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Artificial Intelligence and Racial Profiling:

Emerging Challenges for the European Court of Human Rights

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Preface

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A. Introduction

As Artificial Intelligence (AI) reshapes law enforcement, the age-old issue of racial profiling faces a new, digital frontier - one that challenges traditional human rights protections and adjudication processes. The integration of AI into policing, from predictive algorithms to real-time facial recognition, adds unprecedented complexities to the already contentious practice of profiling. For instance, the use of AI-driven "hot spot" policing in cities like Los Angeles has raised concerns about perpetuating racial biases through seemingly objective data analysis.

Although there are still relatively few cases in its jurisprudence, the European Court of Human Rights (ECtHR) has increasingly addressed issues of racial profiling in the context of law enforcement in recent years. Furthermore, the rapid advancement of AI-driven law enforcement tools presents new challenges that test the boundaries of existing legal frameworks and human rights protections. This is particularly significant for the Court, which not only provides remedies for violations but also plays a crucial role as an interpreter of human rights commitments.

After examining how racial profiling has emerged as an international concern and outlining its definitional framework, this article aims to address the question: What new challenges does AI-driven policing pose to the ECtHR's existing adjudicatory approach, based on observations of its jurisprudence on racial profiling?

Contributing to the ongoing discussions on AI regulation, this article provides insights into how AI might complicate human rights adjudication within the non-discrimination law domain. It emphasizes the critical role of human rights adjudicatory bodies in AI regulation and highlights the complex interactions between AI regulatory frameworks, human rights law, and human rights adjudication.

The structure of the article is as follows: It firstly briefly reviews the early developments, starting from issues related to police stops in the U.S. and the evolving definitional framework within the international human rights law discourse (2). Examining the ECtHR's related

jurisprudences on racial profiling, the emergence and development of the Court's approach to racial profiling is highlighted, while persistent controversies and challenges remain (3). It then explores the potential implications of AI-driven policing for future adjudications, arguing that the integration of AI will further complicate existing challenges in various dimensions (4). Finally, the article concludes by summarizing the main arguments and illustrating ideas for future research (5).

B. Racial Profiling, Discrimination and Human Rights Protection

I. The Evolution of Racial Profiling in International Discourse: From Domestic Concerns to General Recommendation No. 36

The concept of 'racial profiling' has evolved significantly over the past decades, initially gaining traction at the domestic level, particularly in the United States during the 1990s, before being incorporated into international human rights discourse. The issue first came to prominence in the context of traffic stops. For example, the "Traffic Stops Statistics Act of 1997"[1] mandated the collection of data on the race and ethnicity of individuals stopped by law enforcement during traffic stops, marking an early effort to address the issue. Additionally, awareness of racial profiling grew through domestic litigation, with the subject expanding to include concerns about unreasonable searches and seizures by police.[2]

As domestic awareness grew, the issue of racial profiling soon captured international attention, leading to discussions at forums such as the United Nations World Conference against Racism,

[1] House of Representatives, Traffic Stops Statistics Study Act of 1998, HR 118, 105th Congress (1997-1998) https://www.congress.gov/bill/105th-congress/house-bill/118/titles, accessed 21 August 2024.

[2] See, for example, Senate Research Center, C.S.S.B. 1074, 77th Legislature (Tex 2001), Committee Report (Substituted), 18 March 2001, https://lrl.texas.gov/scanned/srcBillAnalyses/77-0/SB1074RPT.PDF, accessed 27 October 2024.

Racial Discrimination, Xenophobia, and Related Intolerance, held in Durban, South Africa, in 2001.

The Durban Declaration and Programme of Action (DDPA) emphasized that States must "design, implement, and enforce effective measures to eliminate the phenomenon popularly known as 'racial profiling,' which includes the practice of police and other law enforcement officers relying, on any degree, on race, colour, descent, or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity."[3]

In 2007, the European Commission against Racism and Intolerance (ECRI)[4] further provided a more precise definition of racial profiling, highlighting its occurrence without objective and reasonable justification: "the use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality, or national or ethnic origin in control, surveillance, or investigation activities".[5] This definition underscores the arbitrary nature of such practices and their incompatibility with human rights principles.

In 2020, the ECRI further issued a statement on racist police abuse, including racial profiling and systemic racism, strongly condemning the use of racial profiling by law enforcement

[3] Durban Declaration and Programme of Action (adopted 8 September 2001, World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban) para 72, https://www.ohchr.org/sites/default/files/Documents/Publications/Durban_text_en.pdf, accessed 27 October 2024.

[4] One important role of the ECRI is to issue General Policy Recommendations (GPRs) addressing to the governments of all member states. GPRs cover important areas of concern in government action against racism and intolerance across Europe and are intended to serve as guidance for policy makers.

[5] ECRI General Policy Recommendation No. 11 on Combating Racism and Racial Discrimination in Policing (adopted 29 June 2007) para 1, https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/recommendation-no.11, accessed 21 August 2024.

authorities and urging Member States to take immediate and effective action to combat it.[6] That same year, the EU's "A Union of Equality: EU Anti-Racism Action Plan 2020-2025" reaffirmed the illegality of discriminatory profiling, emphasizing that any profiling resulting in discrimination based on racial or ethnic origin is prohibited under EU law.[7]

More recently, the Committee on the Elimination of Racial Discrimination (CERD)[8] adopted General Recommendation No. 36 on Preventing and Combating Racial Profiling by Law Enforcement Officials in 2020.[9] While the CERD had previously addressed racial profiling in its past recommendations[10], General Recommendation No. 36 has been particularly well-regarded

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[6] Statement of the European Commission against Racism and Intolerance (ECRI) on Racist Police Abuse, Including Racial Profiling, and Systemic Racism (adopted 2 July 2020, ECRI 82nd plenary meeting), https://rm.coe.int/statement-of-ecri-on-racist-police-abuse-including-racial-profiling-an/16809eee6a, accessed 21 August 2024.

[7] Union of Equality: EU Anti-Racism Action Plan 2020-2025 (18 September 2020) https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-anti-racism-action-plan-2020-2025_en, accessed 21 August 2024, in which Article 11(3) of Directive (EU) 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties was referred to.

[8] It is a body of independent experts that monitors the implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its State parties. The Committee also publishes its interpretation of the content of human rights provisions, known as general recommendations (or general comments), and organizes thematic discussions.

