



**IRREVERSIBLE CONSEQUENCES:
RACIAL PROFILING AND LETHAL FORCE IN
THE “WAR ON TERROR”**

Briefing Paper

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The Center for Human Rights and Global Justice (CHRGJ) at NYU School of Law (<http://www.chrgj.org>) focuses on issues related to “global justice,” and aims to advance human rights and respect for the rule of law through cutting-edge advocacy and scholarship. The CHRGJ promotes human rights research, education and training, and encourages interdisciplinary research on emerging issues in international human rights and humanitarian law. Philip Alston is the Center’s Faculty Chair; Smita Narula and Meg Satterthwaite are Faculty Co-Directors; and Jayne Huckerby is Research Director.

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Project Directors:

Smita Narula, Assistant Professor of Clinical Law, NYU School of Law; Faculty Director, Center for Human Rights and Global Justice, NYU School of Law.

Jayne Huckerby, Research Director, Center for Human Rights and Global Justice, NYU School of Law.

Principal authors and researchers:

This report was researched by Adrian Friedman and Vrinda Grover as part of the International Human Rights Clinic at NYU School of Law. The report was co-authored by Adrian Friedman, Vrinda Grover, Jayne Huckerby, and Smita Narula.

Substantive review and comment on the Report was provided by:

William Abresch
Stephen Holmes
Julie Ringelheim
Tony Thompson

Research and writing assistance was provided by:

Ritu Gambhir
Annie Lai
Susan Pappy
Amanda Rawls
Keren Wheeler
Tatiana Pataraia

Additional assistance was provided by:

Samantha Baras
Sarah Bowlin
Dana Dasch
Sarah Davidson
Fauzia Dawood
Vilas Dhar
Elizabeth Fasolino
Sumit Galhotra
April Gu
Anurag Gupta
Dr. R. Jaipal
John Sifton

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IRREVERSIBLE CONSEQUENCES

RACIAL PROFILING AND LETHAL FORCE IN THE “WAR ON TERROR”

I. Executive Summary

A. Overview

Since the September 11, 2001 attacks in the United States (U.S.) a number of countries have either adopted or reinforced counter-terrorism measures that stand in direct contradiction to established human rights norms. Under the pretext of protecting national security in the global “war on terror” States have, for example, violated the right to due process of law, the right to be free from torture and other cruel, inhuman and degrading treatment, the right to be free from discrimination, and even the right to life.

Under international law, States have both a right and a duty to protect individuals within their borders; this includes protecting individuals from acts of terrorism. Measures taken in fulfillment of this duty, however, must also respect the rule of law, human rights, and fundamental freedoms. To date, few States have been able to effectively reconcile this dual obligation to protect national security while respecting human rights. A recent example of this failure is the adoption of “shoot-to-kill” policies to deal with suspected terrorists.

In 2005 a number of “shoot-to-kill” policies authorizing the use of lethal force against suspected suicide bombers came to light. Following the July 22, 2005 killing of Jean Charles de Menezes, a Brazilian electrician who London police mistook for a suicide bomber, the United Kingdom (U.K.) revealed the existence of a national “shoot-to-kill” policy named Operation Kratos. Also in 2005, reports surfaced that the U.S. Capitol Police had become the first police department in the U.S. to adopt a “shoot-to-kill” policy for dealing with suspected suicide bombers. Other U.S. law enforcement agencies are considering following suit. In late 2005 the U.S. National Bomb Squad Commanders Advisory Board issued and distributed the first national protocol on suicide bomber response.

The use of “behavior pattern recognition” has similarly emerged as a trend in counter-terrorism training. Senior U.S. intelligence specialists, for example, have argued that it would be more useful to attempt to identify and isolate the type of behavior that might precede an attack rather than focusing on “the type of person who fits a profile of a terrorist.” Behavior pattern recognition is already being introduced in airport and transportation security in the U.S., and in law enforcement in the U.K. Both “shoot-to-kill” policies and behavior pattern recognition techniques have long been used in Israel, whose counter-terrorism experts are actively recruited to train law enforcement and security personnel worldwide on the implementation of these policies and techniques.

On July 8, 2005, a day after the London bombings, the International Association of Chiefs of Police (IACP), an organization of global membership that facilitates the training and cooperation of police officers in the U.S. and worldwide, released its guidelines on the detection and prevention of suicide bombings. These guidelines are articulated in IACP’s Training Keys 581 and 582 (entitled Suicide (Homicide) Bombers I & II, respectively) (hereinafter “Training Keys”). To detect potential suicide bombers, Training Key 581 instructs police officers to look

for certain behavioral and physical characteristics, similar to those identified in behavior pattern recognition guidelines. To prevent potential suicide bombers, Training Key 582 promotes the use of lethal force, encouraging officers to aim for the suspect's head and shoot-to-kill.

Both “shoot-to-kill” policies as well as the indicators associated with behavior pattern recognition are often marked by a lack of transparency in terms of their content, adoption, and implementation. This secrecy is frequently attributed to the imperative of maintaining national security. While protecting national security is of paramount importance, policies that empower law enforcement officials to disregard established standards on the use of lethal force and to substitute reliable intelligence with confusing and often stereotyped profiles of threatening individuals, must be made subject to public scrutiny.

Unlike official “shoot-to-kill” policies, the Training Keys are publicly available documents. Though not official government policy, they are the subject of this Briefing Paper because: a) they are emblematic of both existing official policies and policies under consideration; and b) they have the potential to influence police departments—particularly in the U.S. where the IACP is headquartered—to train police officers to use behavioral profiling techniques, and to adopt and implement “shoot-to-kill” policies in response to terrorism-related threats.

While a shift away from focusing on the “the type of person” who fits a terrorist profile toward the type of behavior that might precede an attack is laudable, this Briefing Paper argues that the indicators contained in Training Key 581 will not be implemented in a neutral manner. Specifically, it concludes that these indicators are proxies for racial, ethnic and religious profiling, and that implementation of the Training Key will disproportionately target Muslims, Arabs and South Asians, or those perceived to be Muslim, Arab, or South Asian.

Additionally, while the use of lethal force may, under certain circumstances, be both necessary and justified, especially when responding to the imminent detonation of a bomb, Training Key 582 promotes the use of lethal force even when the threat of harm is not imminent and where the very existence of a bomb has not been confirmed. Instead, officers are encouraged to infer the existence of the “capability to detonate” a bomb or the *threat* of such use on the basis of overly-broad physical and behavioral characteristics, that will in the overwhelming number of cases end up targeting Muslims, Arabs and South Asians, or those perceived to be Muslim, Arab, or South Asian.

This Briefing Paper analyzes the Training Keys in light of relevant international and regional human rights law, and U.S. domestic law, and concludes that the implementation of the Keys by police departments would result in violations of standards prohibiting unjustified discrimination and the arbitrary use of force.

In so doing, it challenges a major precept of the “war on terror” campaign generally, and “shoot-to-kill” and profiling policies specifically: that the attacks of September 11, 2001 have heralded a new era that warrants new approaches to law enforcement, and justifies a departure from established human rights norms. Such an approach ignores the intricacies and breadth of the human rights regime, which recognizes the duty of States to protect persons against terrorist attacks, while also setting out appropriate and necessary prohibitions on discriminatory treatment and the arbitrary deprivation of human life. These prohibitions seek to ensure that *all* persons are truly secure and protected. By contrast, profiling on the basis of race, religion, ethnicity and nationality sends the problematic message that the security of some is worth more than the

security of others; or worse, that human rights abuses against those who fit into this ill-defined category of “terrorist” are a necessary pre-condition to ensuring the security of the nation.

B. The “Suicide Bomber Profile”

Training Key 581 makes explicit and implicit references to Muslims in its delineation of characteristics that signify a potential threat. Training Key 581 provides a brief history of suicide bombings, with a specific focus on the activities of Islamic militants, including Al Qaeda. The Training Key also contains a number of references to religious behavior as a basis for suspicion. For example, officers are encouraged to look for persons “mumbling (prayer)”; “...sudden changes in behavior—for example, a fanatically religious person visiting sex clubs (or the reverse)...”; and the smell of “scented water (for ritual purification).” These religion-based indicators, while neutral on their face, when read in conjunction with other parts of the Training Key that make explicit references to “shahid,” “jihad” and “Muslim zealot,” will lead to the disproportionate targeting of Muslims or those perceived to be Muslim.

Despite its conclusion that “no suicide bombing profile exists,” Training Key 581 provides a series of indicators (related to behavior, appearance, smell, equipment and vehicle) under the heading “Suicide Bomber Preincident Indicators” and then sets out a “checklist” of physical and behavioral characteristics that should be cause for concern under the heading “Suicide Bomber Profile.”

These indicators include:

- the wearing of loose or bulky clothing in the summer;
- pacing back and forth;
- fidgeting with something beneath one’s clothing;
- failure to make eye contact;
- being in a drug-induced state;
- strange hair coloring;
- wearing too much cologne;
- wearing talcum powder; and
- being overly protective of one’s baggage.

These broad and over-inclusive indicators leave far too much room for error. Officers are effectively encouraged to interpret potentially non-threatening behavior as threatening. The potential for error has already been borne out in incidents in London and Miami where fatal mistakes were made by the police as a result of purported reliance on indicators similar to those found in the Training Keys.

Two weeks after the July 7, 2005 bombings in London, and one day after the failed bombings of July 21, Jean Charles de Menezes was shot and killed by police officers in the Stockwell Underground tube station in London. De Menezes, a Brazilian national, was mistakenly identified by the officers as a suspect in the failed July 21 bombings. The police initially claimed that they suspected de Menezes because of his “clothing and behaviour.”¹ According to the police, de Menezes was followed leaving a suspected terrorist’s home and was wearing a dark bulky jacket that could have been hiding a bomb.² Police claimed that he vaulted over the ticket barrier to gain entry into the tube station and that he was gunned down in hot pursuit.³ The leaked results of an official investigation revealed that the police’s initial claims were not true. De Menezes was in fact wearing a light denim jacket and used his travel card to gain entry into the station.⁴ He was not running away from the police and was reportedly

unaware that he was being followed.⁵ Once inside the train he was pinned down by police officers and shot in the head at close range multiple times.⁶ Police officers reportedly mistook de Menezes for a suspect in the failed July 21 bombings, in part because he had “Mongolian eyes.”⁷

The Training Keys also include factors such as “mumbling,” “pacing back and forth,” and “being overly protective of one’s baggage” that could lead to the erroneous targeting of the mentally ill, as was demonstrated when an airline passenger with bi-polar disorder was shot and killed by Federal Air Marshals in Miami. On December 7, 2005, Rigoberto Alpizar, a 44-year-old U.S. citizen of Costa Rican descent, and his wife boarded a flight in Miami headed to Orlando. Following an argument with his wife, Alpizar, who was visibly agitated and clutching his bag, ran to the front of the airline declaring that he had to get off the plane.⁸ After Air Marshals became involved and began to escort Alpizar off the plane, his wife ran after them yelling that her husband, who suffered from bi-polar disorder, was ill and off his medication.⁹ After being removed from the plane, Alpizar was shot and killed on the jetway, allegedly as he was reaching for his bag.¹⁰ There are no witness accounts confirming that Alpizar claimed that he had a bomb, as was stated by the Air Marshals involved in the shooting.¹¹

Both Alpizar and de Menezes were also dark-skinned men who superficially matched what has become the generally accepted profile of the “terrorist”; namely, young Muslim men of Middle Eastern or South Asian origin. The scope for all of the behavioral indicators contained in the Training Keys to be read in *non-neutral* ways is heightened by the widespread acceptance of this profile, and by the discriminatory targeting of Muslims, Arabs, and South Asians in a variety of post-September 11, 2001 counter-terrorism measures.

In the “war on terror,” individuals profiled on the basis of their race, religion, ethnicity, and/or nationality (namely Arabs, Muslims and South Asians or those perceived to fit these categories) have been subject to stops and searches while driving, flying, traveling through airports, and even while praying. They have been illegally detained, deported, required to submit to special registration, “disappeared,” and rendered to countries where it is likely that they will be tortured. Profiling in the context of a “shoot-to-kill” policy threatens the ultimate sanction—death by extrajudicial execution.

C. The Use of Lethal Force

The irreversible consequences of a “shoot-to-kill” policy necessitate that police officers discharge lethal force only when *necessary* and when the threat of harm to the officer or others is *imminent*. Instead, Training Key 582 identifies the circumstances in which lethal force is justified as follows:

Officers should be reminded that the law does not require that the threat of death or serious injury be imminent, as is sometimes noted in police use-of force policies. This point is very important in any deadly force encounter, but even more so when one is dealing with explosive devices capable of widespread death and destruction. One need not wait until a suicide bomber makes a move or takes other action potentially sufficient to carry out the bombing when officers have reasonable basis to believe that the suspect has the capability to detonate a bomb. The threat of such use is, in most instances, sufficient justification to employ deadly force. An officer need only determine that the use of deadly force is objectively reasonable under the circumstances.

The Training Key removes the “usual safeguards” that normally attach to the use of force. Specifically the Training Key:

- Rejects the requirement, most clearly articulated in international law, that the threat be imminent;
- Omits reference to the requirement under international, regional, and U.S. domestic law that lethal force be “necessary”;
- Fails to ensure that responses to potential suicide bombers will be intelligence-led and instead focuses on ill-conceived stereotypes and behavioral indicators that are contradictory, over-broad, biased, and prone to error;
- Does not reflect on the importance and nature of a command structure to ensure that uses of force are appropriately controlled; and
- Fails to contemplate the wide-range of potential suicide bomber scenarios or the wide range of responses that these scenarios may attract.

The Training Key suggests a dilution of existing standards on the reasoning that “when one is dealing with explosive devices capable of widespread death and destruction” a different set of standards apply. The fatal consequences of a “shoot-to-kill” policy necessitate an approach that reinforces existing safeguards, instead of diluting them. Moreover, international, regional and U.S. domestic law recognize that there will be moments when lethal force is justified, but they also assist law enforcement officials and protect populations by stipulating important thresholds of reasonableness, imminence, and graduated use of force to ensure that the use of lethal force does not amount to an arbitrary deprivation of life.

By removing these safeguards and not offering any alternate checks on uses of force, the Training Keys place both officers and “suspects” in great peril. The power to deploy lethal force is an awesome responsibility for any police officer. The inappropriate use of force has several consequences for the offending officer, including civil or criminal liability, work-related penalties, and great emotional stress. These consequences further underscore the need to exercise great caution in the use of force both for the sake of the suspect and for the sake of the officer involved. Instead of giving officers sufficient guidance in the exercise of this immense responsibility, the Training Keys widen the suspect class of suicide bombers to include all Muslims or those perceived to be Muslim, resulting in an unworkably large and highly arbitrary suspect pool. Second, the Training Keys’ use of broad and over-inclusive indicators (such as the wearing of loose or bulky clothing in the summer, pacing back and forth, fidgeting with something beneath one’s clothing, failure to make eye contact, and so on) creates the potential for non-threatening persons to be targeted for actions that the Training Key encourages officers to interpret as threatening. Third, the indicators are contradictory and inconsistent. Officers are told, for example, to look for individuals who are nervous and individuals who are calm, individuals who are overtly Muslim and individuals who hide their identity so as to blend in with the environment. In sum, the guidelines are meaningless to officers who have only a few seconds to decide whether an individual constitutes a real threat before deploying lethal force. The lack of real guidance will also leave officers to rely on their own assumptions on whom to treat as suspect.

D. Profiling and National Security

The use of profiling in Training Key 581 is emblematic of a broader “war on terror” phenomenon of using race, religion, ethnicity, and nationality as a proxy for criminal suspicion of terrorist activity. Profiling amounts to lazy police work—instead of investigating crimes on the basis of reliable intelligence, the net is cast widely in the hope of (unlikely) success. The faulty

nature of this premise has already been borne out in the U.S. where widespread round ups, questioning, and special registration of thousands of young Arab and Muslim men did not result in a single charge related to terrorist activity. In the context of a “shoot-to-kill” policy, the profiling of Muslims—or those perceived to be Muslims on the basis of their race, ethnicity, or nationality—is not just lazy, it is fatal.

Profiling is also counterproductive to governments’ efforts to ensure national security, and a waste of precious law enforcement resources. Profiling compromises the trust between police officers and the communities in which they operate. Profiling also diverts limited resources away from identifying real threats to national security, and threatens to undermine the very goal of security by sending the message to those planning terrorist attacks that their efforts will be successful as long as they deploy individuals who do not fit this racialized “terrorist” profile.

Ultimately the use of profiling is a dehumanizing exercise that ascribes criminal or terrorist tendencies to entire communities on the basis of their race, ethnicity, religion, or nationality. State-sanctioned profiling also legitimizes the prejudice of the general public. Hate crimes against Arabs, Muslims, and South Asians in the U.S. and Europe have increased dramatically since September 11, 2001, with incidents ranging from threats, harassments, and employment discrimination, to major assaults, arson, and murder. Unchecked abuses by both state and non-state actors send the problematic message that those belonging to, or perceived to be belonging to, these communities can legitimately be targeted as the “terrorist” other.

E. Moving Forward

The prohibitions against discrimination and the use of lethal force apply in both pre-incident assessments of suicide bomber threats, as well as the actual use of force against suspected suicide bombers. However, governments also have obligations that apply to their *post*-incident responses to the shooting of suspected suicide bombers. This includes a duty to investigate allegations of discrimination and arbitrary uses of force, and to prosecute all of those responsible. While these post-incident steps can help ensure accountability for illegal shootings, they will never be able to reverse its consequences: the loss of human life. Before reaching this point of no return, States should make public their plans to introduce these policies, invite dialogue with communities most threatened by them, and sufficiently train police officers on the prohibitions against racial profiling and the use of deadly force.

The Center for Human Rights and Global Justice calls on States and police departments considering the adoption of such policies to ensure that these policies comply with fundamental human rights norms. Specifically, the Center calls on officials to:

- Make public their plans to introduce these policies, invite dialogue with communities most threatened by them, and sufficiently train police officers on the prohibitions against racial profiling and the arbitrary use of deadly force.
- Ensure that law enforcement officers do not substitute reliable intelligence with behavioral indicators that operate as proxies for racial, ethnic, and religious profiling.
- Ensure that strategies for responding to potential suicide bombers operate within the framework of existing legal standards that include safeguards relating to necessity and imminence to check against arbitrary uses of lethal force.
- Publicly investigate allegations of racial profiling and illegal uses of force in all counter-terrorism measures and prosecute those found responsible for these violations.

Fundamental rights must not become casualties to the politics of fear that have characterized States' responses to the "war on terror." Only a faithful adherence to human rights norms that are grounded in international, regional, and domestic law can help ensure that *all* persons are truly secure and protected.

II. Introduction

The last few years have witnessed a proliferation of “shoot-to-kill” policies designed for use against those suspected of taking part in terrorist activity.¹² Despite the serious and even lethal consequences of these policies, precise information about their adoption, content and implementation is often either unclear or unavailable to the public. One suggested policy that is publicly available is contained in Training Keys 581¹³ and 582,¹⁴ entitled Suicide (Homicide) Bombers I & II, respectively. (hereinafter “Training Keys”). The Training Keys were released by the International Association of Chiefs of Police (IACP) in July 2005.¹⁵ Together, these documents provide guidance to police officers on how to identify and neutralize suspected suicide bombers.

The “shoot-to-kill” strategy contained in the Training Keys is indicative of a broader worldwide trend to authorize or encourage the deployment of lethal force against suspected terrorists.¹⁶ The Training Keys’ focus on particular behavioral and physical characteristics is also representative of a broader trend to substitute reliable intelligence with confusing and often stereotyped profiles of threatening individuals. Increased reliance on police officers as frontline defenders against terrorist attacks in urban and other environments¹⁷ necessitates closer scrutiny of guidance given to police officers on how to best protect national security interests. The Training Keys provide a concrete way to bridge the information gap on these policies and to begin to scrutinize the principles that underpin them. The representative nature of the Training Keys also opens the door to a broader critique of problematic global law enforcement trends of which the Training Keys are emblematic.

To facilitate this critique, this Briefing Paper is divided into two broad sections. The first section begins with a description of the IACP and a discussion of the content of the Training Keys. It then considers the significance of the Training Keys as both representative and formative policy tools. The second section analyzes the Training Keys from a legal perspective. It reiterates the applicability of human rights law to “shoot-to-kill” policies and examines three main legal issues: the duty of States to protect those within their border; the prohibition against discrimination; and rules limiting the use of lethal force. Both the sections on discrimination and the use of force focus on applicable international and regional human rights law¹⁸ and on United States (U.S.) domestic law.¹⁹ The Briefing Paper’s conclusion turns to States’ post-incident responses, and argues that States have a duty to investigate allegations of discrimination and arbitrary deprivations of life.

III. The IACP, Training Keys 581 and 582 and “Shoot-to-Kill” Policies

A. What is the IACP?

1. The IACP: Role and Organizational Structure

The IACP is the world’s oldest and largest nonprofit organization of police executives, with close to 20,000 members²⁰ in 101 countries.²¹ Despite its international character, the IACP is most closely identified with the U.S. The IACP is headquartered in Virginia; its membership is overwhelmingly comprised of serving and retired U.S. police officers; its leadership is U.S. dominated;²² and it has long been involved in the development of law enforcement policies in the U.S.²³ Additionally, the IACP trains law enforcement officers in the U.S. and abroad with a view to fostering police co-operation and promoting the exchange of best practices.²⁴ Its international

work is facilitated, in part, by its “World Regional Offices”²⁵ and by its close relationship with other international organizations.²⁶

2. *The IACP and Training Keys 581 and 582*

A number of the IACP’s activities have focused on developing the counter-terrorism capacity of law enforcement officials. The IACP has provided training²⁷ (including a training course on “Terrorism Tactics and Counter Measures – ‘Homicide Bombers’”)²⁸ and has supported or co-operated with the training programs of other organizations on similar topics. In 2004, for example, three training programs on responses to suicide bombers were held in Israel for U.S. law enforcement officers as part of the Law Enforcement Exchange Program (LEEP) of the Jewish Institute for National Security Affairs (JINSA) with the “support and co-operation” of the IACP.²⁹ Local law enforcement officers have attended and participated in such programs,³⁰ which represent perhaps the largest counter–terrorism cooperative training enterprise between the U.S. and Israel.³¹ Against this backdrop, in July 2005 the IACP issued the Training Keys.

B. What are Training Keys 581 and 582?

1. *Relationship and Content*

Training Key 581 addresses the nature and history of suicide bombings³² and sets out a “suicide bomber profile.” Training Key 582 identifies the way in which law enforcement officers should then respond to potential suicide bombers. These Training Keys are to be used in conjunction with each other.³³ The broad content of the Training Keys can be summarized as follows:

- **Training Key 581:** On the nature of suicide bombings, Training Key 581 concludes that suicide bombings: are a hybrid between crime and war;³⁴ are mainly either individual or vehicular;³⁵ and contain various strategic advantages.³⁶ While the Training Key contends that “no suicide bombing profile exists”³⁷ it then proceeds to provide a series of indicators (behavior, appearance, smell, equipment and vehicle) under the heading “Suicide Bomber Preincident Indicators” and a “checklist” of the most obvious signs of a potential suicide bomber under the heading “Suicide Bomber Profile.”³⁸ The checklist includes references to clothing, appearance and smell to assist police officers in detecting a threat.
- **Training Key 582:** identifies the circumstances in which a police officer should resort to lethal force to deal with a suspected suicide bomber. The Training Key contends that lethal force is authorized if the suspect constitutes a threat of death or serious injury, either to officers or members of the public.³⁹ The Training Key rejects a requirement that an attack be “imminent” before lethal force is used, while noting that this requirement is sometimes contained in police policies on use of force.⁴⁰ The precise test of when resort to force is justified is articulated as follows:

One need not wait until a suicide bomber makes a move or takes other action potentially sufficient to carry out the bombing when officers have reasonable basis to believe that the suspect has the capability to detonate a bomb. The *threat* of such use is, in most instances, sufficient justification to employ deadly force. An officer need only determine that the use of deadly force is objectively reasonable under the circumstances.⁴¹

Training Key 582 provides guidance on the type of force that should be used once this determination has been made: officers are told to aim at the target's head:

[I]f lethal force is justified, all shots should be aimed at the bomber's head—specifically, at the tip of the nose when facing the bomber, at the point of the ear canal from the side, or about one inch below the base of the skull from behind. An accurately placed head shot will terminate the bomber before he or she can take action to detonate the explosive device and will not accidentally set off the device.⁴²

2. *Significance of the Training Keys: Representative and Formative*

The Training Keys are emblematic of a broader trend to either recommend or implement “shoot-to-kill” policies in response to the threat of suicide bombings. The United Kingdom (U.K.) began developing tactics to respond to suicide bombers in the aftermath of September 11, 2001 and in 2003 adopted a national “shoot-to-kill” policy entitled Operation Kratos (see box).⁴³ In the U.S., the U.S. National Bomb Squad Commanders Advisory Board issued the first national protocol for suicide bombers response in late 2005;⁴⁴ while the U.S. Capitol Police has already adopted a “shoot-to-kill” policy for suicide bombers.⁴⁵ According to this policy, officers are trained to recognize the “usual traits and characteristics of suicide bombers” and are instructed to “aim for the head.”⁴⁶ Each of these policies is marked by a lack of transparency in their adoption and implementation.⁴⁷ This secrecy is frequently attributed to the imperative of maintaining national security.⁴⁸

As noted above, the IACP Training Keys are publicly available documents that are indicative of the general thinking that underlies “shoot-to-kill” policies.⁴⁹ The fact that the Training Keys are based in part on an Israeli model of using behavioral profiles to identify suicide bombers⁵⁰ make them key points of insight for the policies of other countries that are also known to draw on the Israeli approach, despite concerns about the applicability of this approach outside of Israel.⁵¹ Israeli security personnel, for example, provide training to their American counterparts on how to deal with suicide bombers⁵² and there has also been close co-operation between the U.K. and Israel on the formulation of U.K. policy and the training of U.K. officers.⁵³ More generally, the relevant Israeli actors (the Israeli Defence Forces, police and emergency response teams) are seen as the “primary international exemplars in their domestic responses to suicide bombing.”⁵⁴

The significance of the Training Keys is not limited to their representative character. The Training Keys also have the potential to influence the adoption and implementation of future “shoot-to-kill” policies of police departments, particularly in the U.S. This potential is heightened by four factors:

- The adoption of “shoot-to-kill” policies is currently being debated by law enforcement officials in the U.S., at least one of whom has stated that “shoot-to-kill” would be the “inevitable policy” following a suicide bombing in the U.S.;⁵⁵
- Police officers are increasingly relied upon (and receive training) in counter-terrorism activities;⁵⁶
- Local police departments have independent authority to adopt and implement use of force policies.⁵⁷ As mentioned above, the U.S. Capitol Police have already adopted a “shoot-to-kill” policy;⁵⁸ and

- The IACP is extensively involved in the training of U.S. police officers⁵⁹ including in training on the use of force.⁶⁰ The closeness of the relationship between the IACP and U.S. police departments is demonstrated by the fact that U.S. Capitol Police Chief Terrance Gainer formerly served on the Terrorism Committee of the IACP and that the U.S. Capitol Police policy “helped guide” the IACP Training Keys.⁶¹

While the Training Keys in and of themselves are not official policy, and therefore not subject to legal scrutiny, existing and future “shoot-to-kill” policies that track elements of the Training Keys, implicate international, regional and domestic law on discrimination and the use of force. Subjecting the Training Keys to scrutiny under these laws therefore allows for a critique of the general ideas that have, and will continue to, inform government “shoot-to-kill” rules, both in the U.S. and worldwide.

