiling. If profiles are based on specific intelligence regarding a crime that has already been committed and discovered, they are descriptive profiles.[16] These kinds of profiles containing characteristics of certain suspects can also be classified as '*suspect descriptions*'.[17] On the other hand, if profiles are not based on specific intelligence

5 *FRA*, Towards More Effective Policing, Understanding and Preventing Discriminatory Ethnic Profiling: A Guide, p. 8.
6 Ibid.
7 Ibid., pp. 8-9.
8 *Pap*, Ethnic Profiling and Discrimination: The International Context and Hungarian Empirical Research Findings, HJLS 4/2011, p. 282.
9 *FRA*, (fn. 5), p. 8.
10 Ibid.
11 Ibid., p. 9.
12 *Ebisike*, Offender Profiling in the Courtroom: the use and abuse of expert witness testimony, 2008, p. 1.
13 *FRA*, (fn. 5), p. 11; *Open Society Institute* (ed.), Ethnic Profiling in the EU, 2009, p. 8.
14 *Scheinin*, Report of the Special Rapporteur on the Promotion of Human Rights while Countering Terrorism, UN Doc. A/HRC/4/26, para. 33.
15 *FRA*, (fn. 5), p. 13.
16 *Scheinin*, (fn. 14), para. 33; *De Schutter/Ringelheim*, Ethnic Profiling: A Rising Challenge for Human Rights Law, MLR 3/2008, p. 361.
17 *FRA*, (fn. 5), p. 12.

regarding a crime that has already been committed and rather relate to future or not yet discovered crimes, they are predictive profiles.[18] In this case profiles rely *'on educated assumptions derived from experience and training'*.[19] Predictive profiles are thus based on generalisations about groups of individuals who fit the assumption.[20] If these generalisations rely on stereotypical elements like religion or race rather than behaviour, they are generally more likely to be discriminatory.[21] The issue of discrimination will be discussed further below. Descriptive profiling techniques were developed in the United States and were generally used to convict serial killers, whereas predictive profiling was used to identify potential drug couriers.[22]

More recently, criminal profiling has been used in the context of counterterrorism and referred to as *'terrorist-profiling'. Scheinin* notes in his report that *'in recent years, so-called terrorist profiling has become an increasingly significant component of states' counterterrorism efforts'*.[23] Additionally, the EU itself reminded the member states as early as 2002 that counterterrorism is a high priority objective of the EU and recommended close cooperation with each other and the European Union Agency for Law Enforcement Cooperation[24] (Europol) to develop terrorist profiles.[25] However, in the context of terrorist profiling, the profiles are predictive because they are designed to identify individuals before they commit a certain crime.[26]

The discussion about **racial profiling** started in the United States and was first associated with the phrase *'driving while black'*.[27] This phrase described the police traffic stops only applying to African Americans or other minorities in the 1990s. These 'black drivers' were considered more likely to be criminals than 'white drivers'.[28] The notion of racial profiling then developed into a broader notion and was used for general law enforcement decision-making involving racial or ethnic factors.[29] According to the definition by the European Commission against Racism and Intolerance (ECRI), the notion of racial profiling concerns 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 activi-*

18 *Scheinin*, (fn. 14), para. 33; *De Schutter/Ringelheim,* (fn. 16), p. 361.
19 *FRA*, (fn. 5), p. 12.
20 *Harris*, Profiles in Injustice: Why Racial profiling cannot work, 2003, pp. 26-28.
21 *FRA*, (fn. 5), p. 12.
22 *De Schutter/Ringelheim*, (fn. 16), p. 361.
23 *Scheinin*, (fn. 14), para. 32.
24 Formerly known as the European Police Office and the Europol Drugs Unit, Article 1(2) of the Regulation (EU) No. 2016/794 of the European Parliament and of the Council of 11/05/2016 on the European Agency for Law Enforcement Cooperation.
25 Draft Council Recommendation (EC) No. 11858/3/02 REV 3 of 18/11/2002 on the development of terrorist profiles.
26 *Moekli*, Terrorist Profiling and the importance of a proactive approach to human rights protection, http://ssrn.com/abstract=952163 (30/09/2017), p. 6.
27 *Harris*, When success breeds attack: The coming backlash against Racial Profiling Studies, MJRL 6/ 2001, p. 237.
28 *De Schutter/Ringelheim,* (fn. 16), p. 361.
29 Ibid.

ties'.[30] This definition leads to the assumption that in some cases, especially when there is an objective or reasonable justification, criminal profiling based on criteria of ethnicity or race, can be permissible. Such cases would not fall within the definition of racial profiling. The permissibility of criminal profiling, namely if there can be an objective or reasonable justification, will be discussed below. A more recent definition is provided by the Fundamental Rights Agency of the EU (FRA). The FRA considers that racial profiling occurs if '*the practice involves treating an individual less favorably than others who are in a similar situation, for example by exercising police powers such as stop and search solely on the basis of a person's skin colour, ethnicity or religion*'.[31] That the practice already lacks objective or reasonable justification is not required by this definition. Like the FRA the German Bundestag is arguing that racial profiling only occurs when the decision is solely based on grounds such as, for example, colour.[32] However, this narrow definition excludes permissible practices, which are nevertheless racially biased,[33] and restricts the notion of racial profiling to a narrow scope of application, namely only where grounds such as race or ethnicity are the only criteria the decision is based on. Other authors are therefore in favour of a broad definition in which racial profiling can already occur, if the mentioned grounds are one of the criteria that lead to the final decision.[34] In that case a so-called bundle of motives[35] leads to the decision.

Alongside the notion of racial profiling, the notion of ethnic profiling is often used in the media, by academics and organisations – especially in Europe.[36] These two terms need to be distinguished. In sociology, ethnicity is primarily described as a group of individuals who share cultural characteristics, for example, language or religion.[37] As opposed to this, race is described as a group of individuals who share physical characteristics, for example, skin colour or body form.[38] The crucial difference is that race is a classification by others, whereas ethnicity is a classification by the group itself.[39] Race can therefore fall under the scope of ethnicity, but does not necessarily have to. According to the sociological understanding of ethnicity and race, racial profiling would be restricted to physical appearance factors and therefore be a '*subtype of ethnic*

30 *ECRI*, General Policy Recommendation No. 11 on Combatting Racism and Racial Discrimination in Policing, 29/06/2007, para. 1.
31 *FRA*, Fundamental rights: challenges and achievements in 2013, Annual Report 2013, p. 155.
32 *Deutscher Bundestag,* Drucksache 17/4569, 15/08/2013, p. 2.
33 *ENAR/OSI*, Factsheet on Ethnic Profiling, 2009, p. 4.
34 *Cremer*, Racial Profiling als Polizeipraxis, Unsere Gesetzeslage lässt Racial Profiling zu oft zu, https://causa.tagesspiegel.de/gesellschaft/werden-migranten-von-der-polizei-diskriminiert/unsere-gesetzeslage-laesst-racial-profiling-zu-oft-zu.html, (30/09/2017), p. 13, *Harris*, (fn. 20), p. 11.
35 *Froese*, Gefahrenabwehr durch typisierendes Vorgehen vs. Racial Profiling, DVBl 5/2017, p. 293.
36 *Herrnkind*, „Filzen Sie die übrigen Verdächtigen!", Polizei und Wissenschaft 3/2014, p. 36.
37 *Cornell/Hartmann*, Ethnicity and Race, Making Identities in a Changing World, 2nd ed., 2007, pp. 17-18.
38 Ibid., p. 24.
39 Ibid., p. 26.

profiling'.[40] In the context of profiling, ethnic profiling is indeed sometimes referred to as the broader term covering profiling that involves factors of race, ethnicity and religion.[41] Nevertheless, the terms racial profiling and ethnic profiling are used synonymously.[42]

In the provisions prohibiting racial discrimination, which will be explained in detail below, the term race refers to the social construct and should be interpreted along with colour, descent, national or ethnic origin.[43] In the context of racial or ethnic profiling, the core objectives are racist attributions by law enforcement agencies.[44] That is why the term 'racist profiling' is sometimes used.[45] Occasionally, the term 'colour profiling' is mentioned.[46] Others exceed the racist context and extend the notion of racial or ethnic profiling to other cultural minorities like young white Americans with 'Hip-hop-flair'.[47] This article will solely use the term racial profiling as a synonymy for the notions ethnic/racist/colour profiling.

