

# **The Strasbourg Court's Finding of Race Discrimination in *Nachova v. Bulgaria*: the Consequences for Spain**

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I wish to thank the organizers for inviting me to take part in this important meeting. The treatment of racial minorities and non-citizens, always of great moment, has taken on perhaps even greater sensitivity and importance since September 11, 2001. Given the events of the past several weeks in Madrid, much of the world will no doubt be looking at how Spain addresses the threat of terrorist violence while ensuring full protection of the rights of all persons to non-discrimination.

I come from a country which knows a thing or two about racism. Racist attitudes and practices preceded the writing of the American Constitution and have powerfully influenced – and poisoned – social attitudes and public policy to this day. So I don't come here to tell you to follow the American way. Nonetheless, I do think civil society in the United States has made great progress in raising awareness of racism and challenging it in the courts.

Rather, I want to talk for a few minutes about a very important recent legal development at European level in the fight against racism and racist violence – and suggest a few ways that those engaged in that fight can take advantage of it.

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In February of this year, the European Court of Human Rights, for the first time in its history, found a government in breach of Article 14 – the non-discrimination guarantee – of the European Convention in a case involving race discrimination.

The case, *Nachova*,<sup>1</sup> originated in Bulgaria, where a number of leading human rights cases in recent years have begun. It involved the shooting deaths of two unarmed Roma men – conscripts in the Bulgarian army’s construction force – by military police who were trying to arrest them for having escaped from military prison. A subsequent investigation cleared the military police of any wrongdoing.

The Court found that the shootings involved excessive force and had not been investigated sufficiently, and thus violated the right to life under Article 2 of the Convention.

However, the Court’s most significant ruling concerned Article 14, the protection against discrimination including on grounds of race. Prior to the ruling in *Nachova*, the European Court had never before found a violation of Article 14 on grounds of racial discrimination. Which was somewhat strange, since racial discrimination is not uncommon in a number of European countries.

The difficulty was in part that discrimination is a hard thing to prove. And a long line of European Court judgments had made clear that the standard of proof before a violation of the Convention could be found was “proof beyond a reasonable doubt” – a very high standard to meet.

In the *Nachova* case, the evidence that the shootings of the two Roma men were racially motivated consisted of the following:

- First, the shootings, with an automatic machine gun, took place in the middle of the day in a populated Roma neighborhood
- Second, moments after the shooting, one of the pursuing officers had turned to a neighbor of the victims and shouted, “You damn Gypsies,” while pointing a gun at him
- Third, this was one of a series of cases which the Court had heard in which law enforcement officers in Bulgaria had subjected Roma to violence resulting in death
- Fourth, many other incidents of alleged police brutality against Roma had been reported by inter-governmental monitoring bodies and NGOs.

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<sup>1</sup> European Court of Human Rights, Judgment in the case of *Nachova and others v. Bulgaria*, February 26, 2004. [Online here](#).

In such circumstances, the Court found two separate violations of Article 14 of the Convention, taken together with Article 2.

First, the Court found, the authorities failed in their duty to establish whether discriminatory attitudes may have played a role in the murder of the two Roma men. In short, the Court found discrimination in the procedure by which the murders had been investigated.

Second, the Court held that the murders themselves were motivated by racially discriminatory attitudes, in breach of Article 14. This finding was a breach of the substantive duty of non-discrimination in enjoyment of the right to life.

Significant as these rulings were, the reasoning employed by the Court was equally so – and it is the Court’s reasoning which has opened a pathway for those fighting racism in other countries, including Spain, to challenge in court incidents of racial violence.

Thus, in finding a procedural violation of Article 14, the Court affirmed that violence by state agents is always a serious matter, but that racially-motivated violence is even more so.