[9] General Recommendation No. 36 on Preventing and Combating Racial Profiling by Law Enforcement Officials (UN Doc CERD/C/GC/36, 2020).

[10] See, for example, *CERD*, General Recommendation No. 30 on Discrimination against Non-Citizens (UN Doc CERD/C/64/Misc.11/rev.3, 2004); *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); General Recommendation No. 34 on Racial Discrimination against People of African Descent (UN Doc CERD/C/GC/34, 2011).

for its comprehensive understanding of racial profiling and its inclusive, detailed recommendations for combating racial profiling.[11]

Moreover, this recommendation is particularly noteworthy for its attention to modern contexts and technological concerns. One of its unique and forward-looking aspects is the emphasis on the risks and implications of algorithmic profiling, particularly in the use of AI and big data by law enforcement. This recommendation addresses how AI can perpetuate racial biases and discrimination, making it the first international human rights instrument to comprehensively explore racial profiling within the context of emerging technologies. In Chapter VII, this document highlights the features of algorithmic profiling, highlighting that "discriminatory outcomes of algorithmic profiling can often be less obvious and more difficult to detect than those resulting from human decisions," and that "human rights defenders generally lack the technological expertise to identify such discriminatory practices".[12]

This brief overview traces the evolution of racial profiling as a concept, from its roots in domestic discussions to its recognition in international human rights instruments. Key milestones include early U.S. legislation, the 2001 Durban Conference, and several European initiatives, culminating in the CERD's General Recommendation No. 36 in 2020. These developments have collectively shaped our preliminary understanding of racial profiling, addressing both traditional contexts and emerging technological challenges. Building on this foundation, the next section will delve into a comprehensive exploration of racial profiling's general definition, examining how various international instruments and discussions have contributed to a more nuanced and inclusive conceptualization of this terminology.

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[11] See, for example, *Moeckli*, 'General Recommendation No. 36 (2020) on Preventing and Combating Racial Profiling by Law Enforcement Officials (CERD), 4 February 2022.

[12] General Recommendation No. 36 (n 9), para 31.

II. The Anatomy of Racial Profiling: Key Elements, Terminology, and Definitional Challenges

Through a comparative reading of various domestic and international instruments addressing racial profiling, it is concluded that a robust and consistent concept of racial profiling should encompass the following elements:

Firstly, it is conducted by police and other law enforcement agencies. Racial profiling initially gained attention in the U.S. within the context of traffic stops but has since expanded to include other policing practices such as identity checks, raids, border and custom checks, home searches, targeting for surveillance, operations to maintain or reestablish law and order or immigration decisions.[13]

The term "*law enforcement agency*" is sufficiently general to cover the different types of authorities involved in racial profiling, while the discussion in this paper remains primarily focused on practices commonly associated with the police, such as traffic stops and identity checks. When specifying the scope of discussion, terms like "*discriminatory identity check*" will also be used to specify the discussion to certain types of racial profiling.

Secondly, racial profiling is inherently discriminatory, based on protected characteristics such as race, colour, descent, or national or ethnic origin. It is important to recognize that the list of prohibited grounds should not be exhaustive when defining racial profiling, as current forms of discrimination can be intersectional, and new grounds may emerge with technological advancements. For example, profiling foreigners, especially men, passing through certain train stations as potential criminals, leading to disproportionate police checks[14], or profiling individuals based on their online behaviour – such as visiting certain websites or posting specific types of content

[13] Ibid., para 19.

[14] In such cases, the complexity is that the discriminatory impact can be based on nationality, gender, location or intersectional grounds.

on social media – illustrates how discrimination may not be easily categorized under a single or even multiple traditional discrimination grounds.

While "*racial*" is commonly used in most discussions, more inclusive terminologies such as "*discriminatory profiling*" or "*contrôle au faciès*" (used in French contexts) can be more neutral and accurate. It is encouraging to note that General Recommendation No. 36 considers profiling that relies on protected grounds to any degree as discriminatory. This broad understanding of racial profiling is crucial, as in policing practices, profiling can occur for various reasons – such as an individual's behaviour or speech and the deep-seated biases of the enforcement authorities. It remains difficult to assert that profiling is solely based on discriminatory grounds. This complexity is even more pronounced in the context of AI policing, where the reasons for certain actions may appear neutral on the surface, yet underlying biases can go undetected.

Thirdly, not all types of profiling are prohibited or illegal. The criterion of " reasonable justification" is emphasized across various legal instruments.[15] Profiling is commonly, and legitimately, used by law enforcement officers to prevent, investigate, and prosecute criminal offences. However, when profiling is not based on objective criteria or reasonable justification and leads to discriminatory outcomes, it becomes unlawful, which can be used to explain why the term "*unlawful profiling*" is also used in a report of the European Union Agency for Fundamental Rights (FRA).[16]

The distinction between lawful and unlawful profiling is a critical aspect of this discussion, yet it remains challenging to define precisely. While certain forms of profiling – such as those based on specific post-crime descriptors – may be considered reasonably justified, others –

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[15] See, for example, General Recommendation No. 36 (n 9), para 13 and ECRI General Policy Recommendation No. 11 (n 4), para 1.

[16] European Union Agency for Fundamental Rights (FRA), Preventing Unlawful Profiling Today and in the Future: A Guide, 5 December 2018, https://fra.europa.eu/en/publication/2018/preventing-unlawful-profiling-today-and-future-guide, accessed 21 August 2024.

particularly those relying on protected characteristics for predictive policing – are widely recognized as problematic. However, the line between lawful and unlawful profiling is not always bifurcated but easily blurred[17], especially as new technologies introduce additional complexities.[18]

The definition and terminologies we explored above provide a foundation for understanding what constitutes racial profiling, but they do not fully capture its real-world impact. In the following section, we will shift our focus to examine the systemic harm caused by racial profiling and its profound interference with human rights. This discussion will illuminate how racial profiling, even when perceived as a routine law enforcement practice, can lead to deep-seated societal issues.

III. The Legal Incompatibility of Racial Profiling with Human Rights Standards

Racial profiling constitutes a severe interference with fundamental human rights and is incompatible with international human rights law.

Racial profiling as a phenomenon that causes discriminatory impact on certain disadvantage groups of people in law enforcement directly contradicts the principles of non-discrimination and equality before the law. This principle is included in numerous human rights instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), article 26 of the International Covenant on Civil and Political Rights (ICCPR), article

[17] Imagine an anti-terrorism context, in which predictive checks may also partially rely on past terrorists' descriptions.

