Legal Opinion in the Case of Reference Index of Antilleans '*VerwijsIndex Antillianen*'

March 2008

OPEN SOCIETY
JUSTICE INITIATIVE

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Introduction

1. A key question raised by the present case is whether the collection of racial and ethnic[1] data through the Reference Index of Antilleans (*VerwijsIndex Antillianen*) and the subsequent use of the information in that database merit a lawful exception to the general prohibition on the collection of ethnic data by the Dutch Data Protection Authority (*College Bescherming Persoonsgegevens* – "CBP") or instead violate the right to privacy as well as the prohibition of racial discrimination set forth in the European Convention on Human Rights and other relevant authorities.
2. For reasons set forth in this submission, the Open Society Justice Initiative ("Justice Initiative") believes that the creation and use of the Reference Index for Antilleans does not merit an exception and instead is an unlawful infringement of the right to be free from racial and ethnic discrimination in the exercise of fundamental rights, including in particular the right to privacy, in violation of applicable European and international human rights standards.
3. The Justice Initiative pursues law reform activities grounded in the protection of human rights and contributes to the development of legal capacity for open societies. It has offices in Budapest, Hungary; New York, the United States; and Abuja, Nigeria. Its principal activities include submitting legal opinions before national and international courts on questions of law in which it has specialized expertise, such as those implicating international norms assuring equality and prohibiting racial and ethnic discrimination. Accordingly, the Justice Initiative has a particular interest and specialized expertise in issues raised by this case.

[1] Ethnicity and race are often used interchangeably to refer to the background of the persons concerned. The same will be done here. See European Court of Human Rights, *Timishev v. Russia*, Nos. 55762/00 and 55974/00, 13 December 2005, § 55: "Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds."

Factual Background[2]

4. In December 2005, the Minister of Housing, Neighbourhoods, and Integration ("the Minister") promulgated a regulation providing for the establishment of a Reference Index of Antilleans to identify Antillean and/or Aruban[3] youth deemed "at-risk" of experiencing social problems or of committing crimes and who therefore, in the Minister's view, warrant enhanced attention by local authorities. To this end, the Reference Index is available to various government entities in municipalities that have a substantial population of citizens of Antillean origin.[4] In its judgment of 26 July 2007, The Hague Regional Court described the content of the Reference Index of Antilleans as follows:

> The Reference Index of Antilleans seeks to collect information from local agencies with regard to Antillean at-risk youths (up to 25 years of age) with multiple problems, such as information with regard to work, housing, care, welfare, education, police (public order and safety), and criminal law. The national Reference Index of Antilleans does not contain the locally known information itself but refers to this locally known information from the Municipal Case Consultations.

5. The regulation establishing the Reference Index of Antilleans specifies several criteria for inclusion of individuals in the Index. The target group comprises 1) individuals of Antillean origin, a category defined as either having been born in the Netherlands Antilles or Aruba, or having been born to at least one parent who was born in the Netherlands Antilles or Aruba, 2) who are no more than 25 years of age,[5] and 3) who are "at risk." "At-risk youth" are defined as: "Youth who individually or as a group cause nuisance or engage in crime, and who are in a vulnerable position on the labour market due to a disadvantage in language and/or schooling or their financial situation."[6]

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[2] The Justice Initiative has consulted the following materials in preparing this legal opinion: Judgment of The Hague Regional Court, Administrative Law Chamber, 26 July 2007, declaring well-founded the appeal of the *Stichting Overlegorgaan Caribische Nederlanders* (Dutch Caribbean Consultative Body, hereafter referred to as "OCaN") against the use of the Reference Index of Antilleans; the appeal briefs of the Council of State against the aforementioned judgment filed by the appellants, including the Minister, the mayors of the 21 municipalities in which the Reference Index of Antilleans is used, and the CBP, as well as OCaN; procedural and factual background materials relating to the establishment of the Reference Index of Antilleans and its operation: Ministerial Regulation on the use of the Reference Index of Antilleans (*Circulaire voorschrift gebruik VIA*), 15 January 2007, Brochure: Working with the Reference Index of Antilleans (*Het werken met de VerwijsIndex Antillianen,* undated), Reference Index of Antilleans Contours Document (*VerwijsIndex Antillianen Contourendocument,* 24 January 2007), Model Description on Case Consultations regarding Antilleans (*Model Modelbeschrijving Casusoverleg Antillianen,* 24 January 2007) ("Model Description") and the administrative challenge to the Reference Index of Antilleans brought by OCaN.

[3] This legal opinion will hereinafter use the term "Antillean" to refer to the Antillean and Aruban youth targeted in this program. *See also* Model Description, p. 5.

[4] Municipal entities with access to this information are identified in paragraph 9.

[5] *See* Model Description, p. 9.

[6] *See* Model Description, p. 7.

