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Embargoed for release:
12:00 A.M. EST MAY 10, 2006
May 8, 2006
N-389 2005-06

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MINORITIES WILL BEAR THE BRUNT OF "SHOOT-TO-KILL" POLICIES

NEW REPORT DOCUMENTS DANGEROUS TREND TO SUBSTITUTE RELIABLE INTELLIGENCE WITH STEREOTYPED PROFILES OF TERRORISTS

"Shoot-to-Kill" policies discriminate against minorities and violate legal norms on the use of lethal force, the NYU Center for Human Rights and Global Justice (CHRGJ) charged in a report released today. The 71-page report, "Irreversible Consequences: Racial Profiling and Lethal Force in the 'War on Terror'," critiques Training Keys issued by the International Association of Chiefs of Police (IACP) that guide police officers on how to detect and neutralize a suspected suicide bomber.

The IACP is the world's oldest and largest nonprofit organization of police executives with over 20,000 members in over 101 countries. The IACP trains law enforcement officers in the U.S. and abroad with a view to promoting the exchange of best practices. The Training Keys 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.

Officers are told to look for specific behavioral and physical characteristics to identify threats, and then aim at the suspect's head and shoot-to-kill. The Training Keys are reflective of "Shoot-to-Kill" policies that have emerged in the wake of September 11, 2001. 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, the U.K. revealed the existence of its national "Shoot-to-Kill" policy named Operation Kratos, which includes behavioral indicators similar to those found in the Training Keys. In late 2005 the U.S. National Bomb Squad Commanders Advisory Board issued and distributed the first national protocol on suicide bomber response. Also in 2005, reports surfaced that the U.S. Capitol Police had become the first U.S. police department to adopt a "Shoot-to-Kill" policy for dealing with suspected suicide bombers. Other U.S. law enforcement agencies are considering following suit. On Thursday, May 11 the U.K. government is expected to release the results of its official inquiries into the London bombings, which will include wide-ranging recommendations on how security services can better respond to terrorism threats.

The CHRGJ report was co-authored by NYU Center for Human Rights and Global Justice Faculty Director and Professor Smita Narula, Research Director Jayne Huckerby, Vrinda Grover, and Adrian Friedman. According to the report, contrary to accepted legal norms, the Training Keys promote 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 such a threat on the basis of overly-broad and conflicting physical and behavioral characteristics, that will in the overwhelming number of cases target Muslims, Arabs, and South Asians, or those perceived to fit into these categories. The report concludes that behavioral indicators found in the Training Keys, which make explicit references to Muslims, are in fact proxies for racial, ethnic, and religious profiling.

"The power to deploy lethal force is an immense responsibility for any police officer," said Professor Smita Narula. "Instead of giving officers sufficient guidance in the exercise of this responsibility, behavioral indicators substitute reliable intelligence with stereotyped profiles that encourage officers to treat innocent behavior as threatening."

According to the report, the indicators contained in the Training Keys are overly-broad and prone to error. Officers are told to look for individuals who wear bulky clothing in the summer, pace back and forth, fidget with something beneath their clothing, fail to make eye contact, wear too much cologne, or have strange hair coloring. The indicators are also 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 (those who mumble as if praying or who wear scented water for “ritual purification”) *and* individuals who seem to hide their Muslim identity so as to blend in.

In sum, the guidelines are meaningless to officers who only have a few seconds to decide whether an individual constitutes a real threat before deploying lethal force. “The lack of real guidance leaves officers to rely on their own assumptions and stereotypes on whom to treat as suspect. Studies have shown that officers will use racial and other stereotypes to read non-threatening behavior as criminal or threatening,” said Jayne Huckerby.

“The identification of suspects cannot be based on confusing indicators, or on the assumption that all Muslims, or those perceived to be Muslim, are potentially terrorists,” Narula added. “If people can be shot on the basis of these assumptions, mistakes are bound to be made.”

The potential for error has already been borne out in incidents in London and Miami. On July 22, 2005 Jean Charles de Menezes, a Brazilian national, was shot and killed by police officers in London. The police initially claimed that they suspected de Menezes because he was wearing a bulky jacket that could have been concealing a bomb. Factors such as “mumbling,” “pacing back and forth,” and “being overly protective of one’s baggage” could also lead to the erroneous targeting of the mentally ill, as was demonstrated when Rigoberto Alpizar, an airline passenger with bi-polar disorder, was shot and killed by U.S. federal air marshals in Miami on December 7, 2005.

