

A HUMAN RIGHTS GUIDE FOR RESEARCHING RACIAL AND RELIGIOUS DISCRIMINATION IN COUNTER-TERRORISM IN EUROPE

**OPEN SOCIETY
FOUNDATIONS**

**AMNESTY
INTERNATIONAL**



Published February 2021

© 2021 Amnesty International and the Open Society Foundations

This publication is available as a PDF on the Amnesty International and Open Society Foundations websites under a Creative Commons license that allows copying and distributing the publication, only in its entirety, as long as it is attributed to Amnesty International and the Open Society Foundations and used for noncommercial educational or public policy purposes. Photographs may not be used separately from the publication.



A Human Rights Guide for Researching Racial and Religious Discrimination in Counter-Terrorism in Europe

Table of Contents

Glossary of frequently used acronyms	7
Foreword	
Tendayi Achiume and Fionnuala Ní Aoláin	8
Foreword	
Momodou Malcolm Jallow	10
Acknowledgements	11
1. Introduction	12
1.1. Background	12
1.2. The guide	15
1.2.1. Why is there a need for this guide?	15
1.2.2. How was the guide developed?	16
1.2.3. Organisation of this guide	16
1.2.4. Who should use this guide?	17
2. Discrimination: legal standards and key definitions	22
2.1. Legal standards	22
2.1.1. The principle of equality and non-discrimination	22
2.1.2. International and regional legal instruments	23
2.1.3. The prohibition on discrimination in the counter-terrorism context	27
2.2. Defining discrimination	29
2.2.1. Elements of discrimination	29
2.2.1.1. 'Any distinction, exclusion, restriction or preference' or 'less favourable treatment'	29
2.2.1.2. Based on prohibited grounds	30
2.2.1.3. Without objective and reasonable justification	31
2.2.1.4. Relevance of intent	32
2.2.2. Forms of discrimination	32
2.2.2.1. Direct discrimination	32
2.2.2.2. Indirect discrimination	33
2.2.2.3. Multiple, intersectional, and systemic discrimination	33
2.2.2.4. Harassment	35
2.2.3. Ethnic profiling	37

3. Demonstrating discrimination in the counter-terrorism context	39
3.1. Introduction	39
3.2. What needs to be demonstrated?	39
3.2.1. Less favourable treatment	39
3.2.2. Based on prohibited grounds	40
3.2.2.1. Race and religion-counter-terrorism and Muslims in Europe	40
3.2.2.2. Other grounds of discrimination in the counter-terrorism context	44
3.2.2.3. A causal link	47
3.2.3. Without objective and reasonable justification	47
3.2.3.1. Level of scrutiny	48
3.2.3.2. Legitimate aim	48
3.2.3.3. Appropriateness	49
3.2.3.4. Necessity	51
3.2.3.5. Proportionality	52
3.2.4. Burden of proof	53
3.3. How to demonstrate discrimination	54
3.3.1. Introduction	54
3.3.2. Laws and policies that explicitly target certain groups	55
3.3.2.1. Application in the counter-terrorism context	56
3.3.3. Comparators	56
3.3.3.1. Application to the counter-terrorism context	58
3.3.4. Use of stereotypes	62
3.3.4.1. Application in the counter-terrorism context	65
3.3.5. General context	66
3.3.5.1. Application in the counter-terrorism context	67
3.3.6. Sources	68
3.3.6.1. Interviews	68
3.3.6.2. Documentary evidence	70
3.3.6.3. Statements by authorities	72
3.3.6.4. Quantitative data	78
3.3.6.5. Testing and observation	85

4. Challenges	88
4.1. The ‘common sense’ defence	88
4.2. Lack of available evidence	90
4.3. Non-disclosure of evidence on national security grounds	92
4.4. Limited oversight and accountability in the counter-terrorism context	98
4.5. Structural nature of discrimination	100
5. Conclusion and key recommendations	102
5.1. Human rights organisations, researchers, and advocates	102
5.2. Oversight and accountability mechanisms	104
Annex 1: Non-discrimination provisions in international and regional legal instruments	105
Annex 2: Relevant handbooks and research guides on discrimination law	107

Glossary of frequently used acronyms

CEDAW	UN Convention on the Elimination of Discrimination Against Women
CERD	UN Committee on the Elimination of All Forms of Racial Discrimination
CESCR	UN Committee on Economic, Social, and Cultural Rights
CJEU	Court of Justice of the European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECRI	European Commission Against Racism and Intolerance
EU	European Union
FRA	EU Agency for Fundamental Rights
HRC	UN Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
IGO	Intergovernmental Organisation
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
ODIHR	OSCE Office for Democratic Institutions and Human Rights
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
UN	United Nations

Foreword

We consider it an honour and privilege to write the foreword to this timely and necessary human rights research guide. Human rights protections remain precarious and fragile across the globe, but never more so than in geographies that many have considered guardians for rights and safe places for ideas, norms, and practices of rights particularly for the most vulnerable. Producing this guide to address the perniciousness of discrimination on racial, ethnic, religious, and national origin bases in the European counter-terrorism context underscores the extent to which assumptions about where rights are 'safe' and where they are not are often regrettably unfounded.

We recognise that many European states have experienced profound security challenges in recent decades and that the violence and harm caused by terrorism have been painful for individuals, families, and communities. Yet, the response to these security challenges has been fraught and, in many contexts, harmful not only to individuals and communities but to the rule of law and to democracy itself. In particular, both our mandates have observed that the harms of security responses and counter-terrorism measures are not felt equally by all who call Europe their home. Rather, the costs of securitization and counter-terrorism have had identifiable and disparate impact on certain historically and socially marginalized groups perceived as 'threats' to national security. The resurgence of ethnonationalist populist movements across Europe, among other trends, has further unjustly cemented the treatment of certain racial, ethnic, and religious minority groups as dangerous 'outsiders.' As a result, too often a counter-terrorism apparatus that is facially neutral has resulted in human rights violations on a racially and religiously discriminatory basis. Counter-terrorism measures have been at the forefront of marginalizing, stigmatizing, and rendering further inequalities upon individuals, groups, and communities who are generally ill-equipped to challenge the

harms they experienced as a result of these state measures. Furthermore, racialized national security and counter-terrorism frameworks have all but neglected threats from extreme right-wing, white supremacist groups and individuals.

We are both profoundly aware that crisis enables states to take measures whose effects fall heaviest on those who are marginal and perceived as 'other' in society. Racial, ethnic, and religious minorities are particularly vulnerable to direct and indirect targeting from security and counter-terrorism measures. Notably, these are often the same communities that have well-founded histories of mistrust, abuse, and maltreatment from those agents of the state whose powers are augmented and enabled by counter-terrorism law and practice. As this guide amply demonstrates, legacies of harm and mistrust provide the bedrock upon which new patterns of injustice and discrimination are layered.

The guide meticulously documents that countering terrorism, which remains undefined, has been on a growth trajectory in Europe with no end in sight. It compromises ever-expanding criminal law, increasingly regulates the pre-criminal arenas, engages administrative systems, and finds its way into the capillaries of everyday life from health access, to classrooms, to houses of worship. The breadth of places where counter-terrorism regulation is applied reaches from air to shore and sea. In these multiplicities of places not all people are treated equally, and discriminatory practice flourishes, enabled by political discourses of 'othering' and of 'suspect' communities where suspicion is reserved for minority racial, ethnic, and religious communities. The guide rightly identifies and catalogues the discriminatory impacts on Muslim communities and those perceived to be Muslim, and most saliently provides a concrete roadmap of the patterns, prevalence, and systematic nature of discrimination. In doing so, the guide fills an evident gap given the willingness or inability of states to name and specify these experiences as racism and xenophobia, or more concretely

to acknowledge their systemic, embedded, and often intersectional nature. Particularly, the guide provides the tools to apply antidiscrimination law to the counter-terrorism field, offering a missing link that will be invaluable for those at the frontlines of pushing back against counter-terrorism using a human rights frame.

We hope that the guide will be taken up on the ground by civil society actors including human rights organisations and defenders, faith groups, humanitarians, and researchers to expand their existing toolkits so as to challenge systemic discrimination that racial, ethnic, and religious minorities experience because of a normalized (and accelerating) counter-terrorism architecture across Europe. The focus of the guide and, in particular, its enablement to ‘speak back to counter-terrorism’, offers practical strategies that have never been more needed.

The protection of human rights is essential to keep societies safe and secure. The vibrancy, inclusion, and protection of racial, ethnic, and religious minorities is a litmus test on the health of a democracy. Counter-terrorism shortcuts and nullification of rights cast long shadows on the rule of law. This guide offers practical solutions to expose and call to account the discriminatory harms of excessive and misdirected counter-terrorism. We commend the work and affirm its value.

Tendayi Achiume

Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance

Fionnuala Ní Aoláin

Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Foreword

A Human Rights Guide for Researching Racial and Religious Discrimination in Counter-Terrorism in Europe could not be more timely or more necessary. While governments in Europe and beyond spare no efforts in combating terrorism, these activities can also undermine people's fundamental freedoms and their ability to live together. We can only effectively fight terrorism by following international human rights standards that guarantee and preserve the rights of all members of society.

According to the OSCE/ODIHR publication, *Fighting Terrorism, Protecting Human Rights*, 'One of the side effects of terrorist activity and the international response to it has been the tendency to pit the ideas of liberty, human rights, and security against each other. The notion of human rights protection has often been presented as being in conflict with protection from terrorism. This is extremely misleading.'

Legislators and governments are always required, within the scope of their work, to take into account at all times internationally recognised human rights standards and freedoms. If they fail to do so, then they must be held accountable.

Sadly, there is a real risk that action against terrorism may lead to discrimination against certain individuals and groups. This risk must be prevented and addressed. We could never accept that some groups suffer the consequences of terrorism twice: the first time as direct targets, like the rest of the population, and the second time as victims of discrimination induced by countermeasures.

Providing researchers, human rights defenders, and all those committed to promoting equality with reliable guidance on how to detect and document discrimination is a commendable initiative. Used correctly, this publication

should help prevent and counter discrimination and protect those who are subject to unjustified and illegal treatment in the name of combatting terrorism.

This research 'largely focuses on discrimination against Muslims, as the most common form of discrimination in the counter-terrorism context in Europe.' Indeed, Muslims and those perceived as being Muslims are constantly and consistently scapegoated and presented as a threat to security. This adds to the other forms of discrimination that they face, only some of which are in the public eye, such as hate speech in political discourse.

Islamophobia is rife in Europe and is underestimated, often mistakenly viewed as unintentional or irrational. In fact, it is systemic and it may even become ideological, especially when instrumentalised by political figures for electoral gain. While unfair and damaging to the communities it directly targets, Islamophobia also undermines the social cohesion of entire societies.

In the coming months, the Parliamentary Assembly of the Council of Europe will step up efforts to combat this form of discrimination and start preparing a new report, *Countering Islamophobia in Europe*. This work will be carried out in close cooperation not only with national parliaments but also with civil society organisations and individual experts. We all have a role to play in eliminating the inequality and discrimination caused by counterterrorism measures. *A Human Rights Guide for Researching Racial and Religious Discrimination in Counter-Terrorism in Europe* will be an invaluable resource for our efforts to preserve social cohesion and protect fundamental rights.

Momodou Malcolm Jallow

General Rapporteur on Combating Racism and Intolerance, Parliamentary Assembly of the Council of Europe

Acknowledgements

Amnesty International and the Open Society Foundations thank all those who contributed time and expertise to this project.

Eda Seyhan, human rights lawyer and research consultant, was the primary researcher and author of this guide. **Cristina Goñi**, Regional Manager for Advocacy and Security Policy at Open Society Initiative for Europe, and **Julia Hall**, Researcher on Counter-Terrorism and Human Rights in the Europe Regional Office at Amnesty International, had overall responsibility for the project and reviewed the various versions of the guide on behalf of the Open Society Initiative for Europe and Amnesty International, respectively. **Tufyal Choudhury**, Associate Professor in Law at Durham University, and **Lanna Hollo**, Senior Legal Officer at the Open Society Justice Initiative, also undertook detailed reviews. Further internal reviews were conducted by **Simon Crowther**, Legal Advisor on Counter-Terrorism and Human Rights and **Chris Chapman**, Researcher/Advisor on Indigenous Peoples' Rights at Amnesty International. **Katharina Kirchberger**, Research, Campaigns and Communications Assistant in the European Regional Office at Amnesty International and **Nerea López de Vicuña** of the Open Society Initiative for Europe provided invaluable support.

Special thanks are due to the experts who authored the forewords for this research guide: **Tendayi Achiume**, UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance; **Momodou Malcolm Jallow**, General Rapporteur on Combating Racism and Intolerance, Parliamentary Assembly of the Council of Europe; and **Fionnuala Ní Aoláin**, UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

Amnesty International and the Open Society Foundations are particularly grateful to the many academics, lawyers, researchers, and activists who contributed a significant amount of their time and effort to this project:

Yasmine Ahmed, Former Executive Director, Rights & Security International

Patrick Ball, Director of Research, Human Rights Data Analysis Group

Slim Ben Achour, lawyer of the Paris bar and member of the French Lawyers Union

Michele Eken, former Aryeh Neier Fellow, Open Society Justice Initiative

Lilla Farkas, Senior expert on racial or ethnic origin, European Network of Legal Experts in gender equality and non-discrimination

Maryam H'Madoun, Policy Officer, Open Society Justice Initiative

Daniel Holder, Deputy Director, Committee on the Administration of Justice

Marie Mercat-Bruns, Affiliated Professor, Sciences Po Law School

Ojeaku Nwabuzo, Senior Research Officer, European Network Against Racism

Marco Perolini, Western Europe Researcher, Amnesty International

Sindyan Qasem, Research Associate, Freie Universität Berlin

Asim Qureshi, Research Director, CAGE

Francesco Ragazzi, Associate Professor in International Relations at the Institute of Political Science, Leiden University

Peter Rodrigues, Professor of Immigration Law, Leiden University

Amrit Singh, Director of Accountability, Liberty and Transparency, Open Society Justice Initiative

1. Introduction

1.1. Background

Discrimination against certain groups perceived as ‘threats’ to national security is a longstanding human rights concern. Governments across the globe have historically exploited crises, including in the aftermath of violent attacks, to target racial, ethnic, and religious minorities, under draconian counter-terrorism laws and policies that provide sweeping powers to law enforcement, intelligence actors, and states’ intelligence and security apparatus. As a result, discrimination against individuals and entire groups in the counter-terrorism context remains an entrenched problem adversely affecting people’s lives in dramatic ways, despite the high status of the prohibition on racial discrimination among the norms of international law.

This research guide is the outcome of a joint initiative between Amnesty International and the Open Society Foundations to provide guidance to human rights and antiracism activists, researchers, NGOs, and oversight bodies seeking to document and prove discrimination, as defined in human rights law, in the counter-terrorism context in Europe. The ever-expanding body of laws, policies, and practices that are justified on national security grounds—often serving as vehicles for both direct and indirect discrimination—include law enforcement and border control checks, expulsions, and deportations on national security or public order grounds, administrative measures such as control orders, expanded grounds for criminal prosecutions for terrorism offences, counter-radicalisation measures (including in education, health, and welfare settings), nationality-stripping, and various forms of monitoring and surveillance, including online. Many of these measures are imposed on people based on secret information to which they have little or no access.

Muslims and those perceived as Muslim have borne the brunt of an increasingly securitized Europe, particularly since the coordinated attacks in the United States on 11 September 2001¹ and violent attacks in a number

1 Before the 2000s, the focus of much counter-terrorism legislation, and cause of the vast majority of deaths from ‘terrorism’ in Western Europe were Neo-Nazi, nationalist/separatist and far-left groups. See <https://www.datagraver.com/case/people-killed-by-terrorism-per-year-in-western-europe-1970-2015>.

of European countries since then.² Lawful religious, cultural and political activities, and affiliations of Muslims in Europe have been construed as dangerous, and that label has been used to justify surveillance, arrest, expulsion, and other restrictions on their rights, sometimes in what authorities claim is a preventive manner with no intention of charging or prosecuting a person based on a reasonable suspicion of criminal activity.³ Muslim associations or those perceived as such have been shut down or threatened with closure.⁴ Muslims have been confined to their homes under curfews, prohibited from traveling outside their neighbourhoods and outside the country, ordered to report daily to the police, had their online speech monitored and, in some cases, have had their nationality revoked, stripping them of some of the most basic protections guaranteed by the state. In the majority of cases, the information upon which these measures are applied is secret. Neither the person subjected to the measure, nor their lawyer, has access to their complete security file, resulting in an inability to adequately challenge the restrictions and thus obtain an effective remedy for the human rights violations they have suffered. By constructing and reinforcing the notion of Muslims as a ‘threat’, such measures have helped create an

2 These attacks include, but are not limited to, the following:

- On 11 March 2004, coordinated attacks on the Madrid train network killed 193 people and injured over 2,000 others.
- On 7 July 2005, coordinated suicide attacks on the London Underground train network killed 52 people and injured over 700 others.
- On 13 November 2015, coordinated attacks killed 130 people in Paris, including 89 at the Bataclan theatre, and injured hundreds of others.
- On 22 March 2016, coordinated suicide attacks killed 32 people and injured over 300 at Brussels airport and a metro station in central Brussels, Belgium.
- On 14 July 2016, a man driving a truck deliberately ran over pedestrians in Nice, France, killing 86 people and injuring over 400.
- On 19 December 2016, a man drove a truck through a Christmas market in Berlin, killing 12 people and injuring over 50.
- On 22 May 2017, a man committed a suicide attack after a concert in the Manchester Arena, United Kingdom, killing 22 people and injuring over 500.
- From 16 to 21 August 2017, coordinated attacks in Barcelona and Cambril, Spain, killed 16 people and injured over 152 others.
- On 16 October 2020, a man killed a schoolteacher in Conflans-Sainte-Honorine, a north-west suburb of Paris.
- On 2 November 2020, a man killed 4 people and injured 23 others in a series of shootings in Vienna, Austria.

3 Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe*, EUR 01/5342/2017 (2017) <https://www.amnesty.org/download/Documents/EU-R0153422017ENGLISH.PDF>.

4 Amnesty International, *Austria/France: Measures Announced By The Governments Threaten Freedom Of Association*, EUR 01/3359/2020 (2020): ENAR, *Open Statement–EU’s statement of solidarity against terrorism recycles concerning narratives and discriminatory solutions*, (2020): See, e.g., L’Obs, ‘Qu’est-ce que BarakaCity, l’ONG humanitaire que Darmanin veut dissoudre avec le CCIF?’ (2020) <https://www.nouvelobs.com/mort-de-samuel-paty/20201019.OBS34922/qu-est-ce-que-barakacity-l-ong-humanitaire-que-darmanin-veut-dissoudre-avec-le-ccif.html>.

environment where Muslims are the subjects of virulent hate speech and vulnerable to public attacks.

United Nations and European institutions have widely acknowledged the discriminatory impact of counter-terrorism laws and policies. The Council of Europe's European Commission Against Racism and Intolerance (ECRI) 2018 annual report stressed that 'Islam and Muslims continue to be associated with radicalization, violence and terrorism' and that 'a dangerous "normalisation" of Islamophobic prejudice can be observed.'⁵ Yet discrimination has received far less attention than other rights violations in the counter-terrorism context in research conducted by human rights NGOs.⁶ In contrast, there is a wealth of social science evidence and studies by other civil society organisations linking national security measures and discrimination against Muslims.⁷

Why is there so little human rights-based research to support the claim that counter-terrorism laws and practices in Europe discriminate against Muslims? Firstly, discrimination can be hard to prove. The European Court of Human Rights (ECtHR) often does not address claims of discrimination under Article 14 (prohibition of discrimination) of the European Convention on Human Rights (ECHR) in a case if it has already found a violation of a substantive right. Lawyers generally find that discrimination is harder to prove than a violation of other rights, such as the right to liberty or right to freedom of expression, and consequently legal challenges to counter-terrorism are rarely brought on discrimination grounds, making the role of researchers, NGOs, and oversight bodies in documenting discriminatory impact even more important. The lack of transparency due to the reliance on secret evidence and opacity in decision-making, and the absence of procedural safeguards with the shift towards 'preventive' administrative measures, render research even more difficult.

5 ECRI, *Annual Report on ECRI's Activities Covering the Period from 1 January to 31 December 2018* (2019), p. 10.

6 Eijkman and Schuurman state that 'the effect of most counter-terrorism efforts on the rights and liberties of minorities is uncertain.': Quirine Eijkman and Bart Schuurman, 'Preventive Counter-Terrorism and Non-Discrimination in the European Union: A Call for Systematic Evaluation' (2011), ICCT-The Hague Research Paper, p. 16. One exception is a report on ethnic profiling, including in the counter-terrorism field, by the Open Society Justice Initiative, *Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory* (2009).

7 See, e.g., Arun Kundnani, *The Muslims are Coming! Islamophobia, Extremism and the Domestic War on Terror* (Verso, 2014); Azfar Shafi & Asim Qureshi, *Stranger than fiction: How 'pre-crime' approaches to 'Countering Violent Extremism' Institutionalise Islamophobia*, (Transnational Institute, 2020); Johanna Martine Lems, Laura Mijares Molina, Virtudes Téllez Delgado (2018), 'Constructing Subaltern Muslim Subjects: The Institutionalization of Islamophobia', *24:1 Revista de Estudios Inter-nacionales Mediterráneos*

There are also obstacles from within the human rights field. In 2006, then head of the European Roma Rights Centre (ERRC), Dimitrina Petrova wrote that ‘anti-discrimination and equality standards and surrounding issues are unfamiliar to the majority of the human rights community’ and that human rights advocates are ‘often confused as to the meaning and boundaries of the concept of discrimination.’⁸ Although there has been progress since then, this has been largely concentrated in the sphere of economic and social rights.⁹

1.2. The guide

1.2.1. Why is there a need for this guide?

The key purpose of this guide is to encourage human rights research on discrimination in the counter-terrorism context. Research is an important part of any strategy seeking to challenge discrimination—it allows for a better understanding of the causes and impacts of discrimination in the national security context, and better identification of effective remedies. The results of research can be used in legal challenges, in public communications, and in communications with decision-makers. All European countries have obligations under domestic and international law to promote and protect the right to equality and non-discrimination research can identify where these states fall short of their obligations and can be used in domestic and international advocacy. While there are limitations to using a legal framework (detailed in section 4.5), claims grounded in international human rights law are particularly discernible to decision-makers and oversight and accountability bodies. Furthermore, as governments in Europe often emphasise their commitment to antiracism and equality, allegations of racial discrimination, if well evidenced, can be very powerful in shaping the policy and media agenda and influencing public opinion.

Why use an antidiscrimination framework for human rights research when most counter-terrorism laws and practices can be challenged on other human rights grounds? Discrimination analysis allows human rights organisations to be more responsive to the concerns and needs of the most marginalised. In simple terms, ensuring the full enjoyment of human rights for all requires understanding differences in the way that human rights violations are experienced. Understanding these differences helps identify remedies that are more effective and tailored to the needs of those most impacted. The persistence of such differences can feed into a perception that human rights

8 Dimitrina Petrova, ‘Implementing Anti-Discrimination Law and the Human Rights Movement’ (2006) 17:1 *Helsinki Monitor* 19, p. 23.