Operation Kratos

In the aftermath of September 11, 2001, the U.K. developed a “series of tactics to deal with the threat posed by a suicide bomber” identified as Operation Kratos.⁶² Operation Kratos is a “national policy” that was “centrally” “adopted” and “ratified” by the U.K. Association of Chief Police Officers (ACPO) in 2003.⁶³ Citing a need to protect national security, detailed information on the tactics and technologies employed in Operation Kratos has not been made available to the public.⁶⁴ Following the July 2005 de Menezes shooting,⁶⁵ however, the Metropolitan Police Authority (MPA)⁶⁶ issued a report describing “how the MPS [Metropolitan Police Service] developed its response to the threat of suicide terrorism.”⁶⁷ While emphasizing that the nature of a suicide attack calls for “positive action” by law enforcement⁶⁸ and recognizing in some circumstances that “[l]ethal force may be the only option,”⁶⁹ the information publicly available on Operation Kratos indicates that it:

Purports to operate within the boundaries of the existing legal framework on the use of lethal force.

A number of statements by U.K. officials have reiterated that the Operation Kratos tactics “are wholly consistent” with relevant U.K. domestic law and the *ACPO Manual of Guidance on Police Use of Firearms*⁷⁰ and emphasized the requirement that the threat be imminent and that resort to force be “absolutely necessary”⁷¹ be observed. However, according to a review of leaked documents, legal advice on the Operation Kratos guidelines suggests that officers seeking to defend their uses of force will be able to avail themselves of the “much more liberal” defense that they “believed” they were acting reasonably, rather than having to prove that “they had acted reasonably in shooting dead an unarmed person.”⁷² This legal advice is conceived of as a lesser standard than that applied in Israel, for example, where officers must “demonstrate that a suspect is actually carrying a bomb before they are permitted to open fire.”⁷³

Puts in place a distinct command structure where a specific individual is nominated as being responsible for the decision on whether force should be used against a suicide bomber.

Operations taken pursuant to Operation Kratos will be commanded by “(s)pecially trained ACPO officers, acting as the ‘Designated Senior Officer’, (DSO)... It is the DSO who will give the order to a firearms officer to shoot. Legal advice to support this stance has been obtained. There is a DSO on call 24 hours per day, seven days per week to deal with suspected suicide terrorist incidents.”⁷⁴

Identifies different options for different types of suicide bomber threats.

Operation Kratos is divided into three separate plans: Operation Andromeda (for “spontaneous sighting” of a suspected suicide bomber by a member of the public); Operation Beach (“an intelligence-led covert operation to locate and arrest persons suspected of involvement in acts of terrorism”); and Operation Clydesdale (to address situations where “intelligence has been received about a suicide attack on a pre-planned event”).⁷⁵ The U.K. policy anticipates that resort to lethal force will not be the automatic police response for each of these Operations. It stipulates that “The options for all three operations range from an unarmed stop of the suspect by uniformed officers through to the deployment of armed police officers” without disclosing the tactics of each of these options.⁷⁶

*Claims that there is no suicide bomber profile but provides officers with indicators on how to identify suspects that are similar to those found in IACP Training Key 581.*⁷⁷

A review of leaked documents reveals that Operation Kratos guidelines instruct officers to “...look for people who may be sweating or look ‘recently clean shaven (with) short hair.’” According to the document, suspicious behavior also includes ‘mumbling, possibly praying, looking anxious, wearing bulky clothing not in keeping with the weather, (and) holding something in the hand/clenched fist; wire or toggle protruding from bag.’⁷⁸ The MPA has publicly stated that although there is no suicide bomber profile, there are particular groups that “may feel more vulnerable owing to public perceptions of suicide terrorists and their ethnic origins or religious beliefs.”⁷⁹ For this reason, the MPS Diversity Directorate is to develop a “community communications strategy” to improve information flows and where appropriate involve vulnerable groups in review of Operation Kratos.⁸⁰

Authorizes investigations into the implementation of these tactics (such as the investigation into the de Menezes shooting),⁸¹ on the basis that police officers are “not above the law.”⁸²

As of October 26, 2005 existing tactics under Operation Kratos were being reviewed but remained in place.⁸³

IV. Training Keys 581 and 582 and International, Regional and U.S. Domestic Law

A. How does human rights law apply to “shoot-to-kill” policies?

As with any government activity, the adoption and implementation of a “shoot-to-kill” policy must comply with applicable domestic, regional, and international law. This section of the Briefing Paper identifies the content of these applicable rules with respect to two broad areas implicated by “shoot-to-kill” policies that rely on behavioral profiling: the prohibition on discrimination and limitations on the use of force. In looking to the applicable legal regimes, this Briefing Paper challenges a major precept of both the “war on terror” campaign and “shoot-to-kill” rhetoric: that the attacks on New York and Washington D.C. have heralded a new era in which new approaches to law enforcement and international law are warranted, and a departure from human rights norms is justified.⁸⁴

In a “shoot-to-kill” context, this precept often has two elements. The first seeks to diminish the significance of human right law by shifting questions about “shoot-to-kill” policies from a law enforcement framework to an international humanitarian law framework.⁸⁵ There are traces of this approach in Training Key 581 when it describes suicide bombings as a hybrid between crime and war, and seeks to distinguish suicide bombers from “ordinary criminals.”⁸⁶ The second is to undermine the utility of human rights law by setting up a false conflict between “the human right not to be blown up by terrorists and the human right not to be arbitrarily shot by the police.”⁸⁷ This approach ignores the intricacies and breadth of the human rights regime which recognizes the duty of States to protect persons against terrorist attacks, while also setting out requirements of non-discrimination and protection against arbitrary deprivation of life that seek to ensure that all persons are truly secure and protected.

B. What does a State’s duty to protect entail?

International and regional human rights law recognizes that the State has a right and a duty to protect its nationals and others against terrorist attacks.⁸⁸ Under international law, this duty is primarily set out in Article 6 of the International Covenant on Civil and Political Rights (hereinafter “ICCPR”). Article 6 imposes a legal duty on States to exercise due diligence in protecting the life of every person within their territory and jurisdiction from attacks by criminals, including terrorists.⁸⁹ This duty includes an obligation to take reasonable and appropriate measures to protect the life of persons under a State’s jurisdiction, and to be cognizant of threats to their personal security.⁹⁰

Regional law contains similar obligations. Article 2(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “the European Convention”) enjoins the State to take appropriate steps to safeguard the lives of those within its jurisdiction.⁹¹ This imposes a duty on the State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.⁹² It may also extend in appropriate circumstances to a positive obligation to take “preventive operational measures” to protect those at risk from another’s criminal acts.⁹³ In the Inter-American system, the Inter-American Court has similarly held that “[W]ithout question, the State has the right and duty to guarantee its security.”⁹⁴ The Court has further held that the duty to ensure the security of a State must be discharged in accordance with law and morality.⁹⁵ In the case of *Velásquez Rodríguez*, the Court remarked that “regardless of the seriousness of certain

actions and the culpability of the perpetrators of certain crimes, the power of the state is not unlimited, nor may the state resort to any means to attain its ends. The state is subject to law and morality. Disrespect for human dignity cannot serve as a basis for any state action.”⁹⁶

The Court’s comments go to a central tenet of human rights law: that protection against terrorism and respect for human rights “both form part of a seamless web of protection” that States are required to uphold.⁹⁷ The ICCPR,⁹⁸ the European Convention⁹⁹ and the American Convention on Human Rights (hereinafter “the American Convention”)¹⁰⁰ have all been interpreted as requiring a State to comply with international human rights law relevant to the protection of individuals, while attempting to protect national security. This requirement has also been outlined in a number of regional instruments.¹⁰¹

C. How does international, regional and domestic law prohibit discrimination?

1. General

In the wake of the events of September 11, 2001, countries worldwide have either introduced or reinforced a number of counter-terrorism measures in an effort to fight the “global war on terror.” In most countries, these measures have resulted in serious human rights violations.¹⁰² In the U.S., violations have included arbitrary and mass arrests and detentions,¹⁰³ special registration programs,¹⁰⁴ secret detentions,¹⁰⁵ torture,¹⁰⁶ deportations,¹⁰⁷ and “extraordinary renditions.”¹⁰⁸ Despite the differences in the nature and location of these human rights violations, one element has been consistent: the disproportionate impact of these measures on Muslims, Arabs, or South Asians.¹⁰⁹ Profiling of Arabs, Muslims, and South Asians has increased dramatically in the U.S. and elsewhere¹¹⁰ since the events of September 11, 2001,¹¹¹ with widespread reports of prejudice, harassment and attacks.¹¹² For example, Arabs, Muslims, and South Asians (or those perceived to be Arab, Muslim or South Asian) have been subject to stops and searches while driving,¹¹³ flying,¹¹⁴ traveling through airports¹¹⁵ and even while praying.¹¹⁶

All of these activities are in large part based on an assumption that these persons fall into a broad-based category of “other” and that the “other” are potential “terrorists.”¹¹⁷ This assumption is at once both generalizing and stigmatizing, as evidenced in the U.S., for example, by the across-the-board use of the term “persons of interest” to describe Muslims, Arabs, and South Asians whom the government has targeted in terrorism investigations.¹¹⁸ While this assumption derives to some extent from the self-proclaimed Islamic identity of the perpetrators of the September 11, 2001 attacks, it can also be traced to a more general demonization and targeting of Arabs and Muslims that preceded these events.¹¹⁹ For example, terrorist activities in the 1980s outside of the U.S. prompted reprisals against Arab-Americans and those appearing to be Arab in the U.S., prompting 1986 U.S. Senate hearings on the phenomena¹²⁰ and the prophetic declaration of one Congressman that he would “...hate to think of the orgy of violence against Arab Americans that would be unleashed should a terrorist incident occur in the U.S. and be attributed, correctly or not, to Islamic Jihad or some other Arab Nationalist group.”¹²¹

The violations described above implicate a fundamental principle of international, regional and U.S. domestic law: the prohibition against discrimination.¹²² Discrimination is prohibited in a number of international instruments,¹²³ and on a number of grounds, including race, color, sex, language, religion, political or other opinion, national or social origin, property and birth.¹²⁴ One area in which a number of these grounds coalesce is in the construction of the category of “terrorist.” This category has been described as a “complex matrix of ‘otherness’ based on race, national origin, religion, culture, and political ideology...”¹²⁵

As noted above, these indicia of “otherness” broadly point toward two groups: Muslims and Arabs,¹²⁶ which in practice encompasses Muslims and non-Muslims of Middle Eastern descent, as well as Muslims and non-Muslims of non-Middle Eastern descent (such as Sikhs and other members of the South Asian community).¹²⁷ These complexities arise because the categories of “Muslims” and “Arabs” are not discrete signifiers of religious or racial identity: the racial “Arab” is often conflated with the religious category “Muslim,”¹²⁸ and Islam is racialized to create an increasing phenomenon of “religiously driven racial discrimination.”¹²⁹ In addition, the assumption that all terrorists are Muslim leads law enforcement officers to target “Muslim-looking people,” thereby converting a clearly unacceptable religious stereotype into a racial and ethnic one.¹³⁰ These indicia of ethnicity, race and religion also intersect with non-citizenship status resulting in increased discrimination against Muslim and Arab immigrants.¹³¹

While it is increasingly acknowledged that persons may experience discrimination on multiple grounds,¹³² the law is still limited in the extent to which it recognizes these intersections.¹³³ This often means that a challenge to a policy or practice must point to a specific ground of discrimination that the policy or practice infringes.¹³⁴ Depending on the particular circumstances, discrimination against Muslim, Arab and South Asian immigrants may constitute discrimination on the basis of race, color, descent, ethnic origin, religion, or nationality. The extent to which these different grounds are recognized, and the tests for determining whether discrimination exists, vary across international, regional and U.S. domestic law as set out below.

2. *Discrimination and International Law*

a) *Grounds of Discrimination*

The prohibition against racial discrimination is of key importance in international law.¹³⁵ The International Convention on the Elimination of all Forms of Racial Discrimination (hereinafter “ICERD”) is the main international instrument prohibiting both direct and indirect (see below)¹³⁶ discrimination on the basis of race, color, descent, or national or ethnic origin.¹³⁷ States’ obligations to end racial and other forms of discrimination apply to all persons regardless of their immigration status.¹³⁸ Importantly, the Committee on the Elimination of Racial Discrimination (the body responsible for monitoring implementation of ICERD) has stressed both generally and in its Concluding Observations on specific countries that these obligations must be observed in anti-terrorism measures.¹³⁹ Discrimination on the grounds of race, color, and national or social origin is also prohibited by Articles 2 and 26 of the ICCPR.¹⁴⁰ The ICCPR also makes it clear that the right to non-discrimination “on the ground of race, colour, sex, language, religion or social origin” is non-derogable, even in times of officially proclaimed public emergencies where the State may permissibly limit other ICCPR rights.¹⁴¹ However the non-derogability of the prohibition on racial discrimination does not just derive from the ICCPR: the prohibition against racial discrimination is a peremptory norm of international law¹⁴² from which States cannot derogate.¹⁴³

International human rights law also explicitly prohibits religious discrimination pursuant to Articles 2(1) and 26 of the ICCPR.¹⁴⁴ This prohibition on religious discrimination is a non-derogable right under Article 4(2) of the ICCPR.¹⁴⁵ While discrimination on the grounds of religion is not explicitly prohibited by ICERD, it may form part of the discrimination on the grounds of race, ethnicity, color or national origin.¹⁴⁶ Other non-binding instruments also address the prohibition on religious discrimination.¹⁴⁷

Although discrimination on the basis of “nationality” is not explicitly listed in the ICCPR, the Human Rights Committee (the body responsible for monitoring implementation of

the ICCPR) has interpreted the ICCPR's prohibition on discrimination on 'other status' (Article 2(1)) to mean that the grounds listed in the Article are non-exhaustive and include prohibition on the basis of nationality.¹⁴⁸ Discrimination on the ground of nationality may include discrimination on the basis of citizenship and discrimination on the basis of race.¹⁴⁹ Despite Article 1(2) of ICERD exempting from review "...distinctions, exclusions, restrictions or preferences made by a State Party... between citizens and non-citizens," the Committee on the Elimination of Racial Discrimination has confirmed that Article 1(2) cannot be read as "undermining the basic prohibition on discrimination," such as that contained in the ICCPR.¹⁵⁰ The Committee has further clarified that:

Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.¹⁵¹

The Committee is also cognizant of the close relationship between racial, ethnic or national origin discrimination and discrimination on the basis of nationality,¹⁵² noting that in some cases discrimination on the basis of nationality may actually be a proxy for discrimination on the basis of race.¹⁵³

b) Activities to Which Prohibition on Discrimination Applies

The prohibition on discrimination consists of both negative and positive obligations for the State. Pursuant to their negative obligations States must not discriminate in either the introduction or application of laws.¹⁵⁴ Their positive obligation requires States to take appropriate measures to eliminate discrimination. In the context of racial discrimination, for example, this means that a State has the duty "to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination."¹⁵⁵ States are expressly bound by the prohibition on discrimination in the methods they use to identify terrorism suspects:

Any use of profiling or similar devices by a State must comply strictly with international principles governing necessity, proportionality, and non discrimination and must be subject to close judicial scrutiny.¹⁵⁶

The Committee on the Elimination of Racial Discrimination has further clarified that States are under an obligation to:

Ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping...¹⁵⁷

...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.¹⁵⁸

The State also has a duty to conduct prompt, impartial and thorough investigations when it is alleged that a person has been the victim of racial insults and violence.¹⁵⁹ Failure to conduct such investigations constitutes a breach of the State's duties under ICERD.¹⁶⁰

c) **Direct and Indirect Discrimination**

Both direct and indirect discrimination is prohibited by international law.¹⁶¹ Direct discrimination constitutes actions the *purpose* or aim of which are to discriminate against a particular group of persons.¹⁶² Indirect discrimination constitutes actions that although facially neutral have the *effect* of diminishing a particular group's enjoyment of rights.¹⁶³ Indirect discrimination requires a *prima facie* showing that a rule, provision or policy that is neutral on its face has a disproportionate impact on particular groups.¹⁶⁴

d) **When does differentiated treatment amount to discrimination?**

International human rights law does not prohibit all forms of differentiated treatment.¹⁶⁵ The Human Rights Committee has repeatedly stated that:

The right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.¹⁶⁶

The Human Rights Committee has also indicated that a measure may not be discriminatory if it is aimed at achieving a legitimate purpose.¹⁶⁷ The Committee on the Elimination of Racial Discrimination has also articulated that differentiation will not amount to discrimination if:

...the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.¹⁶⁸

Although not often made clear, proportionality between the measure introduced (e.g. racial profiling) and the end sought to be achieved by the measure also appears to be an inherent part of the test of discrimination under international law.¹⁶⁹

3. ***Discrimination and Regional Law***

a) **Europe**

i. *Grounds of Discrimination*

The rights protected by the European Convention must be secured without discrimination on "...any ground such as sex, *race*,¹⁷⁰ *color*, language, *religion*, political or other opinion, *national or social origin*, *association with a national minority*, property, birth or other status" (Article 14) (emphasis added). Like the prohibition on discrimination in the ICCPR, the list of prohibited grounds set out in Article 14 is non-exhaustive.¹⁷¹ However, unlike the ICCPR's "free-standing" prohibition against discrimination, the right against discrimination in the Convention is linked to the other substantive rights listed therein. While a successful discrimination claim does not require proof that the substantive right in question has been violated,¹⁷² it is only possible to bring an Article 14 claim with respect to the rights listed in the

European Convention.¹⁷³ While it has traditionally been very difficult to make out claims of racial discrimination pursuant to Article 14,¹⁷⁴ there has been a shift toward greater recognition of the problematic aspects of race-based treatment.¹⁷⁵

Protocol No. 12 to the European Convention,¹⁷⁶ which came into force on April 1, 2005 (but is not yet ratified by all States party to the Convention)¹⁷⁷ does not contain the requirement that discrimination must be linked to substantive rights. It includes a general and free-standing prohibition against discrimination¹⁷⁸ and prohibits discrimination by State parties on the same grounds as those set out in Article 14 as follows: “The enjoyment of *any right set forth by law* 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.” (emphasis added).¹⁷⁹

While some of the grounds with which this Briefing Paper is concerned—race, ethnicity, religion, or nationality-based discrimination—are all notionally covered by the Convention, in practice the European Court of Human Rights (hereinafter “the ECtHR” or “the European Court”) has attached different levels of importance to these rights; these differences emerge in the application of the test of whether a particular differentiation constitutes discrimination (see below).¹⁸⁰

ii. Activities to Which Prohibition on Discrimination Applies

Like international law, European regional human rights law requires States to refrain from discrimination and to take steps to investigate allegations of discriminatory treatment.¹⁸¹ The Court has specifically clarified that failure to investigate the role of racial discrimination in the use of force by law enforcement officials constitutes a violation of Article 14 and Article 2 in its procedural aspect.¹⁸² In this respect, the Court has emphasized that racially motivated acts of violence are “particularly destructive of fundamental rights” and that failure to investigate such incidents jeopardizes public confidence in law enforcement.¹⁸³ With respect to racial or ethnic profiling of terrorism suspects that precedes such incidents, it has been argued that Protocol No. 12 may be a useful way to address a potential lacuna in European human rights law on this specific issue.¹⁸⁴

Other organs of the European system have been consistently clear that all counter-terrorism measures must comply with the prohibition on discriminatory treatment.¹⁸⁵ For example, the European Commission against Racism and Intolerance has cautioned that “the fight against terrorism should not become a pretext under which racism, racial discrimination and intolerance are allowed to flourish.”¹⁸⁶ It has urged member States to “pay particular attention to guaranteeing in a non discriminatory way the freedoms of association, expression, religion and movement, and to ensuring that no discrimination ensues from legislation and regulations—or their implementation—” in matters of law enforcement.¹⁸⁷

iii. Direct and Indirect Discrimination

Discrimination has been interpreted by the ECtHR to mean “... treating differently, without an objective and reasonable justification, persons in relevantly similar situations.”¹⁸⁸ The Court has indicated on a number of occasions that the Convention prohibits discrimination that has a disproportionate impact,¹⁸⁹ but has yet to either find a successful claim of indirect discrimination¹⁹⁰ or develop a systematic position on the different types of indirect discrimination that may arise.¹⁹¹ In part the difficulties in proving indirect discrimination arise from the high standard of proof required¹⁹² and the Court’s reluctance to recognize the critical role of statistical

evidence in showing disproportionate impact; the Court has stated that “...statistics are not by themselves sufficient” to establish discrimination.¹⁹³

In contrast, the prohibition on indirect discrimination and acceptance of the use of statistical evidence to prove disproportionate effect is clearly recognized in European Union law¹⁹⁴ in both the jurisprudence of the European Court of Justice¹⁹⁵ and in the directives adopted by the European Council, including its Race Directive.¹⁹⁶

iv. When does differentiated treatment amount to discrimination?

As with international law, not every difference in treatment will amount to discrimination. Discrimination under the European Convention is defined as different treatment of persons in similar or analogous situations where that difference has no objective and reasonable justification.¹⁹⁷ The measure will not be reasonable and objective if the aim sought to be achieved by it is illegitimate¹⁹⁸ or if there is no proportionality between the aim sought to be achieved and the means employed to achieve it.¹⁹⁹ In making this assessment, consideration is given to whether the means effectively advance the ends.²⁰⁰ The importance of the right sought to be infringed by the measure will also factor into the assessment of whether a measure is discriminatory.²⁰¹

As mentioned above, the test as to whether differentiation constitutes discrimination is applied differently depending on the alleged ground of discrimination. It has been argued that the ECtHR “recognizes to a limited extent a distinction between ‘suspect’ and ‘non-suspect’ grounds of differentiation.”²⁰² A “suspect” differentiation includes differentiation on the grounds of race, ethnicity, or nationality, which must be justified by “particularly weighty reasons” and which must be necessary to the fulfillment of the aims pursued.²⁰³ A “non-suspect” ground of differentiation, on the other hand, must only “have an objective and reasonable justification, requiring that the differentiation pursue a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized.”²⁰⁴

b) Inter-American System

i. Grounds of Discrimination

The American Convention on Human Rights prohibits general discrimination²⁰⁵ and specific discrimination of any kind related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition with respect to the fulfilment of the other rights²⁰⁶ in the Convention.²⁰⁷

ii. Activities to Which Prohibition on Discrimination Applies

Inter-American regional human rights law similarly imposes both negative and positive obligations on States parties. The Inter-American Court on Human Rights (hereinafter “the Inter-American Court”) has remarked that the principle of equality and non-discrimination permeate every act of a State party related to respecting and ensuring human rights.²⁰⁸ The Inter-American Court has classified the prohibition on discrimination as a *jus cogens* norm and has indicated that any act in conflict with this norm is unacceptable.²⁰⁹ States parties to the American Convention must refrain from enacting discriminatory laws, or implementing or interpreting laws in a manner that discriminates against a specific group of persons.²¹⁰ States parties must also take affirmative action to reverse or change discriminatory situations that exist to the detriment of a specific group of persons in their societies.²¹¹

Article 27(1) of the American Convention provides that in time of war, public danger, or other emergency that threatens the independence or security of a State party, a State party may derogate from some of its obligations under the American Convention but such derogation may not involve discrimination on the grounds of race, color, sex, language, religion, or social origin.²¹² Any measures taken pursuant to Article 27 must also be of exceptional character, strictly limited in time and to the extent required by the exigencies of the situation, subject to regular review, and consistent with other obligations under international law.²¹³

The prohibition on discrimination must also be upheld in counter-terrorism activities. For example, Article 14 of the Inter-American Convention Against Terrorism,²¹⁴ absolves States parties of providing mutual legal assistance if the requested State party has substantial grounds for believing that the request has been made for the purpose of prosecuting, punishing, or causing prejudice to a person on account of that person's race, religion, nationality, ethnic origin, or political opinion and Article 15(1) requires that measures taken by States parties fully respect the rule of law, human rights, and fundamental freedoms.

iii. Direct and Indirect Discrimination

Direct discrimination is explicitly prohibited under the American Convention,²¹⁵ which has also been interpreted to prohibit indirect discrimination.²¹⁶ However, because the Commission and the Court use an approach to discrimination similar to the European test (see above) little case-law is devoted to the question of the content of the test of indirect discrimination.²¹⁷

iv. When does differentiated treatment amount to discrimination?