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, Arab, or South Asian men. In the “war on terror,” individuals profiled on the basis of their race, religion, ethnicity, and/or nationality 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.

According to the report, “profiling 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.”

“Profiling in the context of a ‘Shoot-to-Kill’ policy threatens the ultimate sanction—death by extrajudicial execution. The irreversible consequences of such a policy necessitate that police officers discharge lethal force only when necessary and only on the basis of reliable intelligence,” added Huckerby.

“Behavior pattern recognition” is already being introduced in airport and transportation security in the United States, and in counter terrorism operations in the United Kingdom. According to the report, 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.

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.”

“Fundamental rights must not become casualties to the politics of fear that have characterized states’ responses to the ‘war on terror,’” Narula commented. “Only a faithful adherence to human rights norms can help ensure that *all* persons are truly secure and protected.”

The full report can be downloaded at www.chrgj.org

The Center for Human Rights and Global Justice (CHRGJ) at NYU School of Law 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.



CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE

NEW YORK UNIVERSITY SCHOOL OF LAW

WRITTEN SUBMISSION TO HUMAN RIGHTS COMMITTEE, 87TH SESSION, JULY 2006

Racial Profiling and Lethal Force in the 'War on Terror'

I. Introduction

1. This note is submitted to the United Nations (U.N.) Human Rights Committee (Committee) for the Committee's examination of the second and third periodic reports of the United States (U.S.) at its 87th session in July 2006. It is also hoped that the contents of this note will assist with other aspects of the work of the Committee on the topics set out below.
2. This note briefly addresses how "shoot-to-kill" policies with respect to suspected suicide bombers may potentially violate Articles 2, 6 and 26 of the International Covenant on Civil and Political Rights (ICCPR).
3. The contents of this note are based on a May 2006 report released by New York University School of Law's Center for Human Rights and Global Justice (CHRGJ) entitled *Irreversible Consequences: Racial Profiling and Lethal Force in the 'War on Terror'* (attached).¹ This report critiques two trends in "shoot-to-kill" policies that are embodied in Training Keys issued by the International Association of Chiefs of Police (IACP)²:
 - a. The use of certain behavioral and other indicators to detect a suicide bomber that act as proxies for religious, racial, ethnic and nationality profiling; and
 - b. Removal of the usual safeguards that attach to the use of force when responding to the threat of suicide bombers.

II. "Shoot-to-kill" policies and incidents: General

4. 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.³ For example, 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 revealed the existence of a national "shoot-to-kill" policy named Operation Kratos.⁴

5. 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. While not official government policy, the IACP Training Keys provide a useful insight into the content of these policies, as they are representative of “shoot-to-kill” policies that have emerged in the wake of September 11, 2001.⁵ The IACP Training Keys also have the potential to influence the adoption and implementation of future “shoot-to-kill” policies by U.S. police departments. This is because U.S. police departments are currently debating the adoption of such policies (see below paragraph 11); police officers are increasingly relied upon (and receive training in) counter-terrorism activities;⁶ local police departments have independent authority to adopt and implement use of force policies;⁷ and the IACP is extensively involved in the training of U.S. police officers, including training on the use of force.⁸
6. As mentioned above in paragraph 3, the IACP Training Keys are emblematic of two trends in “shoot-to-kill” policies: first, the use of certain behavioral and other indicators to detect a suicide bomber; and second, the removal of use of force safeguards. 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, the Training Keys promote 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.⁹ Instead, officers are encouraged to infer the existence of the “capability to detonate” a bomb or the *threat* of such use¹⁰ 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.
7. The types of physical and behavioral characteristics listed in the Training Keys that should be cause for concern 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;
 - being overly protective of one’s baggage; and
 - religious behavior e.g. “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).”¹¹

When read in conjunction with other parts of the Training Keys that make explicit references to “shahid,”¹² “jihad”¹³ and “Muslim zealot,”¹⁴ the use of these indicators will lead to the disproportionate targeting of Muslims or those perceived to be Muslim.