To answer the questions raised in the beginning, it needs to be pointed out that criminal profiling in its descriptive and predictive form is generally a legitimate and lawful tool. It ends, where factors of ethnicity, race, religion or national origin are involved. If this happens, racial profiling can arise. There is a debate on whether racial or ethnic factors need to be the sole determining factors or only one of the factors in the final decision. According to some scholars, the factors need not be the only ones involved in the decision-making process, rather a bundle of motives will suffice. Other factors, for example worn out clothes, can still be involved for it to be racial profiling. Because of this controversy, the boundaries between impermissible racial profiling and permissible criminal profiling are not conclusively clarified. International and national courts assess situations differently. Some argue that racial or ethnic factors need to be decisive, whereas others argue that they only need to be involved among others. The different opinions in the case law will be explained below.

I. Forms of racial profiling

Racial profiling exists in different forms. A general distinction can be made between formal and informal racial profiling. The definition of the ECRI[48] restricts the scope of racial profiling to the use of control, surveillance and investigation activities. If one of these activities is *'based on a profile formally established by competent authorities'*[49] formal racial profiling occurs. In that case we are dealing with an official policy

40 cf. *Reimann*, Is Racial Profiling just?, Journal of Ethics 1-2/2011, p. 4.
41 *FRA*, (fn. 5), p. 15.
42 *EU Network of Independent Experts on Fundamental Rights*, Ethnic Profiling, pp. 9-10.
43 *Van Boven,* Racial and Religious Discrimination in: Wolfrum Max Planck Encyclopedia of Public International Law (ed.), 2007, para. 2.
44 *Herrnkind*, (fn. 36), p. 36.
45 Ibid.
46 *Tator/Henry*, Racial Profiling in Canada, 2007, p. 88.
47 *Meeks*, Driving while Black, p. 5.
48 Ibid., p. 4.
49 *De Schutter/Ringelheim*, (fn. 16), p. 362.

targeting certain forms or areas of crime.[50] On the other hand, if the profile is established by the subjective understanding of a law enforcement officer, informal racial profiling can occur.[51] As established by Canadian case law this kind of profiling can be '*conscious or unconscious, intentional or unintentional*'.[52] Formal racial profiling is often carried out by automatic means (like the screening of data), whereas informal racial profiling is more often carried out directly on the ground (like identity checks).[53] In the case of informal profiling, proving the factors the law enforcement officer's decision finally relied upon in individual cases may be difficult. The selection process is not as transparent as in the case of formal profiling. Statistics in the United States have shown that stop and search procedures can have a racially disparate impact even though other factors were relied on.[54] If individuals of a certain racial or ethnic group are more likely to drive older cars, the police will stop them if they are on the lookout for cars with broken taillights.[55] Therefore, the core difference between formal and informal practice is the contrast between institutional and individual practices.[56] If the profiling practice is conducted by the police force as a whole, the discussion about institutional racism or institutionalised bias arises.[57]

Formal and informal racial profiling for their part can be split into various other manifestations. The different manifestations mentioned are non-exhaustive. The article will discuss only selected examples:

Identity checks and vehicle controls enjoy the highest attention in the public debate around racial profiling.[58] Most case law deals with such practices and their conformity with human rights law. During an identity check or a vehicle control individuals are exposed to the ideas and beliefs of individual law enforcement officers. In comparison to data mining operations, the operation is over quickly. That is why judicial protection is rarely sought. The number of unreported cases of people being victim of racial profiling during identity checks and vehicle controls may well be high.

In **data mining operations** the police sometimes use sensitive personal data inter alia on ethnicity and religion in an investigation process.[59] This works by processing an extensive amount of individual personal data with automatic means. An example for such a massive data mining operation is the German 'Rasterfahndung'-method. In that case the German police screen personal data sets of public and private bodies in order to find individuals matching certain suspect features.

50 *OSI*, (fn. 13), p. 22.
51 Ibid.
52 Court of Quebec (Criminal Division) Judgment of 27/01/2005, *The Queen v. Campbell*, para. 34.
53 *De Schutter/Ringelheim*, (fn. 16), p. 362.
54 *Blank/Dabady/Citro*, Measuring Racial Discrimination, p. 188.
55 Ibid.
56 *OSI*, (fn. 13), p. 8.
57 Ibid.
58 *Herrnkind,* (fn. 36), p. 37.
59 *Open Society Foundations*, Reducing Ethnic Profiling in the EU, 2012, p. 20.

When looking for illegal immigrants during **immigration control practices**, certain individuals are targeted. Physical appearance factors, such as skin colour, are often used in this context.[60] Police and/or immigration or customs officials in airports and train stations single out persons for extra attention. Because of the government's desire to maintain secrecy about such controls, it is hard to gather evidence here.[61]

Raids are often conducted as preventive measures and involve identity checks and searches of homes.[62] They are not directed against one person but rather affect a community or neighbourhood as a whole.[63] As the Open Society Institute (OSI), today Open Society Foundations, reports, Roma were especially targeted in many of the European countries where they lived.[64]

II. The existing legal framework

There is no fundamental right or principle, which expressly deals with the concept of racial profiling as such. It is not a legal term. However, there are certain human rights standards raising concerns about the concept. The following legal framework cannot address all forms of racial profiling. The focus will lie instead on racial profiling appearing in the form of data mining and stop and search policies. Existing provisions that restrict or even prohibit these forms of racial profiling will be explained. Three bodies of laws are essential when it comes to the issue of racial profiling in those forms: anti-discrimination law, the regulation of data protection and the regulation of stop and search powers.

1. Antidiscrimination Law

In all cases of racial profiling differential treatment is involved, which completely or partially relies on racial or ethnic criteria. Therefore, anti-discrimination norms are of high importance in all cases of racial profiling.

a) Universal International Law

The Human Rights Committee (HRC) holds the view that the right to non-discrimination and the right to equality before the law as well as the right to equal protection of the law without any discrimination are basic principles relating to the protection of human rights.[65] According to Arts. 1 and 2 of the Universal Declaration of Human

60 Ibid.
61 *ENAR/OSI*, (fn. 33), p. 9.
62 *Rostas*, Checks and Police Raids in: OSI (ed.), Ethnic Profiling in the European Union, 2005, p. 28.
63 *OSI*, (fn. 13), p. 43.
64 *Rostas*, (fn. 62), p. 27.
65 *HRC*, General Comment No. 18, HRI/GEN/1/Rev. 9 (Vol. I), para. 1.

Rights (UDHR),[66] which was the first international human rights catalogue, everyone is equal in dignity and rights and discrimination on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status is prohibited. The UDHR is, as a United Nations General Assembly Resolution, generally not binding on member states, but some of its principles have acquired legal status over the years.[67]

However, international treaty law also provides non-discrimination clauses. International treaties are binding on states and their public authorities, which include law enforcement authorities.[68] A general prohibition of discrimination can be found in Art. 26 of the International Covenant on Civil and Political Rights (ICCPR), which is a freestanding non-discrimination clause.[69] According to that provision, all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. Furthermore, any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status shall be prohibited. The ICCPR additionally contains an accessory non-discrimination clause in Art. 2. According to that provision, the rights recognised in the ICCPR shall be respected and ensured without distinction on the same grounds listed in Art. 26. A similar accessory non-discrimination clause can be found in Art. 2 para. 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Another reference to discrimination is made in Art. 4 ICCPR. Generally, this article allows state parties to derogate from obligations under the Covenant in times of public emergency. It further provides that the derogation should not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin. The HRC concludes that this provision determines that there are *'dimensions of the right to non-discrimination that cannot be derogated from in any circumstances'*.[70]

Besides the ICCPR and ICESCR, there are some issue-specific conventions prohibiting discrimination on one of the particular grounds listed in Art. 2 of the Covenants.[71] The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is one of these specific conventions and aims to eliminate racial discrimination. In Art. 1 para. 1 ICERD, a definition of racial discrimination can be found. According to that provision *'"racial discrimination" shall mean 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'*.[72]

66 UNGA Res. 217A (III) *Universal Declaration of Human Rights* of 10/12/1948, UN Doc. A/RES/3/217A.
67 *Charlesworth*, (fn. 43), para. 13.
68 *Henrard*, (fn. 43), para. 43.
69 Ibid., para. 7.
70 *HRC*, General Comment No. 29, UN Doc. CCPR/C/21/Rev. 1/Add. 11, para. 8.
71 *Henrard*, (fn. 43), para. 8.
72 Art. 1 para. 1 ICERD.

