Fighting Terrorism while Fighting Discrimination: Can Protocol No. 12 Help?

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This panel has been asked to address "the scope of Protocol No. 12." I would like to do so by focusing these brief remarks on a particular set of problems to which I believe the Protocol may be relevant: the application of anti-discrimination law in Europe to the fight against terrorism.

A significant challenge in Europe today is to ensure that the fight against terrorist violence is carried out effectively, intelligently, and in a non-discriminatory manner.

Over the past several years, a number of governments, for understandable reasons, have engaged vigorously in the adoption and implementation of counter-terrorist measures.

At the same time, Europe's official bodies have substantially expanded the legal and normative framework outlawing racial and ethnic discrimination. In 2000 the European Union adopted the Race Directive prohibiting both direct and indirect discrimination on grounds of racial or ethnic origin. The same year, the Committee of Ministers of the Council of Europe adopted Protocol No. 12 to the European Convention. And in response to a stream of litigation brought by victims and public interest groups, the European Court of Human Rights has begun to generate a body of jurisprudence interpreting the prohibition against discrimination, including on grounds of race, ethnicity and national origin, contained in Article 14. The *Nachova* judgment of the Grand Chamber earlier this year was significant in this regard.

Notwithstanding these positive developments, to date, beyond broad declarations of good intent, insufficient attention has been given to how the fight against terrorism squares with the effort to combat racial and ethnic discrimination. There need be more consideration of the inter-relationship between the two, and Protocol No. 12 is relevant to that discussion.

Around the world, some governments have since Sept 11 adopted an approach that carves out certain segments of the population for special attention or lesser protection – whether non-citizens or persons coming from designated Arab or Muslim countries. In certain cases, whole groups – for example, those termed "unlawful enemy combatants" – have been deemed to lie outside the realm of legal protection. Historically, societies faced with threats have often proven more willing to sacrifice the liberty of a few for the security of many. My own country's record is scarred by the forced internment during World War II of tens of thousands of Japanese-Americans – based on nothing more than their descent or national origin.

Let me be clear. Terrorism is a genuine and serious threat to human rights and human security. It merits a determined response on the part of governments. But picking and

choosing which norms apply and which don't, or carving vast exceptions for whole groups of persons, is counter-productive.

Thankfully, the Council of Europe has taken a different approach. The Guidelines on human rights and the fight against terrorism[1] make clear that "All measures taken by states to fight terrorism must … exclude[e] any form of arbitrariness, as well as any discriminatory or racist treatment…." (Guideline II). Similarly, the text of Protocol No. 12 rejects a piecemeal, selective approach in affirming that "All PERSONS are equal before the law and are entitled to the equal protection of the law." (Preamble).
But how to ensure in practice, in application to real-life situations, adherence to these principles?

Let me briefly suggest a few ways in which Protocol No. 12 may facilitate the application of anti-discrimination norms to the fight against terrorism. In so doing, I will touch upon several of the sub-topics noted for this panel, including the scope of Protocol No. 12, its relationship with both Article 14 of the Convention and European Union law, and the question of horizontal effect.

There are a number of government activities implicated by the fight against terrorism and as to which "the additional scope of protection under Article 1" (Explanatory Report, para. 22) of Protocol No. 12 may be particularly relevant. Time permits discussion of only two: the use of ethnic profiling in stops, searches, surveillance and related activities by the police, and the singling out of persons of a particular race, ethnicity, religion, national origin or nationality for special treatment in policies concerning immigration and/or deprivation of citizenship.

1. Ethnic profiling

In recent years, more than one government in Europe has resorted to policies of racial or ethnic profiling by law enforcement as a means of combating terrorist violence. By racial or ethnic profiling I refer to the invidious use of racial or ethnic stereotypes as a basis for decisions by investigative and law enforcement personnel about who has been or may be involved in criminal activity.

Ethnic profiling is not unknown. Indeed, it has been widely documented in a number of Council of Europe member states, by ECRI and others. In recent years, several governments have focused their investigative and police resources on persons who look as though they are Muslim or of Arab origin. Unfortunately, it has not always been clear that the link to Muslim or Arab identity is based on information about a specific incident in a particular place, rather than a broad assumption that as a general matter Muslims or Arabs are more likely to be terrorists. Indeed, some governments have been quite open about the use of profiling. In early 2005, a senior minister of one European Union member state explicitly declared that antiterrorism legislation would inevitably be "disproportionately experienced by" the Muslim community since "that is the nature of the terrorist threat." Other governments have reportedly instructed police units to collect

[1] Adopted 11 July 2002.

data on young men with Islamic backgrounds from universities, registration offices, health insurance companies, and other sources.