The Training Keys also remove the “usual safeguards” that normally attach to the use of force. Specifically the Training Keys:

- Reject the requirement that the threat be imminent;
- Omit reference to the requirement that lethal force be “necessary;”

- Fail to ensure that responses to potential suicide bombers will be intelligence-led and instead focus on ill-conceived stereotypes and behavioral indicators that are contradictory, over-broad, biased, and prone to error;
 - Do not reflect on the importance and nature of a command structure to ensure that uses of force are appropriately controlled; and
 - Fail to contemplate the wide-range of potential suicide bomber scenarios or the wide range of responses that these scenarios may attract.
8. Both the prevalence of “shoot-to-kill” policies and the representative nature and problematic aspects of the IACP Training Keys in particular have been recently addressed by the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.¹⁵

III. “Shoot-to-kill” policies and incidents: the U.S.

Behavioral Indicators

9. 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 January 2004 in the U.S., Boston’s Logan airport became a test case for the use of behavioral indicators by Federal Air Marshals in air-transit security.¹⁶ The U.S. Transportation Security Administration (TSA) also intends to introduce purportedly race-neutral behavioral profiling more widely.¹⁷ 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.”¹⁸

“Shoot-to-Kill” Policies and Incidents

10. The U.S. National Bomb Squad Commanders Advisory Board issued the first national protocol for suicide bombers response in late 2005.¹⁹ The U.S. Capitol Police adopted a “shoot-to-kill” policy for suicide bombers in February 2004.²⁰ 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.”²¹
11. 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.²²
12. On December 7, 2005, U.S. Federal Air Marshals shot and killed Rigoberto Alpizar, a 44-year-old U.S. citizen of Costa Rican descent. Prior to the shooting, Alpizar and his wife had 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.²³ 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.²⁴ After being removed from the plane, Alpizar was shot and killed on the jetway, allegedly as he was reaching for his bag.²⁵ Different accounts exist as to whether Alpizar claimed he had a bomb.²⁶ On 23 May 2006, the staffing/review team investigating events at the Miami-Dade State Attorney’s Office determined that “the shooting officers were legally justified in their use of force and no criminal charges will be filed.”²⁷

IV. “Shoot-to-Kill” Policies and the ICCPR

Behavioral Indicators

13. “Shoot-to-kill” policies which rely on facially neutral behavioral indicators to identify a suicide bomber may act as proxies for racial, ethnic, religious or nationality profiling in violation of Articles 2 and 26 of the ICCPR. The ICCPR has been interpreted to prohibit both direct and indirect discrimination²⁸ on all of these grounds,²⁹ and requires that differentiations be based on reasonable and objective criteria³⁰ and be directed to a legitimate purpose in order to be justified.³¹
14. 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.³² It has already been alleged, for example that the behavioral identification system at Logan Airport “effectively condones and encourages racial and ethnic profiling.”³³
15. Indeed, 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. Further, the nature of behavioral indicators which law enforcement officers are typically instructed to find suspicious (e.g. avoidance of eye contact or displays of fear and nervousness) may more readily attach to particular communities and result in their disproportionate targeting. For example, for Arab persons the avoidance of eye contact may be a sign of respect³⁴ and members of minority communities may be more likely than members of the majority to be fearful in their interactions with police authorities.³⁵ These considerations make it very likely that such indicators will have the purpose or effect of disproportionately burdening Muslims, Arabs and South Asians or those perceived to fit these categories.
16. The differentiation that results from such measures is not justified. The following factors demonstrate that profiling on the basis of race, ethnicity, nationality or religion is a measure that is neither objective, nor reasonable, nor proportional. While the conclusions in this section draw primarily on U.S. examples, the reasoning that underlies these conclusions is applicable to the problem of racial profiling and the “War on Terror” more generally.
 - a. 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;
 - For example, it is well documented that the widespread round ups and questioning of thousands of young Arab and Muslim men in the U.S. immediately after the events of September 11, 2001 did not result in a single charge related to terrorist activity.³⁶
 - b. Profiling compromises the ability of police to work with communities to identify terrorism threats;
 - Profiling undermines the police’s capacity to establish trust with the communities that they have identified as sources of information on security threats.³⁷ This trust has already been compromised by widespread law enforcement operations targeted at particular racial, ethnic and religious groups.³⁸

- c. Profiling diverts limited law enforcement resources away from identifying real threats to national security; and
 - Profiling diverts limited law enforcement resources;³⁹ 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;⁴⁰ and encourages the reporting of frivolous “tips” by members of the general public that further divert law enforcement resources, and in some cases have led to the arbitrary detention of those profiled by the general public.⁴¹
- d. Profiling institutionalizes prejudice and legitimizes the prejudicial behavior of the general public.
 - 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, 2001.⁴² These bias incidents have continued since this period and although less physical in nature, they continue to include discrimination in employment and housing⁴³ and are legitimized by both the State and the intellectual elite.⁴⁴

