

**Ethnic Profiling and Counter-Terrorism
Trends, Dangers and Alternatives**

**James Goldston
Executive Director, Open Society Justice Initiative**

**Anti-Racism and Diversity Intergroup, European Parliament
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In 2005, the Open Society Justice Initiative, which works around the globe to foster rights-based law reform, launched an effort to address ethnic profiling by police in Europe. We were concerned, on the one hand, by long-standing allegations of police discrimination against Roma and other visible minorities in the course of ordinary crime prevention activities and, on the other, by new reports about law enforcement targeting of Muslims in the fight against terrorism.

By “ethnic profiling” we mean the use of racial, ethnic or religious stereotypes in making law enforcement decisions to arrest, stop and search, check identification documents, mine databases, gather intelligence and other techniques. To be sure, profiling is not always objectionable. Profiles are compilations of identifiable characteristics believed to correlate statistically with certain conduct – for example, persons over age 60 are more likely to have slower reflexes or to be susceptible to certain illnesses. Insurance companies, hospitals, businesses and government agencies commonly rely on such probabilistic inferences, or predictions, in their daily work. In the context of fighting crime or terrorism, concentrating attention on certain identifiable attributes may help direct scarce law enforcement resources toward those individuals considered more likely to engage in criminal or terrorist activity. In this way, profiles ostensibly reduce the number of persons subjected to the inconvenience and interference that some preventive measures imply. Moreover, to the extent that profiles employ appropriate criteria, they may help prevent discrimination by circumscribing unbounded discretion and reducing the potential negative effect of individual prejudice.

In practice, efforts to develop predictive profiles for counter-terrorist purposes commonly begin with an examination of past terrorist attacks and the composition of known terrorist organizations. The idea is to identify patterns among the individuals that have been involved in terrorist activities and develop profiles on the basis of common characteristics. But the circumstances of such individuals are highly varied. Consistent patterns that could provide the basis for a precise profile prove elusive. Often, there is temptation to look to factors which have deep roots in public opinion, such as race, religion, nationality or national origin. And yet, when profiles rely upon generalizations about broad, effectively immutable characteristics, they often cross the boundary to discrimination. In its worst forms, ethnic profiling brands whole communities as suspect,

and in so doing, departs from professional law enforcement reliance on individual behavior, specific and time-bound suspect descriptions or accumulated intelligence.¹

Ethnic profiling is widespread, yet remains little documented and not explicitly prohibited under European law. To date, no European countries other than the United Kingdom systematically collect information on ethnicity and police stop and search practices. This is a serious problem. Ethnic profiling misdirects law enforcement resources and alienates some of the very persons whose cooperation is necessary for effective crime detection and terrorism prevention. Absent hard information about the extent of ethnic profiling, and the generation of data on patterns of law enforcement practice, it is hard if not impossible to develop strategies to address profiling's impact on police relations with minority communities.

In recognition of these challenges, and working in partnership with local and regional institutions, the Justice Initiative project pursues three principal objectives:

To **increase awareness** of the prevalence of ethnic profiling, in part through research and documentation, among law enforcement officers, human rights advocates, policymakers and the general public;

To secure the **adoption or clarification of European and national legal norms** that explicitly ban ethnic profiling as one particularly egregious manifestation of discriminatory conduct; and

To support the **development of national civil society and police capacity** to work together in developing and applying good practices to monitor and remedy discriminatory patterns.

Over the past year, we have embarked on several parallel initiatives. First, in cooperation with police and NGOs in Bulgaria, Hungary, and Spain, we carried out interview-based research that found markedly disproportionate treatment of minorities during police stops; strong prejudices about minorities and patterns of offending among police and majority populations; non-existent or weak complaints mechanisms; and little or no measurement of stops' productivity. Second, in Russia, observational research documented profiling practices by police throughout the Moscow metro system. The results show that non-Slavs are more than twenty times as likely as Slavs to be stopped

¹ The United States government defines the problem as follows: "In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity in a specific suspect description. This prohibition applies even where the use of race or ethnicity might otherwise be lawful. In conducting activities in connection with a specific investigation, Federal law enforcement officers may consider race and ethnicity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization. This standard applies even where the use of race or ethnicity might otherwise be lawful." U.S. Department of Justice, Civil Rights Division, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (June, 2003), http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm (accessed July 26, 2004)

by the police. These are the highest levels of ethnic disproportion ever documented in a study of profiling. Third, we are preparing a report to be launched before the end of the year that seeks for the first time to document the extent of ethnic profiling in both ordinary policing and counter-terrorism throughout the European Union. Finally, we are exploring further country-based research in other countries, including France and The Netherlands.

I. Ethnic Profiling in Europe Today

Though our efforts are very much underway, they are far from complete. We don't pretend to have all the answers. Nonetheless, we have already seen evidence of ethnic profiling being carried out in several countries across Europe in different ways. The following examples are illustrative.

