OPEN SOCIETY
JUSTICE INITIATIVE

Submission for a Roundtable of the Civil Liberties Committee of the European Union
Brussels, 30 June 2008

Since the 9/11 attacks in New York, 32 percent of British Muslims report being subjected to discrimination at airports, and stops and searches of British Asians increased five-fold after the June 2007 attempted bombings in London and Glasgow. A data mining exercise in Germany trawled through the sensitive personal data of 8.3 million people—without finding a single terrorist. From street stops to airport searches to data mining, ethnic profiling affects many thousands of people and stigmatizes entire communities. Widely practiced but little scrutinized, profiling insidiously and wrongly suggests that discrimination is acceptable, even appropriate.

The Civil Liberties Committee has been a vital voice taking note of the dangers of ethnic profiling and flagging the need for appropriate monitoring and safeguards. This hearing reflects the key role of this Committee and we are honoured to have the opportunity to be here today.

While ethnic profiling appears to have intensified in the face of the current terror threat, profiling is not a new tactic. Evidence shows that police officers across the EU have long used generalizations about ethnicity, religion, or national origin in targeting people for inquiries. Today, Europe is confronting a new terrorist threat, not only in the form of potential attacks by Al Qaeda, but also in the phenomenon of the "home-grown terrorist" inspired by Al Qaeda, and the possibility that terrorists are exploiting immigration and asylum policies to gain entry to the region. These concerns underlie a new interest in ethnic and religious profiling as a means to target police and intelligence resources more effectively and detect potential terror suspects. Among other areas, Europe's rapidly-expanding data immigration and border control data bases offer an information resource for law enforcement and counter-terrorism as well as immigration control, and it may well be tempting to seek to exploit them through the use of profiles. Law enforcement authorities should resist this temptation as, not only is ethnic profiling an illegal form of discrimination in most circumstances, there is also no evidence that it works, and considerable evidence that it may in fact be counter-productive.

Before raising some specific issues about ethnic profiling and immigration and border control, it is important to be clear as to what we are talking about when we use the term "profiling".

What is profiling—and what is not?

Given the prevalence of profiling across Europe, and the fact that most if not all ethnic profiling constitutes illegal discrimination under European law, there is a troubling lack of clarity among European political and law enforcement authorities as to what constitutes ethnic profiling. Thus, French officials have told us that there is no such thing as a terrorist profile that is useful in practice, and reportedly have opposed exploration of terrorist profiling by Europol. Yet a number of French law enforcement and counter-terror practices single out Muslims on the basis of their religious practice and ethnic origin rather than on the basis of specific suspicious behaviors or illegal actions. (France is far from alone; we have researched similar targeting of

immigrants and minorities in Germany, Italy, the Netherlands and the UK, and have received reports of similar actions in many other countries in addition.) That this is not recognized as a contradiction reflects a narrow understanding, in which ethnic profiling is defined as the use of race as the *sole* or *exclusive* criterion for suspicion or as the use of an explicitly articulated ethnic profile, such as that used by German authorities in a massive data mining exercise that failed to produce a single terror arrest.

The narrow definition of ethnic profiling fails to capture many practices that cause a disproportionate focus on ethnic and religious minorities. Profiling may or may not result from racist intent on the part of individual law enforcement officers. Many officers may be unaware of the degree to which ethnic stereotypes drive their subjective decision-making. Ethnic profiling remains persistent and pervasive precisely because it reflects the habitual and subconscious use of negative stereotypes—stereotypes that are deeply-rooted in the institutional culture of law enforcement and in the broader general public.

The definition of "ethnic profiling" used by the Justice Initiative is the use of ethnicity, race, national origin or religion rather than individual behavior as a basis for making law enforcement and/or investigative decisions about persons who are believed to be or to have been involved in criminal activity.

A broader definition of ethnic profiling does not disallow all use of ethnicity, national origin or religion by police

Legitimate law enforcement profiling tools

"Suspect profiles" or "suspect descriptions" use victim or witness reports to describe a particular person sought in connection with a particular crime. Personal appearance, which almost always includes ethnic characteristics, is a core aspect of a suspect profile. However, when police receive an overly general suspect description that features race, ethnicity or similar characteristics, they should seek additional and more specific information before using the description to stop and search people.[1]