In 2002, the EU's Working Party on Terrorism drew up recommendations for member states on the use of "terrorist profiling," using a set of variables – including nationality, age, education, birthplace, psycho-sociological characteristics, and family situation – in order to identify terrorists before they take action.

These developments raise genuine questions. The EU's Network of Independent Experts on Fundamental Rights has expressed serious concerns about the development of terrorist profiles by police or immigration authorities, which, they warn, "presents a major risk of discrimination."[2] According to the Network, "The development of these profiles for operational purposes can only be accepted in the presence of a fair, statistically significant demonstration of the relations between these characteristics and the risk of terrorism, a demonstration that has not been made at this time."[3]

Racial profiling practices clearly implicate anti-discrimination norms. Thus, ECRI's General Policy Recommendation N°8 on combating racism while fighting terrorism adopted by ECRI on 17 March 2004 specifically recommends that governments

> "pay particular attention to guaranteeing in a non discriminatory way the freedom… of … movement and to ensuring that no discrimination ensues from legislation and regulations - or their implementation - … governing [inter alia] … checks carried out by law enforcement officials within the countries and by border control personnel."

And yet, it is not clear that such practices violate existing European Union law or the European Convention. In this sense, Protocol No. 12, by creating an independent non-discrimination norm, may fill a gap.

The EU's principal anti-discrimination guidance on questions of racial and ethnic discrimination – the Race Directive of 2000 – does not in all likelihood apply to these issues. Some observers have gone so far as to suggest that policing might conceivably fall within the "goods and services … available to the public" as to which the Directive mandates equal access (Art. 3(1)(h)). But this seems an interpretation at odds with the scope of the European Community's limited powers.

There is greater support for the notion that Article 14 of the European Convention, taken together with one of the other articles, bars racial and ethnic profiling by the police. When the activity at issue consists of stops and searches, much depends on how the words "arrest" and "detention" in Article 5(1) are understood. Some argue that, "where a policeman, by physical restraint or by words or conduct, indicates to a person that he is not free to leave, there is an arrest for the purposes of Article 5."[4] On the other hand,

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[2] EU Network of Independent Experts on Fundamental Rights, "Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002" (March 2003), para. 4.
[3] Id.
[4] Harris, O'Boyle, Warbrick (1995), p. 100.

there is caselaw of the Strasbourg organs suggesting that the "intention of the police" should determine whether a person is under arrest – in which case, the question is not so clear.[5]

Other kinds of profiling practices, though objectionable, may with even greater difficulty fall within the penumbra of a substantive convention right such that Article 14's prohibition against discrimination might apply. Thus, when police engage in surveillance of persons in public places in a manner that does not clearly infringe rights to privacy under Article 8, but which is focused only upon persons of a certain ethnicity or national origin or racial appearance, it is not clear that such conduct would be prohibited by the Convention as it stands.

Protocol No. 12 more clearly encompasses this activity, whether because stops, searches and surveillance amount, in the language of para. 22 of the explanatory report to the Protocol, to "the exercise of [police] discretionary power," or because they constitute "any other act or omission by a public authority."

2. Immigration and Citizenship

Profiling is one area where Protocol No. 12 may add needed clarity to the legal framework. Discrimination with respect to immigration and citizenship is another. In recent years, a number of governments have tightened their immigration and citizenship policies with a view to keeping out, and/or removing from their territory, suspected terrorists. There is no doubt much sense in looking at what can be done lawfully to keep persons known to be involved in terrorist violence outside national borders. Nonetheless, some of this effort appears to have devolved into the singling out of groups of persons defined by ethnicity, race, national origin or nationality.

In a number of countries measures have been proposed or adopted, variously, (i) to restrict immigration and/or rights of residency, (ii) to speed up deportation, and/or (iii) to strip of citizenship persons suspected of involvement in support for terrorist activities. In practice, such measures have often focused on darker skinned persons from certain countries in North Africa and the Middle East.

At a normative level, ECRI's General Policy Recommendation No. 8 recommends that governments ensure that no discrimination results from legislation and regulations, or their implementation, governing …

- "expulsion, extradition, deportation and the principle of *non-refoulement*
- issuing of visas
- residence and work permits and family reunification
- acquisition and revocation of citizenship."

But at the level of binding law, there is once again less guidance. The European Union Race Directive is not likely of assistance insofar as it "does not cover difference of

[5] X v FRG, No. 8819/79, 24 DR 158 (1981).

treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons … and to *any treatment* which arises from the[ir] legal status…." (Art. 3(2)).