Thus the Court observed,

- “[W]here there is suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society’s condemnation of racism and ethnic hatred and to maintain the *confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.*” (para. 157).
- Furthermore, “when investigating violent incidents and, in particular, deaths at the hands of State agents, State authorities have the additional duty” – not just to pursue a rigorous inquiry into the violence itself, but also – “to take all reasonable steps to *unmask any racial motive and to establish whether or not ethnic hatred or prejudice may have played a role* in the events.” (para. 158).
- Why this additional obligation to look into the possibility of racial motivation? Because, the Court explained, “failing to do so and treating racially induced violence and brutality on an unequal footing

with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are *particularly destructive of fundamental rights.*” (Id.). “In order to *maintain public confidence in their law enforcement machinery*, contracting States must ensure that in the investigation of incidents involving the use of force a distinction is made *both in their legal systems and in practice* between cases of excessive use of force and of racist killing.” (Id.).

- In particular, “any evidence of *racist verbal abuse by law enforcement* agents during an operation involving the use of force against persons from an ethnic or other minority is highly relevant to the question whether or not unlawful, hatred-induced violence has taken place. Where such evidence comes to light in the investigation, it must be verified and – if confirmed – trigger a *thorough examination of all the facts in order to uncover any possible racist motives.*” (Para. 162).

Hence, the Court has held, any suggestion of racial motivation at all in the course of an act of police violence triggers a *heightened obligation* on the authorities to examine particularly carefully whether race has played a role in the misconduct at issue.

With respect to the substantive violation of Article 14, the Court went farther in breaking new legal ground.

- Thus, while the general standard of proof is “proof beyond a reasonable doubt”, when “alleged discriminatory acts of violence” are at issue, “specific approaches to the issue of proof may be needed.” (Para. 167).
- In particular, “a measure may be considered as discriminatory on the basis of evidence of its impact (disproportionately prejudicial effects on a particular group), notwithstanding that the measure is not specifically aimed or directed at that group.” (Id.). Thus, the intent of a particular rule or practice may not be to discriminate – but it may amount to discrimination so long as its effect is disproportionately borne by one racial group.
- The Court noted that “it has become an established view in Europe that effective implementation of the prohibition of discrimination requires the use of specific measures that take into account the difficulties involved in proving discrimination.” (Para. 168). Here the Court cited the EU Race Directive and the Employment Framework Directive.

- Therefore, “in cases where the authorities have [a] not pursued lines of inquiry that were clearly warranted in their investigation into acts of violence by State agents and have [b] disregarded evidence of possible discrimination, [the Court] may, when examining complaints under Article 14 of the Convention, draw negative inferences or shift the burden of proof to the respondent Government...” (Para. 169).

In such cases, the Court is saying, racial motivation will be presumed, and the burden will be on the Government to disprove it.

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What does all this mean for those concerned with incidents of racial violence? And why is this of relevance to Spain?

I am no expert on the situation here, but a range of monitoring organizations have identified problems in Spain that seem remarkably similar to the issues addressed in Nachova.

1. Last month, the UN Committee on the Elimination of Racial Discrimination expressed “concern about allegations received of instances of police misbehavior towards ethnic minorities or persons of non-Spanish origin, including abusive and insulting speech, ill-treatment and violence.”<sup>2</sup> (para. 11).

2. Amnesty International has also documented “frequent and widespread” complaints of race-related ill-treatment, “common” instances of “racial profiling,” and “the discriminatory use of identity checks [which] led to ill-treatment and abuse by public officials of people of foreign origin.”<sup>3</sup>

3. And in its last report on Spain,<sup>4</sup> ECRI, the Council of Europe’s European Commission against Racism and Intolerance, noted precisely the kinds of

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<sup>2</sup> CERD/C/64/CO/6, Concluding observations of the Committee on the Elimination of Racial Discrimination : Spain. 12/03/2004. [Online here.](#)

<sup>3</sup> Amnesty International, Written submission to the CERD discussion on non-citizens and discrimination (AI INDEX: IOR 42/006/2004). [Online here.](#) See also “Spain: Government must act against torture and ill-treatment” (AI INDEX: EUR 41/013/2002), November 20, 2002. [Online here.](#)