[18] See, for example, European Union Agency for Fundamental Rights, '#BigData: Discrimination in Data-Supported Decision Making' , 30 May 2018, https://fra.europa.eu/en/publication/2018/bigdata-discrimination-data-supported-decision-making, accessed 21 August 2024, pp. 4–5; *Rashida/Schultz/Crawford*, 'Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice', 5 March 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3333423, accessed 31 October 2024.

14 of the European Convention on Human Rights (ECHR), and article 24 of the Inter-American Convention on Human Rights (IACHR).

Beyond violating the general principle of non-discrimination, different manifestations of racial profiling also infringe on a range of specific human rights.

The most common practices of racial profiling often manifest through routine policing activities such as arbitrary stops, searches, and detentions partly or solely based on race, ethnicity, national origin or other protected grounds. Occasions involving detention or arrest may violate the right to liberty and security of person, as guaranteed, for example, by article 9 of the ICCPR, article 9 of the Universal Declaration of Human Rights (UDHR) and article 5 of the ECHR, article 7 of the IACHR.

Identifying the most routine and persistent manifestation of racial profiling – namely, discriminatory identity checks – through domestic or international judicial adjudications will be an ambitious task. Strategic litigation has played a key role in establishing that this form of racial profiling violates the right to private life under article 8 of the ECHR at the international level. This jurisprudence will be examined in detail in the following section.

Interference with privacy or private life rights due to racial profiling can also arise from other practices, such as unwarranted monitoring and data collection based on racial or ethnic characteristics. [19] The increasing use of technologies such as facial recognition and algorithmic profiling exacerbates this issue by enabling continuous and pervasive surveillance of specific groups, often without their consent or knowledge. This presents a complex dilemma for authorities addressing racial profiling. On the one hand, the collection of personal data related to such characteristics can itself infringe on privacy rights and violate data protection laws like the

[19] *Nicol Turner Lee/Caitlin Chin-Rothmann*, 'Police Surveillance and Facial Recognition: Why Data Privacy Is Imperative for Communities of Color' , 12 April 2022, https://www.brookings.edu/articles/police-surveillance-and-facial-recognition-why-data-privacy-is-an-imperative-for-communities-of-color/, accessed 21 August 2024.

GDPR[20]. On the other hand, data on personal characteristics can be essential evidence for proving the discriminatory impact of profiling practices. It is thus crucial that any data collection aimed at addressing discrimination is strictly limited, conducted with the consent of the data subjects, and used solely for combating such discrimination.

Racial profiling at borders and during immigration checks restricts the individuals' right to liberty of movement, which is guaranteed, for example, under article 12 of the ICCPR and article 22 of the IACHR. These practices are particularly prevalent in the context of anti-terrorism measures, where individuals from Islamic backgrounds can be disproportionately subjected to stricter controls and scrutiny.[21]

In more severe cases, racial profiling can escalate to the use of excessive force, leading violations of prohibition of torture[22], sometimes may even lead to unlawful killings, thereby undermining the right to life, as guaranteed, for example, in article 6 of the ICCPR, article 2 of the ECHR and article 4 of the IACHR.[23]

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[20] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation) [2016] OJ L119/1.

[21] For researches of racial profiling in the immigration control context, see, for example, *Arnold*, 'Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law', 2007, http://www.arizonalawreview.org/pdf/49-1/49arizlrev113.pdf, accessed 21 August 2024.

[22] See ECtHR, Lingurar v. Romania, Application no. 48474/14, 16 April 2019, in which the impugned raid activity was decided as violating article 3 of the ECHR read in conjunction with article 14 of the Convention.

[23] See, for example, Promotion and Protection of the Human Rights and Fundamental Freedoms of Africans and of People of African Descent against Excessive Use of Force and Other Human Rights Violations by Law Enforcement Officers through Transformative Change for Racial Justice and Equality, Report of the United Nations High Commissioner for Human Rights (A/HRC/54/66), 5 September 2023, https://www.ohchr.org/en/documents/thematic-reports/ahrc5466-promotion-and-protection-human-rights-and-fundamental-freedoms, accessed 21 August 2024.

Beyond infringing on fundamental rights and thus leading to individual reparations in discrimination case law, racial profiling has systemic and structural causes that can result in broader, systemic harm to society at a macro level.

Racial profiling may lead to a perpetuation of negative stereotypes and biases. It relies on and reinforces negative stereotypes about certain racial or ethnic groups, particularly those perceived as being associated with crime or terrorism. As these communities are disproportionately targeted by law enforcement, they may face social stigma, economic disadvantages, and reduced opportunities for advancement. When law enforcement practices are based on these stereotypes, it not only validates these biased views but also embeds them deeper into the fabric of society. This cyclical reinforcement leads to the normalization of discriminatory attitudes, making it more difficult to challenge and dismantle systemic racism.[24]

Racial profiling can also have a negative impact on community relations and trust, since it significantly damages the relationship between law enforcement and the communities they serve, particularly minority communities. The literature underscores that this erosion of trust has profound implications for public safety, as communities become less likely to cooperate with law enforcement, report crimes, or participate in community policing initiatives[25].

Racial profiling even contributes to the perpetuation of socioeconomic inequalities. For example, individuals who are repeatedly stopped or arrested may face legal costs, lose their jobs, or have difficulty finding employment due to a criminal record. The literature has shown that these economic disadvantages are not just the result of individual encounters with law enforcement but are reflective of broader patterns of discrimination that limit the economic mobility of entire

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[24] *Moeckli*, 'Racial and Ethnic Profiling' in Christina Binder and others (eds), Elgar Encyclopedia of Human Rights (Edward Elgar Publishing, 2022) p. 116, 6 September 2022, https://www.elgaronline.com/display/book/9781789903621/b-9781789903621.racial.and.ethnic.profiling.xml, accessed 21 August 2024.