Police, customs or immigration officials may also use ethnicity and other personal factors when they have specific, concrete intelligence regarding future crimes "involving a particular group of potential suspects at a specific location, for a short, specified duration of time"—in effect, a "suspect profile" of a specific group. It is not uncommon for criminal justice officials to create special, temporary task forces to address crime organizations with national or ethnic links. Immigration officers, customs and border guards also use profiles that include ethnicity and national origin in efforts to detect contraband and organized crime. As with vague suspect descriptions, the operational use of a concept as broad as that of an ethnic gang or nationality-based crime ring must be used with caution. Such profiles risk perpetuating harmful stereotypes, and they may be self-defeating if they are not based on current intelligence, as crime patterns often adapt in response to enforcement practices in order to avoid detection. While there are few studies of the efficiency of these profiles, in at least one case the U.S. Customs Service found that the rate at which officers detected drugs doubled after they *abandoned* a "drug mule" profile that had focused on Caribbean and Latin American women. (See endnote 1.)

"Criminal profiling" or "offender profiling." A criminal profile is constructed by analyzing the nature of a crime and the manner in which it was committed to develop guidance to help identify an unknown perpetrator. The underlying theory is that certain types of crime can be studied and common factors analyzed to build an offender profile of some predictive value to aid police investigations. Examples include serial-killer or serial-rapist profiles. Some, but not all, criminal profiles include race or ethnicity. Criminal profiling has not provoked public controversy, though many criminologists challenge its efficacy.

and other law enforcement. Specific suspect descriptions, sometimes called "suspect profiles," that describe a particular person or persons being sought for a particular crime at a particular time in a particular place are entirely legitimate as is the use ethnicity or national origin of organized crime groups or gangs, where this is one aspect of a broader, specific and up-to-date intelligence briefing. (See box for more detailed discussion.) But even in their necessary and legitimate law enforcement uses, ethnicity, race, religion and national origin must be treated with great caution. Perceptions and stereotypes associating ethnic minorities with crime are stubbornly persistent, even when they have little or no basis in fact. Police must be sure that they base their actions on current, precise and reliable intelligence and not on outdated and over-generalized experiences.[1]

Ethnic Profiling Is Generally Incompatible with International Law

A basic principle of the rule of law is that law enforcement actions respond to an individuals' conduct. Profiling views people as suspicious because of who they are rather than because of what they do. To cast suspicion on people because of their race, ethnic origin or religion violates the principle of equal treatment and is a form of race discrimination that is prohibited by international law.

The principal test of the legality of ethnic profiling practices in Europe is the anti-discrimination standard of the European Convention on Human Rights. Under that standard, if two similarly situated individuals are treated differently absent an objective and reasonable justification, one of them has been subjected to unlawful discrimination. The crucial question is whether ethnic profiling is a proportionate tool—that is, does the benefit in terms of law enforcement efficiency outweigh any costs that flow from use of the profile? And finally, could the same benefits not be produced using an alternative, less costly approach? European case law has established that where race constitutes an *exclusive* basis for law enforcement action, it amounts to discrimination. In practice, it is often difficult to prove racist intent beyond a reasonable doubt in many individual law enforcement actions, but when patterns of practices are examined they clearly demonstrate persistent discrimination against a particular group. Such practices constitute *indirect discrimination* which is also prohibited under European law (the Racial Equality Directive).

When the considerable harms caused by measures that rely on racial profiling are weighed against their limited success in actually preventing terrorism, there can be little doubt that they are a disproportionate and therefore inappropriate tool by international human rights standards. They clearly fall foul of the principle of non-discrimination, which cannot be derogated and must be respected even in times of terrorist threat. These concerns led the European Union Network of Independent Experts on Fundamental Rights in 2006 to conclude that ethnic profiling should "in principle" be considered unlawful in any circumstance:

> [T]he consequences of treating individuals similarly situated differently according to their supposed 'race' or to their ethnicity has so far-reaching consequences in creating divisiveness and resentment, in feeding into stereotypes, and in leading to the over-criminalization of certain categories of persons in turn reinforcing such stereotypical associations between crime and ethnicity, that differential treatment on this ground should in principle be considered unlawful under any circumstances.[2]

Profiling at borders

Very few studies exist of profiling at borders. In part, this reflects the additional challenges to defining and monitoring profiling at borders, particularly in the case of immigration decision-making which is, by definition, based first and foremost on the nationality and visa status of the person seeking to cross the border. Such research is also complicated by limited access and the desire to maintain secrecy about security practices. But the lack of data should not be taken to indicate an absence of profiling. If you speak with European citizens of minority ethnic origin, almost every person has a direct experience of being singled out for extra attention by police, immigration or customs officials in airports and train stations—including British MEPs traveling on the Eurostar from London to Brussels.