Additionally, Art. 2 para. 1 ICERD provides that racial discrimination in all its forms should be eliminated. The preamble of the ICERD states that *'there is no justification for racial discrimination, in theory or in practice, anywhere'*.[73] However, Art. 1 para. 4 ICERD provides that special measures aiming to promote the equality of certain racial or ethnic groups or individuals and therefore constituting differential treatment, will not be regarded as discriminatory, *'provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved'*.[74] Art. 5 of the ICERD provides that the prohibition of discrimination is guaranteed in the enjoyment of a list of rights: inter alia the right to equal treatment before tribunals and all other organs administering justice and the right to security of a person and protection by the state against violence or bodily harm.

The Committee of the ICERD clearly states that it is possible that racial profiling results in negative consequences for ethnic and religious groups, migrants, asylum-seekers and refugees and therefore in racial discrimination.[75] Accordingly, racial profiling falls under the term of racial discrimination in Art. 1 para. 1 ICERD. In 2005, the ICERD adopted a General Recommendation in which it considers *'that the risks of discrimination in the administration and functioning of the criminal justice system have increased in recent years, partly as a result of the rise in immigration and population movements, which have prompted prejudice and feelings of xenophobia or intolerance among certain sections of the population and certain law enforcement officials, and partly as a result of the security policies and anti-terrorism measures adopted by many States, which among other things have encouraged the emergence of anti-Arab or anti-Muslim feelings, or, as a reaction, anti-Semitic feelings, in a number of countries'*.[76] It further advises that *'the States parties should take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person's colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion'*.[77]

The equality principle in international law has not yet reached the status of customary international law because opinio iuris and state practice differ too much.[78] However, the prohibition of racial discrimination can be seen as a preemptory norm of international law (ius cogens), which cannot be set aside by a treaty or acquiescence.[79] Such discrimination is almost never acceptable according to the public opinion.[80] Even the International Court of Justice stated that obligations erga omnes de-

73 Preamble ICERD.
74 Art. 1 para. 4 ICERD.
75 *ICERD*, Concluding Observations: Canada, UN Doc. CERD C/61/CO/3, para. 338.
76 *ICERD*, General Recommendation No. 31, preamble.
77 Ibid., para. 20.
78 *Henrard*, (fn. 43), para. 83.
79 *Scheinin*, (fn. 14), para. 41.
80 *Henrard*, (fn. 43), para. 84.

rive *'from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'*.[81]

Next to these binding non-discrimination concepts extending to the use of racial profiling, there are certain soft law standards dealing with the concept of racial profiling. According to the code of conduct for law enforcement officials, *'law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons'*.[82] In the commentary, human rights mean those protected by national and international law, inter alia the UDHR, ICCPR and the ICERD.[83] The Program of Action adopted at the World Conference against Racism in 2000 has a provision specifically directed against the use of racial profiling: states are urged *'to design, implement and enforce effective measures to eliminate the phenomenon popularly known as "racial profiling"'*.[84]

The question of whether racial profiling falls under the explained general and specific prohibitions of discrimination in international law was discussed by the past UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Martin Scheinin*, in his 2007 report. He argues that profiling as such is *'compatible with the principle of non-discrimination if the profiling is supported by objective and reasonable grounds'*.[85] He distinguishes between profiling involving distinctions according to race and profiling involving distinctions according to national or ethnic origin and religion. Whereas profiling involving race can never be justified, profiling involving national or ethnic origin and religion can be justified. He clarifies that terrorist profiling that involves *'distinctions to a persons presumed "race"'*[86] cannot be supported by objective and reasonable grounds and is therefore not compatible with the principle of non-discrimination. This is based on the argument that there are no different human races and distinctions according to presumed races would consequently be *'unfounded stereotyping'*.[87] As a requirement for justification of profiling involving ethnic or national origin or religion, *Scheinin* argues that the differential treatment must pursue a legitimate aim and there has to be a reasonable relationship of proportionality between the treatment and the aim pursued.[88] To examine proportionality, suitability and effectivity and possible negative effects that could occur need to be considered.[89] In the context of counterterrorism, he regards the prevention of terrorist attacks as a legitimate aim for profiling tech-

81 ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, I.C.J. Reports 1970 p. 3, 33-34.
82 *UNGA*, Res. 34/169 Code of Conduct for Law Enforcement Officials, UN Doc. A/RES/34/169, Art. 2.
83 Ibid., Commentary lit. a to Art. 2.
84 *United Nations*, Durban Declaration and Plan of Action, Adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Violence, 2001, para. 72.
85 S*cheinin*, (fn. 14), para. 43.
86 Ibid., para. 44.
87 Ibid.
88 Ibid., para. 45.
89 Ibid., para. 47.

niques, which are based on ethnicity, national origin or religion.[90] To be suitable and effective *'a profile would need to be narrow enough to exclude persons who do not present a terrorist threat and at the same time broad enough to include those who do'*.[91] However, *Scheinin* concludes that *'terrorist profiles based on characteristics such as ethnicity, national origin and religion are regularly inaccurate and both over- and under-inclusive'*.[92] They are over-inclusive, because ethnicity, national origin and religion are not generally linkable to terrorist activities and under-inclusive because terrorists are using other ways to avoid the stereotype, such as female suicide bombers.[93] Terrorist profiles create, according to *Scheinin*, negative effects because they create feelings of intimidation and humiliating and mistrust in the police.[94] To sum up, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism regards racial profiling as disproportionate and therefore as not justifiable under international law.

b) Regional International Law

A provision prohibiting discrimination in general can be found in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Art. 14 ECHR provides that the enjoyment of the rights and freedoms set forth in the ECHR *'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'*.[95] In contrast to the freestanding non-discrimination clause in Art. 26 ICCPR, Art. 14 ECHR is restricted to the rights enshrined in the Convention. Art. 14 ECHR is therefore purely accessory and its function within the Convention subsidiary.[96] The European Court of Human Rights (ECtHR) has clarified that not every difference in treatment is prohibited. Rather *'the principle of equality of treatment is violated if the distinction has no objective and reasonable justification'*.[97]

In 2005, the protection against discrimination was expanded by Protocol No. 12 to the ECHR. According to Art. 1 para. 1 of Protocol No. 12, discrimination on any ground in the open list of grounds in Art. 14 ECHR is generally prohibited in respect of any right set forth by law. In contrast to Art. 14 ECHR, Protocol No. 12 is not restricted to the rights set forth by the Convention and is therefore broader in scope. It is a freestanding non-discrimination provision. Art. 1 para. 2 supplements the general prohibition of discrimination stating that *'no one shall be discriminated against*

90 Ibid., para. 46.
91 Ibid., para. 48.
92 Ibid.
93 Ibid., paras 50-52.
94 Ibid., paras 56, 58.
95 Art. 14 ECHR.
96 ECtHR, App. Nos 55762/00 and 55974/00, *Timishev v. Russia* [2nd section], 13/12/2005 (final on 13/03/2006), para. 53.
97 ECtHR, App. No. 1474/62 at al, *Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* [Court Plenary], 14/07/1968, para. 10.

by any public authority on any ground such as those mentioned in paragraph 1'.[98] As of 2017, the Protocol has been ratified by 20 states while 18 others have signed but not yet ratified it.[99] If the states would sign the Protocol, these rights would also be subject to the prohibition of discrimination and therefore justiciable to a greater extent than before.[100] As already mentioned in the context of international law, racial profiling constitutes prohibited discrimination and therefore falls under Art. 14 ECHR and Protocol No. 12 to the ECHR.