Stop and Search

Some government officials in Europe have been quite open about the fact that Muslim communities are the objects of special attention in the fight against terror. In March 2005, the UK minister responsible for counter-terrorism told British parliamentarians that Muslims would have to accept as a "reality" that they will be stopped and searched by the police more often than the rest of the public: "If a threat is from a particular place then our action is going to be targeted at that area.... It means that some of our counter-terrorism powers will be disproportionately experienced by the Muslim community."² When this provoked an outcry, the Minister later retracted these statements, clarifying that police stops would be intelligence-led.

UK Home Office data confirms that police have targeted perceived Muslims since September 11, 2001. Police stops under British anti-terrorism powers (known as Section 44 stops³) of those considered "Asians" increased by 302 per cent from April 1, 2002 to March 31, 2003.⁴ Yet, out of a total of 21,577 Section 44 stops and searches in this period, none have to date resulted in a conviction for a terrorism offence.⁵ The UK does have more than 60 defendants currently awaiting trial on terrorism charges. To our

²Ms. Blears was speaking before the Commons Home Affairs Committee Inquiry into the impact of anti-terrorist measures on community relations. Reported in Dodd, Vikram and Alan Travis. "Muslims face increased stop and search". *The Guardian*. 2 March 2005.

Official guidelines for using these powers indicate that officers "must take particular care not to discriminate against members of minority ethnic groups in exercise of these powers". However they also indicate that there may be circumstances "where it is appropriate for officers to take account of a person's ethnic origin in selecting persons to be stopped in response to a specific terrorist threat (for example, some international terrorist groups are associated with particular ethnic identities)." Police and Criminal Evidence Act, Code A, 2.25. Available on the internet at: http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/PACE_Chapter_A.pdf?view=Binary

³ *Terrorism Act 2000, Chapter 11, Part V, Section 44, power to stop and search*

⁴ Home Office Press Release, "Government and Police Must Engage Communities To Build A Fairer Criminal Justice System", Reference: 220/2004, July 2, 2004.

⁵ The majority of arrests appear to result in immigration proceedings and deportations. Aron Kundnani, "Racial profiling and anti-terror stop and search," January 31, 2006, London: Institute of Race Relations.

knowledge, not one of these resulted from a Section 44 stop. Rather, these were largely the results of intelligence based investigation over extended periods.⁶

Mass Identity Checks

German police have used preventive powers to target mosques for mass identity document checks, particularly after Friday prayers. Interviews with a range of law enforcement officials suggest that these checks are wide-ranging information-gathering exercises, not based on concrete intelligence. By late March 2006, 25 to 30 mosques, including the largest and best-known, had experienced these operations, which seem to be most common in the southern states or *lander*. The conduct of these checks can be intimidating: police dressed in riot gear surround the mosque and check the identity documents of every person leaving the building.⁷ The operation can take hours. Thousands of people have been affected. Persons without proper identification have been taken to police stations and held for several hours until their status is verified.⁸

Raids/Mass Searches

Police in more than one EU member state have also targeted Muslim places of worship, businesses and private homes for raids and mass searches.⁹ Raids often involve intrusive tactics that can have traumatic effects. They may not reflect a sophisticated profile, but focus attention on persons primarily and sometimes only because they are perceived as Muslims. These wide-reaching raids have produced few targets for further investigation, and no arrests or charges for terrorist offences.¹⁰ Our findings support the reports of international human rights organizations that “since September 11, thousands of Muslims have been subjected to screening of their personal data, house searches, interrogations, and arrests solely because their profiles have matched certain base criteria, foremost of which is an affiliation with Islam.”¹¹

Data Mining

⁶ In announcing this number of pending trials, a representative of the London Metropolitan Police also said that the use of Section 44 powers should be tightened in order to avoid alienating minorities. James Sturcke and agencies, “Anti-terror chief demands reforms to system,” February 16, 2006, The Guardian Unlimited.

⁷ Justice Initiative interview, Professor Werner Schiffauer, Berlin, March 2006.

⁸ Justice Initiative interview, Dr. Rolf Gossner, President, Internationale Liga für Menschenrechte Germany, Berlin, March 2006.

⁹ Justice Initiative Interview, Vice President, Islamic Federation in Berlin, Berlin, March 2006. See “Massive anti-militant raid”, <http://edition.cnn.com/2003/WORLD/europe/12/11/germany.islamic.reut/>

¹⁰ According to Dr. Nadeem Elyas, Chair of the Central Council for Muslims in Germany, which represents 400 mosques in Germany, police have “raided 300 mosques, searched 2000 offices and apartments, and interrogated thousands of Muslims,” but have not made any evidence public to demonstrate that these measures have yielded any useful information about terrorist activities. See Bakir Siddik and Ben Harburg. “The Ghosts that I awoke: German anti-terror law and religious extremism,” available at http://www.humanityinaction.org/docs/Bakir_and_Harburg_Final%5B1%5D.doc.