Beyond the standard immigration and security checks at borders and ports of entry, modern technology has created a new capacity to register, store and review vast amounts of personal data—including the personal data required of travelers on entry to the European Union. Recently created EU databases include the Visa Information System (VIS),[3] the Schenghen Information System (SIS I and SIS II),[4] and Eurodac, an asylum database.[5] These data bases are viewed, not only as a tool of immigration control, but also as a potential resource for broader law enforcement as reflected in proposals to grant law enforcement access to these data bases, and create operational links between the VIS, SIS II, and Eurodac.[6] The proposed entry-exit system, which will use the same platform, is the most recent addition to these systems.[7] In addition to checks by immigration officers at borders, the proposed entry/exit system would allow law enforcement to perform non-border identity checks based upon biometric data but does not detail under what circumstances such searches would be permitted. Still pending, but anticipated, is a Commission call for the creation of a database of residence permits and passports.

Civil rights and privacy advocates have taken note of the rapidly-growing trend of granting law-enforcement authorities from European member states broad access to rapidly expanding EU databases, and raised concerns that this is taking place without adequate data protection, particularly for sensitive personal data. The European Data Protection Supervisor (EDPS), Peter Hustinx, has expressed concern at the breadth of the exemption to protections of sensitive personal data that is allowed for law-enforcement purposes.[8] Hustinx has raised serious concerns about the European Council's proposal to increase law enforcement access to the VIS for purposes of combating terrorism and serious crime. He argues that the proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters "significantly weakens" protections of personal data of European citizens.[9] Additionally in his preliminary opinion on the proposed entry/exit system, the EDPS expresses concern that "all travelers are put under surveillance and are considered a priori as potential law breakers."[10]

The expanded use of data collected for immigration and border control purposes by law enforcement bodies complicates both the data protection regime and the protection of fundamental right to non-discrimination. One aspect of this complexity is the fact that data for the SIS, VIS, and entry/exit system would be collected under the authority of the Schengen Border Code but would be used by Member States in accordance with national regulations. This creates multiple frameworks for the use of sensitive data with little oversight or accountability.

What are the real or potential abuses of these data bases? Our work has flagged four areas in which discriminatory practices take place or could take place:

- the use of immigration data bases for data mining;
- the use of ethnic profiling in immigration decision making;
- a knock-on effect when immigration and border control systems lead to or support profiling by national or local police in the enforcement of immigration law within a country's borders;
- when exemptions from EU non-discrimination obligations for immigration processes and the treatment of third country nationals allow discrimination.

Concerns about abuse of immigration data bases and data mining

Public controversies about potential ethnic profiling of EU databases have largely focused on the Passenger Name Record system,[11] but it is clear that immigration data bases offer a rich and tempting resource for exploration by law enforcement in both immigration enforcement and counter-terrorism. When driven in significant part by ethnic criteria, *data mining* is a prime example of explicit ethnic profiling.

In data mining, large data bases of personal information,[12] such as immigration or student records, housing information and so on, are subjected to computerized searches using a specific profile, generally based on common characteristics of persons responsible for past offences.[13] Ethnicity, national origin and religion often figure heavily in these profiles. The data is used to narrow down a set of targets for further investigation. Data mining has been explored with a specific interest in its potential as a tool to identify terror "sleeper cells". Thus, German authorities' interest in data mining in order to detect the potential presence of further sleeper cells like the Hamburg cell which included several of the 9/11 terrorists. Germany's data mining effort, conducted from the end of 2001 until early 2003, is the most extensive examples of data mining for counter-terror purposes since 9/11 outside of the United States. Germany's constitutional court eventually ruled that, in the absence of a concrete danger, this technique constituted an unwarranted intrusion on personal privacy.[14] Moreover, Germany's massive data mining operation apparently did not yield a single arrest of a terrorist.

The result was exactly the same in the USA, when the Federal Bureau of Investigations (FBI) used immigration records to identify Arab and Muslim foreign nationals in the United States after 9/11. On this basis, 80,000 individuals were required to register with authorities; another 8,000 were called in for FBI interviews; and more than 5,000 were locked up in preventive detention. Not one has been convicted of a terrorist crime to date. In the words of Georgetown University law professor David Cole: "In what has surely been the most aggressive national campaign of ethnic profiling since World War II, the government's record is 0 for 93,000."[15]

While Germany has reportedly discontinued data mining, civil liberties activists remain concerned that it is an enticing tool for law enforcement, particularly as technological tools continue to advance and as European authorities are storing vast amounts of personal data in new and rapidly expanding EU immigration data bases.