9 See, e.g., the case brought by the ERRC against the Czech Republic in relation to the right to education: ECtHR, *D.H. and Others v. the Czech Republic* [GC], No. 57325/00, 13 November 2007.

protect some more than others, undermining support for human rights as a whole. Discrimination research may also reveal the root causes of human rights violations or structural issues underpinning systemic and structural racism that are otherwise obscured. As stated in section [1.1](#), there is little human rights law-based research to support the claim that counter-terrorism laws in Europe discriminate against Muslims—this guide aims to help researchers fill that gap.

1.2.2. How was the guide developed?

This research guide is the product of a joint initiative of Amnesty International and the Open Society Foundations aimed at facilitating and encouraging investigation of the discriminatory impact of European counter-terrorism laws and policies by civil society groups, specifically those with a human rights focus. The project began with a small meeting of legal, academic, and NGO experts in June 2019, followed by interviews and desk research culminating in the first draft of this research guide. A group of academics, researchers, and campaigners received an early draft of this guide in July 2020 and provided feedback. The guide was subsequently amended and subject to further internal reviews. It was published by Amnesty International and the Open Society Foundations with an online launch in February 2021.

The guide is based primarily on international human rights law but draws on regional legal instruments and domestic and regional case law. In view of the limited case law in Europe on discrimination in the counter-terrorism context, and advances in discrimination research and jurisprudence in other fields, the research guide refers to case law on discrimination in areas such as employment, access to goods and services and education, and cases from outside Europe. In doing so, the research guide facilitates the cross-fertilisation of valuable ideas and best practice across different jurisdictions that address various forms of discrimination.

1.2.3. Organisation of this guide

This research guide is composed of five main sections, including this introduction (section 1), and two annexes:

- [Section 2](#) introduces the basic principles of international discrimination law, outlining relevant international and regional legal standards, what elements constitute unlawful discrimination, and different forms of discrimination and ethnic profiling. It briefly discusses their application to the counter-terrorism context.
- [Section 3](#) details different methodologies and forms of evidence that can be used to establish a violation of the right to non-discrimination and analyses their utility in the national security context. It addresses

what must be demonstrated to establish a claim of discrimination in the counter-terrorism context and *how* this may be achieved.

- [Section 4](#) addresses common challenges facing researchers seeking to document and prove discrimination in the counter-terrorism context, including the counter-argument that focusing on certain groups is a ‘common sense’ response to terrorism and obstacles presented by the non-disclosure of evidence on national security grounds, and suggests strategies for overcoming these challenges.
- [Section 5](#) sets out a brief conclusion and key recommendations.
- [Annex 1](#) lists relevant international and regional legal instruments and their provisions on the prohibition of discrimination. [Annex 2](#) lists further resources for guidance on research and litigation on non-discrimination.

Recommendations for best practice appear throughout the text. In-depth case summaries also appear in the guide to aid readers in their understanding of how discrimination has been proved both in the counter-terrorism context outside Europe and in other contexts.

The terms ‘terrorist’, ‘terrorism’, ‘Islamist’, ‘extremism’, and ‘extremist’ are ill-defined, generally imprecise and, as a result, rife for misuse. Their use in this report is not an endorsement but is for ease of reference, as these terms routinely appear in legislation, policies, and academic research.

1.2.4. Who should use this guide?

This text is intended as a practical research guide for those conducting research and engaging in advocacy, campaigning, and litigation to end discrimination in the counter-terrorism field. Although based on human rights law, the guide is written to appeal to those without legal expertise and legal practitioners who lack specific knowledge or experience in discrimination law. The research guide is complementary to existing toolkits and guides on discrimination law, some of which are listed in [Annex 2](#). The guide is intended for research in Europe, including non-EU countries.

The term ‘researcher’ is used in the guide to refer to anyone undertaking discrimination research, including litigators, activists, advocates, and policy or research staff in NGOs, rather than specifically to individuals in official ‘researcher’ roles.

The table below sets out how the guide will be useful to different readers.

Audience	Uses
Researchers, advocates, and campaigners	<ul style="list-style-type: none"> Summarises the law on non-discrimination for non-legal experts Sets out the necessary elements to plan and execute research on discrimination in the counter-terrorism context Explores methodological challenges to establishing discrimination and provides recommendations Identifies common counterarguments to claims of discrimination and suggests responses for research or advocacy Includes examples of research and case law from different jurisdictions
Lawyers and legal practitioners	<ul style="list-style-type: none"> Provides a summary of international and regional legal instruments on antidiscrimination Sets out methods of collecting evidence of discrimination that can be used to build a legal case Includes case law from other jurisdictions that can supplement legal arguments Identifies common counterarguments to claims of discrimination that litigators may encounter Does not provide a guide to domestic litigation in any particular jurisdiction or serve as a guide to bringing a claim under EU law—see Annex 2.
<p>Oversight and accountability actors, such as equality bodies, national human rights institutions (NHRIs), regional and international bodies</p> <p><i>(e.g., ECRI, the EU Agency for Fundamental Rights (FRA), the Office for Democratic Institutions and Human Rights (ODIHR), and UN treaty bodies and special procedures)</i></p>	<ul style="list-style-type: none"> Provides a resource to support the mandate to ensure compliance of counter-terrorism laws, policies, and practices with the prohibition on discrimination Sets out methodologies to prove discrimination in the counter-terrorism context and ways to overcome common challenges, such as a lack of data and comparators Identifies common counterarguments to claims of discrimination and suggests responses Includes relevant decisions and research by oversight bodies in various jurisdictions Provides a resource to facilitate the investigation of individual complaints of discrimination

A note on COVID-19

This research guide was largely completed during the COVID-19 pandemic in 2020. At the time of writing, at least 92 countries across the world had declared states of emergency on public health grounds.¹⁰ Many more had used executive powers and administrative measures, akin to emergency powers, to respond to the pandemic. There are clear parallels between government responses to the pandemic and measures taken to counter-terrorism: travel bans, preventive detention (in the form of mandatory quarantine), curfews, surveillance, and penalties for violating restrictions. An expanded role for police and military also featured heavily in both. The right to liberty, the right to privacy, and freedoms of movement, peaceful assembly, association, and expression were among the many rights curtailed to prevent the spread of the virus. Cases of police overreach and violence while enforcing COVID-19 restrictions had been reported all over the world.

Pandemics have a long history of reinforcing patterns of discrimination; certain people are perceived as deserving of the protection of the state, while others are deemed as threats, unfairly blamed for spreading the virus and, in some cases, more repressively controlled as a result.¹¹ The same underlying principle applies to terrorism, where some minority groups are deemed threatening and dangerous, and are therefore more tightly monitored and controlled.¹² As with counter-terrorism, a sense of crisis (both real and perceived) serves to legitimise repressive state powers that may last long after the formal end of emergency regimes.

There is substantial evidence of the discriminatory impact of laws, policies and practices to prevent the spread of COVID-19 in Europe. In some cases, minority groups were explicitly targeted with more restrictive controls. For example, in Bulgaria and Slovakia, 10 Roma settlements were subjected to quarantines enforced by the police and military, including the use of roadblocks, checkpoints, and drones with thermal sensors to prevent Roma residents from leaving quarantined areas.¹³ Authorities in Cyprus, Greece, and

10 International Centre for Non-Profit Law. 'COVID-19 Civic Freedom Tracker' (2020), <https://www.icnl.org/covid19tracker/>.

11 The fact that counter-terrorism and interventions to counter pandemics are both forms of 'social control' accounts for many of their similarities. For further reading, see Wendy Parmet, 'Public Health and Social Control: Implications for Human Rights' (2009) International Council on Human Rights Policy (ICHRP) Working Paper and E. Blower, K. Donald, and S. Upadhyay. 'The Human Rights Implications of Contemporary Patterns of Social Control' (2012) 4:2 *Journal of Human Rights Practice*, pp. 187-212.

12 Paddy Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Act in Britain* (London: Pluto Press, 1993).

13 Amnesty International, *Policing the Pandemic: Human Rights Violations in the Enforcement of Covid-19 Measures in Europe* (2020), EUR 01/2511/2020, p. 20, <https://www.amnesty.org/download/Documents/EUR0125112020ENGLISH.PDF>

Serbia imposed mandatory quarantines on shared accommodation and camps for migrants, asylum seekers, and refugees.¹⁴ In the city of Nice in France, longer night-time curfews were imposed in predominantly working class and minority ethnic neighbourhoods than in the rest of the city.¹⁵

Abusive and violent actions by police enforcing COVID-19 lockdown measures disproportionately targeted already over-policed and vulnerable groups.¹⁶ In the United Kingdom, analysis of official data revealed that people of colour were 54 percent more likely to be fined for violating COVID-19 restrictions than white people.¹⁷ In Seine-Saint-Denis in France, the poorest department in mainland France with a high proportion of residents of North and West African origin, the number of fines for breaching COVID-19 confinement regulations was three times higher than in the rest of the country.¹⁸

There has been a clear push from states and security actors to expand the concept of national security to include public health and to use COVID-19 as an excuse for further securitisation.¹⁹ The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UN Special Rapporteur on counter-terrorism and human rights) has noted that ‘the specter of COVID-19 is functioning as a means for speeding up the passage of pending counterterrorism legislation, including in countries as diverse as the Philippines, France, Cambodia, Kyrgyzstan, and China’ and that ‘offering the global counterterrorism architecture as a solution and/or key partner in responding to the pandemic is highly problematic.’²⁰

The COVID-19 pandemic has also been weaponized by the far-right and some governments to attack Muslims. In India, government statements blaming Muslims for the virus have fueled violent assaults on Indian Muslims, boycotts

14 Ibid, p. 9.

15 Ibid, p. 20.

16 OHCHR, ‘COVID-19 Security Measures No Excuse for Excessive Use of Force, say UN Special Rapporteurs’ (2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25802&LangID=E>

17 Liberty Investigates, ‘BAME People Disproportionately Targeted By Coronavirus Fines’ (2020) <https://libertyinvestigates.org.uk/articles/bame-people-disproportionately-targeted-by-coronavirus-fines/>

18 Human Rights Watch, *They Talk to Us Like We’re Dogs: Abusive Police Stops in France* (2020), section I

19 CAGE, *Exploiting a Pandemic: The Security Industry’s Race to Infiltrate Public Health* (2020), p. 10.

20 Fionnuala Ní Aoláin, ‘Under Cover of COVID at the UN: Why Counterterrorism Is Not the Answer to a Pandemic’, *Just Security* (2020), https://www.justsecurity.org/71305/under-cover-of-covid-at-the-un-why-counterterrorism-is-not-the-answer-to-a-pandemic/?mc_cid=02eabe4009&mc_eid=59f80f54cc

of Muslim-run businesses and bans on Muslims entering certain towns.²¹ In media and social media in Europe, Muslims and other racialised people have been unfairly accused of failing to follow COVID-19 regulations and spreading the virus.²²

COVID-19 has exposed and exacerbated racial inequality, creating a watershed moment for the securitization of public health and the authoritarian use of othering. Governments have framed the virus as a racialized security threat, and deployed tactics that are similar to those used to counter-terrorism.²³ The need to expose and challenge the discriminatory impact of counter-terrorism measures is now even clearer and more acute. The uprisings sparked by the killing of George Floyd in the United States have also drawn attention to systemic racism and impunity for state violence against Black people. Many organisations and individuals have since engaged in long over-due processes of understanding and confronting racism in their own practices and exploring ways to contribute to the cause of antiracism and decolonisation. It is hoped that this research guide will equip readers with the tools necessary to challenge one manifestation of systemic racism—the discriminatory impact of counter-terrorism laws, policies, and practices.

21 Hannah Ellis-Petersen and Shaikh Azizur Rahman, 'Coronavirus Conspiracy Theories Targeting Muslims Spread in India', *Guardian* (2020), <https://www.theguardian.com/world/2020/apr/13/coronavirus-conspiracy-theories-targeting-muslims-spread-in-india>

22 Mehdi Hasan, 'The Coronavirus Is Empowering Islamophobes — but Exposing the Idiocy of Islamophobia', *The Intercept* (2020), <https://theintercept.com/2020/04/14/coronavirus-muslims-islamophobia/>

23 Arun Kundnani, 'From Fanon to Ventilators: Fighting for Our Right to Breathe,' *ROAR* (2020), <https://roarmag.org/essays/from-fanon-to-ventilators-fighting-for-our-right-to-breathe/>

2. Discrimination: legal standards and key definitions

This section provides a basic overview of the legal standards in international and regional (both ECHR and European Union (EU)) discrimination law, sets out the core elements of discrimination, and defines different forms of discrimination and ethnic profiling. It briefly discusses the application of these legal standards and concepts to the counter-terrorism context.

2.1. Legal standards

2.1.1. The principle of equality and non-discrimination

The principle of equality and non-discrimination is one of the cornerstones of the international human rights system. Equality, at its most basic, means that individuals in like situations should be treated alike, and that individuals in different situations should be treated differently. Discrimination is commonly seen as an affront to human dignity, a core value that is foundational to all human rights.²⁴ Discrimination law is one tool for achieving the broader goals of equality and human dignity.

The centrality of the principle of non-discrimination means that it features in many national constitutions and international legal instruments, in addition to treaties specifically addressing forms of discrimination (the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)). The prohibition on racial discrimination is a peremptory norm of customary international law (also known as *jus cogens*), which means that it applies to all states independently of their treaty obligations, and gives rise to obligations *erga omnes* (i.e., that are owed to the international community as a whole) from which states cannot derogate.²⁵ The prohibitions on discrimination on the grounds of sex and religion have arguably also reached this status under international law.²⁶

24 The ECtHR recognised that racial discrimination can 'constitute a special form of affront to human dignity' and 'could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3 of the Convention.' *East African Asians v. the United Kingdom* (4403/70), European Court of Human Rights (1973), para. 196.

25 *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgement) International Court of Justice Rep 3 (1970), paras. 33–34.

26 Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds), *International Human Rights Law*. 3rd edition (Oxford: Oxford University Press 2018), p. 151; Malcolm Shaw, *International Law*. 8th edition (Cambridge: Cambridge University Press 2017), p. 287.

2.1.2. International and regional legal instruments

Depending on the particular instrument, the prohibition on discrimination may apply only to certain substantive rights (i.e., as an ‘accessory’ to those rights) or may apply regardless of whether another substantive right is engaged (i.e., as a ‘free standing’ right). This section presents core non-discrimination provisions in the International Covenant on Civil and Political Rights (ICCPR), the ICERD, the ECHR, and relevant EU Directives.

There are many more international and regional instruments relevant to discrimination in the counter-terrorism context—a comprehensive list is available in [Annex 1](#). Readers should note that, although the wording of non-discrimination provisions is similar, legal instruments vary as to the potential grounds of discrimination and who can make a claim under any particular instrument. [Annex 2](#) includes references to materials that explain in greater depth the variations between different instruments.

ICCPR

Article 2 (1): 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 recognised 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.

Article 26: 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.

ICERD

Article 1 (1): 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.

Article 2 (1): 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;

...

(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;

Article 5: In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

...

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one’s own, and to return to one’s country;

...

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

...

Discrimination is also prohibited under the ECHR. Article 14 provides an ‘accessory right’ to equality and non-discrimination in the enjoyment of the substantive rights and freedoms guaranteed by other provisions of the ECHR. In other words, it only prohibits discrimination in situations where other substantive rights, such as the right to life (Article 2) or prohibition on torture (Article 3), are engaged. The limited protection offered by Article 14 gave rise to the need for Protocol No. 12 to the ECHR, which sets out a free-standing prohibition on discrimination. To date, this Protocol has only been ratified by 20 out of the 47 states that are parties to the ECHR.²⁷

²⁷ The list of countries that have ratified Protocol 12 to the ECHR may be found here: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures>

ECHR

Article 14: The enjoyment of the rights and freedoms set forth in this Convention 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.

Protocol No. 12, Article 1 [adopted 4 November 2000: in force from 1 April 2005]:

1. 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.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

The right to non-discrimination appears in different sources of EU law and is most fully articulated in two Directives; Directive 2000/43/EC of 29 June 2000 on the principle of equal treatment between persons irrespective of racial or ethnic origin (the 'Racial Equality Directive'), and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the 'Framework Directive').

The scope of the Racial Equality Directive is limited to employment, social rights, education and the supply of goods and services, while the Framework Directive applies only to employment. The Framework Directive states in Article 2 (5) that it is 'without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences.' While these Directives do not cover law enforcement, including counter-terrorism measures, they, and the case law of the Court of Justice of the European Union (CJEU), provide useful guidance on how to interpret non-discrimination provisions found elsewhere. Moreover, some states, when incorporating the Directives into their national law, have broadened their scope of application.

These Directives have been transposed into domestic law and apply at the national level in EU Member States. EU institutions themselves must adhere to the ECHR and any EU law must comply with the Charter for Fundamental Rights, so national security policy-making at the EU level is still subject to the principle of non-discrimination. EU Directives themselves can be challenged on discrimination grounds to the CJEU.

Racial Equality Directive

Article 2:

1. For the purpose of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.
2. For the purposes of paragraph 1:
 - (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.

- (b) Indirect discrimination shall be taken to occur where 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.

While the primary focus of this guide is international human rights law, researchers should be aware that, in some jurisdictions, discrimination is prohibited in domestic criminal law and, in those jurisdictions, claims of discrimination are most commonly brought as criminal complaints. In France, for example, victims tend to file criminal complaints for discrimination in part because there is no requirement to hire a lawyer, as prosecutors take charge of the case, and there is improved access to evidence, through the judge's investigation.²⁸ Where discrimination in the counter-terrorism context warrants criminal investigation in an EU member state, victims of discrimination are entitled to minimum standards of information, support, protection, and procedural rights owed to victims of crime under EU law.²⁹ Choice of forum and strategy for domestic litigation, including the relative advantages or disadvantages of criminal complaints, is beyond the scope of this research guide—relevant resources are set out in [Annex 2](#).

28 Sophie Latraverse, 'Country report: Non-Discrimination – France 2020', European Commission: Directorate-General for Justice 2020, p. 84.

29 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

2.1.3. The prohibition on discrimination in the counter-terrorism context

The prohibition on discrimination applies to laws, policies, and practices by states to counter-terrorism and uphold national security. International law does allow states to derogate from (i.e., suspend) some of their human rights obligations when there is a ‘public emergency which threatens the life of the nation’, which can include emergencies arising from acts of terrorism. Derogations are only permitted in certain narrowly defined circumstances; permissible reasons for derogations from the ICCPR are set out in Article 4 of that treaty, while derogations from the ECHR are subject to its Article 15. Some human rights cannot be restricted or suspended even during a state of emergency (i.e., ‘non-derogable’ rights). Although the right to equality and non-discrimination is not specifically listed among the non-derogable rights, the ICCPR provides that any derogating measures taken under a state of emergency must ‘not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.’³⁰ Accordingly, the UN Human Rights Committee (HRC) has stated that ‘there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances.’³¹ Similarly, the ECtHR has held derogating measures will be unlawful where they are ‘disproportionate in that they discriminated unjustifiably.’³²

International and regional bodies have repeatedly affirmed the need for counter-terrorism measures to comply with the principle of equality and non-discrimination. The UN Office of the High Commissioner for Human Rights (OHCHR) has noted that:

‘The principle of nondiscrimination must always be respected and special effort made to safeguard the rights of vulnerable groups. Counterterrorism measures targeting specific ethnic or religious groups are contrary to human rights and would carry the additional risk of an upsurge of discrimination and racism.’³³

30 Article 4(1) ICCPR.

31 HRC, ‘CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency’ (2001), UN Doc CCPR/C/21/Rev.1/Add.11, para. 8.

32 *A and others v. Secretary of State for the Home Department* [2004] UKHL 56, para. 190.

33 OHCHR, ‘Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism’, p. 5.

The OHCHR has also called for ‘due care’ to ensure that programs to prevent or counter violent extremism ‘have no direct or incidental effects that would result in discrimination, stigmatization and racial or religious profiling.’³⁴

The UN Committee on the Elimination of Racial Discrimination (CERD) has underlined the obligation of states to ‘ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin.’³⁵ The UN Special Rapporteur on counter-terrorism and human rights has criticised discriminatory counter-terrorism measures in many countries and expressed concern that counter-extremism policies ‘have discriminately targeted certain groups and communities, particularly based on religious grounds.’³⁶

At the regional level, the ECRI recommends that legislation and regulations ‘adopted in connection with the fight against terrorism are implemented at national and local levels in a manner that does not discriminate... on grounds of actual or supposed race, colour, language, religion, nationality, national or ethnic origin.’³⁷ Provisions prohibiting discrimination also appear in some EU legal and policy instruments related to counter-terrorism. Directive 2017/541 on combatting terrorism states in recital 35 that the Directive respects the general prohibition of discrimination and notes in particular, in recital 39, that ‘criminal law measures adopted under this Directive should... exclude any form of arbitrariness, racism or discrimination.’³⁸ Article 29 of the Directive also directs the European Commission to assess the potential discriminatory impact of the Directive. The EU Directive on terrorist financing similarly refers to the principle of non-discrimination in recitals 65 and 66.³⁹

In practice, provisions prohibiting discrimination in EU counter-terrorism instruments have not stopped the implementation of discriminatory laws and policies. There is a clear gap between the human rights language included in such documents and the actions of Member States, but the inclusion of such language provides an important point of leverage for research and advocacy regarding the discriminatory impact of counter-terrorism measures.

34 OHCHR, ‘Report on best practices and lessons learned on how protecting and promoting human rights contribute to preventing and countering violent extremism’ (2016), A/HRC/33/29, para. 30.

35 CERD, ‘Report of the Committee on the Elimination of Racial Discrimination’, Sixtieth session (4–22 March 2002) Sixty-first session (5–23 August 2002) (2002), UN Doc. A/57/18, para. XI(C(5)).

36 UN Special Rapporteur on counter-terrorism and human rights, ‘Human rights impact of policies and practices aimed at preventing and countering violent extremism’ (2020), UN Doc. A/HRC/43/46, para. 28.

37 ECRI, ‘General Policy Recommendation 8 on Combating Racism while Fighting Terrorism’ (2004), p. 5.

38 Directive 2017/541 on combating terrorism, replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

39 Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

In relation to Directive 2017/541 on combatting terrorism, the European Commission is conducting an assessment of the impact of the Directive on fundamental rights, including on the right to non-discrimination, for delivery to the European Council and Parliament by September 2021.

2.2. Defining discrimination

The UN Human Rights Committee (HRC) defines discrimination as ‘any **distinction, exclusion, restriction or preference**, which is based on any ground such as **race, colour, 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**.’⁴⁰ (emphasis added)

2.2.1. Elements of discrimination

2.2.1.1. ‘Any distinction, exclusion, restriction or preference’ or ‘less favourable treatment’

For discrimination to have occurred, an individual or group must first be subjected to a ‘distinction, exclusion, restriction or preference.’ This requirement is formulated slightly differently under EU law, as ‘less favourable treatment’ or, under the ECHR, as ‘a difference in treatment.’⁴¹ ‘Less favourable treatment’ occurs when an individual has been treated less favourably or differently to how others, in a similar situation, have been or would be treated. Such treatment can be imposed by public authorities under national legislation or by the actions of public officials or private entities.

Examples of ‘less favourable treatment’ in the counter-terrorism context include: stop and search or identity checks by police or border guards, surveillance, raids, limitations on fair trial rights, imprisonment, harsher detention conditions, deprivation of nationality, expulsion on national security grounds, listing (i.e., being placed on a list of terrorist suspects), referral to a counter-radicalisation or counter-extremism program, and the imposition of a control order (i.e., an administrative measure imposing a range of restrictions, often on freedom of movement and association, also known as an assigned residence order).