<sup>4</sup> Council of Europe’s European Commission against Racism and Intolerance, Second report on Spain, December 13, 2002. [Online here.](#)

problems prevalent in Spain that the European Court condemned in the Nachova case. Thus, ECRI noted

- a reported “increase over the last few years ... in the number of allegations of police misbehavior vis a vis ethnic minorities or persons of non-Spanish origin. Such allegations include discriminatory checks, insulting and abusive speech, but also ill-treatment and violence, in some cases resulting in death.” (ECRI 2002, para. 38).
- “there is reported to be little investigation of incidents and little transparency on the results of these investigations within the police.” (id., para. 39)
- moreover, “the racist dimension of offences tends to be overlooked.” (id., para. 26).

In view of these concerns, the Nachova judgment has significant consequences both for civil society – NGOs, advocacy groups, and lawyers – and for government bodies.

### Civil Society

As for civil society groups, when allegations of violence against racial minorities or immigrants are raised, they should follow closely the authorities’ investigations to ensure they are prompt, effective and thorough. Under Nachova, where domestic authorities do not do their jobs properly, if they

- a) do not pursue “clearly warranted” lines of inquiry – ignored certain facts, failed to collect all relevant evidence, omitted reference in their decision to troubling events – and if they
- b) disregard evidence of possible discrimination

Then NGOs may wish to work with complainants in pursuing legal remedies for the flawed investigation, including up to the Strasbourg Court.

In such cases, the Court has made clear that it may place the burden on the government to prove that the act of violence was not motivated by racial hatred, or risk being found in breach of the Convention.

## Government

In addition, the Spanish government should establish the institutional capacity to investigate thoroughly all allegations of racial violence by the police, in conformity with Nachova's requirements.

Some relevant factors to consider with respect to the government's responsibilities in this regard are the following:

- Are there reliable statistics on the number of racially motivated attacks, and incidents of police abuse of ethnic minorities and non-citizens?
- Is there an official body designated to gather and process data on complaints, investigations and sentences; to conduct independent surveys; to publish information; to carry out investigations and provide assistance, including legal aid, to victims in individual cases; to make recommendations; and to develop and oversee the implementation of a strategic policy to combat racist violence? Where such an official body exists, does it have adequate funding, competent permanent staff, institutional independence, and sufficient political backing for its mission?
- Does domestic law provide for sentencing enhancements for acts of violence motivated by racial hatred? Are these applied regularly in practice?
- Do law enforcement authorities regularly receive training on human rights and anti-discrimination issues, and does the government actively promote awareness raising among state agents about racist attitudes? Is there a mechanism to monitor the effectiveness of such training, as well as what police are learning and how they apply what they learn?
- When allegations of ill-treatment by the police arise, is there an internal disciplinary system in place to ensure a prompt and thorough investigation of such allegations by a body which is, and is seen to be, independent and impartial and which avoids conflicts of interest? (CPT Report 2003, paras. 19, 33). In this regard, for example as the CPT pointed out in a report published last year (para. 28), it would be problematic if allegations of abuse were investigated by police or Civil Guard officers who are ultimately answerable to the same hierarchical superior as the targets of investigation.

- When police are convicted of violence against ethnic minorities and immigrants, are they sentenced appropriately?
- Is there a consistent policy at the highest levels of government of condemning publicly and repeatedly incidents of racist violence and discrimination, and emphasizing the importance of multiculturalism, tolerance and respect for diversity?

European integration will take a major step forward in two weeks, when the European Union adds ten new members. This process of integration and enlargement has contributed to the deepening of Europe's political dimension, including through the protection of fundamental human rights. In recent years, European human rights law has taken on greater practical significance within individual countries, as the decisions of the European Court of Human Rights in Strasbourg and of the European Court of Justice in Luxembourg have become more generally known among practicing judges and lawyers. The case of *Nachova v. Bulgaria* is an example of how these sometimes distant regional institutions can have concrete effects on the daily lives of human rights victims. Civil society advocates in Spain and other countries have a keen interest in making use of these developments in their own work.

Thank you for your attention.

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