[25] General Recommendation No. 36 (n 9), para 13 and ECRI General Policy Recommendation No. 11 (n 4), para 34.

communities[26]. The systemic impact of racial profiling extends to educational and housing opportunities as well. Communities that are heavily policed often have lower property values, poorer schools, and fewer resources. This creates a cycle of disadvantage where the children of those targeted by racial profiling are less likely to succeed in school and more likely to encounter similar profiling themselves.[27]

The nature of racial profiling – relevant not only within the individual rights discourse, where it is addressed through legal concepts of direct or indirect discrimination in individual rights-based adjudications, but also as a form of systemic and structural discrimination[28] with deep societal roots and persistent harms – indicates that human rights adjudicative bodies must adopt more nuanced and comprehensive approaches.

While the ECtHR and other international adjudicative bodies have made important rulings on racial profiling, it is crucial to explore how these institutions will address the complexities that racial profiling presents, particularly with the new challenges posed by AI technologies. The following sections will critically analyze the relevant jurisprudence, focusing particularly on how the ECtHR has interpreted and applied legal principles in key cases, and will then consider the potential implications of AI on future human rights adjudications.

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[26] *Rycroft*, The Economics of Inequality, Discrimination, Poverty, and Mobility (3rd edn, Routledge, 2024), 3 May 2024.

[27] *Lewis/Krysan/Harris*, 'Institutional Patterns and Transformations: Race and Ethnicity in Housing, Education, Labor Markets' in: Maria Krysan and Amanda E. Lewis (eds), The Changing Terrain of Race and Ethnicity (Russell Sage Foundation, 2004) p. 67, August, 2006..

[28] For a discussion of systemic and structural discrimination within non-discrimination law, see, for example, *De Schutter*, International Human Rights Law (3rd edn, Cambridge University Press, 24 October 2019).

C. ECtHR's Adjudications on Racial Profiling: Achievements and Challenges

I. An overview of the case law of racial profiling under the ECtHR

The case *Lingurar v. Romania*, decided by the ECtHR in 2019, stands out from three later cases examined by the Court due to its distinct context.[29] It involves four members of a Roma family who were subjected to a violent police raid in their home in Vâlcele, Romania, in 2011. The applicants alleged that the raid was conducted in a discriminatory manner, motivated by racial stereotypes against the Roma community. The Court found that the police had exercised their powers in a discriminatory manner, as the raid was justified by stereotypical views of the Roma community as being inherently criminal. This amounted to a violation of article 14 (prohibition of discrimination) taken in conjunction with article 3 (prohibition of inhuman or degrading treatment) of the ECHR. The Court also criticized the Romanian authorities for their failure to carry out an effective investigation into the applicants' claims. As a result, the Court concluded that there had been a violation of both the substantive and procedural limbs of article 14 in conjunction with article 3.

While the Court mentioned "ethnic profiling,"[30] recognizing it as part of the broader concept of racial profiling, it did not reference any specific instruments on racial profiling or delve deeper into the analysis of this issue.

[29] Lingurar v Romania (n 22).

[30] Ibid., para 76 and para 79.

In contrast to the explicit usage of discriminatory justifications by the relevant authority in the *Lingurar* case, where racial bias was overtly acknowledged, the other three cases involve more nuanced discussions on racial profiling.[31]

Two Chamber decisions were released on the same day in 2022: *Muhammad v. Spain*[32] and *Basu v. Germany*[33].

Muhammad concerns a Pakistani national who claimed that he was subjected to an identity check by the Spanish police solely due to his race, alleging that this constituted racial profiling. The applicant pursued both criminal and administrative remedies in Spain, claiming that the identity check violated his rights under article 14 (prohibition of discrimination) and article 8 (right to respect for private and family life) of the ECHR. He argued that the police's actions were racially discriminatory and that the Spanish authorities failed to adequately investigate these claims. The Court ultimately found no violation of the applicant's rights under the Convention and noted that, while identity checks can fall within the scope of article 8, not every identity check constitutes a violation of private life. It is concluded that the applicant did not provide sufficient evidence to prove that the identity check was racially motivated or that the Spanish authorities failed in their obligation to investigate the claims. As a result, the Court ruled by a narrow majority (four votes to three) that there had been no violation of articles 8 or 14.

In the case of *Basu v. Germany*, a different outcome was reached compared to *Muhammad*, despite the similarities in the applicants' allegations.

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[31] Similar to the case of *Lingurar*, law enforcement agencies also use racism reasons to justify policing activities in other international human rights adjudications on racial profiling, see, for example, *Acosta Martínez v Argentina*, Judgment, Inter-Am Ct HR (ser C) No 410 (31 August 2020) (in Spanish); *Williams Lecraft v Spain*, UN Doc CCPR/C/96/D/1493/2006 (27 July 2009).

[32] ECtHR, Muhammad v. Spain, Application no. 34085/17, 18 October 2022.

[33] ECtHR, Basu v. Germany, Application no. 215/19, 18 October 2022.

It involves a German national of Indian origin, who challenged an identity check conducted by the police on a train crossing from the Czech Republic into Germany. Like that in *Muhammad,* the applicant in *Basu* claimed that the identity check was racially motivated, constituting racial profiling, and violated his rights under article 14 in conjunction with article 8 of the ECHR. The Court found that the identity check did fall within the scope of article 8 due to the serious negative effects it had on the applicant's private life and concluded that there had been a violation of article 14 taken in conjunction with article 8 in the procedural aspect because the German authorities failed to conduct an effective investigation into the applicant's allegations of racial profiling.

However, the Court did not find a substantive violation of article 14 and emphasized that due to the respondent State's failure to conduct an effective investigation, the Court was "unable to find" whether there had been a substantive violation of article 14.[34]

These two decisions have led to a bunch of criticisms, particularly by Judge Pavli in the *Basu* case, as well as from scholars and observers.[35] The criticism accounts focus on two interrelated aspects:

[34] Ibid., para 38.

[35] See, for example, *Ringelheim*, 'Basu v Germany and Muhammad v Spain: Why the First European Court of Human Rights' Judgments on Racial Profiling in Identity Checks Are Disappointing', 7 February 2023, https://www.ejiltalk.org/basu-v-germany-and-muhammad-v-spain-why-the-first-european-court-of-human-rights-judgments-on-racial-profiling-in-identity-checks-are-disappointing/, accessed 21 August 2024; *Streicher*, 'Tackling Racial Profiling: Reflections on Recent Case Law of the European Court of Human Rights', 16 December 2022, https://strasbourgobservers.com/2022/12/16/tackling-racial-profiling-reflections-on-recent-case-law-of-the-european-court-of-human-rights/, accessed 21 August 2024.