In the Inter-American system, not every difference in treatment will amount to discrimination on the basis that not all differences are in themselves offensive to human dignity.²¹⁸ The Court has repeatedly affirmed that there is no discrimination in differences of treatment of individuals by a State when the classifications selected are based on substantial factual differences and where there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review.²¹⁹ According to the Court, these aims may not be unjust or unreasonable, that is, they may not be "arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of human kind."²²⁰

4. Discrimination and U.S. Domestic law

a) General

Prior to September 11, 2001 racial and ethnic profiling in U.S. law enforcement activities was generally considered unacceptable, in theory if not in practice.²²¹ Such was the stated position of government and law enforcement officials.²²² Since September 11, 2001, the approach to profiling has been bifurcated.²²³ With respect to "ordinary" law enforcement operations, racial and ethnic profiling remains officially unacceptable. In 2003, for example, the U.S. Department of Justice issued guidelines to federal law enforcement officers that forbade the use of race or ethnicity in "routine or spontaneous law enforcement decisions, such as ordinary traffic stops."²²⁴ With respect to law enforcement operations involving terrorism suspects, however, a different standard applies.²²⁵ Both the government²²⁶ and members of the public²²⁷ have given either tacit or explicit support for the use of racial or ethnic profiling in the "war on terror."²²⁸

b) Constitutional Standard

There is no legislation governing the use of racial, ethnic or religious profiling at the federal level.²²⁹ However, courts have developed jurisprudence on the prohibition of discrimination under the U.S. Constitution.

i. Grounds of Discrimination

The Fourth Amendment of the U.S. Constitution²³⁰ forbids a police officer from explicitly using race or ethnicity as a basis for reasonable suspicion when making an arrest.²³¹ The Fourteenth Amendment to the Constitution guarantees equal protection of the law²³² and accordingly prohibits the selective enforcement of the law based on factors such as race and ethnicity.²³³ Claims that the police have used racial or ethnic profiling can and have been brought under the Fourteenth Amendment.²³⁴

Although the Equal Protection Clause of the Fourteenth Amendment applies to all within the U.S., including non-citizens,²³⁵ it is unlikely that a challenge against profiling of Arabs and Muslims, whether citizens or non-citizens, would succeed under U.S. domestic law for a number of reasons.²³⁶ First, in the context of non-citizens, the courts have carved out exceptions to the prohibition against discrimination on the basis of alienage and ethnicity, under immigration law's plenary power doctrine;²³⁷ second, various amendments to the Immigration and Naturalization Act have led to a general erosion of judicial review by limiting non-citizens' access to federal courts;²³⁸ and third, a high level of deference has been accorded to the executive in questions of national security.²³⁹

While there exists legislation to prevent discrimination on the basis of religion in the context of employment,²⁴⁰ and to punish hate crimes that are motivated by religious hatred²⁴¹ in general there are few legal remedies for religious discrimination claims under U.S. domestic law.²⁴² It has been argued that religion ought to be treated in the same manner as race such that religion-based classifications should be treated as suspect and should be subject to strict scrutiny.²⁴³

ii. Activities to Which Prohibition on Discrimination Applies

The prohibition against discrimination in U.S. domestic law imposes only a negative obligation on the states and the federal government. Under the Fourteenth Amendment to the Constitution states are prohibited from denying persons within their jurisdiction "the equal protection of the laws."²⁴⁴ The federal government is given the power to enforce the Fourteenth Amendment through legislation, but this power is permissive and there is no positive duty to enact laws aimed at eliminating discrimination at the state level.²⁴⁵ Although the Fourteenth Amendment applies only to the states, the federal government is also bound by the negative duty not to discriminate by virtue of the Fifth Amendment.²⁴⁶

iii. *Direct and Indirect Discrimination*

For a claim to succeed under the Fourteenth Amendment a plaintiff must “show either intentional discrimination or an adverse effect driven by some form of discriminatory animus on the part of law enforcement officials.”²⁴⁷ In other words, U.S. law recognizes indirect discrimination but makes it very difficult to prove by requiring a showing of racial animus on the part of law enforcement officials.²⁴⁸ Indeed, claims of either direct or indirect racial or ethnic discrimination, whether in the context of law enforcement or more generally, have to date been difficult to prove.²⁴⁹ For example, in a controversial case, the Supreme Court upheld as constitutional a race-based police sweep on the reasoning that plaintiffs had not proven discriminatory intent on the part of the police.²⁵⁰ The Ninth Circuit, however, has condemned race-based stops in the strongest possible terms.²⁵¹

iv. *When does differentiated treatment amount to discrimination?*

Should either intentional discrimination or adverse effects be proved, however, it would be very difficult for the government to survive strict scrutiny and justify the discriminatory measure.²⁵² All measures which amount to intentional discrimination or adverse affects, including classifications on the basis of race²⁵³ and national origin²⁵⁴ will trigger strict scrutiny. An action or law subject to strict scrutiny will require a compelling governmental purpose to which it is narrowly tailored in order to be constitutional.²⁵⁵

c) Policies and Guidelines on Profiling and Law Enforcement

Domestic policies and policing guidelines consistently prohibit racial and ethnic profiling in law enforcement. Various police departments have emphasized that detentions, traffic stops, arrests, searches, and seizures require reasonable suspicion or probable cause and must be based on facts that can be clearly articulated.²⁵⁶ The use of race and ethnicity is only permitted in cases based on trustworthy intelligence linking a specific person or persons to a crime.²⁵⁷ Notably, to the extent that any profiles may be used, they are to be used only as a basis for further investigation and not as a basis for arrest.²⁵⁸ Officers must possess a reasonable suspicion of criminal activity, indicated by clearly articulable facts, to support a decision to stop or briefly detain an individual as part of an investigative stop.²⁵⁹ The IACP has specifically reached this conclusion in its 1998 Training Key 394 entitled “Investigative Stops Using Drug Courier Profiles.”²⁶⁰ There is no exception that allows use of profiling in the resort to force: if it is alleged that the victim’s race or ethnicity played a role in a law enforcement official’s decision to use force, complaints are to be directed against the officer concerned.²⁶¹

The Los Angeles Police Department manual has also addressed the practice of arresting persons suspected of being in the country illegally. It makes clear that undocumented alien status is in and of itself an insufficient ground for police action, adding that undocumented aliens must be afforded the same protection as others, and given their vulnerable status, may even require special protection.²⁶²

5. *Would Implementation of Training Key 581 constitute a form of prohibited discrimination under international, regional and U.S. domestic law?*

The discussion of the various legal regimes above demonstrates some differences in the grounds upon which discrimination is prohibited; the content of the test for direct versus indirect discrimination; and the circumstances in which discrimination is justified. Rather than attempting

to specifically assess the Training Key against each legal regime, this section of the Briefing Paper poses two broad questions that cut across the different tests.

First, *Does Training Key 581 Have the Purpose or Effect of Disproportionately Burdening a Particular Racial, Ethnic, Religious or National Group?* This question is relevant for all three systems to determine whether there is direct or indirect discrimination. As noted above, direct discrimination occurs when a policy or measure has the purpose of discriminating against a particular group. Indirect discrimination occurs when a policy or measure, though neutral on its face, has a disproportionate impact on a particular group of persons in practice. Under U.S. law, a showing of discriminatory intent is also needed to support a claim of indirect discrimination.

Second, *Is this Disproportionate Burden Justified?* International and regional law allows discrimination to be justified in certain circumstances, where the aim of the measure is legitimate and the differentiation is objective, reasonable and proportional to that aim. In the U.S. once discrimination has been proved, it may still be justified if narrowly tailored to a compelling governmental purpose.²⁶³

a) Does Training Key 581 Have the Purpose or Effect of Disproportionately Burdening a Particular Racial, Ethnic, Religious or National Group?

Specific language contained in Training Key 581 may be cited as evidence of *purpose* to single out a particular group for differential treatment. For example, in describing the advantages that suicide bombers are supposed to have over “normal terrorist bomb[ers],” the Training Key uses language that makes it clear that the suicide bombers with which it is concerned are those who claim to locate their actions within the tenets of Islam:

A suicide bomber is considered a shahid—a martyr who engages in jihad (holy war) and will, upon completion of the mission, bring honor to his or her family and organization and enjoy the benefits of eternal paradise. After individuals are selected to become a shahid, they go through long training sessions that determine their level of religious commitment, attitude, and ability to remain calm under pressure. Individuals who pass this indoctrination and training process should be considered fanatics who will gladly blow up themselves and others to reach their intended target.²⁶⁴

Training Key 581 also makes specific reference to Muslims in its listing of suicide bomber indicators:

- A fresh shave—a male with a fresh shave and lighter skin on his lower face may be a religious *Muslim* zealot who has just shaved his beard so as not to attract attention, and to blend in better with other people in the vicinity (emphasis added).²⁶⁵

It is difficult to make a blanket assessment about whether these two references are sufficient to show a discriminatory *purpose* amounting to direct discrimination. This makes it necessary to also look at whether there is indirect discrimination in Training Key 581, that is, whether the Training Key targets people from particular racial, ethnic and religious groups in practice. The following factors strongly suggest that this will be the impact of the Training Keys.

i. *Behavioral indicators have the inherent potential to become proxies for racial, ethnic, and religious profiling.*

1. Increased use of behavioral indicators in law enforcement

Since September 11, 2001, there has been an increase in the use of so-called behavioral indicators (or “behavior pattern recognition”) by law enforcement officials to detect and prevent potential terrorist threats. For example, in the U.S, in January 2004, the role of Federal Air Marshals at Boston’s Logan airport became a test case for the use of behavioral indicators in air-transit security.²⁶⁶ The U.S. Transportation Security Administration (TSA) also intends to introduce purportedly race-neutral behavioral profiling more widely.²⁶⁷ Senior U.S. intelligence specialists have similarly argued that it would be more useful to attempt to identify and isolate the type of behavior that might precede an attack rather than focusing on “the type of person who fits a profile of a terrorist.”²⁶⁸ The U.K. has also introduced the use of behavioral indicators as part of Operation Kratos (see box).²⁶⁹ An increased focus on behavioral indicators may in part result from U.S.’ and U.K.’s enhanced cooperation with Israel in the context of counter-terrorism training. Israel has long used behavioral profiles in its own counter-terrorism efforts.²⁷⁰ While the purported shift away from a focus on personal profiles to behavioral profiles is laudable, as noted below, it is unlikely that even facially neutral behavioral indicators will be implemented in a neutral manner.

2. Behavioral indicators have the potential to be used as a proxy for profiling on the basis of race, ethnicity or religion

Those responsible for the training of law enforcement officials have cautioned that behavioral profiles may be used as a proxy for profiling on the basis of race, ethnicity or religion.²⁷¹ The propensity to use race or other stereotypes to read behavior as criminal or threatening is shown by studies that illustrate that minority communities are the disproportionate victims of police use of force.²⁷² While different theories have been advanced to explain this statistic, the police’s subconscious bias against particular communities can and does play a significant role.²⁷³ In a climate of heightened scrutiny and state-sanctioned human rights violations against Muslims and those perceived to be Muslim because of their race, ethnicity, or nationality, it is unrealistic to expect that police officers will implement behavioral indicators in a neutral manner. It has already been alleged, for example that the behavioral identification system at Logan Airport “effectively condones and encourages racial and ethnic profiling.”²⁷⁴

In some cases, interpreting behavior through the lens of racial, ethnic and religious stereotypes may not be deliberate or ill-intentioned. Police officers may be better able to distinguish between threatening and non-threatening behavior in communities with which they are familiar.²⁷⁵ The percentage of police officers in the U.S. who hail from Muslim, South Asian or Arab communities is negligible.²⁷⁶ As a result, there is a risk that individuals from these communities (with which police officers are unfamiliar) will be singled out because police officers are not equipped to draw on detailed and culturally nuanced information to distinguish between benign behavior and behavior that constitutes a real threat.²⁷⁷ This risk is particularly acute in the context of a perceived threat of suicide bombing where the police officer is called upon to make a split-second determination of the threat and react accordingly.²⁷⁸ The problem of undue reliance on subconscious perceptions is further heightened by the very nature of police work, which to a certain extent inherently requires reliance on assumptions, stereotypes and generalizations.²⁷⁹ This reliance is further exacerbated by the language barriers that exist between

law enforcement officials and immigrant communities, limiting the scope for communication that might otherwise dispel some of this dependence on stereotypes and generalizations.²⁸⁰

- ii. *Behavioral indicators in Training Key 581 will lead to targeting of Muslims, South Asians and Arabs or those perceived to fit these categories*

The concern that behavioral profiling will result in the targeting of particular racial, ethnic and religious groups is borne out by Training Key 581. The following elements under the heading “Suicide Bomber Preincident Indicators”²⁸¹ and set out in the “Suicide Bomber Profile”²⁸² are conducive to such targeting:

Behavior. Does the individual act oddly, appear fearful, or use mannerisms that do not fit in? Examples include repeatedly circling an area on foot or in a car, pacing back and forth in front of a venue, glancing left and right while walking slowly, fidgeting with something under his or her clothes, exhibiting an unwillingness to make eye contact, mumbling (prayer),²⁸³ or repeatedly checking a watch or cell phone. To overcome nervousness, some suicide bombers are given drugs; thus, a person in a drug-induced state is another red flag. Other indicators include sudden changes in behavior—for example, a fanatically religious person visiting sex clubs (or the reverse), or an individual giving away personal belongings or suddenly paying off all debts.

Smell. Is the individual wearing too much cologne or perfume, or does he or she smell of talcum powder or scented water (for ritual purification)?²⁸⁴ ...

Suicide Bomber Profile

Tunnel vision. The bomber often will be fixated on the target and for that reason will look straight ahead. He or she also may show signs of irritability, sweating, tics, and other nervous behavior²⁸⁵ ...

A fresh shave—a male with a fresh shave and lighter skin on his lower face may be a religious Muslim zealot who has just shaved his beard so as not to attract attention, and to blend in better with other people in the vicinity²⁸⁶ ...

Evasive movements. It seems obvious that anyone who tries to avoid eye contact, or to evade security cameras and guards, or who appears to be surreptitiously conducting surveillance of a possible target location, may be a bomber.

Each indicator is examined in turn below:

1. Explicit and implicit references to Muslims

As noted above, Training Key 581 provides a brief history of suicide bombings, with a specific focus on the activities of Islamic militants, including Al Qaeda.²⁸⁷ The Training Key also contains a number of references to religious behavior as a basis for suspicion. For example, officers are encouraged to look for persons “mumbling (prayer)”²⁸⁸; “...sudden changes in behavior—for example, a fanatically religious person visiting sex clubs (or the reverse)...”; and the smell of “scented water (for ritual purification).” These religion-based indicators, while neutral on their face, when read in conjunction with other parts of the Training Key (such as the references to “shahid”, “jihad,”²⁸⁹ and “Muslim zealot” discussed above) will disproportionately

target Muslims. Indeed the scope for all of the behavioral indicators (and in particular the ones discussed below) to be read in *non*-neutral ways is heightened by the discriminatory targeting of Muslims or those perceived to be Muslim in numerous post-September 11, 2001 counter-terrorism activities.

2. Evasive movements, including avoidance of eye contact

The Training Keys instruct officers to look out for people “exhibiting an unwillingness to make eye contact” adding that “It seems obvious that anyone who tries to avoid eye contact ... may be a bomber.”²⁹⁰ This indicator will have a disproportionate impact on those groups who may avoid eye contact because, for example, they consider it rude or disrespectful. This may include certain Asian and Arab community members.²⁹¹

3. Displays of fear and nervousness

The Training Key warns officers to look out for suspects who look “fearful,” “use mannerisms that do not fit in,” and “show signs of irritability, sweating, tics, and other nervous behavior.”²⁹² The underlying assumption is that a person who shows signs of nervousness must be about to commit a crime and that there are no other potential explanations for their behavior. A focus on nervous behavior may disproportionately burden immigrant and minority community members in two significant respects: first, due to the lack of familiarity with the communities discussed above,²⁹³ police may be more likely to interpret nervous behavior exhibited by minorities as indicative of criminal intent; and second, as described below, all else being equal, immigrants and other minorities are more likely to feel nervous and fearful simply by virtue of being around or interacting with the police.²⁹⁴ This fear can be attributed to a number of general factors. It may arise from a person’s undocumented status and concern that interaction with the police would result in this fact being revealed.²⁹⁵ It may also be attributed to a general anxiety around the police arising from the widespread ill-treatment of immigrants and minorities at the hands of law enforcement officials. Finally, prior negative experiences with the police in the immigrants’ country of origin may predispose them to nervousness around police officers in their host country.²⁹⁶

This fear has only increased since the events of September 11, 2001, and the heightened crackdown on immigrants that has ensued, particularly on immigrants of Middle Eastern or South Asian origin.²⁹⁷ In the U.S., this problem may be exacerbated if plans to allow State and local police to enforce immigration violations are approved.²⁹⁸ The relative inexperience of the police in dealing with immigration law may heighten the risk of problematic encounters with immigrants,²⁹⁹ which in turn may enhance the fear and nervousness of targeted communities.

In sum, Muslims, Arabs and South Asians, and those perceived to be Muslim, Arab, or South Asian, will bear the disproportionate brunt of such indicators either in effect or as a result of governmental intent. This conclusion is supported by a combination of the following factors: the explicit and implicit references to Muslims in Training Key 581; the requirement that officers be suspicious of evasive movements, including avoidance of eye contact, and displays of fear and nervousness; and the broader discriminatory patterns of counter-terrorism operations that center on the assumption that all terrorists are Muslim, and that all Muslims (or those perceived to be Muslim) are potentially terrorists.

b) Is this Disproportionate Burden Justified?

As noted above, policies that impose a disproportionate burden on particular groups (either purposely or in effect) must be justified in order not to constitute prohibited discrimination. Under international and regional human rights law, such a burden can only be justified if it is objective and reasonable, and is aimed at achieving a legitimate purpose. Under U.S. law, the policies must be narrowly tailored to achieving a compelling governmental purpose in order to be lawful.

However, often these legal tests of whether a differentiation is justified are stated in simple terms that belie the difficulties and need for nuance in their application to particular measures. This section aims to distill the elements of these tests and to use each element to assess Training Key 581. In so doing, the Briefing Paper acknowledges that the precise way in which these elements are read together will vary across jurisdictions. The elements are as follows:

- Importance of the right sought to be infringed by the measure,³⁰⁰
- Aim or objective of the measure, including its legitimacy,³⁰¹
- Nature of the differentiation, whether it uses criteria that are “objective and reasonable;”³⁰² and
- Proportionality between the effects of the means used and the ends or aim sought to be achieved.³⁰³ This includes an assessment of whether the means effectively advance that end,³⁰⁴ such that means which do not meet the identified end will not be proportional.

First, with respect to the importance of the right that racial and other forms of profiling infringes, this Briefing Paper has already established the fundamental importance of the general prohibition on discrimination in international law, and noted that racial discrimination is considered a peremptory norm from which no derogation is permitted.³⁰⁵ In particular, the unacceptability of racial profiling has been made clear both in general terms,³⁰⁶ and specifically in relation to the profiling of Arabs, Muslims, and South Asians post-September 11, 2001.³⁰⁷ As the next section of this Briefing Paper demonstrates, an irreversible consequence of this profiling is the use of lethal force pursuant to a “shoot-to-kill” policy contained in Training Key 582. This creates a direct correlation between the infringement of the prohibition on discrimination and violation of another essential right: the right to life.³⁰⁸

In applying the second test—the legitimacy of the aim or objective pursued—arguably the purpose of Training Key 581 is to identify suicide bomber suspects and thereby defend national security. Defending the security of people within a State’s jurisdiction is not only a compelling State purpose, but a State duty under law.³⁰⁹ However, this objective or purpose should not be rarified: it has been consistently stated that this purpose must be pursued in compliance with human rights norms.³¹⁰ Additionally, it is arguably a legitimate and important societal goal that States manage to successfully balance counter-terrorism measures with the human rights protections by which they are bound.

Third, in assessing the “objective” and “reasonable” nature of the differentiation, and the “proportionality” of means to ends, it is important to bear in mind the following:

- The profiling of Muslims, Arabs, and South Asians in a variety of counter-terrorism measures has not led to the successful identification of terrorism suspects;
- Profiling compromises the ability of police to work with communities to identify terrorism threats;
- Profiling diverts limited law enforcement resources away from identifying real threats to national security; and
- Profiling institutionalizes prejudice and legitimizes the prejudicial behavior of the general public.

Taken as a whole these factors demonstrate that profiling on the basis of race, ethnicity, nationality or religion is a measure that is neither objective, nor reasonable, nor proportional. These conclusions are borne out in the detailed discussion of each point below.

i. Profiling of Muslims, Arabs, and South Asians in counter-terrorism measures has not identified terrorism suspects

Profiling is based on the faulty premise that race, religion, ethnicity and/or national origin correlate with terrorism.³¹¹ The faulty nature of this premise has already been borne out in the U.S. where widespread round ups and questioning of young men of Middle Eastern and South Asian origin did not result in a single arrest for terrorist activity. In the period immediately after September 11, 2001, authorities conducted a wide-spread sweep of people suspected of involvement in terrorist activities.³¹² Those targeted were disproportionately Arab or Muslim.³¹³ Many men from predominantly Arab or Muslim countries, who were not actually detained, were invited to voluntary interviews with the authorities.³¹⁴ In the first wave of interviews, approximately 2,261 Arab and Muslim men between the ages of 18 and 33 were questioned on the basis that they fit the criteria identified by the government of those who might have knowledge of terrorist-related activities.³¹⁵ Only three criminal charges were brought as a consequence of these interviews; none relating to terrorist activity.³¹⁶ Even after the 2,261 interviews failed to secure a single terrorism-related charge, the authorities interviewed over 3,000 additional people fitting the Arab and Muslim profile.³¹⁷

In short, the use of racial profiling amounts to “lazy” police work – instead of investigating crimes properly and on the basis of reliable intelligence, the net is cast widely in the hope of (unlikely) success:³¹⁸

Current profiles of what a suicide bomber might look like focus on Arab males, between 18 and 40 years old, wearing baggy clothes or clothing inappropriate to the weather, acting strangely or praying, with fixed mechanical smiles, but little else (ATF bulletin, no date).³¹⁹ The utility of such profiles in the U.S. might be nil (i.e., the profile would include many American teenagers on the basis of dress alone), especially given the more recent use elsewhere of females and middle class citizens in martyrdom operations.³²⁰

The mis-targeting and subsequent death of two suspected bombers in Miami and London serve as powerful reminders of the lethal implications of profiling-based police work.³²¹ Law

enforcement veterans have similarly argued against the utility of racial profiling in the context of the “war on drugs.”³²² In their dissenting opinion to a Supreme Court case that held that profiling may be effective in the context of attempts to catch drug couriers, Justices Marshall and Brennan noted that:

A law enforcement officer’s mechanistic application of a formula of personal and behavioral traits in deciding whom to detain can only dull the officer’s ability and determination to make sensitive and fact-specific inferences... particularly in ambiguous or borderline cases. Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work, of subjecting innocent individuals to unwarranted police harassment and detention... This risk is enhanced by the profile’s “chameleon-like way of adapting to any particular set of circumstances.”³²³

ii. Profiling compromises the ability of police to work with communities to identify terrorism threats

The use of profiling in Training Key 581 is counterproductive to governments’ efforts to fight terrorism as they undermine the police’s capacity to establish trust with the communities that they have identified as sources of information on security threats.³²⁴ Successful police operations require trust between the police and the communities in which they operate.³²⁵ This trust has already been compromised by widespread law enforcement operations targeted at particular racial, ethnic and religious groups.³²⁶

The IACP has itself recognized that racial profiling undermines the confidence of the public in the police.³²⁷ It has emphasized that: “The best way to ensure the trust of citizens and the courts, and to protect our officers from unfair criticism, is to develop an anti profiling policy that delineates approved techniques for professional traffic stops and makes a clear statement that profiling is not one of those techniques.”³²⁸ Regrettably, the IACP’s own attempts to shift away from racial profiling and toward behavioral profiling in Training Key 581 will not engender greater community trust given the great likelihood that the Key will be implemented in a manner that targets Muslims or those perceived to be Muslim.

Racial profiling and other counter-terrorism measures, including immigration-related crackdowns, also reduce the willingness of affected community members to report crimes against them to the police³²⁹ including hate crimes.³³⁰ As a result, community members may be denied the police protection and judicial redress to which they are entitled.

iii. Profiling diverts limited law enforcement resources away from identifying real threats to national security

Profiling on the basis of race, ethnicity, religion and national origin diverts limited law enforcement resources away from identifying real threats to national security,³³¹ and threatens to undermine the very goal of security by sending the message to those planning terrorist attacks that their efforts will be successful as long as they deploy individuals who do not fit this racialized “terrorist” profile.³³²

Profiling also encourages the reporting of frivolous “tips” by members of the general public that further divert precious law enforcement resources, and in some cases have led to the arbitrary detention of those profiled by the general public. For example, a number of the “tips” and “leads” that resulted in the post-September 11, 2001 immigration detentions “were based on little more than ethnic profiling by members of the public and local police.”³³³ The reporting of

“suspects” by members of the general public is only one example of the ways in which state-sanctioned profiling has fueled and legitimized private acts of violence and bias.

iv. *Profiling institutionalizes prejudice and legitimizes the prejudicial behavior of the general public*

Most fundamentally, profiling on the basis of religion, race, ethnicity or nationality institutionalizes prejudice³³⁴ and promotes and legitimizes the prejudice of the general public. While U.S. officials recognize the “moral obligation to prohibit racial profiling” in the ordinary criminal context, because it sends a “dehumanizing message” to individuals that they are “judged by the color of their skin,”³³⁵ such recognition has been readily abandoned in the context of the “war on terror.”³³⁶

The connection between state-sanctioned profiling and the legitimization of private bias is evident in the dramatic increase in hate crimes against Muslims and Arabs and those perceived to be Muslim or Arab in the aftermath of September 11, 2001. A total of 1,717 bias incidents against Muslims—including threats, harassment, and acts of discrimination and physical violence—were recorded by the Council on American-Islamic Relations between September 11, 2001 and February 2002.³³⁷ The website of the U.S. Department of Justice Civil Rights Division, Initiative to Combat Post-9/11 Discriminatory Backlash, notes that as of September 9, 2004 the Civil Rights Division, in co-operation with the Federal Bureau of Investigation, and U.S. Attorneys offices, has investigated 546 incidents since September 11, 2001 “involving violence, threats, vandalism and arson against Arab-Americans, Muslims, Sikhs, South-Asian Americans and other individuals perceived to be of Middle Eastern origin.”³³⁸ The incidents have included threats, minor assaults, assaults with dangerous weapons, and assaults resulting in serious injury and death. There have also been incidents of “vandalism, shootings, arson and bombings directed at homes, businesses, and places of worship.”³³⁹ None of these figures may reveal the true extent of the abuse since they only correspond to incidents reported by people confident or informed enough to seek out resources to assist them.³⁴⁰ Since the immediate aftermath of September 11, 2001, bias incidents have continued. Although they are less physical in nature, they continue to include discrimination in employment and housing.³⁴¹ Indeed, a 2004 report of the U.N. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance noted with alarm the dramatic increase in incidents of Islamophobia around the world and drew attention to the “resurgence” of “discrimination and hostility against Arabs and Muslims” in countries such as Australia, Belgium, Canada, France and the U.S.³⁴²

This violence is legitimized by both the State and the intellectual elite. For example, in the U.S., government condemnation of hate crime violence was eclipsed by the much stronger public message of their anti-terrorism campaign of targeted detention and questioning, which “reinforced a public perception that Arab and Muslim communities as a whole were suspect and linked to the ‘enemy’ in the U.S. war against terrorism.”³⁴³ The report of the U.N. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance also notes the role of the intellectual elite in causing an increase in Islamophobia, and records: “a clear increase in Islamophobia, to which there are two fundamental aspects: intellectual legitimization of increasingly overt hostility towards Islam and its followers by influential figures in the world of arts, literature and the media; and tolerance of such hostility in many countries.”³⁴⁴ This message, and indeed acts of private violence more generally, can be averted by any number of measures, including increased prosecution of hate crimes, and the generating of publicity in connection to these prosecutions.³⁴⁵

Continued discrimination in the private sphere, like profiling itself, is in part motivated by fear. As articulated by Ron Daniels, Executive Director of the Center for Constitutional Rights, “Racial Profiling is a technique that, at its root, responds to the base instincts of fear. Whether the fear is crime or terrorism, it is a way for the majority to legitimize the violation of minority rights.”³⁴⁶ The implementation of Training Key 581 and “shoot-to-kill” policies that contain similar profiles, would have a disproportionate impact on Muslims, Arabs, and South Asians, without justification, and therefore in violation of the prohibition on discrimination in human rights law. Such policies would also serve to reinforce existing prejudices that equate Muslims, Arabs, and South Asians with the terrorist “other.” The results of this equation can vary from acts of hostility, harassment and abuse, to deadly consequences, including the use of lethal force by law enforcement officials. This latter consequence is addressed in the next section analyzing Training Key 582.

D. How does international, regional and domestic law regulate uses of force by law enforcement officials?

1. The Right to Life – Non-derogable but not absolute

Human rights law recognizes the challenges faced by States in protecting national security and ensuring human rights.³⁴⁷ Even a right as fundamental as the right to life can be limited in certain circumstances. The fundamental nature of the right to life is recognized in the ICCPR,³⁴⁸ the European Convention,³⁴⁹ and the American Convention,³⁵⁰ all of which classify the right to life as non-derogable.³⁵¹ Further, Article 6 of the ICCPR describes the right to life as an “inherent right,” implying that the right derives its legitimacy from the humanity of every individual and is therefore not subject to the vagaries of social, political or legal systems.³⁵²

None of these instruments, however, grant an absolute right to life. The ICCPR and the American Convention prohibit only the arbitrary deprivation of life. The European Convention also qualifies the right, but through a different formulation; Article 2(1) provides that no one shall be deprived of life intentionally. Article 2(2) further clarifies that deprivation of life shall not contravene the right to life when it results from the “use of force which is no more than absolutely necessary” in any of the three circumstances set out in the Article, including in “defence of any person from unlawful violence.”

The legality of the use of lethal force by the State or its agents hinges on whether the actions fall within those circumstances in which deprivations of life are permitted. This in turn depends on the interpretation assigned to an arbitrary deprivation of life (under Article 6 of the ICCPR and Article 4 of the American Convention) or use of absolutely necessary force to protect a person’s life from an unlawful violent attack (under Article 2 of the European Convention).