⁴⁰ HRC, ‘General Comment 18 Non-discrimination’ (1989) UN Doc. HRI/GEN/1/Rev.1, para. 7.

⁴¹ Article 2(2), Race Equality Directive; *Burden v. the United Kingdom* (13378/05), European Court of Human Rights (2008), para. 60.

2.2.1.2. Based on prohibited grounds

The ‘less favourable treatment’ must be based on certain prohibited grounds. Prohibited grounds, also known as protected characteristics, listed in the HRC definition are race, colour, sex, language, religion, political or other opinion, national or social origin, property and birth. The definition is open-ended in that it permits claims of discrimination to be brought on the basis of grounds beyond those listed (‘and other status’), allowing for new grounds of discrimination to be developed.

The individual or group alleging discrimination does not need to have the protected characteristic. They may be associated with someone who does and suffers discrimination on that basis, as in a case where a mother successfully claimed that she was treated unfavourably at work because her son was disabled.⁴² An individual may also be *presumed* to have a protected characteristic. A non-Muslim person who is perceived to be Muslim, and so suffers less favourable treatment, can claim discrimination on the grounds of religion, even though they are not in fact Muslim. This concept can be applied even more widely: an individual who suffers less favourable treatment at work because they attended a Pride march can claim discrimination on the grounds of sexual orientation,⁴³ or a person sanctioned for failing to carry out a policy that was discriminatory toward a certain religion can claim discrimination on the grounds of religion.⁴⁴

There must be a causal link between the prohibited characteristic and the less favourable treatment. This does not mean that the prohibited characteristic is the *only* reason for the questionable conduct, rule or policy. Nor does such conduct need to explicitly refer to the prohibited ground or apply exclusively to those possessing the prohibited characteristic. The question of how to establish a causal link between the prohibited characteristic and treatment in question is explored in greater detail in section 3.2.

The prohibited characteristics that are particularly relevant in the counter-terrorism context are race, religion, ethnic origin, national origin, nationality, political or other opinion, and sex. These grounds appear in most international and regional definitions of discrimination. In the case of nationality, states are allowed to make distinctions between citizens and non-citizens in certain narrowly defined areas, such as the right to vote.⁴⁵ The ECtHR has accepted

42 C-303/06, *S. Coleman v. Attridge Law and Steve Law* (2008) ECLI:EU:C:2008:415.

43 District Court Warszawa Śródmieście, *XY and Polish Society of Antidiscrimination Law on behalf of XY v. Company Z*, sygn. VI C 402/13, decision 9 July 2014; Regional Court, Warsaw (second instance), sygn. V Ca 3611/14, decision 18 November 2015.

44 *Showboat Entertainment Centre Ltd v. Owens* [1984] ICR 65.

45 CERD, ‘General Recommendation 30: Discrimination against non-citizens’ (2002), UN Doc. CERD/C/64/Misc.11/rev.3.

nationality as falling within the scope of the ECHR (‘or other status’ in Article 14), but the Racial Equality and Framework Directives explicitly exclude ‘difference of treatment based on nationality’ from their scope (Article 3(2)).⁴⁶

2.2.1.3. Without objective and reasonable justification

Differential treatment based on a prohibited ground is permissible under law in some situations—where there is an **objective and reasonable justification** for the difference in treatment. This requires the following:

- The difference in treatment pursues a legitimate aim e.g., national security or public order;⁴⁷ and
- there is a reasonable relationship of proportionality between the means employed and the aim, meaning that the means employed are:
 - (1) appropriate i.e., the policy is a suitable and effective means of achieving the intended aim;⁴⁸
 - (2) necessary i.e., there are no other, less discriminatory policies that could meet the same aim;⁴⁹ and
 - (3) proportionate to that aim i.e., the significance of the aim pursued outweighs the disadvantage suffered by the targets of discrimination and their wider community.

The assessment of appropriateness, necessity, and proportionality in the narrow sense (1–3 above) are often referred to collectively as the ‘proportionality principle.’⁵⁰

Assessing whether a particular justification meets these requirements involves considering a range of issues, including the purpose of a particular law or policy, available alternatives, and the overall impact of the law or policy.

46 Where differences of treatment based on nationality amount to indirect discrimination on grounds of racial or ethnic origin, this would fall under the scope of the Racial Equality Directive. For further explanation of nationality-based discrimination under EU law, see Olivier De Schutter, ‘Links between migration and discrimination: A legal analysis of the situation in EU Member States’, European Commission: Directorate-General for Justice 2016.

47 HRC, ‘General Comment No 18: Nondiscrimination’, para. 13; *Belgian Linguistics case* (1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64), European Court of Human Rights (1968), para. I(B(10)).

48 E.g., C-222/84, *Johnston v RUC* (1986) ECLI:EU:C:1986:206, para. 38; *Abdulaziz, Cabales and Balkandali v. United Kingdom*, European Court of Human Rights (1985), para. 81.

49 See, e.g., C-222/84, *Johnston v. RUC* (1986) ECLI:EU:C:1986:206, para. 38; *Informationsverein Lentia and others v. Austria* (13914/88), European Court of Human Rights (1993), para. 39.

50 *Belgian Linguistics case* (1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64), European Court of Human Rights (1968), para. I(B(10)).

EU law differs from the ECHR⁵¹ and international legal instruments in that direct discrimination on racial or religious grounds, with the narrow material scope of the Racial Equality and Framework Directives, *cannot* be objectively justified.⁵²

In the counter-terrorism context, the legitimate aim is almost always national security (or public order). Courts rarely deny the existence of a legitimate aim. Nevertheless, any stated national security objective must be narrowly defined. Counter-terrorism measures are less likely to satisfy the proportionality principle for the reasons set out in section 3.2.3. This requires examining whether the discriminatory measure is an appropriate and effective means of countering terrorism and, secondly, whether the government's stated national security objective outweighs the harm caused by the measure to the individual or group affected.

2.2.1.4. Relevance of intent

It is important to note that no discriminatory **intent** is required to prove discrimination.⁵³ There is no need to prove that a person intended to discriminate or was motivated by prejudice or bias. Similarly, a public authority may have non-prejudiced reasons for a particular rule or practice, but if that practice constitutes unjustified differential treatment based on a prohibited ground, then it will amount to discrimination.

2.2.2. Forms of discrimination

2.2.2.1. Direct discrimination

Direct discrimination refers to less favourable or detrimental treatment of a person on the grounds of a protected characteristic. It is commonly understood as providing for formal equality. Direct discrimination is prohibited under international human rights law and European law.⁵⁴ An example of direct discrimination in the counter-terrorism context is being refused entry at a border based on an instruction to police to refuse individuals of particular

51 See Opinion of Advocate General Sharpston delivered on 13 July 2016 in Case C-188/15, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, paras. 63–67.

52 There are specific exemptions permitting direct discrimination in employment where race, ethnicity or religion is a genuine occupational requirement, and in relation to positive or affirmative actions that aim to prevent or compensate for disadvantage linked to race or ethnicity. The material scope of the Racial Equality and Framework Directives does not include law enforcement or national security matters—see section 2.1.2.

53 *Althammer et al. v. Austria*, UN Human Rights Committee, UN Doc. CCPR/C/78/D/998/2001 (2003), para. 10.2. See also, for example, Opinion 1996–23 of the Equal Treatment Commission of the Netherlands stating that it 'prohibits unequal treatment irrespective of the intention of the person who metes it out.'

54 See definitions of discrimination in international and regional legal instruments in section 2.1.

ethnic origin.⁵⁵ For a claim of direct discrimination, the law or practice in question need not refer explicitly to the prohibited ground but may refer to a characteristic or practice that is indissociable from the protected ground. For example, a list of radicalisation factors that includes fasting during Ramadan is evidence of direct discrimination on the grounds of religion, because fasting during Ramadan is indissociable from Islam.

2.2.2.2. Indirect discrimination

Indirect discrimination occurs when a policy, practice or rule which appears neutral on its face actually disadvantages or disproportionately impacts a certain group in practice, unless that disproportionate impact can be objectively justified.⁵⁶ The ECtHR has acknowledged that discrimination may be indirect, stating that ‘a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group.’⁵⁷ The HRC definition encompasses measures that have the *purpose* (direct discrimination) or the *effect* (indirect discrimination) of interfering with a person’s rights on a prohibited ground.

Policies and laws may not be aimed or intended to affect a certain group but may inadvertently do so—they may have an ‘unjustified disparate impact on a group’ and thereby constitute discrimination.⁵⁸ A practice or rule can include formal laws, a written policy or informal practices. An example of indirect discrimination is a law banning facial concealment in public, which may disproportionately impact Muslim women who wear a full-face veil.

2.2.2.3. Multiple, intersectional, and systemic discrimination

Tackling discrimination from the perspective of a single characteristic may fail to take into account some violations of the right to equality and non-discrimination. As explained in the Canadian case of *Canada (A.G.) v. Mossop*, ‘individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination... Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals.’⁵⁹

Multiple discrimination describes unlawful differential treatment on the

55 This was the case in *Timishev v. Russia*, (55762/00, 55974/00), European Court of Human Rights (2005).

56 Article 2(2)(b) EU Racial Equality Directive.

57 *D.H. and Others v. the Czech Republic* (57325/00), European Court of Human Rights (2007), para. 184.

58 CERD, ‘General Recommendation 14: Article 1, paragraph 1, of the Convention’ (1994) UN Doc. A/48/18, para. 2.

59 Madam Justice L’Heureux-Dubé writing for the minority in *Canada (A.G.) v. Mossop* [1993] 1 SCR 554, para. 645–6.

grounds of several characteristics separately. For example, a Muslim woman who is subjected to insults based on her gender and, separately, derogatory comments about her religious practices at work is the target of multiple discrimination. **Intersectional discrimination** describes discrimination on several grounds that interact with each other in a manner which produces a specific form of discrimination, distinct from discrimination on any one of the single grounds. For example, a young Muslim man may be stopped by police because of stereotypes about young Muslim men specifically that do not apply to non-Muslim young people or young Muslim women—in this case, it is the combination of characteristics that results in the police stop. Intersectional discrimination is increasingly recognised by UN treaty bodies, including in individual cases.⁶⁰ **Systemic discrimination** is not separately defined under international law. It is, however, relevant in adjudicating cases and in some jurisdictions—see the Paris Labour Tribunal case below and section 2.2.2.4.⁶¹ Claims of systemic discrimination can be shown by the general context of disadvantage that certain groups face—see section 3.3.5.

60 E.g., CERD, 'General comment No. 32 on special measures needed to advance certain racial or ethnic groups' (2009), UN Doc. A/64/18 (Annex VIII), para. 7; CEDAW, 'General Recommendation 28 on the Core Obligations of States Parties under Art. 2' (2010), UN Doc. CEDAW/C/GC/28, para. 18; *Maria de Lourdes da Silva Pimentel v. Brazil*, CEDAW, UN Doc. CEDAW/C/49/D/17/2008 (2011), *Kell v. Canada*, CEDAW, UN Doc. CEDAW/C/51/D/19/2008 (2012), *R.P.B. v. The Philippines*, CEDAW, UN Doc. CEDAW/C/57/D/34/2011 (2014).

61 Systemic discrimination is a recognised concept under Canadian law—see *Canadian National Railway Co. v. Canada* (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114—and by the U.S. Equal Employment Opportunity Commission—see <https://www.eeoc.gov/systemic-discrimination>. Following a study by the Ministry of Justice into systemic discrimination in the workplace, a new law in France providing for class action suits brought by unions and NGOs was introduced in 2016 as an attempt to address systemic discrimination—see Law No. 2016-1547, 18 November 2016 on the modernization of Justice in the XXIst Century.

Case Concerning 25 Undocumented Malian Construction Workers– Paris Labour Tribunal⁶²

Following serious workplace accidents and a strike, 25 undocumented Malian construction workers brought a claim for systemic discrimination on the grounds of origin, nationality, and ethnicity against their employer, who had failed to ensure their safety, to issue pay slips, and to pay them wages owed, among other violations of their employment rights.

In a December 2019 judgement, and in accordance with a decision of the Defender of Rights,⁶³ the Paris Labour Tribunal found that the abusive treatment

of the 25 workers constituted ‘systemic racial discrimination.’ The Tribunal accepted into evidence a qualitative sociological analysis of the management of labour on construction sites in Paris. The Defender of Rights argued, relying in part on this evidence, that an ethnic hierarchy of rights and functions existed on the construction site, with work distributed on the basis of origin and the most strenuous and hazardous work assigned to the undocumented Malian workers.

2.2.2.4. Harassment

Harassment is a form of discrimination whereby unwanted conduct related to a protected ground occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. Harassment is specifically prohibited under Article 2 (3) of both the EU Racial Equality and Framework Directives but is not recognised as a separate cause of action by international human rights bodies. International human rights bodies may still examine complaints regarding conduct amounting to harassment, but these complaints would need to fall within the ordinary definition of discrimination set out in the relevant treaty.⁶⁴ In deciding the effect of the conduct in question, courts will consider the perception of the victim as well as making an objective assessment. The conduct can include any kind of behaviour, such as spoken or written words, images, physical contact, and gestures. One sufficiently serious incident is enough to ground a claim of harassment. Unlike ordinary discrimination claims, harassment cannot be objectively justified, meaning that the state cannot invoke national security or any other legitimate aim as a defence once a case of harassment is established. There is no need to show that the target of harassment was treated differently from others (i.e., no need to provide a

62 Paris Labour Tribunal, Judgment on the systemic, racial discrimination suffered by undocumented Malian workers in the construction sector, 17 December 2019, No. 17/10051.

63 Defender of Rights, Decision 2019-108 of 19 April 2019 on the situation of 25 undocumented workers claiming to have been the victims of discriminatory treatment on the part of their employer, a construction company, on the basis of their origin and nationality.

64 One complaint before the CERD that concerned a situation which would be considered harassment under EU law was *Hagan v. Australia*, UN Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/62/D/26/2002 (2003). The applicant was successful in claiming discrimination but did not use the harassment framework.

comparator—see section 3.3.3).

Ethnic profiling by law enforcement may be considered a form of harassment—see the case of police harassment in Paris below. The Belfast-based Committee on the Administration of Justice conducted an important study in 1994 on harassment by security forces in the counter-terrorism context in Northern Ireland—see section 3.3.6.4. The harassment framework may also apply to individual counter-terrorism cases, where a person who is perceived as a suspected terrorist, extremist or vulnerable to ‘radicalization’ faces interference from law enforcement (e.g., visits, surveillance, approaches to employers and family members) which creates a hostile and degrading environment for them.

Police Harassment in the 12th *arrondissement* of Paris⁶⁵

In December 2015, a group of 18 minors and young adults of North African and African origin alleged repeated, unjustified identity checks, racist insults, beatings, and pat-downs amounting to sexual assault by police. On instructions from their superiors, police officers patrolled areas of the 12th *arrondissement* of Paris and sought to expel or move on groups of young people, classifying them officially as ‘undesirable’ in the police computer system. In April 2018, three police officers were convicted at first instance for violence by persons holding public authority.

As part of a civil case against the French state lodged by persons affected by this police harassment, the Defender of Rights concluded, in an *amicus* brief

filed in May 2020, that the pattern of repeated and abusive identity checks and police violence created an ‘intimidating, hostile, degrading, humiliating or offensive environment’, thereby constituting ‘discriminatory harassment’, and ‘systemic discrimination’, noting that the police practices were not isolated events and took place in a context of well-documented discriminatory identity checks by police. In October 2020, the court of first instance found the state liable for gross misconduct (*faute lourde*) in relation to the disproportionate use of force and unjustified identity checks by police, but did not uphold the claim of discrimination.

Racist and discriminatory speech acts by politicians have also been deemed harassment.⁶⁶ There are many similar examples of speeches by politicians linking Islam and terrorism that create a hostile or degrading environment for Muslims—see section 3.3.6.3.

2.2.3. Ethnic profiling

65 Pascale Pascariello, ‘Le Défenseur des droits dénonce la discrimination systématique pratiquée par la police’, *Médiapart*, 2 June 2020, <https://www.mediapart.fr/journal/france/020620/le-defenseur-des-droits-denonce-la-discrimination-systemique-pratquee-par-la-police>

66 See, e.g., Bulgaria, Protection Against Discrimination Commission, decision No. 119 of 29 March 2017; Hungary, Debrecen Court of Appeal, decision No. Pf.I.20.059/2019/4 of 9 May 2019; Italy, Tribunal of Milan, decision No. 47117/2016 of 22 February 2017.

Ethnic profiling is prohibited under international and European law as a violation of the right to freedom from discrimination. A 2009 decision by the HRC was the first by an international body acknowledging that racial profiling was unlawful discrimination, stating that physical and ethnic characteristics ‘should not by themselves be deemed indicative’ of unlawful presence in a country.⁶⁷ The ECtHR held that, where law enforcement action is based ‘exclusively or to a decisive extent’ on ethnic origin, it is not capable of being objectively justified.⁶⁸ Domestic courts across Europe have also upheld cases concerning claims of ethnic profiling.⁶⁹

Ethnic profiling is defined as ‘the practice of police and other law enforcement officers relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity’.⁷⁰ Both the CERD and ECRI have said that ethnic profiling violates the prohibition against discrimination.⁷¹ ECRI defines racial profiling as ‘use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities.’⁷² In its recently adopted General Recommendation on preventing and combating racial profiling, the CERD notes that ‘racial profiling is linked to stereotypes and biases, which can be conscious, unconscious, individual, or institutional and structural.’⁷³

Definitions of ethnic profiling differ as to the role of ethnicity in law enforcement decision-making. The first definition above is the most expansive,

67 *Rosalind Williams Lecraft v. Spain*, UN Human Rights Committee, UN Doc. 1493/2006, (2009).

68 *Timishev v. Russia* (55762/00, 55974/00), European Court of Human Rights (2005), para. 59.

69 See, e.g., Finland–The National Non-Discrimination and Equality Tribunal, Decision 337/2018, 19 December 2018; France Court of Cassation (Cour de Cassation), Decision 1245, 9 November 2016 (partially successfully); Germany–Higher Administrative Court of Rhineland–Palatinate, Decision 7 A 11108/14.OVG, 21 April 2016; Sweden–Svea Court of Appeal, Case T 6161–16, *Fred Taikon (and 10 more plaintiffs) v. Swedish State through the Chancellor of Justice*, 28 April 2017; The Netherlands–Supreme Court, No 16/00166, 9 October 2018 (see also an ongoing challenge against ethnic profiling by Dutch border police– <https://pilpnjcm.nl/en/dutch-border-police-in-court-for-ethnic-profiling/>).

70 Durban Declaration and Programme of Action, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001), UN Doc. A/CONF.189/1, para. 72. The CERD also used this definition in its general recommendation on racial profiling adopted in November 2020–see CERD, ‘General Recommendation No. 36 on Preventing and Combating Racial Profiling by Law Enforcement Officials’ (2020), UN Doc. CERD/C/GC/36, para. 21.

71 CERD, ‘Concluding Observations of the Committee on the Elimination of Racial Discrimination on Austria’ (2002), UN Doc. CERD/C/60/CO/1 and CERD, ‘General Recommendation No. 36 on Preventing and Combating Racial Profiling by Law Enforcement Officials’ (2020), UN Doc. CERD/C/GC/36.

72 ECRI, ‘General Policy Recommendation No. 11 on Combating Racism and Racial Discrimination in Policing’ (2007), Doc. CRI (2007)39, para. 1.

73 CERD, ‘General Recommendation No. 36 on Preventing and Combating Racial Profiling by Law Enforcement Officials’ (2020), UN Doc. CERD/C/GC/36, para. 20.

as it includes practices that rely ‘to any degree’ on race or ethnicity. More conservative definitions limit ethnic profiling to situations where ethnicity is the ‘sole or main criterion.’⁷⁴ Proving that ethnicity is the ‘sole or main criterion’ is much more difficult than proving it has been relied upon ‘to any degree’, as law enforcement agents can often point to numerous reasons for their decision-making. The overly restrictive nature of the ‘sole criterion’ basis has led to a broadening of definitions of ethnic profiling under international law. Amnesty International recommended, in its comments on a draft version of General Recommendation No. 36 of the CERD, that ethnic profiling be defined as where ‘in the absence of a suspect description—personal attributes such as presumed race, colour, descent, nationality or ethnic origin, etc., are taken into account in law-enforcement decision-making, not only as a decisive factor but also in combination with other factors.’⁷⁵

Many forms of discrimination in the counter-terrorism context can be understood as ethnic profiling. Profiling may include police stops and searches, identity checks, arrests, raids, surveillance, border control, and some forms of counter-radicalisation referrals. Many definitions of ethnic profiling refer to actions by law enforcement officers, which include police, security services and border agencies.⁷⁶ The UN Special Rapporteur on counter-terrorism and human rights noted, particularly since 11 September 2001, the adoption of law enforcement measures across the world based on ‘terrorist’ profiles including characteristics such as presumed race, ethnicity, national origin or religion, and stressed that profiling practices based on ‘race’ were incompatible with human rights principles.⁷⁷

74 FRA's definition specifies law enforcement decisions ‘based only or mainly’ on race, ethnicity or religion. See Fundamental Rights Agency, *Toward More Effective Policing. Understanding and Preventing Discriminatory Ethnic Profiling: A Guide* (2010), p. 15.

75 Amnesty International, *Observations to the United Nations Committee on the Elimination of Racial Discrimination Draft General Recommendation No. 36 on preventing and combating racial profiling*, IOR 40/0624/2019, (2019).

76 On digital technologies and discrimination in the border and immigration context, see UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ‘Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance’ (2020), UN Doc. A/75/590.

77 UN Special Rapporteur on counter-terrorism and human rights, ‘Report of the special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism’ (2007), UN Doc. A/HRC/4/26.

3. Demonstrating discrimination in the counter-terrorism context

3.1. Introduction

This section provides guidance for establishing a claim of discrimination in the counter-terrorism context. The first sub-section, [3.2](#), sets out what must be demonstrated, applying the elements of the definition of discrimination introduced in section [2.2.1](#) to the counter-terrorism context and analysing the level of proof required. The second sub-section, [3.3](#), explains how these elements can be established, detailing different methodologies, such as the use of comparators and stereotyping, and sources of evidence, such as interviews and quantitative data.

The methods and forms of evidence discussed in this section are relevant to both claims of direct and indirect discrimination. Both forms of discrimination result in a difference of treatment based on a prohibited ground. For example, a Muslim man may be stopped at the border because border agents are explicitly targeting Muslim men for questioning (direct discrimination) or because the criteria for stops is formulated in such a way that Muslim men are more likely to meet the criteria (indirect discrimination). In some circumstances, it may be unclear whether a situation constitutes direct or indirect discrimination and an argument could be made for either claim, with researchers making a choice based on the strongest evidence available, using the methods outlined below.⁷⁸

3.2. What needs to be demonstrated?

3.2.1. Less favourable treatment

The first step in establishing a claim of discrimination is identifying the less favourable treatment to which an individual or group has been subjected. This may be, for example, referral to a counter-radicalisation program, the imposition of a control order or being subjected to a harsher detention regime in prison. Beyond individual measures, ‘less favourable treatment’ may be a difference in institutional approach by the state, such as assigning responsibility for surveillance to the military or secret services instead of police or using emergency powers against some groups and not

⁷⁸ In *Chez*, the CJEU explores the difference between direct and indirect discrimination, directing the national court to find a claim of direct or indirect discrimination based on the evidence. See C-83/14, ‘*CHEZ Razpredelenie Bulgaria*’ AD v. *Komisija za zashtita ot diskriminatsia* (2015) EU:C:2015:480, para. 92–109.

similarly situated others.⁷⁹ In Northern Ireland, for example, covert policing of Republican armed groups falls under the remit of the United Kingdom's security service MI5 while covert policing of Loyalist armed groups sits with the ordinary Police Service of Northern Ireland (PSNI), with significant differences between MI5 and PSNI in terms of equality obligations, standards, and oversight.⁸⁰

Generally, the measure, practice, policy or law that constitutes 'less favourable treatment' can be easily identified and established through relevant documentation. The fact of an imposition of a control order, for example, can be demonstrated through documents provided to the individual and their lawyer regarding the order. Similarly, showing that the treatment in question is 'less favourable' may involve detailing the impact of the treatment on substantive rights or the harms caused by the treatment. For example, depriving a person of their nationality is clearly 'less favourable' than not doing so, given the substantial impact of the loss of nationality on the enjoyment of other rights.

