

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**Application no. 43868/18**

**BETWEEN:**

**Mohamed Wa Baile**

**Applicant**

**and**

**Switzerland**

**Respondent**

**and**

**Amnesty International**

**Intervener**

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**WRITTEN SUBMISSION ON BEHALF OF  
THE INTERVENER**

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## I. Introduction

1. This submission is presented by Amnesty International Limited (the "Intervener") pursuant to the leave to intervene granted by the President of the Section in response to the application dated 19 November 2020 in accordance with Article 36(2) of the Convention and Rule 44(3) of the Rules of Court.
2. This brief presents an analysis of the human rights implications of ethnic profiling<sup>1</sup> by outlining existing international human rights law and standards, including and beyond those set out by this Court, for guaranteeing the right to non-discrimination in law enforcement activities such as control, surveillance or investigation activities. The brief draws on the Court's own jurisprudence, EU law, relevant international human rights treaties, general comments of specialised international bodies as well as national jurisdictions.
3. This brief examines *inter alia* the concept and use of ethnic profiling practices, states obligations to prevent ethnic profiling, the obligation to take measures to combat racial discrimination and to investigate allegations of ethnic profiling as a form of racial discrimination. It is informed by Amnesty International's experience through documenting, litigating and analysing discrimination and ethnic profiling.<sup>2</sup> Moreover, it focuses on ethnic profiling in Switzerland, its recognition as a concern, preventive measures to combat ethnic profiling and remedies available to individuals subjected to discriminatory identity checks.
4. International human rights law and standards have consistently held that ethnic profiling violates the right to non-discrimination and may violate the right to privacy, right to freedom of movement, the right to liberty and security of person. Furthermore, ethnic profiling may infringe upon the right to be free from inhuman and degrading treatment.
5. States have international obligations to prevent and combat ethnic profiling by *inter alia* prohibiting practices of ethnic profiling, reviewing policies, laws and regulations, collecting and analysing disaggregated data and ensuring adequate and effective mechanisms for remedy and redress.

## II. Defining and understanding ethnic profiling

6. Ethnic profiling is defined as "the practice of police and other law enforcement officers relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in

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<sup>1</sup> In this document the Intervener uses the term "ethnic" profiling. "Ethnicity" is understood to include and to go beyond the concept of "race". It constitutes a social and fluid construct, referring to a social group that shares a common and distinctive culture, religion, or language, notwithstanding that individuals' identities are complex and made up of many other elements. However, the Intervener refers to "racial" profiling when the term is used in the referenced sources.

<sup>2</sup> Amnesty International, "You never know with people like you" Police policies to prevent ethnic profiling in Belgium, 2018, available at: <https://policehumanrightsresources.org/executive-summary-report-you-never-know-with-people-like-you-police-policies-to-prevent-ethnic-profiling-in-belgium>; Amnesty International, *Trapped in the Matrix: Secrecy, stigma, and bias in the Met's Gangs Database*, 2018, [https://www.amnesty.org.uk/files/reports/Trapped%20in%20the%20Matrix%20\\_Amnesty%20report.pdf](https://www.amnesty.org.uk/files/reports/Trapped%20in%20the%20Matrix%20_Amnesty%20report.pdf); Amnesty International, *Racial/Ethnic Profiling: Positionspapier zu Menschenrechtswidrigen Personenkontrollen*, 2014, [https://amnesty-polizei.de/wp-content/uploads/2016/05/Racial\\_Profiling\\_Positionspapier.pdf](https://amnesty-polizei.de/wp-content/uploads/2016/05/Racial_Profiling_Positionspapier.pdf); Amnesty International, *Stop and search powers pose a risk to human rights, Acknowledging and tackling ethnic profiling in the Netherlands*, 2014, [https://www.amnesty.nl/content/uploads/2016/11/amnesty\\_stopandsearchpowersposearisktohumanrights.pdf?x45368](https://www.amnesty.nl/content/uploads/2016/11/amnesty_stopandsearchpowersposearisktohumanrights.pdf?x45368); Amnesty International, *Police, justice et droits humains, Pratiques policières et droits humains en Suisse. Préoccupations et recommandations d'Amnesty International*, 2007, [https://www.amnesty.ch/fr/pays/europe-asie-centrale/suisse/docs/2007/rapport-pour-une-police-respectueuse-des-droits-humains/rapportpolice\\_fr.pdf](https://www.amnesty.ch/fr/pays/europe-asie-centrale/suisse/docs/2007/rapport-pour-une-police-respectueuse-des-droits-humains/rapportpolice_fr.pdf).

criminal activity".<sup>3</sup> Ethnic profiling manifests itself in a wide range of shapes and forms and is not limited to situations of open discrimination.<sup>4</sup>

7. In 2009, the Human Rights Committee ("CCPR") was the first UN treaty monitoring body to confirm that racial profiling constitutes unlawful discrimination.<sup>5</sup> Over the years, several international and European human rights mechanisms, including this Court, have consistently held that ethnic profiling violates the right to non-discrimination, which is anchored in a number of treaties, including the International Covenant on Civil and Political Rights ("ICCPR"), the ECHR and International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"). Both, the Committee on the Elimination of Racial Discrimination ("CERD") and the European Commission against Racism and Intolerance ("ECRI") have stated that racial profiling violates the prohibition of discrimination.<sup>6</sup> In *Timishev v. Russia*,<sup>6</sup> this Court established that a difference in treatment "based exclusively or to a decisive extent on a person's ethnic origin" cannot be "objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures."<sup>7</sup>
8. In addition to violating the right to non-discrimination, ethnic profiling may violate or negatively impact the right to privacy, the right to freedom of movement, the right to liberty and security, freedom of association and the right to an effective remedy.<sup>8</sup> It is also harmful to human dignity because it disregards the fact that each person is a unique individual and has to be treated as such by state officials.<sup>9</sup> The European Commission of Human Rights has established that the singling out a group of persons for differential treatment on the basis of race may constitute a special form of affront to human dignity and may constitute degrading treatment contrary to Article 3 ECHR.<sup>10</sup>
9. Moreover, ethnic profiling is linked to and reinforces stereotypes, biases and prejudice regarding particular minority groups and legitimises racism and racial discrimination against such groups among the general population.<sup>11</sup>
10. People subjected to discrimination, intimidation or violence as a result of their background or place of origin feel less connected to the country they live in and they show lower levels of trust in the police and judicial institutions.<sup>12</sup> As a result, ethnic profiling can hamper the effectiveness of the police because of the reduced willingness of the profiled individuals and groups to cooperate.<sup>13</sup>