As is the case with universal law, there are certain regional soft law standards that need to be considered. The European Code of Police Ethics of the Council of Europe (CoE) states that *'the police shall carry out their tasks in a fair manner, guided, in particular, by the principle of impartiality and non-discrimination'*.[101] Additionally, the ECRI argues in its Recommendation No. 10 on combating racism while fighting terrorism that governments should ensure that no discrimination follows from legislation and regulations and their implementation, inter alia checks carried out by law-enforcement officials.[102]

c) EU Law

The Treaty Establishing the European Community included certain discrimination clauses but they originally had an economic focus.[103] The Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts broadened the anti-discrimination system of law and moved away from the solely economic dimension.[104] Art. 13 of the EC Treaty opened the fight against discrimination and prohibited, inter alia, discrimination based on racial or ethnic origin and religion. On the basis of Art. 13 of the EC Treaty, two equality Directives were adopted complementing the EU's system of anti-discrimination law: the Council Directive No. 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive) and the Council Directive No. 2000/78/EC of 27 November 2000 prohibiting discrimination in employment and occupation on various grounds, including religion or belief (Employment Equality Directive). Both Directives apply to the public and private sector.[105]

However, it is questionable whether racial profiling falls within the scope of the Racial Equality Directive. According to Art. 3 para. 1 of the Racial Equality Directive,

98 Art. 1 para. 2 Protocol No. 12 to the ECHR.
99 *CoE*, Chart of Signatures of Treaty 177, http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/177/signatures?p_auth=0Kq9rtcm (30/09/2017).
100 Ibid.
101 *Committee of Ministers*, Recommendation Rec. (2001)10 on the European Code of Police Ethics, 19/09/2001, Appendix, Explanatory Memorandum, para. 40.
102 *ECRI*, General Policy Recommendation No. 8 on Combating Racism while Fighting Terrorism, 17/03/2004, p. 5.
103 *Henrard*, (fn. 43), para. 15.
104 Ibid., para. 18.
105 Art. 3 para. 1 of the Racial Equality Directive and Employment Equality Directive.

the Directive shall apply *'within the limits of the powers conferred upon the Community'* in relation to eight listed areas, inter alia, employment and access to goods and services. Acts by national law enforcement authorities are not covered. The wording of Art. 3 of the Directive therefore limits the scope and excludes racial profiling by law enforcement authorities. The European Network Against Racism (ENAR) regards the restrictive scope of the EU Equality Directives excluding law enforcement profiling as a dramatic deficiency, which should be fixed immediately.[106] The Network highlights that modes of cooperation among law enforcement agencies in the EU, such as the European Arrest Warrant or the Visa Information System, are rapidly developing, but do not fall within the EU protection against discrimination.[107] The scope of EU action and EU protection against discrimination should go hand in hand.

Finally, a closer inspection of EU human rights law is required. According to Art. 6 para. 1 TEU, the Charter of Fundamental Rights (European Charter) and according to Art. 6 para. 3 TEU, the ECHR and common constitutional principles form EU human rights law. Art. 53 of the European Charter determines the relationship between the Charter and other bodies of human rights law: other bodies of law are cumulatively applicable. The European Charter has its own chapter on equality. Art. 21 para. 1 of the European Charter provides that *'any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited'*.[108] In Art. 1 para. 2, discrimination on grounds of nationality *'within the scope of application of the treaties'*[109] is also prohibited. The same applies here as for universal and regional international law: racial profiling constitutes prohibited discrimination under Art. 21 of the European Charter.

According to Art. 51 para. 1, the Charter is binding on EU institutions and on the Member States but only when they are implementing EU law. The scope of application for an implementation of EU Law has been established, developed and extensively interpreted by the European Court of Justice (CJEU).[110] National authorities are however implementing EU law whenever an EU national, whose presence in the respective Member State is based on a right derived from EU law, such as Art. 21 TFEU or Art. 45 TFEU (freedom of movement for workers), is targeted.

Nevertheless, the EU Member States are bound by Art. 7 para. 2 of the Regulation (EU No. 2016/399) of the European Parliament and of the Council establishing an Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). This provision obliges border guards directly and prohibits discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age

106 Ibid.
107 Ibid., p. 8.
108 Art. 21 para. 1 European Charter.
109 Art. 21 para. 2 European Charter.
110 CJEU, case C-5/88, *Wachauf*, ECLI:EU:C:1989:321; CJEU, case C-260/89, *ERT*, ECLI:EU:C:1991:254; CJEU, case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105.

or sexual orientation. Secondary EU law therefore provides a non-discrimination clause for law enforcement, which is restricted to border control.

d) National Law

The established body of international human rights law focused on anti-discrimination is legally binding in all EU Member States, because they are state parties to the ICCPR, the ICESCR and the ICERD. Additionally, all EU Member States have joined the ECHR, meaning that all individuals within their jurisdiction are protected by the ECHR. The ECHR is directly applicable in Germany due to its incorporation in national law.[111] Moreover, the Bundesverfassungsgericht (BVerfG), the German Constitutional Court, uses the case law of the ECHR when interpreting the fundamental rights provisions of the Basic Laws in order to keep them in conformity with the ECHR. The Convention has also been transformed into national law by the United Kingdom.[112] If the EU accedes to the ECHR, which it is obliged to do according to Art. 6 para. 2 TEU, it will be possible for individuals to hold the EU directly accountable before the ECtHR.

Apart from that, national constitutions include provisions guaranteeing the right to non-discrimination. The following will take a closer look at German national law and national law in the United Kingdom.

aa) Germany

In Germany, Art. 3 para. 1 of the Grundgesetz (GG), the German constitution, contains a general equality clause. According to this provision, all human beings are equal before the law. Art. 3 para. 3 of the GG specifies the more general equality clause of Art. 3 para. 1 GG. This provision states that no person shall be discriminated against or favoured on the grounds of their gender, birth, race, language, national or social origin, faith, religion or political opinion. Art. 3 para. 3 GG is violated if there is special treatment based on the grounds, which are stated in this provision. Therefore, a causal link between one of the listed grounds and the discrimination or preference is required.[113] Nevertheless, unequal treatment can be justified.[114] Justification for a violation of Art. 3 para. 1 GG and Art. 3 para. 3 GG follows different standards. The reason for this distinction lies in the intensity of unequal treatment. Unequal treatment is considered more intense if it involves one of the grounds listed in Art. 3 para. 3 GG. Thus unequal treatment falling under Art. 3 para. 1 GG can be justified by an objective reason.[115] Art. 3 para 3. GG imposes stricter standards. The justification needs to be

111 Gesetz über die Konvention der Menschenrechte und Grundfreiheiten, 07/08/1952, BGBl. II, 685.
112 Human Rights Act 1998, entered into force on 02/10/2000.
113 BVerfGE 75, p. 70.
114 BVerfGE 88, p. 96.
115 BVerfGE 1, p. 52.

in accordance with the limits inherent in the GG.[116] Unequal treatment is only permissible, if it is necessary to protect another constitutional value. A strict proportionality assessment is required which includes a legitimate aim, suitability and necessity of the unequal treatment and a trade-off between the applied means and the aim pursued.[117]

bb) United Kingdom

The principle of equality is one of the fundamental principles of the British constitution.[118] According to the introductory text of the Human Rights Act 1998, primary and subordinate legislation must be interpreted in a way that is consistent with the rights of the ECHR. The principle of equality is therefore further expanded by and focused on Art. 14 of the ECHR. Finally, there are Acts of Parliament dealing with particular aspects of discrimination. In the case of racial profiling, the Race Relations Act 1976 is of relevance. It provides special protection against racial discrimination. Since its amendment in 2000 it also applies to public authorities and therefore law enforcement agencies.[119]

e) Summary: standard of protection against discrimination

Protection against discrimination in Europe can be found within universal international law, regional international law, EU law and national law itself. The practice of racial profiling involves a differential treatment on the grounds of race or ethnicity and thus constitutes discrimination. Pursuant to the closed model of justification direct discrimination is strictly prohibited and indirect discrimination is only prohibited if it is unjustified. When it comes to the justification, the different treatment needs to pursue a legitimate aim and there must be a reasonable relationship between the aim pursued and the means applied including that the means are suitable and effective. The prevention of further terrorist attacks can undoubtedly be a legitimate aim. The decisive question is therefore whether racial profiling is a proportionate practice to achieve this aim. According to the analysis of *Scheinin*, racial profiling is not suitable if one is dealing with predictive terrorist profiles.[120] The profiles are in that case over- and under-inclusive, because on the one hand they include persons with no link to terrorism at all and on the other hand miss potential terrorists. A profile, which is at the same time too broad and too narrow, cannot be suitable and effective. The opinion changes if one is dealing with descriptive profiles. These kinds of profiles are regarded as suitable and effective. The FRA has affirmed that the reliance on criteria like ethnicity, national origin and religion is not prohibited, if an investigation of a crime committed produces evidence that the suspect fulfills some of the criteria, or if there

116 *Osterloh/Nussberger*, in: Sachs (ed.), Grundgesetz Kommentar, Art. 3, para. 254.
117 Ibid.
118 *Dicey*, Introduction to the Study of the Law of the Constitution, 10[ed.], 1960, p. 202.
119 Race Relations (Amendment) Act 2000, 19 B.
120 See above, (fn. 14), pp. 10-11.

is information that an individual fulfilling the criteria is preparing to commit a crime.[121]

All in all, anti-discrimination law in Europe outlaws racial profiling. A justification is only possible if it is a case involving descriptive profiles.

