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Racial and Ethnic Profiling

I. Context and definition

[1] In the film *The Silence of the Lambs* the FBI chases a serial killer who skins his female victims' corpses and is therefore called 'Buffalo Bill'. As the investigation stalls, the FBI agent Clarice Starling (Jodie Foster) seeks the help of the cannibalistic psychiatrist Hannibal Lecter (Anthony Hopkins). Based on the files of the case, Lecter gives Starling specific clues as to 'Buffalo Bill's' mental state and behavioural pattern, which are followed up systematically by Starling. In this way Lecter and Starling design a detailed personal profile of the killer: he is about to make a 'suit' out of his victims' skin as he longs to be a woman. Starling can identify and find him.

[2] A Spanish police officer is required to search for illegal immigrants at the train station of Valladolid. As the train from Madrid arrives, he checks the identity of only one person on the platform: Rosalind Williams Lecraft, a Spanish citizen of Afro-American origin. When Williams Lecraft asks the police officer why, of all people, she was being stopped, he replies that he was obliged to check the identity of ‘people like her’, as many of them were illegal immigrants. He adds that the Ministry of the Interior had given orders to carry out identity checks of ‘coloured people’ in particular (HRCtee, *Williams Lecraft v Spain* [2009]).

[3] Starling and the Spanish police officer engaged in *criminal profiling*, i.e. the systematic association of sets of physical, behavioural or psychological characteristics with particular offences and their use as a basis for making law-enforcement decisions. Two types of profile can be distinguished. Originally, only *descriptive profiles* were used, i.e. profiles that are designed to identify – as in *The Silence of the Lambs* – those likely to have committed a particular criminal act and who thus reflect the evidence the investigators have gathered concerning this act. Today, however, in the name of the fight against (perceived) threats such as illegal immigration (→ Migrants), drug trafficking (→ Organized Crime) and → terrorism, criminal profiling is used more and more for preventive purposes. Accordingly, there is an increased reliance on *predictive profiles*, i.e. profiles that are designed to identify – as in the search at the Valladolid train station – those who may be involved in future, or as-yet-undiscovered, crimes.

[4] Predictive profiles are fundamentally different from descriptive profiles such as that of ‘Buffalo Bill’. In the case of a killer, the police can collect factual information to construct a detailed behavioural and psychological profile. In the fight against illegal immigration, drug trafficking or terrorism, in contrast, the search is for individuals who do not fit any specific behavioural or psychological pattern, individuals whose very existence may be only assumed. Only physical characteristics remain as indicators. Instead of the behaviour of persons, their origin and social background become of interest. Today’s preventive policing is aimed at individuals who fulfil a pattern of easily identifiable personal characteristics such as their (presumed) ‘race’, ethnic origin, religion, gender or age. If one of the first three characteristics is used as part of a profile – even if it is in combination with other factors – *racial or ethnic profiling* occurs.

[5] As has been highlighted most recently by the Black Lives Matter movement, racial and ethnic profiling is a persistent and pervasive problem facing contemporary societies all over the world (see also → Persons of Colour (PoC)). A new and particularly difficult challenge in this context is posed by the use of algorithms and artificial intelligence to predict and combat crime: as biases may be ingrained in them, they are prone to exacerbate the problem. For example, predictive policing based on large-scale databases may reproduce, and thus reinforce, existing biases embedded in the policing system (Report on Racial Discrimination and Emerging Digital Technologies [2020] paras 36-7), and the accuracy of facial recognition technology may differ depending on the colour or ethnicity of the person assessed, which may lead to discrimination (CERD Committee, *GR No 36: Preventing and Combating Racial Profiling by Law Enforcement Officials* [2020] para 35).

II. Conformity with human rights

[6] There is no explicit prohibition of racial or ethnic profiling in international law. However, law enforcement measures based on such profiling are in potential conflict with, for instance, the rights to life (→ Life, Right to), → freedom of movement and residence, liberty of person (→ Liberty of Person, Right to) and respect for private life (→ Private and Family Life, Right to Respect for). Above all, however, they are highly problematic with regard to the prohibition of discrimination (→ Discrimination, Prohibition of).

[7] Articles 2(1) and 26 of the → International Covenant on Civil and Political Rights (ICCPR), Articles 1, 2 and 5 of the → International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) as well as Article 2 of the → Convention on the Rights of the Child (CRC) prohibit discrimination on grounds such as ‘race’, colour, religion and national or ethnic origin. At the regional level, respective prohibitions can be found in the → African Charter on Human and Peoples’ Rights (AfCHPR) (Arts 2 and 3), the → American Convention on Human Rights (ACHR) (Arts 1 and 24), the → Arab Charter on Human Rights (Arts 2 and 35), and the → European Convention on Human Rights (ECHR) (Art 14 and Protocol No 12). Even states that have not ratified these treaties are bound by the right to non-discrimination on the grounds of ‘race’, religion and ethnic origin, because this right has become part of → customary international law.