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<sup>3</sup> World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration and Programme of Action, UN Doc. A/CONF.189/12 (2001), p. 40, para. 72. The Committee on the Elimination of Racial Discrimination (CERD) also used this definition in its recently adopted general recommendation on racial profiling – see CERD General Recommendation No. 36 on Preventing and Combating Racial Profiling by Law Enforcement Officials, UN Doc. CERD/C/GC/36 (2020), para. 18.

<sup>4</sup> Amnesty International, *Observations to the United Nations Committee on the Elimination of Racial Discrimination's Draft General Recommendation No. 36 on Preventing and Combating Racial Profiling*, IOR 40/0624/2019, p. 1, <https://www.amnesty.org/en/documents/ior40/0624/2019/en/>.

<sup>5</sup> *Rosalind Williams Lecraft v. Spain*, UN Human Rights Committee, UN Doc. CCPR/C/96/D/1493/2006 (2009).

<sup>6</sup> CERD General Recommendation No. 36, *op. cit.*, para. 21; ECRI General Policy Recommendation No. 11 on Combating Racism and Racial Discrimination in Policing (2007), CRI(2007)39, para. 39.

<sup>7</sup> *Timishev v. Russia* (55762/00 and 55974/00), European Court of Human Rights (2005), para. 58.

<sup>8</sup> CERD General Recommendation No. 36, *op. cit.*, para. 28.

<sup>9</sup> European Union Agency for Fundamental Rights, *Towards More Effective Policing – Understanding and Preventing Discriminatory Ethnic Profiling, A Guide*, 2010, p. 18 - 19, [https://fra.europa.eu/sites/default/files/fra\\_uploads/1133-Guide-ethnic-profiling\\_EN.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/1133-Guide-ethnic-profiling_EN.pdf).

<sup>10</sup> *East African Asians v. the United Kingdom* (4403/70), European Commission of Human Rights (1973), para. 196.

<sup>11</sup> ECRI General Policy Recommendation No. 11, *op. cit.*, para. 25; CERD General Recommendation No. 36, *op. cit.*, para. 20.

<sup>12</sup> European Union Agency for Fundamental Rights, *Second European Union Minorities and Discrimination Survey – Main results*, 2017, para. 109, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2017-eu-midis-ii-main-results\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-midis-ii-main-results_en.pdf).

<sup>13</sup> CERD General Recommendation No. 36, *op. cit.*, para. 26; ECRI General Policy Recommendation No. 11, *op. cit.*, para. 25; UN High Commissioner for Human Rights (OHCHR), *Preventing and countering racial profiling of people of African descent, Good practices*

### ***Ethnic profiling in the context of immigration***

11. While occurring in all types of law enforcement interventions, ethnic profiling is particularly likely to happen in the context of immigration control at points of entry into states (official boarding crossings, airports, railway stations and bus depots).<sup>14</sup> In a landmark case concerning a woman of African descent subjected to an identity check at a railway station in Spain solely on the grounds of her ethnicity, the CCPR held that:

“identity checks carried out . . . to control illegal immigration, serve a legitimate purpose. However, when the authorities carry out such checks, the physical or ethnic characteristics of the persons subjected thereto should not by themselves be deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics.”<sup>15</sup>

12. In its policy recommendation on safeguarding irregular migration, ECRI stated that “race” should not be used as a proxy for immigration status, in order to justify racial profiling.<sup>16</sup>

### ***Reasonable suspicion standard***

13. Police powers which do not require a reasonable suspicion or similar threshold drive ethnic profiling.<sup>17</sup> This allows, for example, police to interpret normal behaviour - which is not indicative of any criminal wrongdoing - of individuals of certain ethnic appearance as suspicious (e.g. sitting on a park bench for extended amounts of time or walking quickly).<sup>18</sup> For instance, averting one's gaze or avoiding a police officer does not constitute a valid reason for carrying out an identity check, especially if there are no other objective grounds for suspicion.<sup>19</sup> In this respect, police avoidance behaviour could be the result of previous recurring and humiliating experiences with discriminatory police controls.<sup>20</sup>

14. States must establish solid policy frameworks and guidance for law enforcement decision making, which encompass what constitutes reasonable and objective suspicion as well as an outline of legitimate criteria to be taken into consideration when deciding who to stop and search.<sup>21</sup> In *Gillian and Quinton v. United Kingdom*, this Court concluded that stop and search authorizations that are not subject to restrictions and permit police to stop persons based on their intuition alone, are not “in accordance with the law” and violate Article 8 ECHR.<sup>22</sup>

**15. Ethnic profiling violates international and European treaties that prohibit discrimination and unequal treatment. This includes ethnic profiling in the context of addressing irregular immigration. Stops, identity checks or searches that are not based on objective and reasonable criteria pointing to involvement in crime are not legitimate.**

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and challenges, <https://www.un.org/sites/un2.un.org/files/preventracialprofiling-en.pdf> para. 23. See also Amnesty International, *Racial /Ethnic Profiling: Positionspapier zu Menschenrechtswidrigen Personenkontrollen*, op. cit., p. 7,

<sup>14</sup> Human Rights Council, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere, UN Doc. A/HRC/29/46 (2015), para. 20.

<sup>15</sup> *Rosalind Williams Lecraft v. Spain*, op. cit., para. 7.2.