2. Regulation of data protection

Racial profiling, especially in the form of data mining, can conflict with the right to the protection of personal data, because it provides a basis for personal data to be collected, analysed and stored.

a) International Law

On the universal international level the right to privacy is guaranteed in Art. 17 ICCPR. Art. 17 ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his or her privacy and that everyone has the right to the protection of the law against such interference. This obligates state parties to enact legislation that limits the collection and processing of personal data.

On the regional level, the 1981 Council of Europe Convention for the Protection of Individuals with regard to the processing of personal data to which all EU Member States are parties, provides the legal framework for the automatic processing of personal data. According to its Art. 3 para. 1, it applies to the private and public sector, which includes law enforcement agencies. It must be noted that the scope of the Convention is limited to the automatic processing of data. Automatic processing means the '*storage of data, carrying out of logical and/or arithmetical operations on those data, their alteration, erasure, retrieval or dissemination*',[122] if carried out in whole or in part by automated means. The mere collection of data within the processing process does not fit within that definition.[123] The scope is therefore restricted to cases where the collection itself is accompanied by storage. The basic requirements for processing are laid down in Art. 5 of the Convention: '*Personal data undergoing automatic processing shall be: obtained and processed fairly and lawfully; stored for specified and legitimate purposes and not used in a way incompatible with those purposes; adequate, relevant and not excessive in relation to the purposes for which they are stored; accurate and, where necessary, kept up to date; preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored*'.[124] The person concerned should additionally have the right to access and rectify his or her data.[125] The Convention establishes a special category for '*personal data*

121 *FRA*, Opinion on the Proposal for a Council Framework Decision on the use of Passenger Name Record data for law enforcement purposes, 2008, para. 41.
122 Art. 2 lit. c of 1981 CoE Convention.
123 *De Schutter/Ringelheim*, (fn. 16), p. 373.
124 Art. 5 lit. a – e of 1981 CoE Convention.
125 Art. 8 lit. c of 1981 CoE Convention.

revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life'.[126] They *'may not be processed automatically unless domestic law provides appropriate safeguards'*.[127] This provision takes the higher risk of discrimination into account, which goes along with the processing of data relating to racial or ethnic origin or religion.[128] According to Art. 9, derogations are allowed as long as they are provided for by the law and constitute a necessary measure in a democratic society in the interest of *'protecting State security, public safety, the monetary interests of the State or the suppression of criminal offences'*[129] or *'protecting the data subject or the rights and freedoms of others'*.[130]

The processing of personal data in the police sector was specifically addressed in the 1987 Recommendation of the Council of Ministers regulating the use of personal data in the police sector. According to one of its basic principles *'the collection of data on individuals solely on the basis that they have a particular racial origin, particular religious convictions, sexual behaviour or political opinions or belong to particular movements or organisations which are not proscribed by law should be prohibited'*.[131] *'The collection of data concerning these factors may only be carried out if absolutely necessary for the purposes of a particular inquiry'*.[132] The fact that the Recommendation is using the term *'particular inquiry'* leads to the assumption that descriptive profiling, which is focused on a particular crime that has been committed, is regarded as legitimate. Predictive profiles contain generalisations about crimes not yet committed and are therefore not subject to a particular inquiry, and as such the Recommendation doesn't permit them.

Aside from the 1981 Convention, Art. 8 of the ECHR, which regulates the right to respect for private and family life, applies to the processing of personal data.[133] Under Art. 8 ECHR the processing and storage of personal data by a public authority is justified, if it is *'in accordance with the law'*[134] and *'necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'*.[135]

Consequently the aforementioned Recommendation is not legally binding. However, the processing of sensitive data in the form of predictive profiling violates Art. 8 ECHR in conjunction with Art. 14 ECHR.

126 Art. 6 of 1981 CoE Convention.
127 Ibid.
128 *De Schutter/Ringelheim*, (fn. 16), p. 374.
129 Art. 9 para. 2 of 1981 CoE Convention.
130 Ibid.
131 Appendix to the *Committee of Ministers,* Recommendation Rec. (87) 15 regulating the use of personal data in the police sector, 17/09/1987, Principle 2.4 of the Basic Principles.
132 Ibid.
133 ECtHR, App. No. 9248/81, *Leander v Sweden* [GC], 26/03/1987, para. 48; ECtHR, App. No. 28341/95, *Rotaru v Romania* [GC], 04/05/2000, para. 43.
134 Art. 8 para. 2 ECHR.
135 Ibid.

b) EU Law

The European Charter includes a right to data protection (Art. 8 European Charter). According to Art. 8 para. 1 of the Charter, everyone enjoys the right to the protection of personal data. *'Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified'*.[136]

The right to personal data protection is further regulated in the Treaties. According to Art. 16 para. 1 TFEU, the European Parliament and the Council shall lay down the rules for the processing and the free movement of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law. At the secondary EU law level, the Directive No. 95/46/EC formed the core legislation regarding personal data protection for a long time. It had a broader scope than the 1981 Council of Europe Convention, because it did not require that the processing take place by automatic means and that the data be stored after the collection.[137] However, the Directive did not apply to the processing concerning public security, defence, state security and activities of the state in areas of criminal law and therefore excluded data mining by law enforcement authorities.[138]

In November 2008, a Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters was adopted. The Framework Decision applies to the *'processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system'*[139] for the purpose '*of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties'*.[140] According to Art. 6 of the Framework Decision, the processing of personal data revealing, inter alia, racial or ethnic origin and religious beliefs is prohibited, unless it is strictly necessary and national law provides adequate safeguards. The Framework Decision has a broader scope of application than the 1981 Council of Europe Convention, but the standard of protection is similar. Nevertheless, the 1987 Recommendation of the Committee of Ministers goes further in the protection of sensitive data, because it requires that the collection of such data is necessary for a special inquiry,[141] whereas the Framework Decision allows the collection in general under adequate legal safeguards.

However, the European Commission put forward a reform of the EU data protection, which led to the adoption of Regulation No. 2016/679 of the European Parlia-

136 Art. 8 para. 2 European Charter.
137 Art. 2 lit. b of Directive No. 95/46 EC of the European Parliament and the Council of 24/10/1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
138 Art. 3 para. 2 and preamble recital 13 of Directive No. 95/46/EC.
139 Art. 1 para. 3 of Council Framework Decision 2008/977/JHA of 27/11/2008.
140 Art. 1 para. 2 of Council Framework Decision 2008/977/JHA.
141 *Committee of Ministers*, (fn. 131), p. 17.

ment 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 No. 95/46/EC (General Data Protection Regulation) and to the adoption of Directive No. 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. The General Data Protection Regulation entered into force on 24 May 2016 and will apply from 25 May 2018, whereas the Directive entered into force on 5 May 2016 and needs to be transposed by the Member States by 6 May 2018. Both, the Regulation and the Directive apply to the processing of personal data.[142] According to the definitions laid down in both texts '*"processing" means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction*'.[143] According to Art. 2 para. 2 lit. d and Recital 19 of the preamble of the General Data Protection Regulation, the Regulation does not apply '*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, including the safeguarding against and the prevention of threats to public security and the free movement of such data*'.[144] The more special Directive No. 2016/680 applies, which is tailored to the processing of data by law enforcement authorities. Art. 10 of Directive No. 2016/680 provides that the processing of special categories of data, inter alia, data revealing racial or ethnic origin or religious belief is prohibited, unless it is strictly necessary and accompanied with appropriate safeguards and only where it is authorised by EU or national law or only to protect the vital interest of the targeted person or of another natural person or only where the processing relates to data which were made manifestly public by the targeted person. Art. 11 of the Directive provides specific rules for profiling. In the Directive, profiling is defined as '*any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements*'.[145] Art. 11 para. 3 specifically obliges the prohibition of racial profiling, in accordance with EU law.

142 Art. 2 para. 1 of General Data Protection Regulation and Art. 2 para. 1 Directive No. 2016/680.
143 Art. 4 para. 2 of General Data Protection Regulation and Art. 3 para. 2 Directive No. 2016/680.
144 Art. 2 para. 2 lit. d of General Data Protection Regulation.
145 Art. 3 para. 4 of Directive No. 2016/680.

This new framework, which outlaws racial profiling in the form of data mining, is an improvement of data protection in the EU. We shall see, whether the Member States comply with their obligations under Directive No. 2016/680 and adequately transpose the prohibition of racial profiling in the form of data mining into their national law.

c) National Law

International law and especially EU law are important, because some EU Member States have no constitutional right to privacy. In the United Kingdom for example, a right to privacy was non-existent for a long time.[146] After the Human Rights Act 1998, which integrated the ECHR, Art. 8 ECHR provides personal data protection in the United Kingdom.