Firstly, in discrimination-related adjudications, the reversal of the burden of proof is a general principle.[36] Once an applicant demonstrates a difference in treatment, it becomes the State's responsibility to prove that this differential treatment is not based on discriminatory grounds. In *Muhammad*, however, this reversal of the burden of proof did not occur because the Court held that "[t]he applicant has not succeeded in showing any surrounding circumstances which could suggest that the police were carrying out identity checks motivated by animosity against citizens who shared the applicant's ethnicity."[37] This ruling is read as that the burden to prove discrimination remained with the applicant.

In *Basu*, the failure of the German authorities to carry out an effective investigation into the racial motives behind the identity check did not lead to a substantive finding of discriminatory profiling. This outcome implies that the burden of proving discrimination fell back on the applicant, rather than the State being required to demonstrate that the identity check was not discriminatory. Critics argue that this represents a failure to appropriately apply the principle of reversed burden of proof, where the State's inability to prove non-discrimination should have led to a finding of discrimination.[38]

Secondly, in both *Muhammad* and *Basu*, indirect or environmental evidence such as reports of human rights organizations or NGOs was not given an adequate weight.[39] Due to the absence

[36] This principle has been established in the ECtHR's case law and been enshrined in international human rights law. See, for example, the ECRI's General Policy Recommendations nos. 7, 11, 15 and Recital 21, article 8 of Council Directive 2000/43/EC of 29 June 2000; ECtHR, Timishev v. Russia, Application nos. 55762/00 and 55974/00, 13 December 2005, para 57 and ECtHR, D.H. and Others v. the Czech Republic [GC], Application no. 57325/00, 13 November 2007, para 177.

[37] *Muhammad v Spain* (n 32) para 99.

[38] For example, Judge *Pavli* has criticized it as "procedural minimalism", *Basu v Germany*, Partly Dissenting Opinion of Judge Pavli.

[39] For example, *Ringelheim* (n 35).

of direct evidence demonstrating racial motives behind the identity checks, a sufficient presumption of discrimination to shift the burden of proof onto the States was not established.

It remains unclear whether the Court responded directly to previous criticisms in its 2024 decision in the case of *Wa Baile v. Switzerland*, but the judgment appears to address key concerns raised in its earlier jurisprudences.[40]

The applicant, a Swiss national of Somali origin, was subjected to an identity check by Zurich municipal police on February 5, 2015. He alleged that the check was based on racial profiling. After refusing to comply with the police's demands, the applicant was fined for non-compliance. Like the cases of *Muhammad* and *Basu*, the applicant argued that the identity check violated his rights under article 14 in conjunction with article 8 of the ECHR. The Court found that Swiss authorities failed to effectively investigate whether racial motives influenced the police's actions, leading to a procedural violation of article 14 in conjunction with article 8. Crucially, however, the Court went further by also finding a substantive violation of article 14 combined with article 8, determining that the identity check was indeed discriminatory. This marked the first time the ECtHR found a substantive violation of article 14 in the context of a discriminatory identity check.

The *Wa Baile* judgement is noteworthy for several reasons:

Firstly, the Court reversed the burden of proof, establishing a strong presumption of discrimination.[41] When the State failed to rebut this presumption, it led to the substantive conclusion that the identity check was discriminatory. This shift in the burden of proof played a critical role in the Court's decision to recognize a substantive violation of article 14 in conjunction with article 8.

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[40] ECtHR, Wa Baile v. Switzerland, Application nos. 43868/18 and 25883/21, 20 February 2024.

[41] Ibid., para 134.

Secondly, the presumption of discrimination was formed through the strategic use of a wide range of international human rights instruments, including General Recommendation No. 36, international reports on racial profiling, and contributions from human rights NGOs.[42] These resources were pivotal in advancing the case to a stage where the State had to justify the reasonableness of the identity check.

Thirdly, a key factor differentiating this case from *Muhammad* and *Basu* is that the Administrative Tribunal of the Canton of Zurich (*le tribunal administratif du canton de Zurich*) had already acknowledged the identity check as illegal in the domestic proceedings. This recognition by the domestic court likely influenced the ECtHR's decision to find a substantive violation. Without this domestic recognition, the Court might have been more hesitant to reach such a conclusion. Nevertheless, this groundbreaking judgment remains encouraging, especially for its accurate understanding of the systemic and structural nature of racial profiling.

II. The ECtHR's Approach to Racial Profiling: Principles and Challenges

Reviewing the case law on racial profiling from the ECtHR, it's encouraging to see that the Court has made strides in addressing profiling issues and establishing key principles, though some areas remain unclear.

The Court's progress in redressing racial profiling has particularly focused on discriminatory identity checks – a persistent issue within different jurisdictions all over the world.[43] Identity checks are typically brief, and their harm to victims is often implicit, mental, and long-lasting.

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[42] Ibid., para 42-56.

[43] The issue of racial profiling in non-traditional immigrant countries often does not receive sufficient attention, for example, *Philippe Mesmer*, 'Foreigners Increasingly Targeted by Racial Profiling in Japan: Several People Have Filed Complaints Against the Actions of the Japanese Police, Claiming to Be Victims of Discrimination', 9 May 2024, https://www.lemonde.fr/en/international/article/2024/05/09/japan-sees-an-increase-in-racial-profiling-of-foreigners_6670946_4.html, accessed 21 August 2024.

This transient and often untraceable nature of identity checks makes proving discrimination particularly challenging.

Through its case law, the ECtHR confirmed early on that unreasonable identity checks fall within the scope of article 8 of the Convention, stating that "the use of coercive powers conferred by legislation to require an individual to submit to an identity check… amounted to an interference with the right to respect for private life."[44]

However, the Court also established in *Muhammad* that not all identity checks constitute an interference with human rights. The threshold is whether "the person concerned has an arguable claim that he or she may have been targeted on account of specific physical or ethnic characteristics."[45]

Moreover, the Court has imposed obligations on States to effectively investigate racial motives behind identity checks. This procedural obligation under article 14 necessitates independent investigations[46] – ideally conducted by bodies separate from the police and prosecution system[47]. For effective investigations, racial profiling allegations are supposed to be duly and independently dealt with, during which the core concern is whether related organs have collected and secured evidence such as video footage, testimonies and police reports.

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[44] ECtHR, Gillan and Quinton v. the United Kingdom, Application no. 4158/05, 12 January 2010, para 63.