<sup>16</sup> ECRI General Policy Recommendation No. 16 on safeguarding irregularly present migrants from discrimination, CRI(2016)16, p. 10 para. 32 and Explanatory Memorandum, p. 27.

<sup>17</sup> Amnesty International, *Observations to the CERD's Draft General Recommendation No. 36*, op. cit., p. 3.

<sup>18</sup> Ibid., p. 1.

<sup>19</sup> Amnesty International, ‘On ne sait jamais, avec des gens comme vous’: Politiques policières de prévention du profilage ethnique en Belgique, 2018, [https://www.amnesty.be/IMG/pdf/rapport\\_profilage\\_ethnique.pdf](https://www.amnesty.be/IMG/pdf/rapport_profilage_ethnique.pdf), p. 17.

<sup>20</sup> Ibid., p. 17.

<sup>21</sup> Amnesty International, *Observations to the CERD's Draft General Recommendation No. 36*, op. cit., p. 3.

<sup>22</sup> *Gillian and Quinton v. the United Kingdom* (4158/05), European Court of Human Rights (2010), paras. 83 - 87.

### III. Positive obligations to eliminate ethnic profiling

16. This Court has established that states are required to show “special vigilance and vigorous reaction” towards racial discrimination because of its perilous consequences.<sup>23</sup> Hence, states have an obligation to “use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment.”<sup>24</sup>
17. ICERD sets a clear obligation of states to take all appropriate measures to eliminate racial discrimination in all its forms, which includes the obligation to ensure that its public authorities and institutions refrain from engaging in any acts or practices of racial discrimination.<sup>25</sup> Its treaty monitoring body, the CERD, has pointed out that states should take necessary steps to prevent profiling which exposes persons to greater suspicion based solely on their physical appearance, colour, features or membership to a racial or ethnic group.<sup>26</sup> Apart from taking preventive measures, states are also obliged to provide effective protection as well as effective remedies against acts of racial discrimination.<sup>27</sup> CERD has recommended that states take measures to counter any tendency of ethnic profiling targeting people of African descent.<sup>28</sup>
18. Furthermore, states have an obligation to review, enact or amend legislation in order to prohibit and eliminate all forms of racial discrimination, including ethnic profiling.<sup>29</sup> ECRI recommended that states introduce a reasonable suspicion standard in their regulations, which would oblige the police to exercise activities such as control, surveillance or investigation based on founded objective criteria.<sup>30</sup>
19. Additionally, ECRI<sup>31</sup> and CERD<sup>32</sup> recommended collecting disaggregated data on relevant enforcement practices broken down by prohibited grounds for racial discrimination such as national or ethnic origin, language, religion and nationality. The Intervener has also recommended that states should introduce stop and search forms that document the reason for the stop and the perceived ethnicity and gender of the person stopped and provide a receipt to the person checked.<sup>33</sup>
20. In regard to law enforcement trainings, ECRI recommended that they should cover the use of the reasonable suspicion standard the unlawfulness of racial profiling, its harmful nature as well as the fact that it is ineffective.<sup>34</sup>
21. **States have several positive obligations to prevent the use of ethnic profiling and to ensure that its public authorities and institutions refrain from engaging in ethnic profiling. These obligations**

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<sup>23</sup> *D.H. and others v. the Czech Republic* (57325/00), European Court of Human Rights (2007), para. 176.

<sup>24</sup> *Ibid.* See also: *Nachova and others v. Bulgaria* (43577/98 and 43579/98), European Court of Human Rights (2005), para. 145. *Timishev v. Russia, op. cit.*, para. 56.

<sup>25</sup> Article 2 and 5 ICERD.

<sup>26</sup> CERD General Recommendation No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, UN Doc. A/60/18 (2005), para. 20.

<sup>27</sup> Article 6 ICERD; CERD General Recommendation No. 31, *op. cit.*, para. 6; CERD General Recommendation No. 36, *op. cit.*, para. 24.

<sup>28</sup> General Recommendation No. 34 on Racial discrimination against people of African descent, UN Doc. CERD/C/GC/34 (2011), paras. 31 and 39.

<sup>29</sup> Article 2, paragraph 1 (c) ICERD; CERD General Recommendation No. 36, *op. cit.*, para 23; See also ECRI General Policy Recommendation No. 11, *op. cit.*, p. 4, para. 1.1.

<sup>30</sup> ECRI General Policy Recommendation No. 11, *op. cit.*, p. 4, para. 3 and Explanatory Memorandum, p. 12, para. 44.

<sup>31</sup> *Ibid.*, p. 4, para. 2 and Explanatory Memorandum, p. 11.

<sup>32</sup> See CERD General Recommendation No. 36, *op. cit.*, para. 50.

<sup>33</sup> Amnesty International, *Observations to CERD's Draft General Recommendation No. 36, op. cit.*, p. 4.

<sup>34</sup> ECRI General Policy Recommendation No. 11, *op. cit.*, p. 12, para. 45.

**include: adopting legislation that prohibits the use of ethnic profiling and introduces a reasonable suspicion standard to law enforcement activities; collecting disaggregated data on the use of ethnic profiling practices; providing effective protection and remedies against acts of racial discrimination, including ethnic profiling, and providing trainings to police officers regarding the unlawfulness of ethnic profiling, its harmful nature and ineffectiveness.**