The EU has undertaken a number of explorations of terrorist profiling. In November 2002 the Council of the European Union issued a draft recommendation calling for enhanced cooperation

in data-sharing between EU member states and with Europol and in developing profiles to assist in the identification of terrorists. The draft recommendation noted that "most but not all" EU countries were working on terrorist profiles[16] and, although it did not specify how the profiles might be applied, the recommendation includes both travel documents and method and means of travel as central components of profiles, and flags that immigration authorities are as well as police are key to cooperation in the application of terrorist profiling.[17] The recommendation stated that the terrorist profiles would be based on "a set of *physical*, psychological or behavioral variables, which have been identified, as typical of persons involved in terrorist activities and which may have some predictive value in that respect." (Emphasis added.)

The European Union Network of Independent Experts in Fundamental Rights warned that the proposed terrorist profiles presented a major risk of discrimination, raising the concern that: "The development of these profiles for operational purposes can only be accepted in the presence of a fair, statistically significant demonstration of the relations between these characteristics and the risk of terrorism, a demonstration that has not been made at this time."[18] In response, the European Council informed parliamentarians in July 2003 that the development of terrorist profiles would only be pursued at the EU level if there were a proven statistical link between the defined characteristics and the risk of terrorism.[19]

Profiling in immigration decision making

It is often difficult to determine whether immigration authorities are singling out persons for different treatment based on their ethnicity or religion as opposed to their nationality, which is legitimate, indeed the primary basis for immigration decisions. We have heard, but have not been able to verify, suspicions that such discriminatory treatment is taking place. Where different groups of persons of the same nationality are treated differently on such grounds, this is clear profiling and has been found to be unlawful in the UK courts. This was the judgment of the United Kingdom House of Lords in the *Roma Rights Case.*[20] The plaintiffs in *Roma Rights* claimed that U.K. customs officers stationed at Prague Airport subjected Roma to more intrusive and skeptical questioning than non-Roma when screening U.K.-bound travelers for possible asylum seekers.[21] The opinion of Baroness Hale—whose proposed declaration finding discrimination was endorsed by the other four Law Lords constituting the House of Lords Appellate Committee—observed that the challenged practice "was not only unlawful in domestic law but also contrary to our obligations under customary international law and under international treaties to which the United Kingdom is a party."[22] Even if the stereotype prompting the differential treatment—the assumption that Roma, being more likely than other Czech citizens to seek asylum might be "more likely to put forward a false claim"[23]—Baroness Hale concluded that this could not justify discriminatory treatment.[24]

Immigration enforcement justifies police profiling domestically

Immigration enforcement within a country's border is often based on ethnic profiling as police decide who is a possibly illegal immigrant and should be stopped for an identity check based on foreign appearance which, in practice generally means non-white appearance. A senior Spanish officer explained: "We stop foreigners to see if they are illegal; how can we enforce the [immigration] law if we don't stop people who look like foreigners?"[25] A 2004 interview-based study of police internal controls of foreigners in Sweden argued that both the legal framework and prevailing police practices generate ethnic discrimination.[26] Officers described commonly

using ethnic profiling and intuition as the basis for discretionary searches for illegal immigrants, and could not articulate more substantive criteria for identifying illegal immigrants.[27]

These patterns are often facilitated by outdated immigration laws that fail to reflect the reality of increasingly multi-ethnic societies. It is particularly disturbing that the use of appearance as valid grounds for enforcing immigration within national borders has been upheld in national courts. In a 2001 ruling, the Spanish Constitutional Court accorded Spanish police broad latitude, ruling that it is permissible for the police to "use the racial criterion as merely indicative of a greater probability that the interested party was not Spanish."[28] The Court reasoned that when police controls serve the purpose of "requiring that foreigners in Spanish territory are obliged to have documentation which proves their identity and their legal status in Spain …. specific physical or ethnic characteristics can be taken into consideration as reasonably indicative of the national origin of the person who has them." A dissenting judge noted that using race as a proxy for nationality makes little sense in what is "already a multi-racial society." The Spanish decision is currently being challenged before the United Nations Committee on Human Rights.[29]

Particularly when political authorities order strict enforcement of national immigration laws, including proactive police efforts to seek out illegal immigrants, police are especially likely to stop people who "look foreign"—even as the number of persons of minority appearance who are in fact naturalized citizens or long-standing citizens has significantly increased. The possibility of checking persons against European data bases seems likely only to heighten this trend and provide another to argue for the reasonableness of singling minorities for police attention.