6. To be considered "at risk," an Antillean youth must also meet one or more "bottleneck criteria" set forth in the regulation creating the Reference Index of Antilleans promulgated by the Minister as a type of risk profile.[7] These include circumstances in which an Antillean youth:

    - owes back rent for a period exceeding six months;
    - is not registered in a Municipal Personal Records Database ("GBA") but has nonetheless come into contact with government agencies for the purpose of obtaining personal treatment and/or individual support from the municipalities;
    - experiences learning problems, has been absent from school for more than 20 school days, or has abandoned school in the last twelve months;
    - has poor job prospects;
    - has committed fraud; or
    - meets the so-called 1-2-3 criteria of police encounters: that is, they have had at least one instance of an offence involving violence and/or at least two instances of drug-related offences and/or at least three instances of causing a "nuisance"[8] in the preceding twelve months.

7. The Hague Regional Court's judgment of 26 July 2007 characterises the Minister's reasons behind creating the Reference Index of Antilleans as follows:

    > The objectives of the Reference Index of Antilleans . . . are to eliminate the disadvantaged position of Antillean youths as well as to tackle and reduce crime caused by these youths and to grant integral personal help to Antillean youths on the municipal level. Because the target group is very mobile and a portion of it is not registered in the GBA, the reference data in the Reference Index of Antilleans helps to clarify whether in other municipalities, information with regard to the at-risk youths of Antillean origin is known.

8. Information included in the Reference Index on Antilleans is gathered through a process known as "Municipal Case Consultations" (*Casusoverleg*). These Municipal Case Consultations occur within each of the 21 municipalities that participate in the Reference Index of Antilleans program. Municipal agencies that participate in the consultations include local housing councils and apartment corporations (*woningbouwcorporaties*), municipal educational authorities, the municipal social affairs and employment agency ("SZW"), social workers, probation and resettlement institutions, the health authorities ("GG & GD/GGZ") in the relevant municipality, and the police and the public prosecutor's office of

[7] *See* Contours Document, p. 17.

[8] In this context the term "nuisance" refers to a public order or disturbance caused to others. Such disturbances are normally registered ex officio by the police and/or the housing councils or recorded following a complaint. While this can be a disturbance caused to neighbours, it also includes disorders on public streets that result in police or other officials' involvement or intervention.

each municipality.[9] At the Municipal Case Consultations the participating agencies share information from their own case files regarding Antillean youths in their jurisdictions and decide who, in their view, meet the bottleneck criteria and thus should be included in the national Reference Index of Antilleans. According to the Model Description on the use of the Reference Index of Antilleans—a regulation promulgated by the Minister to guide municipal agencies—indicators of a criminal risk that warrant inclusion in the Reference Index of Antilleans and discussion within the Municipal Case Consultations are "signals of nuisance, suspicions of criminal behaviour and crimes committed."[10]

9. Each Municipal Case Consultation is presided over and coordinated by each municipality's "Antilleans Coordinator" (*Antillianen Coordinator*), a specially mandated civil servant. The Antilleans Coordinator is authorized by law to enter the information obtained from local agencies during the Municipal Case Consultation within his or her municipality into the national Reference Index of Antilleans. These Antillean Coordinators also serve as the contact persons for other municipalities seeking specific information about individuals identified as at-risk Antillean youths in other municipalities.

10. In addition to serving as the forum for data collection for the national Reference Index of Antilleans, the Municipal Case Consultations also serve as the forum for each municipality to determine what actions or measures, if any, it should undertake with respect to individuals identified as at-risk Antillean youth. Such actions can take the form of schooling or employment and/or debt relief, but can also involve enhanced policing through increased monitoring and interventions with a view toward preventing crime and protecting public order.

11. The information pertaining to Antillean youth included in the Reference Index of Antilleans consists of personal information, such as the individual's name, age, date of birth, place of birth, known address and municipal registration (if available), as well as the relevant bottleneck indicators identified by any of the 21 participating municipalities in the course of their Municipal Case Consultations. Additionally, the Reference Index is regularly matched against a separate Reference Index of Persons in the Criminal Justice System (*Verwijsindex Personen in de Strafrechtsketen*), which contains information on all individuals' encounters with the criminal justice system in the Netherlands (including criminal records). If an individual included in the Reference Index of Antilleans is found to have an entry in the Reference Index of Persons in the Criminal Justice System, information from the latter is entered into the former Index. This information flows back to the participants in the Municipal Case Consultations once the Antilleans Coordinators have identified a match between individuals listed in both Reference Indices.

[9] This list is not exhaustive. A consultation partner may be anyone who has a "direct interest and is involved in an integral personal action plan with an Antillean at-risk youngster." Model Covenant, ibid, p. 7.

[10] *See* Model Description, ibid, p. 13.

12. This process represents a departure from the rules that generally govern data collection in the Netherlands. Normally, state agencies are prohibited from collecting ethnic and racial data and maintaining them in a database.[11] To collect the data included in the Reference Index of Antilleans, the Minister was required by Dutch law to apply for a waiver from the CBP to overcome this general prohibition.[12]

13. On 11 December 2006, the CBP granted the waiver, which was challenged by the Dutch Caribbean Consultative Body representing Antilleans and Arubans in the Netherlands (*Stichting Overlegorgaan Caribische Nederlanders* –"OCaN"). The challenge eventually was brought before the Administrative Law Section of The Hague Regional Court.