#### **IV. Reversal of the burden of proof and intent to discriminate**

22. This Court has concluded in various cases that the burden of proof is reversed when the complainant establishes a *prima facie* case that there was a difference in treatment: it is then up to the respondent State to demonstrate that an objective and reasonable justification exists for the difference of treatment.<sup>35</sup>
23. Law enforcement officers may consciously use ethnic profiling based on stereotypes, or they may also unconsciously apply ethnic profiling through using criteria which seem neutral but have a disproportionate impact on groups of persons on basis of their race, colour, language, religion, national or ethnic origin.<sup>36</sup> Thus, practices of ethnic profiling “can be conscious or unconscious, individual, or structural and institutional”.<sup>37</sup> Given the fact that ethnic profiling can occur in a form of indirect discrimination, no intent to discriminate is required to prove the violation of the right to non-discrimination.<sup>38</sup>
24. This Court has established that in cases of indirect discrimination, less strict evidential rules apply.<sup>39</sup> Indirect discrimination can be proven by providing statistical evidence or by using alternative means of evidence.<sup>40</sup> The Court has established that the burden of proof falls on the state, in cases where information related to the events of the case “lie[s] wholly, or in large part, within the exclusive knowledge of the authorities”.<sup>41</sup> Data in regard to the use of ethnic profiling practices by law enforcement generally lies in the exclusive knowledge of the state authorities.
25. Moreover, taking into account the difficulties of proving discrimination, this Court has held that in cases where state authorities did not take steps of inquiry and investigation into acts of violence of state agents and disregarded evidence of possible discrimination, the Court “might draw negative inferences or shift the burden of proof to the respondent Government.”<sup>42</sup>
26. The EU has also developed a comprehensive legal framework over the years for challenging discrimination, along with three directives<sup>43</sup> which encompass one uniform wording relating to evidentiary standard and burden of proof in discrimination cases.<sup>44</sup> Once the claimants

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<sup>35</sup> *D.H. and others v. the Czech Republic*, *op. cit.*, para. 177; *Biao v. Denmark* (38590/10), European Court of Human Rights (2016), para. 92; *Timishev v. Russia*, *op. cit.*, para. 57.

<sup>36</sup> ECRI General Policy Recommendation No. 11, *op. cit.*, para. 37 - 38. See also: CERD General Recommendation No. 36, *op. cit.*, para. 20.

<sup>37</sup> CERD General Recommendation No. 36, *op. cit.*, para. 20.

<sup>38</sup> *D.H. and others v. the Czech Republic*, *op. cit.*, para. 184.

<sup>39</sup> *D.H. and others v. the Czech Republic*, *op. cit.*, para. 186; See also *Nachova and others v. Bulgaria*, *op. cit.*, paras. 147 and 157.

<sup>40</sup> See for example: *Biao v. Denmark*, *op. cit.*, paras. 108 - 114.

<sup>41</sup> *Bouyid v. Belgium* (23380/09), European Court of Human Rights (2015), para. 83.

<sup>42</sup> *Nachova and others v. Bulgaria*, *op. cit.*, para. 128.

<sup>43</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Equality Directive); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Framework Directive); Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (the Recast Directive).

<sup>44</sup> See: Art 8(1) of Council Directive 2000/43; Art 10(1) of Council Directive 2000/78 & 2006/54 19(1); See also: Case C-394/11 *Belov v CHEZ Elektro Balgaria AG* [2013] 2 CMLR 29, para. 94; Case C-83/14, *CHEZ v Nikolova* EU:C:2015:480, paras. 78, 80 - 83; Case C-81/12, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării* EU:C:2013:275, para. 51.

establish a *prima facie* case of unequal treatment, the burden of proof shifts onto the respondent.<sup>45</sup>

27. **In cases of ethnic profiling, it suffices that the complainant demonstrates a *prima facie* difference in treatment for the burden of proof to shift to the state. Thereupon, the burden falls on the state to justify the unequal treatment.**

#### V. States' obligation to investigate allegations of ethnic profiling

28. States have a positive obligation to assure everyone effective protection and remedies against acts of racial discrimination, as well the right to seek just and adequate reparation or satisfaction from national tribunals for damages suffered as a result of racial discrimination.<sup>46</sup> The right to an effective remedy extends to acts committed by state officials.<sup>47</sup> CERD and ECRI consider that states should record and pursue effective investigations on allegations of ethnic profiling conducted by law enforcement officials.<sup>48</sup>
29. As stated above, ethnic profiling constitutes racial discrimination. Hence it violates the right to non-discrimination and it can violate other rights, including the right to privacy, right to freedom of movement, the right to liberty and security of person and the right to be free from inhuman and degrading treatment.<sup>49</sup>
30. In cases examined within Articles 2 and 3 ECHR, this Court has held that there is a duty to investigate allegations of racially motivated violence and a “duty to take all responsible steps to unmask any racist motive and establish whether or not ethnic hatred or prejudice may have played a role in the events”.<sup>50</sup> In the case *East African Asians v. the United Kingdom*, the European Commission of Human Rights held that the singling out of a group of persons for differential treatment on the basis of race may constitute a special affront to human dignity and thus may constitute degrading treatment contrary to Article 3.<sup>51</sup> Also, in *Gillian and Quinton v. the United Kingdom* the Court concluded that the public nature of the search instigates feelings of humiliation and embarrassment on the profiled individuals or groups.<sup>52</sup> Hence, ethnic profiling practices may constitute an affront to human dignity and amount to a violation of the right to be free from degrading treatment. Thus, the failure to investigate allegations of ethnic profiling may amount to a violation of a procedural obligation under Article 3.
31. An obligation to investigate was acknowledged by this Court within Article 4 as well.<sup>53</sup> Furthermore, in *Beizaras and Levickas v. Lithuania*, this Court has held that the state had a procedural duty to effectively investigate whether hateful and homophobic comments on a posted photo of two young men kissing, constituted incitement to hatred and violence, under

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<sup>45</sup> See: Case C-415/10, *Meister v Speech Design Carrier Systems GmbH* EU:C:2012:8, Opinion of the Advocate General at para 14: ‘the Court has already held in its judgment in *Kelly v National University of Ireland (University College, Dublin)* (Case C-104/10) [2012] ICR 322, the mechanism consists of two stages. First of all, the victim must sufficiently establish the facts from which it may be presumed that there has been discrimination. In other words, the victim must establish a *prima facie* case of discrimination. Next, if that presumption is established, the burden of proof thereafter lies on the defendant.’ This approach was endorsed by the CJEU in their judgment in the case (paras 34-36).