There is a further prejudicial twist to the profiling of minorities for immigration enforcement. While it is not surprising that clampdowns on illegal immigration typically lead to heightened use of ethnic profiling, police often intensify their use of profiling in the context of *general* crime prevention campaigns. Police may be profiling because they believe that foreigners and immigrants commit more crime, because their productivity measures do not distinguish between criminal and immigration violation arrests, or because either type of arrest is viewed as equally satisfactory. We have found evidence of all of these practices in different countries. Statistics are often made public that distinguish between arrests of foreigners versus nationals but fail to distinguish between arrests based on criminal charges versus detentions for immigration violations. These practices all produce the misleading impression that most crime is committed by foreigners and reinforces or creates public prejudices associating migrants with crime.

Broader gaps and problems in EU immigration standards

The final issue to note in considering the creation of new regional immigration resources, is the troubling gap that exists in current EU immigration law in the protection of third country nationals. The European Network Against Racism (ENAR), a coalition of over 600 anti-discrimination groups from across the EU and a partner with Justice Initiative in our profiling project, has repeatedly called for the abrogation of Article 3.2 of the Racial Equality Directive (Council Directive 2000/43/EC) which derogates the principle of non-discrimination, allowing for differences of treatment on grounds of nationality, immigration process and the legal status of third country nationals.

The exclusion of nationality discrimination leaves a significant gap in protection and can be used to 'mask' the reality that supposedly legitimate differences based in nationality are in fact forms

of discrimination that are based on 'race' or ethnic origin—as with police profiling of minorities in their use of identity checks and stops to detect illegal immigrants. This exemption has been misused by member states to evade their obligation to ensure that asylum and immigration laws and practices are neither discriminatory nor have discriminatory effects and has prevented EU law from fully addressing the problem of profiling.

Another serious limitation of current EU anti-discrimination law is that it does not cover justice and law enforcement issues on any grounds, including racial or ethnic origin, religion and nationality. While we recognize the limitations of EU competence in home affairs matters, it is troubling that initiatives such as the data bases we are discussing today do fall within the scope of EU action, but fall outside the scope of EU protections against discrimination. It is even more troubling when one adds to this equation the inadequate state of data protection standards for law enforcement cooperation. The European Data Protection Supervisor has noted that existing legal standards are too general to be effective in law enforcement, and that "the lack of common rules could create a situation in which even minimum standards are not observed." As border control systems rapidly create large volumes of data and law enforcement access to this data is permitted for counter-terrorism investigations as well as immigration control, it is incumbent on the European Union to rectify what has become an unintelligible system of standards with complex and overlapping data protection standards and complete gaps in anti-discrimination norms.

Good practices in border control

The Justice Initiative is currently conducting research, with the University of Warwick, on contract to the European Union Agency for Fundamental Rights, into good practices to monitor and address ethnic profiling. Our research is ongoing and we have not found very many initiatives to address discrimination at borders, but we can mention the initiatives undertaken at Manchester airport to provide information to travelers and improve the quality of their encounters with airport officials, and to reach out to local minority communities living in the area and discuss airport security needs and travelers concerns. Another example of good practice that we are planning to visit is the anti-discrimination training of airport officials at Frankfurt airport. The US Customs experience already mentioned highlights the value of documenting and analyzing practices, including a specific concern with potential discrimination, to determine their impact and efficiency. Drawing on what is known from policing, research tells us that improving the quality of the personal encounter—through polite treatment and providing clear explanations for actions and information about procedures—improves a stressful experience. Most people understand the need for tight security measures, but they want and deserve to be treated with respect. The fact that travelers generally leave the area quickly and do not stop and take the time to complain should not allow indifference to their experiences, particularly when these are bad.

In fashioning remedies for, and alternatives to, ethnic profiling, governments should work closely with minority representatives and human rights groups. This may be challenging; there is little history of cooperation between the police and immigrant communities in much of Europe, and outright hostility among some. But these issues must be addressed. To that end, complaints mechanisms should also be strengthened; and complaints of police discrimination must be treated with utmost seriousness by specialized mechanisms, judicial authorities and the police themselves.

Conclusions and recommendations

Profiling is not irrational; it seeks to increase effectiveness by targeting law enforcement resources. But there is no evidence that profiling works, considerable evidence that it does not, and some disturbing indications that it may actually hamper law enforcement. When police or immigration officials act on prejudice, they blind themselves to real suspicious behaviors. This was the case of the US Customs that we have described. Profiles are both under- and over-inclusive; that is, they risk being too narrow and missing real suspects or too broad, in which case they are expensive to apply in terms of manpower and target large numbers of completely innocent people. More broadly, profiling feeds and aggravates existing mistrust and consequent hostility and lack of cooperation in fighting crime and terrorism among the very communities where support is most needed for counter-terrorism and immigration control. From street stops to airport searches to massive data mining by national security agencies, profiling affects many thousands of people and stigmatizes entire communities. Furthermore, profiling is, in most circumstances, unlawful.