14. On 26 July 2007 The Hague Regional Court ruled in favour of OCaN, holding that "processing data in that reference index regarding Antillean origin of at-risk youths is not an appropriate method to reach the intended purpose." Furthermore, the Court established that, by authorizing the registration of ethnic data on a systematic, as opposed to incidental, basis in the absence of concrete draft legislation that would be enacted promptly, the CPB had acted contrary to its own established policy. The Court held that the CBP had not provided sufficient justification for a derogation from its official policy for such an exceptional measure.

15. The CBP, the Minister and the 21 municipalities that participate in the Reference Index of Antilleans lodged an appeal against this judgment to the Council of State. On 21 November 2007 the CBP withdrew its permission for the use of the Reference Index of Antilleans, stating that it did so to conform to the judgment of The Hague Regional Court. The Minister and the municipalities maintained their appeal.

Issues and Arguments Presented

16. This submission addresses two issues:

- Does the establishment and use of the Reference Index of Antilleans constitute an infringement of the right to privacy in respect of sensitive racial/ethnic data under European and international law?

[11] Pursuant to Article 30 of the Law on Police Registers, individual criminal justice records maintained by police are confidential and generally are accessible only by those explicitly authorized by law, such as police themselves, public prosecutors, the judiciary, defence counsel, probation officers and after-care institutions. There is, however, an exception [can you indicate for what?] which the police are entitled to invoke for purposes of the Municipal Case Consultations and which covers all municipal agencies participating in those consultations. An exemption to Article 30 is granted by the Minster of Interior. As regards the public prosecutor's office, the General Prosecutor's Office must approve any exception to the general prohibition on providing individual criminal justice records to unauthorised third parties. (*Parket Generaal,* regulated in the Instruction concerning the Law on Criminal Justice Data *(Aanwijzing Wet justitiële en strafvorderlijke gegevens, 2004A009*)). All relevant exemptions have been granted to police and local public prosecutor's offices.

[12] As required in Article 23, preamble and under (e) of the Netherlands Personal Data Protection Act.

- Does the establishment and use of the Reference Index of Antilleans constitute racial discrimination in relation to the right to privacy in violation of European and international law?

17. This legal opinion assesses these questions in light of the European Convention on Human Rights ("ECHR"), the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ("Data Protection Convention").[13] In view of the weight accorded European human rights law—particularly the binding nature of the ECHR—in Dutch law and the authoritative nature of the jurisprudence of the case law of the European Court of Human Rights, this submission focuses on European human rights jurisprudence.

18. Reviewing European and international human rights standards, this legal opinion will demonstrate that the creation and use of the Reference Index of Antilleans is incompatible with the right to private life and the right to be free from racial and ethnic discrimination in connection with the right to private life.

Right to Privacy and the Protection of Sensitive Data

19. It is uncontested that the Reference Index of Antilleans collects and enables various government agencies to have access to private and personal data. This data is gathered and processed on the explicit basis of the racial and ethnic origin of individuals, in accordance with the Minister's criteria for identifying "at-risk Antillean youth" as described in paragraphs 5-6.

20. The registration of personal data is itself a direct interference with the right to privacy as protected by Article 8 of the ECHR. Article 8 provides:

> Everyone has the right to respect for his private and family life....
>
> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

21. Under the case law of the European Court of Human Rights, registration and classification of individuals in a database establishing an "at-risk group" for the purposes of monitoring those individuals constitutes an *ipso facto* interference with the right to respect for private life.

22. As concerns the storing of personal, and in particular racial and ethnic data, the European Court of Human Rights has affirmed that the norms contained in the

[13] ETS No. 108. This submission does not separately address Directive 95/46/EC of 24 October 2005 on The Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (OJ L 281 of 23.11.1995, p. 31.) as it essentially provides the same guarantees as those provided by the Data Protection Convention.

Council of Europe's Data Protection Convention, to which the Netherlands is a party, inform the scope of the protections on private and family life under Article 8 of the ECHR.[14] This Convention provides special protection for "sensitive private data," which includes information on racial origin. Specifically, Article 6 prohibits processing personal data revealing racial origin and criminal record unless adequate safeguards are provided. Those safeguards must protect against the risk that such data will be abused.[15]

23. In sum, European human rights law and Council of Europe norms on data protection generally prohibit the collection, storing, and use of personal data relating to race/ethnicity. The establishment and use of the Reference Index on Antilleans constitute *prima facie* violation of this prohibition. The question to which we turn now is whether the Index falls within any of the narrow exceptions to this prohibition.

The Reference Index of Antilleans Does Not Fall within a Justified Exception to the Right to Private Life

24. Pursuant to Article 8(2) of the ECHR, interference in an individual's private life is permissible only under strictly defined and exceptional circumstances. The interference must pursue a legitimate aim, be prescribed by law, and be "necessary in a democratic society." As explained below, the Reference Index of Antilleans does not satisfy the stringent requirements for justifiably interfering with privacy.