[8] International law prohibits both direct and indirect discrimination, so that any difference in treatment or outcome based on one of these grounds will be permissible only if there is a justification for it. According to the jurisprudence of the → European Court of Human Rights (ECtHR), which has been adopted by other human rights bodies, any distinction must, first, pursue a legitimate aim and, second, be a proportionate means of achieving this aim.

[9] Distinctions based on ‘race’, colour or ethnicity are regarded as inherently suspect, so that the existence of a justification is reviewed with particularly strict scrutiny. In the case of *Timishev v Russia* (2005), the ECtHR even concluded that ‘no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures’ (ibid. para 58).

III. Justification for profiling?

[10] As a consequence, the use of profiles that include the criteria of ‘race’ or ethnic origin will be permissible only if it is supported by objective and reasonable grounds. The mere fact that further search criteria – such as (alleged) behaviour – are relied on, does not, as such, constitute sufficient justification. On the other hand, in specific cases it may be permissible for the police to rely – even if it is ‘to a decisive extent’ – on a person’s skin colour or ethnic origin if, based on witness statements, they search specifically for a suspect with a certain skin colour – in other words, if a descriptive profile is used. In this respect the ECtHR formulation in *Timishev* (2005) is misleading.

[11] The first limb of the justification test, the existence of a legitimate aim, will normally be fulfilled as the law enforcement practices at issue are adopted to protect public security. In the *Williams Leecraft* case (2009), the Human Rights Committee held that ‘identity checks carried out for public security or crime prevention purposes in general, or to control illegal immigration, serve a legitimate purpose’ (ibid. para 7.2).

[12] In contrast, reliance on search criteria such as race or ethnic origin in most cases will fail to meet the proportionality test. As opposed to the FBI’s painstaking investigations in *The Silence of the Lambs*, racial or ethnic profiling may seem to offer a convenient alternative that makes intuitive sense. In fact, however, this method has proved to

be ineffective in the fight against drug trafficking and terrorism, as well as in other areas of crime prevention. Predictive profiles based on such stereotypical traits as ‘race’ or ethnicity are far too broad and thus lead to a misallocation of law enforcement resources. At the same time they are also easy to evade. Several studies have shown that reliance on ‘neutral’, non-discriminatory search criteria, in particular behaviour, is more promising and enhances the effectiveness of police work (HRC, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism* [2007] paras 48-54, 60). Thus, racial or ethnic profiling is, on the one hand, not a suitable means for achieving the aims referred to above; on the other hand, it entails considerable adverse effects. Although anyone stopped and searched by the police may feel intimidated or degraded to a certain extent, the humiliating effect is multiplied if the stop is based on personal characteristics. These individual experiences may be translated into negative group effects. Law enforcement practices based on racial or ethnic profiling contribute to the social construction of whole communities as potential criminals, terrorists or illegal immigrants, and foster xenophobic prejudice. As the European Commission against Racism and Intolerance (ECRI) has observed, this stigmatization of certain communities, in turn, may have significant negative implications for law enforcement efforts as it may increase distrust of the police (ECRI, *General Policy Recommendation No 11* [2007] para 34).

[13] Accordingly, numerous human rights bodies have condemned law enforcement practices that are based on racial or ethnic profiling. At the → United Nations (UN) level, the Committee on the Elimination of Racial Discrimination (CERD Committee) has urged states to ‘take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person’s colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion’ (CERD Committee, *GR No 31: Criminal Justice System* [2005] para 20; see also CERD Committee, *GR No 34: People of African Descent* [2011] para 39). In December 2020, the CERD Committee adopted a General Recommendation which provides detailed guidance on preventing and combating racial profiling by law enforcement officials (CERD Committee, *GR No 36: Preventing and Combating Racial Profiling by Law Enforcement Officials* [2020]). The Durban

Declaration and Programme of Action (2001) equally calls on states to implement effective measures to eliminate racial profiling (*ibid.* para 72), and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance devoted a thematic report to the problem (2015). In the case of Ms Williams Lecraft, the Human Rights Committee concluded that there had been no reasonable and objective grounds for singling her out based solely on her racial characteristics and that, therefore, Spain had violated the prohibition of discrimination (*Williams Lecraft v Spain* [2009] paras 7.4, 8).