<sup>46</sup> Article 8 UDHR; Article 13 ECHR; Article 6 CERD; Article 26 ICCPR.

<sup>47</sup> CERD General Recommendation No. 31, *op. cit.*, para. 6.

<sup>48</sup> CERD, General Recommendation No. 36, *op. cit.*, paras. 52 – 54 ; ECRI General Policy Recommendation No. 11, *op. cit.*, paras. II 9 and 10.

<sup>49</sup> CERD General recommendation No. 36, *op. cit.*, para. 28.

<sup>50</sup> *Nachova and others v. Bulgaria*, *op. cit.*, para. 158; *Ognyanova and Choban v. Bulgaria*, (46317/99), European Court of Human Rights (2006), para. 145; *Abdu v. Bulgaria* (no. 26827/08), European Court of Human Rights (2014), para. 44.

<sup>51</sup> *East African Asians v. the United Kingdom*, *op. cit.*, para. 196.

<sup>52</sup> *Gillian and Quinton v. the United Kingdom*, *op. cit.*, para. 63.

<sup>53</sup> *Rantsev v. Cyprus and Russia*, (25965/04), European Court of Human Rights (2010), para. 288; *S.M. v. Croatia* (60561/14), European Court of Human Rights (2020), paras. 309 - 311.

Article 14, read in conjunction with Article 8.<sup>54</sup> According to the jurisprudence of this Court, states have an obligation to continuously reassert “society’s condemnation of racism and ethnic hatred and to maintain the confidence of minorities.”<sup>55</sup> In certain cases, for example where articles 2 and 3 are engaged, such investigation must be of a criminal nature. However, with respect to the violation of other rights, administrative investigations and enquiries will generally suffice so long as a remedy is ensured to the victims and further violations are discouraged. In light of this, this Court should recognize that states have a procedural obligation to investigate allegations of ethnic profiling.

32. **States have an obligation to ensure everyone access to effective protection and remedies against ethnic profiling and to conduct timely, independent and effective enquiries or investigations into allegations of ethnic profiling.**

## VI. Ethnic profiling in Switzerland

33. In 2007, the Intervener published a report on policing practices in Switzerland which opened the debate on ethnic profiling in the country.<sup>56</sup> It demonstrated that certain police officers displayed racist attitudes towards persons that were subjected to identity checks and that ethnic profiling was practiced in particular in the fight against drug trafficking. Furthermore, it documented an increase in identity checks on persons of actual or presumed foreign origin in various cantons as a result of the tightening of asylum and migration laws and policies.<sup>57</sup> Until today, these issues have not been addressed by the authorities and the problematic practices persist: according to the growing number of reports by international human rights bodies,<sup>58</sup> civil society organizations,<sup>59</sup> ombudsperson’s offices,<sup>60</sup> scientific experts<sup>61</sup> and the network for victims of racism<sup>62</sup> people perceived as foreigners are still repeatedly stopped and searched without reasonable and objective grounds. Recently, testimonies of victims of ethnic profiling

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<sup>54</sup> *Beizeras and Levickas v. Lithuania* (41288/15), European Court of Human Rights (2020), para. 129.

<sup>55</sup> *Nachova and others v. Bulgaria*, *op. cit.*, para. 157.

<sup>56</sup> Amnesty International, *Police, justice et droits humains*, *op. cit.*

<sup>57</sup> *Ibid.*, p. 24.

<sup>58</sup> See for instance: ECRI Report on Switzerland (6<sup>th</sup> monitoring cycle), 2020, paras. 110 – 112, <https://rm.coe.int/ecri-report-on-switzerland-sixth-monitoring-cycle-/16809ce4bd>; Concluding observations of the UN Human Rights Committee on the fourth periodic report of Switzerland, UN Doc. CCPR/C/CHE/CO/4 (2017) paras. 22 – 23; Concluding observations of CERD on the combined seventh to ninth periodic reports of Switzerland, UN Doc CERD/C/CHE/CO/7-9 (2014), para. 14.

<sup>59</sup> Allianz gegen Racial Profiling, *Racial/Ethnic Profiling Diskriminierende Personenkontrollen durch die Polizei als Ausdruck von institutionellem Rassismus in den Schweizer Polizeikorps*, 2016, [http://www.stop-racial-profiling.ch/wp-content/uploads/2016/11/stellungnahme\\_d.pdf](http://www.stop-racial-profiling.ch/wp-content/uploads/2016/11/stellungnahme_d.pdf); Collectif Jean Dutoit, *Report for the rights and mobility of black African migrant persons in Switzerland and in Europe*, 2018, [http://www.stop-racial-profiling.ch/wp-content/uploads/2020/07/jeandutoitcollective\\_reportfortherightsandmobility\\_english\\_a4\\_final.pdf](http://www.stop-racial-profiling.ch/wp-content/uploads/2020/07/jeandutoitcollective_reportfortherightsandmobility_english_a4_final.pdf).

<sup>60</sup> The ombudsperson’s office of the city of Zurich mentioned ethnic profiling for the first time in its annual report of 2009 and subsequently focussed its 2010 and 2014 report on the topic. Ombudsstelle der Stadt Zürich, Jahresberichte, [https://www.stadt-zuerich.ch/portal/de/index/politik\\_u\\_recht/ombudsstelle/publikationen\\_u\\_merkblaetter/jahresberichte.html](https://www.stadt-zuerich.ch/portal/de/index/politik_u_recht/ombudsstelle/publikationen_u_merkblaetter/jahresberichte.html). In 2016, the ombudsperson declared in a press interview that recorded cases of ethnic profiling in Zurich have not dropped, <https://www.tagesanzeiger.ch/zuerich/stadt/jung-schwarz-verdaechtig/story/22537987>.