2. Use of Force Safeguards and International Law

The text of the ICCPR does not provide explicit guidance on what constitutes an arbitrary deprivation of life. The definition of “arbitrary” was left open,³⁵³ enabling flexibility and fact-specific determinations of arbitrariness.³⁵⁴ To assist these fact-specific determinations, the Human Rights Committee has articulated some general principles on when use of force qualifies as an arbitrary deprivation of life in violation of international law. These general principles include:

- *Proportionality*: the Human Rights Committee has interpreted the ICCPR to require proportionality in the use of force.³⁵⁵ The Committee has specifically emphasized the need for proportionality in the context of use of force against terrorism suspects.³⁵⁶
- *Necessity*: the jurisprudence of the Human Rights Committee has also been interpreted to require necessity when using lethal force in law enforcement.³⁵⁷ The use of lethal force will only be justified when it is necessary for self defense or to protect the life of other persons.³⁵⁸ *The U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*³⁵⁹ similarly make it clear that firearms cannot be used “except in self-defence or defence of others against the imminent threat of death or serious injury... intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”³⁶⁰
- *Use of non-lethal means where feasible*: in the context of targeted killings, the Committee has noted that “Before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.”³⁶¹ This includes a requirement for warning, surrender, and an opportunity to explain presence or intentions.³⁶² *The U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* also clarify that non-violent means must be utilized unless such means would be inappropriate, ineffective or would cause danger to police officials and others.³⁶³

A prohibition on the arbitrary deprivation of life contains both positive and negative obligations for States. States must enact laws to control strictly the circumstances in which people may be deprived of their life by the State.³⁶⁴ States must also take effective action to prevent security officials under their control from arbitrarily depriving individuals of their right to life.³⁶⁵ There is a range of scenarios in which State conduct can violate the right to life, including if a State authorizes the use of force without lawful reasons,³⁶⁶ and where State conduct creates the risk of lives being lost even when no loss of life results.³⁶⁷

3. Use of Force Safeguards and Regional Law

a) Europe

As noted above, Article 2(2) of the European Convention only authorises the use of lethal force by law enforcement officers provided that it is “absolutely necessary” to defend the lives of persons against unlawful violence. The phrase “absolutely necessary” works to narrow the circumstances in which deprivations of life may be justified. It is a stricter standard than that which is imposed on other specific rights in the European Convention, which may be limited only to the extent “necessary in a democratic society.”³⁶⁸ This stricter standard derives from the importance of the right to life and requires the European Court to subject the use of lethal force to the “most careful scrutiny,” particularly where the use of force is deliberate.³⁶⁹ The ECtHR has provided further guidance on both the content and consequences of the “absolute necessity” requirement as follows:

- Recourse to potentially lethal use of force is not absolutely necessary if the suspect does not pose a “threat to life and limb” and is not “suspected of having committed a violent offense”;³⁷⁰
- The actions of law enforcement officials must be susceptible to independent review to ensure that they are lawful and not excessive;³⁷¹

- The force used must be strictly proportionate to the aim of protecting persons against unlawful violence;³⁷² and
- The use of force must be based on information that has been “evaluat(ed)” with the “greatest of care.”³⁷³ This requires officers to assess the intelligence upon which a perceived threat is based and be sure that this intelligence is reliable before engaging in lethal force and to “make sufficient allowances for the possibility that ... intelligence assessments might, in some respects at least, be erroneous.”³⁷⁴

The leading ECtHR case on the use of force is *McCann and Others v. United Kingdom*. In this case the United Kingdom’s Special Air Service (SAS) soldiers shot and killed several members of the Irish Republican Army (IRA) on the basis of false information that one of the IRA members had a bomb. The Court did not hold the soldiers individually liable and instead held the U.K. government responsible for a violation of the right to life under Article 2 of the European Convention. In determining whether there was a violation of the right to life the Court carefully scrutinized whether the “force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence,” and “whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.”³⁷⁵ The Court found that the soldiers’ use of lethal force, in light of information received from superiors that it was absolutely necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life, was not a violation of Article 2.³⁷⁶ The Court did however hold that the authorities’ failure to take preventive measures against the suspects in the planning, control and organization of the operation; their failure to make sufficient allowances for possible erroneous intelligence assessments; and the automatic recourse to lethal force were in violation of Article 2 of the European Convention.³⁷⁷

This emphasis on “intelligence-led” responses supported by senior decision making processes³⁷⁸ is evident in the U.K.’s Operation Kratos policy discussed above (see box). As noted further below, in sharp contrast to Operation Kratos—which ostensibly seeks to operate within the boundaries of relevant laws on the use of force, recognizes the vulnerability of particular groups and seeks to involve them in policy review, and allows for differentiated and nuanced situation-specific responses—the guidelines contained in Training Key 582 seek to dilute the usual safeguards that attach to the use of lethal force and, in their place, offer law enforcement officials little more than conflicting and overly-broad indicators that are prone to error and abuse.

b) Inter-American System

The Inter-American Commission and the Inter-American Court have both considered the content of the right to life on a number of occasions.³⁷⁹ In the context of counter-terrorism measures particularly, the Commission has clarified that the use of lethal force must be in strict compliance with the principles of necessity and proportionality and must distinguish between individuals who threaten the security of all, and civilians who do not present this threat.³⁸⁰ The Commission has also highlighted that the amount of force must be justified by the circumstances.³⁸¹

4. Use of Force Safeguards and U.S. Domestic Law

a) The U.S. Supreme Court and the Use of Force

U.S. domestic law on the use of force has been developed primarily in the context of two scenarios: the use of force during a police search; and the use of force against “fleeing felons,” that is, suspects trying to evade arrest. In *Tennessee v. Garner*³⁸² the Supreme Court held that

lethal force may only be used against a fleeing felon if “it is necessary to prevent the escape [of the suspect] and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”³⁸³ Importantly, the Court also held that the use of lethal force would be unreasonable and in violation of the Fourth Amendment of the U.S. Constitution³⁸⁴ if the suspect does not pose an “immediate threat to the officer and no threat to others...”³⁸⁵ The assessment of whether a use of force incident is unconstitutional is a balancing test, requiring the Court to “balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”³⁸⁶

In the leading case on the use of excessive force in the context of a police search, *Graham v. Connor*, the Court highlighted three factors of special importance in making the determination of whether use of force is justified: “the severity of the crime at issue, whether the suspect poses an *immediate* threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” (emphasis added).³⁸⁷

b) Standards applied by law enforcement entities

Policies of various police departments at the local and state level acknowledge that police must make “complicated” decisions on the spur of the moment.³⁸⁸ However, they also emphasize that force must only be used as a measure of last resort to prevent harm to the officer or to others, when all other reasonable alternatives have been exhausted or “would be clearly be ineffective under the particular circumstances.”³⁸⁹

These statements are broadly consistent with IACP’s Training Keys on use of improper use of “deadly” force, developed separately from Training Key 582.³⁹⁰ These Training Keys emphasize that:

- Resort to force involves a “complex but ordered four-step process” to make the decision to use force and that this process consists of Perception, Evaluation, Decision, and Action (PEDA), each requiring a “separate area of police knowledge and expertise;”³⁹¹
- Officers have a duty to avoid negligent use of excessive force, adding that when the suspect does not pose a deadly and immediate threat, the use of lethal force would be negligent to use lethal force;³⁹²
- Inappropriate use of force has several consequences for the offending officer, including civil or criminal liability, work-related penalties, and great emotional stress.³⁹³ These consequences further underscore the need to exercise great caution in the use of force for the sake of the suspect as well as the officer involved.

5. Do Training Keys 581 and 582 comply with rules on use of force under international, regional and U.S. domestic law?

Training Key 582 identifies the circumstances in which lethal force is justified as follows:

Lethal force is justified if the suspect represents a significant threat of death or serious injury to an officer or others. Federal laws and rulings are better attuned to the type of national security threat that suicide bombers represent from both a criminal and civil liability perspective. Officers should be reminded that the law does not require that the

threat of death or serious injury be *imminent*, as is sometimes noted in police use-of force policies. This point is very important in any deadly force encounter, but even more so when one is dealing with explosive devices capable of widespread death and destruction. One need not wait until a suicide bomber makes a move or takes other action potentially sufficient to carry out the bombing when officers have reasonable basis to believe that the suspect has the capability to detonate a bomb. The *threat* of such use is, in most instances, sufficient justification to employ deadly force. An officer need only determine that the use of deadly force is objectively reasonable under the circumstances.³⁹⁴

Training Key 582 removes the “usual safeguards” that normally attach to the use of force.³⁹⁵ For example, Training Key 582 rejects the imminence requirement that is most clearly articulated in international law. Further, Training Key 582 omits reference to the requirement under international, regional and U.S. domestic law that lethal force be “necessary.” Training Key 582’s frequent reference to the “suspect” or “suspect bomber” or “bombing suspect” suggests that officers can use lethal force on the basis of mere suspicion. As such, the Key undermines the high level of certainty that is required before lethal force can be considered lawful.³⁹⁶ Training Key 582 also stipulates that law enforcement officials need only a “reasonable basis to believe that the *suspect has the capability to detonate a bomb*” (emphasis added). The failure to require a reasonable basis to believe that the suspect even *has* a bomb to detonate, coupled with the lack of guidance for law enforcement officers on how to determine whether or not the capability to detonate exists, obviate the normal verification procedures that precede resort to lethal force. In addition to failing to provide guidance on how to ensure intelligence-led responses, Training Key 582 does not reflect on the importance and nature of a command structure to ensure that uses of force are appropriately controlled.³⁹⁷ Furthermore, Training Key 582 neither contemplates the wide-range of potential suicide bomber scenarios, nor the wide range of responses that these scenarios may attract.³⁹⁸ Finally, it does not consider how or whether rules about resort to non-lethal methods (such as warnings) would operate with respect to suspected suicide bombers,³⁹⁹ especially in cases where the very existence of a bomb has not been verified.

The removal or watering down of safeguards on the use of lethal force sets a dangerous precedent. It amounts to a tacit assertion that current uses of force standards are inapplicable or ineffective in countering real suicide bombing threats. Such an assertion misses the whole function of prevailing legal standards on the use of lethal force, which is not to deny law enforcement officials the authority to use lethal force when required, but rather to ensure that lethal force is *only* used when it is required. Unlike the Training Keys, these standards also assist law enforcement officials and protect populations by stipulating important thresholds of reasonableness, imminence, and graduated use of force to ensure that the use of lethal force does not amount to an arbitrary deprivation of human life.

By removing these safeguards (and not offering any alternative safeguards in their place)⁴⁰⁰ Training Key 582 fails to provide any meaningful checks against arbitrary deprivations of human life. Moreover, telling officers to use Training Key 582 in conjunction with Training Key 581 only heightens the scope for arbitrariness for the following reasons. Training Key 582 stipulates that “[a]n officer need only determine that the use of deadly force is objectively reasonable under the circumstances.”⁴⁰¹ An officer’s determination of whether deadly force is “objectively reasonable” will, in part, be informed by whether s/he makes the split second decision that the suspect fits the profile of the suicide bomber as set out in Training Key 581. Training Key 581 is an inadequate safeguard to ensure that lethal force is not arbitrary or that it is absolutely necessary because:

- Its discriminatory aspects, discussed above, widen the suspect class of suicide bombers to include all Muslims, Arabs or South Asians or those perceived to be Muslims, Arabs or South Asian, resulting in an unworkably large and highly arbitrary suspect pool.⁴⁰²
- It fails to provide sufficient checks on the use of force by stopping short of demonstrating how the indicators are to be read together.
 - The Training Key states that “[w]hile any one indicator may not by itself be cause for concern, multiple anomalies will signify a potential threat,”⁴⁰³ without then identifying the combination of indicators that must be present before resort to force is warranted.
- Its use of broad and over-inclusive indicators creates the potential for non-threatening persons to be targeted for actions that the Training Key encourages officers to interpret as threatening.⁴⁰⁴
 - These broad and over-inclusive indicators include the wearing of loose or bulky clothing in the summer, pacing back and forth, fidgeting with something beneath one’s clothing, failure to make eye contact, mumbling as if praying, being in a drug-induced state, strange hair coloring, wearing too much cologne, wearing talcum powder, and being overly protective of one’s baggage.⁴⁰⁵ In a policing context, guidelines such as these that are over-inclusive become meaningless to officers attempting to interpret them, leaving officers to rely on their own assumptions on who to treat as suspect.⁴⁰⁶
- The guidelines it provides are potentially inconsistent.
 - For example, officers are told to look for “nervous behavior”⁴⁰⁷ and at the same time told that suicide bombers undergo extensive training in order to “remain calm under pressure.”⁴⁰⁸ Officers are told to look for individuals who stand out as “religious Muslim zealot[s]”⁴⁰⁹ (individuals mumbling as if praying or those who smell of “scented water (for ritual purification)”)⁴¹⁰ and for individuals who are trying to “blend in” “so as not to attract attention” (such as freshly shaved men).⁴¹¹
 - These potential inconsistencies are reminiscent of the wide contradictions that have been found in other profiling exercises, such as government profiling of drug couriers.⁴¹² Like drug courier profiles, the profile of the suicide bomber contained in Training Key 581 does little to meaningfully narrow the field of potential suspects, leaving officers too much discretion to rely on their own personal attitudes and stereotypes.

The inherent arbitrariness of these indicators has already been demonstrated by two “shoot-to-kill” incidents resulting in the deaths of persons not linked to any terrorist activity: the police claimed that Jean Charles de Menezes was wearing bulky clothing when they shot and killed him in a subway station in London;⁴¹³ and factors such as mumbling, pacing back and forth, and being overly protective of one’s baggage, can easily apply to mentally disturbed persons, as was demonstrated when Rigoberto Alpizar (who suffered from bi-polar disorder) was shot and killed by Federal Air Marshals in Miami.⁴¹⁴ Aside from problems about how to objectively determine the existence of many of these factors (e.g. whether a person is wearing too much cologne), there are a plethora of potential explanations for why individuals might be engaging in the behaviors outlined above. The implementation of policies such as those recommended by Training Key 582 would violate human rights law by failing to require officers

to explore these further and by allowing mere suspicion to justify the use of deadly force.⁴¹⁵ A reliance on behavioral indicators as a substitute for real investigative work and intelligence opens up both individual officers and the State to potential responsibility under law.

V. Conclusion

“Shoot-to-kill” policies, of which the IACP Training Keys 581 and 582 are emblematic, implicate fundamental human rights norms governing both the prohibition on discrimination and the use of force. States have an obligation to ensure that both existing and future “shoot-to-kill” policies comply with these norms. At a minimum, States must not substitute reliable intelligence with behavioral indicators that operate as proxies for racial, ethnic, and religious profiling. States must also ensure that strategies for responding to potential suicide bombers operate within the framework of existing legal standards that include safeguards relating to necessity and imminence to check against arbitrary uses of lethal force. Existing standards appropriately and sufficiently accommodate the threats posed by suicide bombers, while simultaneously ensuring that both police officers and members of the general public are protected against arbitrary deprivations of life.

While this Briefing Paper has argued that prohibitions against discrimination and the use of lethal force must inform both pre-incident assessments of suicide bomber threats, as well as the actual use of force against suspected suicide bombers, the fundamental nature of these prohibitions also give rise to specific duties in relation to a State’s *post*-incident response. In particular, States have a duty to publicly investigate allegations of discrimination and arbitrary deprivations of life, and to prosecute those found responsible for these violations.⁴¹⁶ These investigations must be broad enough to enable effective and comprehensive scrutiny of the different levels of responsibility that attach to the State⁴¹⁷ as well as the individual officers concerned. While these post-incident steps can help ensure accountability for illegal and arbitrary uses of lethal force, they will never be able to reverse its consequences: the loss of human life.

To ensure full accountability, States must not prejudge the outcomes of these investigations, as was the case in the U.S. government’s response to the Alpizar shooting, which has been limited to a “standard investigation” and official statements in support of the air marshals’ actions even before such an investigation was concluded.⁴¹⁸ Congressional leaders even hailed the shooting as a successful example of the government’s efforts to heighten airline security. Representative John L. Mica, Chairman of the House Transportation Subcommittee on Aviation, went so far as to state that the incident “shows that the program has worked beyond our expectations,” adding that “This should send a message to a terrorist or anyone else who is considering disrupting an aircraft with a threat.”⁴¹⁹

Regrettably, the real message that is sent by these incidents—and by the existence of “shoot-to-kill” and other counter-terrorism policies that institutionalize prejudice through the use of racial profiling—is that the lives of some are more expendable than others. Before reaching this point of no return, States should make public their plans to introduce these policies, invite dialogue with communities most threatened by them, and sufficiently train police officers on the prohibitions against racial profiling and the use of deadly force. Fundamental rights must not become casualties to the politics of fear that have characterized States’ responses to the “war on terror.” Only a faithful adherence to human rights norms that are grounded in international, regional, and domestic law can help ensure that *all* persons are truly secure and protected.

¹ Jon Ungeod-Thomas & David Leppard, *Shoot-to-kill without warning*, THE TIMES (London), July 31, 2005, available at http://www.timesonline.co.uk/article/0,,2087-1715340_1,00.html.

² *Id.*

³ *Id.*

⁴ Mark Honigsbaum *Brazilian did not wear bulky jacket*, THE GUARDIAN (U.K.), July 28, 2005, available at http://www.guardian.co.uk/uk_news/story/0,3604,1537457,00.html#article_continue.

⁵ Rosie Cowan, Duncan Campbell & Vikram Dodd, *New claims emerge over Menezes death*, THE GUARDIAN (U.K.), Aug. 17, 2005, available at <http://www.guardian.co.uk/attackonlondon/story/0,16132,1550565,00.html>.

⁶ Jonathan Ungeod-Thomas *Focus: Executed: Anatomy of a police killing*, THE GUARDIAN (U.K.), Aug. 21, 2005, available at http://www.timesonline.co.uk/article/0,,2087-1743478_1,00.htm

⁷ *Doubt over shoot-to-kill policy*, THE INDEPENDENT (U.K.), Aug. 21, 2005, available at <http://news.independent.co.uk/uk/crime/article307307.ece>.

⁸ *White House backs air marshals' actions*, CNN, Dec. 9, 2005, available at <http://www.cnn.com/2005/US/12/08/airplane.gunshot/index.html>.

⁹ Curt Anderson, *Passenger: Alpizar Was Agitated at Gate*, ABC NEWS, Dec. 8, 2005, available at <http://abcnews.go.com/US/wireStory?id=1387695>.

¹⁰ *Man shot dead at Florida airport*, BBC NEWS, Dec. 8, 2005, available at <http://news.bbc.co.uk/2/hi/americas/4508432.stm>.

¹¹ Siobhan Morrissey, *Eyewitness: "I Never Heard the Word 'Bomb'"*, TIME MAGAZINE, Dec. 8, 2005, available at <http://www.time.com/time/nation/article/0,8599,1138965,00.html>;

Simon Freeman & Agencies, *Witnesses dispute official line on plane shooting*, TIMES, Dec. 9, 2005, available at http://www.timesonline.co.uk/article/0,,11069-1918131_1,00.html.

¹² *See Report of United Nations (U.N.) Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/2006/53, para 44 (2006), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G06/116/84/PDF/G0611684.pdf?OpenElement> (describing the introduction of shoot-to-kill policies in a number of contexts, including terrorist threats, looting, high incidences of armed robberies and drug-use epidemics).

¹³ IACP, *Training Key 581: Suicide (Homicide) Bombers: Part I* (hereinafter "Training Key 581") (2005), available at <http://www.theiacp.org/pubinfo/IACP581SuicideBombersPart1.pdf>.

¹⁴ IACP, *Training Key 582: Suicide (Homicide) Bombers: Part II* (hereinafter "Training Key 582") (2005), available at <http://www.theiacp.org/pubinfo/IACP582SuicideBombersPart2.pdf>.

¹⁵ Sari Horwitz, *Chiefs Group Bolsters Policy on Suicide Bombers*, WASH. POST, Aug. 4, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/03/AR2005080301867.html>.

¹⁶ *Report of U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, *supra* note 12, at para 49 (describing the IACP guidelines as "representative of shoot-to-kill thinking").

¹⁷ *Inside the NYPD's Counter-Terror Fight*, CBS NEWS, Mar. 19, 2006, available at http://www.cbsnews.com/stories/2006/03/17/60minutes/main1416824_page4.shtml (describing the creation of a special unit of the New York Police Department (NYPD) to deal with terrorism and the fact that primary responsibility for counter-terrorism operations in New York City now lies with the NYPD).

¹⁸ The Briefing Paper canvasses regional law in recognition of the fact that should States adopt guidelines similar to those provided in the Training Keys different regional standards will apply.

¹⁹ This Briefing Paper analyzes domestic law of the U.S. because the U.S. is a focal point of the "war on terror;" because the Training Keys were formulated in the U.S.; and because many of the problematic law enforcement mechanisms discussed in this Briefing Paper have already been adopted there and emulated elsewhere (*see infra* notes 43 – 48 and accompanying text).

²⁰ IACP, Memorandum to IACP Membership, Nov. 4, 2005, 8 available at <http://www.theiacp.org/documents/pdfs/Publications/EDupdate110405.pdf> (listing the membership as 19,625). Note that at a number of places on the IACP website it is stated that membership exceeds 20,000: *see* IACP website, available at <http://www.theiacp.org/about/>.

²¹ *Id.*

²² All but three IACP presidents have been U.S. officers. The remaining three are Canadian. *See* the list of Past Presidents of the IACP, available at <http://www.iacp.org/leadership/pastpresidents.htm> (listing the

past presidents of the IACP and showing that in 1925-6, 1944-5, and 1967-8 the IACP had Canadian presidents).

²³ For example, in 1987, the IACP entered into a cooperative agreement with the U.S. Justice Department's Bureau of Justice Assistance to establish a National Law Enforcement Policy Center. See IACP, ANNUAL REPORT 19 (2002), available at <http://www.theiacp.org/documents/pdfs/Publications/2002%20Annual%20Report.pdf>.

²⁴ According to the IACP, its goals are 'to advance the science and art of police services; to develop and disseminate improved administrative, technical and operational practices and promote their use in police work; to foster police cooperation and the exchange of information and experience among police administrators throughout the world; to bring about recruitment and training in the police profession of qualified persons; and to encourage adherence of all police officers to high professional standards of performance and conduct': see <http://www.theiacp.org/about/history.htm>. When it comes to exchanging information amongst police officers, an important Division of the IACP is the Division of State Associations of Chiefs of Police (SACOP): see http://www.theiacp.org/div_sec_com/DIV/SACOP.htm. The International Managers of Police Academies and College Trainers (IMPACT), is a section within the IACP that encourages and facilitates the coordinated exchange of ideas, procedures, and specific information for the professional leadership and management of education and training within police agencies: see http://www.theiacp.org/div_sec_com/sections/impact.htm.

²⁵ The regional offices and their locations are as follows: Asian/Pacific Region (New Delhi, India); Central American/Caribbean Region (Nassau, Bahamas); European Region (Dublin, Ireland); Middle East/North Africa Region (Doha, Qatar); North American Region (Toronto, Canada); South American Region (Brasilia, Brazil); Sub-Saharan/Southern African Region (vacant): see http://www.theiacp.org/div_sec_com/div/IntlDiv.htm#wro.

²⁶ For example, the IACP currently holds observer status with INTERPOL and consultative status with the U.N.: see <http://www.theiacp.org/international/index.htm>. INTERPOL is the largest international police organization in the world; it "facilitates cross-border police co-operation, and supports and assists all organizations, authorities and services whose mission is to prevent or combat international crime": see The International Criminal Police Organization (INTERPOL) website, available at <http://www.interpol.int/public/icpo/default.asp>.

²⁷ IACP, IACP Training and Education, *2005 Training Catalogue*, available at <http://pdf2html.spawncamp.net/pdf2html.php?url=http://www.theiacp.org/Training/2005IACPTrainingCatalog.pdf>

²⁸ IACP, What's New, *New IACP Training Course-Terrorism Tactics & Counter Measures – "Homicide Bombers,"* available at http://www.iacp.org/documents/index.cfm?fuseaction=document&document_type_id=1&document_id=787.

²⁹ See Jewish Institute for National Security Affairs (JINSA), *JINSA Brings Together Israeli Counter-Terror Experts and U.S. Police Officers*, Oct. 22, 2004, available at <http://www.jinsa.org/articles/articles.html/function/view/categoryid/2168/documentid/2702/history/3.2359.2166.2168.2702> (discussing three two-day counter-terrorism conferences underwritten by JINSA that have received the "support and co-operation" of the IACP).

³⁰ *Id.*

³¹ *Id.*

³² The Training Keys contain a brief history of suicide bombings (see Training Key 581, *supra* note 13, at 2). While this history includes references to non-Islamic groups that have also employed suicide bombers, it focuses primarily on suicide bombings perpetrated by Islamic militants. It is important to bear in mind that "...although religious motives may matter, modern suicide terrorism is not limited to Islamic Fundamentalism." (Robert Pape, *The Strategic Logic of Suicide Terrorism*, AM. POL. SCI. REV., Vol. 97, No.3, 1, 1(2003)). Although suicide attacks have received heightened attention since the September 11, 2001 attacks, they are not a new phenomenon (see Scott Atran, *Genesis of Suicide Terrorism*, SCIENCE, Mar. 7 2003, 1535; Robert Bunker and John Sullivan, *Suicide Bombings in Operation Iraqi Freedom*, MIL. REV., Jan.-Feb. 2005, 79) and they have been perpetrated by men, women and children in the name of a vast range of causes (Pape, *id.*).

³³ Training Key 581, *supra* note 13, at 1 (describing Training Keys 581 and 582 as a "two-part series").

³⁴ *Id.*

³⁵ *Id.* at 2.

³⁶ *Id.* at 2 – 3.

³⁷ *Id.* at 3 (stating that “No suicide bomber profile exists—men, women, and adolescents have all engaged in this activity. Most commonly, bombers are unmarried males between 16 and 40 years old. To a lesser extent, females between 16 and 25 years old have engaged in this activity”).

³⁸ *Id.* at 5.

³⁹ Training Key 582, *supra* note 14, at 2

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See generally, Metropolitan Police Authority (MPA), *Minutes of Meeting held Sept. 29, 2005* (hereinafter “Minutes of MPA Sept. 29, 2005 Meeting”), available at <http://www.mpa.gov.uk/committees/mpa/2005/050929/minutes.htm>. Note that U.K. officials reject the use of the term “shoot-to-kill” to describe this policy: see, e.g., U.K. House of Commons, *Uncorrected Transcript of Oral Evidence, Minutes of Evidence Taken Before Home Affairs Committee*, Sept. 13, 2005, available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/uc462-i/uc46202.htm> (in response to Question 25 concerning the “fairness” of describing the policy as a “shoot-to-kill” policy, British Home Secretary (Interior Minister), Charles Clarke replied: “Not at all. I think shoot to kill is not an appropriate phrase or description to use. I do not really like the phrase “shoot to protect.” In my answer to you I put “shoot to protect” in quotation mark rather than accepting it...” See also *Minutes of MPA Sept. 29, 2005 Meeting*, in which Catherine Crawford, MPA Chief Executive stated that “...this is a ‘shoot to stop’ policy not a ‘shoot to kill’ policy.” The first application of the policy was the shooting of Jean Charles de Menezes: see Vikram Dodd, *Seconds to Decide if Suspect is Suicide Threat*, GUARDIAN (U.K.), July 23, 2005.