¹¹ IHF, *Intolerance and Discrimination Against Muslims in the EU: Developments since September 11*, March 2005 at 78. Available at: http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=4029.

Possibly the investigative method that is most reliant on an explicit profile is the practice of data mining or data trawling - the use of computer searches of data bases for persons who meet specific criteria. A particularly illustrative case is the ambitious profiling operation - *rasterfahndung* - carried out in Germany from the end of 2001 until early 2003. In this massive exercise, German police reportedly collected sensitive personal data from public and private databases pertaining to approximately 8.3 million persons.¹² The profile was based on characteristics of members of the “Hamburg cell” around Mohammed Atta, one of the 9/11 hijackers. Criteria established at national level included:

18 - 40 years old

Male

Current or former student

Resident in the regional state (Land) where the data is collected

Muslim

Legal residency in Germany

Nationality or country of birth from a list of 26 countries with predominantly Muslim population / or stateless person / or nationality "undefined" or "unknown".¹³

In the end, not a single terrorist suspect was identified.¹⁴

Despite the lack of results and evident resource demands of the *Rasterfahndung*, German authorities proposed in March 2002 (and again in 2004) that this method be adopted at EU-wide level.¹⁵ The Justice Initiative has been informed that counter-terrorism officials of other EU member states opposed the proposal, based on their

¹² M. Kant, “Nothing doing? Taking Stock of Data Trawling Operations in Germany after September 11, 2001,” *Statewatch Bulletin*, May/August 2005.

¹³ These criteria were established by the "Sub-Working Group Grid" of the Coordination Group on International Terrorism (KG IntTE), a Germany governmental body. The KG IntTE was set up by decision of a Working Group (AK II) of the Interior Ministers' conference (IMK); it is chaired by the Bundeskriminalamt (BKA) and includes the subcommittee leadership, operations and fight against crime (UA FEK), AG Krip, Federal Border Guards, Foreign Intelligence Service, internal intelligence service, chief public prosecutor and army representatives.

¹⁴ The Berlin Data Protection Commissioner has commented: “Rasterfahndung was without result. No arrests or conviction resulted from this.... Two people were arrested in Hamburg soon after 9/11, but they were not caught by rasterfahndung. They were caught using conventional methods, such as telephone tapping ... Rasterfahndung took up an enormous amount of manpower and time within the police force.” Justice Initiative Interview, Berlin, March 2006. See also D. Moeckli, "Discriminatory Profiles: Law Enforcement after 9/11 and 7/7." 2005 *European Human Rights Law Review* 517 (2005).

¹⁵ "...In Germany's view, computerised profile searches both for criminal prosecution purposes and in order to avert dangers constitute a proper and necessary tool in the fight against international terrorism. However, in view of the fact that members and supporters of terrorist groups are known to roam across Europe, the measure would be much more effective if it were applied by all EU Member States." Council of European Union, Brussels, 8 March 2002, doc 6403/2, ENFOPOL 27 (German proposal to Article 36 Committee). In November 2002, the Council of the European Union recommended that Member States exchange information with one another and with Europol on the development and use of terrorist profiles. Council of the European Union, Recommendation on the development of terrorist profiles, November 28, 2002. The German Government reinforced its call in 2004. R. Kleine, "Schily fordert Raster-Fahndung in ganz Europa" *Bild-Zeitung*, March 27, 2004, cited in Moeckli, Daniel "Discriminatory Profiles: Law Enforcement After 9/11 and 7/7. *European Human Rights Law Review* 2005, 5, 517 - 532.

judgment that such profiling is ineffective.¹⁶ However, in November 2002, the Council of the European Union issued a draft recommendation on the development of terrorist profiles.¹⁷ The recommendation called for increased data-sharing between EU member states and with Europol, as well as enhanced cooperation in developing profiles to assist in the identification of terrorists. These profiles would be based on “a set of physical, psychological or behavioural variables, which have been identified, as typical of persons involved in terrorist activities and which may have some predictive value in that respect.”¹⁸

In May 2003, the EU Network of Independent Experts in Fundamental Rights warned that the proposed terrorist profiles [...] present [] a major risk of discrimination.” 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.”¹⁹

The European Parliament, and the LIBE committee in particular, have consistently and properly raised questions and made important recommendations about the use and potential abuse of European data bases,²⁰ and the need to apply clear and consistent data protection as the European community presses forward toward full availability of data for law enforcement and the fight against terrorism.²¹ The European Data Protection Supervisor has also expressed concern at the breadth of the exemption to protection of sensitive personal data for law enforcement purposes.²²

¹⁶ Justice Initiative Interview, French government counter-terrorism official, Paris, February 2006.