3.2.2. Based on prohibited grounds

3.2.2.1. Race and religion-counter-terrorism and Muslims in Europe

Discrimination must be based on certain prohibited grounds. Before exploring these particular grounds further, it is helpful to understand how discrimination against Muslims can be understood as a form of racial discrimination.

'Racialisation' describes a process through which racial meanings are constructed by powerful institutions and groups, and used to justify discrimination, stereotyping, violence and othering of groups such as Roma, Muslims and Black people.⁸¹ Racialisation occurs through;

*'The extension of racial meaning to a previously racially unclassified relationship, social practice or group. Racialization is an ideological process, a historically specific one.'*⁸²

Racial hierarchies are constructed around essentialised differences between groups, which may be based on physical appearance or cultural differences.

79 For example, the applicants in *Ireland v. UK* unsuccessfully claimed discrimination by arguing that there was a difference in treatment between Loyalist and Republican armed groups, based on the use of emergency powers exclusively, until 1973, and thereafter predominately against Republican armed groups. The court found that there was a difference of treatment until 1973 but that it was objectively and reasonably justified. *Ireland v. UK* (5310/71), European Court of Human Rights (1978), para. 225-232.

80 Committee on the Administration of Justice, 'The Policing You Don't See: Covert Policing and the Accountability Gap: Five Years on from the Transfer of "National security" primacy to MI5' (2012), p. 67.

81 Amnesty International, *Policing the Pandemic: Human Rights Violations in the Enforcement of Covid-19 Measures in Europe* (2020), EUR 01/2511/2020, p. 4.

82 M. Omi & H. Winant (eds.), *Racial Formation in the United States*. 3rd ed. (New York: Routledge, 2015), p. 64.

Social science researchers describe how Muslims have become a racialised group, particularly since 11 September 2001, as identities that were differentiated on ethnic grounds became increasingly homogenised under one racialised category (i.e., Pakistanis in the United Kingdom or Turks in Germany being more frequently presented, in media and policy, as Muslims in Europe).⁸³ The racialisation of Muslims through the ‘war on terror’ builds on earlier Orientalist stereotypes that present Muslims, specifically men, as innately violent and Islam as inherently antagonistic to the perceived values and norms of ‘the West.’ An even longer history of violence against Jews and Muslims in Europe and ‘theories of Christianity’s superiority... laid the ground for anti-Semitism and Islamophobia’⁸⁴.

The process of racialisation occurs when ‘Muslim appearances, behaviours, and assumed practices are taken as a sign of inferiority.’⁸⁵ In this context, Islamophobia is increasingly recognised as a form of racism. In the United Kingdom, the All-Party Parliamentary Group on British Muslims defined Islamophobia as ‘rooted in racism and is a type of racism that targets expressions of Muslimness or perceived Muslimness.’⁸⁶ In France, the Defender of Rights recently noted, based on testimonies and complaints, a ‘trend that the term “Muslims” is used to refer, de facto, to Arab immigrants or individuals perceived as such...the religious marker tends to exacerbate the racial marker.’⁸⁷ Similarly, in an amicus curiae brief to the CERD, the German Institute for Human Rights stated that the ‘labels “Turks” or “Arabs” are applied as synonyms for Muslims.’⁸⁸

83 Margaret Chon & Donna E. Arzt, “Walking While Muslim” (2004–2005) 68 *Law and Contemporary Problems* 215

84 Lilla Farkas, “The Meaning of Racial or Ethnic Origin in EU Law: Between Stereotypes and Identities”, European Commission: Directorate-General for Justice 2017, p. 36.

Academics have argued that race as a category was co-constituted with religion, beginning with the expulsion of the *Moriscos*, a crypto-Muslim community perceived as a threat to security and culturally alien, from Spain in the early 1600s: François Soyer, ‘Faith, Culture and Fear: Comparing Islamophobia in Early Modern Spain and Twenty-First-Century Europe’ (2013, 36:3 *Ethnic and Racial Studies*, pp. 399–416.

85 Narzanin Massoumi, David Miller, Tom Mills, Hilary Aked, ‘Written Evidence Submitted to the All Party Parliamentary Group on British Muslims’ available on p. 39 of <https://static1.squarespace.com/static/599c3d2febbd1a90cfd8a9/t/5bfd1ea3352f531a6170ceee/1543315109493/Islamophobia+Defined.pdf>

86 All-Party Parliamentary Group on British Muslims, ‘Report on the inquiry into a working definition of Islamophobia/anti-Muslim hatred’ (2019).

87 French Defender of Rights, *Discrimination and Origins: The Urgent Need for Action* (2020), p. 29.

88 *TBB-Turkish Union in Berlin/Brandenburg v Germany*, CERD, UN Doc. CERD/C/82/D/48/2010 (2013), para. 8.1.

Some international and regional bodies have acknowledged the close relationship between prohibited grounds related to race. The ICERD defines racial discrimination broadly to include ‘race, colour, descent, or national or ethnic origin’ (Article 1). The CERD notes that membership of a particular racial or ethnic group should be based upon self-identification.⁸⁹ The CERD has addressed Islamophobia in its concluding observations⁹⁰ and noted that prohibited grounds are ‘extended in practice by the notion of ‘intersectionality’ whereby the Committee addresses situations of double or multiple discrimination—such as discrimination on ground[s] of gender or religion.’⁹¹ Nationality, like religion, is often closely linked to a racial or ethnic group, and the CERD has also raised concerns about racial discrimination against non-citizens.⁹² The UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has noted that ‘racial and religious discrimination are not always easy to distinguish, especially in practice.’⁹³

In Europe, the ECRI takes a broad approach to defining ‘racial discrimination’, including on grounds of religion, nationality or ethnic origin. Religion was excluded from the text of the EU Racial Equality Directive but is included in the Framework Directive. In terms of jurisprudence, legal challenges related to Islamophobia have generally been based on freedom of religion or religious discrimination⁹⁴ rather than racial discrimination. The ECtHR has stated that discrimination on the grounds of ethnic origin is a form of racial discrimination, but has generally not made a similar link between religion and racial discrimination. In one case, the ECtHR ruled discrimination against a Jewish applicant to be a form of racial discrimination but did not address religion in its judgement, relying instead on the concept of ethnic origin.⁹⁵

89 CERD, ‘General Recommendation 8: Article 1, paragraphs 1 and 4 of the Convention’ (1990).

90 CERD, ‘Concluding Observations regarding Denmark’ (2006), UN Doc. CERD/C/DEN/CO/17, para 11; CERD, ‘Concluding Observations regarding the Netherlands’ (2010), UN Doc. CERD/C/NLD/CO/17-18, para. 14.

91 CERD, ‘General Recommendation 32: Meaning and scope of special measures’ (2009), UN Doc. CERD/C/GC/32, para. 7.

92 CERD, ‘General Recommendation 30: Discrimination against non-citizens’ (2004), UN Doc. CERD/C/64/Misc.11/rev.3

93 UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ‘Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance’ (2018), UN Doc. A/HRC/38/52

94 See *S.A.S v France* (43835/11), European Court of Human Rights (2014); C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV* (2017) ECLI:EU:C:2017:203; C-188/15, *Asma Bougnaoui and Association de défense des droits de l’homme (ADHD) v Micropole SA* (2017) ECLI:EU:C:2017:204.

95 *Sejdić and Finci v. Bosnia and Herzegovina* (27996/06 and 34836/06) European Court of Human Rights (2009).

In addition to examining the links between religious and racial discrimination, researchers should also consider the role that gender plays in counter-terrorism decision-making.⁹⁶ Gendered assumptions about individual agency, including assumptions about women as ‘the first line of protection in the prevention of terrorism and extremism’⁹⁷ or being coerced into participation in armed groups, may influence counter-terrorism and counter-extremism strategies. Integrating gender into discrimination research involves more than simply examining the impact of counter-terrorism laws and practices on women—stereotypes about young men’s predisposition to violence or ‘radicalisation’ may also play a role in decision-making by authorities. Researchers should consider whether the counter-terrorism laws and policies being examined perpetuate gender stereotypes and impact genders differently, including the impact on Muslim women who may ‘disproportionately bear[ing] the brunt of increased anti-Muslim racism and discrimination that flows from such policies.’⁹⁸

How should a researcher identify a prohibited ground of discrimination given this complex picture? It is typical good practice to identify the grounds of discrimination based on the context and available evidence, and to explain the links between these grounds, as identified in the paragraphs above. For example, in observation-based studies of ethnic profiling by police, observers often gather data regarding ethnic appearance, as perceived by them (see, e.g., the study on ethnic profiling in section 3.3.6.5). While ascribing ethnic origin based on appearance is complicated and prone to inaccuracies, the most relevant prohibited ground in relation to these studies is, nevertheless, ethnic origin. In the case of *Hassan v. City of New York* below, the applicants argued that the prohibited ground of discrimination was religion based on available evidence; for example, official documents presented as evidence by the applicants stated that, out of the 28 ‘ancestries of interest’ identified by the NYPD, the NYPD ‘expressly chooses to exclude people and establishments with such “ancestries” [from its counter-terrorism surveillance programme] if they are not Muslim’ (such as Egyptian Christians and Syrian Jews). As such, the actions of the NYPD were clearly based on religion rather than ethnic origin.⁹⁹

96 Jayne Huckerby & Margaret Satterthwaite (eds.) *Gender, National Security, and Counter-Terrorism: Human Rights Perspectives* (Routledge, 2013); Fionnuala Ni Aoláin & Jayne Huckerby, ‘Gendering Counterterrorism: How to, and How Not to – Part II’ (2018) <https://www.justsecurity.org/55670/gendering-counterterrorism-to-part-ii/>; Sahar F. Aziz, ‘From the Oppressed to the Terrorist: Muslim American Women in the Crosshairs of Intersectionality’ (2012), 9 *Hastings Race & Poverty L.J.* 191; SOS Racismo, *Islamophobia and Gender: Women, Feminisms, Institutions and Discourses in Relation to Sexism and Racism* (2018).

97 ENAR, *Instrumentalising Women’s Rights in Racist Discourses: We Need an Intersectional Approach* (2019).

98 Center for Human Rights and Global Justice, *Women and Preventing Violent Extremism: The U.S. and U.K. Experiences* (New York: NYU School of Law, 2012), p. 9.

99 *Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015), para. II. A.I. pp. 12–13.

While the constraints of available evidence may limit the grounds claimed, researchers on discrimination against Muslims in Europe are advised to explain the link between race and religion, given the well-documented and increasing racialisation of Muslims. It is also advisable to acknowledge why the person suffering discrimination believes they were discriminated against. The divisions imposed by law—between culture or tradition and religion—can be artificial and unresponsive to how individuals see themselves and are seen in society. Research into discrimination in the counter-terrorism context should highlight that, although only one ground may be claimed on the evidence available, notions of race, religion and ethnicity have been conflated post-9/11 such that Islam, Muslims and ‘brown men’ in general are racialised as radical and dangerous to Western national security interests.

3.2.2.2. Other grounds of discrimination in the counter-terrorism context

While this research guide largely focuses on discrimination against Muslims as the most common form of discrimination in the counter-terrorism context in Europe, discrimination on other grounds may be more relevant in certain countries. Claims of discrimination have been brought before the ECtHR against Turkey regarding violations by military and security forces in the predominately Kurdish southeast region and against the United Kingdom in the context of the conflict in Northern Ireland. These claims argued discrimination on grounds of ethnic or national origin or association with a national minority based on the fact that violations by security forces disproportionately impacted certain communities.¹⁰⁰ Although the ECtHR largely rejected these claims for lack of evidence, understandings of discrimination have changed considerably since then. The methodologies and information in this guide are intended to advance progress in collecting and analysing evidence of discrimination, including similar cases of discrimination on ethnic or national origin grounds as those previously rejected by the ECtHR.

Recommendation

Researchers investigating discrimination against Muslims in the counter-terrorism context should identify specific grounds of discrimination based on the context and available evidence, while also explaining the manner in which Muslims are increasingly racialised such that the grounds of race, religion, and ethnic origin are linked.

¹⁰⁰ See, e.g.: *McKerr v. UK* (28883/95), European Court of Human Rights (2001); *Jordan v. UK* (24746/94), European Court of Human Rights (2001); *Aktaş v. Turkey* (24351/94), European Court of Human Rights (2003); *Avşar v. Turkey* (25657/94), European Court of Human Rights (2001); *Kurt v. Turkey* (24276/94), European Court of Human Rights (1998).

Hassan V. City Of New York (No. 14-1688)– **United States Court of Appeals for the Third Circuit, 2015**

Documents leaked to the Associated Press in 2011 revealed a secret New York City Police Department (NYPD) counter-terrorism surveillance programme targeting Muslims. The programme involved audio and video surveillance, extensive mapping of Muslim religious institutions, businesses and gathering places, infiltration by undercover officers, and the use of informants from within the community. The NYPD itself admitted that the programme failed to produce a single lead.¹⁰¹

Brought by the Center for Constitutional Rights, this was the first of three lawsuits against the NYPD program. It concerned surveillance of Muslims in New Jersey by the NYPD. The case was dismissed on first instance but, after an appeals court found in favour of the applicants, the City of New York agreed to settle the case. The settlement included a number of positive outcomes for campaigners, including promises from the NYPD to dismantle the units that undertook the spying and not to engage in surveillance based on religious and speech activity.

How did the applicants prove discrimination in this case?

The applicants alleged a violation of the Equal Protection Clause of the United States Constitution through discrimination on the grounds of religion and a violation of the right to free exercise of religion under the First Amendment. To state a claim under the Equal Protection Clause, applicants must show that the NYPD purposefully classified them on account of their religion. This requires evidence of policies and practices that expressly classify persons on the basis of religion.

The applicants' argument of discrimination on religious grounds was based on the following:

- NYPD documents listed 28 countries as 'ancestries of interest' but specifically excluded non-Muslims from these countries (e.g., Coptic Christians from Egypt). In NYPD reports regarding the surveillance, it is clear that communities were assessed for the

presence of Muslims (e.g., 'No Muslim component within these [Portuguese or Brazilian] communities was identified').¹⁰²

- Informants were placed specifically in mosques, monitoring prayer services and collecting information about congregants. Informants also reported on Muslim businesses and other gathering places.
- Muslim student associations were monitored, whereas the activities of Christian, Jewish or any other religious group were not.
- In addition to NYPD documents regarding this surveillance program, and testimony of informants and those subjected to surveillance, the applicants relied on statements from Mayor Michael Bloomberg and other high-level officials condoning the surveillance of Muslims under the program.

The applicants argued that this difference in treatment harmed them and the Muslim community as a whole. The surveillance caused direct harm to the victims, such as decreased participation by mosque congregants, change and reduction in manifestation of religious practice, and adverse financial impact on Muslim businesses. The surveillance also stigmatised Muslims and invited additional prejudice and discrimination against them.

The City of New York countered that, because the 9/11 attacks were committed by Muslims, a policy directly in the aftermath that seeks to tackle this perceived threat would naturally produce a disparate impact on Muslims. It argued that the surveillance served a legitimate aim.

The court rejected the City's arguments and held in favour of the applicants. Where an applicant can point to a policy that is expressly discriminatory and that explicitly singles out Muslims, then the fact of a law enforcement motive cannot justify the practice: 'even if NYPD officers were subjectively motivated by a legitimate law-enforcement purpose (no matter how sincere), they've intentionally discriminated if they wouldn't have surveilled Plaintiffs

101 *Hassan v. City of New York*, (No. 14-1688), D.N.J First Amended Complaint, para.. 2.

102 *Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015), para. II.A.1.

had they not been Muslim.¹⁰³ The court warned against bending constitutional protections in the name of a real or perceived exigency, saying that: 'What occurs here in one guise is not new. We have been down similar roads before. Jewish-Americans during the Red Scare, African-Americans during the Civil Rights Movement, and Japanese-Americans during World War II are examples that readily spring to mind'.¹⁰⁴

In relation to evidence, the court noted that the applicant's claim was well substantiated as it set out when the policy was conceived, where and why it was employed and the methods.¹⁰⁵

Lessons

- Challenges to surveillance operations on grounds of discrimination are generally difficult because of the secrecy surrounding decision-making. Here, the bulk of the evidence demonstrating that NYPD decision-making regarding targets was based on religion came from NYPD documents themselves. These documents
- were leaked to the press and further information was obtained through a long-term investigation by the Associated Press. Similar cases have been facilitated by former informants turning on the FBI and working together with NGOs (including a case brought by the ACLU of Southern California regarding discriminatory surveillance of Southern California's Muslim community¹⁰⁶).
- Because this case was settled and did not get to the discovery stage, evidence did not include a written policy specifically stating that Muslims were being targeted. Nevertheless, other evidence, taken together, established the claim of direct discrimination. The City's defence was, as is common in the European context, an appeal to 'common sense', stating that the focus on Muslims was a natural consequence of the legitimate aim pursued. The court's rejection demonstrates that such 'common sense' arguments cannot justify targeting of Muslims on national security grounds.

103 Ibid, para. IV.A.1.ii.

104 Ibid, para. V.

105 Ibid, para. IV.A.1.i.

106 See <https://www.civilfreedoms.org/?p=20536>

3.2.2.3. A causal link

There must be a causal link between the less favourable treatment and the prohibited grounds. This does not mean that the prohibited ground must be the only reason for the less favourable treatment. As discussed in section [2.2.3](#) above, many instances of discrimination in the counter-terrorism context constitute ethnic profiling, defined as when the prohibited ground is relied upon ‘to any degree’ or ‘in combination with other factors’ in decision-making. As such, ‘the practice of using “race” or ethnic origin, religion, or national origin, as either the sole factor, or one of several factors, in [a] law enforcement decision’ is discriminatory.¹⁰⁷

In the counter-terrorism context, authorities will justify measures based on a range of factors, only some of which may be related to a protected ground. For example, authorities in France have justified the imposition of assigned residence orders by reference to factors such as ‘that a person began growing a beard; ‘having religious documents’...; possessing CDs of Quranic chants or recitals; a person’s style of dress; the expressed desire to live in a Muslim country; alleged links with individuals who have a “rigorous” practice of Islam and more generally, the “manifestation” of religious practice (that is Islam).’¹⁰⁸ These factors, related to religion, are often combined with other factors, such as previous offences or being associated with individuals either suspected or convicted of terrorism offences. The factors related to religion do not need to be the only reason for the imposition of an order, but need to have played a role, potentially in combination with other factors, in the decision-making of the authorities.¹⁰⁹

Demonstrating a causal link between the treatment in question and the prohibited ground is the most difficult aspect of establishing a claim of discrimination. The methods listed in section [3.3](#) are ways to establish this causal link.

3.2.3. Without objective and reasonable justification

Although providing an objective and reasonable justification for the discriminatory impact of counter-terrorism actions is the responsibility of the state (see section [3.2.4](#) below), researchers must consider and address potential justifications for less favourable treatment in order to make a strong claim of discrimination.

¹⁰⁷ Olivier de Schutter & Julie Ringelheim, “Ethnic Profiling: A Rising Challenge for European Human Rights Law” (2008), 71:3 *Modern Law Review* 358, p. 8.

¹⁰⁸ Amnesty International, *Punished Without Trial: The Use Of Administrative Control Measures In The Context Of Counter-Terrorism In France* (2018), EUR 21/9349/2018, p. 29.

¹⁰⁹ Olivier de Schutter and Julie Ringelheim, p. 8.

3.2.3.1. Level of scrutiny

Before examining these issues, it is important to understand the level of scrutiny applied to discrimination claims. Under international law, particularly in the ECtHR, states enjoy a margin of appreciation (in simple terms, a degree of discretion in decision-making) in deciding whether differential treatment is objectively justified, but the scope of this margin depends on the circumstances, the subject matter, and the background.¹¹⁰ Particularly in national security cases, judicial bodies have given states a wide scope of discretion (though this has not consistently been the case in the ECtHR¹¹¹) and subscribed to the notion that the executive is better equipped than the judiciary in assessing intelligence matters. This is tempered, however, by the high level of scrutiny towards distinctions based on race,¹¹² religion¹¹³ or nationality.¹¹⁴ The ECtHR has said that where differential treatment is ‘based on race, colour or ethnic origins, the notion of objective and reasonable justification must be interpreted as strictly as possible.’¹¹⁵ Such distinctions require ‘very weighty reasons’ to be justified. The ECtHR has similarly said (in a case related to public order and the prevention of criminal offences) that a difference in treatment ‘which is based exclusively or to a decisive extent on a person’s ethnic origin’ cannot be justified.¹¹⁶

3.2.3.2. Legitimate aim

States commonly seek to justify discriminatory counter-terrorism measures by referring to the legitimate aims of national security or public order. They may argue that a disproportionate focus on Muslims is natural because the greatest threat to national security comes from so-called ‘Islamist’ groups. Researchers should assess whether any purported national security objective is sufficiently narrowly defined. The *Siracusa Principles* provide useful guidance in assessing limitations of rights set out in the ICCPR.¹¹⁷ Principle 29 states that national security can only be invoked to justify measures ‘when

¹¹⁰ *Rasmussen v. Denmark* (8777/79), European Court of Human Rights (1984), para. 40.

¹¹¹ See e.g., *Observer and Guardian v. United Kingdom* (13585/88) European Court of Human Rights (1991); *Sürek and Özdemir v. Turkey* (23927/94 and 24277/94) European Court of Human Rights (1999); *Slivenko v. Latvia* (48321/99), European Court of Human Rights (2003); *Zarakolu and Belge Uluslararası v. Turkey* (26971/95) European Court of Human Rights (2004).

¹¹² *East African Asians v. the United Kingdom* (4403/70), European Court of Human Rights (1973), para. 207.

¹¹³ *Hoffmann v. Austria* (12875/87), European Court of Human Rights (1993), para. 36.

¹¹⁴ *Gaygusuz v. Austria* (17371/90), European Court of Human Rights (1996), para. 42.

¹¹⁵ *Oršuš and Others v. Croatia* (15766/03) European Court of Human Rights (2010), para. 156.

¹¹⁶ *Timishev v Russia*, para. 54.

¹¹⁷ UN Commission on Human Rights, ‘The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’ (1985), UN Doc. E/CN.4/1985/4

they are taken to protect the existence of the nation or its territorial integrity or political independence against force or the threat of force.’ A German constitutional court decision, in relation to a data mining operation that targeted Muslims, ruled that establishing a national security aim capable of justifying such an operation requires ‘concrete facts, which point to the preparation or commission of terrorist attacks’ rather than a general risk.¹¹⁸

Researchers will be aware that states often use counter-terrorism powers where there is no genuine national security purpose. Counter-terrorism powers are typically invoked because they grant state actors broad discretion, often with less accountability or oversight, than other areas of law and policy. For example, law enforcement officers may invoke national security to justify identity checks that are clearly for routine immigration purposes, targeting citizens of minority ethnic origins. Researchers should assess whether any purported national security objective is legitimate and reasonable in the circumstances.