An interference must be prescribed by law

25. The Netherlands Personal Data Protection Act provides that the CPB may grant an exception to gather personal data without a statutory basis insofar as this is necessary in view of a compelling public interest and appropriate safeguards are provided to protect privacy. The CPB may stipulate conditions and limitations under which an exemption is granted.[16]

26. The CPB has developed a policy under which exemptions are granted for systematic processing of personal ethnic data only if legislation that will regulate

[14] *See Amann v. Switzerland*, [GC], No. 27798/95, § 65, 16 February 2000, Reports of Judgments and Decisions 2000-II: "The Court reiterates that the storing of data relating to the 'private life' of an individual falls within the application of Article 8 § 1. It points out in this connection that the term 'private life' must not be interpreted restrictively." The Court's protective approach corresponds to that of the Council of Europe's Data Protection Convention, which entered into force on 1 December 1993 with respect to the Netherlands and whose purpose, as elaborated in Article 1, is "to secure in the territory of each Party for every individual ... respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him." The Data Protection Convention defines such "personal data" in Article 2 as "any information relating to an identified or identifiable individual".

[15] ECRI, *"Ethnic" statistics and data protection in the Council of Europe countries*, November 2007, www.coe.int/t/e/human_rights/ecri/1-ECRI/Ethnic%20statistics%20and%20data%20protection.pdf.

[16] As required in Article 23, preamble and under (e) of the Netherlands Personal Data Protection Act.

the processing is forthcoming within a reasonable period. It has been confirmed by the Government that no concrete statutory regulation was envisaged by the Government for the Reference Index of Antilleans. Despite this, the CPB granted the exemption contrary to its own stated policy. Accordingly, the Reference Index of Antilleans was established without following procedures mandated by Dutch law to ensure additional protection of *sensitive* ethnic data. For this reason, the Reference Index was not "prescribed by law" as required under Article 8 (2) of the ECHR.

27. Not only does the Reference Index for Antilleans lack a firm basis in Dutch law, but the *ad hoc* nature of its approval by the CPB and the unclear nature of its use (see paragraph 48) mean that the Index does not satisfy the "quality of law" standard enunciated by the European Court of Human Rights in, among other cases, *Van Vondel v. The Netherlands*:[17]

> As to the question whether the interference was "in accordance with the law", the Court reiterates that this expression requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and be compatible with the rule of law (see, for instance, Narinen v. Finland, no. 45027/98, § 34, 1 June 2004).

28. In sum, the establishment of the Reference Index of Antilleans in a manner that departs from the statutorily mandated procedure adopted by the CPB leads to the conclusion that the Index was not "prescribed by law" as required under Article 8(2) of the ECHR. While this alone means that the Index does not constitute a valid exception to the right to private life, we next consider whether other requirements for a permissible exception have been satisfied.

Legitimate aim

29. Article 8(2) of the ECHR establishes that the only aims that would justify an interference with the right to private life are "national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others." This list is exhaustive; no other aims may be pursued by measures that limit enjoyment of the right to private life.

30. The aims advanced by the Minister in establishing the Reference Index of Antilleans are 1) to eliminate the disadvantaged position of Antillean youths, 2) to tackle and reduce crime caused by such youths, and 3) to grant integral personal help to Antillean youths on the municipal level.

[17] No. 38058/03, § 51, 20 October 2007, HUDOC.

31. The first and third aims stated by the Minister do not fall within the exhaustive list of legitimate aims that might justify an exception to the general prohibition against the collection and use of personal data.

32. Preventing crime, protecting public order and/or the rights of others are legitimate aims to the extent that the interferences envisaged by the State are genuinely designed for the purpose of fairly achieving these aims and not for engaging in racial profiling tactics (see discussion on ethnic profiling below in paragraphs 52-56. For the purpose of argument we will assume here that serving the aforementioned legitimate aims is indeed what is aspired by collecting and processing of ethnic data through the Reference Index of Antilleans.

"Necessary in a democratic society"

33. That the Government might have articulated a legitimate aim does not in itself justify an interference with private life. As noted above, an interference with private life that pursues a legitimate aim must also be "necessary in a democratic society." Under the jurisprudence of the European Court of Human Rights, to satisfy this test a measure interfering with private life must address a "pressing social need" and be "proportionate to the legitimate aim pursued".[18] To satisfy the test of proportionality, measures must be accompanied by safeguards ensuring that the interference with privacy rights is no greater than necessary to achieve a legitimate aim and address a pressing social need.

34. In the present case, the Reference Index of Antilleans does not satisfy the requirement that the interference with private life through the collection of information according to race is necessary to achieve a legitimate aim. Indeed, it is questionable whether the Reference Index of Antilleans advances the aim of preventing crime. The Minister has not demonstrated in any pleadings or evidence submitted in this case how the information gathered, processed, and used in the Reference Index of Antilleans is effectively utilized to prevent crime. To the contrary, a recent report commissioned by the Amsterdam municipality shows that youth crime prevention projects in general, including those encompassed in the Reference Index of Antilleans, fail to produce the desired results and in some instances lead to higher re-offending rates.[19] The Government bears the burden of establishing the necessity of such a measure, particularly when it is aimed exclusively at persons from one specific racial group. (See next section, analyzing compatibility of Reference Index with prohibition of racial discrimination.)