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

¹⁸ Ibid. The elements of the profiles identified in the document include nationality, travel document, method and means of travel, age, sex, physical distinguishing features (e.g. battle scars), education, choice of cover identity, use of techniques to prevent discovery or counter questioning, places of stay, methods of communication, place of birth psycho-sociological features, family situation, expertise in advanced technologies, skills at using non-conventional weapons (CBRN), attendance at training courses in paramilitary, flying and other specialist techniques. Ibid.

¹⁹ “EU network of independent experts in fundamental rights” (CFR-CDF), First Report, May 2003.

²⁰ On the proposal for a regulation of the Visa Information System (VIS); on the proposal for a Council framework decision on the protection of personal data processed in the framework of police and judicial co-operations in criminal matters; and on the four-country initiative (France, Ireland, Sweden and the UK) on the retention of electronic and public communications data for the prevention, investigation, detection and prosecution of crime including terrorism.

²¹ “The rapporteur also has doubts as to the proportionality of the individual measures. The ends do not justify the means, as the measures are neither appropriate nor necessary and are unreasonably harsh toward those concerned.” European Parliament Draft Report on the proposal for a Council framework decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters. Committee on Civil Liberties and Home Affairs. Rapporteur: Martine Roure. Provisional 2005/0202(CNS). Amendment 15, Article 5, paragraph 1 a (new). See also almost identical concerns raised in the European Parliament Draft Report on the proposal for a regulation of the European Parliament and of the Council on the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas. (COM(2004)0835 – C6-0004/2005 – 2004/0287(COD)) Committee on Civil Liberties, Justice and Home Affairs. Rapporteur: Sarah Ludford. Amendment 14, Article 1 (c).

²² Art 4.4 is too broad allowing that law enforcement need only believe that having the personal data would make it easier to prevent, investigate, detect and prosecute crime, rather the standard should be that law

As debates continue, at least some countries are forging ahead. The first workshop on terrorist profiles was held at the headquarters of the German Federal Police in June 2003.²³ In July 2003, the UK announced its participation in a pilot group on terrorist profiling comprising experts from a number of EU Member States.²⁴ The European Council has informed parliamentarians²⁵ that the development of terrorist profiles would be carried out across the EU only if there were a proven statistical link between the defined characteristics and the risk of terrorism. As recently as February of this year, a Europol official confirmed that the agency continues to explore the usefulness of profiles in countering the terrorist threat.²⁶

Anti-Radicalization

Another area in which explicit profiles are being developed has emerged from the concept of radicalization, which is a response to the appearance of the “home-grown terrorist.” As opposed to the Middle Eastern nationals who bombed the World Trade Center in New York or the Moroccans who bombed Atocha station in Madrid, all the London Underground bombers of last July were British nationals. The “radicalization” approach isolates behavioral characteristics, gathered from past attacks, as a means of identifying a person in the process of “radicalizing” and possibly preparing to launch a terrorist attack.

Authorities in The Netherlands have sought to “detect radicalization processes at an early stage and to reverse them before they lead to punishable offences.”²⁷ More generally, one expert has observed, “It is nowadays a common thread within EU counterterrorism thinking and action to single out this radicalization process as the main focal point in combating terrorism.”²⁸

Indicators of radicalization include (i) particular behavior patterns, such as frequent travel or hosting gatherings at one's home, and (ii) changes in behaviour, such as

enforcement can demonstrate a need and show that less privacy intrusive measures are not available. Opinion of the European Data Protection Supervisor on the Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters (COM(2005) 475 final). 19 December 2005.

²³ House of Commons debate on Tuesday 8 July 2003, Hansard, House of Commons, Vol. 408, Part No. 424, Written Answers to questions, 8 July 2003.

²⁴ Written Question P-3694/03 by Sarah LUDFORD (ELDR) to the Council, Subject: Terrorist profiling. Tuesday 15 November 2005. At <http://www.sarahludfordmep.org.uk/speeches/97.html>

²⁵ Question Time on Wednesday 2 July 2003, Hansard, House of Commons, Vol. 408 Part No. 420.

²⁶ Institut National de Hautes Etudes de Sécurité (INHES) Expertizes Collectives de Terrorisme en Europe; échanges entre chercheurs et services chargés de la lutte anti-terroriste, Colloque Européen AGIS, 24 février 2006. Paris, France.

²⁷ Dutch Minister of Justice, “Broad-based approach against radicalism and radicalisation,” September 30, 2005, at

http://english.nctb.nl/press_and_publications/Press_releases/Press_releases_2005/Press_release_050930.asp.