3.2.3.3. Appropriateness

The means of achieving the national security aim must also be appropriate. Researchers will need to consider whether the policy or measure is suitable for, and effective in, achieving the particular aim pursued by the state. Most counter-terrorism measures can be criticised for their ineffectiveness. In France, for example, only 25 out of 3,242 administrative searches conducted at the start of the state of emergency declared in November 2015 resulted in criminal investigations for a terrorism-related offence (of which 21 were for ‘apology of terrorism’—a vaguely defined offence that unfairly restricts freedom of expression).¹¹⁹ Counter-terrorism experts criticise such measures as national security deportations and nationality-stripping for merely externalising rather than countering an alleged threat and being contrary to binding commitments to international cooperation in counter-terrorism matters.¹²⁰

The effectiveness of preventive counter-terrorism measures, particularly those aimed at ‘extremism’ or ‘radicalisation’, has been assessed as ‘uncertain

¹¹⁸ Decision of German constitutional court BVerfGE 115,320: BVerfG 518/02 of 4 April 2006.

¹¹⁹ Amnesty International, *Upturned Lives: The Disproportionate Impact of France's State of Emergency* EUR 21/3364/2016, (2016), p. 33. available at <https://www.amnesty.org/download/Documents/EUR2133642016ENGLISH.pdf>

¹²⁰ Security Council resolution 1373 (2001) states that all Member States should ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and that Member States should afford one another the greatest measure of assistance in connection with criminal investigations or proceedings relating to the financing or support of terrorist acts.

to distinctly counterproductive.¹²¹ Tests for establishing ‘radicalisation’ that include indicators related to religious practice lack scientific basis; governments themselves have admitted that there is no single pathway to violence, and religion is rarely a relevant factor.¹²² It should also be acknowledged that the effectiveness of preventive measures cannot be empirically verified, as it requires proving a negative, which hinders the state’s ability to objectively justify its actions. As noted by the UN Special Rapporteur on counter-terrorism and human rights, evidence that counter-extremism approaches ‘have successfully reduced extremism is scarce’ and many such programs are overly focused on religious ideology ‘despite the lack of empirical data to support the assumption that religious ideology supports terrorism.’¹²³ While states often fail to measure the effectiveness of their own policies, researchers can seek out analysis by academics and think tanks.¹²⁴

Discriminatory counter-terrorism measures may also have unintended or less direct consequences which render them ineffective in meeting the stated national security aim. For example, there is a growing body of research that finds a person’s willingness to cooperate with police, including alerting them to terrorism-related dangers, is impacted by their perception of the legitimacy of the police.¹²⁵ A UK study found that for Muslims, willingness to cooperate with the police was shaped by perceptions of fairness, both in the implementation of counter-terrorism legislation and policies and in the formulation and creation of policies.¹²⁶ Individuals react not only to how they are treated by police, but also to how individuals belonging to a group with which they identify are treated. The International Commission of Jurists’ Eminent Jurists Panel found that past counter-terrorism measures ‘often alienated the very people who might assist in the task of gathering intelligence, preventing terrorist acts, and providing evidence.’¹²⁷ More broadly, the Eminent Jurists Panel also questioned whether counter-terrorism

121 Quirine Eijkman and Bart Schuurman, ‘Preventive Counter-Terrorism and Non-Discrimination in the European Union: A Call for Systematic Evaluation’ (2011), ICCT-The Hague Research Paper, p. 23.

122 Alan Travis, ‘MI5 Report Challenges Views on Terrorism in Britain’, *Guardian* (2008).

123 UN Special Rapporteur on counter-terrorism and human rights, ‘Human rights impact of policies and practices aimed at preventing and countering violent extremism’ (2020), UN Doc. A/HRC/43/46, para. 16.

124 See, e.g., C. Lum, L.W. Kennedy & A.J. Sherley, ‘The Effectiveness of Counter-terrorism Strategies: A Campbell Systematic Review’, Campbell Collaboration review paper (2006), available at <https://onlinelibrary.wiley.com/doi/pdf/10.4073/csr.2006.2>

125 Tufyal Choudhury, ‘The Experience of Canadian Muslim Civil-Society Organizations and Activists in Influencing and Shaping Counter-terrorism Legislation’ (2017), Working Paper for Canadian Network for Research on Terrorism, Security, and Society (TSAS), p. 19.

126 Aziz Huq, Tom R. Tyler, & Stephen J. Schulhofer, ‘Mechanisms for Eliciting Cooperation in Counterterrorism Policing: Evidence from the United Kingdom’ (2011), 8 *Journal of Empirical Legal Studies*, pp. 728–761.

127 International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (2009), p. 42.

laws and measures, through using the demonising language of ‘terrorist’ and ‘terrorism’, can ‘hinder rather than facilitate the search for solutions’ and noted that ‘comprehensive solutions, including political, social and economic approaches, are necessary.’¹²⁸

3.2.3.4. Necessity

States must also show that a discriminatory measure is necessary, in that there are no less discriminatory measures available. Researchers should consider alternatives to the measure in question in their assessment of necessity. Rather than shutting down a mosque, could law enforcement have pursued ordinary investigative measures such as targeted surveillance, based on a reasonable suspicion, of those persons for whom specific information regarding concrete threats existed? Instead of depriving a person abroad of their citizenship in order to prevent their return home, could they be returned under the supervision of state officials and, if information exists regarding a concrete threat they might pose, be the subject of ordinary investigative methods? In many cases, there will be alternative, less intrusive or punitive measures available to states.

Beyond the individual level, researchers can also point to alternatives to the counter-terrorism framework for addressing serious violence. Drawing on past examples, the Eminent Jurists Panel noted that a wide range of policy measures are needed for the prevention of terrorism, including ‘in the matter of education, community relations, policing, the economy, foreign policy, respect for the rights of minority communities, and in the mainstreaming of human rights and equality considerations into all government policy.’¹²⁹ Similarly, in relation to programs to counter violent extremism, OHCHR has noted a requirement for ‘careful consideration of a combination of individual, situational, economic, social and cultural factors and their interplay, beyond simple security measures.’¹³⁰ Others have pointed to the need to address underlying causes of violence through ‘drastically reducing inequality through employment, welfare, housing, education and health policies’,¹³¹ ‘prioritizing State accountability’¹³² for abuse and violations by government authorities, and pursuing an ‘ethical foreign policy’¹³³ agenda.

¹²⁸ Ibid, p. 43.

¹²⁹ Ibid, p. 118.

¹³⁰ OHCHR, ‘Report on Best Practices and Lessons Learned on How Protecting and Promoting Human Rights Contribute to Preventing and Countering Violent Extremism’ (2016), A/HRC/33/29, para. 13.

¹³¹ Medact, *False Positives: The Prevent Counter-extremism Policy in Healthcare* (2020), p. 64.

¹³² UN Special Rapporteur on counter-terrorism and human rights, ‘Human rights impact of policies and practices aimed at preventing and countering violent extremism’ (2020), UN Doc. A/HRC/43/46, para. 21.

¹³³ CAGE, *Beyond Prevent: A Real Alternative to Securitised Policies* (2020), pp. 38–40.

3.2.3.5. Proportionality

To satisfy the test of proportionality, the aim pursued by the measure or policy must outweigh the disadvantage suffered by the targets of discrimination and the wider community. Researchers should point to evidence of the short- and long-term negative impacts of counter-terrorism laws in Europe on affected persons and communities. The individual subjected to a counter-terrorism measure may be directly negatively impacted through, for example, being deprived of their liberty, restricted in their movement, expelled from their home or subject to raids and surveillance. The family of any impacted individual may also suffer significant mental and financial hardship, as well as stigmatisation from the wider community. Some counter-terrorism measures may result in family breakdown and forced separations. Being the target of a discriminatory counter-terrorism measure or a series of measures can cause embarrassment, fear, anxiety, and trauma, with potential long-lasting effects. The cumulative experience of acts of racial discrimination adversely impacts the mental and physical health of ethnic minorities, including contributing to diminished self-esteem, depression, psychological distress, and anxiety.¹³⁴ Such harm should be carefully considered in the proportionality analysis undertaken by decision-makers in the counter-terrorism context and also by courts in their deliberations regarding whether a limitation on a person's rights was both necessary and proportionate.

More broadly, there is the potential stifling effect on political expression by Muslims and self-censoring of civil society. By perpetuating a perception in the public imagination that Muslims are a threat, discriminatory counter-terrorism measures also feed discrimination against Muslims in other spheres like employment and education, and legitimise broader racism and xenophobia.

Recommendation

Researchers should identify and address potential justifications for less favourable treatment, assessing each possible justification in terms of the proportionality test, in order to make a strong claim of discrimination.

¹³⁴ See, e.g., Elizabeth A. Pascoe, Laura Smart Richman (2009), 'Perceived Discrimination and Health: A Meta-analytic Review' 135(4) *Psychol Bull*, pp. 531–54; Stephanie Wallace, James Nazroo & Laia Bécarea (2016), 'Cumulative Effect of Racial Discrimination on the Mental Health of Ethnic Minorities in the United Kingdom' 106(7) *Am J Public Health*, pp. 1294–1300.

3.2.4. Burden of proof

In civil cases concerning discrimination, the burden of proof (where ‘burden of proof’ means a duty to conclusively prove facts in legal proceedings) shifts from the person alleging discrimination (the claimant) to the alleged wrongdoer (the defendant) once the claimant has established a *prima facie* case i.e., produced facts from which it may be presumed that there has been discrimination.¹³⁵ Thus, unlike in ordinary civil cases, the claimant does not need to definitively prove that discrimination occurred. Once the claimant establishes a *prima facie* case, it is then up to the defendant to prove that there has been no breach of the right to non-discrimination. The defendant must either demonstrate that the treatment was based on reasons totally unconnected to a protected characteristic or provide an objective and reasonable justification for the difference in treatment.

The doctrine of burden of proof is applied by courts in legal proceedings but is also useful to understand how to conduct discrimination research. The aim in human rights research is;

‘by definition limited to presenting factual circumstances or conducts in which discrimination may be presumed. By virtue of the nature of proof that applies in discrimination cases, in many cases we cannot determine whether discrimination really occurred as we cannot perform proof procedures typical of discrimination law during the field research.’¹³⁶

While discrimination can be difficult to prove, researchers can benefit from the shared burden of proof in discrimination cases. Human rights researchers and activists should present all the information that points to a claimed unlawful difference in treatment or outcome and call on the state to show that it is not unlawful discrimination. While it is best practice to send an official communication to the relevant authorities before publishing any research seeking their justification for any difference of treatment, researchers can also pre-empt potential justifications for unfavourable treatment, using government statements, the texts of laws and policies, and parliamentary debates, and ensure that these justifications are adequately addressed in their research. In publishing a finding of discrimination it will ultimately be for the organisation conducting the research to decide whether the purported justification preferred by the government in question is sufficient, and what level of evidential certainty they chose to meet before publishing their

135 See, e.g., *Bhinder Singh v. Canada*, UN Human Rights Committee, UN Doc. CCPR/C/37/D/208/1986 (1989); *D.H. and others v. Czech Republic* (57325/00), European Court of Human Rights (2007), para. 82–84.

136 Dimitrina Petrova, ‘Researching Discrimination’ in Bård A. Andreassen, Hans-Otto Sano & Siobhán McInerney-Lankford (eds.), *Research Methods in Human Rights: A Handbook* (Edward Elgar Publishing 2017), p. 392.

findings. To bring a case to court they would merely need a *prima facie* case, and it will be for the researcher or their organisation to appraise whether meeting this test is sufficient to make public accusations.

Recommendation

Researchers should present evidence of differential treatment to the relevant authorities and call on them to demonstrate that the difference in treatment was lawful.

3.3. How to demonstrate discrimination

3.3.1. Introduction

This section sets out different ways of establishing a *prima facie* case of discrimination in the counter-terrorism context and different sources of evidence, informed by case law on discrimination. Human rights researchers should use a mix of these methods and sources in order to make the strongest case possible. It is rare, especially in many European countries where discrimination is often less overt, to find a ‘smoking gun.’ In most cases, it will be necessary to rely on different methodologies and forms of evidence from which, collectively, discrimination can be inferred. As stated by the ECtHR, a *prima facie* case of discrimination can be established through the ‘coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact.’¹³⁷ This means that conducting discrimination research may involve some additional time and resources compared to other human rights violations. Researchers must specifically plan to research discrimination and integrate some of the following methodologies in their research plan from the outset.

This section begins by outlining four ways or methodologies for establishing a *prima facie* case:

- By identifying laws and policies that explicitly target protected characteristics;
- By showing a difference of treatment between two groups or persons in a similar situation *but for* their race, ethnic origin or other protected characteristic (i.e., by providing a comparator);
- Through the operation of stereotypes about certain groups in decision-making; and
- By establishing a general context of discrimination against a particular group.

This section then details different sources of information and evidence, such as interviews and quantitative data, for establishing a *prima facie* claim of discrimination.

The precise choice of methodology and forms of evidence depends on the

¹³⁷ *D.H. and Others v. the Czech Republic* (57325/00), European Court of Human Rights (2007), para. 178.

research question and available sources of information. For example, if it is not possible to identify a suitable comparator, as is often the case in the counter-terrorism context, researchers may instead seek to demonstrate the operation of stereotypes in decision-making and a general context of discrimination. There will also be variations in approach between research to demonstrate discrimination in an individual case and research to show a pattern of discrimination or that a particular law has discriminatory impact. Generally, demonstrating a case of indirect discrimination will require gathering substantial evidence, often from a mix of sources, to show that policies, practices or laws that appear neutral disproportionately impact certain groups.

Recommendation

Researchers should use a combination of methods and sources of information, outlined in this research guide, in order to establish the strongest case possible. Researchers must also specifically plan to research discrimination and integrate discrimination methodologies in their research plan from the outset.

3.3.2. Laws and policies that explicitly target certain groups

A disproportionate focus on certain groups may be evident in the wording of the law or policy itself or in intermediate documents providing implementation guidance, such as circulars, guidelines, budgets or training materials. The CERD stated that ‘legislation that has the effect of penalizing without legitimate grounds certain groups or membership of certain communities’, is an indicator of racial discrimination.¹³⁸ For example, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance has argued that ‘the Netherlands’ counterterrorism laws currently authorize and result in discrimination on the basis of dual nationality’ by distinguishing between mono and dual nationals, and only permitting the deprivation of Dutch citizenship from the latter.¹³⁹ Researchers should examine whether documents specifically target one group or single out a particular religious or cultural practice as this indicates direct discrimination.

¹³⁸ CERD, ‘General recommendation 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system’ (2005), UN Doc. A/60/18, para 4(b).

¹³⁹ UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, ‘Amicus Brief before the Dutch Immigration and Naturalisation Service’ (23 October 2018), para. 53. See also Institute on Statelessness and Inclusion, ‘Principles on Deprivation of Nationality as a National Security Measure’ (2020), Principle 6. The ECtHR recently upheld the deprivation of French nationality from five men who were convicted of terrorism offences, noting that their status as dual citizens meant that the decisions did not render them stateless: *Ghounid & Others v. France* (52273/16, 52285/16, 52290/16, 52294/16, 52302/16), European Court of Human Rights (2020).

3.3.2.1. Application in the counter-terrorism context

This method has broad application in the counter-terrorism context, where policies and practices which explicitly target one group can be identified. In the case of *Hassan v. City of New York* above, NYPD documents clearly identified Muslims as targets of a counter-terrorism surveillance program. The UN Development Programme has noted that preventing violent extremism ‘as a whole in certain countries is focused on Islamist violent extremism, obscuring other forms of extremism that can lead to stigmatisation and polarisation.’¹⁴⁰ For example, guidance in France regarding counter-radicalisation issued by the official National Centre for Support and Prevention of Radicalisation lists ‘beards for men’ and ‘anti-Western rhetoric’ in their signs of radicalisation.¹⁴¹ In the Netherlands, the Comprehensive Action Programme to Combat Jihadism identifies so-called ‘jihadism’ as its target, which clearly singles out Muslims.¹⁴² A counter-extremism programme in Albania in 2018, supported by the U.S. Department of State, involved teaching 22,000 teachers to tackle ‘extremism’ in general terms, but the training materials referred exclusively to Islam.¹⁴³ There are many more examples of counter-terrorism laws, policies, and implementation guidance that explicitly focus on Muslims or Islam in the European context.

Recommendation

Researchers should examine whether counter-terrorism laws, policies or intermediate documents (like guidelines, budgets, etc.) specifically target one group or single out a particular religious or cultural practice as this indicates direct discrimination.

3.3.3. Comparators

A common method in proving discrimination is to show a difference of treatment between the person or group alleging discrimination and a person or group in a similar situation *but for* their race, ethnic origin or other protected ground. The person or group alleging discrimination must show

140 United Nations Development Programme (UNDP), ‘Assessing progress made and the future of approaches to preventing violent extremism: report of the second global meeting of UNDP on preventing violent extremism (Oslo II)’ (2018), p. 25.

141 Sébastien Pietrasanta, “La déradicalisation, outil de lutte contre le terrorisme” (2015), <https://www.vie-publique.fr/sites/default/files/rapport/pdf/154000455.pdf>

142 See the Comprehensive Action Programme to Combat Jihadism under the Ministry of Justice and Security’s National Coordinator for Security and Counterterrorism (NCTV), 29 August 2014, found at <https://data2.unhcr.org/en/documents/details/44369>

143 Enes Bayrakli & Farid Hafez (eds), “European Islamophobia Report” (2018), SETA, p. 67.

that the comparator has received more favourable treatment than those alleging discrimination or present evidence, often quantitative data, that a neutral policy or practice has disproportionately impacted them compared to the comparator group. The burden then shifts to the authority accused of discrimination to show that the difference in treatment or impact was justified. The comparator can be *hypothetical* (i.e., it is not necessary to identify an actually existing person to serve as a comparator).

Where a comparator approach is taken, the choice of comparator is important and can determine whether differential treatment is established. Nevertheless, clear and objective criteria for assessing the suitability of a comparator based on case law is lacking. The ECtHR has stated that a difference must be established between persons in ‘analogous’ or ‘relatively similar’ situations.¹⁴⁴ The CJEU has stated that situations do not have to be identical but only comparable.¹⁴⁵ The choice must be judged in relation to the actual aim pursued by the measure in question, rather than in the abstract.¹⁴⁶ As such, two groups may be considered comparable for the purposes of one situation but not another.

***A and others v. Secretary of State for the Home Department*—UK House of Lords, 2004**¹⁴⁷

Applicants challenged the United Kingdom’s policy of indefinite detention of foreign terrorism suspects, arguing that it constituted discrimination against non-UK nationals. The comparison presented was between UK national and non-UK national terrorism suspects, with the difference between them being immigration status or nationality (i.e., a prohibited ground). The Court of Appeal rejected this comparator, arguing that UK national and non-UK national terrorism suspects were not sufficiently similar. They differed in one crucial way—the former had a right of abode in the United Kingdom while the latter did not. The House of Lords rejected this

argument because the residency status of terrorism suspects was not relevant to the threat they posed to national security. The comparator had to be judged according to the legitimate purpose which the measure served—in this case, national security. Right of abode was irrelevant to national security. The House of Lords found the regime of indefinite detention to be discriminatory and therefore declared it incompatible with the ECHR. As a result, the regime was abolished and replaced with a system of control orders that were applied to both foreign and domestic terrorism suspects.

¹⁴⁴ *Lithgow and others v. the United Kingdom* (9006/800) European Court of Human Rights (1996), para. 177; *Fredin v. Sweden* (12033/86) European Court of Human Rights (1991), para. 60.

¹⁴⁵ C-267/12, *Frédéric Hay. v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* (2013), ECLI 823, para. 33.

¹⁴⁶ *Ibid.*

¹⁴⁷ *A and others v. Secretary of State for the Home Department* (2004) UKHL 56.

If a comparator cannot be identified, a comparison can be made with a basic or substantive standard that meets the requirements of human dignity.¹⁴⁸ Substantive standards necessary to ensure human dignity are set out in international human rights instruments and national constitutions. The Canadian Supreme Court frequently refers to human dignity as the value underpinning the right to non-discrimination, where dignity is harmed by 'unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits.'¹⁴⁹ The South African Constitutional Court similarly eschews the narrow comparative approach in favour of an expansive view of human dignity.¹⁵⁰

While use of a comparator is the most common method to prove discrimination and, indeed, considered a requirement in most cases before the CJEU and ECtHR, it may not be possible to adduce the evidence required to show that two comparators are sufficiently analogous. There is an additional concern that the comparator approach can lead to 'levelling down' where the authorities eliminate any difference in treatment by subjecting all groups to the less favourable treatment. In the absence of an appropriate comparator or where there is concern regarding a 'levelling down' outcome, researchers should consider using a combination of the other methods detailed in this guide to establish a *prima facie* case of discrimination.

3.3.3.1. Application to the counter-terrorism context

Choosing an appropriate comparator in the counter-terrorism context raises conceptual difficulties. Should the treatment of so-called 'Islamist terrorists' be compared, for example, to far-right or separatist/nationalist 'extremists'? Are these groups sufficiently analogous to infer that any difference in treatment is based on religion and race?¹⁵¹

In *Catrimán et al v. Chile* (below), the applicants produced data showing that most of those subjected to counter-terrorism laws in Chile were members of an Indigenous minority group, the Mapuche. The Inter-American Court of Human Rights (IACtHR) held that this was not sufficient to prove discrimination as there was no comparator. The court required information on 'the universe of violent or criminal acts of a similar nature at the time of the events of this case supposedly perpetrated by individuals who were not members of the Mapuche

148 Interights, *Non-Discrimination in International Law: A Handbook for Practitioners* (2011), p. 105.

149 *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497, para. 53.

150 *President of the Republic of South Africa v. Hugo* 1997 (4) SA 1 (CC).

151 In the case of far-right 'extremists' researchers have questioned the validity of comparisons with 'Islamist terrorists' given the relative prevalence of far-right ideas and values in parts of the media and politics—see Richard McNeil-Willson, 'Not All "Extremisms" Are Created Equal' (2019), <https://mcneilwillson.eu/blog/f/not-all-%E2%80%98extremisms%E2%80%99-are-created-equal>; Arun Kundnani, 'Blind Spot? Security Narratives and Far-Right Violence in Europe' (2012), ICCT Research Paper.

indigenous people, to whom [the Counter-Terrorism Act] should also have been applied.’¹⁵² Following this approach, evidence of discrimination in the use of counter-terrorism laws would not only require data showing that most people prosecuted under counter-terrorism laws are Muslims, but also examples of non-Muslims engaged in similarly violent or criminal acts at a similar time whose actions were not classified as terrorism. This may indeed be far-right ‘extremists’, separatists/nationalists or others who have planned and/or engaged in acts of violence.