35. Legislative proposals now under consideration in the Netherlands further indicate that the Government itself does not consider the Reference Index for Antilleans to

[18] *Z. v. Finland,* No. 22009/93, § 94, 25 February 1997, Reports of Judgments and Decisions1997-I. European Court of Human Rights, *Smith and Grady v. the United Kingdom*, Nos. 33985/96 and 33986/96, §§ 88, 27 September 1999, ECHR 1999-V.

[19] Measuring re-offending in projects dealing with and preventing youth criminality (*Recidivemeting trajecten aanpak en preventie jeugdcriminaliteit*), 28 February 2008, http://www.servicecentrumhandhaving.nl/Nieuws/archief-2008/jeugdprojecten-vaak-niet-effectief.aspx?cp=39&cs=5477.

be necessary to achieve its stated aim of crime prevention. The Government has recognized that Antillean youth are not the only group facing problems with school dropouts, unemployment, and risks of engaging in criminal activities.[20] A racially neutral database with a statutory basis in domestic law called the Reference Index of At-Risk Youth (*Verwijsindex Risicojongeren*) is envisaged in the near term by the Netherlands Government.[21] According to the Ministry of Youth and Family, the necessary amendment to current law is now being drafted in a process involving consultations with concerned parties.[22] The law providing a statutory basis for the general Reference Index of At-Risk Youth is expected to enter into force in 2009.

36. The envisaged race-neutral resource database will include information based solely on objective risk criteria and not on the concerned persons' race or ethnicity. While this submission does not address the question whether maintaining such a general database satisfies international legal standards protecting privacy, the Government's plan shows that it believes that there is an alternative to the approach taken by the Reference Index of Antilleans that does not entail the collection of "sensitive data" as that term is used in the Council of Europe Data Protection Convention. Accordingly, the Reference Index of Antilleans does not meet the test of proportionality and necessity in relation to the aims pursued, even to the extent that these aims would be genuine and legitimate.

37. For these reasons, the collection, processing and exchange of data included in the Reference Index of Antilleans, which takes as a starting point the racial background of the target group, violates Article 8 of the ECHR as it constitutes an interference with the right to private life that lacks an appropriate qualitative legal basis and is not a proportionate measure to satisfy the requirement that it be "necessary in a democratic society."

Prohibition of Racial Discrimination in Relation to Collecting, Processing and Using Ethnic/Racial Data

38. The collection of sensitive racial and ethnic data such as that involved in the Reference Index of Antilleans implicates not only the right to private life, but also constitutes a prima facie violation of the internationally-protected right to be free from racial and ethnic discrimination. As demonstrated below, the Reference Index of Antilleans does not satisfy relevant tests for lawful exceptions to the prohibition of discrimination set forth in the ECHR.

39. It is undisputed that the starting point for registration in the Reference Index of Antilleans is the requirement that an individual be an under-25 youth of Antillean

[20] www.verwijsindex.nl

[21] As noted by The Hague Regional Court in its judgment of 26 July 2007, the Reference Index of Antilleans was instituted as a pilot/test project.

[22] www.verwijsindex.nl/stand-van-zaken_stand-van-zaken

origin. (See paragraphs 4-5.) Accordingly, actions taken by participating agencies in reliance on the Reference Index are also linked to the included individuals' race and ethnicity. This inevitably constitutes differential treatment of Antilleans based upon their race.

40. The difference in treatment lies in the fact that the native Dutch population and other racial/ethnic groups in the Netherlands are not subject to comparable scrutiny. The Reference Index of Antilleans is intended to monitor and address crime and social disadvantage, problems that not surprisingly pertain to many segments of Dutch society across racial and ethnic categories. Yet individuals of Netherlands Antillean origin are the only ones currently subjected to database registration as "at-risk" youths and to subsequent State intervention in the form of intensified monitoring.

41. Differential treatment on the basis of race and ethnicity implicates a foundational norm of international law—the prohibition of racial discrimination, which is found in every major international and regional human rights instrument. The International Court of Justice has described the prohibition of racial discrimination as an obligation *erga omnes*.[23] It has also established that the enforcement of "distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter" of the United Nations.[24]

42. At the European level, Article 14 of the ECHR and Protocol 12 to the ECHR[25] prohibit discrimination on racial and ethnic (as well as other) grounds in the exercise of fundamental rights, which include the right to private life as protected by Article 8 of the ECHR. Article 14 of the Convention provides:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

43. The legal status and fundamental importance of the prohibition of racial discrimination was recently reaffirmed as an important public interest by the

[23] International Court of Justice, Barcelona Traction, Light and Power Co, ICJ Reports 1970.