²⁸ Rick Coolsaet, “Between Al-Andalus and a failing integration; Europe’s pursuit of a long-term counterterrorism strategy in the post-AlQaeda era,” IRRI-KIIB, Academia Press, Brussels, May 2005, p. 9.

a man of Arabic origin who suddenly acquires more traditionally religious Muslim approaches to hair style, dress, mosque attendance or physical contact with women in public. At a regional level, the EU has identified factors underlying the recruitment of terrorists including: regional conflicts, failed or failing states, globalization and resulting socio-economic consequences, alienation, propagation of an extremist worldview, and systems of education.²⁹

In theory, by substituting behavior for immutable characteristics such as national origin, ethnicity or race, “anti-radicalization” policies could avoid discrimination and enhance effectiveness.³⁰ In its broadest sense, the concept of radicalization is concerned with the failures of integration of immigrant minority communities. Reversing those failures is critical. All too often, however, the policy discourse around radicalization focuses on changes in individual behavior. Experience suggests this process is subject to far too many factors to allow for reduction to a profile capable of guiding operational policy. Moreover, behavioral indicators may, in practice, serve as proxies for ethnic profiling. Finally, to date there has been little public recognition of the danger that law enforcement actions themselves may perpetuate the dynamic of radicalization. Research in the UK, US and Canada has shown that profiling has a particularly adverse impact on young men who bear the brunt of police attention.

II. Questionable Legality

As this all-too-brief survey indicates, ethnic profiling is an increasingly significant component of EU member states’ efforts to combat terrorist violence. And yet, to date, it has received relatively little public attention. This is unfortunate. At regional and national levels, Europe is having vitally important discussions about how to confront terrorism, how to create harmonious multi-ethnic societies, and how to uphold and protect rights and ideals that have achieved important articulations in regional standards. It is important that the issue of profiling is recognized and addressed in the context of these broader exchanges. In the remainder of my talk, I wish to address two questions of central importance to any consideration of ethnic profiling as a tool to fight terrorism. First, is it lawful? Second, is it effective?

There is no international or European norm which expressly forbids ethnic profiling as such. Nonetheless, the principal standard-setting inter-governmental bodies

²⁹ Communication from the Commission to the European Parliament and the Council concerning Terrorist recruitment: addressing the factors contributing to violent radicalization, Brussels, 21.9.2005, COM(2005) 313 final. The European Union Strategy for Combating Radicalisation and Recruitment to Terrorism, Council of the European Union, Brussels, 24 November 2005, 14781/1/05 Rev 1, Limite, JAI 452 / ENFOPOL 164 / COTER 81.

³⁰ This was the case with one of the few instances in which we have quantitative data on the relative effectiveness of a race-based profile – a drug courier profile used by the US Customs service – versus a behavioral profile adopted in 1999 following condemnation of the racial profile. In that case, the switch from using a profile that included ethnicity to an entirely behavioral profile, and requiring closer supervision of stops, produced an important increase in the hit rate – from 6 percent or under to 13 percent – and (in contrast to the previous drug courier profile) resulted in a hit rate that did not vary significantly across different ethnicities. U.S. Customs Service (1998). Personal Searches of Air Passengers Results: Positive and Negative, Fiscal Year 1998, U.S. Customs Service.

within the United Nations and the Council of Europe – the Committee on the Elimination of Racial Discrimination (CERD) and the European Commission against Racism and Intolerance (ECRI) – have made clear that ethnic profiling violates the prohibition against discrimination. As far back as 1994, CERD voiced its concern “to ensure that preventive identity checks were not being carried out in a discriminatory manner by the police.”³¹ More recently, in condemning the September 11 attacks “unequivocally,” CERD emphasized that, as the prohibition against racial discrimination is a peremptory – hence, non-derogable – norm, states must ensure that counter-terrorism programs do “not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping.”³² ECRI’s General Policy Recommendation No. 8 on combating racism while fighting terrorism specifically recommends that governments “pay particular attention 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.”³³

These declarations are consistent with European and international jurisprudence interpreting the prohibitions against racial discrimination in Article 1 of ICERD³⁴ and Article 14 of the European Convention on Human Rights.³⁵ Under the governing caselaw, the test for discrimination is two-fold: (i) first, whether there has been a difference of treatment such that persons of another ethnic, racial or religious group in “relevantly similar” situations are treated differently; and (ii) second, whether the difference in treatment has an objective and reasonable justification when “assessed in relation to the aim and effects” of the measure at issue. The European Court of Human Rights, which has had more occasion to apply this test than many other courts, has made clear that a “difference in treatment ... must not only pursue a legitimate aim: Article 14 [the non-discrimination guarantee of the European Convention] is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.”³⁶ The fight against terrorism will almost always constitute a legitimate aim. To satisfy anti-discrimination standards, profiling must also employ proportionate means.

³¹ CERD, Concluding Observations – France (1994), para. 125.

³² CERD, General Recommendation No. 30 (Non-Citizens), para. 6. CERD has also urged states to “take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person’s colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion.” CERD, General Recommendation No. 31 (Administration of the Criminal Justice System), para. 20.

³³ ECRI’s General Policy Recommendation No. 8 on combating racism while fighting terrorism, adopted 17 March 2004.