<sup>61</sup> Mohamed Wa Baile, Serena O. Dankwa, Tarek Naguib, Patricia Purtschert, Sarah Schilliger (ed.) “Racial Profiling Struktureller Rassismus und antirassistischer Widerstand”, 2019, <https://www.transcript-verlag.de/media/pdf/de/4b/14/oa9783839441459TsR4G3Q8DRFVD.pdf?fbclid=IwAR1qliaBchBxmLuMWgJ8Jd5UwPOSUcveFPK26I9LavPzIL9CUtflYUXUxE>; Tarek Naguib, Kurt Pärli, Nadine Bircher, Sara Licci, Salome Schärer, Anti-Schwarze-Rassismus, “Juristische Untersuchung zu Problem und Handlungsbedarf”, 2017, [https://www.ekr.admin.ch/pdf/ZHAW\\_Studie\\_Anti\\_Schwarze\\_Rassismus\\_2017.pdf](https://www.ekr.admin.ch/pdf/ZHAW_Studie_Anti_Schwarze_Rassismus_2017.pdf); David Mühlemann, Tarek Naguib; Réka Piskoty, “Racial Profiling: Struktureller Rassismus”, 2017, [https://www.zhaw.ch/storage/sml/institute-zentren/zsr/aufsatz-plaedoyer-racial-profiling-naguib-17.pdf?fbclid=IwAR3TuSyclpzt\\_FFXMF3kOabpJFit001-NYbt4\\_dNeST-D0x6RrFuYC6sc4w](https://www.zhaw.ch/storage/sml/institute-zentren/zsr/aufsatz-plaedoyer-racial-profiling-naguib-17.pdf?fbclid=IwAR3TuSyclpzt_FFXMF3kOabpJFit001-NYbt4_dNeST-D0x6RrFuYC6sc4w); Kijan Espahangizi et al., “Racial/Ethnic Profiling, Institutioneller Rassismus – kein Einzelfallproblem Öffentliche Stellungnahme zur institutionellen Verantwortung für diskriminierende Polizeikontrollen”, 2016, [https://www.humanrights.ch/cms/upload/pdf/160602\\_rac\\_profiling\\_stellungnahme\\_wissenschaftler\\_innen.pdf](https://www.humanrights.ch/cms/upload/pdf/160602_rac_profiling_stellungnahme_wissenschaftler_innen.pdf).

<sup>62</sup> Beratungsnetz für Rassismuspfer, *Auswertungsbericht Rassismussvorfälle aus der Beratungspraxis*, 2019, [https://www.humanrights.ch/cms/upload/pdf/2020/200426\\_Rassismusbericht\\_19\\_D.pdf](https://www.humanrights.ch/cms/upload/pdf/2020/200426_Rassismusbericht_19_D.pdf).

have been published in the press<sup>63</sup> and in research studies.<sup>64</sup> A Swiss police trainer and government advisor declared in the press that around 20% of police interventions do not respond to any objective criteria for the stop.<sup>65</sup> Alarming is also that several police interventions have led to the deaths of Black persons over the last few years.<sup>66</sup>

34. Ethnic profiling has not been recognized as a serious concern by the state authorities in Switzerland, hence it is not addressed in an adequate manner. Despite repeated pressure from members of parliament, the Swiss Federal Council has refused to review the practices of border guards and police corps in order to analyse the existence and the extent of ethnic profiling and the effectiveness of existing preventive measures.<sup>67</sup> Whenever authorities and police officers admit to cases of racial profiling,<sup>68</sup> they consider them as a result of individual misconduct or unconscious stereotypes among individual police officers and fail to recognize ethnic profiling as an institutional problem.<sup>69</sup>
35. There is no clear legal framework that imposes limits to carrying out identity checks. Article 215 Criminal Procedural Code (CrimPC)<sup>70</sup> allows checks on persons without concrete suspicion.<sup>71</sup> ECRI has therefore recommended Switzerland to ensure - either by revising the legal provisions or by developing case law - that “reasonable suspicion” is required in all cases where persons are stopped.<sup>72</sup>

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<sup>63</sup>“Einfach die falsche Hautfarbe“, Die Wochenzeitung, 10 November 2016, <https://www.woz.ch/-7425>; “Jung, Schwarz und Verdächtig“, Tagesanzeiger, 27 April 2016, <https://www.tagesanzeiger.ch/zuerich/stadt/jung-schwarz-verdaechtig/story/22537987>.

<sup>64</sup> Kollaborative Forschungsgruppe Racial Profiling, *Racial Profiling, Erfahrung, Wirkung, Widerstand*, 2019, [https://www.rosalux.de/fileadmin/rls\\_uploads/pdfs/Studien/racial-profiling.pdf](https://www.rosalux.de/fileadmin/rls_uploads/pdfs/Studien/racial-profiling.pdf).

<sup>65</sup>“Les policiers suisses ciblent-ils les Noirs?“, Le Temps, 6 December 2016, [www.letemps.ch/suisse/policiers-suisses-ciblent-ils-noirs](http://www.letemps.ch/suisse/policiers-suisses-ciblent-ils-noirs).

<sup>66</sup> In March 2018, a Nigerian man in Lausanne died following a police arrest (“Violences policières: l’affaire Mike s’éternise“, Le Temps, 23 July 2020, <https://www.letemps.ch/suisse/violences-policieres-laffaire-mike-seternise>; “Schwarzer starb bei Polizeikontrolle in Lausanne: ‘Gut, dass es zum Prozess kommt’“, Aargauer Zeitung, 4 June 2020, <https://www.aargauerzeitung.ch/schweiz/schwarzer-starb-bei-polizeikontrolle-in-lausanne-gut-dass-es-zum-prozess-kommt-138079681>). In October 2017, a 23-year-old Gambian man died in police custody in Vaud (“La mort du requérant gambien en prison met en lumière les failles de la procédure“, Le Temps, 31 Octobre 2017, <https://www.letemps.ch/suisse/mort-requerant-gambien-prison-met-lumiere-failles-procedure>) and in November 2016, a young Congolese man was fatally shot during a police patrol in Bex (“Un cortège pour Hervé, abattu par la police à Bex“, La Tribune de Genève, 19 November 2016, <https://www.tdg.ch/suisse/faits-divers/cortege-herve-abattu-police-bex/story/24179471>).