As police continue to profile different ethnicities, nationalities and religions across Europe, they are, wittingly or not, contributing to a growing sense of marginalization, of being unwelcome, in minority and immigrant communities. Profiling does not only violate individuals' basic rights and freedoms, it instils insecurity amongst all the members of the targeted communities, and stigmatizes those communities in the public eye, legitimizing and fostering broader acts of violence and discrimination against them, straining inter-ethnic relations and social cohesion.

Until ethnic profiling is recognized as a problem, expressly banned in law, and addressed in practice, the damage it wreaks will only deepen. In a Europe characterized by increasing xenophobia, it is all the more important that those entrusted to uphold and enforce the law do so with full respect for the basic principle of equal justice.

The European Parliament and its Committee on Civil Liberties (LIBE) in particular, have consistently raised concerns about privacy rights and dangers of discrimination in the use and potential abuse of European databases, including for data mining exercises. As the European community presses for full availability of data for law enforcement and the fight against terrorism, the LIBE committee has made a series of recommendations on the need for clear and consistent data protection that, among other things, would protect data bases from being used in data mining exercises.[30] We fully support these recommendations and view them as important safeguards to generate confidence that EU immigration data bases will be used without prejudice and with full respect for the rights of all.

In order to make clear that ethnic profiling has no place in a Europe that respects human rights, we recoomend that:

- Member states should adopt specific standards that ban discriminatory practices by law enforcement, including but not limited to ethnic profiling. This ban should cover all forms of discrimination, including nationality.
- In order to access personal data, law enforcement should be able to demonstrate a need (not solely the belief that such data will aid an investigation) and show that less privacy intrusive measures are not available. The EU—through the Council, the Commission and

the Parliament— should call on member states to adopt safeguards to protect personal data and oversee the manner in which it is used in law enforcement.

- EU funding programmes and national authoroties should support the identification, development and implementation of good practices.
- In fashioning remedies for, and alternatives to, ethnic profiling, governments should work closely with minority representatives and human rights groups.

ENDNOTES

[1] There is some evidence that removing race or ethnicity from a criminal profile that includes racial ethnic criteria (in this case a drug courier profile) and mandating that officers look at specified non-ethnic criteria can help avoid discrimination *and* improve efficiency. In a rare instance in which an ethnic profile was ended, an explicit non-racial, behavioral profile was introduced, and its impact was measured, the results suggested that behavioral profiles may indeed enhance law enforcement effectiveness. In 1998, 43 percent of searches that US Customs officers performed were directed at blacks and Latino/as, a far higher rate than these groups' proportion of travelers. A particularly large number of searches—including invasive x-rays and strip searches—were carried out on Latina and black women suspected of being "drug mules." The hit rates for these searches were relatively low across all groups—5.8 percent for whites, 5.9 percent for blacks, and 1.4 percent for Latinos--and were particularly low for black and Latina women, who were in fact the least likely to be carrying drugs on or in their bodies. In 1999, the Customs agency changed its procedures, removing race from factors to consider in making stops and introducing observational techniques focusing on behavior such as nervousness and inconsistencies in passengers' explanations, using more intelligence information, and requiring closer supervision of stop and search decisions. By 2000, the racial disparities in Customs searches had nearly disappeared, the hit rate improved from just under five percent to over 13 percent and became almost even for all ethnic groups. (U.S. Customs Service, *Personal Searches of Air Passengers Results: Positive and Negative, Fiscal Year 1998*, (Washington DC: U.S. Customs Service, 1998).)

[2] European Union network of independent experts on fundamental rights, CFR-CDF.Opinion4.2006, op cit at 54, at 6.

[3] The Visa Information System or VIS was created to support coordination of data between EU consular officials, immigration, asylum and border authorities for the 134 countries that require EU entry visas. Reportedly the VIS will store the personal and biometric data (digitized photos and fingerprints) of approximately 20 million Schengen visa applicants annually; some 70 million sets of fingerprints may be stored at any one time. (Comment on data base dimensions by participant at "Ethnic Profiling and Ethical Approaches to Security and Counter-Terrorism", a meeting co-hosted by the European Policy Center, the King Badouin Foundation and the Open Society Justice Initiative, Brussels, May 31, 2007.) On March 7, 2005, the Council recommended granting internal security authorities' access to the VIS in order to "achieve fully the aim of improving internal security and the fight against terrorism." The European Commission has made a proposal for a Decision on access for consultation of the VIS by law enforcement authorities (COM (2005)600). Both proposals have been discussed by the Council and the parliament and endorsed by plenary vote of the European Parliament on 6 June 2007.