⁴⁴ See Horwitz, *supra* note 15 (referring to its preparation); Interviews by Larry Abramson, *Police Consider Suicide Bombers and Deadly Force*, NPR MORNING EDITION, Aug. 2, 2005, available at <http://www.npr.org/templates/story/story.php?storyId=4781483> (discussing plans to adopt a new policy). The fact that the Protocol has been adopted was confirmed by the Center for Human Rights and Global Justice: Telephone Interview Sergeant Jim Hansen, Seattle Police Department (Feb. 17, 2006). Sergeant Hansen has been working on the Protocol for the National Bomb Squad Commanders Advisory Board (see Abramson, *id.*).

⁴⁵ See Horwitz, *supra* note 15. See also John McArdle, *Hill Cops May ‘Shoot to Kill’*, ROLL CALL, Nov. 3, 2005 (stating that this policy was “enacted” in February 2004).

⁴⁶ McArdle, *supra* note 45.

⁴⁷ For example, in relation to the U.K., the details of Operation Kratos have not been disclosed on the basis that “to do so could prejudice future operations”: see *Minutes of MPA Sept. 29, 2005 Meeting*, *supra* note 43. See also Press Release, Association of Chief Police Officers of England, Wales and Northern Ireland, *Kratos Briefing Note* (Oct. 26, 2005) (hereinafter “ACPO, *Kratos Briefing Note*”) (provided by the MPA to Human Rights Watch on Nov. 16, 2005, pursuant to Human Rights Watch’s written request for “a copy of the Operation Kratos policy for suicide bombers, and any other information that is relevant in this regard...”) (copy on file with CHR/GJ) (noting that “For operational reasons we are not prepared to disclose or confirm information about our detailed tactics and developing technologies”); Heather Brooke, *The Secret Policeman Has a Ball*, TIMES (LONDON), Nov. 17, 2005, available at <http://www.timesonline.co.uk/article/0,,3284-1875631,00.html> (describing the fact that the police in the U.K. have shrouded in secrecy their activities generally, and their shoot-to-kill policy in particular, on the basis that to reveal details would threaten national security). The IACP has similarly rejected calls for transparency. Attempts by both Human Rights Watch and the Center for Human Rights and Global Justice to obtain information from the IACP on whether the Training Keys were being implemented by police departments were met with no response.

⁴⁸ *Id.*

⁴⁹ *Report of U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, *supra* note 12, at para 49.

⁵⁰ Training Key 581, *supra* note 13, at 5 (prefacing the Suicide Bomber Profile with the statement that “A noted authority on terrorism states that Israeli authorities and psychologists have carefully developed

behavioral profiles that might help security personnel identify a potential suicide bomber. The following are among the most obvious signs of such persons according to this source” (footnote excluded)).

⁵¹ See Sam Nunn, *Thinking the Inevitable: Suicide Attacks in America and the Design of Effective Public Safety Policies*, J. HOMELAND SEC. & EMERGENCY MANAGEMENT 7, 15 (2004) <http://www.bepress.com/jhsem/vol1/iss4/401> (at 7 citing Bruce Hoffman, *The calculus of terror*, ATLANTIC UNBOUND, May 15, 2003, at 2 that “if suicide bombing [was] to commence in the United States, it would be different in many ways from what we see in Israel [and] our defenses would have to be different”; and noting at 15 that “(d)escriptions of suicide bombers in the Middle East are unlikely to serve as good models for a western suicide bomber...”).

⁵² See JINSA, *supra* note 29 (listing “Suicide Bombings: Methodology and Responses” and “The Mind of the Suicide Bomber” as topics of presentations made by Israeli “counter-terrorism professionals” at U.S. conferences). Note that the Anti-Defamation League has sponsored officer-exchange programs between Israeli security officials and U.S. police on dealing with suicide bombers (see Abramson, *supra* note 44). Private consultants from Israel are also providing training to U.S. law enforcement agencies: see, e.g., International Security Instructors, available at <http://www.isiusa.us/> (listing clients as including the FBI, the US Marine Corps, the Navy Seals and the US Army at <http://www.isiusa.us/html/clients.html> and listing a number of courses/seminars on “suicide terrorism”: <http://www.isiusa.us/html/Courses.html>).

⁵³ See Dodd, *supra* note 43. But see MPA, *Suicide Terrorism*, Report 13, Oct. 27, 2005 (hereinafter “MPA, *Suicide Terrorism*”), para. 4, available at <http://www.mpa.gov.uk/committees/mpa/2005/051027/13.htm> (noting that trips by Metropolitan Police Service (MPS) to Israel, Sri Lanka and Russia to investigate tactics for suicide bomber response, resulted in “(s)ome valuable lessons” on “identifying potential suicide bombers, how common types of devices are made and worn, and intelligence gathering practices.” However, the Report also states that “...the tactics to deal with suicide bombers in all three countries are wholly unsuitable for adoption by the U.K. There is no Human Rights legislation in these countries and the tactics deployed are not consistent with the UK policing philosophy”).

⁵⁴ Nunn, *supra* note 51, at 13 (relying on S. Katz, *On patrol with an Israeli police bomb squad*, Law & Order 48(10): 69-75, Oct. 2000).

⁵⁵ See Horwitz, *supra* note 15 (quoting Miami Police Chief John F. Timoney as follows: “I can guarantee you that if we have, God forbid, a suicide bomber in a big city in the United States, ‘shoot to kill’ will be the inevitable policy. It’s not a policy we choose lightly, but it’s the only policy.”).

⁵⁶ See, e.g., *Inside the NYPD’s Counter-Terror Fight*, *supra* note 17 (recording that NYPD is an example of a police force that has transformed the way in which it operates and now focuses heavily on fighting terrorism with 1000 police officers assigned to deal with terrorism in a new “terrorism beat,” and the creation of a Counter-Terrorism Bureau within the NYPD).

⁵⁷ See Horwitz, *supra* note 15.

⁵⁸ See *infra* notes 45 – 46 and accompanying text.

⁵⁹ See *infra* notes 24, 27 – 31 and accompanying text.

⁶⁰ See IACP, 2006 Training Catalog, 19, available at <http://www.theiacp.org/Training/2006IACPTrainingCatalog.pdf>.

⁶¹ See McArdle, *supra* note 45. For further information on the IACP, Terrorism Committee, see: http://www.iacp.org/div_sec_com/committees/Terrorism.htm.

⁶² *Minutes of MPA Sept. 29, 2005 Meeting*, *supra* note 43.

⁶³ Memorandum to MPA Members from Catherine Crawford (Chief Executive & Clerk to the Authority), *Re: Counter Suicide Terrorism*, Aug. 8, 2005 (provided by the MPA to Human Rights Watch on Nov. 16, 2005, pursuant to Human Rights Watch’s written request for “a copy of the Operation Kratos policy for suicide bombers, and any other information that is relevant in this regard...”) (copy on file with CHR/GJ).

⁶⁴ See *infra* note 47.

⁶⁵ See *infra* notes 1 – 7 and accompanying text.

⁶⁶ The MPA is an independent body composed of 23 members, which provides support to and scrutinizes the Metropolitan Police Service (MPS). It promotes local democratic accountability of the police force in London through consultation with the community. See generally <http://www.mpa.gov.uk/about/default.htm>.

⁶⁷ MPA, *Suicide Terrorism*, *supra* note 53.

⁶⁸ *Minutes of MPA Sept. 29, 2005 Meeting*, *supra* note 43.

⁶⁹ *Id.*

⁷⁰ MPA, *Suicide Terrorism*, *supra* note 53, at para. 10; MPA, *Minutes of Meeting on Mar. 21, 2002*, Agenda Item 13, Presentation on MPS Anti-Terrorism Work, 140 (noting two options as follows “1. If 100% sure, head Shot 2. If not sure, challenge from a position of safety. Officers to react dependent upon the suspect’s reaction – in accordance with their training from the ACPO firearms manual of guidance”).

⁷¹ *Minutes of MPA Sept. 29, 2005 Meeting*, *supra* note 43. *See further* ACPO, *Kratos Briefing Note*, *supra* note 47 (noting that the “ACPO does not have a so called ‘shoot to kill’ policy. Firearms officers have to make judgements that fit the circumstances and where necessary, act to neutralize the threat before them which may be to themselves or the public. This action is not just confined to the threat from a suicide bomber”); MPA, *Internal Briefing Note*, Aug. 8, 2005 (provided by the MPA to Human Rights Watch on Nov. 16, 2005, pursuant to Human Rights Watch’s written request for “a copy of the Operation Kratos policy for suicide bombers, and any other information that is relevant in this regard...”) (copy on file with CHRJ).

⁷² David Leppard, *Police get “licence to kill” without questions*, THE TIMES (LONDON), Mar. 12, 2006, available at <http://www.timesonline.co.uk/article/0,,2087-2081524,00.html>

⁷³ *Id.*

⁷⁴ MPA, *Suicide Terrorism*, *supra* note 53, at para. 12.

⁷⁵ *Id.* at para. 1.

⁷⁶ *Id.* at para. 2.

⁷⁷ *Minutes of MPA Sept. 29, 2005 Meeting*, *supra* note 43.

⁷⁸ Leppard, *supra* note 72.

⁷⁹ MPA, *Suicide Terrorism*, *supra* note 53 (under the heading entitled “C. Race and equality impact”).

⁸⁰ *Id.*

⁸¹ Note that the Independent Police Complaints Commission (IPCC) conducted an independent investigation of the de Menezes shooting and submitted its report to the Crown Prosecution Service on January 19, 2006. Copies were also provided to Coroner John Sampson, the MPA, and the MPS as required by law. The IPCC also exercised its discretion to provide a copy to the Home Secretary in “grave and exceptional circumstances.” The report has not yet been shared with de Menezes’ family and is not otherwise publicly available: *see* Press Release, IPCC, IPCC Submits Jean Charles de Menezes Investigation File to CPS (Jan. 19, 2006) available at http://www.ipcc.gov.uk/news/pr190106_stockwell. *See further* *Menezes Report Handed in to CPS*, BBC NEWS, Jan. 19, 2006, available at <http://news.bbc.co.uk/1/hi/uk/4624794.stm>; *Menezes Family Angry Over Report*, BBC NEWS, Jan. 20, 2006, available at <http://news.bbc.co.uk/1/hi/uk/4630498.stm>.

⁸² MPA, *Internal Briefing Note*, *supra* note 71.

⁸³ ACPO, *Kratos Briefing Note*, *supra* note 47.

⁸⁴ *See, e.g., Report of U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, *supra* note 12, at para 45 (explaining that “shoot-to-kill” policies are justified as a new approach to combat terrorism).

⁸⁵ *Id.* at para 46 (stating that “shoot-to-kill” policies often “import(s)” the terminology of international humanitarian law and arguing that “[t]he notion that the law of armed conflict is an appropriate frame of reference for a Government seeking to deal with law enforcement issues is one that must be soundly rejected. To do otherwise is tantamount to allowing Governments to declare war simultaneously on a given group and on human rights in general.”).

⁸⁶ Training Key 581, *supra* note 13, at 1 (describing suicide bombings as a blurring between war and crime and explaining that suicide bombers will behave differently from ordinary criminals by actively engaging police officers “as would any other ‘criminal-soldier’ belonging to a terrorist or insurgent organization.”).

⁸⁷ *Report of U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, *supra* note 12, at para 47.

⁸⁸ *See, e.g.,* Office of the U.N. High Commissioner for Human Rights (OHCHR), *Jurisprudence of the U.N. and Regional Organizations on The Protection of Human Rights While Countering Terrorism* 3, 11 -12 (2003) available at <http://www.ohchr.org/english/about/publications/docs/digest.doc>.

⁸⁹ *See* Jiménez Vaca v. Colombia, Communication No 859/1999, Human Rights Committee, U.N. Doc. CCPR/C/74/D/859/1999 at para. 7.3 (2002); U.N. Human Rights Committee, *Annual Report*, paras 71 – 74 (2005); *Report of U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, *supra* note 12, at para 47.

⁹⁰ Delgado Páez v. Colombia, Communication No. 195/1985, Human Rights Committee, U. N. Doc. CCPR/C/39/D/195/1985 at para. 5.5 (1990).

⁹¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *opened for signature* Nov. 4, 1950, *entered into force* Sept. 3, 1953, *as amended by* Protocol 11, which entered into force on November 1, 1998, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>. Article 2(1) reads as follows: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

⁹² See, e.g., Secretary General of the Council of Europe, *Secretary General’s report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies*, para 9 (2006), available at http://www.globalsecurity.org/intell/library/reports/2006/secret-detentions-transport_ce-sg_060228.htm.

⁹³ See Kiliç v. Turkey, 33 Eur. H.R. Rep. 58, para. 62 (2001).

⁹⁴ See Neira Alegría v. Peru, Inter-Am. Ct. H.R. (Ser. C) No. 20, para. 75 (Jan. 19, 1995).

⁹⁵ Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (Ser. C) No. 4, para. 154 (July 29, 1988). See also Neira Alegría v. Peru, *supra* note 94, at para. 74.f

⁹⁶ Velásquez Rodríguez, *supra* note 95, at 154.

⁹⁷ International Commission of Jurists, *Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, 1 (2004). See also *Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, E/CN.4/2005/103, para. 7, (2005) available at <http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.103.pdf> (stating that human rights and the fight against terror “are not antithetical, but complimentary responsibilities of States.”).

⁹⁸ See, e.g., Human Rights Committee, *Concluding Observation: Estonia*, U.N. Doc. CCPR/CO/77/EST, para. 8 (2003).

⁹⁹ See *Klass and Others v. Germany*, 28 Eur. Ct. H.R. (ser. A) paras. 46 - 50 (1978).

¹⁰⁰ American Convention on Human Rights, Nov. 22, 1969, KAV 2305, 9 ILM 673 (1970), O.A.S. Treaty Series No.36, art. 5, P 2, OEA/Ser. L./V/II.23 doc. rev. 2, *entered into force* July 18, 1978, available at <http://www.cidh.org/Basicos/basic3.htm>. See *Neira Alegría v. Peru*, *supra* note 94, at para. 74; *Velasquez-Rodriguez*, *supra* note 95, at para. 154. The Inter American Commission has also stated that “unqualified respect for human rights must be a fundamental part of any anti – subversive strategies when such strategies have to be implemented”: Inter-Am. C.H.R., Annual Report 1990-91, OEA/Ser.L/V/II.79 rev. 1 Doc. 12 (1991), ch. V, at 512.

¹⁰¹ See, e.g., Council of Europe, *Guidelines on human rights and the fight against terrorism* (2002), available at [http://www.coe.int/T/E/Human_rights/h-inf\(2002\)8eng.pdf](http://www.coe.int/T/E/Human_rights/h-inf(2002)8eng.pdf) (including the statement in the Preface, in which then Council of Europe Secretary-General Walter Schwimmer stated that “It is perfectly possible to reconcile the requirements of defending society and the preservation of fundamental rights and freedoms. The Guidelines . . . are designed to serve as a realistic, practical guide for anti-terrorist policies, legislation and operations which are both effective and respectful of human rights”: *id.*). Organization of American States, Inter-American Convention Against Terrorism, June 3, 2002, AG Res. 1840, OAS AG, 32nd Sess., OAS Doc. XXXII-O/02, *entered into force* July 10, 2003, available at: http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/DIL/treaties_and_agreements.htm (with Article 15 providing that “[t]he measures carried out by the states parties under this Convention shall take place with full respect for the rule of law, human rights, and fundamental freedoms.”).

¹⁰² See generally U.N. High Commissioner for Human Rights, Statement, *On Terrorists and Torturers*, Dec. 7, 2005, available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/3B9B202D5A6DCDBCC12570D00034CF83?opendocument>.

¹⁰³ See, e.g., American Civil Liberties Union (ACLU), *Petition before the UN Working Group on Arbitrary Detention* (2004) available at <http://www.aclu.org/safefree/general/169121gl20040126.html#attach>; ACLU, *Memo to Interested Persons on the Civil Liberties Record of Designate Michael Chertoff*, (2005) available at <http://www.aclu.org/safefree/general/18834leg20050128.html> (discussing Operation PENTTBOM (Pentagon – Twin Towers – Bombing) which involved the detention of almost 1,200 persons, both citizens and non-citizens, over a period of two months after September 11, 2001. Material witness warrants and

criminal charges were used to justify many of the detentions, while non-citizens were held for immigration violations). See further HUMAN RIGHTS WATCH AND THE AMERICAN CIVIL LIBERTIES UNION, WITNESS TO ABUSE HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11 (2005) available at <http://hrw.org/reports/2005/us0605/> (documenting the U.S. Department of Justice's abuse of the 1984 material-witness law to hold those perceived as terrorism threats in indefinite confinement). See generally CENTER FOR NATIONAL SECURITY STUDIES, STRENGTHENING AMERICA BY DEFENDING OUR LIBERTIES: AN AGENDA FOR REFORM, 8, 11 - 16 (2003) available at www.cnss.org/Defending%20our%20Liberties%20report.pdf.

¹⁰⁴ See Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative* 29 N.Y.U. REV. L. & SOC. CHANGE 573, 580-581 (2005) (describing the introduction, on June, 6 2002, of the National Security Entry-Exit Registration System (NSEERS). The system required digital fingerprinting of all immigrants, special registration of all those staying in the U.S. for more than 30 days, requiring regular re-registration once a year, and exit procedures for those leaving the country. The registration requirement also applied to those already within the country and who were citizens of the 25 countries designated as posing a national security concern. Twenty four of the 25 countries were countries with predominantly Arab or Muslim populations). Over 85,000 immigrants voluntarily registered; 13,000 were subsequently deported. All of the deportations were for immigration law violations, many of which were technical; none were charged with terrorism-related offenses: see Statement of Carlina Tapia Ruano, First Vice President, American Immigration Lawyers Association, *Oversight Hearing on the Reauthorization of the PATRIOT Act Before the House Judiciary Committee June 10, 2005*, Washington, D.C. 6 (2005) available at www.aila.org/content/default.aspx?docid=16686. Muslim applicants have also experienced major delays in the processing of citizenship and green card applications: see *Immigrants' Lives in Limbo*, DALLAS EVENING NEWS, Mar. 16, 2006 available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/031506dnmetbacklog.12402162.html> (describing the long delays faced by Muslim applicants and highlighting the particular situation of Mazin Shalabi, a Jordanian national who, despite being a pilot for a major airline and having gone through extensive and regular checks by the Federal Aviation Administration, the FBI, and other federal agencies, had to wait three years to obtain security clearance to become a U.S. citizen.)

¹⁰⁵ CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, FATE AND WHEREABOUTS UNKNOWN: DETAINEES IN THE WAR ON TERROR (2005) available at <http://www.nyuhr.org/whereaboutsunknown.htm>.

¹⁰⁶ See, e.g., ACLU, ENDURING ABUSE: TORTURE AND CRUEL TREATMENT BY THE UNITED STATES AT HOME AND ABROAD A shadow report by the American Civil Liberties Union prepared for the United Nations Committee Against Torture on the occasion of its review of The United States of America's Second Periodic Report to the Committee Against Torture (2006) available at http://www.aclu.org/safefree/torture/torture_report.pdf.

¹⁰⁷ See generally American Civil Liberties Union, *ACLU response to HRC's request of August 3, 2005, for information on counter-terrorism measures adopted by the United States following the events of September 11, 2001*, 1-2 (2005) available at <http://www.aclu.org/FilesPDFs/acluhrcsubmissionsept2.pdf> (noting that immigrants detained or deported were penalized for technical immigration violations that would not have attracted such consequences for other immigrants). In a number of cases individuals were detained for months before being deported: see Nina Bernstein, *Held in 9/11 Net, Muslims Return to Accuse U.S.* N.Y. TIMES Jan. 23, 2006 available at <http://select.nytimes.com/gst/abstract.html?res=F00910FA385B0C708EDDA80894DE404482>.

¹⁰⁸ See ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS" (New York: ABCNY & NYU School of Law, 2004); CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, BEYOND GUANTÁNAMO: TRANSFERS TO TORTURE ONE YEAR AFTER RASUL V. BUSH (New York: NYU School of Law, 2005); CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, TORTURE BY PROXY: INTERNATIONAL LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS", Briefing Paper for U.K. All Party Parliamentary Group on Extraordinary Renditions (New York: NYU School of Law, 2005).

¹⁰⁹ See Lapp, *supra* note 104, at 578 (describing the findings of the Migration Policy Institute (MPI) in their report, *America's Challenge: Domestic Security, Civil Liberties and National Unity* that those arbitrarily arrested since September 11, 2001 have disproportionately been Arab and/or Muslim men. The MPI report is available for purchase at http://www.migrationpolicy.org/pubs/Americas_Challenge.php). The use of the description "Arab, Muslim and South Asians" to describe those affected by post-September 11, 2001

counter-terrorism measures follows the approach adopted in Muneer Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion* 92 CALIF. L. REV. 1259 (2004) for the reasons contained therein: *see id.* n1.

¹¹⁰ James A. Goldston, *Justice Initiative Presentation: Fighting Terrorism while Fighting Discrimination: Can Protocol No. 12 Help* Open Society Justice Initiative Seminar to Mark the Entry into Force of Protocol No. 12 to the ECHR available at http://www.justiceinitiative.org/db/resource2?res_id=103058 (describing the use of racial and ethnic profiling in Europe since September 11, 2001 under the guise of “national security”).

¹¹¹ According to Amnesty International, “Prior to 9/11, racial profiling was frequently referred to as ‘driving while black.’ Now, the practice can be more accurately characterized as driving, flying, walking, worshipping, shopping or staying at home while Black, Brown, Red, Yellow, Muslim or of Middle-Eastern appearance” : *see* AMNESTY INT’L, THREAT AND HUMILIATION: RACIAL PROFILING, DOMESTIC SECURITY AND HUMAN RIGHTS IN THE UNITED STATES (2004) (hereinafter “THREAT AND HUMILIATION”) available at http://www.amnestyusa.org/racial_profiling/report/. *See further* *Turkmen v Ashcroft, Third Amended Class Action Complaint And Demand For Jury Trial*, Sept. 13, 2004, para 8, available at http://www.ccr-ny.org/v2/legal/september_11th/docs/Ammended_Turkmen.pdf (alleging that the post-September 11, 2001 preventive detention of non-citizens in the U.S. was based on profiling: “In arresting Plaintiffs and class members, denying them bond without an adequate evidentiary basis, detaining them under unreasonable and excessively harsh conditions, and holding them far beyond the time necessary to effectuate their removal, Defendants Ashcroft, Mueller, Ziglar, and others have also engaged in racial, religious, ethnic, and/or national origin profiling. Plaintiffs’ and class members’ race, religion, ethnicity, and/or national origin have played a determinative role in Defendants’ decision to detain them initially, to subject them to a blanket no-bond policy, to subject them to punishing and dangerous conditions of confinement, and then to keep them detained beyond the point at which removal or voluntary departure could have been effectuated, in violation of the rights guaranteed to them by the Fifth Amendment to the Constitution.” Deposition of the plaintiffs in this case began in late January 2006: *see* Center for Constitutional Rights, *Four Men Deported After 9/11 Return To New York To Pursue Suit Against U.S. Government For Abuse*, available at <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=fd2T7ToPtx&Content=697>).

¹¹² *See Report by Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, U.N. Doc. E/CN.4/2004/19, (2004) available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.2004.19.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2004.19.En?Opendocument), paras 7-13 (describing anti-Muslim incidents in the U.S.. According to the report, Muslim businesses have been looted; and there has also been an increased anti-Muslim rhetoric in certain evangelical circles. The report describes an increased incidence of anti-Muslim incidents in particular states and highlights various reports by human rights organization documenting anti-Muslim attacks and sentiment.); paras 14-17 (describing anti-Muslim incidents in France in which mosques have been defaced and, in one incident, subject to an arson attack; expressions of anti-Muslim sentiment in public events and postings on French-based internet sites.; and a sharp increase in incidents in which Muslims have been injured in anti-Muslim attacks); and paras 18-20 (describing anti-Muslim sentiment in other countries such as Canada, Belgium and Australia).

¹¹³ *See, e.g.*, AMNESTY INT’L, THREAT AND HUMILIATION, *supra* note 111, at 1 (describing the following incident: “Mr. Mohammed Ali of Denton, Texas, was pulled over by police officers because one of his car lights was brighter than the other. Officers reportedly proceeded to repeatedly ask Mr. Ali if he had any dead bodies or bombs in his car. When Mr. Ali replied that he did not have any dead bodies or bombs in his car, the police searched his vehicle without consent, found a small pocketknife in the pocket of his passenger-side door and arrested him.”).

¹¹⁴ *See, e.g.*, a brief filed by the ACLU on behalf of Robert Rajcoomar, a former U.S. Army major and practicing physician of Indian descent who was arrested and detained on a flight in 2002. Following an incident on the plane that led Air Marshals to draw their weapons, Rajcoomar was arrested for watching the incident too closely. No charges were ever brought against Rajcoomar, who was simply told “we didn’t like the way you looked” and “we didn’t like the way you looked at us.” *See* James Bovard, *Gun Nuts at 30,000 feet?* Mar. 7, 2005, available at <http://www.fff.org/freedom/fd0412c.asp>. *See further* ACLU, *Complaint in Rajcoomar v. U.S., et al.* available at <http://www.aclu.org/safefree/general/173381g120030414.html>.

¹¹⁵ *See, e.g.*, Christopher Gerson, *Airlines, passengers confront racial profiling*, CNN.COM, Oct. 3, 2001, available at <http://archives.cnn.com/2001/TRAVEL/NEWS/10/03/rec.airlines.profiling/> (documenting the

case of Vahid Zohrevandi, a Dallas software developer and Iranian-born U.S. citizen, who was reading his paper on an American Airlines flight when approached by an airline employee with a passenger manifest and told to take his belongings and leave the plane. Zohrevandi claims that he was told that “The pilot does not feel comfortable flying”...and “The pilot does not like how you look...” Zohrevandi was escorted off the plane and questioned by airport police officers “for more than an hour on his workplace, his marriage status, his religion, whether he was Muslim, how many children he has, his address, his phone number...”. In another incident, San Antonio businessman Ashraf Khan was told to get off the plane because “the crew did not feel safe flying with him.”). Politicians have also been subject to profiling. An Arab-American Congressman, Rep. Darrell Issa, was refused permission to board a flight to Saudi Arabia, via Paris, in October 2001, despite the intervention of another Congressman, Rep. Robert Walker. APPLIED RESEARCH CENTER, RACING TO WAR – ASSESSING THE RACIAL IMPACTS AND IMPLICATIONS OF THE ‘WAR ON TERRORISM’ 7 (2003).

¹¹⁶ On September 19, 2005 5 Muslim men were detained and questioned by authorities during a football game at Giants Stadium after they were spotted praying in a section of the stadium that was open to the public. The men were taken to a room and questioned by the FBI for half an hour “about their faith, how often they pray, what mosque they attend. They were asked if they knew ‘the Sheik,’ a reference to Sheik Omar Abdul Rahman, the blind Egyptian cleric convicted for his role in the 1993 World Trade Center bombing.”: *see* Rudy Larini & Russell Ben-Ali, *FBI denies profiling 5 Muslims who prayed at Giants game Men tell of being questioned at stadium after being observed near the main air duct*, Nov. 3, 2005). The men were not questioned at the time that their praying was observed, but instead “much later” indicating that they could not have been considered an “immediate danger”: Editorial, *Suspicious of Racial Profiling*, THE STAR-LEDGER, Nov. 4, 2005. On the same day at the same stadium Mathew Varughese and his cousin (Americans of Indian heritage), Pierre Mainville (biracial), and their Dominican friend, were also detained and questioned by the police and the FBI who had received reports that “the group was snapping photographs of the game.” According to Varughese, none of them had cameras. FBI officials questioned the four men about their about their nationalities and religious backgrounds (all four men are Christian). “As they were escorted out of their seats, someone yelled out: ‘Go back to your country’”: Tania Padgett, *New Stadium Profiling Claims*, NEWSDAY, Nov. 12, 2005.