[24] International Court of Justice, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1970, 3 at 70. The International Law Commission has asserted that racial discrimination is one of the few peremptory norms of international law from which no derogation is allowed even under circumstances of national emergency. ILC, "Fragmentation of International Law," UN Doc. A/CN.4/L.682, 2006. See also *R v. Immigration Officer at Prague Airport*, UKHL 55, § 46 (2004) ("The great theme which runs through subsequent human rights instruments, national, regional and international, is the legal right of equality with the correlative right of non-discrimination on the grounds of race…State practice virtually universally condemns discrimination on grounds of race. It does so in recognition of the fact that it has become unlawful in international law to discriminate on the grounds of race. It is true that in the world, as we know it, departures from this norm are only too many. But the international community has signed up to it. The moral norm has ripened into a rule of customary international law. It is binding on all states."

[25] Protocol 12 ECHR (ETS No. 177) entered into force in respect of the Netherlands on 1 April 2005.

European Court of Human Rights in the case of *D.H. and Others v. Czech Republic*.[26]

The Difference in Treatment of Antillean Youth Constitutes Discrimination under the ECHR

44. While discrimination on the basis of race, ethnicity and national origin is strictly prohibited under the ECHR and other sources of international legal obligation, not all distinctions on these grounds constitute discrimination. The European Court of Human Rights has ruled: [27]

> A differential treatment of persons in relevant, similar situations, without an objective and reasonable justification, constitutes discrimination. Discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination (see the definitions adopted by the United Nations and the European Commission against Racism, Intolerance and Xenophobia). Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction.

45. Under ECHR jurisprudence, some measures involving differential treatment can be justified, just as some measures that interfere with the right to private life fall within the scope of justified exceptions under European human rights law (see paragraphs 24-37). The criteria allowing for differential treatment under Article 14 of the ECHR overlap substantially with those that pertain to Article 8 (right to private life): such differential treatment must pursue a "legitimate aim," and there must be a "reasonable proportionality between the means employed and the aim sought to be realised."[28]

46. As noted earlier in our discussion of Article 8 violations, at least one of the aims sought to be achieved by the Reference Index for Antilleans—preventing crime—falls within the exhaustive list of legitimate aims that may justify utilizing a racial distinction. (See paragraphs 29-32.)

47. Satisfying the proportionality test is, however, even more difficult under Article 14 than under Article 8 itself: As the European Court has recently affirmed, "where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible."[29]

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[26] Grand Chamber [GC], No. 57325/00, § 204, 13 November 2007, HUDOC. (http://www.echr.coe.int/ECHR/EN/hudoc).
[27] *Timishev v. Russia*, infra, § 56.
[28] *D.H. and Other v. Czech Republic*, supra, § 196.
[29] *Id.*

The Collection and Subsequent Use of Private Data based on Antillean Racial Origin Is Disproportionate to the Government's Stated Objectives

48. To satisfy the European Court of Human Rights' proportionality test under Article 14, measures that employ distinctions based on race, ethnicity and similar criteria must be capable of effectively achieving the relevant legitimate aims, i.e. they must be both pertinent and effective in achieving those aims.[30] Thus, even if a measure pursues a legitimate aim, such as protecting the public against crime, any incidental infringement on protected rights must be necessary and otherwise proportionate to the aim sought to be achieved. Where the same result can be achieved through an alternative approach that does not rely on a racial or ethnic differentiation, a distinction is considered an unnecessary and therefore discriminatory.[31] Where, as here, the incidental infringement on protected rights, such as the right to private life (see paragraphs 33–37) and the right to non-discrimination, is acute, the State has a particularly heavy burden in establishing that a measure that relies upon differential treatment on account of race is necessary and otherwise proportionate.

49. A first step toward meeting that burden, as suggested above, is to demonstrate that the Reference Index is effective achieving a legitimate aim. The Minister has not met this burden. She has not articulated the concrete actions that may be taken by municipal agencies participating in the Reference Index of Antilleans, and other national policy documents have been vague in describing what sort of preventive and repressive measures municipalities may undertake acting on information gathered through the Index.[32]

50. Naturally, there is little public concern when positive action is taken to provide schooling support for school dropouts, childcare or health support fur teenage mothers, although even here it is questionable whether such assistance should be assisted by a race-based database. The problem becomes acute when, on the basis of the at-risk categorisation, preventive and repressive action is taken against the identified individuals based on a generalization of those individuals' presupposed inclination to engage in crime, cause nuisance, and disrupt public order, and these individuals are singled out for "specific interventions," and even, as currently

[30] See, *mutatis mutandis,* European Court of Human Rights, *Abdulaziz and Others v. United Kingdom*, Nos. 9214/80; 9473/81; 9474/81, § 81, 28 May 1985, Series A-94.

[31] See, e.g., European Court of Human Rights, *Inze v. Austria*, No. 8695/79, § 44, 29 October 1987, Series A-126: in which the European Court found that proposed legislative amendments "show that the aim of the legislation in question could also have been achieved by applying criteria other than that based on [birth in or out of wedlock]".