<sup>67</sup> Interpellation 17.3601, Sibel Arslan, “Einschätzung des Bundesrates zum Phänomen des Racial Profiling“, 16 June 2017, <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20173601>; Postulat 18.3356, Sibel Arslan, “Prävention gegen Diskriminierung bei Personenkontrollen durch die Polizei“, 16 March 2018, <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20183356>.

<sup>68</sup> See e.g. Lionel Imhof, “Profilage racial: en avoir conscience ou non : Enjeux et défis pour la police“, Cahiers du BLI n° 4, 2011, <https://www.lausanne.ch/officiel/administration/sport-et-cohesion-sociale/secretariat-general-scs/bli/publications/cahiers-du-bli.html>.

<sup>69</sup> The Federal Council replied to a parliamentary interpellation that ethnic profiling is not an institutional problem (Interpellation 17.3601, Sibel Arslan, *op. cit.*). The President of the Conference of Cantonal Police Commandants in Switzerland, Stefan Blättler, declared at a conference of the Swiss Competence Centre for Human Rights in 2016: “discriminatory identity checks are not an institutional problem” (Conference on Police Law, 1 December 2016, Presentation by Stefan Blättler, p. 9: [https://www.skmr.ch/cms/upload/pdf/161201\\_Praesentation\\_Stefan\\_Blaettler.pdf](https://www.skmr.ch/cms/upload/pdf/161201_Praesentation_Stefan_Blaettler.pdf) (translated)). The Security Director of Zurich, Richard Wolff, explained in a press interview that he does not believe Zurich police to be racist (“Racial Profiling: Bauchgefühl reicht in Zürich nicht für Polizeikontrolle“, NZZ, 20 November 2017, <https://www.nzz.ch/zuerich/aktuell/racial-profiling-bauchgefuehl-reicht-in-zuerich-nicht-fuer-polizeikontrolle-ld.1330045>).

<sup>70</sup> Pursuant to Art. 215 para. 1 CrimPC the police may, for the purpose of investigating an offence, stop a person and, if necessary, bring that person to the police station for the purpose of investigating an offence. Art. 215 para. 2 CrimPC gives the police the right to require the person that was stopped to provide their personal details, produce identity documents, produce property in their possession and to open containers or vehicles.

<sup>71</sup> According to the jurisprudence of the Swiss Federal Supreme Court, Art. 215 para. 1 CrimPC requires that the police stop be in the interest of clarifying a criminal act. However, a concrete suspicion of a crime is not required. A mere vague suspicion is sufficient. (Swiss Federal Supreme Court, Judgement of 14. August 2019, 6B\_1070/2018, para. 1.4.1). Art. 215 para. 2 CrimPC does not require any suspicion (Conseil fédéral suisse, Message relatif à l’unification du droit de la procédure pénale, FF 2006 1057, p. 1206). Some cantonal police laws do not require suspicion and are vaguely formulated, e.g. according to Art. 21 of the Zurich Police Law (PoIG/ZH), the police may stop a person “if it is necessary for the fulfilment of their duties”.

<sup>72</sup> ECRI Fifth report on Switzerland (2014), CRI(2014)39, para. 69. ECRI has also called for the definition and prohibition by law of racial profiling in policing in its General Policy Recommendation No. 11, *op. cit.*

36. If, in addition, police officers do not receive guidance and instructions on objective criteria for identity checks with reference to the prohibition of discrimination, it leaves them to rely on their own interpretation or instinct when deciding whether to conduct an identity check or not. Establishing "reasonable grounds" based on objectively verifiable facts as determining element for a stop and providing clear guidance to police officers on how to apply this criterion in practice is an indispensable measure to prevent arbitrary and potentially discriminatory stops, identity and vehicle checks, and searches.
37. There is also an absence of statistics regarding ethnic profiling<sup>73</sup> in Switzerland and the state appears unwilling to collect data.<sup>74</sup> Due to the lack of a uniform monitoring system that provides data in different fields, including disaggregated data that would reveal discriminatory policing practices, too little is known about the extent of ethnic profiling in Switzerland.
38. Access to justice for victims of human rights violations by the police is often hindered by lack of information, the length<sup>75</sup> and the prohibitive financial costs<sup>76</sup> of criminal and administrative proceedings, the psychologically straining nature of legal proceedings, the risk of further discrimination and the vulnerable situation of foreign nationals without legal status. Furthermore, the police often respond to criminal complaints filed by alleged victims of human rights violations using counteraccusations of "violence and threats against officers" or similar offences.<sup>77</sup> The Federal Council rejected parliamentary demands regarding the strengthening of the legal protection of victims of ethnic profiling.<sup>78</sup>
39. Proposals to implement a receipt system including information about the time, the place, the reasons for the stop and its outcome have also been dismissed by the federal and the cantonal authorities forces.<sup>79</sup> Although the government argues that receipts constitute an excessive burden on the police, they are first and foremost a guarantee of its accountability, an essential data collection source and a means of reinstating trust between the police and the population.<sup>80</sup>
40. The Intervener<sup>81</sup> in line with international human rights bodies<sup>82</sup> has repeatedly criticized the absence of an independent complaint and investigation mechanism regarding racial

<sup>73</sup> Concluding observations of CERD on the combined seventh to ninth periodic reports of Switzerland, *op. cit.*, para 14; Concluding observations of CERD on the combined fourth to sixth periodic reports of Switzerland, UN Doc. A CERD/C/CHE/CO/6 (2008), para 14.