¹¹⁷ Susan Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 299 (2002).

¹¹⁸ Following the attacks of September 11, 2001 attacks, hundreds of non-citizens, mainly Muslims, were rounded up and held for months as “persons of interest” in a detention center in Brooklyn prior to deportation: *see* Bernstein, *supra* note 107 (describing the post-deportation return to the U.S. of two such “persons of interest” to testify in a federal lawsuit against top government officials and detention guards). *See also* ACLU, *Petition before the UN Working Group on Arbitrary Detention supra* note 103, at 1 (referring to persons being identified as being “of interest”). The term “person of interest” has not been formally defined. According to Jim Kouri, spokesperson for the National Association of Chiefs of Police, the term “person of interest” is often used in place of the term “suspect” to avoid legal action on the part of the person so identified: *see* Donna Shaw, *Dilemma of Interest* AMERICAN JOURNALISM REV. Feb./Mar. 2006, available at <http://www.ajr.org/Article.asp?id=4042> (describing the negative effects of being classified as a “person of interest” and discussing generally the vagueness of the term). In late 2001, the FBI described scientist Steven Hatfill as a “person of interest” in relation to the mailing of anthrax that killed five people. As a result, U.S. Sen. Chuck Grassley (R-Iowa) wrote to Attorney General Ashcroft to ask if any policy existed defining the term. On receiving a response from Ashcroft, Grassley issued a press statement saying: “There is no formal policy, level of evidentiary standard, procedure, or formal definition for the term ‘person of interest’ . . . Government agencies need to be mindful of the power they wield over individual citizens, and should exercise caution and good judgment when they use that power”: *see id.* *See generally* Guy Gugliotta & Allan Lengel, *Justice Dept. Says it Intended to Shield Anthrax Probe Figure*, WASH. POST, Dec. 13, 2002.

¹¹⁹ *See generally* Susan M. Akram & Kevin R. Johnson, *Race and Civil Rights Pre-September 11, 2001: The Targeting of Arabs and Muslims* in CIVIL RIGHTS IN PERIL: THE TARGETING OF ARABS AND MUSLIMS, (Elaine C. Hagopian, ed. 2004). *See also* HUMAN RIGHTS WATCH, “WE ARE NOT THE ENEMY” HATE CRIMES AGAINST ARABS, MUSLIMS, AND THOSE PERCEIVED TO BE ARAB OR MUSLIM AFTER SEPTEMBER 11, 11-14 (2002) (hereinafter “HUMAN RIGHTS WATCH, WE ARE NOT THE ENEMY”) available at

<http://hrw.org/reports/2002/usahate/usa1102.pdf> (describing the “backlash” against Arabs and Muslims in the U.S. prior to September 11, 2001).

¹²⁰ *Ethnically Motivated Violence Against Arab-Americans: Hearings of the Committee on the Judiciary, Subcommittee on Criminal Justice*, 99th Cong., 2d sess., (1986).

¹²¹ *Id.*, Statement of Rep. Mervyn M. Dymally.

¹²² *See, e.g.*, Human Rights Committee, General Comment No. 18, *Non-discrimination* para. 1 (1989) (hereinafter “Human Rights Committee, General Comment No. 18”) (noting that “Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”).

¹²³ *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217, UN GAOR, 3d Sess., UN Doc. A/810 (1948) art. 2, available at <http://www.unhchr.ch/udhr/lang/eng.htm>; International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 Dec. 16, 1966, entered into force 23 March 1976, 999 U.N.T.S. 171 arts. 2(1) and 26 available at <http://www.ohchr.org/english/law/ccpr.htm>; International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), entered into force Jan. 3, 1976, 993 U.N.T.S. 3 art. 2(2) available at <http://www.ohchr.org/english/law/cescr.htm>; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), entered into force Jan. 4, 1969, 660 U.N.T.S. 195 art 2(1) available at <http://www.ohchr.org/english/law/icerd.htm>; Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981 art. 2 available at <http://www.ohchr.org/english/law/cedaw.htm>.

¹²⁴ *See, e.g.*, ICCPR, *supra* note 123, art. 2(1) (providing “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

¹²⁵ Akram & Johnson, *supra* note 117, at 299.

¹²⁶ *Id.*

¹²⁷ Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215, 222-223, 240 (2005). Prominent examples of Muslims of non-Middle Eastern or South Asian origin who have been targeted include Jose Padilla (a U.S. citizen of Puerto Rican descent arrested on May 8, 2002: *see Profile: Jose Padilla*, BBC NEWS, Nov. 22, 2005, available at <http://news.bbc.co.uk/1/hi/world/americas/2037444.stm>) and U.S. Army Chaplain James Yee (a third-generation Chinese-American convert to Islam who was a Chaplain at Guantánamo Bay for ten months before being arrested in September 2003, charged with espionage, and held in solitary confinement for 76 days. All charges were subsequently dropped: *see U.S. drops all charges against Muslim chaplain* CNN.COM, May 6, 2004, available at <http://www.cnn.com/2004/LAW/03/19/yee.charges.dropped/>; *Fmr. Army Chaplain James Yee on the Abuse of Prisoners at Guantanamo, His Wrongful Imprisonment and Anti-Muslim Sentiment in the Military* Oct. 6, 2005, available at <http://www.democracynow.org/article.pl?sid=05/10/06/1316240>). *See infra* note 288.

¹²⁸ Chon & Artz, *supra* note 127, at 222 (noting that there is “widespread misunderstanding about the overlap between Arabs and Muslims, who are often lumped together but are fundamentally different identity groups.”).

¹²⁹ *Id.* at 215, 216.

¹³⁰ Ahmad, *supra* note 109, at 1278 – 9 (labeling this phenomenon “The Construction of Muslim-Looking People and the ‘Logic’ of Fungibility,” and arguing that the category of “Muslim-looking” has racial content).

¹³¹ Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14(2) EUR. J. INT’L L 241, 255 (2003).

¹³² *See, e.g.*, Committee on the Elimination of Racial Discrimination, General Recommendation No 30, *Non-citizens* para 7 (2004) (hereinafter “CERD, General Recommendation No. 30”) (noting that “There will often be an overlap between racial discrimination and other forms of discrimination based on minority status, such as national or ethnic origin”).

¹³³ ONTARIO HUMAN RIGHTS COMMISSION, AN INTERSECTIONAL APPROACH TO DISCRIMINATION: ADDRESSING MULTIPLE GROUNDS IN HUMAN RIGHTS CLAIMS 6 (2001) at <http://www.ohrc.on.ca/english/consultations/intersectionality-discussion-paper.pdf> (noting that although

intersectional analysis is the preferred approach, courts use other methods to address multiple grounds e.g. dealing with grounds sequentially and considering whether one ground compounds other grounds of discrimination).

¹³⁴ INTERIGHTS, NON-DISCRIMINATION IN INTERNATIONAL LAW – A HANDBOOK FOR PRACTITIONERS 241 (2005) (hereinafter “INTERIGHTS, NON-DISCRIMINATION IN INTERNATIONAL LAW”) (noting that “International human rights tribunals have not yet adopted a multiple or intersectional approach. Their approach is to focus on a single ground at a time in the case law to see whether each has been substantiated in turn, without acknowledging multiple simultaneous violations.”).

¹³⁵ See, e.g., Committee on the Elimination of Racial Discrimination, *Statement on racial discrimination and measures to combat terrorism*, para. 4 (2002) (hereinafter “CERD, *Statement on racial discrimination and measures to combat terrorism*”) (recalling that “the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted”) available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/f4b63c02a6cc5e33c1256c690034a465/\\$FILE/N0264357.doc](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/f4b63c02a6cc5e33c1256c690034a465/$FILE/N0264357.doc).

¹³⁶ ICERD, *supra* note 123, Article 2(1) (providing that “States Parties [must] condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races...”). See also Committee on the Elimination of Racial Discrimination, General Recommendation No. 14, *Definition of discrimination (Art. 1, par.1)* para. 1 (1993) (hereinafter “CERD, General Recommendation No. 14”) (noting that “A distinction is contrary to the Convention if it has *either the purpose or the effect* of impairing particular rights and freedoms.” (emphasis added)).

¹³⁷ ICERD, *supra* note 123, Article 1(1) (providing “In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”). A person’s own sense of identification with a particular racial or ethnic group is decisive when considering prohibited discrimination, unless some justification exists for disregarding it: Committee on the Elimination of Racial Discrimination, General Recommendation No. 8, *Identification with a particular racial or ethnic group (Art.1, par.1 & 4)*. See further INTERIGHTS, NON-DISCRIMINATION IN INTERNATIONAL LAW, *supra* note 134, at 166.

¹³⁸ CERD, General Recommendation No. 30, *supra* note 132, at para 7.

¹³⁹ See, e.g., CERD, *Statement on racial discrimination and measures to combat terrorism*, *supra* note 135, at paras 3, 5 and 6; Committee on the Elimination of Racial Discrimination, *Concluding Observations: Canada*, U.N. Doc. CERD C/61/CO/3, para. 338 (2002) (expressing concern about increased racial hatred, violence, and attacks against Muslims and Arabs in the wake of the September 11, 2001 attacks and calling on Canada to ensure that application of Canada’s Anti-Terrorism Act “does not lead to negative consequences for ethnic and religious groups, migrants, asylum seekers and refugees, in particular as a result of racial profiling.”).

¹⁴⁰ The ICCPR, *supra* note 123, prohibits two types of discrimination: discrimination in the enjoyment of the rights specifically enshrined in the Covenant (Article 2(1) provides that “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”) and general discrimination that is unrelated to these rights (Article 26 provides that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

¹⁴¹ *Id.* Article 4(1) (providing that “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”).

¹⁴² See *infra* note 135.

¹⁴³ The Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, *entered into force* Jan. 27, 1980, art. 32, 1155 U.N.T.S. 331, art. 53 *available at* <http://www.un.org/law/ilc/texts/treaties.htm> (stating that “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”).

¹⁴⁴ For consideration of religious discrimination under the ICCPR, *see, e.g.*, Karnel Singh Bhinder v. Canada, Communication Nos. 208/1986, Human Rights Committee, U.N. Doc. CCPR/C/37/D/208/1986 (1989); Arieh Hollis Waldman v. Canada, Communication No. 694/1996, Human Rights Committee, U.N. Doc. CCPR/C/67/D/694/1996 (1999).

¹⁴⁵ *See infra* note 141 and accompanying text.

¹⁴⁶ INTERRIGHTS, NON-DISCRIMINATION IN INTERNATIONAL LAW, *supra* note 134, at 207. Note for example that the Committee on the Elimination of Racial Discrimination has commented on religious discrimination in its Concluding Observations and repeatedly reminded States not to discriminate on the basis of ethnicity, race or religion: *see generally* Committee on the Elimination of Racial Discrimination, *Concluding Observations: Canada*, *supra* note 139; *generally* Committee on the Elimination of Racial Discrimination, *Concluding Observations on Belgium*, U.N. Doc. CERD C/60/CO/2 (2002); Committee on the Elimination of Racial Discrimination, *Concluding Observations on Denmark*, U.N. Doc. CERD C/60/CO/5 (2002); and Committee on the Elimination of Racial Discrimination, *Concluding Observations on Switzerland*, U.N. Doc. CERD C/60/CO/14 (2002).

¹⁴⁷ *See, e.g.*, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, G.A. res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981); *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, G.A. res. 47/135, annex, 47 U.N. GAOR Supp. (No. 49) at 210, U.N. Doc. A/47/49 (1993).

¹⁴⁸ Human Rights Committee, General Comment No. 15, *The position of aliens under the Covenant* para 1 (1986) (stating that “[I]n general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.”). *See further* Ibrahima Gueye et al. v. France, Communication No. 196/1985, Human Rights Committee, U.N. Doc. CCPR/C/35/D/196/1985 (1989); Josef Frank Adam v. The Czech Republic, Communication No. 586/1994, Human Rights Committee, U.N. Doc. CCPR/C/57/D/586/1994 (1996); Mümtaz Karakurt v. Austria, Communication No. 965/2000, Human Rights Committee, U.N. Doc. CCPR/C/74/D/965/2000 (2002).

¹⁴⁹ INTERRIGHTS, NON-DISCRIMINATION IN INTERNATIONAL LAW, *supra* note 134, at 183.

¹⁵⁰ CERD, General Recommendation No. 30, *supra* note 132, at para. 2.

¹⁵¹ *Id.* at para. 4.

¹⁵² INTERRIGHTS, NON-DISCRIMINATION IN INTERNATIONAL LAW, *supra* note 134, at 183 (noting that “Many victims of discrimination plead both race and national origin together as the relevant grounds.”).

¹⁵³ *See* Ziad Ben Ahmed Habassi v. Denmark, Communication No. 10/1997, Human Rights Committee, U.N. Doc. CERD/C/54/D/10/1997 paras 9.3 – 9.4 (1997).

¹⁵⁴ Human Rights Committee, General Comment No. 18, *supra* note 122, at paras. 1, 2 and 10.

¹⁵⁵ International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 123, Article 2(1) which reads: “States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations; (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization; (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.”

¹⁵⁶ Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, paras 351 – 353 (2002) available at <https://www.cidh.oas.org/Terrorism/Eng/toc.htm>.

¹⁵⁷ CERD, General Recommendation No. 30, *supra* note 132, at para. 6. *See also* Committee on the Elimination of Racial Discrimination, *Concluding Observations: Canada*, *supra* note 139, at para. 338; Committee on the Elimination of Racial Discrimination, *Concluding Observations: Moldova*, U.N. Doc. CERD A/57/18 para. 223 (2002) (“The Committee notes reports according to which, after the tragic events of 11 September 2001 in the United States, a parliamentary inquiry was conducted into the alleged existence of terrorists among students of Arab origin at the International Independent University of Moldova. The State party should ensure that actions taken should follow due process of law and that they avoid any suspicion of racial profiling.”).

¹⁵⁸ Committee on the Elimination of Racial Discrimination, General Recommendation No. 31, *General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system* para. 20 (2005).

¹⁵⁹ *See L.K. v. The Netherlands*, Communication No. 4/1991, Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/42/D/4/1991 para 6.6 (1993).

¹⁶⁰ *Id.* at para. 6.7

¹⁶¹ *See* Human Rights Committee, General Comment No. 18, *supra* note 122, at para. 7 (stating that “The Committee believes that the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”). *See further* CERD, General Recommendation No. 14, *supra* note 136, at para. 1. An example of indirect discrimination is where a purportedly neutral regulation, such as relating to dress in the workplace, has an impact on particular groups. *See, e.g., Karnel Singh Bhinder v. Canada*, *supra* note 144, in which the Human Rights Committee found a prima facie case of indirect discrimination against a Sikh man because work regulations requiring the wearing of hard hats had the effect of discriminating against those who wear turbans. In Sikhism, the turban is considered an “article of faith,” mandated by the founders of the religion, and “not to be regarded as mere cultural paraphernalia.” The Sikh Coalition, *Sikh Theology*, available at <http://www.sikhcoalition.org/Sikhism11.asp> (last visited May 1, 2006). However, the Committee found that this discrimination was justified and not in violation of Article 26 on the grounds that “legislation requiring that workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the Covenant.”: *Karnel Singh Bhinder v. Canada*, *supra* note 144, at para. 6.2.

¹⁶² INTERRIGHTS, NON-DISCRIMINATION IN INTERNATIONAL LAW, *supra* note 134, at 72.

¹⁶³ *Id.* at 81.

¹⁶⁴ *Id.*

¹⁶⁵ *See* Human Rights Committee, General Comment No. 18, *supra* note 122, at para 13 (“Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”).

¹⁶⁶ *Broeks v. The Netherlands*, Communication No. 172/1984, Human Rights Committee, U.N. Doc. CCPR/C/OP/2 para. 13 (1990). *See inter alia* *Cheban v. Russian Federation*, Communication No. 790/1997, Human Rights Committee, U.N. Doc. CCPR/C/72/D/790/1997 para 7.2 (2001) (“If distinctions are made, they must be based on objective and reasonable grounds”); *Danning v. the Netherlands*, Communication No. 180/1984, Human Rights Committee, U.N. Doc. Supp. No. 40 (A/42/40) at 151, para. 13 (1987) (“The right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.”); *Evan Julian et al v. New Zealand*, Communication No. 601/1994, Human Rights Committee, U.N. Doc. CCPR/C/59/D/601/1994) para. 8.5 (1997) (“Keeping in mind the Committee’s prior jurisprudence (footnote omitted) according to which a distinction based on objective and reasonable criteria does not constitute discrimination within the meaning of article 26 of the Covenant...”); *Gueye et al. v. France* *supra* note 148, at para. 9.4 (“the right to equality before the law and to equal protection of the law without any discrimination does not make all differences

of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26”); Neefs v. The Netherlands, Communication No. 425/1990, Human Rights Committee, U.N. Doc. CCPR/C/51/D/425/1990 para 7.2 (1994) (“The right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.”); Oulajin and Kaiss v. The Netherlands, Communication Nos. 406/1990 and 426/1990, Human Rights Committee, U.N. Doc. CCPR/C/46/D/406/1990/426/1990 para. 7.3 (“The principle of non-discrimination and equality before the law implies that any distinctions in the enjoyment of benefits must be based on reasonable and objective criteria.”); Pauer v. Austria, Communication No. 415/1990, Human Rights Committee, U.N. Doc. CCPR/C/44/D/415/1990 para. 7.3 (1992) (“The Committee reiterates its constant jurisprudence that the right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.”).

¹⁶⁷ Human Rights Committee, General Comment No. 18, *supra* note 122, at para 13. For examples of how this test is applied, *see inter alia*, Araujo-Jongen v. The Netherlands, Communication No. 418/1990, Human Rights Committee, U.N. Doc. CCPR/C/49/D/418/1990 (1993) (finding that the requirement that applicants for unemployment benefits be unemployed at time of application is reasonable and objective given the purpose of unemployment-benefits legislation is to provide assistance to the unemployed); Danning v. The Netherlands, *supra* note 166 (finding that differentiation between benefits received by married couples and couples merely cohabiting are based on reasonable and objective criteria); Foin v. France, Communication No. 666/1995, Human Rights Committee, U.N. Doc. CCPR/C/67/D/666/1995 (1999) (finding that the decision by France to require conscientious objectors to serve double the period of military service violates article 26 of the ICCPR as differentiation was based on purported need to ascertain whether beliefs of conscientious objectors was genuine, which is not reasonable and objective); Gueye v. France, *supra* note 148, (finding that differentiation by which soldiers of Senegalese origin were paid inferior pensions to soldiers of French origin in the French army serving in Senegal was not reasonable and objective and noted that mere administrative convenience is not a sufficient justification for differentiating in conflict with Article 26 of the ICCPR); Järvinen v. Finland, Communication No. 295/1988, Human Rights Committee, U.N. Doc. CCPR/C/39/D/295/1988 (1990) (finding that a 16-month period of civilian, non-combative service for conscientious objectors, compared to only 8 months for combat service, was non-punitive and justifiable); Snijders v. The Netherlands, Communication No. 651/1996, Human Rights Committee, U.N. Doc. CCPR/C/63/D/651/1996 (1998) (finding that the requirement that non-resident beneficiaries of state health insurance pay a contribution when resident beneficiaries are not required to do so was justified on the basis that failure to make this differentiation would deplete the funds available to the insurance scheme).

¹⁶⁸ CERD, General Recommendation No. 14, *supra* note 136, at para. 2.

¹⁶⁹ *See, e.g.*, Kall v. Poland, Communication No 552/1993, Human Rights Committee, U.N. Doc. CCPR/C/60/D/552/1993 (1997) Individual opinion by Committee members Elizabeth Evatt and Cecilia Medina Quiroga, cosigned by Christine Chanet (*dissenting*) (the dissent related to the Committee’s finding that the rights of the applicant had not been violated and not to the test of “discrimination” under the Covenant, which the above three members characterized as requiring the Committee to examine whether the classification in question “was both a necessary and proportionate means for securing a legitimate objective”); Toonen v. Australia, Communication No. 488/1992, Human Rights Committee, U.N. Doc. CCPR/C/50/D/488/1992 para 10 (2004) (with Australia identifying the following test to determine whether a measure constitutes “discrimination”: (a) Whether Tasmanian laws draw a distinction on the basis of sex or sexual orientation; (b) Whether Mr. Toonen is a victim of discrimination; (c) Whether there are reasonable and objective criteria for the distinction; (d) Whether Tasmanian laws are a proportional means to achieve a legitimate aim under the Covenant.); Habassi v. Denmark, *supra* note 153, at para. 7.8 (with the State party arguing that “differentiation of treatment that pursues a legitimate aim and respects the requirement of proportionality is not prohibited discrimination”); Kristjánsson v. Iceland, Communication No. 951/2000, Human Rights Committee, U.N. Doc. CCPR/C/78/D/951/2000 para 7.2 (2003) (with the State party arguing that “the aim of the differentiation is lawful and based on objective and reasonable considerations and that there is reasonable proportionality between the means employed and the aim pursued.”).

¹⁷⁰ In addition to constituting a prohibited ground of discrimination under the European Convention and Protocol No. 12, discrimination on the basis of race has also been characterized as a form of degrading treatment prohibited by Article 3 of the Convention: *see* Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 1 para 306 (2000); INTERIGHTS, NON-DISCRIMINATION IN INTERNATIONAL LAW, *supra* note 134, at 174 (discussing the interaction between degrading treatment and racial discrimination).

¹⁷¹ European Commission, *The Prohibition of Discrimination under European Human Rights Law: Relevance for EU Racial and Employment Equality Directives* 14 (2005) (hereinafter “European Commission, *The Prohibition of Discrimination under European Human Rights Law*”) available at http://europa.eu.int/comm/employment_social/publications/2005/ke6605103_en.pdf.

¹⁷² *See* Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium, 6 Eur. Ct. H.R. (ser. A) para. 9 (1968).

¹⁷³ *See* Botta v. Italy, App. No. 21439/93, 26 Eur. H.R. Rep. 241, para. 39 (1998); Inze v. Austria, 126 Eur. Ct. H.R. (ser. A) para. 36 (1987); Rasmussen v Denmark 87 Eur. Ct. H.R. (ser. A) para. 29 (1984); INTERIGHTS, NON-DISCRIMINATION IN INTERNATIONAL LAW, *supra* note 134, at 46.

¹⁷⁴ *See* Nachova v. Bulgaria, App. Nos. 43577/98 and 43579/98, paras. 147,160 (Eur. Ct. H.R. July 6, 2005) (Grand Chamber) (hereinafter “Nachova v. Bulgaria, Grand Chamber”). *See further* James Goldston, *Address to OAS Working Group to Prepare a Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance*, Washington, D.C., U.S.A. (Nov. 29, 2005), at 4 (hereinafter “Goldston, *OAS Working Group Address*”) available at: www.justiceinitiative.org/db/resource2/fs/?file_id=16569.

¹⁷⁵ *See* Moldovan v. Romania, App. Nos. 41138/98 and 64320/01, (Eur. Ct. H.R. July 12, 2005). This was the first case in which an Article 14 violation on the grounds of race was upheld. Note that the first instance decision of the European Court in Nachova v. Bulgaria, App. Nos. 43577/98 and 43579/98, (Eur. Ct. H.R. Feb. 26, 2004) (hereinafter “Nachova v. Bulgaria, First Instance”) found that the killing of two Roma men by military police was a substantive violation of the prohibition on racial discrimination in Article 14 of the Convention. This aspect of the decision was, however, overturned by the Grand Chamber on July 6, 2005 (*see* Nachova v. Bulgaria, Grand Chamber, *supra* note 174). This aspect of the decision was, however, overturned by the Grand Chamber on July 6, 2005. *See further* Goldston, *OAS Working Group Address*, *supra* note 174, at fn. 9.

¹⁷⁶ *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4.XI.2000)*. European Treaty Series (ETS), No. 177. [ON-LINE]. [Strasbourg]: Council of Europe, Treaty Office, [22.01.2004] (hereinafter “Protocol No. 12”) available at <http://conventions.coe.int/Treaty/en/Treaties/Word/177.doc>.

¹⁷⁷ *See*

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=4/25/2006&CL=ENG> (recording 13 ratifications as at April 25, 2006). Note that a number of key countries, including France and the U.K., have not yet signed Protocol No. 12. For an assessment of Protocol No. 12’s likely impact, *see* European Commission, *The Prohibition of Discrimination under European Human Rights Law*, *supra* note 171, at 25.

¹⁷⁸ *See* Article 1(1) of Protocol 12, *supra* note 176. *See generally* Council of Europe Steering Committee for Human Rights, *Explanatory Report on Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, (XXXX) available at <http://conventions.coe.int/Treaty/en/Reports/Html/177.htm>.

¹⁷⁹ Article 1(1) of Protocol No. 12, *supra* note 176. Article 1(2) adds: “No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

¹⁸⁰ *See* European Commission, *The Prohibition of Discrimination under European Human Rights Law*, *supra* note 171, at 39-40.

¹⁸¹ *See* Nachova v. Bulgaria, Grand Chamber, *supra* note 174, at paras. 142, 160, 168. *See further* Goldston, *OAS Working Group Address*, *supra* note 174, at 4.

¹⁸² Nachova v. Bulgaria, Grand Chamber, *supra* note 174, at para. 168.

¹⁸³ *Id.* at 160.

¹⁸⁴ *See* James Goldston, *Address to Seminar to Mark the Entry into Force of Protocol No. 12*, Strasbourg, France (Oct. 11, 2005), available at http://www.justiceinitiative.org/db/resource2?res_id=103058. (suggesting that “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”).

¹⁸⁵ Council of Europe, *Guidelines on human rights and the fight against terrorism*, *supra* note 101, Guideline II.

¹⁸⁶ European Commission against Racism and Intolerance (ECRI), *General Policy Recommendation No.8 on combating racism while fighting terrorism*, adopted by ECRI Mar. 17, 2004 available at http://www.coe.int/T/e/human_rights/ecri/1-ECRI/3-General_themes/1-Policy_Recommendations/Recommendation_N%B08/2-Recommendation_8.asp#TopOfPage. ECRI is a monitoring body established by the first Summit of the Heads of State and Government of the member States of the Council of Europe.

¹⁸⁷ *Id.*

¹⁸⁸ D.H. and Others v. the Czech Republic, App. No. 57325/00, para. 44 (Eur. Ct. H.R. Feb. 7, 2006).

¹⁸⁹ *See, e.g., id.* at para. 46; Hugh Jordan v. The United Kingdom, App. No. 24746/94, Eur. Ct. H.R. 327, para. 154 (2001).

¹⁹⁰ *See further* INTERRIGHTS, NON-DISCRIMINATION IN INTERNATIONAL LAW, *supra* note 134, at 47, 84.

¹⁹¹ European Commission, *The Prohibition of Discrimination under European Human Rights Law*, *supra* note 171, at 16 (stating that “The European Court of Human Rights presently is in a transitory moment, as it seeks to go beyond the prohibition of direct discrimination in order to reinforce the protection afforded by Article 14 ECHR, but has not yet developed a systematic case-law on the different forms of indirect discrimination which have been identified.”).