[32] See policy and instruction documents referred to in footnote 2 and more recently in particular the policy letter "Towards a professional, integral and long-term approach of Antillean-Dutch at-risk groups" (*Naar een professionele, integrale en meerjarige aanpak van Antilliaans-Nederlandse risicogroepen*) sent by the Government to Parliament on 1 February 2008, § 4.4 'Measures in the Netherlands' (*Maatregelen in Nederland*) p. 10 and 'Freedom of Movement of Persons' (*Personenverkeer*), p. 12.

envisaged in certain cases, subject to a territory ban (*ongewenstverklaring*) in The Netherlands.[33]

51. Measures already pursued by various municipalities suggest that the Index will be used—and at any rate that there is a serious risk the Index will be used—to further develop various types of police action already in use, which are driven by an assumption that certain minority communities are especially prone to criminal behaviour. Examples include the following:

    - Rotterdam has created a repressive intervention team consisting of a "City Marine" (*Stadsmarinier*),[34] representatives of the housing corporation, the municipal social and welfare office, the municipal personal records database office, and the police. This intervention team pays house visits on the special "Antilleans Day" to Antillean households suspected of "irregularities."[35]

    - Zwolle has instituted the VESPULA project, a "unique" anti-crime approach entailing preventive police investigations that focus on potential Antillean suspects whom the police believe are likely to commit a crime but who have not yet done so. Under this project "a suspect is being permanently watched until enough evidence is gathered against him or her".[36]

    - Rotterdam has created the "Koraal" Action Programme to deal with "195 core criminal Antilleans." These individuals are placed under permanent suspicion and informed that the police are watching them. Each of these identified Antilleans is "adopted" by a police officer or member of an "Antilleans team" who monitors him or her.[37]

52. These measures, which are indicative of the type of additional measures likely to be taken by municipal agencies in reliance on the Reference Index for Antilleans, are examples of ethnic profiling—a practice that is generally likely to violate Article 14 of the ECHR. While various institutions have defined "ethnic profiling" somewhat differently, the Justice Initiative uses this phrase to connote the use of racial or ethnic stereotypes rather than individual behaviour as a basis for making

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[33] Details as to the government's proposal to ban certain Antilleans from Dutch soil comparable to the territorial ban (*ongewenstverklaring*) of foreigners holding a residence permit, despite the fact that they are Dutch citizens, are provided in the policy letter "Towards a professional, integral and long-term approach of Antillean-Dutch at-risk groups" (*Naar een professionele, integrale en meerjarige aanpak van Antilliaans-Nederlandse risicogroepen*) sent by the Government to Parliament on 1 February 2008, § 4.4 'Measures in the Netherlands' (*Maatregelen in Nederland*) p. 10 and 'Freedom of Movement of Persons' (*Personenverkeer*), p. 12.

[34] A Rotterdam municipality instituted civil servant appointed to head the intervention team targeting "at-risk" Antilleans.

[35] "Irregularities" in this case are: causing nuisance, illicitly drawing on unemployment benefits, and/or not being registered in the municipality.
See http://www.nieuwrotterdamstij.mediarotterdam.nl/onderdeel.php?id=26&editieID=2.

[36] See http://www.integratie.net/binaries/dossierantillianen/beleid/2006/9/kieweb003-pb-tussentijdse-rapportage-aanpak-aa-zwolle-jv-061114.pdf.

[37] http://www.integratie.net/binaries/dossierantillianen/beleid/2007/11/brief-bgm-commissie-bvm-181007-au.pdf.

law enforcement and/or investigative decisions about who has been or may be involved in criminal activity.[38] Racial and ethnic data need not be the sole basis for police action to fall within this definition; it is sufficient that such criteria constitute at least one of the grounds driving police action. The European Union Network of Independent Experts on Fundamental Rights, an expert institution established by the European Commission, has defined ethnic profiling as "the practice of classifying individuals according to their 'race' or ethnic origin, their religion or their national origin, on a systematic basis, whether by automatic means or not, and of treating these individuals on the basis of such a classification.[39] For its part, the European Commission against Racism and Xenophobia ("ECRI") has defined ethnic profiling as "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."[40]

53. In its only judgment to date assessing the compatibility of a practice involving ethnic profiling with Article 14, the European Court of Human Rights found a clear violation. In *Timishev v. Russia*, the Court determined that a practice in which law enforcement officials stopped individuals and limited their freedom of movement based solely on their membership in a particular ethnic group was a most invidious violation of the right to be free from racial and ethnic discrimination.[41]

54. Other sources of European standards reinforce the view that the type of ethnic profiling implicated in the Reference Index of Antilleans constitutes prohibited discrimination, particularly as it results in extreme stigmatisation of the Antillean population as criminals. The European Union Network of Independent Experts on Fundamental Rights[42] has determined that treating differently individuals who are otherwise similarly situated according to their presumed race or ethnicity has such far-reaching consequences in creating divisiveness and resentment, in perpetuating harmful stereotypes, and in leading to the overcriminalisation 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.[43]

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[38] See J.A. Goldston, 'Toward a Europe without ethnic profiling', Justice Initiative, June 2005, p. 7.