[45] *Muhammad v Spain* (n 32) para 50.

[46] Concluding Observations on the Combined Tenth to Twelfth Periodic Reports of Switzerland (CERD/C/CHE/CO/10-12, 20 September 2021) para 20(b)(iii), https://www.ohchr.org/en/documents/concluding-observations/cerdccheco10-12-concluding-observations-committee-elimination, accessed 21 August 2024.

[47] This means not only a lack of any hierarchical or institutional connection but also a practical and independent investigation. ECtHR, Bouyid v. Belgium [GC], Application no. 23380/09, 28 September 2015, para 118.

Beyond procedural obligations, the Court is gradually building substantive obligations[48] for addressing racial profiling. In *Wa Baile*, the Court emphasized that only the respondent State can provide details such as how many other people were subjected to the same identity check and other relevant information.[49] The failure of Switzerland to provide this information indicated that identity checks should be more traceable, requiring collection of the data of identity check subjects by the police.

The Swiss Parliament subsequently responded to the Court's breakthrough decision:

"It is now up to the competent authorities of the canton to examine which measures should be taken to implement the judgment. In general, the issue of racial profiling during identity checks primarily concerns the responsibilities of the police. Therefore, the responsibility lies with the cantons. It is expected that the judgment can be implemented within the framework of existing legal provisions."[50]

This response reflects an awareness at the state level of the necessity to redress racial profiling issues, and expectations and opportunities of reforms within local police systems.

At the canton level, however, the effectiveness of the existing framework in dealing with racial profiling was still emphasized according to a parliamentary motion of September 2024.[51]

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[48] For the definition of substantive obligations, see *Janneke Gerards*, General Principles of the European Convention on Human Rights (2nd edn, Cambridge University Press, 13 July 2023), https://www.cambridge.org/highereducation/books/general-principles-of-the-european-convention-on-human-rights/3D2EE92D85245C812DA7C47AECD7EFC6#overview, accessed 21 August 2024, p 191.

[49] *Wa Baile v Switzerland* (n 40) para 134.

[50] This is translated from the German text in: The Federal Assembly – The Swiss Parliament, 'Profilage Racial/Ethnique: Conséquences de l'Arrêt de la CEDH', https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20247281, accessed 21 August 2024.

[51] Parlamentarischer Vorstoß, Antwort des Regierungsrates, Urteil EGMR Wa Baile vs. Schweiz – Massnahmen und Konsequenzen des Urteils im Kanton Bern, 4 September 2024, https://www.rr.be.ch/de/start/beschluesse/suche/geschaeftsdetail.html?guid=6a7ae0076f4e48659b434fc3621ed6f1, accessed 16 October 2024.

Different from the view of the Court and involved NGOs, which argue that the absence of clear legal provisions regarding racial profiling facilitates discriminatory identity checks and advocate for legal reforms to ensure that such checks are based solely on reasonable suspicion, the cantonal government maintains that "no particular need for action arises from the ECtHR judgement".[52]

Regarding concerns about establishing an independent body to investigate complaints of discrimination based on skin colour, separate from the police and other authorities, the canton asserts that "the supervisory and directive authority of the public prosecutor's office over the police does not result in a lack of independence of the public prosecutor's office in conducting investigations."[53]

The complexity of addressing racial profiling is, again, evident here. As a systemic issue, even when a judicial breakthrough is achieved, authorities can find it challenging to take specific positive measures to combat racial profiling. The problem is not only embedded within law enforcement systems but also has deeper societal roots, some of which can extend beyond the scope of judicial competence.

Despite the established principles made by the ECtHR in addressing racial profiling, certain ambiguities persist and thus need further reflections.

One institutional limitation lies in the Court's reliance on an individual right-based approach and the premier function of the Court as deciding on individual disputes, which may occasionally contradict with the needs of addressing systemic and structural discrimination issues like racial profiling. This paradox and the need of balancing between individual justice and so-called

[52] Ibid., p 3.

[53] Ibid., p 6.

constitutional justice is also elucidated outside the context of discrimination and persistent through the Court's case law.[54]

In cases of discrimination, this paradox is reflected in the approach adopted by the Court when dealing with evidence. On one hand, the Court relies on direct evidence of discriminatory intent against the victim, such as official reports or video footage. On the other hand, it is essential to give due consideration to indirect or contextual evidence that demonstrates the broader social background, such as state reports or general recommendations. This is not a novel and rare discussion if we review the Court's jurisprudences of discrimination, especially in occasions involving systemic discrimination such as the ethnic segregation of Roma pupils in education context[55] and domestic violence against women.[56]

However, the Court's approach to evidence has been inconsistent and sometimes confusing, leading to criticism about its reasoning. For instance, in *Muhammad*, despite acknowledging concerns raised by various evidence regarding racially motivated police identity checks, the Court ultimately dismissed this broader contextual factor. The Court focused narrowly on whether the specific identity check in question was motivated by racism, stating that its sole concern was the case at hand.[57] This approach sidelined relevant evidence and left open the question of whether such factors could have influenced the outcome. As a result, future

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[54] See, for example, *Lemmens/Van Drooghenbroeck*, 'How "Systematic" is the European Court of Human Rights' Approach to "Systemic" Violations of the Convention?', 29 September 2023.

[55] *D.H. and Others v the Czech Republic* (n 36).

[56] In the ECtHR's caselaw of domestic violence, the Court often considers indirect evidence that can illustrate the general atmosphere towards victims in a society. See *Katarzyna Sękowska-Kozłowska*, 'Proving Domestic Violence as Gender Structural Discrimination before the European Court of Human Rights', 17 April 2024, https://link.springer.com/article/10.1007/s11196-024-10148-w, accessed 21 August 2024.

[57] *Muhammad v Spain* (n 32) para 100: "a number of organisations, including intergovernmental bodies, have expressed concern regarding the occurrence of racially motivated police identity checks […] the Court cannot lose sight of the fact that its sole concern in the case at hand is to ascertain whether the fact that the applicant was required to identify himself on the street was motivated by racism".

applicants and lawyers are left with little guidance on how environmental or indirect evidence might be treated in similar cases. To address this ambiguity, the need for the Court to develop a more explicit and consistent approach to assessing the weight of environmental or indirect evidence in its jurisprudence will spark a long-lasting discussion.