The Institute for Social Policy and Understanding (ISPU) conducted this exact comparison in the United States. It compared ‘individuals committing or plotting violent acts who are perceived to be Muslim and allegedly acting in the name of Islam’ and ‘individuals committing or plotting violent ideologically motivated acts who are not perceived to be Muslim.’¹⁵³ Using an existing database of ideologically motivated violence and trial documents, ISPU analysed incidents from 2002 to 2015. It factored in the fatalities, weapon used, intended level of harm, target of incident, and existence of co-perpetrators to ensure that the acts compared are similar in terms of their threat to national security and thus sufficiently analogous. It found that, in relation to similarly violent ideological plots, 83 percent of Muslim perpetrators received terrorism-related penalties (with much longer sentences) while most non-Muslim perpetrators received lesser criminal charges (e.g., possession of means to make explosives). Furthermore, in the majority of cases involving Muslims, undercover law enforcement or informants actually provided the means for commission of the crime (e.g., firearm or bomb).¹⁵⁴

152 *Catrimán et al v. Chile*, Inter-American Court of Human Rights, 29 May 2014, para. 219.

153 Institute for Social Policy and Understanding, *Equal Treatment? Measuring the Legal and Media Responses to Ideologically Motivated Violence in the United States* (2018), https://www.imv-report.org/?mc_cid=a4827c286d&mc_eid=d9a68def72#title

154 Part of the reason for this difference is the treatment of acts by Muslim perpetrators as ‘international’ rather than ‘domestic’, even where the perpetrators lack foreign ties. See Shirin Sinnar (2019), ‘Separate and Unequal: the Law of “Domestic” and “International” Terrorism’ 117(7) *Michigan Law Review*, pp. 1333–1404

Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous people) v. Chile–Inter–American Court of Human Rights, 2014

Background

Chile's antiterrorism law, enacted in 1984 by the military dictatorship of General Augusto Pinochet, treats land occupations and attacks on equipment or personnel of private companies as terrorism, permits the use of anonymous prosecution witnesses and allows for prolonged pre-charge detention of those labelled as suspected terrorists. This law has been predominately used against Mapuche Indigenous people in response to their efforts to reclaim their land, 95 percent of which has been taken since the 19th century. The most extreme tactics used by Mapuche activists have been land occupations, road blockages, and setting fire to or otherwise destroying crops, buildings, timber, vehicles, and machinery. One arson attack on a farm resulted in the deaths of two people.¹⁵⁵ The heavy-handed response of Chilean police to Mapuche protests has led to deaths and injuries among protestors.¹⁵⁶

The eight Mapuche claimants in this case before the IACtHR had been prosecuted for 'terrorist arson' and 'threats to terrorist arson', among other offences, under Chile's counter-terrorism law for events that took place in 2001 and 2002 in the context of Mapuche efforts to reclaim their ancestral lands. They claimed that the classification of their conduct as acts of 'terrorism' led to a lack of due process and other harms. The claimants alleged a number of human rights violations, including of the right to freedom of expression, presumption of innocence, the right to an impartial judge and equal protection of the law, and non-discrimination.

This summary covers only the discrimination claim.

How did the applicants prove discrimination in this case?

The claimants argued that the criminal law was applied to them in a discriminatory manner on grounds of ethnic origin. There were two elements to the claim; that the counter-terrorism law was selectively applied to the Mapuche Indigenous people (Claim 1) and that domestic criminal judgements contained statements revealing the use of stereotypes and prejudice based on ethnic origin (Claim 2).

Claim 1 was based on statistical data. One data set showed that 11 out of the 21 proceedings under the counter-terrorism law from 2000 to 2013 were against Mapuche Indigenous people. Approximately 4 percent of the total population in Chile are Mapuche. The applicants had collected this data themselves.¹⁵⁷ Through a freedom of information request, they had obtained a list of all counter-terrorism cases in this period. Using this list, an NGO contacted the lawyers and individuals in the cases to ascertain the number of Mapuche defendants among the case list. The state later confirmed these findings.

Claim 2 was based on an analysis of the domestic criminal judgments, both by the court and by expert witnesses. The claimants also provided evidence of the general context of discrimination against Mapuche Indigenous people, including through expert academic witnesses, NGO reports, and the statements of UN and regional bodies.

The court began its analysis by stating that 'a difference of treatment is discriminatory when it has no objective and reasonable justification; in other words, when it does not seek a legitimate purpose and when the means used are disproportionate to the purpose sought.'¹⁵⁸ The court rejected Claim 1 for lack of evidence, despite the Inter-American Commission of Human Rights upholding

155 Amnesty International, *Pre-Juicios Injustos: Criminalización del Pueblo Mapuche a través de la Ley "Antiterrorista" en Chile* AMR 22/8862/2018, (2018): <https://amnistia.cl/wp-content/uploads/2018/08/informe-LAT-web.pdf>

156 Human Rights Watch, *Undue Process: Terrorism Trials, Military Courts and the Mapuche in Southern Chile* (2004): https://www.hrw.org/reports/2004/chile1004/5.htm#_Toc86045141

157 *Catrimán et al v. Chile*, Inter-American Court for Human Rights, 29 May 2014, para. 75.

158 *Ibid*, para. 200.

this claim. It stated that the fact that the counter-terrorism law had been ‘mostly applied to members of the Mapuche indigenous people does not, in itself, lead to the conclusion that there has been the alleged “selective” application of a discriminatory nature.’¹⁵⁹ The court did not dispute the data but criticised the lack of comparator. The claimant had not provided ‘sufficient information on the universe of violent or criminal acts of a similar nature at the time of the events of this case supposedly perpetrated by individuals who were not members of the Mapuche indigenous people, to whom, using the criteria based on which the Counter-terrorism Act was applied in the cases of Mapuche defendants, this law should also have been applied.’¹⁶⁰

The court upheld Claim 2. It stated that ‘criminal law may be applied in a discriminatory manner if the judge or court convicts an individual on the basis of reasoning founded on negative stereotypes that associate an ethnic group with terrorism in order to determine any element of criminal responsibility.’¹⁶¹ The court, relying on an earlier case, further stated that it was necessary to examine ‘the arguments adduced by the domestic judicial authorities, their actions, the language used, and the context in which the judicial decisions were handed down.’¹⁶²

The evidence included expert witnesses who had examined the domestic criminal judgements and found that ‘a significant part of the legal arguments’ of these judicial decisions reveals ‘stereotypes and prejudices that reflect negatively on these communities’ and that reasoning in these decisions is ‘supported by discriminatory terms, stereotypes or preconceived prejudices.’¹⁶³ By way of example, the domestic court referred to Mapuche land claims as ‘the so-called “Mapuche problem.”’¹⁶⁴ It considered as evidence media reports and witness testimonies regarding violent acts attributed to Mapuche people, other than the

applicants, which had not been subject to verification or prosecution. In assessing terrorist intent, the domestic court had inferred such intent from stereotypes about the violence of the Mapuche land claims, and testimony from individuals attesting to their fear from alleged violent attacks by Mapuche people other than the applicants. The alleged facts of these attacks were not verified. The IACtHR concluded that ‘the mere use of this reasoning, which reveals stereotypes and biases, as grounds for the judgments constituted a violation of the principle of equality and non-discrimination and the right to equal protection of the law.’¹⁶⁵

Lessons:

- The use of quantitative data regarding terrorism cases requires considerable care. Where quantitative data is used, a comparison must be made to an appropriate benchmark. Claim 1 failed because of the use of statistical data without an appropriate comparator.
- Stereotyping in judgements can serve as evidence of discrimination, without a requirement for quantitative data or a direct comparison. This is much easier to prove in the counter-terrorism context in Europe than adducing a comparator. With the exception of closed court trials and classified evidence, judgements are readily available to victims and their lawyers and trial observation can ensure that evidence presented in courts is accurately documented. The reliance of the domestic court on acts not committed by the charged individuals but by other Mapuche is akin to the reliance, by authorities, on acts of political violence committed by other Muslims to conclude that a separate Muslim person—or indeed, all Muslims—constitute a threat.

159 Ibid, para. 219.

160 Ibid.

161 Ibid, para. 223.

162 Ibid, para. 226.

163 Ibid, para. 225.

164 Ibid, para. 227.

165 Ibid, para. 227.

The ISPU study is a useful reference for those seeking to use the comparator approach to establish a *prima facie* claim of discrimination in the counter-terrorism context in Europe. As the study found, a common issue is that presumed 'Islamist' acts are identified as 'terrorism' more frequently than other forms of political violence. Because of the overly broad definition of terrorism, there are many incidents that could be considered within the scope of counter-terrorism laws that are nevertheless not treated as 'terrorism.' Selecting from the universe of acts of violence those that are sufficiently analogous in terms of their threat to national security, and comparing their treatment to actions by Muslim perpetrators, is one way of using a comparator approach in the counter-terrorism context. It is useful to complement data showing disproportionate impact of counter-terrorism laws on Muslims with this kind of qualitative comparative analysis of cases.

Recommendation

Researchers should ensure any quantitative data regarding the impact of counter-terrorism laws and policies is combined with qualitative analysis of relevant counter-terrorism measures, and that, where possible, quantitative data is analysed according to a relevant benchmark or comparator.

3.3.4. Use of stereotypes

One method of demonstrating discrimination is by illustrating how stereotypes operate in decision-making in a particular case or how a policy or law relies upon and perpetuates stereotypes. Although commonly used to evince ethnic profiling in law enforcement decisions, this method has also gained success outside of the narrow law enforcement context, specifically in the United States. Reliance on stereotyping as evidence of discrimination first appeared in the 1989 Supreme Court case of *Price Waterhouse v. Hopkins*, where a female employee was denied a promotion in part due to her failure to conform to stereotypes about how she should appear and behave as a woman.¹⁶⁶

More recent U.S. decisions have allowed applicants who put forward evidence of stereotyping to establish a *prima facie* case of discrimination when they lack an appropriate comparator.¹⁶⁷ In one case involving a school psychologist whose performance evaluations deteriorated after having a child, resulting in her unexpectedly being denied tenure, the court held that 'stereotypical remarks about the incompatibility of motherhood and employment' were

¹⁶⁶ Stephanie Bornstein, 'Unifying Antidiscrimination Law Through Stereotype Theory', 20 *Lewis & Clark L. Rev.* (2016), p. 938.

¹⁶⁷ *Ibid*, p. 942.

evidence that ‘gender played a part in the employment decision’ and by themselves gave rise to an inference of discrimination.¹⁶⁸ Any such remarks must be made by the decision-makers and in the context of the relevant decision (i.e., be more than mere ‘stray remarks’). In the United States, the stereotyping approach has been used less frequently in relation to race or ethnic discrimination and, where it has been used, stereotypes have been more likely to be dismissed as ‘stray remarks.’¹⁶⁹

Stereotyping is recognised as a form of gender discrimination under the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). The UN Committee on Economic, Social and Cultural Rights (CESCR) has explained that ‘discrimination on the basis of sex may be based on the differential treatment of women...; or stereotypical assumptions.’¹⁷⁰ There have been cases before the IACtHR and Constitutional Court of South Africa where laws and measures based on gender stereotypes were deemed discriminatory.¹⁷¹ The ECtHR in *Carvalho Pinto De Sousa Morais v. Portugal* stated that ‘the issue with stereotyping of a certain group in society lies in the fact that it prohibits the individualised evaluation of their capacity and needs’ and found in favour of the applicant because the domestic court had made assumptions based on gender stereotypes.¹⁷² A male comparator ‘is not essential for a finding of discriminatory treatment based on a gender stereotype.’¹⁷³

There are signs that discrimination on the basis of race and ethnicity is ‘catching up’ with the progressive model realised for sex discrimination. This includes in Europe, where commentators have noted that the ‘comparability test seems to have become less important now’ in the ECtHR as social stigma and stereotyping become methods of demonstrating discrimination.¹⁷⁴ In the 2019 ECtHR case of *Lingurar v. Romania*, Roma applicants claimed discrimination on the basis that authorities justified a police raid against them ‘using stereotypical arguments concerning what was perceived to be

168 *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 126 (2d Cir. 2004), para. 122.

169 Stephanie Bornstein, ‘Unifying Antidiscrimination Law’, p. 977.

170 Committee on Economic, Social and Cultural Rights, ‘General Comment No 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)’ UN Doc. E/C.12/2005/4.

171 *President of the Republic of South Africa v. Hugo* 1997 (4) SA 1 (CC); *Maria Eugenia Morales De Sierra v. Guatemala*, Inter-American Court of Human Rights, 16 October 1996.

172 *Carvalho Pinto De Sousa Morais v. Portugal* (17484/15) European Court of Human Rights (2017), para. 46.

173 Rebecca J. Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2011), p. 114.

174 Alexandra Timmer, ‘Toward an Anti-Stereotyping Approach for the European Court of Human Rights’ (2011), 11:4 *Human Rights Law Review*, 719.

the attitude of Roma in general and by referring to other unrelated incidents involving members of the Roma community.¹⁷⁵ They also argued institutional bias against Roma communities as demonstrated during the police actions and procedures themselves.¹⁷⁶ The court considered that:

‘the manner in which the authorities justified and executed the police raid shows that the police had exercised their powers in a discriminatory manner, expecting the applicants to be criminals because of their ethnic origin. The applicants’ own behaviour was extrapolated from a stereotypical perception that the authorities had of the Roma community as a whole.’¹⁷⁷

In *Chez*, a case concerning the practice of an energy company to place electrical pylons in a Roma-majority district at a greater height than in other districts resulting in consumers being unable to check their electricity meters, the CJEU criticised the practice in question for being ‘based on ethnic stereotypes or prejudices’ and stated that it would constitute direct discrimination ‘if that measure proves to have been introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned.’¹⁷⁸ The court took into consideration the fact that the energy company asserted that ‘damage and unlawful connections are perpetrated mainly by Bulgarian nationals of Roma origin’, without providing any evidence of alleged damage or tampering with electrical pylons, stating that ‘such assertions could in fact suggest that the practice at issue is based on ethnic stereotypes or prejudices.’¹⁷⁹

Stereotypes need not be the only factor determining the conduct of the decision-maker, as discussed in sections [2.2.3](#) and [3.2.2.3](#) above. Proving the operation of stereotypes in a particular case requires evidence of the authorities’ decision-making, such as judgements, police interviews, the text of administrative orders and related documents and statements by officials. Researchers seeking to show that a particular law perpetuates negative stereotypes and is, therefore, discriminatory should analyse the texts of law, policies, and any implementing guidance.

175 *Lingurar v. Romania* (48474/14), European Court of Human Rights (2019), para. 54.

176 *Ibid*, para. 75.

177 *Ibid*, para. 76.

178 C-83/14, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, (2015), EU:C:2015:480, para. 91.

179 *Ibid*, para. 82.

3.3.4.1. Application in the counter-terrorism context

Researchers should consider using the stereotyping approach, which has broad application in the counter-terrorism context, especially in the absence of an appropriate comparator. In *Catrimán et al v. Chile* (above), the claim of discrimination based on stereotypes associating Mapuche people with violence succeeded where the comparative approach failed. In Europe, stereotypes associating Muslims with ‘extremism’ and ‘terrorism’ are prevalent. Stereotypes play a particularly significant role in preventive counter-terrorism and counter-radicalisation measures where there is no requirement for evidence of a specific planned act of violence. In this context, a person’s identity, beliefs, and behaviours, in the absence of concrete actions, become ‘evidence’ of potential future engagement in acts of terrorism. In particular, certain manifestations of religious practice or association become highly relevant to decision-makers because of a stereotypical assumption that Muslims, at least those who exhibit those religious practices, are more likely to be ‘extremists’ or prone to engage in ‘terrorism.’ Counter-extremism programs ‘render[s] groups and individuals as “suspect” often primarily on the basis of stereotypes concerning religious or ethnic groups and geographical location.’¹⁸⁰ In general, the scope for stereotyping is greatest where decision-makers have the broadest discretion.

One example of the significance of stereotypes is in the UK’s Prevent programme. The Prevent programme is part of the UK government’s counter-terrorism policy aimed at stopping people ‘from becoming terrorists or supporting terrorism.’¹⁸¹ A key pillar of Prevent is training public sector workers, including teachers, academics, doctors, and nurses, to spot the ‘signs of radicalisation’ and requiring authorities to ‘have due regard to the need to prevent people from being drawn into terrorism.’¹⁸² Once a public sector worker reports an individual under the Prevent programme, their case may be considered by police and other authorities and, if deemed a legitimate concern, considered for a counter-radicalisation programme (the ‘Channel’ programme). Training given to public sector workers under the Prevent programme in the United Kingdom has been criticised for ‘pandering to stereotypes.’¹⁸³ In one case, detailed in a recent NGO report, a physiotherapist reported his patient, a young Muslim man, to the Prevent programme after

180 UN Special Rapporteur on counter-terrorism and human rights, ‘Human rights impact of policies and practices aimed at preventing and countering violent extremism’ (2020), UN Doc. A/HRC/43/46, para. 24.

181 UK Government, ‘CONTEST: The United Kingdom’s Strategy for Countering Terrorism’ (2018), para. 99.

182 UK Counter-Terrorism and Security Act 2015, section 26.

183 Medact, *False Positives: The Prevent Counter-Extremism Policy in Healthcare* (2020), p. 27.

noticing him watching a YouTube video by an Islamic scholar discussing religion.¹⁸⁴ In this case, it seems that stereotypes associating Muslim men interested in the study of Islam with ‘potential extremism’ and potential radicalisation influenced the decision by the physiotherapist.

Researchers may also use the stereotyping approach to show that a particular law or policy perpetuates negative stereotypes and is, therefore, discriminatory. The HRC, in its country review of the Netherlands, noted that its policy of nationality deprivation was likely to perpetuate ‘stereotypes resulting in discrimination, hostility, and stigmatization of certain groups such as Muslims, foreigners and migrants.’¹⁸⁵ Laws or proposals to target ‘political Islam’ on national security grounds in Austria, ban minarets in Switzerland, and tackle so-called ‘Islamic separatism’ in France, for example, perpetuate stereotypes that link Muslims to ‘terrorism’ and see Islam as a threat.¹⁸⁶ Bans on the wearing of full-face veil in many European countries have also ‘contributed to strengthening stereotypes and prejudices against Muslims.’¹⁸⁷

Recommendation

Researchers should present evidence of the operation of stereotypes in counter-terrorism decision-making, laws, policy, and practices, especially where an appropriate comparator cannot be identified, to establish a claim of discrimination.

3.3.5. General context

The existence of a ‘general context’ of discrimination is commonly considered by courts in assessing whether a *prima facie* case of discrimination has been demonstrated. It is not, on its own, sufficient to establish a *prima facie* case. Rather, showing that a general context of discrimination exists against a particular group strengthens a claim of discrimination.

¹⁸⁴ Ibid, p. 43.

¹⁸⁵ HRC, ‘List of Issues prior to submission of the fifth periodic report of the Netherlands’ (2017), UN Doc. CCPR/C/NLD/QPR/5, para. 10.

¹⁸⁶ Farid Hafez, ‘Austria’s New Programme for Government. En Route to a Restrictive Policy on Islam?’ *Qantara.de* (2017), <https://en.qantara.de/content/austrias-new-programme-for-government-en-route-to-a-restrictive-policy-on-islam>; Amnesty International, ‘Switzerland Minaret Ban Would Breach Freedom of Religion Obligations’ (2009); *France 24*, ‘Macron Outlines Plan to Fight “Islamist Separatism” in France’ (2020), <https://www.france24.com/en/20201002-live-macron-outlines-proposal-for-law-to-fight-separatism-in-france>

¹⁸⁷ Amnesty International, *Choice and Prejudice: Discrimination against Muslims in Europe*, EUR 01/001/2012 (2012), p. 91.

The CERD has said the broader context of a case should be taken into account, particularly for indirect discrimination complaints.¹⁸⁸ In *Yean & Bosico v. Dominican Republic*, the IACtHR considered, as part of the evidence, a broader context of racism against Haitians in the Dominican Republic.¹⁸⁹ It based this on observations of UN treaty bodies and experts, Organization of American States' reports, and academic research. Similarly, the ECtHR acknowledged the general context of racism and history of segregation of Roma people in *D.H. and others v. the Czech Republic*, noting that 'as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority.'¹⁹⁰

While a general context of discrimination requires documentary evidence, some facts of discrimination may be so self-evident in a particular context that courts have deemed that they do not require any evidence. In the UK case of *London Underground v. Edwards*, the court took it as 'common knowledge' that more single parent women than men had child-care responsibilities.¹⁹¹ Belgian antidiscrimination legislation specifies that facts which would allow a *prima facie* case to be established include facts that are common knowledge, as well as the use of a distinction criterion that is inherently suspect.¹⁹² In the CJEU case of *Chez*, although population statistics were unavailable, the fact that a district was 'commonly referred to as the largest "Roma district" in the particular town' was sufficient to establish that the district had a significant number of Roma residents.¹⁹³

3.3.5.1. Application in the counter-terrorism context

The existence of a general climate of mistrust and intolerance against Muslims in Europe is clear. Researchers seeking to demonstrate discrimination against Muslims and perceived Muslims in the counter-terrorism context should provide evidence of this general context of Islamophobia. There is a substantial body of academic literature, reports by civil society, IGO outputs, and press reports that establish the broader context of Islamophobia in Europe—see the discussion on Islamophobia and racism at section [3.2.2.1](#) and a list of potential

188 *L.R et al v. Slovakia*, CERD, UN Doc. CERD/C/66/D/31/2003 (2004), para. 10.4.

189 *Case of the Yean & Bosico children v. Dominican Republic*, Inter-American Court for Human Rights, 8 September 2005.

190 *D.H. and Others v. the Czech Republic* (57325/00), European Court of Human Rights (2007), para. 182.

191 *London Underground v. Edwards* (No. 2) (1998) IRLR 364. See also the Australian case of *Mayer v. Australian Nuclear Science and Technology Organisation* (2003), EOC 93-285.

192 Belgium, General Anti-Discrimination Federal Act, Article 28(3); Racial Equality Federal Act, Article 30(3); Federal Gender Act, Article 33(3).

193 C-83/14, "*CHEZ Razpredelenie Bulgaria*" AD v. *Komisija za zashtita ot diskriminatsia* (2015) EU:C:2015:480, para. 31.

sources of information at section [3.3.6.2](#).

Recommendation

Researchers should include evidence of a general context of discrimination that is relevant to their claim in order to make the strongest case possible.

3.3.6. Sources

3.3.6.1. Interviews

Interviews are a common source of information for human rights research. Interviews may be structured (following a set questionnaire), semi-structured (based on set themes but with flexibility for deviation), and exploratory.¹⁹⁴ Researchers should consider developing a questionnaire for interviews to ensure that each interviewee is responding to a uniform set of questions.¹⁹⁵ Questionnaires will vary depending on the specific research question. This section outlines general categories of interviewees and types of information that should be sought.

Researchers should seek to interview, at a minimum, the person(s) or groups alleging discrimination and state officials responsible for the measures, policies or laws that are allegedly discriminatory. The latter should, where possible, include different levels of authority (e.g., from teachers to the Minister of Education).

Interviews with persons alleging discrimination should cover:

- basic facts (the ‘who, what, when, where and why’) regarding the conduct, measure or state action which is the subject of their complaint (the ‘less favourable treatment’);
- the potential grounds of discrimination and any prohibited characteristics the interviewee possesses; and
- information necessary to analyse whether any justification put forward by the state is ‘objective and reasonable’, including:
 - the reasons provided to the interviewee by state officials for their conduct or the measure in question (although rare, state officials may openly admit to the individual a discriminatory reason for their actions–

¹⁹⁴ For more analysis of different interview methods, see J.A. Gubrium & J.A. Holstein, *Handbook of Interview Research: Context and Method* (Sage: 2001).