Use of Lethal Force

17. Policies that instruct law enforcement on how to respond to potential suicide bombers must not remove the usual safeguards that attach to the use of force. These requirements include:
 - a. Proportionality,⁴⁵ including in the context of use of force against terrorism suspects;⁴⁶
 - b. Necessity;⁴⁷ and
 - c. Use of non-lethal means where feasible.⁴⁸
18. Removing the requirements that a threat is imminent and that lethal force is “necessary”, and encouraging the use of lethal force on the basis of mere suspicion or failing to require a reasonable basis to believe that the suspect even *has* a bomb to detonate, strip the use of force of its usual safeguards.
19. This removal or watering down of safeguards on the use of lethal force 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 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.

V. Recommended Questions

20. Following on from paragraphs 4⁴⁹ and 15⁵⁰ of the Committee's List of Issues, the Committee may wish to ask questions or adopt conclusions that encourage the U.S. to:
- a. Make public the existence and content of any "shoot-to-kill" policies and any plans to introduce these policies. In this regard, the Committee may wish to reiterate the need for transparency and open dialogue around measures that have the potential to affect the security of persons in the community;
 - b. Ensure that police officers are sufficiently trained on the prohibitions against racial profiling and the arbitrary use of deadly force;
 - c. Ensure that law enforcement officers do not substitute reliable intelligence with behavioral indicators that operate as proxies for racial, ethnic, and religious profiling;
 - d. 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; and
 - e. Publicly investigate allegations of racial profiling and illegal uses of force in all counter-terrorism measures and prosecute those found responsible for these violations. In this regard, the Committee may wish to refer to the conduct of the U.S. in relation to the Alpizar case, where officials made statements in support of the air marshals' actions even before an investigation into the incident was concluded and the report of that investigation was issued.⁵¹

About CHRGI

The Center for Human Rights and Global Justice (CHRGI) at NYU School of Law 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 CHRGI 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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¹ This report is available at <http://www.nyuhr.org/docs/CHRGJ%20Irreversible%20Consequences.pdf>.

² IACP, *Training Key 581: Suicide (Homicide) Bombers: Part 1* (2005), available at <http://www.theiacp.org/pubinfo/IACP581SuicideBombersPart1.pdf>; IACP, *Training Key 582: Suicide (Homicide) Bombers: Part II* (2005), available at <http://www.theiacp.org/pubinfo/IACP582SuicideBombersPart2.pdf>. The IACP is the world's oldest and largest nonprofit organization of police executives, with close to 20,000 members in 101 countries: 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/>.

³ 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).

⁴ See generally, Metropolitan Police Authority (MPA), *Minutes of Meeting held Sept. 29, 2005*, available at <http://www.mpa.gov.uk/committees/mpa/2005/050929/minutes.htm>.

⁵ Report of U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 3, at para. 49 (describing the IACP guidelines as “representative of shoot-to-kill thinking”).

⁶ See, e.g., *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 (recording that the 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).

⁷ See 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>.

⁸ See IACP, 2006 Training Catalog, 19, available at <http://www.theiacp.org/Training/2006IACPTrainingCatalog.pdf>; 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.

⁹ *Training Key 582: Suicide (Homicide) Bombers: Part II*, *supra* note 2, at 2.

¹⁰ *Id.*

¹¹ *Training Key 581: Suicide (Homicide) Bombers: Part I*, *supra* note 2, at 3 – 5.

¹² *Id.* at 2.

¹³ *Id.*

¹⁴ *Id.* at 5.

¹⁵ Report of U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 3.

¹⁶ 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.

¹⁷ 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/homsec/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>.

¹⁸ ACLU, *SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11* 3 (2004) (hereinafter “ACLU, SANCTIONED BIAS”) available at <http://www.aclu.org/safefree/resources/17017pub20040226.html>.

¹⁹ See Horwitz, *supra* note 7 (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.*).

²⁰ See Horwitz, *supra* note 7. See also John McArdle, *Hill Cops May 'Shoot to Kill'*, ROLL CALL, Nov. 3, 2005 (stating that this policy was "enacted" in February 2004).

²¹ McArdle, *supra* note 20.

²² See Horwitz, *supra* note 7 (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.").

²³ *White House backs air marshals' actions*, CNN, Dec. 9, 2005, available at <http://www.cnn.com/2005/US/12/08/airplane.gunshot/index.html>.