[4] The Schenghen Information System (SIS I and SIS II) is a secure database used by 15 European countries to support the free movement of persons following the abolishing of border controls under the 1985 Schengen Agreement. SIS I and SIS II maintain and distribute information for border security and law-enforcement purposes. According to the newly agreed regulation on SIS II, biometrics will be inserted in the SIS II following a quality check, though for the time being will be used only for verification purposes (as opposed to identification purposes). Article 22; OJ L 381 of 28 December 20056, p.4

[5] The Eurodac is a fingerprint system for asylum applicants and illegal immigrants created to coordinate asylum applications across EU member states. Discussions about giving law enforcement authorities' access to Eurodac are ongoing, following the explicit call of the European Council to permit such access at a June 2007 meeting. June 12-13, 2007, Justice and Home Affairs Council meeting. Eurodac reportedly has some 350,000 entries. Comment at "Ethnic Profiling and Ethical Approaches to Security and Counter-Terrorism," Brussels, May 31, 2007.

[6] Ibid. para. 41. In addition to these European Union data bases, the Prüm Treaty, signed on May 27, 2005, by seven European Union countries, will facilitate the exchange of data from DNA and fingerprint databases to produce improve cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration. See Fausto Correia, *Prüm Treaty will allow EU27 to exchange DNA data to fight crime*, (Brussels: Challenge Project report, adopted by the European Parliament, June 19, 2007). At http://www.libertysecurity.org/article1498.html

[7] See Preparing the next steps in border management in the European Union: COM(2008) 69 Final, 13 February 2008

[8] "Art 4.4 is too broad allowing that law enforcement need only believe that having the personal data would make it easier to prevent, investigate, detect and prosecute crime, rather the standard should be that law enforcement can demonstrate a need and show that less privacy intrusive measures are not available." Opinion of the European Data Protection Supervisor on the Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters (COM(2005) 475 final). 19 December 2005.

[9] Peter Hustinx, *Third Opinion of the European Data Protection Supervisor on the Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal*

matters, (Brussels: August 27, 2007) 17. See also, Opinion of the European Data Protection Supervisor for a Council Decision concerning access for consultation of the Visa Information System (VIS) by the authorities of Member States responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offenses and other serious criminal offices (COM (2005) 600 final). (2006/C 97/03). This opinion specifically raises concern with the risk of profiling of travelers through access to information such as "purpose of travel."

[10] Preliminary Comments of the European Data Protection Supervisor on: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions,"Preparing the next steps in border management in the European Union", COM(2008) 69 final;

[11] See web site of Statewatch, a UK-based NGO that monitors civil liberties in Europe, for extensive discussions of the PNR and issues around privacy and data mining, at http://www.statewatch.org/ and also EPIC, the Electronic Privacy Information Center, at http://www.epic.org/

[12] Personal information is defined, and its use regulated by the European Union Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Personal data are defined as "any information relating to an identified or identifiable natural person (Art. 2, a). Within the category of personal data, there are aspects that constitute sensitive personal data including: religious beliefs, political opinions, health, sexual orientation, race, membership of past organizations. The Directive stipulates that personal data should not be processed unless conditions are met that require that the processing be transparent, for a legitimate purpose and proportional. When sensitive personal data is processed, additional restrictions apply (Art. 8). See EU data protection page at http://ec.europa.eu/justice_home/fsj/privacy/

[13] See Wilhelm Achelpöhler and Dr. Holger Niehaus, "Data Screening as a Means of Preventing Islamist Terrorist Attacks on Germany," *German Law Journal*, Vol. 5, No. 5, (May 1, 2005).

[14] See full-text of decision at: http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg06-040.html

[15] David Cole, "Are We Safer?" *The New York Review of Books*, Vol. 5, No. 4, March 9, 2006.