³⁴ Article 1 of ICERD defines “racial discrimination” to include relevant distinctions based on “race, colour, descent or national or ethnic origin.” International human rights law also explicitly prohibits religious discrimination. See, e.g., ICCPR, Arts. 2(1), 26, and related jurisprudence of the UN Human Rights Committee addressing religious discrimination. Moreover, the CERD has repeatedly reminded states not to discriminate on the basis of race, ethnicity or religion.

³⁵ “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... race, colour ... religion ... national or social origin, association with a national minority ... or other status.” Art. 14, ECHR.

³⁶ Belgian Linguistics Case (No. 2), 1 EHRR 252, para. 10 (1968).

In assessing proportionality, one must consider both the costs and benefits of profiling – or, put another way, its harms and its effectiveness in combating terrorism.

Chief among the harms of ethnic profiling is its contribution to stigmatizing members of targeted ethnic, religious or national groups. The existence of ethnic profiles (even those that arguably have a statistical foundation) lends legitimacy, if unintentionally, to the use of race, ethnicity or religion by others in less careful and more invidious ways. If the police and government security agencies use ethnicity as indicia of who is a terrorist, why should not local shopkeepers, restaurant owners or airplane flight attendants? In this quite fundamental sense, ethnic profiling goes against the grain of European and international law, which – for good and important reasons of history and logic – powerfully disfavors distinctions that rest on criteria such as ethnicity, race and religion.³⁷

III. Questionable Effectiveness

It is thus clear that ethnic profiling imposes substantial costs, not only on members of certain affected minorities, but on societies more generally that aspire to guarantee the rule of law and equality for all. In light of these costs, it is not enough that ethnic profiling be rational. It must be demonstrably effective. So, even if it were true, it is not sufficient that, in some contexts, race or ethnicity may correlate with criminal activity. Even if it were true, it is not sufficient that, in some contexts, young Muslim men of Middle Eastern descent disproportionately commit acts of terrorist violence. And therefore, even if it were *rational* – in this limited sense - to focus greater attention on young Muslim males of Middle Eastern descent, that would not make it *appropriate or lawful*. Given how burdensome the costs for members of certain minority groups, and given how European Court caselaw abhors distinctions based on race, ethnicity or national origin, nationality, or religion, profiling must be shown to be clearly effective in a way which has yet to be done.

There are at least four aspects of effectiveness which must be addressed in order to comply with this stringent test.

Fostering alienation, compromising trust

³⁷ See, e.g., *East African Asians*, 3 EHRR 76 (1973), para. 207 (“a special importance should be attached to discrimination based on race”); *Hoffman v Austria*, 17 EHRR 293, para. 36 (1993) (“a distinction based essentially on a difference in religion alone is not acceptable”); *Gaygusuz v. Austria*, 23 EHRR 365, para. 42 (1996) (same for nationality). Neither a) limiting ethnic profiling only to “non-citizens” nor b) substituting nationality for ethnicity in the profile brings an otherwise unlawful practice within the law. As to non-citizens, the UK House of Lords has already ruled that non-citizens may not be singled out for detention on grounds of terrorism. See *A v. Secretary of State for the Home Department*, UKHL 56 (2004) (anti-terrorism legislation may not single out non-citizens for preventive detention consistent with the non-discrimination principle). And in any event, as we have noted, a substantial number of persons involved in terrorist incidents have been native-born citizens. See., e.g., Robert S. Leiken, “Europe’s Angry Muslims.” *Foreign Affairs* (2005). Targeting only nationals of certain countries may permit the argument that a government practice is not *driven by* ethnicity or religion, but it may nonetheless amount to unlawful racial/ethnic discrimination, if – as is often the case – the countries at issue are overwhelmingly Muslim.

First is the question of profiling's impact on police-community cooperation. By branding whole communities as suspect, ethnic profiling may not only institutionalize prejudice among the general public; it also engenders feelings of alienation and humiliation among members of targeted groups. The degree of alienation may well vary depending on the kind of action at issue. Where profiling results in arrest, deportation, or abusive conduct, it will more likely contribute to ill will. And yet, one ought not underestimate the potential for even brief questioning in a public place to lead to community hostility, where ethnicity is used as a marker for special treatment.³⁸ Numerous studies carried out since 2001 have documented "a growing perception among Muslim leaders and communities across Europe that they are being stopped, questioned, and searched not on the basis of evidence and reasonable suspicion but on the basis of 'looking Muslim'."³⁹ It can hardly help to alienate the very communities whose cooperation with law enforcement is needed to combat terrorism.⁴⁰

Over- and Under-inclusion

Second is the dual problem of over- and under-inclusion. In order to serve as a useful filter for law enforcement, a profile needs to be broad enough to include those individuals that present a terrorist threat and simultaneously narrow enough to exclude those who do not. All too often, the profile accomplishes neither function well. A broad profile that encompasses more likely threats is often of less value as a filter, precisely because it also includes many who are of no legitimate interest. On the other hand, the more specific a profile, and thus the fewer innocent people caught, the more likely that individuals of genuine concern will fall outside of its purview.