In Germany, the right to privacy can be extracted from Art. 2 para. 1 in conjunction with Art. 1 para. 1 GG. The BVerfG held that the right guarantees that everyone can decide for him- or herself when and within what limits personal information will be open to the public.[147] Moreover, the right protects against the collection, storage, use and transfer of personal data.[148] Restrictions on the right are generally possible, but only in the case of predominant general interests, subject to the principle of proportionality.[149]

d) Summary: standard of data protection

There are international standards eliminating racial profiling in the context of data protection. Moreover, an improvement of the protection can be observed in Union Law. The current legal framework, which is formed by Directive No. 95/45 EC and Framework Decision 2008 will be replaced by Regulation No. 2016/679 and Directive No. 2016/680 providing a rule, which specifically outlaws racial profiling. However, much depends on the implementation of Directive No. 2016/680 and the response of the Member States.

3. Regulation of stop and search powers

Identity checks and stop and search arrests constitute law enforcement mechanisms. As a general police action, they require a legal basis, which is provided by national law. In many EU Member States police officers enjoy a large discretion within the scope of that legal basis.[150] This broad discretion paves the way for racial profiling.

146 *Zweigert/Kötz*, Einführung in die Rechtsvergleichung, 3rd ed., 1996, p. 705.
147 BVerfG, Beschluss vom 04/04/2016, 1-BvR 518/02, para. 69.
148 Ibid.
149 Ibid., para. 81.
150 *De Schutter/Ringelheim*, (fn. 16), p. 371.

a) International Law

In universal international law, a provision regulating the power of the police to check and arrest does not exist. However, the fundamental rights of those affected by identity checks and stop and search arrests are regulated. When it comes to such measures, the rights to freedom of movement (Art. 12 ICCPR), the right to personal liberty (Art. 9 ICCPR) and also the right to privacy (Art. 17 ICCPR) are at stake.

The power to arrest individuals is regulated by regional international law. According to Art. 5 para. 1 ECHR, no one can be deprived of his liberty except in an exhaustive number of cases and in accordance with a procedure prescribed by law. However, Art. 5 para. 1 ECHR is focused on repressive measures, rather than preventive measures. Identity checks and stop and search measures generally fall under the notion of preventive measures, because they give the authorities the possibility to check the identity of an unknown person who could be a potential criminal, but has not yet committed any crime. In some cases, stop and searches can be repressive, especially when the identity check identifies a person who already committed a criminal offence, or a criminal against whom an arrest warrant has been issued. Para. 47 of the European Code of Police Ethics specifies that a standard of reasonable suspicion prior to any action should be introduced to ensure that arbitrariness is avoided and the national law itself is foreseeable in its application. The ECRI also encouraged the introduction of a reasonable suspicion standard.[151]

The case law of the ECtHR shows that Art. 8 (right to respect for private life), 14 ECHR (prohibition of discrimination) and Art. 2 of Protocol No. 4 to the ECHR (freedom of movement) are binding during stop and search procedures.[152]

b) EU Law

The fundamental rights catalogue of the EU provides a right to liberty and security (Art. 6 European Charter), the protection of personal data (Art. 8 European Charter) and the freedom of movement (Art. 45 European Charter). These fundamental rights and of course the prohibition of discrimination (Art. 21 European Charter) need to be regarded during stop and search procedures by national authorities if these occur in the implementation of EU law (Art. 51 European Charter). This is like the already mentioned case of whenever an EU national is targeted in a foreign member state.

c) National Law

National legislation tends to grant the police a broad discretion over whom to target and therefore has no strict limitations on the use of characteristics such as race, eth-

151 *ECRI,* (fn. 30), para. 3.

152 ECtHR, App. No. 4158/05, *Gillan and Quinton v The United Kingdom,* 12/01/2010, para. 87; ECtHR, App. No. 30194/09, *Shimovolos v Russia*, 21/06/2011, para. 64-75; ECtHR, App. No. 28940/95, *Foka v Turkey* [4th section], 24/06/2008.

nicity or religion.[153] According to *Moekli,* the reason for this wide discretion is the conferral of special powers and a lack of judicial oversight.[154] Precisely in the context of counterterrorism, special powers are often added to those already available and judicial review is explicitly excluded in some countries. According to the EU Network of Independent Experts in Fundamental Rights this leads to a sense of impunity within law enforcement and a sense of powerlessness and resentment among the affected minorities.[155] In the following, the legal framework in Germany and the United Kingdom will be illustrated:

In Germany, the exercise of state power and the fulfillment of government duties are, according to Art. 30 GG, a matter of the constituent states, insofar as the GG does not confer the requisite powers on the federation. In the area of border protection, the federal police are responsible (§ 2 para. 1 BPolG). According to § 22 para. 1 lit. a of the BPolG, the federal police can stop, question, check the identity of and search anybody, if they assume that he or she entered the country without authorisation. The assumption is based on the police officer's perception of the situation or his or her border control experience. Identity checks under § 22 para. 1 lit. a BPolG are often referred to as dragnet controls meaning the control of individuals without suspicion or indications of danger.[156]

In the United Kingdom, the Police and Criminal Evidence Act 1984 requires a reasonable suspicion standard in preventive stop and search procedures.[157] In contrast, stops conducted under the Criminal Justice and Public Order Act 1994 do not require a reasonable suspicion standard.[158]

d) Summary: standard of protection in stop and search procedures

The legal framework of stop and search procedures is provided for by the rights of freedom of movement, the rights to personal liberty and private life and, additionally, anti-discrimination law. Stop and search procedures are designed by national law. However, these laws need to contain a standard of reasonable suspicion prior to any law enforcement action as a minimum requirement. As already mentioned, national laws do not in all cases require such a standard of reasonable suspicion. In Art. 22 para. 1 lit. a BPolG for example, the perception of the situation or border control experience suffices.

153 *Moekli*, (fn. 26), p. 2.
154 Ibid., p. 4.
155 EU Network of Independent Experts in Fundamental Rights, p. 8.
156 *Graf*, Verdachts- und ereignisunabhängige Personenkontrollen, Polizeirechtliche und verfassungsrechtliche Aspekte der Schleierfahndung, 2006, p. 24.
157 See inter alia Part 1 para. 3, Chapter 60, Police and Criminal Evidence Act 1984.
158 Section 60, Criminal Justice and Public Order Act 1994.

III. The existing international and supranational case law

The main focus of the landmark decisions regarding racial profiling in international law lies on the question of whether certain police practices constitute unlawful discrimination.

a) International Law

In 2009, the HRC reviewed an identity check for the purpose of immigration control by the Spanish national police.[159] In this case, Rosalind Williams Lecraft, a Spanish citizen, was approached by the national police at a train station and asked for her identity card.[160] When she asked for the reason of the identity check, the police officer answered that he was obliged to check coloured people like her, because they often turn out to be illegal immigrants.[161] Williams Lecraft claimed that Spain violated Art. 12 para. 1 ICCPR (freedom of movement) and Art. 26 ICCPR (freestanding right to non-discrimination) in conjunction with Art. 2 ICCPR (accessory right to non-discrimination). The HRC examined whether the identity check constituted racial discrimination.[162] It held that public security, crime prevention and immigration control present legitimate purposes for identity checks.[163] However, in carrying out such checks physical or ethnic characteristics cannot be used as indicators for illegal immigration and the decision to check certain people cannot be solely based on such characteristics.[164] Moreover the HRC took the view that there was no reasonable and objective criterion for the differentiation, which therefore constituted impermissible discrimination.[165]

The ECtHR also dealt with forms of racial profiling. However, the ECtHR is not as quick to regard police practices as discriminatory as the HRC in the Williams Lecraft v. Spain case or special Rapporteur *Scheinin* in his 2007 report.[166] In 2002, the ECtHR had to review a police practice including identity checks of persons who were suspected to be illegal immigrants.[167] In the case, a large group of illegal immigrants, mostly of African origin, inspired by a campaign to take collective action of other aliens without residence permits, occupied a church in Paris and were joined by several human rights organisations.[168] The police issued an order for the total evacuation of the church and set up a checkpoint at the exit and stopped and questioned all occupants of the church about whether they had documentation authorising them to stay and