¹⁹⁵ Although researchers should also take care to allow interviewees the opportunity to offer information outside the set list of questions—asking open-ended, rather than closed (‘yes’ or ‘no’), questions is preferable.

e.g., in *Timishev v. Russia*, a police officer refused the applicant entry past a checkpoint and told him that his refusal was based on an oral instruction not to admit Chechens¹⁹⁶);

- the consequences of the allegedly discriminatory act for the individual, their family and their wider community;
- any related actions or measures (e.g., previous offences) that they have been subjected to by the authorities; and
- whether they have made any complaints or legal challenges in relation to the allegedly discriminatory conduct.

Interviews with state officials will vary according to the role and responsibility of the interviewee, but types of information that should be sought from officials in interviews are:

- how laws and policies were enacted in practice or the basic facts of the particular case in question (the 'less favourable treatment');
- details of any training, instructions or implementing guidance they received;
- whether the interviewee acknowledges any difference in treatment;
- information necessary to analyse whether any justification put forward by the state was 'objective and reasonable', including:
 - the aim of any measure, policy or law and any specific reasons for its enactment;
 - whether any alternative measures were considered and, if so, why they were dismissed;
 - whether they consider that the measure, policy or law was effective and any related evidence;
 - any negative impacts identified by the authorities, particularly those that impinged on the effectiveness of a measure (e.g., diminished willingness from certain groups to engage with state officials); and
 - where the interviewee acknowledges a difference in treatment, whether they believe that this difference was based on reasons totally unconnected to a protected characteristic, or whether there is a causal link to a prohibited ground but the difference in treatment was objectively and reasonably justified.

In general, state officials will rarely admit a discriminatory reason for their

¹⁹⁶ *Timishev v. Russia* (55762/00, 55974/00), European Court of Human Rights (2005).

actions in interviews. However, in the counter-terrorism context, some state officials believe that targeting Muslims or particular ethnic minorities is legitimate given the perceived high risk to public safety of inaction and so may admit the discriminatory reasons for their actions.¹⁹⁷ Such interviews may also reveal the operation of stereotypes in their decision-making. The research in Belgium detailed below provides an example of interviews with state officials who admitted to undertaking ethnic profiling.¹⁹⁸ Any such admissions would still need to be combined with other evidence to establish a *prima facie* case.

Amnesty International Research on Ethnic Profiling in Belgium, 2018

As part of an investigation into ethnic profiling in Belgium, where no equality data is collected regarding police stops, Amnesty International Belgium conducted interviews with 48 police officers in three local police zones. In addition, Amnesty International Belgium interviewed staff from the Cabinet of the Minister of the Interior, the Federal Police, the Permanent Committee for the Local Police, police accountability body Comité P, Belgian equality body Unia, and those responsible for several police training courses.

Twenty-four police officers acknowledged during the interviews that a problem of ethnic profiling exists in Belgium. One inspector said: 'I do use ethnic profiling, but I don't know how I should do my job differently. We've got to discriminate, because

otherwise, we wouldn't catch anyone.'¹⁹⁹ Twenty-five officers detailed practices that indicate the operation of stereotypes in decision-making. For example, one inspector said: 'If we're passing by a commercial street and see an 80-year-old woman window-shopping, we're not going to pay attention. If it's a 17-year-old Moroccan wearing a cap and looking nervous, we will stop and check him. Maybe he is meeting his girlfriend and that is causing him stress, or maybe he is preparing to rob a store.'²⁰⁰

The interviews also revealed a lack of oversight, guidance, training or tools provided to police officers to prevent ethnic profiling. As a result of its research findings, Amnesty International called on authorities to recognise ethnic profiling as a concern in Belgium and take measures to combat it.

197 Open Society Justice Initiative, *Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory* (2009), pp. 89, 107.

198 See also interviews with officials regarding the detention regime for terrorism suspects and those convicted on terrorism charges in Amnesty International Netherlands and Open Society Justice Initiative, *Inhuman and Unnecessary: Human Rights Violations in Dutch High-Security Prisons in the Context of Counterterrorism* (2017).

199 Amnesty International Belgium, *You Never Know With People Like You: Police Policies to Prevent Ethnic Profiling in Belgium* (2018), p. 3 of Executive Summary in English, available at: https://www.amnesty-international.be/sites/default/files/bijlagen/ethnic_profiling_executive_summary_en.pdf

200 Ibid, p. 21 of French version, available at: https://www.amnesty.be/IMG/pdf/amn_rapport_profilage_ethnique_web_ok.pdf

3.3.6.2. Documentary evidence

Researchers should seek the following types of documentary evidence, although exactly which are relevant and available will vary by context. Researchers should only seek access to documents regarding an individual case with the informed consent of the individual concerned. Some people subjected to counter-terrorism or counter-radicalisation measures may not wish to attract any further attention from the authorities by requesting access to documents regarding their case.

While some of these documents are publicly available, others may need to be requested from authorities (including through ‘freedom of information’ requests if possible) and individuals or their lawyers. It is important to note that in many jurisdictions, any person—not just a lawyer or journalist—can file a ‘freedom of information’ request.²⁰¹

Sources of documentary evidence include:

- Legal documents related to an individual’s case
- Policy documents such as circulars, guidelines, and training materials
- Legislation, including explanatory notes and submissions made during passage through parliament
- Regulations attendant to adopted legislation
- Budgets (for analysis of allocation of funds that in practice target specific groups)
- Transcripts of parliamentary debates, parliamentary resolutions, and reports from parliamentary committees
- Equality impact assessments of the law or policy in question or relating to the agency accused of discrimination
- Monitoring and evaluation documents relating to the law, policy or practice produced by the agency and/or oversight bodies
- Protective framework-policy and procedures in place to prevent discrimination such as training of personnel, rules of engagement, and codes of conduct
- Prior complaints regarding an agency, law or policy, from the relevant authority (e.g., police complaints body, equality body, ombudsperson, etc.)
- Media reports (in particular, ‘successful’ counter-terrorism operations are often reported in the media)

²⁰¹ For guidance, see <https://www.muckrock.com/project/foia-101-tips-and-tricks-to-make-you-a-transparency-master-234/> and <https://www.access-info.org/#>

- Official statements from authorities, including police and government press releases
- Academic research on the impact or experience of the law or policy in question

Sources of documentary evidence particularly relevant to establishing a general context of discrimination include reports and other information from:

- UN treaty bodies and Special Procedures—particularly the HRC, Committee against Torture (CAT), CERD, Working Group on Arbitrary Detention (WGAD), Working Group on the use of mercenaries, Special Rapporteur on counter-terrorism and human rights and Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance;
- UN Universal Periodic Review reports of the UN Human Rights Council
- Council of Europe—specifically the ECRI, the Commissioner for Human Rights, and resolutions and reports of the Parliamentary Assembly (PACE);
- OSCE—particularly the Tolerance and Non-Discrimination Information System;²⁰²
- NGO reports—e.g., the annual European Islamophobia Report,²⁰³ shadow reports by the European Network Against Racism (ENAR) and domestic anti-Islamophobia NGOs;
- Equality bodies and NHRIs—including FRA and domestic bodies like the Commission nationale consultative des droits de l'homme (CNCDH) in France and UNIA in Belgium;
- Academic studies; and
- Media reports.

Documentary evidence is particularly important in assessing whether any potential justification for differential treatment is 'objective and reasonable.' The effectiveness of policies and alternative policy options are often discussed in official documents, like parliamentary debates and evaluations, and reports by oversight and accountability bodies. Official documents may also contain statistical data regarding the effectiveness of a measure (such as arrest rates following police checks). Studies by think tanks and academics are useful for examining alternative policies and the impact of certain practices. Analysis produced by security agencies, such as Europol reports and the Global Terrorism

202 The Tolerance and Non-Discrimination Information System may be accessed at: <https://tandis.odihr.pl/about.jsp>

203 Enes Bayrakli & Farid Hafez (eds), *European Islamophobia Report* (2018), SETA – <https://www.setav.org/en/european-islamophobia-report-2018-eir2018/>

Database, provide insights into the perceived ‘threat picture’ facing states.

3.3.6.3. Statements by authorities

Statements by authorities can often provide easily accessible evidence of direct or indirect discrimination. This may be in the form of statements by authorities announcing their intent to discriminate or statements, for instance in parliamentary debates or to the press, that indicate a policy’s aim to single out certain groups even where this is later masked by neutral language in policy documents and law. Official statements are important sources of evidence in support of both legal claims of discrimination and claims made in human rights research.

Discriminatory statements have been accepted as proof of direct discrimination. In the *Feryn* case, a Belgian employer said in a press interview that he would not recruit applicants of Moroccan origin.²⁰⁴ Similarly, in the *Accept* case, a shareholder and patron of a Romanian football club said in an interview that the club would not hire LGBT footballers.²⁰⁵ Both cases were referred to the CJEU. The CJEU said that such statements were sufficient to establish a *prima facie* case of direct discrimination. In Italy, claims of discrimination have been supported by evidence of inconsistencies between written laws and statements by authorities, such as where apparently neutral policies were introduced but government representatives mentioned targeting Roma people in interviews published on official websites.²⁰⁶

Similarly, in *Bączkowski and Others v. Poland*, the ECtHR found that homophobic statements by the Mayor of Warsaw regarding a proposed march in a press interview, during which he said that ‘there will be no public propaganda about homosexuality’ and ‘propaganda about homosexuality is not the same as exercising one’s freedom of assembly’, were evidence of discrimination. A road traffic officer and municipal authorities, all officially acting on behalf of the mayor, refused permission for the march after the mayor’s comments appeared in the media. The court stated that ‘his opinions could have affected the decision-making process in the present case and, as a result, impinged on the applicants’ right to freedom of assembly in a discriminatory manner’, so finding a violation of the right to non-discrimination.²⁰⁷

204 C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* (2008), ECLI:EU:C:2008:397.

205 C-81/12, *Asociația Accept v. Consiliul Național pentru Combaterea Discriminării* (2013), ECLI:EU:C:2013:275.

206 Lilla Farkas, ‘How to Present a Discrimination Claim: Handbook on Seeking Remedies under the EU Non-discrimination Directives’, European Commission: Directorate-General for Justice (2011), para. 5.1.4.

207 *Bączkowski and Others v. Poland* (1543/06), European Court of Human Rights (2007), para. 100.

Discriminatory statements can also form part of the evidence in an indirect discrimination case. For example, in *Sonya Yaker v. France*, a 2016 communication to the HRC regarding the ban on full-face veils targeting Muslim women in France, the HRC concluded that the apparently neutral ban was discriminatory in its application by examining the text of the law, which included exceptions for most facial coverings except the Islamic veil; analysing data related to the implementation of the law; and reviewing the debate preceding its adoption. Part of this debate included resolutions passed by the French National Assembly explicitly condemning the full-face veil as 'contrary to the values of the Republic' and a discriminatory statement by President Nicolas Sarkozy that 'the burqa is not welcome in the French Republic.'²⁰⁸ Such statements and the parliamentary debate demonstrated to the HRC concluded that the law emerged out of a 'political desire to ban, as a matter of principle, the wearing of the full-face veil' rather than to serve any legitimate aim.²⁰⁹

Discriminatory statements by authorities may also constitute harassment—see below.

Harassment of Roma People by the Mayor of Kiskunlacháza— Supreme Court (Kúria) of Hungary²¹⁰

In 2009, the mayor of Kiskunlacháza made statements at a public demonstration and in the media implying that Roma people were responsible for the recent murder of a young girl and saying that the town of Kiskunlacháza had had enough of 'Roma aggression.' Following a claim brought by the Hungarian Helsinki Committee, the Metropolitan Administrative and Labour Court found that the mayor's statements contributed to the creation of a

hostile and threatening environment for local Roma residents, noting that his position as a public office holder gave additional weight to his statements. The court stated that harassment can be committed against a group of persons. In October 2014, the Supreme Court of Hungary upheld this judgement, reiterating that harassment may be committed against groups and not just individuals.

Evidence of discriminatory statements in the counter-terrorism context is abundant. Authorities often single out and denigrate Muslims and Islam as threats to national security. In the aftermath of a violent attack in 2019 in France, President Emmanuel Macron called on French citizens to be vigilant

208 *Yaker v. France*, UN Human Rights Committee, UN Doc. CCPR/C/123/D/2747/2016 (2018), para. 8.13.

209 Ibid, para. 3.5.

210 Hungary, Kúria, decision No. Kfv.III.37.848/2014/6 of 29 October 2014.

towards the ‘Islamist hydra.’²¹¹ Shortly after, the Minister of Interior in a parliamentary speech listed signs of radicalisation including ‘having a beard, regular and visible praying, and rigorous religious practice especially in relation to Ramadan.’²¹² Following another violent attack in 2020, President Macron announced a new law against ‘separatism’, referring only to Islam in his speech, which was followed by raids targeting Muslim associations.²¹³ In Germany, a law was introduced requiring religious personnel to undergo German language tests before preaching in Germany. Although the law refers to ‘religious personnel’ in neutral terms, politicians frequently used the word ‘imam’, and the political debate around the adoption of the law focused exclusively on Islam.²¹⁴ Similarly, the Austrian ban on ‘terrorist’ symbols was expanded to include the Muslim Brotherhood and other organisations, with the Vice-Chancellor justifying the change by saying that, by banning the symbols of ‘fascistic Islam’, he was putting an end to ‘creeping Islamization’ in Europe. This takes place in the context of an explicit war on ‘political Islam’ by the Austrian government.²¹⁵ In Hungary, Prime Minister Viktor Orbán has made openly racist statements, declaring Hungary does not want ‘Muslim invaders’ as he introduced constitutional changes to restrict ‘alien populations’ settling in Hungary and oblige state bodies to protect ‘the Christian culture of Hungary.’²¹⁶ Such statements by high-level decision-makers can form part of the evidence for a *prima facie* case of discrimination, as further demonstrated in the Supreme Court challenge to the U.S. ‘Muslim ban’ below.

211 RFI, ‘Macron Urges Muslim Leaders to Take Up the Fight against Islamist Radicalisation’ (2019), <http://www.rfi.fr/en/europe/20191029-macron-urges-muslim-leaders-take-fight-against-islamist-radicalisation>

212 Mouv, ‘Une fiche pour détecter les signes de radicalisation à la fac fait polémique’ (2019), <https://www.mouv.fr/mouv-info/cergy-pontoise-une-fiche-servant-detecter-les-signaux-faibles-de-radicalisation-circule-l-universite-354616>

213 France 24, ‘Macron Outlines Plan to Fight “Islamist Separatism” in France’ (2020), <https://www.france24.com/en/20201002-live-macron-outlines-proposal-for-law-to-fight-separatism-in-france>

214 Interview with Sindyan Qasem, 9 December 2019.

215 Enes Bayrakli & Farid Hafez (eds), *European Islamophobia Report* (2018), SETA, p. 13.

216 Emily Shultheis, ‘Viktor Orbán: Hungary doesn’t Want “Muslim Invaders”’, *Politico* (2018). www.politico.eu/article/viktor-orban-hungary-doesnt-want-muslim-invaders/ : Amnesty International, *Hungary: New Laws that Violate Human Rights, Threaten Civil Society and Undermine the Rule of Law Should be Shelved*, EUR 27/8633/2018 (2018), p. 6.

Challenge to the ‘Muslim ban’²¹⁷–Supreme Court of the United States, 2018

President Donald Trump’s executive orders restricting travel to the United States primarily from countries with majority Muslim populations have been challenged extensively in U.S. courts. The details and history of litigation against the three versions of the administration’s ban have been summarised at length elsewhere.²¹⁸ This summary focuses on relevant lessons from the Supreme Court decision in *Trump v. Hawaii*, No. 17–965, 585 U.S., 138 S. Ct. 2392. In this case, the Supreme Court upheld the travel ban by a slim majority of 5–4.

How did the applicants seek to prove discrimination in this case?

The ban was challenged on many grounds, including violation of the Equal Protection Clause (regarding non-discrimination) and the Establishment Clause (regarding freedom of religion) of the U.S. Constitution. The applicants’ arguments in support of these claims included the following:

- The primary purpose of the executive order was not national security but ‘religious animus’, as demonstrated by statements by the President and his advisors.²¹⁹ These statements denigrated Muslims and revealed an intention to prohibit Muslims from entering the United States. For example, the President called for a ‘total and complete shutdown of Muslims entering the United States’ during his campaign. He also said ‘Islam hates us....[W]e can’t allow people coming into this country who have this hatred of the United States’ and that the United States has ‘problems with Muslims coming into the country.’²²⁰ A

Presidential advisor said on television that, when the President first announced the idea, he had called it a ‘Muslim ban’ and asked him about ‘the right way to do it legally.’²²¹ When asked about the move in terminology from a Muslim ban to ‘extreme vetting’, the President said ‘[p]eople were so upset when [he] used the word Muslim.’²²² The evidence also included the fact that the President, around the time of the ban, had retweeted links to anti-Muslim videos.²²³

- The fact that five out of the seven countries included in the ban have majority Muslim populations.²²⁴

The majority opinion ruled that the President had acted within his powers in exercising his authority to limit the entry of foreigners to the United States and that the President had shown ‘sufficient national security justification’ for the measure. The opinion relied in part on the need for deference to the executive in matters of national security. This decision has been widely criticised. The dissenting opinion of Justices Sotomayor and Ginsburg rejected the majority’s conclusions. The dissenting Justices stated that a ‘reasonable observer, presented with all “openly available data,” the text and “historical context” of the Proclamation, and the “specific sequence of events” leading to it’ would conclude that the ban was motivated by anti-Muslim animus.²²⁵ In relation to the purported national security interest served, the minority opinion also explained how this purpose was already achieved through less intrusive means (in the form of the existing vetting scheme and immigration laws).

Lessons:

217 For an in-depth explanation of the ‘Muslim ban’ and its impact, see Amnesty International, *The Mountain is in front of us and the Sea is behind us: The Impact of U.S. Policies on Refugees in Lebanon and Jordan* MDE 02/0538/2019 (2019).

218 ACLU Washington, ‘Timeline of the Muslim Ban’, <https://www.aclu-wa.org/pages/timeline-muslim-ban>

219 Opinion of the Court in *Trump v. Hawaii*, No. 17–965, 585 U.S., 138 S. Ct. 2392 (2018), para. IV. B, p. 27

220 Ibid.

221 Ibid.

222 Dissent of Justices Sotomayor and Ginsburg in *Trump v. Hawaii*, No. 17–965, 585 U.S., 138 S. Ct. 2392, para. I.B, p. 6.

223 Ibid, p. 9.

224 Opinion of the Court in *Trump v. Hawaii*, p. 34.

225 Dissent of Justices Sotomayor and Ginsburg in *Trump v. Hawaii*, para. I.B.2, p. 10.

- This case provides an example of the mixed-methods approach to proving discrimination. Discriminatory statements were provided showing the motivation behind the law in question, as well as evidence of the President's general Islamophobic attitudes. There is also considerable evidence of discriminatory statements from European politicians characterising Muslims as threats or associating Muslims in general with threats to national security.
- The minority opinion of Justices Sotomayor and Ginsburg presents a compelling argument against excessive deference towards the executive in matters of national security. The dissenting Justices criticised the government's unwillingness to 'reveal its own intelligence agencies' views of the alleged security concerns', the basis of its decision-making in 'dangerous stereotypes about, *inter alia*, a particular group's supposed inability to assimilate and desire to harm the United States' and the use of an 'ill-defined national security threat' to justify a broad policy.²²⁶

226 Ibid, para. IV, pp. 26-27.

3.3.6.4. Quantitative data

Statistics are an extremely useful and widely accepted method of proving discrimination. They are especially useful for demonstrating discrimination via the comparator method and in cases of indirect discrimination, as data can show that one group is disproportionately impacted by a particular law, policy or practice. The ECtHR made this clear in *Hoogendijk v. Netherlands* stating that ‘where an applicant is able to show, on the basis of undisputed official statistics, the existence of a *prima facie* indication that a specific rule—although formulated in a neutral manner—in fact affects a clearly higher percentage of women than men, it is for the respondent government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex.’²²⁷

It is, however, a common misconception among human rights actors that statistics are *necessary* to establish a discrimination claim. Statistics, as noted by a Canadian court, are only a potential ‘signal’ of discrimination but ‘should not be confused with the thing signified’—that is, discrimination itself.²²⁸ The European Network of Legal Experts in the Non-Discrimination Field has noted that ‘statistics are not available in many cases and statistical evidence is not a prerequisite for establishing indirect discrimination’, nor it is a requirement in cases of direct discrimination.²²⁹ The ECtHR confirmed that indirect discrimination can be proved without statistics.²³⁰ In the case of *Opuz v. Turkey*, the court acknowledged that no reliable data existed on the issue of domestic violence and rather relied on NGO and UN reports to establish that victims of domestic violence in Turkey are mainly women.²³¹

Statistics must be relevant and precise. The CJEU requires that courts consider ‘whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether in general, they appear to be significant.’²³² Statistics must also show a significant difference between the groups being compared. The HRC has said that indirect discrimination occurs when ‘the detrimental effects of a rule or decision *exclusively or disproportionately* affect persons having a particular race, colour....’²³³

227 *Hoogendijk v. the Netherlands* (58641/00), European Court of Human Rights (2005), p. 22.

228 *Radek v. Henderson Development (Canada) and Securiguard Services* (No. 3) 2005 BCHRT302 [513]

229 Lilla Farkas, ‘How to Present a Discrimination Claim: Handbook on Seeking Remedies under the EU Non-discrimination Directives’, European Commission: Directorate-General for Justice (2011), para. 5.1.3.

230 *D.H. and Others v. the Czech Republic*, para. 188.

231 *Opuz v. Turkey* (33401/02), European Court of Human Rights (2009).

232 C-127/92, *Enderby v. Frenchay Health Authority* (1993) ECR 673, para 17.

233 *Althammer et al. v. Austria*, para 10.2.

Potential sources of statistics include national statistics offices, equality bodies, the government department in question, IGOs (including the European Commission, the OSCE, the UN, and the Council of Europe which often collect comparative data), universities and research institutes, and media.²³⁴ Where no data is publicly available, researchers should request from the authorities disaggregated data relating to the law or policy in question (either disaggregated by prohibited grounds or, in jurisdictions where this is not collected, by proxy (see below)).

Lack of equality data

In most European states, data disaggregated by ethnicity, race or religion is not collected by the government.²³⁵ To overcome this, researchers may consider using proxies, such as place of birth, location of residence, language spoken, and names. In Northern Ireland, the Committee on the Administration of Justice (CAJ) has used residential location as a proxy for likely community (Protestant/Catholic) background given that most neighbourhoods were divided along sectarian lines—see below.²³⁶ In France, the Constitutional Council has held that public studies relating to discrimination can be based on objective information such as name, geographic origin or prior nationality, but not on the processing of personal data on race or ethnicity, which would be contrary to the French constitution.²³⁷ In a case against Airbus, the French High Authority for the Fight Against Discrimination and for Equality (HALDE) relied on evidence of French citizenship and last names of North African origin to find discrimination on ethnic origin against the employer.²³⁸ Academics in France have also analysed judgements from a local court in Paris and, using names and places of birth as proxies, found differential treatment based on the ethnic origin of persons charged with the same offences.²³⁹

Using geographic origin and names as proxies to identify ethnic groups, and then

234 See more detail regarding sources of equality data in European Commission, *Data Collection in the Field of Ethnicity: Analysis and Comparative Review of Equality Data Collection Practices in the European Union* (2017,) http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=45791

235 Some states, such as France and the Netherlands, argue that the collection of such data is prohibited by data protection and equality laws. International and regional bodies, such as the FRA and ECRI, state that data collection can be conducted in a manner compliant with data protection and, furthermore, is necessary to monitor compliance with state obligations. See; Fundamental Rights Agency, *Toward More Effective Policing. Understanding and Preventing Discriminatory Ethnic Profiling: A Guide*, (2010), p. 25.