²⁴ Curt Anderson, *Passenger: Alpizar Was Agitated at Gate*, ABC NEWS, Dec. 8, 2005, available at <http://abcnews.go.com/US/wireStory?id=1387695>.

²⁵ *Man shot dead at Florida airport*, BBC NEWS, Dec. 8, 2005, available at <http://news.bbc.co.uk/2/hi/americas/4508432.stm>.

²⁶ See *Interoffice memorandum from the State Attorney Katherine Fernandez Rundle*, May 23, 2006, available at <http://www.miamisao.com/publications/press/2006/airmarshalshooting.pdf>

²⁷ *Id.*

²⁸ See, e.g., Human Rights Committee, General Comment No. 18, *Non-discrimination* para. 7 (1989) (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.").

²⁹ See ICCPR, Articles 2(1) and 26. On the prohibition of discrimination on the basis of nationality see generally Human Rights Committee, General Comment No. 15, *The position of aliens under the Covenant* (1986); Ibrahim 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).

³⁰ 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 29, 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.”).

³¹ Human Rights Committee, General Comment No. 18, *supra* note 28, at para. 13.

³² See, e.g., 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...”).

³³ 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>.

³⁴ 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.”).

³⁵ VERA INSTITUTE OF JUSTICE, BUILDING STRONGER POLICE – IMMIGRANT COMMUNITY RELATIONS: EXPERIENCES FROM A NEW YORK CITY PROJECT 3 (2005) available at http://www.vera.org/publication_pdf/300_564.pdf (highlighting fear of deportation, negative experiences with the justice system in their place of origin, 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, (2005), available at http://www.lapdonline.org/assets/pdf/Table_of_Contents.pdf (click on Volume 1) (recognizing that the reasons behind an individual’s reluctance to interact with or respond to the police may be benign).

³⁶ See Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative* 29 N.Y.U. REV. L. & SOC. CHANGE 573, 579 (2005). In this 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. Only three criminal charges were brought as a consequence of these interviews; none relating to terrorist activity.

³⁷ See *id.*, at 575n11; Cynthia Lee, *But I Thought He Had a Gun: Race and Police Use of Deadly Force*, 2 HASTINGS RACE & POVERTY L.J. 1, 5 (2004). 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.”

³⁸ 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).

³⁹ 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). 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.”).

⁴⁰ 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).

⁴¹ ACLU, SANCTIONED BIAS, *supra* note 18, 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).

⁴² *See, e.g.*, United States, Second and Third periodic reports to the U.N. Human Rights Committee, para. 336, CCPR/C/USA/3, available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/01e6a2b492ba27e5c12570fc003f558b/\\$FILE/G0545268.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/01e6a2b492ba27e5c12570fc003f558b/$FILE/G0545268.pdf)

⁴³ Muneer Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion* 92 CALIF. L. REV. n9 (2004). 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.: *Report by Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, U.N. Doc. E/CN.4/2004/19, 2 (2004) available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.2004.19.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2004.19.En?Opendocument).

⁴⁴ *Id.*

⁴⁵ *See* 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. 13.3 (1982) (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); DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 342 (1991); MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 111 (1993).

⁴⁶ *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....").

⁴⁷ Suárez de Guerrero v. Colombia, *supra* note 45, 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 45, at 20. *The U.N.*

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, 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."

⁴⁸ Human Rights Committee, *Concluding Observations: Israel*, *supra* note 46, at para. 15. *See also* Suárez de Guerrero v. Colombia, *supra* note 45, 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"). The *U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, *supra* note 47, 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.

⁴⁹ Human Rights Committee, *List of issues: CCPR/C/USA/Q/3*, 30 March 2006 (para. 4. "Please indicate in detail how the State Party ensures full respect for the rights enshrined in the Covenant in relation to its actions to combat terrorism (a) in Afghanistan; (b) in Iraq, (c) in any other place outside its territory, and (d) on its own territory, in particular when it holds detainees. In particular, please comment on the allegation that the State party has established secret detention facilities, on U.S. vessels and aircrafts as well as outside the U.S., and that it has not acknowledged

all detentions of individuals captured within the framework of counter-terrorism activities. How would such practices comply with the Covenant, in particular with articles 7, 9 and 10?”).

⁵⁰ *Id.* (para. 15. “What measures has the State party adopted to assess and eliminate reported practices of racial profiling by law enforcement officials, in particular in the administration of the criminal justice system?”).

⁵¹ *White House backs air marshals' actions, supra* note 23.