159 HRC, Views adopted on 27/07/2009, Communication No. 1493/2006, *Williams Lecraft v. Spain*.
160 Ibid., para. 2.1.
161 Ibid.
162 Ibid., para. 7.2.
163 Ibid.
164 Ibid., para. 7.2, 7.4.
165 Ibid.
166 *De Schutter/Ringelheim*, (fn. 16), p. 366.
167 ECtHR, App. No. 51346/99, *Cisse v. France* [2nd section], 09/04/2002.
168 Ibid., para. 9.

circulate in the territory.[169] White-skinned persons were immediately released, whereas dark-skinned persons were detained and brought before court.[170] The third section of the ECtHR however, which was first dealing with the case, dismissed the allegation that relied on Art. 14, taken together with Art. 5 of the ECHR to argue that the applicant, one of the aliens in the church, was discriminated against on grounds of skin-colour.[171] It held that the control system at the checkpoint had the purpose of ascertaining the identity of suspected illegal immigrants and that under such circumstances it could not be concluded that the applicant was subject to discrimination based on race or skin colour.[172] The analysis of the ECtHR was rather focused on the deprivation of liberty of the individual applicant in this decision and lacked an overall assessment of the control practice regarding all occupants of the church, which took into account that only dark-skinned occupants were actually checked for their identity.[173] Again in 2002, the ECtHR had to decide on the arrest of a number of Roma families from Slovakia whose request for asylum had been dismissed.[174] In its decision in March 2001, the ECtHR regarded the allegation of discrimination as inadmissible, because the families had not been selected on the basis of their national or ethnic origin, but on the basis of their belonging to the same immigration stream.[175]

The reluctance of the ECtHR to accept the presence of racial discrimination seems to have vanished in 2005. In the case of Timishev v. Russia, the Court dealt with an entry refusal to the Kabardino-Balkaria Republic of the Russian Federation by Russian police because of the Chechen ethnic origin of the applicant, Mr. Timishev.[176] Mr. Timishev was travelling by car to Kabardino-Balkaria and when he came to the border, police officers refused him entry based on an oral instruction from the Ministry of the Interior not to let people of Chechen ethnic origin pass.[177] The ECtHR held that refusing entry to Mr. Timishev, and the fact that no other ethnic groups were refused entry, presented a *'clear inequality of treatment in the enjoyment of the right to liberty of movement on account of one's ethnic origin'*,[178] which constitutes discrimination. Moreover *'Discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination'*.[179] Racial Discrimination as a particular vicious kind of discrimination requires *'special vigilance and vigorous reaction'*[180] from the authorities. The ECtHR's assessment goes even further and includes that a *'difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin'*[181] can never

169 Ibid., para. 12, 13.
170 Ibid., para. 13.
171 ECtHR, App. No. 51346/99, *Cisse v. France* [3rd section], 16/01/2001.
172 Ibid.
173 *De Schutter/Ringelheim*, (fn. 16), p. 367.
174 ECtHR, App. No. 51564/99, *Čonka v. Belgium* [3rd section], 05/02/2002.
175 ECtHR, App. No. 51564/99, *Čonka et ligue des droits de l'homme c. Belgique* [3d section], 13/03/2001, para. 9.
176 ECtHR, App. Nos. 55762/00 and 55974/00, *Timishev v. Russia* [2nd section], 13/12/2005.
177 Ibid., paras 12, 13.
178 Ibid., para. 54.
179 Ibid., para. 56.
180 Ibid.
181 Ibid., para. 58.

be objectively justified in a democratic society. This means that where a law-enforcement decision was based on ethnicity among other factors and ethnicity had a decisive impact in the decision-making, it directly results in discriminatory racial profiling.

In summary it can be concluded that, with the exception of Mr. Timishev's case, it was generally not easy for an applicant to prove a case of racial discrimination because of the reluctance of the ECtHR. However, the Court has meanwhile shifted the burden of proof in discrimination cases to the state parties. It has held that '*statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce*'.[182] If the applicant can rely on such statistics, the burden of proof shifts to the state, which then needs to disprove discrimination.[183]

b) EU Law

In contrast to other international judicial bodies, the CJEU has not yet assessed the compliance of racial profiling with fundamental and human rights. However, in the Melki and Abdeli Case in 2010, it gave an impression on what national regulations on stop and search procedures should look like.[184] The CJEU held that Art. 67 para. 2 TFEU and Art. 20 and 21 lit. a of Regulation No. 562/2006,[185] which regulate the abolition of border control but allow identity checks insofar as they are not equivalent to the exercise of border checks, prohibit any national legislation granting a power to police authorities to carry out suspicion less identity checks which do not depend upon the behaviour of the targeted person or on specific circumstances giving rise to a risk of breach of the public order.[186] This means that national law may not authorise racial profiling with regard to identity checks.

IV. Recent situation in EU Member States

According to the opinion of the OSI in 2005, racial profiling is '*widespread, but underresearched in Europe*'.[187] This view has not changed until now. The FRA held in its recent annual report that racial profiling still persists in the EU Member States.[188] With a particular focus on Germany, the situation in the Member States will be presented and examined.

182 ECtHR, App. No. 57325/00, *D.H. and others v. Czech Republic* [GC], 13/11/2007, para. 188.
183 Ibid., para. 189.
184 *Cremer*, (fn. 34), p. 13.
185 No longer in force, end of validity 11/04/2016, replaced by Regulation No. 2016/399, 09/03/2016, see in this Regulation Arts 22, 23.
186 CJEU, cases C-188/10 and C-189/10, *Melki and Abdeli*, ECLI:EU:C:2010:363, para. 74, 75.
187 *Stone*, Preparing a Fresh assault on Ethnic Profiling, in: OSI (ed.), Ethnic Profiling by Police in Europe, 2005, p. 1.
188 *FRA*, Annual Report 2017, p. 88.

1. Recent developments in Germany

One of the latest German cases about racial profiling concerned an identity check by federal police officers in a train.[189] It involved two German nationals and their two children who were travelling in a regional train from Mainz to Cologne in January 2014. Three federal police officers entered the train and asked one of the adults to show his identity card on the basis of § 22 para. 1 lit. a BPolG. The person concerned claimed that the only reason for this check had been their dark skin colour and this violated Art. 3 para. 3 GG. The Higher Administrative Court held that the identity check was illegal, because the skin colour, which fell under the term race in Art. 3 para. 3 GG prohibiting discrimination on such a ground, was among the decisive factors in the selection decision.[190] The right to non-discrimination was already violated, if race or ethnicity, among other factors, was one of the decisive elements, even if it was not the sole decisive factor.[191] With this argument the Higher Administrative Court followed Timishev v. Russia in which the ECtHR held that, if ethnicity or race are among other decisive factors in law enforcement decisions, that constitutes unjustified direct discrimination.

The Higher Administrative Court also discussed the burden of proof. It concluded that the right to non-discrimination laid down in Art. 3 para. 3 GG did not require a reversal of the burden of proof.[192] The defendant authority was therefore not required to prove that none of the factors laid down in Art. 3 para. 3 GG had been in any way decisive. However, if there was a pre-selection of persons subject to identity checks, the selection decision had to be based on convincing reasons other than race.[193] If the alleged reasons were implausible, the burden of proof shifted to the defendant.[194] The latter was then required to prove that the selection decision was not based on a ground prohibited by Art. 3 para. 3 GG. The Court concluded that the defendant could not prove that race had not been a decisive factor in this case. Thus racial discrimination had taken place, which was not justifiable because it was disproportionate in light of the success rate of identity checks in identifying illegal immigrants.[195]

In the discussion about the lawfulness of identity checks on New Year's Eve 2016/2017 in Cologne, allegations of racial profiling were also voiced.[196] On New Year's Eve 2015/2016 in Cologne hundreds of women had been victims of sexual misconduct and in some cases even rape.[197] The police identified 120 suspects.[198] Most of them were of North African descent. In order to prevent similar incidents on New

189 VG Koblenz, Judgment of 23/10/2014–1 K 294/14.KO, BeckRS 2015, 43499.
190 OVG Rheinland-Pfalz, Judgment of 21/04/2016, 7 A 11108/14.
191 Ibid., para. 106.
192 Ibid., para. 109.
193 Ibid., para. 110.
194 Ibid., para. 113.
195 Ibid., para. 132.
196 Ibid.
197 *Guinan-Bank*, Nach Köln: Zwischen Willkommens- und Ablehnungskultur, (http://www.bpb.de/politik/extremismus/rechtsextremismus/242070/nach-koeln, (30/09/2017)).
198 Ibid.

Years Eve 2016/2017, the police carried out about 650 identity checks mostly of North African men.[199] There was some discussion about racial profiling during that night. Some authors[200] denied that it had occurred and highlighted that the police checked identities to avert a concrete danger for public security, whereas others[201] claimed that the identity checks constituted racial profiling.