While the general principle of the reversal of the burden of proof in discrimination cases is frequently emphasized in critiques, a more nuanced criticism can be made regarding its application. The ECtHR has consistently upheld the principle that "once the applicant has shown a difference in treatment, it is for the Government to show that it was justified."[58] However, the threshold for triggering this reversal of the burden of proof has varied across cases.

In *Muhammad*, the Court found that the applicant did not succeed in "showing any surrounding circumstances... which could give rise to the presumption required to reverse the burden of proof."[59] Conversely, in *Wa Baile*, the Court held that a presumption of discrimination existed, thus shifting the burden to the State. This discrepancy can be partly explained by the Court's inconsistent and unclear use of the concept of "prima facie discrimination," which refers to the initial evidence the applicant must present to establish a presumption of discrimination.[60] The variation in the prima facie evidence requirement across these cases is significant and appears to be connected to the differing weights the Court assigns to environmental evidence – such as reports from human rights organizations – in each case. Given the complex and systemic nature of racial profiling, the threshold for establishing prima facie discrimination should be informed

[58] See, for example, *D.H. and Others v the Czech Republic* (n 36), para 177; *Timishev v Russia* (no 36) para 57.

[59] *Muhammad v Spain* (n 32) para 99.

[60] For the Court's confusing methodology of prima facie discrimination, see, for example, *Henrard*, 'The European Court of Human Rights and the "Special" Distribution of the Burden of Proof in Racial Discrimination Cases: The Search for Fairness Continues', 10 July 2023, https://brill.com/view/journals/eclr/4/4/article-p426_003.xml, accessed 21 August 2024.

by a broader range of evidence, as is commonly practised by constitutional courts' adjudications on racial profiling issues.[61]

Another issue that requires further examination is what constitutes a reasonable justification for profiling in predictive policing activities. The case law does not provide clear answers on this matter. While it is recognized that predictive policing activities, such as identity checks, generally fall within the legitimate aim of public security, the specific criteria for what justifies such actions remain ambiguous.

Profiling based explicitly on certain physical or ethnic characteristics is illegal, as established in cases like *Lingurar*. However, the situation becomes more complex when law enforcement does not overtly use physical or ethnic characteristics as justification. For instance, the argument that other people or groups of people are also subjected to the same treatment of identity checks can be considered a reasonable justification, but only if it can be properly proved. This, again, emphasizes the need for greater traceability and documentation of policing activities.

When abnormal behaviour of the alleged victims is cited as justification for police action, the reasonableness of such justification depends heavily on the context. For example, mere refusal to show identification or natural human behaviour, such as avoiding eye contact, are insufficient grounds for reasonable justification. On the other hand, abnormal behaviours that go beyond reasonable suspicion need to be clearly articulated by the police to justify their policing.

The Court's future interpretations will be crucial in addressing these complexities, particularly as new technologies like AI become more prevalent in law enforcement. One of the emerging challenges is the increasing reliance on AI in policing activities, a trend that is gaining momentum globally with the advancement of AI technology.

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[61] See, for example, the case of *Attorney General of Quebec v Luamba et al* 2022 QCCS 25, No 500-17-114387-205 (Québec Superior Court, 25 October 2022).

Looking ahead, it is likely that highly judicialized human rights bodies like the ECtHR will need to adapt their approaches to address these challenges. While the ECtHR has laid important groundwork in racial profiling, the rise of AI in policing presents new challenges that will require careful consideration and adaptation in future human rights adjudication. This issue will be further discussed concerning the Court's ability to respond effectively to these challenges.

D. AI Regulation: Crisis of Discrimination and the Role of the ECtHR

I. AI in Policing: Reinforcing or Reducing Racial Profiling?

With the integration of AI, will the deep-rooted bias in policing implemented solely by human forces diminish, or will it simply become harder to recognize?

Predictive policing algorithms in the AI context refer to the use of data analytics and AI algorithms to forecast where crimes are likely to occur or who might commit them. These systems can include machine learning algorithms that continuously adapt and refine their predictions based on new data, theoretically improving over time. However, the data input into these systems plays a crucial role in determining outcomes and predictions.[62]

"Systemic racism is rife and continues to mutate into new forms – including in new technologies, where algorithms can amplify discrimination", said by the UN Secretary-General *António Guterres,* calling for awareness of racial discrimination caused by technologies. *Ashwini K.P.*, during her interactive dialogue at the Human Rights Council's 56th session in Geneva, Switzerland, highlighted the persistent and damaging belief that technology is neutral and

[62] *Browning*, 'Stop and Risk: Policing, Data, and the Digital Age of Discrimination', 7 August 2020, https://link.springer.com/article/10.1007/s12103-020-09557-x, accessed 21 August 2024.

objective.[63] In her report, she examines how this assumption enables artificial intelligence to perpetuate racial discrimination.[64]

Numerous studies have also shown that because historical data often reflects past biases (e.g., over-policing of minority communities), AI may continue to target these communities disproportionately. The lack of transparency in predictive policing tools – often criticized as "black boxes" where the decision-making process is not transparent or understandable to those using or affected by the technology – further complicates efforts to identify and correct these biases.[65]

Examples of this crisis include Chicago's "Strategic Subject List," which aimed to predict individuals most likely to be involved in violent crime. The program was criticized for disproportionately targeting young Black men, many of whom were added to the list based on minimal or indirect evidence.[66] Similarly, the Los Angeles Police Department's LASER (Los Angeles Strategic Extraction and Restoration) program used predictive policing to focus law

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[63] Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Racism and AI: Bias from the Past Leads to Bias in the Future', 30 July 2024, https://www.ohchr.org/en/stories/2024/07/racism-and-ai-bias-past-leads-bias-future, accessed 15 October 2024.

[64] *Ashwini K.P.*, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN Doc A/HRC/56/68, 3 June 2024, https://www.ohchr.org/en/documents/thematic-reports/a78538-report-special-rapporteur-contemporary-forms-racism-racial, accessed 21 August 2024.

[65] Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, "Racial Discrimination and Emerging Digital Technologies: A Human Rights Analysis" (Human Rights Council, 44th session, 15 June-3 July 2020, UN Doc A/HRC/44/57) para 34; *Danielle Ensign and others*, 'Runaway Feedback Loops in Predictive Policing' (arXiv, 29 June 2017, last revised 22 December 2017) https://arxiv.org/abs/1706.09847, accessed 21 August 2024.