[16] We do not know how many or which EU member states are actively pursuing profiling. In June 2003, the German Federal Police hosted a workshop on terrorist profiling.(House of Commons debate on Tuesday, July 8, 2003, London: Hansard, House of Commons, Vol. 408, Part No. 424, Written Answers to questions.) In July 2003, the UK announced its participation in a pilot group on terrorist profiling comprising experts from a number of EU Member States. (Written Question P-3694/03 by Sarah Ludford (ELDR) to the Council, Subject: Terrorist profiling. November 15, 2005. At http://www.sarahludfordmep.org.uk/speeches/97.html) Under the 2002/2003 Danish presidency of the European Union, Europol was instructed to explore the possibility of profiling terrorists. Europol developed a basic terrorist profile, but, after consulting with security professionals and academic experts, concluded that it was too broad, failed to capture the rapidly changing profiles of terror suspects, and would not be effective. (Justice Initiative Interview, Europol official, The Hague, June 2007.) Reportedly, a number of countries were skeptical about the feasibility and operational productivity of profiles and, lacking unanimity, Europol ceased to pursue the project. (Justice Initiative Interview with French security official, Mr. A.B. Paris, July 2007. A Europol official commented that: "After 9/11 everyone talked about profiles and. indicators, but they don't any more. There is a recognition that it doesn't work. Now we are more focused on processes, incidents and patterns." (Justice Initiative Interview, Europol, June 2007.)

[17] Council of the European Union, Draft Council Recommendation on the development of terrorist profiles, Brussels, October 14, 2002 (11858/1/02, REV 1 LIMITE ENFOPOL 117).

[18] "EU network of independent experts in fundamental rights" (CFR-CDF), First Report, May 2003. The elements of the profiles identified in the document include nationality, travel document, method and means of travel, age, sex, physical distinguishing features (e.g. battle scars), education, choice of cover identity, use of techniques to prevent discovery or counter questioning, places of stay, methods of communication, place of birth, psycho-sociological features, family situation, expertise in advanced technologies, skills at using non-conventional weapons (CBRN), attendance at training courses in paramilitary, flying and other specialist techniques. Draft Council Recommendation on the development of terrorist profiles.

[19] Question Time on Wednesday 2 July 2003, London: Hansard, House of Commons, Vol. 408, Part No. 420.

[20] *R v. Immigration Officer at Prague Airport ex parte Roma Rights Centre and Others* ("*Roma Rights*"), UKHL 55, Judgment of Sept. 17, 2004,

[21] *R v. Immigration Officer at Prague Airport ex parte Roma Rights Centre and Others* ("*Roma Rights*"), UKHL 55, Judgment of Sept. 17, [dec 9?] 2004, ¶¶ 2-4.

[22] Id., Opinion of Baroness Hale of Richmond, ¶ 98.

[23] Id., ¶ 81 (quoting Opinion of Laws LJ in Court of Appeals' judgment).

[24] Id., ¶ 82-3. See also Opinion of Lord Carswell, ¶113.

[25] *I Can Stop and Search Whoever I Want*, at 46.
[26] Sophie Hydén and Anna Lundberg, *Inre utlänningskontroll i polisarbete: mellan rättsstatsideal och effektivitet i Schengens Sverige*, Malmö: IMER, Malmö högskola; Linköping universitet: Tema Etnicitet (2004).
[27] The author, Sophie Hyden, noted in personal conversations with Justice Initiative ethnic profiling project staff that Swedish police officers were aware of this and saw it as a problem, repeatedly stating their need for improved guidance on domestic immigration control as an urgent need given the increased diversity of Sweden's population.
[28] In *Rosalind Williams*, Spanish Constitutional Court Decision No. 13/2001, Jan. 29, 2001 (STC 13/2001).
[29] See *Rosalind Williams Lecraft v. Spain*, Communication Submitted for Consideration Under the First Optional Protocol to the International Convenant on Civil and Political Rights, filing by the Open Society Justice Initiative, SOS Racismo and Women's Link Worldwide, September 11, 2006, at http://www.justiceinitiative.org/activities/ec/ec_spain
[30] "The rapporteur also has doubts as to the proportionality of the individual measures. The ends do not justify the means, as the measures are neither appropriate nor necessary and are unreasonably harsh toward those concerned." European Parliament Draft Report on the proposal for a Council framework decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters. Committee on Civil Liberties and Home Affairs. Rapporteur: Martine Roure. Provisional 2005/0202(CNS). Amendment 15, Article 5, paragraph 1 a (new). See also almost identical concerns raised in the European Parliament Draft Report on the proposal for a regulation of the European Parliament and of the Council on the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas. (COM(2004)0835 – C6-0004/2005 – 2004/0287(COD)) Committee on Civil Liberties, Justice and Home Affairs. Rapporteur: Sarah Ludford. Amendment 14, Article 1 (c).