[39] Opinion of the European Union Network of Independent Experts on Fundamental Rights, "Ethnic Profiling", CRF-CDF, Opinion 4, December 2006, page 9 - ec.europa.eu/justice_home/cfr_cdf/doc/avis/2006_4_en.pdf

[40] ECRI General Policy Recommendation N°11 on combating racism and racial discrimination in policing Adopted by ECRI on 29 June 2007, CRI(2007)39.

[41] See *Timishev v. Russia*, infra, § 56.

[42] A think tank instituted by the European Commission.

[43] Opinion of the European Union Network of Independent Experts on Fundamental Rights, "Ethnic Profiling", CRF-CDF, Opinion 4, December, page 6 - ec.europa.eu/justice_home/cfr_cdf/doc/avis/2006_4_en.pdf

55. ECRI takes a similar view, warning: [44]

> Dangers of abuse and misuse
>
> Illicit uses [of racial/ethnic data] include 1) identification of individuals with reference to characteristics which may expose them to discrimination, exclusion or even persecution 2) the use of statistics to stigmatise a vulnerable group. In the first case, the main dangers inherent in the collection of data and creation of files relate to the possibility of their being used to identify individuals. The data protection laws which regulate the collection, production and dissemination of personal data attempt to control and minimise those dangers. In the second, the problem is less the possibility of identifying individuals, than the isolation of variables which characterise individuals or groups. Here misuse takes the form of stigmatisation, e.g., when stereotypes are confirmed by using findings reductively, or publishing tables without explaining them or analysing the factors which account for discrepancies. This is particularly true of statistics on crime, the prevalence of behaviour regarded as deviant or social problems treated more as burden on the community than as disadvantage for those directly concerned.

56. In a report assessing the Netherlands' compliance with Article 14 of the ECHR published in February 2008, ECRI warned of the illegality of the use of the Reference Index of Antilleans and noted:[45]

> Irrespective of the situation that the [Reference Index] is designed to address, . . . the establishment of a registration system with clear links to the criminal justice system that is based on race and ethnic origin and limited to one specific group, can hardly comply, in ECRI's opinion, with the prohibition of racial discrimination.

Accordingly, ECRI recommended

> …that the Dutch authorities carefully review their policies targeting the Dutch Antillean population to ensure that such policies are in conformity with the prohibition of racial discrimination. In particular, it recommends that the Dutch authorities review the introduction of the Reference Index Antilleans in the light of such prohibition. It also urges the Dutch authorities to discontinue any plans that impinge in a racially-discriminatory manner on Dutch citizens' freedom of movement.

57. It is, in short, doubtful that the Reference Index could under any circumstances satisfy the stringent tests for lawful distinctions developed under Article 14 of the ECHR and by other authorities concerned with racial discrimination. At the least, the Dutch Government must present compelling evidence to prove that race-based data collection and subsequent measures based upon the Index are not only

[44] ECRI, *"Ethnic" statistics and data protection in the Council of Europe countries*, November 2007, www.coe.int/t/e/human_rights/ecri/1-ECRI/Ethnic%20statistics%20and%20data%20protection.pdf

[45] ECRI, Third report on the Netherlands adopted on 29 June 2007 and made public on 12 February 2008, CRI (2008) 3, pp-24-26.

effective, but necessary in achieving its stated goal of crime prevention. Thus far, the Minister has failed to meet her burden of establishing that these measures, which result in differential treatment based upon racial and ethnic origin, are proportionate to the measure's stated aims.

58. Indeed, the development of the race-neutral Reference Index of At-Risk Youth which is scheduled to be enacted in 2009 proves that the Minister's objectives can be achieved through means other than the racially discriminatory Reference Index of Antilleans. (See paragraph 35.)

59. In sum, the case law of the European Court of Human Rights and European commentary warning of the extreme stigmatisation and negative stereotyping that occurs when racial and ethnic minorities are treated differently by governmental measures demonstrates that the Minister has failed to meet her burden of proving that the collection and subsequent use of information in a race-based database, which stigmatises Antillean youth, is proportionate to its stated objectives. The Reference Index of Antilleans lacks an objective, reasonable and compelling justification and is therefore not proportionate to the aims pursued, even to the extent that these aims could be considered genuine and legitimate.

Conclusions

60. The central question addressed in this submission is whether the Reference Index of Antilleans can satisfy applicable tests under European and international human rights law pertaining to the prohibition of racial discrimination and the protection of private life.

61. The assessment carried in relation to European and international human rights law in these legal comments shows that it does not.

62. In conclusion, the Reference Index of Antilleans is not in conformity with European and international human rights norms since it:

- entails differential treatment of young persons of Antillean origin on the basis of their race;
- has a stigmatizing effect on the Antillean community, harmfully affecting far more persons than might even be subject to registration in the Reference Index of Antilleans;
- unjustifiably on the basis of race infringes on the private life of those registered in the Reference Index of Antilleans;
- and therefore violates Article 8 taken alone and together with Article 14 of the ECHR, Protocol 12 of the ECHR, Articles 5 and 6 of the Data Protection Convention, Article 1 of the ICERD and Article 26 of the ICCPR.

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