The varied identities of perpetrators of recent bombings suggest the difficulty - some were Muslims by birth, others were converts; their ethnic and national origins varied enormously; some lived in marginal, poor neighborhoods, while others were comfortably middle class; some had criminal records, others did not. Even gender is not a reliable predictor, given the appearance of women suicide bombers in Sri Lanka, Chechnya, Israel and Iraq.

While over-inclusion imposes unnecessary burdens on "false positives" - persons who are innocent but match the profile - under-inclusion may divert police attention from actual threats that lie beyond the prescribed criteria. Indeed, it has been reported that, prior to the July 2005 attacks on the London public transport system, the leader of the bombers "had come to the attention of the intelligence services as an associate of other men who were suspected of involvement in a terrorist bomb plot. But he was not pursued

³⁸ See House of Commons Home Affairs Committee, *Terrorism and Community Relations*, 6 April 2005.

³⁹ Islamic Institute for Human Rights, "Country Profile: The Conditions of Muslims in France"; Open Society Institute (OSI), *Monitoring Minority Protection in EU Member States: Overview* (2004), p. 53. At: <http://www.eumap.org/>. See also International Helsinki Federation, *Intolerance and Discrimination against Muslims in Selected EU States*, September 2004, pg. 15.

⁴⁰ A senior counter-terrorism official in The Netherlands said, "Community relations are crucial to gathering information.... It is far more important to maintain community relations than any results that stop and search can achieve." Justice Initiative Interview, Amsterdam, December 2005.

because he did not tick enough of the boxes in the pre-July profile of the terror suspect.”⁴¹ Indeed, the most authoritative report to date on the London bombings concludes that “there is not a consistent profile to help identify who may be vulnerable to radicalisation.”⁴²

Evading a Known Profile

Third is the problem of terrorist organizations’ response to the profile. The more predictable law enforcement profiling becomes, the more likely it is that terrorists will adapt their behaviour to circumvent the prescribed categories. New York City’s Police Commissioner Raymond Kelly has observed: “You think that terrorists aren’t aware of how easy it is to be characterized by ethnicity? [...] Look at the 9/11 hijackers. They came here. They shaved. They went to topless bars. They wanted to blend in. They wanted to look like they were part of the American dream. These are not dumb people. Could a terrorist dress up as a Hasidic Jew and walk into the subway, and not be profiled? Yes. I think profiling is just nuts.”

In February 2006, U.S. President Bush announced that a planned attack on Los Angeles had been averted. “Rather than use Arab hijackers,” Bush said, “Khalid Shaikh Mohammed sought out young men from Southeast Asia whom he believed would not arouse as much suspicion.”⁴³

The Distorting Power of Race and Ethnicity

Fourth is the distorting power of race and ethnicity as elements within the profile. Even if race and ethnic origin are relevant characteristics, their utility as part of a profile is questionable, because they are not likely to be accurately applied. Race and ethnicity are, by definition, more visible elements of a profile than many others (country of destination for travelers, payment with cash, etc.). In practice, they may well stand out more than other factors and assume an importance – for those using the profile – disproportionate to their statistical relevance.⁴⁴ To the extent that religion and nationality are proxies for race and ethnic origin (and thus Muslims, Arabs and South Asians are “indicated” by their physical appearance), this problem infects their value in the profile as well. There is, in short, cause for concern, on grounds of efficiency and accuracy, about the overuse of race or ethnicity and the consequent underuse of other factors in a profile.

⁴¹ Sean O’Neill and Dabiel McGrory, “Detectives draw up new brief in hunt for radicals,” *The Times*, December 28, 2005.

⁴² *Report of the Official Account of the Bombings in London on 7 July 2005*, Return to an Address of the Honourable House of Commons (11 May 2006), p. 31. It had earlier been reported that British investigations into the bombings had “forced Scotland Yard to throw away the existing intelligence profile of a terrorist because none of the bombers fitted the model.” Police ‘betrayed’ over cash to fight terrorism, *The Times*, December 28, 2005.

⁴³ Bush details foiled 2002 al Qaeda attack on L.A. Thursday, February 9, 2006; <http://www.cnn.com/2006/POLITICS/02/09/bush.terror/index.html>

⁴⁴ This is illustrated by the well-known phenomenon in the immediate aftermath of 9/11 of members of airplane flight crews who insisted on additional searching, questioning and at times removal from plane of Middle Eastern/Arabic-looking men, all of whom turned out to have done nothing wrong.