<sup>74</sup> According to the federal government, Switzerland does not collect official statistical data on ethnic profiling due to the fact that routine checks carried out on suspects fall under cantonal jurisdiction (Combined tenth to twelfth periodic reports submitted to CERD by Switzerland under article 9 of the Convention, due in 2017, UN Doc CERD/C/CHE/10-12 (2019), para. 78). The Zurich Police has developed a new web application for identity checks which records the location, time and reason for a check, and whether it led to a report or an arrest. However, this application does not include information related to the perceived ethnicity of the person stopped and therefore does not contribute to the collection of data on ethnic profiling ("Weshalb die Polizei ihre Kontrollen im Zürcher Kreis 8 innert eines Jahres versechsfacht hat", NZZ, 9.03.2020, <https://www.nzz.ch/zuerich/polizei-fuehrt-in-zuerich-massiv-weniger-personenkontrollen-durch-ld.1544040>).

<sup>75</sup> See for instance the case of Wilson A.: He filed a complaint against a group of policemen who used violence during a possible discriminatory identity check in 2009 that resulted in his hospitalization. On April 18, 2018, the Zurich District Court acquitted the three police officers after protracted legal disputes, as the public prosecutor's office had wanted to drop the case twice despite substantial evidence of police misconduct, <https://www.humanrights.ch/de/jpf/menschenrechte/polizei/wilson-a-langer-kampf-institutionellen-rassismus>.

<sup>76</sup> Walter Kälin, Reto Locher, *Der Zugang zur Justiz in Diskriminierungsfällen, Synthesebericht*, 2015, [https://www.skmr.ch/cms/upload/pdf/160526\\_studie\\_diskrimination\\_Synthesebericht.pdf](https://www.skmr.ch/cms/upload/pdf/160526_studie_diskrimination_Synthesebericht.pdf), p. 73.

<sup>77</sup> Amnesty International, *Police, justice et droits humains, op. cit.*, p. 131 – 132.

<sup>78</sup> Postulat 20.3799, Samira Marti, "Die rechtlichen Vorgaben zur Verhinderung von Racial und Ethnic Profiling stärken", 18 June 2020, <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20203799>.

<sup>79</sup> Interpellation 17.3601, Sibel Arslan, "Einschätzung des Bundesrates zum Phänomen des Racial Profiling", *op. cit.*

<sup>80</sup> Council of Europe Parliamentary Assembly, Ethnic profiling in Europe: a matter of great concern, Report Doc. 15199 14/12/2020, para. 63.

<sup>81</sup> Amnesty International, *Police, justice et droits humains, op. cit.*, p. 150 - 151.

<sup>82</sup> ECRI Report on Switzerland (6th monitoring cycle), *op. cit.*, paras. 111 and 112; Concluding observations of the UN Human Rights Committee on the fourth periodic report of Switzerland, *op. cit.*, paras. 28 and 29; Concluding observations of the UN Committee

discrimination and racially motivated misconduct by the police. So far, only a few cantons have established ombudsperson offices that receive complaints concerning ethnic profiling incidents<sup>83</sup> and the federal government refuses to create a national complaint mechanism.<sup>84</sup>

41. Finally, there still appears to be a need for comprehensive police training on ethnic profiling and on the use of the reasonable suspicion standard. It should not be limited to theoretical human rights messages on discrimination.<sup>85</sup> The Swiss Federal Commission against Racism,<sup>86</sup> CERD<sup>87</sup> and ECRI<sup>88</sup> have also recommended further training for the police on the issue of racial profiling in every canton in order to combat the problem of structural racism.
42. **The Swiss State has, despite the persisting nature of the problem, failed to recognize ethnic profiling in the police force. Switzerland has not met its international obligations to prevent ethnic profiling. It has not implemented the recommendations of international human rights bodies concerning the revision of the legal framework, the systematic collection of data on ethnic profiling, the training of police officers on the issue of ethnic profiling and on stop and check criteria and the establishment of an independent mechanism for handling and investigating complaints with regard to racial discrimination by the police. Furthermore, Switzerland does not provide victims of ethnic profiling with access to an effective remedy and fails in most cases to conduct effective enquiries or investigations into allegations of ethnic profiling.**

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Against Torture on the seventh periodic report of Switzerland, UN Doc. CAT/C/CHE/CO/7 (2015), para. 10; Concluding observations of CERD on the combined seventh to ninth periodic reports of Switzerland, *op. cit.*, para. 14; Concluding observations of the UN CERD on the combined fourth to sixth periodic reports of Switzerland, *op. cit.*, para. 16.

<sup>83</sup> Basel-Stadt, Basel-Landschaft, Vaud, Zurich and Zug.

<sup>84</sup> Motion 20.3742, Mustafa Atici, "Schaffung von informellen Beschwerdemechanismen für Fälle von Racial und Ethnic Profiling und Ausbau der Fachstelle für Rassismusbekämpfung", 18 June 2020, <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20203742>.

<sup>85</sup> The module "Ethics & Human Rights" developed by the Swiss Police Institute is part of the compulsory basic police training. Although the 30 to 40 hours (out of 1200) cover the topic of racial discrimination, there does not seem to be specific training on ethnic profiling. See Police Training Programme: [https://www.edupolice.ch/de/polizeiausbildung/AUSBILDUNGSPLAN-POLIZEI-\(APP\)](https://www.edupolice.ch/de/polizeiausbildung/AUSBILDUNGSPLAN-POLIZEI-(APP)).

<sup>86</sup> Federal Commission against Racism, *Empfehlungen zum Thema Rassismus gegenüber schwarzen Menschen in der Schweiz*, 2017, [https://www.ekr.admin.ch/pdf/Studie\\_AntiRassismus\\_D.pdf](https://www.ekr.admin.ch/pdf/Studie_AntiRassismus_D.pdf), p. 14.

<sup>87</sup> Concluding observations of CERD on the combined seventh to ninth periodic reports of Switzerland, *op. cit.*, para 14; CERD General recommendation 31, *op. cit.*

<sup>88</sup> ECRI Report on Switzerland (6<sup>th</sup> monitoring cycle), *op. cit.*, paras. 111 and 112; ECRI conclusions on the implementation of the recommendations in respect of Switzerland subject to interim follow-up, CRI(2012)30, p. 6, para. 3.