[14] At the regional level, the ECRI, in its Policy Recommendation on combating racism and racial discrimination in policing, has warned against the use of racial profiling (ECRI, *General Policy Recommendation No 11* [2007]). The ECtHR addressed the issue squarely in the groundbreaking case of *Lingurar v Romania* (2019), which concerned a police operation directed against a Roma community (→ Roma and Sintii). It found that the police authorities had targeted that community because they perceived the Roma community as a whole as anti-social and criminal. The ECtHR concluded that the police had ‘automatically connected ethnicity to criminal behaviour’ and thus engaged in ethnic profiling that violated the prohibition of discrimination (*ibid.* para 76). The Inter-American Commission on Human Rights (IACHR) has also urged states to identify and eliminate racial profiling practices (*The Situation of People of African Descent in the Americas* [2011] para 162). In a case concerning the killing of a young Black man by the Brazilian military police, it held that the authorities had engaged in racial profiling in violation of the right to equality before the law (IACHR, *Wallace de Almeida v Brazil* [2009] para 143). In 2020 the → Inter-American Court of Human Rights (IACtHR) condemned as discriminatory the arrest of a Black man in Buenos Aires who then died after being badly injured in police custody. Noting the long-standing and persisting context of racial discrimination against Black people in Argentina, the Court concluded that the police had been motivated more by racial profiling than a real suspicion that a crime had been committed (IACtHR, *Acosta Martínez y otros v Argentina* [2020] paras 40, 93-103).

IV. Evidence and proof

[15] In cases such as that of *Williams Lecraft*, where the police openly admit to having relied on

search criteria such as ‘race’, skin colour or ethnic origin, it is relatively easy to establish discrimination. However, the prohibition of discrimination can be violated also without there being any discriminatory intent. As indirect discrimination also is prohibited, it is not even necessary that the law enforcement practice at issue is based explicitly on one of these criteria. For example, if police operations are focused on a particular geographic area and, as a consequence, have a disproportionate impact on a particular ethnic group, this can also constitute impermissible profiling. In fact, it is more typical for discriminatory law enforcement practices to result from unconscious, socially deep-rooted biases than to reflect conscious racist behaviour on the part of individual agents.

[16] However, where it is not obvious that ‘race’ or ethnic origin has been relied upon, it will often be very difficult to prove discrimination. The ECtHR therefore has held that less strict evidential rules should apply in cases of alleged indirect discrimination: where reliable statistical evidence points towards a disproportionate impact of a measure, the burden of proof shifts to the state, which must show that there is a justification for the disparate impact (*DH v Czech Republic* [2007] paras 185-95). For the present context this means that there is a need for data on law enforcement practices such as identity checks, stops and searches or border controls that is disaggregated by ‘race’ and ethnicity. Several human rights bodies, including the CERD Committee (*GR No 36: Preventing and Combating Racial Profiling by Law Enforcement Officials* [2020] para 50), the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance ([2015] para 62) and the ECRI (*General Policy Recommendation No 11* [2007] para 2), have underlined the importance of disaggregated data collection as a means to establish, and thus counter, racial and ethnic profiling. Nevertheless, the United Kingdom is the only European country that systematically collects this data.

V. Preventing racial and ethnic profiling

[17] Apart from the collection of disaggregated data, states must adopt a number of further measures to prevent and counter racial and ethnic profiling. Human rights bodies such as the → Office of the High Commissioner for Human Rights (OHCHR) (see *Preventing and Countering Racial Profiling of People of African Descent: Good Practices and Challenges* [2019]), the

CERD Committee (*GR No 36: Preventing and Combating Racial Profiling by Law Enforcement Officials* [2020]), the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (2015), the ECRI (see *Policy Recommendation No 11* [2007]) and the IACHR (*The Situation of People of African Descent in the Americas* [2011]) recommend, first, that states adopt laws and policies that explicitly prohibit racial and ethnic profiling and provide clear guidance for law enforcement agencies as to which search criteria may be used and which may not. Second, in order to ensure that law enforcement agencies respect the prohibition of discrimination, their activities must be subject to thorough and effective control by internal as well as external bodies. Internal accountability can be achieved, for example, through regular review of existing policies and practices by supervisors; and external accountability through the establishment of independent complaints mechanisms that allow members of the public to challenge impermissible profiling practices.

[18] Third, law enforcement agencies should develop recruitment and retention strategies that promote a diverse workforce reflective of the populations they serve. Fourth, states should ensure that law enforcement officers complete training programmes that include human rights education and raise awareness among officers of the various social biases that may affect their conduct. Fifth and finally, where algorithms or artificial intelligence tools are used for law enforcement purposes, it must be ensured that they do not reflect, and thus reproduce, existing biases and inequalities.

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