2. Recent developments in other EU Member States

In its recent annual report, the FRA argued that racial profiling remained an issue of high importance and still persists in the EU.[202] The Agency made the Member States especially aware of the situation in France.[203] In November 2016, in France, the Court of Cassation ruled on the case of men of African or Arab origin, who claimed to have been victims of humiliating police identity checks.[204] It is important to know that none of the men had a police record. The Court of Cassation decided that in three cases the checks were a form of discriminatory racial profiling and therefore unlawful, because they were based on the physical appearance and lacked objective justification.[205] The FRA pointed out that this landmark decision of the French Court made it easier for victims to prove discrimination in the future because they only needed to show elements supporting the assumption of discrimination, whereas the law enforcement agencies needed to prove that objective elements existed to justify the treatment.[206] A witness testimony would suffice as such an element.[207]

The United Kingdom is the only Member State that is continuously collecting data on racial profiling.[208] The Police Complaints Commission provides the most recent data. It shows that black and minority ethnic groups express lower levels of trust in the use of reasonable force than the general population.[209] In 2014 the Government of the United Kingdom came up with the '[b]est use of stop and search scheme'[210] with the aim to *'achieve greater transparency, community involvement in the use of stop and search powers and to support a more intelligence-led approach'*.[211] Under the

199 Ibid.
200 *Froese*, (fn. 35), p. 294.
201 *Cremer*, (fn. 34).
202 *FRA*, (fn. 188), p. 88.
203 Ibid.
204 France, Court of Cassation, Decision No. 15-25.873, ECLI:FR:CCASS:2016:C101245, 09/11/2016.
205 Ibid.
206 *FRA*, Annual Report 2016, p. 88.
207 Ibid.
208 *FRA*, (fn. 5), p. 25; *Hayes*, A failure to regulate: Data protection and Ethnic Profiling in the Police Sector in Europe, (fn. 187), pp. 32, 34.
209 *United Kingdom Independent Police Complaints Commission*, Police Use of Force: Evidence from Complaints, Investigations and Public Perception, (https://www.ipcc.gov.uk/sites/default/files/Documents/IPCC_Use_Of_Force_Report.pdf, p. 8 (30/09/2017)).
210 *United Kingdom Government*, Best use of stop ad search scheme, (https://www.gov.uk/government/publications/best-use-of-stop-and-search-scheme (30/09/2017)).
211 Ibid., p. 2.

scheme forces are obligated to record the broader range of stop and search outcomes, stop and searches under the Criminal Justice and Public Order Act 1994, which does not require a reasonable suspicion standard, are reduced, local communities obtained the possibility to accompany police forces and a complaint policy was enforced.[212] Recently, the Home Secretary re-admitted 13 police forces, who had previously been suspended, because they failed some requirements of the scheme, to the scheme.[213] The concerned forces are now fully complying with the requirements of the scheme.

The ICERD additionally stresses that racial profiling still persists in Europe and should be resolutely combated. In its concluding observations on Greece, the ICERD is concerned that *'Roma continue to be disproportionately subjected to frequent identity checks, arbitrary arrests and harassment by the police and other law enforcement officials, combined with a lack of effective investigation, prosecution and sanctioning of law enforcement personnel for such misconduct'*.[214] It is furthermore concerned that racial profiling is still conducted in Italy[215] and Spain.[216]

V. Means to counter racial profiling

In the legal debate about how to eliminate the practice, three tools are repeated again and again: Monitoring law enforcement, shifting the burden of proof before the courts and creating a better legal framework.

Monitoring should lead to transparency of the system and accountability of agents.[217] The question on how far the monitoring of law enforcement should go cannot easily be answered. The Open Justice Initiative of the OSI argues that only monitoring the number of stop and searches would not suffice.[218] In doing so, the Initiative refers to an already established monitoring mechanism in England, which in the end did not result in a reduction of the number of stop and searches.[219] In reaction, the Open Justice Initiative recommends monitoring the deployment of the police in relation to the volume of stop and searches, monitoring what happens during each stop, to extend the monitoring into the rest of the criminal justice system and to look for sources of bias in the wider society.[220] According to the Initiative, it is of essential importance that trust be built between the police and the affected communities.[221] The

212 Ibid.
213 *United Kingdom Government*, Home Secretary readmits 13 forces to the best use of stop and search scheme, (available at: https://www.gov.uk/government/news/home-secretary-re-admits-13-forces-to-the-best-use-of-stop-and-search-scheme (30/09/2017)).
214 *ICERD*, Concluding observations on the combined twentieth to twenty-first periodic reports of Greece, 03/10/2016, para. 20 lit. c.
215 *ICERD*, Concluding observations on the nineteenth and twentieth periodic reports of Italy, 09/12/2016, paras 27-28.
216 *ICERD*, Concluding observations on the combined twentieth to twenty-first periodic reports of Spain, 21/06/2016, paras 27-28.
217 *Moekli*, Human Rights and Non Discrimination in the "War on Terror", 2008, p. 221.
218 *Stone,* (fn. 187), p. 3.
219 Ibid.
220 Ibid., p. 4.
221 Ibid., p. 3.

already mentioned '[b]est use of stop and search scheme' in the United Kingdom sets a good example in this context. The ECRI recently urged Lithuanian authorities, inter alia, to come up with a police complaint service.[222]

In lawsuits, the protection against discrimination is made difficult by the burden of proof. In anti-discrimination law the claimant needs to produce a prima-facie case of discrimination, where the respondent needs to come up with justification.[223] To strengthen the victim's position, the ECtHR shifted the burden of proof to the respondent, if the claimant can rely upon statistics.[224] National Courts like the Higher Administrative Court Koblenz came up with similar rules to facilitate the situation of the claimant.[225] A general rule allowing a shift in burden in cases where there are statistics to rely on may prove difficult in practice as Member States – with the exception of the United Kingdom – rarely collect such information.[226]

The creation of a legal framework for the elimination of racial profiling, the EU Data Protection Reform, is a step forward. The improvement of data protection in EU law includes the outlawing of profiling practices. Although data protection law outlaws the practice, the lack of an explicit prohibition has still not been remedied. The ultimate goal should therefore be to enact such a provision.

C. Conclusion

The purpose of this article has been to explore the topic of racial profiling in Europe in a legal context and to find out how well equipped European Human Rights Law is to counter it. It was made clear that racial profiling constitutes prohibited and unjustified discrimination in international, regional, EU and national law. Additionally, international and national case law show that at least direct discrimination is effectively tackled. However, EU secondary law lacks a general prohibition of the practice of racial profiling. The Racial Equality Directive does not apply to law enforcement authorities. The scope of the Directive could be broadened or new legislation could be adopted in order to close this gap in EU law, which would then round off the anti-discrimination framework in Europe.

With respect to data protection law, an improvement in EU law can already be found. The Council of Europe Recommendation of 1987, which prohibited racial profiling in the form of data mining, was not legally binding and not incorporated in EU law for a long time. Directive No. 2016/680 seems to finally absorb the Recommendation and adapt EU law accordingly. It contains a prohibition of racial profiling in the form of data mining unless strictly necessary. However, we still need to wait for the transposition of the Directive into national law.

222 *ECRI*, Report on Lithuania (Fifth Monitoring Cycle), 07/06/2016, para. 59.
223 *Henrard*, (fn. 43), para. 52.
224 ECtHR, (fn. 182), p. 25.
225 OVG Rheinland-Pfalz, (fn. 190), p. 26; But: In this decision statistics were not decisive for the shift of burden of proof; the burden of proof shifts, according to the OVG, if the respondent can show no plausible reasons for the selection decision.
226 *FRA*, (fn. 5), p. 25.

In stop and search procedures a reasonable suspicion standard is required under international law. National laws do not completely outlaw stop and search procedures, which are not based on a reasonable suspicion standard. Hence, this is an area where improvement is needed.

In my opinion, European human rights law provides the basic framework, which can and needs to be further extended and adapted. The prohibition of racial profiling as a form of discrimination can only be effective if data protection law and stop and search regulations are adapted as well. A limitation by law might be supplemented by awareness campaigns with the aim of proving wrong those who still desperately adhere to the concept and see it as the only possibility to end the terrorist threat. Racial profiling as an over-reaction to terrorism needs to be stopped. The practices are ineffective and humiliating. However, we shall have to wait and see whether mind-sets change and whether law enforcement will finally be free of racial bias.