IV. Thinking Ahead

The threat of terrorist violence, like the everyday reality of ordinary crime, is genuine and must be addressed. The challenge is to do so in ways which enhance, rather than undermine, human security and individual rights. Ethnic profiling strikes at the heart of the social compact linking law enforcement to the communities they serve. It is part of the problem; we must find other solutions. The alternative to profiling is not doing nothing – or simply succumbing to chance. Over the course of the next year, our project will work closely with intelligence and law enforcement experts, human rights activists, representatives of minority communities and other affected groups to fashion specific recommendations for action. For now, let me offer a few concluding thoughts.

Clarify and Strengthen Legal Standards

International and European regional norms make clear that racial discrimination in the administration of justice is unlawful.⁴⁵ Nonetheless, to date, the UK is the only EU member state that has expressly banned racial discrimination by law enforcement officers.⁴⁶ In recent years, national governments have made great progress in transposing into national law the provisions of the EU race directive, which prohibits discrimination in social and economic life.

In order to make clear that ethnic profiling has no place in a Europe that respects human rights, member states should adopt specific legislative provisions that ban discriminatory practices by law enforcement, including but not limited to ethnic profiling. National legislation and/or operational guidelines on criteria for stops and searches should be brought into line with the standard of the European Code of Police Ethics that “police investigations shall, as a minimum, be based upon reasonable suspicion of an actual or possible offence or crime.”⁴⁷ At both national and regional level, clear data protection standards should assure that processing of sensitive data in criminal and terrorist investigations must be justified by a showing of demonstrable need and no reasonable alternative. The EU – through the Council, the Commission and the Parliament – should call on member states to adopt the appropriate measures.

Documentation and Monitoring

⁴⁵ See, e.g., ICCPR, Arts. 2, 26; European Convention on Human Rights, Arts. 6, 14; ICERD, Arts. 5(a), 5(b), 5(d)(i); CERD, General Recommendation No. 31.

⁴⁶ The Race Relations (Amendment) Act 2000 extended the prohibition on racial discrimination to the performance of public functions by public authorities, including the police and government departments. See Section 19B(1) of the Race Relations (Amendment) Act, as amended in 2000. The Spanish Constitutional Court has gone so far as to hold that “it is not discriminatory for the police to single out a person for a request for identification based on the fact that the person does not appear to be of Spanish origin, provided that this action is carried out in order to verify the person’s compliance with the aliens legislation.” Decision 13/2001 of 29 January 2001.

⁴⁷ *Id.*, Art 47.

For too long, official Europe has ignored problems of racism and xenophobia. Cognitive denial has been eased by the absence of data – or, indeed, of any systematic monitoring which takes into account racial and ethnic differences. Thanks to major advances in European law in recent years – most significantly, the adoption of the EU Race Directive – this policy of data-starved conscious avoidance is coming to an end. The European Commission, in particular, has recently sponsored major studies involving the use of ethnic data to monitor discriminatory patterns. And yet, concerns about the potential misuse of ethnic data continue to impede understanding – of the need for data in order to grasp the scope of the problems to be tackled, and of the potential to do so without compromising privacy and data protection norms. Nowhere is the need for data greater than in the field of criminal justice – precisely where racist myths have proven so powerful. Monitoring of law enforcement activity with respect to ethnic minority communities is essential to foster accountability and provide a common foundation of knowledge on which to build policy. NGOs may have to lead the way, but over time, only governments and police forces have the resources and the infrastructure to monitor themselves.

Data including the ethnicity of persons stopped should be gathered – in separate data bases with due protection for privacy safeguards – and statistical information on the proportionality and outcomes of stops provided to the public on a regular basis. This data will also support improved internal police analysis of the productivity of stops, enhancing supervision and efficient resource allocation. Once standards and operational practices are established, officers should be trained in legitimate criteria for suspicion, in applying data gathering tools and in respectful treatment of those they stop. Compliance with these standards must be monitored and officers held accountable for infringements.

Collaboration Between Law Enforcement and Minority Communities

In fashioning remedies for, and alternatives to, ethnic profiling, governments should work closely with minority representatives and human rights groups. Our project and other initiatives specifically in the field of counter-terrorism are demonstrating the possibility for diverse constituencies to collaborate with law enforcement in documenting stops and searches, disseminating information, and fostering community policing initiatives that build trust and enhance security.⁴⁸

In particular, it is crucial to build partnerships between police and Muslim communities. Reliance on an “expertise model” of counter-terrorist policing ignores the extensive resources within communities that have already supported counter-terror efforts. The challenges inherent in building partnerships are significant; there is little history of Muslim community-police cooperation in many European countries, and outright hostility among some. These will have to be addressed head-on. To this end, complaints mechanisms should also be strengthened; and complaints of police

⁴⁸ Deborah Ramirez, Sasha Cohen O’Connell and Rabia Zafar, *Developing Partnerships Between Law Enforcement and American Muslim, Arab, and Sikh Communities: A Promising Practices Guide*. Open Society Institute, Northeastern University and The Whiting Foundation, May 2004.

discrimination must be treated with utmost seriousness by specialized mechanisms, judicial authorities and the police themselves.