[66] *Saunders/Hunt/Hollywood*, 'Predictions Put into Practice: A Quasi-Experimental Evaluation of Chicago's Predictive Policing Pilot', 12 August 2016, https://link.springer.com/article/10.1007/s11292-016-9272-0, accessed 21 August 2024.

enforcement efforts in certain areas. Critics argued that this led to over-policing of minority neighbourhoods, with little evidence of its effectiveness in reducing crime.[67]

A preliminary observation, though not exhaustive, suggests that racial profiling is likely to persist even with the integration of AI and algorithmic techniques. While AI-driven discrimination may become less overt – allowing States to justify profiling by claiming the neutrality of these technologies – the problem becomes more covert. A more concerning issue is that victims of AI discrimination may be unaware of who is discriminating against them or how the discrimination is occurring, creating additional obstacles to bringing claims of racial profiling before a court. This underscores the critical role of international human rights adjudicative bodies, alongside other human rights actors, in addressing the challenges posed by AI in discrimination cases. Priority will be given to the challenges posed on the ECtHR's approach to discrimination.

II. AI and Human Rights: The ECtHR's Role in Addressing Predictive Policing

How will predictive policing algorithms challenge the adjudication of the ECtHR, and in what manner will the Court respond?

The first challenge for the ECtHR will be whether it will acknowledge and recognize the risk of discriminatory profiling when AI decision-making is involved. AI discrimination lawsuits have become increasingly common in domestic courts, particularly in the U.S., where cases have addressed issues of bias in algorithms.[68] Although cases specifically dealing with AI-driven discrimination have yet to be brought before the ECtHR, the increasing number of reports and legal instruments linking AI to human rights, especially discrimination, along with

[67] 'LAPD Ended Predictive Policing Programs Amid Public Outcry. A New Effort Shares Many of Their Flaws' *The Guardian*, London, 7 November 2021, https://www.theguardian.com/us-news/2021/nov/07/lapd-predictive-policing-surveillance-reform, accessed 21 August 2024.

[68] For example, *Mobley v Workday, Inc* (US Dist Ct, Case No 3:23-cv-00770, 9 April 2024).

recent regional and international binding instruments like the EU AI Act[69] and the Council of Europe Framework Convention on Artificial Intelligence and Human Rights[70], suggest that it is only a matter of time before the Court must confront this issue and making references to the abovementioned materials when interpreting and applying the Convention.

Secondly, the systemic nature of AI-driven discrimination necessitates that the ECtHR considers environmental or indirect evidence. This will require actors such as international organizations and NGOs to provide detailed and credible State reports on the current state of AI policing, with a particular focus on its disparate impacts. These reporting mechanisms could be established within existing human rights monitoring systems, such as the Council of Europe (CoE), the European Commission against Racism and Intolerance (ECRI) and the Fundamental Rights Agency (FRA). Such mechanisms will be crucial for understanding the broader context in which AI operates and its potential to perpetuate discrimination. The key challenge, however, will be determining how much weight the Court assigns to this evidence when evaluating claims of AI-driven discrimination under article 14 of the ECHR.

Thirdly, according to the principle of the reversal of the burden of proof, once a prima facie case of discrimination is established, the States would need to prove that the AI system in question is not discriminatory, and further, the Court will need to consider whether States fulfil their positive obligations to prevent and redress discrimination by AI policing.

This will firstly include States' monitoring of AI policing. According to the preamble of the Framework Convention on Artificial Intelligence and Human Rights, particular attention should

[69] European Parliament Legislative Resolution of 13 March 2024 on the Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts [2024] P9_TA(2024)0138.

[70] Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy, and the Rule of Law (Council of Europe Treaty Series No 225, Vilnius, 5 September 2024).

be given to artificial intelligence systems, and their potential effect of creating or aggravating inequalities, including those experienced by women and individuals in vulnerable situations.

At the legislation or policy-making dimension, article 10 of the Framework Convention on Artificial Intelligence and Human Rights further requires States to adopt or maintain measures with a view to ensuring that activities within the lifecycle of AI systems respect equality, and to adopt or maintain measures aimed at overcoming inequalities to achieve fair, just and equitable outcomes in relation to activities within the lifecycle of AI systems. It remains crucial for scholars and activists to observe how the ECtHR will interpret the positive obligations regarding AI regulation under the Framework Convention, in line with international human rights law (IHRL), particularly with regard to the principle of non-discrimination.

These new binding instruments will shape the Court's future rulings, which will be essential in providing guidance on how States should regulate AI systems and protect individuals from AI-driven discrimination. Such rulings will also contribute to the development of new standards and principles within IHRL concerning the protection of human rights in the context of AI technologies.

E. Concluding Remarks

This article has traced the evolution of racial profiling, offering a detailed examination of the ECtHR's case law and its approach to addressing this critical issue. By highlighting both the achievements and the remaining challenges within the current approach of the ECtHR, it underscores the Court's fundamental principles in tackling racial profiling while acknowledging the gaps that persist, especially in light of emerging technologies.

As AI regulation becomes an increasingly pressing global concern, the challenges posed by AI-driven policing to human rights adjudication cannot be overlooked. The article has specifically analysed how AI technologies, particularly in predictive policing, will challenge the ECtHR's approach to adjudicate discrimination cases under article 14 of the Convention. It is evident that

AI does not only complicate the evidentiary landscape but also necessitates a reflection of the Court's approach in evaluating systemic discrimination.

Looking ahead, the implications of AI, coupled with the concept of systemic discrimination, require a deeper examination of the Court's jurisprudence, extending beyond issues of racial profiling. The complexities introduced by AI also necessitate a broader analysis of different bodies, such as the UN Human Rights Committee (HRC), the Inter-American Court of Human Rights (IACHR), and the European Court of Justice (ECJ). Future research will need to delve deeper into these jurisdictions as the intersection of AI and human rights law continues to evolve, calling for innovative approaches and robust legal frameworks to safeguard fundamental rights.

This broader inquiry into the relationship between AI technologies and IHRL represents a significant area for future study. As *Ashwini K.P.*, the UN Human Rights Council's Special Rapporteur, emphasized, actors within IHRL must remember that "Placing human rights at the centre of how we develop, use, and regulate technology is absolutely critical to our response to these risks."[71]

[71] Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Racism and AI: Bias from the Past Leads to Bias in the Future'(n 63).

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