¹⁹² INTERRIGHTS, NON-DISCRIMINATION IN INTERNATIONAL LAW, *supra* note 134, at 47, 84. *See* statement on the standard of proof required in *Nachova v. Bulgaria*, Grand Chamber, *supra* note 174, at para. 147.

¹⁹³ D.H. and Others v. the Czech Republic, *supra* note 188, at para. 46; Hugh Jordan v. the United Kingdom, *supra* note 189, at para. 154.

¹⁹⁴ *See* Interights, D.H. and Others v the Czech Republic, Written Comments by Interights Pursuant to Article 36 § 2 of the European Convention on Human Rights and Rule 44 § 2 of the Rules of the European Court of Human Rights, para. 10 (2004) available at <http://www.interights.org/doc/D%20v%20H%20written%20comments%20FINAL%2011%20June%202004.doc> (noting that “The European Community has been at the forefront internationally of creating standards for and case law concerning indirect discrimination.”).

¹⁹⁵ The European Court of Justice has accepted the use of statistical evidence in sex discrimination cases: *see* Case 170/84, *Bilka-Kaufhaus GmbH v. Weber Von Hartz*, 1986 ECR 1607, para. 7.

¹⁹⁶ Council of European Union, Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (EU Race Directive), adopted on June 29, 2000, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_180/l_18020000719en00220026.pdf. *See* Article 2(a) (“direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin”); Article 2(b) (provides that “[i]ndirect discrimination shall be taken to occur when an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”).

¹⁹⁷ Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium, *supra* note 172, at para 10.

¹⁹⁸ *Id.* (noting that “A difference of treatment in the exercise of a right laid down in the Convention must... pursue a legitimate aim...”); *National Union of Belgian Police v. Belgium*, App. No. 4464/70, 1 Eur. H.R. Rep. 578, para. 46 (1975) (citing the same text); *Marckx v. Belgium*, App. No. 6833/74, 2 Eur. H.R. Rep. 330, para. 33 (1979) (“According to the Court’s established case-law, a distinction is discriminatory if it “has no objective and reasonable justification,” that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realized”); *Rasmussen v. Denmark*, *supra* note 173, at para. 38.

¹⁹⁹ Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium, *supra* note 172, at para. 10 (noting that “The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally

prevail in democratic societies”; and “ ... Article 14 (art. 14) 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”); *National Union Of Belgian Police v. Belgium*, *supra* note 198, at para. 46; *Rasmussen v. Denmark*, *supra* note 173, at para. 38.

²⁰⁰ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 94 Eur. Ct. H.R. (ser. A) para. 81 (1985) (noting that “The Court accepts that the 1980 Rules also had, as the Government stated, the aim of advancing public tranquillity. However, it is not persuaded that this aim was served by the distinction drawn in those rules between husbands and wives.”).

²⁰¹ *Id.* at para. 78 (noting that “As to the present matter, it can be said that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention.”).

²⁰² European Commission, *The Prohibition of Discrimination under European Human Rights Law*, *supra* note 171, at 14.

²⁰³ *Id.* at 15-16.

²⁰⁴ *Id.* at 6.

²⁰⁵ American Convention on Human Rights, *supra* note 100, Article 24, provides that “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

²⁰⁶ *Id.*, Article 1(1) provides that “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

²⁰⁷ Article 3 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights [Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”, Preamble, Nov. 11, 1988, O.A.S.T.S. No. 69] further obliges States parties to guarantee the exercise of certain economic, social and cultural rights without discrimination. Under Article 19(6) of the Protocol, people may only submit petitions for violations of trade union rights (Article 8) and education rights (Article 13). The Inter-American Commission on Human Rights has held, however, that notwithstanding Article 19(6) of the Protocol, it is competent to consider alleged violations of other economic, social and cultural rights in examining the merits of submitted petitions, pursuant to Articles 26 and 29 of the IACHR. *See Jorge Odir Miranda Cortez et al. v. El Salvador*, Case 12.249, Inter-Am. C.H.R., Rep. No. 29/01, paras. 36, 47 (Mar. 7, 2001). The Inter-American Commission on Human Rights is one of two bodies in the Inter-American System for the promotion and protection of human rights: the other being the Inter-American Court of Human Rights: *see generally* <http://www.cidh.org/what.htm>. For more on the mandates and functions of the Commission and Court *see generally* Cecilia Medina *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS. Q 439 (1990).

²⁰⁸ *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion, OC-18/03, Inter-Am. Ct. H.R. (Ser. A) No. 18, para. 100 (Sept. 17, 2003).

²⁰⁹ *Id.* at para. 101.

²¹⁰ *Id.* at para. 103.

²¹¹ *Id.* at para. 104.

²¹² American Convention on Human Rights, *supra* note 100, Article 27(1) (stating that “In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.”). Pursuant to Article 27(2), the following rights are non-derogable: Article 3 (right to juridical personality), Article 4 (right to life), Article 5 (right to humane treatment), Article 6 (freedom from slavery), Article 9 (freedom from ex post facto laws), Article 12 (freedom of conscience and religion), Article 17 (rights of the family), Article 18 (right to a name), Article 19 (rights of the child), Article 20 (right to nationality), and Article 23 (right to participate in government),

and the judicial guarantees essential for the protection of such rights. *See also* Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *supra* note 156, at para. 343.

²¹³ *See* Habeas Corpus in Emergency Situations, Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (Ser. A) No. 8, paras. 21-24 (Jan. 30, 1987). *See also* Walter Humberto Vasquez Vejarano v. Peru, Case 11.166, Inter. Am. C.H.R., Rep. No. 48/00, paras. 33-38 (Apr. 13, 2000). *See also* OHCHR, *Jurisprudence of the U.N. and Regional Organizations on The Protection of Human Rights While Countering Terrorism*, *supra* note 88, at 4.

²¹⁴ Organization of American States, Inter-American Convention Against Terrorism, *supra* note 101.

²¹⁵ American Convention on Human Rights, *supra* note 100, Article 1(1) (referring to the obligation to ensure rights “without any discrimination for reasons of...”) and Article 24 prohibit direct discrimination. *See further* Goldston, *OAS Working Group Address*, *supra* note 174, at fn. 9.

²¹⁶ In early jurisprudence, the Inter-American Court of Human Rights noted that while non-discriminatory on its face, a proposal that Costa Rica’s naturalization law include a “comprehensive examination on the history of the country and its values” could, if administered in an arbitrary and subjective manner, unfairly discriminate against certain groups of people whose Spanish writing skills were generally not the same as the rest of the population (i.e. indigenous peoples). Nevertheless, the Court did not find the law itself to be discriminatory. *See* Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion, OC- 4/84, Inter-Am. Ct. H.R. (ser. A) No.4, para. 63 (Jan. 19, 1984). In jurisprudence relating to the rights of undocumented migrants, the Court observed that “States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination.” *See* Juridical Condition and Rights of Undocumented Migrants, Advisory, *supra* note 208, at para. 103 (Sept. 17, 2003). *See further* INTERRIGHTS, NON-DISCRIMINATION IN INTERNATIONAL LAW, *supra* note 134, at 69.

²¹⁷ INTERRIGHTS, NON-DISCRIMINATION IN INTERNATIONAL LAW, *supra* note 134, at 69 – 70.

²¹⁸ *See, e.g.*, Juridical Status and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser.A) No. 17, para. 46 (Feb. 28, 2002) (referring to earlier holdings of the Court).

²¹⁹ *See, e.g.*, Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, *supra* note 216, at para. 57.

²²⁰ *Id.*

²²¹ Tracey Maclin, “Voluntary” Interviews and Airport Searches of Middle Eastern Men: The Fourth Amendment in a Time of Terror, 73 MISS. L.J. 471, 471–72 (2003).

²²² *Id.* In February 2001, U.S. President George W. Bush asserted that “[racial profiling is] wrong and we will end it in America. In so doing, we will not hinder the work of our nation’s brave police officers. They protect us every day—often at great risk. But by stopping the abuses of a few, we will add to the public confidence our police officers earn and deserve.” George W. Bush, Address of the President to the Joint Session of Congress (Feb. 27, 2001), available at <http://www.whitehouse.gov/news/releases/2001/02/20010228.html>.

²²³ Maclin, *supra* note 221, at 474–75 (describing continued condemnation by the administration of “ordinary” racial profiling but the use of profiling in the “war on terror”). *See also* Milton Heumann & Lance Cassack, *Afterward: September 11th and Racial Profiling*, 54 RUTGERS L. REV. 283, 286 (2001) (describing the support of profiling in the context of the “war on terror” even by some who otherwise condemn racial profiling).

²²⁴ U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., GUIDANCE REGARDING THE USE OF RACE BY LAW ENFORCEMENT OFFICIALS (2003), available at http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm. The U.S. Department of Justice has also issued a fact sheet describing the racial profiling guidelines, stating that “America has a moral obligation to prohibit racial profiling,” as it “sends the dehumanizing message to our citizens that they are judged by the color of their skin.” It adds that the guidelines impose “more restrictions on the use of race and ethnicity on federal law enforcement than the Constitution requires.” U.S. DEP’T OF JUSTICE, FACT SHEET: RACIAL PROFILING (2003), available at http://www.tsa.gov/interweb/assetlibrary/DOJ_racial_profiling.pdf. The use of race or ethnicity is permitted only when the federal officer is pursuing a specific lead concerning the identifying characteristics of persons involved in an identified criminal activity. *Id.*

²²⁵ Maclin, *supra* note 221, at 473–74; Heumann & Cassack, *supra* note 223, at 283–86.

²²⁶ *See, e.g.*, U.S. DEP’T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT OFFICIALS, *supra* note 224 (providing different instructions for federal officials engaged in

activities involving threats to national security and stating that: “Given the incalculably high stakes involved in such investigations... Federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, and other relevant factors to the extent permitted by our laws and the Constitution... This policy will honor the rule of law and promote vigorous protection of our national security.”).

²²⁷ Heumann & Cassack, *supra* note 223, at 286 (drawing attention to a Gallup poll taken soon after September 11, 2001 which suggested that 71 percent of African Americans, 63 percent of other “non-whites,” and 57 percent of whites supported the special and more intensive scrutiny directed toward Arabs boarding planes). *See also* Paul Sperry, *Politically Correct Suicide: Still No Subway Profiling*, FRONTPAGEMAGAZINE.COM, July 22, 2005, available at <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=18872>.

²²⁸ For arguments advanced in favor of profiling in the context of the “war of terror”, *see* Heumann & Cassack, *supra* note 223, at 285.

²²⁹ The End Racial Profiling Act (“ERPA”) was introduced by Representative John Conyers (D- MI) in the House and Senator Russ Feingold (D-WI) in the Senate in February 2004. The Act would “ban racial profiling at all levels of government and provide systematic monitoring and enforcement mechanisms for law enforcement agencies.” *See* AMNESTY INT’L, THREAT AND HUMILIATION, *supra* note 111, at 30. More specifically, it would “define and ban all forms of racial profiling based on race, religion, national origin, or ethnicity... financially penalize any state that refuses to comply with ERPA... [and] allow for courts to respond to individual complaints.” *Id.* Significantly, this law includes religion as a category of racial profiling. It is supported by many civil rights, human rights, and religious organizations, including groups like the ACLU, Amnesty International, and the NAACP. The bill was reintroduced by Senator Feingold in 2005 and referred to the Senate Committee on the Judiciary. 151 Cong. Rec. S13788, 13805–09 (Dec. 16, 2005). In a review of the approach of the states to racial profiling, Amnesty International found each anti-profiling law to be deficient in some way: *see* AMNESTY INT’L, THREAT AND HUMILIATION, *supra* note 111, at 28 (explaining that as of August 2004, 41 states had introduced and 29 had passed legislation dealing with racial profiling. Only 23 states banned racial profiling. Of the 23 states to have banned profiling, 12 states only banned profiling based “solely” on race, which means that officers were permitted use race as a factor in conjunction with others, such as dress. 46 states failed to ban racial profiling related to religion or religious dress. 35 states failed to ban profiling in pedestrian stops. Only 2 states criminalized a violation of their racial profiling and only 2 states facilitated obtaining court orders to prevent the continued use of profiling).

²³⁰ The Fourth Amendment reads: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause....” U.S. CONST. amend. IV.

²³¹ *See, e.g.*, *United States v. Montero-Camargo* 208 F.3d 1122 (9th Cir. 2000); *Washington v. Lambert*, 98 F.3d 1181, 1187–88 (9th Cir. 1996).

²³² The Equal Protection Clause of the Fourteenth Amendment reads: “[No] state shall... deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

²³³ *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

²³⁴ *Id.* at 464.

²³⁵ *See* Susan M Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage A Distinction Without Difference?* 38 U.C. DAVIS L. REV. 609, 664 (2005) (relying on *Bridges v. Wixon*, 326 U.S. 135 (1945); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)); Lapp, *supra* note 104, at 586 n.70.

²³⁶ Note that while the Supreme Court has held that an Arab person may bring an equal protection claim under § 1981 of Title VII of the Civil Rights Act [42 U.S.C. § 1981 reads: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”] claiming discrimination on the basis of his or her ethnicity [*Saint Francis College v. Al-Khazraji*, 481 US 604 (1987) (upholding the right of an Arab professor denied tenured may bring claim under § 1981)]. The decision was based on the view that race and ethnicity are directly analogous for the purposes of the statute. *Id.* at 613 (emphasizing that discrimination based on ethnicity “is racial discrimination that Congress intended § 1981 to forbid,

whether or not it would be classified as racial in terms of modern scientific theory”)] the case is of limited value in challenging the profiling of Arabs and Muslims in the “war on terror” because § 1981 is narrowly concerned with contracts in the context of employment.

²³⁷ Akram & Karmely, *supra* note 235, at 666 (relying on *Chae Chan Ping v. United States*, which held that Congress has a broad plenary power when it comes to immigration matters, which is largely immune from judicial review. 130 U.S. 581 (1889)).

²³⁸ *Id.* (describing amendments which limited access of non-citizens to federal courts. These limitations relate mainly to time in which to file claims and types of claims that may be brought).

²³⁹ *Id.* at 668 (relying on Tania Cruz, *Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties When “Fears and Prejudices are Aroused,”* 2 SEATTLE J. SOC. JUST. 129, 162 (2003)).

²⁴⁰ Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religions, sex or national origin. Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000e.

²⁴¹ Chon & Arzt, *supra* note 127, at 243 n.144 (describing a study conducted by the Anti-Defamation League that found that the hate crime legislation of 44 U.S. states and the District of Columbia applied to crimes motivated by religious hatred).

²⁴² *Id.* at 246.

²⁴³ *Id.* at 247 (relying on ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.3.2 (2d ed. 2002) and noting that characteristics that trigger “suspectness” are “history of societal discrimination, the history of political powerlessness, the presence of a discrete and insular minority, and, most importantly, the fact of immutability”). If a religious group, such as Muslims, possesses these characteristics, strict scrutiny ought to apply. The Supreme Court, however, has yet to squarely address the question. *Id.* at 248 (discussing the only case of discrimination based on religion to have reached the U.S. Supreme Court to engage this matter, *Cruz v Beto*. 405 U.S. 319 (1972). Although the Court reversed the lower court’s dismissal of the case, it did not reach the equal protection aspects of the argument.)

²⁴⁴ *See infra* note 232.

²⁴⁵ The last section of the Fourteenth Amendment reads: “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.

²⁴⁶ The Fifth Amendment reads: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. Although this provision does not explicitly mention equal protection, the Supreme Court has held that the requirement of due process includes the requirement not to deny equal protection. *See Bolling v. Sharpe*, 347 US 497, 499–500 (1954) (holding that racial segregation at public schools in the District of Columbia violated the Fifth Amendment. The Court explained that in view of its decision that “the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”); *Davis v Passman*, 442 US 228, 234 (1979) (emphasizing that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws).

²⁴⁷ *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000) (describing the several ways that a plaintiff could bring a race-based claim under the Equal Protection Clause:

A plaintiff could point to a law or policy that “expressly classified persons on the basis of race.” Or, a plaintiff could identify a facially neutral law or policy that has been applied in an intentionally discriminatory manner. A plaintiff could also allege that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus. (citations omitted)).

²⁴⁸ In *United States v. Armstrong*, the defendants’ convictions for possession with intent to distribute crack cocaine were upheld, notwithstanding a challenge that they had been selected for federal prosecution because they were black. *See supra* note 223. Referring to the twenty-four federal cases of drug dealing closed in 1991 in which all twenty-four defendants were black, they claimed that they had been targeted for federal prosecution because of their race. *Id.* at 459. In rejecting their claim, the Court held that “clear evidence” was needed in order to rebut the presumption that the prosecution had not violated the Fourteenth Amendment. *Id.* at 465. The Court further held that “[t]o establish a discriminatory effect in a

race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.” *Id.* See also *Washington v Davis*, 426 US 229 (1976); *Arlington Heights v Metro. Hous. Dev. Corp.*, 429 US 252 (1977).

²⁴⁹ AMNESTY INT’L, THREAT AND HUMILIATION, *supra* note 111, at 32.

²⁵⁰ In a case that remains good law, *Brown v. City of Oneonta* 221 F.3d 329 (2d Cir. 2000), the Supreme Court upheld the legality of a race-based police sweep to find a suspect wanted for assault and burglary, finding that the plaintiffs failed to demonstrate discriminatory intent. After the 77-year old crime victim identified the assailant as a black male, police requested a list of all black males from the local university, whom they then attempted to contact and question. The effort failed to produce any suspects. In the days that followed, the police proceeded to stop and question over two hundred black males. They ultimately failed to find the perpetrator.

²⁵¹ The danger of racial or ethnic profiling and the harm that it causes was powerfully expressed powerfully by the Ninth Circuit in *United States v. Montero-Camargo*, *supra* note 231, at 1135 “Stops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone. Such stops also send a clear message that those who are not white enjoy a lesser degree of constitutional protection—that they are in effect assumed to be potential criminals first and individuals second.” 208 F.3d 1122, 1135 (9th Cir. 2000). See also *Washington v. Lambert*, *supra* note 231.

²⁵² Gerald Gunter, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARVARD L. REV. 1, 8 (1972) (famously describing strict scrutiny as “strict in theory, fatal in fact”). “Race” as a suspect classification subject to strict scrutiny review was first recognized in *Korematsu v. United States*. 323 U.S. 214 (1944) (upholding the U.S. government’s program of internment of persons of Japanese decent during WWII). Leaving aside affirmative action programs, which the Court has upheld, *Korematsu* has remained the only case in which a race-based measure was upheld under the strict scrutiny standard. GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 669 n.3 (15th ed. 2004). The decision is generally considered to have been discredited, despite never having been overruled. See Lapp, *supra* note 104, at 588.

²⁵³ *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995).

²⁵⁴ See Lapp, *supra* note 104, at 587 n.73.

²⁵⁵ *Adarand Constructors v. Peña*, *supra* note 253, at 227.

²⁵⁶ See, e.g., Seattle Police Dep’t, *Section 1.010: Unbiased Policing*, in POLICY AND PROCEDURE MANUAL (2006), available at http://www.cityofseattle.net/police/Publications/SPD%20Manualv1_1.pdf (reaffirming the commitment of the Seattle Police Department to unbiased policing and clarifying the circumstances in which officers can consider race and ethnicity when making law enforcement decisions); Los Angeles Police Dep’t, *1/345: Policy Prohibiting Racial Profiling*, in 2005 MANUAL OF THE LOS ANGELES POLICE DEP’T, VOLUME 1, 11 (2005), available at http://www.lapdonline.org/assets/pdf/Table_of_Contents.pdf (click on Volume 1) (stating that:

The Department shall continue to prohibit discriminatory conduct on the basis of race, color, ethnicity, national origin, gender, sexual orientation, or disability in the conduct of law-enforcement activities. Police-initiated stops or detentions, and activities following stops or detentions, shall be unbiased and based on legitimate, articulable facts, consistent with the standards of reasonable suspicion or probable cause as required by federal and state law. Department personnel may not use race, color, ethnicity, or national origin (to any extent or degree) in conducting stops or detentions, or activities following stops or detentions, except when engaging in the investigation of appropriate suspect-specific activity to identify a particular person or group. Department personnel seeking one or more specific persons who have been identified or described in part by their race, color, ethnicity, or national origin, may rely in part on race, color, ethnicity, or national origin only in combination with other appropriate identifying factors and may not give race, color, ethnicity or national origin undue weight. Failure to comply with this policy is a violation of an individual’s constitutional rights. It is also counterproductive to professional law enforcement, amounts to racial profiling, and is considered to be an act of serious misconduct.)

²⁵⁷ See Seattle Police Dep’t, *supra* note 256; Los Angeles Police Dep’t, *supra* note 256;

²⁵⁸ See *id.*

²⁵⁹ Terry v. Ohio 392 US 1, 21 (1968) (stating that “in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion”).

²⁶⁰ IACP, *Investigative Stops Using Drug Courier Profiles 2* (1988) (copy on file with CHRGJ).

²⁶¹ See *Memorandum of Agreement between the U.S. Dep’t of Justice and the D.C. Metro. Police Dep’t and the U.S. Department of Justice* (June 13, 2001), available at <http://www.usdoj.gov/crt/split/documents/dcmoa.htm>.

²⁶² Los Angeles Police Dep’t, *1/390: Undocumented Aliens*, in 2005 MANUAL OF THE LOS ANGELES POLICE DEP’T, VOLUME 1, 12, *supra* note 256, stating:

Undocumented alien status in itself is not a matter for police action. It is, therefore, incumbent upon all employees of this Department to make a personal commitment to equal enforcement of the law and service to the public regardless of alien status. In addition, the Department will provide special assistance to persons, groups, communities and businesses who, by the nature of the crimes being committed upon them, require individualized services. Since undocumented aliens, because of their status, are often more vulnerable to victimization, crime prevention assistance will be offered to assist them in safeguarding their property and to lessen their potential to be crime victims. Police service will be readily available to all persons, including the undocumented alien, to ensure a safe and tranquil environment. Participation and involvement of the undocumented alien community in police activities will increase the Department’s ability to protect and to serve the entire community).

²⁶³ See *infra* notes 252 – 255 and accompanying text.

²⁶⁴ Training Key 581, *supra* note 13, at 2.

²⁶⁵ *Id.* at 5.

²⁶⁶ See *Federal Marshals to Use Behavior Pattern Recognition at Logan*, USA TODAY, Jan. 27, 2004 (reporting that specially trained officers would “analyze passengers for irregular behavior and try to identify people that may have hostile intentions. . . [including people] wearing heavy clothes on a hot day, sweating on a cool day, loitering in the terminal without luggage, or even using a pay phone”. Officers would then “ask simple questions about their identity and look for an innocent explanation that could clear up any confusion.”). See also *Nervous Flyers Catch Security Eye*, CBS NEWS, Dec. 29, 2005. Specific information regarding the behaviors that trigger further surveillance or questioning is not publicly available.

²⁶⁷ See BART ELIAS, WILLIAM KROUSE, & ED RAPPAPORT, CONGRESSIONAL RESEARCH SERV., *HOMELAND SECURITY: AIR PASSENGER PRESCREENING AND COUNTERTERRORISM 22* (2005), available at <http://www.fas.org/sgp/crs/homesecc/RL32802.pdf>; Sally B. Donnelly, *Spotting the Airline Terror Threat*, TIME (online ed.), Oct. 2, 2004, available at <http://www.time.com/time/nation/article/0,8599,708924,00.html>.

²⁶⁸ ACLU, *SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11 3* (2004) (hereinafter “ACLU, SANCTIONED BIAS”) available at <http://www.aclu.org/safefree/resources/17017pub20040226.html>.

²⁶⁹ See *infra* note 78 and accompanying text.

²⁷⁰ See Michael Fikes, *Exposing Hostile Intent*, TRANSP. SEC. (Nov. 12, 2003), available at http://transportationsec.com/ar/security_exposing_hostile_intent/index.htm (describing Israel’s of behavior pattern recognition or “BPR” at Ben Gurion International Airport to reduce terror attacks).

²⁷¹ Interview by Miles O’Brien, *West Bank Bombing; Terrorist Behavior; Wiretap Flap*, CNN, Dec. 29, 2005, available at <http://transcripts.cnn.com/TRANSCRIPTS/0512/29/ltm.03.html> (interviewing Rafi Ron, Former Director of Security, Ben Gurion International Airport and current trainer of air marshals in the U.S., in which Rafi Ron acknowledges the risk of behavioral indicators being used as a proxy for race but suggests that good training would prevent this risk from materializing. In answer to a question about the dangers of racial profiling being embedded in the notion of behavioral profiling, Ron said: “Yes, of course there is such a concern. But I think that the way to handle this concern is through good professional training, rather than just leave it, as we do today, in most cases, leave it to the individual to follow his intuition in the process. Because intuition is affected by prejudices much more than skills that are developed through professional training...”

²⁷² Cynthia Lee, *But I Thought He Had a Gun: Race and Police Use of Deadly Force*, 2 HASTINGS RACE & POVERTY L.J. 1, 3-4 (2004).

²⁷³ See generally *id.*

²⁷⁴ See *King Downing v. Massachusetts Port Authority et al, Complaint and Demand For Jury Trial*, para. 13, Nov. 10, 2004, available at <http://www.aclu.org/FilesPDFs/downing.pdf>.

²⁷⁵ Dr. R. Jaipal, Associate Professor of Psychology at Bloomfield College, specializing in Cross Cultural Psychology, *Analytical Note on Behavioral Indicators in IACP Training Keys 581 and 582*, provided to CHRGJ on November 27, 2005 (copy on file with CHRGJ).

²⁷⁶ See U.S. DEP'T JUSTICE, LOCAL POLICE DEPARTMENTS, 2003 4, 7 (2006) (noting that minority groups classified in the group "Other" (including "Asians, Pacific Islanders, American Indians, and Alaska natives") constitute 2.8% of local police officers. No mention is made of South Asians or Arab-Americans.

²⁷⁷ Jaipal, *supra* note 275.

²⁷⁸ Lee, *supra* note 272, at 7.

²⁷⁹ *Id.*

²⁸⁰ The need to take account of language barriers and the potential for them to serve as a barrier of equality in law enforcement is acknowledged by the police: MANUAL OF THE LOS ANGELES POLICE DEP'T, VOLUME 1, 15, *supra* note 256 (stating that "Implicit in uniform enforcement of law is the element of evenhandedness in its application. The amount of force used or the method employed to secure compliance with the law or to make arrests is governed by the particular situation. Similar circumstances require similar treatment in all areas of the City and for all groups and individuals. To ensure equal treatment in similar circumstances, an officer must be alert to situations where, because of a language barrier or for some other reason, he or she may be called upon to display additional patience and understanding in dealing with what might otherwise appear to be a lack of response.").

²⁸¹ Training Key 581, *supra* note 13, at 3 – 4.

²⁸² *Id.* at 5.

²⁸³ See also Sperry, *supra* note 227 (citing "Suicide Bomber Indicators" provided by the Department of Homeland Security to U.S. border authorities according to a January 2004 "For Official Use Only" obtained by the author. The indicators direct officials to look for individuals who "May been [sic] seen praying fervently, giving the appearance of whispering to someone.").

²⁸⁴ See *id.* (citing "Suicide Bomber Indicators" provided by the Department of Homeland Security to U.S. border authorities that call on officials to look for individuals who "May smell of herbal or flower water (most likely flower water), as they may have sprayed perfume on themselves, their clothing, and weapons to prepare for Paradise. However, not all suicide bombers are using scented water, because it is widely recognized as an indicator.").