It is also questionable whether the European Convention of Human Rights as it presently stands is of much help on these questions.

To be sure, the European Court has already made clear that Article 14 does prohibit discrimination on grounds of nationality, as well as on grounds of race and national or ethnic origin. (Gayguszuz). As with Article 14, so with Protocol No. 12 the grounds enumerated in the text are not exhaustive.[6] In addition, arbitrary deprivation of nationality might under certain circumstances conceivably give rise to a claim under Article 3 and perhaps other provisions. And yet, the Convention does not as such entitle any person to citizenship of a particular country. In this it reflects the general tendency of international law.

Similarly, while deportation and/or expulsion of non-citizens may raise a variety of concerns implicated by different Articles of the Convention, the Convention grants no right of asylum or right to enter as such to non-citizens. Thus a claim of racial or ethnic discrimination in rights of entry for non-citizens would be hard to sustain at present.[7]

As with respect to police profiling, here too Protocol No. 12 would remove some of the ambiguities in existing legal protection by establishing an independent non-discrimination guarantee. At a minimum, the Protocol would compel governments to justify more rigorously and consistently policies which single out particular nationalities or ethnic groups for special invidious treatment – whether in citizenship access or immigration policy. Regardless of the current state of the substantive law of citizenship, immigration and residence for non-citizens under the European Convention, Protocol No. 12 would more clearly prohibit practices of racial and ethnic discrimination in the enjoyment of these rights – and thus provide both governments and potential victims of abuse with more precise guidance as to what is permitted.[8]

3. Horizontal Effect

[6] See Explanatory Report, para. 20 ("list of non-discrimination grounds in Art. 1 is identical to that in Art. 14 of the Convention"; "unnecessary from a legal point of view" to add specific grounds because "the list of non-discrimination grounds is not exhaustive….[T]he European Court of HR has already applied Art. 14 in relation to discrimination grounds not explicitly mentioned in that provision").

[7] In East African Asians v. UK (1973), 3 EHRR 76, the European Commission found that it was degrading treatment to single out a group of British *citizens* on racial grounds, and deny them rights of entry. Even there, because the UK had – and still has – not ratified Protocol No. 4 guaranteeing the right of citizens to enter their own country, the Commission could not rely on Article 14, but had to rest its reasoning on Articles 3 and 8.

[8] Nothing I say should be misunderstood to suggest that international law today does not already forbid these discriminatory practices. I believe it does. To take one prime example, just last December, the House of Lords in the United Kingdom, relying on domestic legislation as well as principles of customary international law, ruled that it was unlawful racial discrimination for UK Immigration Officers at Prague Airport to have treated Roma seeking to travel to the UK less favorably than similarly situated non-Roma. Regina v. Immigration Officer at Prague Airport [2004] UKHL 55 (December 9, 2004).

One other issue concerning the nexus between anti-discrimination norms and the fight against terrorism implicates the question of horizontal effect. For lack of time, I won't go into detail here, but will just mention that in certain countries since 2001, persons perceived to be Muslim or Arabic have suffered a backlash of discrimination and in some cases violence to person or property from private parties. Thus, for example, where perceived Muslims or Arabs are denied opportunities in employment or access to bars, restaurants or other commercial establishments or are discriminated against in other ways that do not implicate the substantive provisions of the Convention, the extent of the Protocol's reach to private parties may be relevant.

The Explanatory Report to Protocol No. 12 suggests that the "extent of any positive obligations flowing from Article 1 is likely to be limited" to, perhaps, "a clear lacuna in domestic law protection from discrimination."[9] The number of countries that lack adequate legislation to address private discrimination is decreasing, thanks in part to the requirement to transpose the race directive in EU member states. But there may still be issues here that merit examination. One in particular might be: to what extent actions of governments that openly engage in ethnic profiling of perceived Muslims or Arabs may send a message, even if unintentionally, to private actors – employers, airlines, and others – that Muslim and Arab identity is a central factor justifying suspicion of terrorism. To the extent that government practices in the fight against terrorism encourage private discrimination, would the horizontal effect of Protocol No. 12 reach more broadly?

There are of course numerous other areas where the fight against terrorism impacts racial and ethnic minorities, and many are covered by the European Convention on Human Rights in its present form. These include issues of personal data protection under Article 8, the permissible limits under Article 10 to speech seen to be supporting terrorist violence, and the due process and liberty rights of detainees under, among other provisions, Articles 3, 5 and 6.

But Protocol No. 12 provides a potentially powerful tool for Europe to reinforce protection against discrimination as it fights terrorism. For this reason alone, it merits broader support among governments.

[9] Explanatory Report, paras. 26, 27.