²⁸⁵ See *id.* (citing "Suicide Bomber Indicators" provided by the Department of Homeland Security to U.S. border authorities, which requires officials to look for individuals who are "Nervous, unresponsive (blank stare), or preoccupied.").

²⁸⁶ See *id.*, (citing "Suicide Bomber Indicators" provided by the Department of Homeland Security to U.S. border authorities, which requires officials to look for individuals with a "Shaved head or short haircut. A short haircut or recently shaved beard or moustache may be evident by differences in skin complexion on the head or face.").

²⁸⁷ See *infra* note 32.

²⁸⁸ Although not the focus of this paper, the effect that profiling on the basis of "praying" will have in suppressing religious expression of particular groups may also constitute a violation of the freedom of religion as guaranteed under international, regional and domestic law. Counter-terrorism measures have already had an impact on the freedom of religious expression in the U.S. For example, because of incidents of violence and intimidation against male members of the Sikh community, some have reportedly been shaving their beards and removing their turbans for fear of being associated with those accused of terrorism. See generally HUMAN RIGHTS WATCH, WE ARE NOT THE ENEMY, *supra* note 119, at 15 (describing the targeting of Sikhs who wear turbans because of false assumption by many Americans that they are Arab or Muslim). Freedom of religion is protected under Article 18 of the Universal Declaration of Human Rights, *supra* note 123 ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship or observance.") A practically identical provision is contained in Article 18(1) of the ICCPR, *supra* note 123 ("Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either

individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”). The ICCPR, however, goes into greater detail than the Universal Declaration. Article 18(2) protects the right to be free from coercion in respect of religion (“No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”). The ICCPR also provides for the limitation of the right to religion in certain circumstances (Article 18(3) reads as follows: “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”). On a regional level, the European Convention protects freedom of religion in a similar way to the ICCPR. Article 9(1) of the European Convention is worded identically to Article 18 of the Universal Declaration. Article 9(2) of the European Convention is practically identical to Article 18(3) of the ICCPR (Article 9(2) of the ECHR reads as follows: “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”). Article 12(1) of the American Convention is identical to Article 18 of the Universal Declaration. Article 12(3) of the American Convention, providing for the limitation of the freedom of religion in certain circumstances, is identical to Article 18(3) of the ICCPR. Article 12(2) of the American Convention protects the right of persons to maintain or change their religion (Article 12(2) reads as follows: “No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.”). In the United States, freedom of religion is protected in the First Amendment to the Constitution (“Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof.”) *See generally* GEOFFREY R. STONE, LEWIS M. SEIDMAN, ET AL., *CONSTITUTIONAL LAW* 1485-1581 (5 ed. 2005).

²⁸⁹ *See further* on the misuse of the term “jihad” as having violent connotations Chon & Artz, *supra* note 127, at 227.

²⁹⁰ Training Key 581, *supra* note 13, at 5.

²⁹¹ *See, e.g.*, U.S. Dep’t of Justice, Community Relations Service, *The First Three to Five Seconds: Understanding Muslims and Arab Americans*, available at http://www.usdoj.gov/crs/training_video/3to5_lan/transcript.html (noting that “In Arab culture you give great respect to members who represent authority. It would be impolite, disrespectful to give one direct consistent eye contact.”).

²⁹² Training Key 581, *supra* note 13, at 4.

²⁹³ *See infra* notes 275 – 277 and accompanying text.

²⁹⁴ VERA INSTITUTE OF JUSTICE, *BUILDING STRONGER POLICE – IMMIGRANT COMMUNITY RELATIONS: EXPERIENCES FROM A NEW YORK CITY PROJECT 3* (2005) (hereinafter “VERA INSTITUTE OF JUSTICE, *BUILDING STRONGER POLICE – IMMIGRANT COMMUNITY RELATIONS*”) available at http://www.vera.org/publication_pdf/300_564.pdf (highlighting fear of deportation, negative experiences with the justice system back home, and language and cultural differences as major barriers to developing trust of the police on the part of immigrant communities). *See also* Robert C. Davis, *Perceptions of the Police among Members of Six Ethnic Communities in Central Queens, NY* 3 2000 available at <http://www.ncjrs.org/pdffiles1/nij/grants/184613.pdf> (noting that research has “consistently demonstrated that members of minority communities are more hostile toward and fearful of the police than Whites”); Los Angeles Police Dep’t, *MANUAL OF THE LOS ANGELES POLICE DEP’T, VOLUME 1, 11*, *supra* note 256 (recognizing that the reasons behind an individual’s reluctance to interact with or respond to the police may be benign).

²⁹⁵ VERA INSTITUTE OF JUSTICE, *BUILDING STRONGER POLICE – IMMIGRANT COMMUNITY RELATIONS*, *supra* note 294, at 3.

²⁹⁶ *Id.*

²⁹⁷ *See infra* notes 102 – 116 and accompanying text.

²⁹⁸ *See* LISA M. SEGHELLI, ET AL., CONGRESSIONAL RESEARCH SERV., *ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT* 23 - 24 (2004) available at <http://fpc.state.gov/documents/organization/31349.pdf> (noting that “One of the overriding concerns with state and local police involvement in the enforcement of immigration law is the potential for civil rights violations.”). Up until recently, the policing of potential violations of immigration laws was

solely within the province of the federal government. There have been recent efforts to allow state and local police forces to take on this responsibility. At this writing these measures had not yet been approved.

²⁹⁹ *Id.*

³⁰⁰ *See infra* note 201 and accompanying text.

³⁰¹ *See infra* notes 167, 168, 198 and 255 and accompanying text.

³⁰² *See infra* notes 166 and 197 and accompanying text.

³⁰³ *See infra* notes 169 and 219 and accompanying text.

³⁰⁴ *See infra* note 200 and accompanying text.

³⁰⁵ *See infra* note 141 and accompanying text.

³⁰⁶ *See, e.g.,* Human Rights Committee, *Concluding Observations: Russian Federation*, U.N. Doc. CCPR/CO/79/RUS para. 24 (2003) (“The [Human Rights] Committee is concerned at the increase of racially motivated violent attacks against ethnic and religious minorities, as well as about reports of racial profiling by law enforcement personnel. It notes with concern reports of xenophobic statements made by public officials. The State party should take effective measures to combat racially motivated crimes. It should ensure that law enforcement personnel receive clear instructions and proper training with a view to protecting minorities against harassment. The State party is also encouraged to introduce specific legislation to criminalize racist acts as well as racially motivated statements made by those in public office (articles 2, 20 and 26).”); Committee on the Elimination of Racial Discrimination, *Concluding Observations: Ukraine*, U.N. Doc. A/56/18 para 375 (2001) (“The Committee [on the Elimination of Racial Discrimination] was disturbed by the oral statement of the delegation that many nationals of a certain African country are involved in drug trafficking in Ukraine. The Committee strongly recommends that the State party take actions to counter any tendency to target, stigmatize or stereotype, which could lead to racial profiling of particular population groups by police and immigration officers as well as in the media and society at large.”).

³⁰⁷ *See infra* note 157.

³⁰⁸ *See infra* notes 347 – 352 and accompanying text.

³⁰⁹ *See infra* notes 88 – 101 and accompanying text.

³¹⁰ *See id.*

³¹¹ *See Lapp, supra* note 104, at 575n11 (citing to various authors who have shown that “profiling is based on a tenuous factual premise that race, religion, ethnicity and/or national origin correlate with terrorism).

³¹² *Id.* at 577-8.

³¹³ *Id.* at 578.

³¹⁴ *Id.* at 578-9.

³¹⁵ *Id.*

³¹⁶ *Id.* at 579.

³¹⁷ *Id.* at 580.

³¹⁸ *See* ACLU, SANCTIONED BIAS, *supra* note 268, at 8. *See generally* DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2003).

³¹⁹ The Bureau of Alcohol, Tobacco and Firearms has released a bulletin on homicide bombers referred to in Nunn, *supra* note 51.

³²⁰ *Id.* at 16.

³²¹ *See infra* notes 1 – 11 and accompanying text.

³²² *See* ACLU, SANCTIONED BIAS, *supra* note 268, at 6.

³²³ *United States v. Solokow*, 490 U.S. 1, 13, (1989).

³²⁴ *See Lapp, supra* note 104, at 575n11; Lee, *supra* note 272, at 5. The rationale is encapsulated in the statements of Mark Mershon, Assistant Director in Charge, FBI New York Field Office, who enjoined Pakistani community members present at a town hall meeting on April 18, 2006 in Queens, New York, to “not forget that” those who committed the terrorist acts of September 11, 2001 are a “small subset of your religion” who “hide in your community” and who the community is best placed to “find.”

³²⁵ Lee, *supra* note 272, at 5.

³²⁶ *See, e.g.,* Elizabeth Heger Boyle & Fortunata Ghati Songora, *Formal Legality and East African Immigrant Perceptions of the “War on Terror”* 22 Law & INEQ. J. 301 (2004).

³²⁷ *See* Highway Safety Committee, IACP, *Policies Help Gain Public Trust*, THE POLICE CHIEF, July 2000, available at http://www.theiacp.org/documents/index.cfm?fuseaction=document&document_id=138. *See generally* on the problematic nature of racial profiling: IACP, *Condemning Racial and Ethnic Profiling in*

Traffic Stops (1999) available at http://www.iacp.org/Resolutions/index.cfm?fuseaction=dis_public_view&resolution_id=41&CFID=6103186&CFTOKEN=47707202; IACP, *Condemnation of Bias-Based Policing* (2001) available at http://www.iacp.org/Resolutions/index.cfm?fuseaction=dis_public_view&resolution_id=167&CFID=6103186&CFTOKEN=47707202.

³²⁸ See Highway Safety Committee, IACP, *supra* note 327.

³²⁹ VERA INSTITUTE OF JUSTICE, BUILDING STRONGER POLICE – IMMIGRANT COMMUNITY RELATIONS, *supra* note 294, at 1.

³³⁰ See *infra* notes 337 – 340 and accompanying text.

³³¹ See Statement of Carlina Tapia Ruano, First Vice President, American Immigration Lawyers Association, *Oversight Hearing on the Reauthorization of the PATRIOT Act Before the House Judiciary Committee*, *supra* note 104, at 6. See also, Council on American-Islamic Relations, *Recent Upsurge in Anti-Muslim Travel Incidents*, Jan. 4, 2006, available at http://www.cairchicago.org/ournews.php?file=on_upsurge01042006 (describing a number of “anti-Muslim travel incidents” and noting that “When such racism governs the way security procedures are implemented, the entire notion of civil liberties is compromised. Security itself is bogged down with inefficient and unnecessary practices that serve no purpose other than to criminalize a group of people for their association with a particular religion.”).

³³² See, e.g., CENTER FOR IMMIGRATION STUDIES, SAFETY IN (LOWER) NUMBERS: IMMIGRATION AND HOMELAND SECURITY 6 (2002) available at <http://www.cis.org/articles/2002/back1102.pdf> (noting that the current focus on “Muslim-majority countries” will likely lead to an increase in terrorists from non-Muslim countries with large Muslim populations, such as the Philippines and Russia, and noting that the FBI has already warned of Al Qaeda plans to use non-Arabic Muslims in their operations).

³³³ ACLU, SANCTIONED BIAS, *supra* note 268, at 12 (drawing these conclusions from incidents recorded in the 2003 report of the Office of the Inspector General, U.S. Department of Justice). See further OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 17-18 (Apr. 2003) available at <http://www.usdoj.gov/oig/special/0306/full.pdf> (describing the “PENTTBOM leads that resulted in the arrest of a September 11 detainee” as being “quite general in nature, such as a landlord reporting suspicious activity by an Arab tenant” and listing examples of these types of leads).

³³⁴ Lapp, *supra* note 104, at 575n11.

³³⁵ See *infra* note 224.

³³⁶ See *infra* note 223 and accompanying text.

³³⁷ See HUMAN RIGHTS WATCH, WE ARE NOT THE ENEMY, *supra* note 119, at 15.

³³⁸ U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., ENFORCEMENT AND OUTREACH FOLLOWING THE SEPTEMBER 11 TERRORIST ATTACKS (2004) available at <http://www.usdoj.gov/crt/nordwg.html> (follow link “Update on Civil Rights Division Activities”) (describing the various incidents and steps taken to prosecute perpetrators of such attacks).

³³⁹ *Id.*

³⁴⁰ See, e.g., Ahmad, *supra* note 109, at 1266-7.

³⁴¹ *Id.* at n9.

³⁴² Report of U.N. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, *supra* note 112, at 2.

³⁴³ HUMAN RIGHTS WATCH, WE ARE NOT THE ENEMY, *supra* note 119, at 3.

³⁴⁴ Report of U.N. Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, *supra* note 112, at 2.

³⁴⁵ See generally HUMAN RIGHTS WATCH, WE ARE NOT THE ENEMY, *supra* note 119, at 6 (recommending specialized training in hate crimes for prosecutors, the creation of hate crime prosecution units, and the publicizing of prosecutions of hate crimes).

³⁴⁶ See CENTER FOR CONSTITUTIONAL RIGHTS, ANNUAL REPORT 16 (2002) available at http://www.ccr-ny.org/v2/funders/images/2002_annual_report.pdf.

³⁴⁷ Report of the Independent Expert on the question of the protection of human rights and fundamental freedoms while countering terrorism, *supra* note 97, at para. 8 (stating that “It is worth recalling that, when drafting the International Covenant on Civil and Political Rights (ICCPR) and various regional human

rights instruments, States were keenly aware of the need to strike a realistic balance between the requirements of national security and the protection of human rights. Accordingly, States included in these instruments provisions that permit them when confronting an emergency or crisis situation, which may include actual or imminent terrorist violence or threats, to limit, restrict or, in highly exceptional circumstances set out in article 4 of ICCPR, derogate from certain rights in these instruments.”).

³⁴⁸ ICCPR, *supra* note 123, Article 6 reads: “1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life...”

³⁴⁹ European Convention, *supra* note 91, Article 2 reads:

“1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

See, e.g., Orhan v. Turkey, App. No. 25656/94, Eur. Ct. H.R. 497, para. 325 (2002) in which the European Court of Human Rights stated that Article 2 “ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted.”

³⁵⁰ American Convention, *supra* note 100, Article 4 reads as follows:

“1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.”

³⁵¹ ICCPR, *supra* note 123, Article 4(2); European Convention, *supra* note 91, Article 15; American Convention, *supra* note 100, Article 27. On Article 4 of the ICCPR, *see generally* Human Rights Committee, General Comment No. 29, *States of Emergency* (article 4) (2001); Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies--A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations* 22 HARV. INT'L. L. J. 1 (1981) (discussing the theory, history, operation and interpretation of Article 4). On Article 15 of the European Convention *see generally* Brendan Mangan, *Protecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal for Reform* 10 HUM. RTS. Q. 372 (1987-1988) (describing generally the system of derogations under Article 15 and arguing against frequent use of Article 15); Mohamed M El Zeidy, *ECHR and States of Emergency: Article 15 - A Domestic Power of Derogation from Human Rights Obligations* 4 SAN DIEGO INT'L L.J. 277 (2003) (discussing generally the effects of and limitations to the use of derogations under Article 15). On Article 27 of the American Convention *see generally* Joan Fitzpatrick, *States of Emergencies in the Inter-American Human System*, in *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS* 371, 375 – 7 (discussing generally the provisions of Article 27) and 377ff (discussing case law dealing with derogations) (David J. Harris & Stephen Livingstone eds., 1998).

³⁵² *See, e.g.*, Suárez de Guerrero v. Colombia, Communication No. R.11/45, Human Rights Committee, U.N. Doc. Supp. No. 40 (A/37/40) at 137, para. 13.1 (1982) (citing Article 6 and stating that “The right enshrined in this article is the supreme right of the human being.”); John Khemraadi Baboeram, et al . v.

Suriname, Communication No. 146/1983 and 148 to 154/1983, U.N. Doc. Supp. No. 40 (A/40/40) at 187, para. 14.3 (1985) (also citing Article 6 and classifying the right to life as a "...supreme right of the human being.").

³⁵³ DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 343 (1991).

³⁵⁴ *Id.* See also MANFRED NOWAK, *UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 111 (1993) (noting that although there have occasional attempts to identify a list of arbitrary deprivations of life, these lists "... fail to account sufficiently for the fact that the term 'arbitrarily' aims at specific circumstances of an individual case and their reasonableness (proportionality), making it difficult to comprehend in abstracto.").

³⁵⁵ See Suárez de Guerrero v. Colombia, *supra* note 352, at para. 13.3 (finding that the police's use of lethal force was "disproportionate to the requirements of law enforcements in the circumstances of the case").

See also JOHANN BAIR, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND ITS (FIRST) OPTIONAL PROTOCOL 20* (2005); MCGOLDRICK, *supra* note 353, at 342; NOWAK, *supra* note 354, at 111.

³⁵⁶ See Human Rights Committee, *Concluding Observations: Israel*, U.N. Doc. 221/08/2003, para. 15 (2003) (discussing the Israeli policy of "targeted assassinations," the Committee expressed its concern at "what the State party calls 'targeted killings' of those identified by the State party as suspected terrorists in the Occupied Territories. This practice would appear to be used at least in part as a deterrent or punishment, thus raising issues under article 6.... The State party should not use 'targeted killings' as a deterrent or punishment. The State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities. State policy in this respect should be spelled out clearly in guidelines to regional military commanders, and complaints about disproportionate use of force should be investigated promptly by an independent body....").

³⁵⁷ Suárez de Guerrero v. Colombia, *supra* note 352, at para. 13.2 (noting that "There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned."). See also BAIR, *supra* note 355, at 20.

³⁵⁸ See e.g., Suárez de Guerrero v. Colombia, *supra* note 352, at para. 13.2.

³⁵⁹ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990), available at http://www.unhchr.ch/html/menu3/b/h_comp43.htm.

³⁶⁰ *Id.* at para. 9.

³⁶¹ Human Rights Committee, *Concluding Observations: Israel*, *supra* note 356, at para. 15. See also Suárez de Guerrero v. Colombia, *supra* note 352, at para. 13.2 ("the police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions").

³⁶² See Suárez de Guerrero v. Colombia, *supra* note 352, at para. 13.2.

³⁶³ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, *supra* note 359, Principle 4 ("Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result"); Principle 10 ("In the circumstances provided for under Principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident").

³⁶⁴ Suárez de Guerrero v. Colombia, *supra* note 352, at para. 13.1.

³⁶⁵ Human Rights Committee, General Comment No. 6: *The Right to Life (Art. 6)*, para. 3 (1982).

³⁶⁶ Chongwe v. Zambia, Communication No. 821/1998, Human Rights Committee, U.N. Doc. CCPR/C/70/D/821/1998 para. 5.2 (2000).

³⁶⁷ *Id.*

³⁶⁸ See, e.g., right to private and family life, home and correspondence (Article 8); the right to freedom of thought, conscience and religion (Article 9); the right to freedom of expression (Article 10); and the right to freedom of peaceful assembly, freedom of association and the right to form and join trade unions (Article 11).

- ³⁶⁹ McCann v. the United Kingdom, 21 Eur. Ct. H.R. (Ser. B) 97, paras. 149 – 150 (1996). *See also* Andronicou and Constantinou v. Cyprus, App. No. 25052/94, 25 Eur. H.R. Rep. 491, para. 171 (1997)
- ³⁷⁰ Nachova v. Bulgaria, Grand Chamber, *supra* note 174, at para. 95.
- ³⁷¹ Güleç v. Turkey (1999) 28 Eur. H.R. Rep. 121, para. 78 (1999).
- ³⁷² McCann v. the United Kingdom, *supra* note 369, at para. 149.
- ³⁷³ *Id.* at para. 211. *See also Report of U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, supra* note 12, at para. 50.
- ³⁷⁴ McCann v. the United Kingdom, *supra* note 369, at para. 211.
- ³⁷⁵ *Id.* at para. 194.
- ³⁷⁶ *Id.* at para. 200. *See also* Andronicou and Constantinou v. Cyprus, *supra* note 369, at para. 192 (reiterating that the test is whether an officer has an “honest belief which is perceived, for good reasons, to be valid at the time...”).
- ³⁷⁷ McCann v. the United Kingdom, *supra* note 369, at para. 213,
- ³⁷⁸ Minutes of MPA Sept. 29, 2005 Meeting, *supra* note 43; MPA, Internal Briefing Note, *supra* note 71 (noting that implementation is “on an intelligence led basis, backing up senior level decision making. All police officers who may be involved in using these tactics are fully and specially trained. There are clear guidelines and authorization levels that are in place”); ACPO, Kratos Briefing Note, *supra* note 47 (noting that “tactics are designed to be used on intelligence led basis. They are not implemented at random, but as a result of intelligence and backed up by senior decision making. They include specialized tactics for both response to the sudden appearance of a suspect where intelligence suggests that they may be about to commit a deadly attack, and for surveillance of suspects identified through intelligence.”).
- ³⁷⁹ *See, e.g.,* Velásquez Rodríguez, *supra* note 95 and Godinez Cruz v. Honduras I, Inter-Am. Ct. H.R. (Ser. C) No. 5 (Jan. 20, 1989) (on the positive obligations on states imposed by the right to life enshrined in Article 4, including the duty to investigate and compensate the unlawful taking of life).
- ³⁸⁰ Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, *supra* note 156, at paras. 86-7 (“[I]n situations where a state’s population is threatened by violence, the state has the right and obligation to protect the population against such threats ... and in so doing may use lethal force in certain situations. This includes, for example, the use of lethal force by law enforcement officials where strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury ... or to otherwise maintain law and order where strictly necessary and proportionate.”). The Commission adds that the use of lethal force by State agents may be warranted in circumstances requiring the protection of persons from imminent threat of death or serious injury: “the state may resort to the use of force only against individuals that threaten the security of all, and therefore the state may not use force against civilians who do not present such a threat. The state must distinguish between the civilians and those individuals who constitute the threat”: *id.* at para. 90.
- ³⁸¹ *Id.* at para. 92 (“the amount of force used must be justified by the circumstances, for the purpose of, for example, self-defense or neutralizing or disarming the individuals involved in a violent confrontation. Excessive force, or disproportionate force by law enforcement officials that result in the loss of life may therefore amount to arbitrary deprivations of life.”).
- ³⁸² Tennessee v. Garner 471 U.S. 1 (1985).
- ³⁸³ *Id.* at 3.
- ³⁸⁴ *See infra* note 230.
- ³⁸⁵ Tennessee v. Garner, *supra* note 382, at 11.
- ³⁸⁶ *Id.* at 8.
- ³⁸⁷ Graham v. Connor 490 U.S. 386, 396 (1989).
- ³⁸⁸ *See, e.g.,* Seattle Police Dep’t, Section 1.145 Chapter 145 – Use of Force 1 (2006), POLICY AND PROCEDURE MANUAL, *supra* note 256.
- ³⁸⁹ Los Angeles Police Dep’t, MANUAL OF THE LOS ANGELES POLICE DEP’T, VOLUME 1, 7, *supra* note 256.
- ³⁹⁰ IACP, Training Key 277: Use of Deadly Force (hereinafter “Training Key 277”) (copy on file with CHRJ) and IACP, Training Key 278: Improper Use of Deadly Force (hereinafter “Training Key 278”) (copy on file with CHRJ).
- ³⁹¹ Training Key 277, *supra* note 390.
- ³⁹² Training Key 278, *supra* note 390.
- ³⁹³ *Id.* (discusses in detail the various potential legal consequences that an officer who uses excessive force may face). *See also* Training Key 277, *supra* note 390.

³⁹⁴ Training Key 582, *supra* note 14, at 2.

³⁹⁵ See *Report of U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, *supra* note 12, at para. 49 (explaining that the use of warnings and the requirement that a threat be imminent before lethal force is engaged serve as safeguards against the improper use of force and arguing that the IACP guidelines strip “the use of lethal force of its usual safeguards”).

³⁹⁶ *Id.* at para. 50.

³⁹⁷ See *infra* note 74 and accompanying text.

³⁹⁸ See *infra* notes 75 – 76 and accompanying text.

³⁹⁹ See e.g., discussion in *Report of U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, *supra* note 12, at para. 49.

⁴⁰⁰ See *id.* at para. 49 (noting that the training documents remove the usual use of force safeguards without offering “alternative safeguards”).

⁴⁰¹ Training Key 582, *supra* note 14, at 2.

⁴⁰² See *infra* notes 281 - 299 and accompanying text.

⁴⁰³ Training Key 581, *supra* note 13, at 4.

⁴⁰⁴ *Report of U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, *supra* note 12, at para. 50 (highlighting the indicators used by the guidelines and the fact that, because many innocent people fit these descriptions, there is a heightened risk of “false alarms”).

⁴⁰⁵ Training Key 581, *supra* note 13, at 5.

⁴⁰⁶ See e.g., David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1079 (1999) (reviewing the Drug Enforcement Administration’s drug courier profiles based on agents’ testimony and concluding that when put together, the list of potential factors that justified investigative stops were extremely broad and internally inconsistent, such that these factors do not meaningfully narrow the field of potential suspects and instead leave officers a lot of discretion to rely on their own personal attitudes and stereotypes).

⁴⁰⁷ Training Key 581, *supra* note 13, at 5.

⁴⁰⁸ *Id.* at 2.

⁴⁰⁹ *Id.* at 5.

⁴¹⁰ *Id.* at 4.

⁴¹¹ *Id.* at 4, 5.

⁴¹² See Cole, *supra* note 406, at 1078 (reviewing the Drug Enforcement Administration’s drug courier profiles based on agents’ testimony identifying the following list of factors justifying stops: “[A]rrived late at night; arrived early in the morning; arrived in the afternoon; one of the first to deplane; one of the last to deplane; deplaned in the middle; purchased ticket at the airport; made reservation on short notice; bought coach ticket; bought first-class ticket; used one-way ticket; used round-trip ticket; paid for ticket with cash; paid for ticket with small denomination currency; paid for ticket with large denomination currency; made local telephone calls after deplaning; made long distance telephone calls after deplaning; pretended to make telephone call; traveled from New York to Los Angeles; traveled to Houston; carried no luggage; carried brand-new luggage; carried a small bag; carried a medium-sized bag; carried two bulky garment bags; carried two heavy suitcases; carried four pieces of luggage; overly protective of luggage; disassociated self from luggage; traveled alone; traveled with a companion; acted too nervous; acted too calm; made eye contact with officer; avoided making eye contact with officer; wore expensive clothing and jewelry; dressed casually; went to restroom after deplaning; walked rapidly through airport; walked slowly through airport; walked aimlessly through airport; left airport by taxi; left airport by limousine; left airport by private car; left airport by hotel courtesy van; suspect was Hispanic; suspect was black female.”).

⁴¹³ See *infra* note 2 and accompanying text.

⁴¹⁴ See *infra* notes 8 – 11 and accompanying text.

⁴¹⁵ See *Report of U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, *supra* note 12, at para. 50 (emphasizing that mere suspicion is insufficient to justify the use of lethal force).

⁴¹⁶ *Id.* at para. 54

⁴¹⁷ *Id.* at para. 53. See also *infra* notes 375 - 377 and accompanying text.

⁴¹⁸ *White House backs air marshals' actions*, *supra* note 8.

⁴¹⁹ Keith L. Alexander, *Shooting is Defended But Gets Mixed Reviews*, WASH. POST, Dec. 8, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/07/AR2005120702565.html>.