236 Dr. Robbie McVeigh (Committee on the Administration of Justice), *It's Part of Life Here*, p. 36.

237 French Constitutional Council, Decision No. 2007-557 DC, 15 November 2007, para. 29.

238 Toulouse Court of Appeal no R 08/06630, 19 February 2010 and Cass. Soc. 15.12.2011 No. K 10-15873 Airbus.

239 Fabien Jobard and M. Zimolag, 'Colour-Tainted Sentencing? Racial Discrimination in Court Sentences Concerning Offences Committed against Police Officers (1965-2005)', 50 *Revue française de sociologie* 2009/5.

using ethnic groups as a proxy for religion, has clear limitations. Not all people from a certain geographic location are of the majority ethnicity of that location. Furthermore, using ethnic origin as a proxy for religion means that non-Muslims within the selected ethnic groups are included while Muslims outside dominant ethnic groups, including the significant number of converts, are ignored. Proxies only relate indirectly to the prohibited grounds set out in law so must be used with caution.

The lack of equality data was not a barrier to a finding of indirect discrimination in *Sonya Yaker v. France*. The data presented in that complaint, collected by the Observatory of Secularism, a body under the French Prime Minister, showed that the majority of police checks under the law banning facial concealment were performed on women wearing the full-face veil. Among the 594 women subjected to checks, 133 were born abroad, mostly the Maghreb (97), the Middle East (9), and sub-Saharan Africa (9). Although it may be obvious that all the women wearing the full-face veil were Muslims, the data relating to national origin of those born abroad bolstered this presumption. The HRC found this data to be sufficient for a finding of discrimination on the grounds of religion.²⁴⁰

In the counter-terrorism context, another proxy which may be available is 'type of extremism.' Some countries that do not systematically collect equality data do provide data disaggregated by 'type.' In Germany the numbers of 'Gefährder' (alleged 'potential offenders' who can be subject to administrative measures) associated with 'Islamism' in comparison with other groups are provided.²⁴¹ In Spain, the Audiencia Nacional (the 'National Court' dealing with national security cases) and the State Attorney's office produce annual reports of their activities, including data on terrorism prosecutions broken down by 'jihadism' and separatist or far-left groups.²⁴² The United Kingdom also provides data regarding referrals to its Prevent programme disaggregated by types of extremism—'Islamist', 'right-wing' or, where the perceived ideology of the referred individual cannot be easily ascertained, 'mixed, unstable or unclear.'²⁴³

Official useful survey data may also be available. The FRA conducted a survey on minorities' experiences of law enforcement in 2010 which revealed that ethnic minorities reported greater rates of interaction with the police.²⁴⁴ The French Defender of Rights conducted a phone survey of a representative sample of more than 5,000 people, finding that Black and Arab men reported more negative interactions with the police than other groups.²⁴⁵

240 *Yaker v. France*, HRC, para. 8.2 and 8.17.

241 Interview with Sindyan Qasem, 9 December 2019.

242 State Attorney, Ministry of Justice, *Memoria 2018*, (2019), https://d3cra5ec8gdi8w.cloudfront.net/uploads/documentos/2019/09/10/memoria2019_76609dd4.pdf

243 Medact, *False Positives*, p. 12.

244 FRA, *EU-MIDIS Data in Focus 4: Police Stops and Minorities* (2010).

245 French Defender of Rights, *Survey on Access to Rights. Vol.1: Police/Population Reports. The Case of Identity Checks* (2017).

Data related to complaints against the alleged discriminator can be a useful source of information in the absence of relevant and available equality data. Belgium's police oversight mechanism, Comité P, analysed complaints it had received in the period 2000–2003 regarding police misconduct looking for patterns of discrimination, including analysis of the national origin of complainants.²⁴⁶ It is important to note, however, that many targets of discrimination do not make complaints or may not identify a discriminatory act as discrimination.

“It’s part of life here...”: The Security Forces and Harassment in Northern Ireland’ Committee on the Administration of Justice , Northern Ireland, 1994

In 1994, the Committee on the Administration of Justice (CAJ), based in Belfast, undertook a quantitative study into harassment by security forces in Northern Ireland. At the time, the CAJ was receiving regular reports of harassment. The then Northern Ireland Office Security Minister had even admitted that ‘the odd bit of harassment went on.’²⁴⁷ Harassment, at the time, was not defined in law but the report drew on existing concepts of racial harassment, which covered verbal or physical intimidation, threats or violence suffered by individuals because of their race.²⁴⁸ Security force harassment included behaviour that went beyond courteous and professional searches, ID checks, and vehicle checks with minimum disruption.

The research was conducted by way of a postal questionnaire sent to a representative sample, based on the Electoral Register, of young people in Northern Ireland. The questionnaire revealed that 48 percent of young Catholics in Northern Ireland

believed they had been harassed at some point by security forces as compared to 12 percent of those who identified as Protestant, and 27 percent of those who identified as neither.²⁴⁹ The main sites of harassment by security forces were stops and searches, vehicle checks and at road blocks. Harassment took the form of verbal abuse, threats of physical violence, unnecessarily disruptive behaviours, and multiple and repeated stops or vehicle checks with nothing found, sometimes many in one day. The research also included qualitative analysis. Many respondents felt they had been harassed because of their being identified as Catholic or coming from Catholic areas.²⁵⁰

A follow-up report on stop and search powers in 2012 entitled *Still Part of Life Here? A Report on the Use and Misuse of Stop and Search/Question Powers in Northern Ireland* identified continued incidents of harassment and unlawful stop and searches.²⁵¹

246 Comité P, ‘Rapport Sur La Discrimination Interne Et Externe Aux Services De Police – Analyse Des Plaintes De L’Année 2004 En Matière De Racisme’ (2005). https://comitep.be/document/onde-rzoeksrapporten/2005%20discrim_i_e%20fr.pdf

247 Dr. Robbie McVeigh (Committee on the Administration of Justice), *It’s Part of Life Here...: The Security Forces and Harassment in Northern Ireland* (1994), p. 43.

248 Ibid, p. 52.

249 Ibid, p. 10.

250 Ibid, p. 109.

251 Committee on the Administration of Justice, *Still Part of Life Here? A Report on the Use and Misuse of Stop and Search/Question Powers in Northern Ireland* (2012).

Collection of data

Where data is not publicly available or provided by authorities, researchers can collect data directly. Surveys sent to potential targets of discrimination and a comparator or benchmark population is another method—see the survey conducted by the CAJ above. Questionnaires sent to other stakeholders are another method—see *D.H. and others v. Czech Republic* (below). Drawbacks of the survey approach include costs, the subjective nature of the reported information (and difficulty of independently corroborating information received from survey answers), and ensuring the sample is large enough to compare different groups.

Researchers should only undertake studies that use proxies and collect and analyse data where technical expertise in statistics is available. This also requires considerable resources. Social scientists are pioneering new techniques to render such collection less time consuming, such as the use of machine learning and data scraping algorithms.²⁵²

Using data

Researchers must carefully examine the reliability of data and understand what it does and does not prove. In the United Kingdom, equality data is routinely collected but must still be carefully assessed. Official equality data may not be disaggregated to reflect all relevant groups, especially where the state refuses to acknowledge certain communities as distinct ethnic groups (i.e., ‘ethnicity denial’). For example, equality data on the use of stop and search powers by police in Northern Ireland is disaggregated by certain ethnicities (Irish Traveller, Asian, Black, etc.) but not by community background (Protestant/Catholic etc), thereby failing to capture potentially significant differences of treatment between groups.²⁵³ Data may be unreliable in other ways. For example, data related to airport stops under Schedule 7 of the UK’s Terrorism Act is available but only includes stops that last over one hour, which few do.²⁵⁴ This data only represents an unknown fraction of the total number of stops. Similarly, data published on referrals of students to the Prevent programme does not include referrals that do not advance beyond the stage of the school’s safeguarding lead, thus masking the true extent of Prevent referrals. Such deficiencies in the data must be carefully noted.

252 Examples of such research include: R. Voigt, J. Eberhardt, et al., *Language from Police Body Camera Footage Shows Racial Disparities in Officer Respect*, PNAS (2017), www.pnas.org/cgi/doi/10.1073/pnas.1702413114; J. Pina-Sánchez, J.V. Roberts & D. Sferopoulos, ‘Does the Crown Court Discriminate Against Muslim Named Offenders? A Novel Investigation Based on Text Mining Techniques’ 59 *Brit. J. Criminol.* (2019).

253 Committee on the Administration of Justice, *Still Part of Life Here? A Report on the Use and Misuse of Stop and Search/Question Powers in Northern Ireland* (2012), p. 10.

254 Interview with Asim Qureshi, CAGE, 28 November 2019.

***D.H. and others v. The Czech Republic*—European Court of Human Rights, 2007²⁵⁵**

This 2007 case before the ECtHR was brought by Roma applicants, who were all pupils excluded from the mainstream education system and placed in special schools for children with learning difficulties. Children were allocated to special schools based largely on their performance on tests. While these tests appeared to be an objective way of screening children, Roma children faced particular obstacles to performing well. The applicants presented statistical evidence showing that, out of 1,360 children in special schools in the Ostrava district, 56 percent were Roma children when Roma students represented only 2.26 percent of the student population. The data also showed that 50.3 percent of Roma children in Ostrava were in special schools while only 1.8 percent of non-Roma students were in these schools.

The court acknowledged that 'less strict evidential rules should apply in cases of alleged indirect discrimination'²⁵⁶ and accepted that the statistics provided by the applicants established a *prima facie* claim. The court held that there was a violation of the right to non-discrimination (Article 14 taken in conjunction with Article 2 of Protocol No. 1).

While in practice barriers to equality in education remain, this landmark decision from the ECtHR and subsequent European Commission infringement proceedings contributed to positive changes in legislation in the Czech Republic, including amendments in 2015 to the Czech School Law.

How did the applicants prove discrimination in this case?

- The applicants argued that they had been 'discriminated against on the grounds, *inter alia*, of race, color, association with a national minority, and ethnicity, in the enjoyment of their right to education.'²⁵⁷

To establish this claim they sought to prove the following elements:

- Differential treatment in the form of different and inferior education— demonstrated by statistics showing the disproportionate number of Roma students in special schools and the disadvantage suffered from attending special schools (e.g., limited opportunities for higher education).
- Lack of objective and reasonable justification—the applicants considered five potential justifications, 'the results of intelligence tests, the allegedly "inherent" intellectual inferiority of Roma children, language difficulties, poverty, or parental consent',²⁵⁸ and explained why each failed to constitute objective and reasonable justification.
- There are no official statistics on the ethnic breakdown of pupils in the Czech Republic. The Czech constitution bans the official collection of data on race and ethnicity. The applicants overcame this problem by sending questionnaires to the head teachers of over 70 schools in the Ostrava district. The government criticised this method, stating that these represented the subjective opinions of the head teachers. While the court considered that they may not be 'entirely reliable', the data nevertheless 'reveal a dominant trend' confirmed by other bodies that have examined educational segregation of Roma children.²⁵⁹ It took the European Roma Rights Centre (ERRC) eight months to collect this data on the ethnic breakdown of pupils from schools.
- The applicants addressed each of the potential justifications for the difference in treatment in detail. For example, the Czech government justified the difference in treatment in part by referring to the 'low intellectual capacity measured with the aid of psychological tests' of

²⁵⁵ *D.H. and Others v. the Czech Republic* (57325/00), European Court of Human Rights (2007).

²⁵⁶ *Ibid*, para. 186.

²⁵⁷ Application by the ERRC in *D.H. and Others v. the Czech Republic* (57325/00), European Court of Human Rights (2007), available at <http://www.errc.org/cikk.php?cikk=3559>, para. 7.3.

²⁵⁸ *Ibid*, para. 7.21.

²⁵⁹ *D.H. and Others v. the Czech Republic*, para. 191.

the applicants.²⁶⁰ Challenging this proposed justification, the applicants provided evidence, including reports from IGOs and statements from expert academics and Ministry of Education staff, that the intelligence tests lacked scientific basis and were biased against Roma students. They provided statements from the Czech government during the domestic litigation stating that the reasons for sending the applicants to special schools included ‘behaviour and poor attendance’ and ‘truancy and the lax approach of parents’—reasons unrelated to intellectual capacity. The applicants also examined the ethnic breakdown of ‘specialised’ and ‘auxiliary’ schools, which cater to children with severe mental or physical disabilities and behavioural problems. Roma students are not disproportionately represented in these schools. The applicants questioned why, if Roma children are less intellectually capable or more likely to suffer mental impairment than non-Roma children, as proposed by the Czech government, the patterns of disproportionate placement of Roma children were not replicated in ‘specialised’ and ‘auxiliary’ schools. The applicants suggested that determinations of serious disabilities were not as susceptible to racial stereotyping.²⁶¹ On the issue of intellectual capability and testing, the court held that ‘at the very least, there is a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them... the tests in question cannot serve as justification for the impugned difference in treatment.’²⁶²

- The applicants also provided other forms of evidence regarding segregation in education in the Czech Republic and racism against Roma communities more generally, including;
 - unofficial estimates of data that confirmed the research results in Ostrava;
 - older official data that predated the constitutional ban on equality data;
 - NGO reports;
 - expert evidence from academics;
 - witness statements from schoolteachers;

- an account of the history of segregation and its widespread acceptance; and
- statements and reports from national, regional, and international bodies.

Lessons

- This case, and the activities of the ERRC leading up to it, demonstrate how research can be conducted in the absence of official equality data. While getting information from police or intelligence services using this method in the counter-terrorism context would be difficult, researchers may be able to identify and survey lawyers working on the chosen research area regarding the breakdown of the ethnic or religious backgrounds of their clients. The survey method may also be adapted to examine counter-radicalisation practices involving schools, social workers, and local councils. The fact that surveys are requesting overall figures helps overcome issues of personal data protection but, nevertheless, in some contexts it may be advisable to request information relating to proxy categories rather than race, ethnicity or religion.
- The court gave weight to the general context and history of racism and segregation against the Roma population. There is, increasingly, a body of academic work and reports from international and regional bodies regarding discrimination against Muslims in Europe that could similarly be adduced.
- The analysis of the tests performed on Roma children to determine their placement in special schools has parallels with counter-radicalisation programs. The ERRC demonstrated that, although these tests appear neutral, those administering them held biases associating Roma children with low intelligence and low educational capacity, as demonstrated in their statements and those by high-level officials. Similarly, although lists of indicators of ‘radicalisation’ appear neutral, social workers and educators who are called on to identify individuals at risk of radicalisation are likely to have biases that associate Muslims with terrorism.

²⁶⁰ Ibid, para. 197.

²⁶¹ Application by the ERRC in *D.H. and Others v. the Czech Republic*, para. 7.42.

²⁶² *D.H. and Others v. the Czech Republic*, para. 201.

A more general issue in using data is understanding the correct benchmark for comparison. This issue was identified in section 3.3.3 on comparators. For example, in *Gillan and Quinton v. UK*, the ECtHR examined data related to stops under Schedule 44 of the UK Terrorism Act.²⁶³ The court noted the disproportionate impact on Black and Asian persons, although discrimination was not claimed or examined in depth. This raw data is useful to indicate a trend, but proper analysis requires understanding the correct benchmark or comparator. It may be that police conduct searches in areas with large Black and Asian populations and at times when a larger number of Black and Asians persons are ‘available’ to be stopped. Rather than comparing the numbers of Schedule 44 stops with the general population, a more accurate comparison would be to the numbers of people available to be stopped at the time and place examined. Observation-based studies, examined below, can sometimes correct this problem. In general, when using quantitative data, researchers need to consider who to compare the data to and, if only census data regarding the overall population is available, highlight this limitation.

3.3.6.5. Testing and observation

Situation testing and observation-based studies are two ways to gather evidence of discrimination that have limited applicability in the counter-terrorism context, and so are only briefly examined in this section.

Situation testing is an experimental method which involves setting up situations where discrimination may occur in order to directly observe it, such as sending in job applications that are similar except for one characteristic (e.g., ethnic origin, indicated by name) and measuring the outcome. This method has mostly been used to show discrimination in employment, housing, and access to goods and services. Whether evidence from situation tests is considered valid in a court of law differs among jurisdictions. It has been used successfully in many European countries.²⁶⁴ In France, this method was used extensively by antiracism NGOs like SOS Racisme to demonstrate discrimination in access to bars, employment, and housing.²⁶⁵

Observation-based studies are a useful method to study law enforcement activity. Researchers monitor the total number of people and their characteristics in certain public spaces to provide a baseline of people available to be subjected to police action (‘the benchmark’). Police actions are also observed and information regarding the number of actions and

²⁶³ *Gillan and Quinton v. UK* (4158/05), European Court of Human Rights (2010), paras. 44–6, 85.

²⁶⁴ See, e.g., *R v. Immigration Officer at Prague Airport and another, ex parte European Roma Rights Centre and others*, [2004] UKHL 55; Supreme Court of Hungary decision in the K.L. discotheque case (No. EBH 2002.625 in the Supreme Court’s official journal); Dutch Equal Treatment Commission decision on access to discotheques in Enschede No. 1997–65 on 10 June 1997.

²⁶⁵ See, e.g., French Court of Cassation (Criminal Division), 11 June 2002, No. 01–85.559.

relevant category (ethnicity, gender, etc.) noted. The population available to be subjected to police action is compared to the population actually stopped or searched by the police. The observations are either conducted by physical observers or based on camera or CCTV footage. Observation-based studies are a commonly accepted method of proving ethnic profiling in U.S. courts.²⁶⁶ These studies are expensive and time-consuming to conduct and require technical expertise to analyse the results.

Open Society Justice Initiative Research on Ethnic Profiling in Paris, 2007²⁶⁷

A study led by the Open Society Justice Initiative in 2007 gathered data on 525 stops at different locations in Paris, and benchmark data for over 32,000 people in those locations. Both were categorised by perceived ethnicity, age, gender, clothing, and the type of bag carried. Monitors also sought, where possible, to speak briefly to the person stopped to gather more information about their reaction to the stop and any outcomes. The study found that persons perceived to be Black were six times more likely than white people to be stopped by police, while the figure for persons perceived to be Arab was 7.6 times. The style of clothing worn

was also an important factor in whether a person would be stopped. People wearing clothing associated with French youth culture ('hip-hop', 'techno', 'punk' or 'goth' styles), two-thirds of whom were also classified as ethnic minorities, made up 47 percent of those who were stopped.

This research was used as evidence to establish a *prima facie* claim of discrimination in a civil case in which the *Cour de Cassation* in 2016 held, for the first time in France, the state responsible for discriminatory identity checks by police.²⁶⁸

Both situation testing and observation-based studies have limited application in the counter-terrorism context. In the case of observation-based studies, many counter-terrorism measures are not observable by bystanders. Subjecting testers in a situation testing operation to actions by police and intelligence services carries very serious risks and is clearly ill-advised. One potential exception is in the field of routine border checks, where situation testing has been used to prove discrimination.²⁶⁹ Even in this context, there are substantial risks involved with subjecting testers to border checks to observe patterns of questioning or stops for counter-terrorism purposes, given the serious repercussions of any attention from counter-terrorism law enforcement for individuals. In general, conducting situation tests requires

²⁶⁶ See, e.g., *State v. Soto* 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996) and *Wilkins v. Maryland State Police* Civ. No. MJG-93-468 (D. Md. 1996).

²⁶⁷ Open Society Justice Initiative, *Profiling Minorities: A Study of Stop and Search Practices in Paris* (2009).

²⁶⁸ France-Court of Cassation (Cour de Cassation), Decision 1245, 9 November 2016.

²⁶⁹ *R v. Immigration Officer at Prague Airport and another, ex parte European Roma Rights Centre and others*, [2004] UKHL 55.

significant planning and assessment of risks, especially for the person doing the testing. Researchers should refer to further expert resources before embarking on such tests.²⁷⁰

²⁷⁰ E.g. F. Alemu, 'Testing to Prove Racial Discrimination: Methodology and Application in Hungary', European Roma Rights Centre, available at www.errc.org/cikk.php?cikk=1016

4. Challenges

4.1. The ‘common sense’ defence

A common justification for the disproportionate targeting of Muslims in the counter-terrorism context is the argument that the most significant threat comes from so-called ‘Islamist’ groups and as a consequence, counter-terrorism measures will, naturally, focus on Muslims. This was the argument made by the NYPD in *Hassan v. City of New York* (see [3.2.2.1](#) above). States may also equate religious belief with the presumed ideology underpinning potential terrorist actions and argue that religious behaviours are a valid sign of radicalisation and that their focus on religious or cultural practices is not stereotyping but merely ‘common sense.’ This section outlines some lessons from case law and other areas of discrimination to help challenge any appeals to ‘common sense.’

‘Common sense’ is not a defence for discrimination under law. This point was articulated by the House of Lords in the 2004 *Prague Airport* case:

*‘Many will think it contrary to common sense to approach all applicants with an equally open mind, irrespective of the very good reasons there may be to suspect some of them more than others. But that is what is required by a law which tries to ensure that individuals are not disadvantaged by the general characteristics of the group to which they belong.’*²⁷¹

The lower court had tried to justify the United Kingdom’s treatment of Roma travellers at Prague Airport using a counter-terrorism example; ‘If a terrorist outrage were committed on our streets today, would the police not be entitled to question more suspiciously those in the vicinity appearing to come from an Islamic background?’²⁷² The House of Lords emphatically rejected this argument in the *Prague Airport* case, although undermined their position in a later case where Lord Brown stated that ‘it seems to me inevitable, however, that so long as the principal terrorist risk...is that from al Qaeda, a disproportionate number of those stopped and searched will be of Asian appearance.’²⁷³

Useful parallels can be drawn from the field of gender discrimination. Stereotypes regarding gender can also correspond to reality, but this is not a valid justification for making decisions based on stereotyping; the fact

²⁷¹ *R v. Immigration Officer at Prague Airport and another, ex parte European Roma Rights Centre and others*, [2004] UKHL 55, para 90.

²⁷² *Ibid*, para. 37.

²⁷³ *R (on the application of Gillan (FC) and another (FC)) v. Commissioner of Police for the Metropolis and another* [2006] UKHL 12, para. 80.

that, empirically, more women have care-giving roles does not justify the presumption that any particular women must be a care-giver and, on that basis, limit their work opportunities.

It is also useful to draw lessons from the field of racial profiling and data in the United States. Academic David Harris has noted that police justify targeting Black and Latinx people by arguing that ‘that’s where the criminals are’—similar to the reasoning that focusing on Muslims makes sense because ‘that’s where the terrorists are.’²⁷⁴ In the United States, this argument was tackled by examining ‘hit rates’, that is ‘the rate at which police succeed in their stop and search efforts’ in that they ‘actually find criminals, uncover guns, and confiscate drugs.’²⁷⁵ If that is, indeed, ‘where the criminals are’, then stops of Black and Latinx people should be more likely to result in arrests. Harris noted that studies from across the United States ‘in which the data collected allow for the calculation of hit rates’ all found ‘higher hit rates not for blacks and Latinos, but for whites.’²⁷⁶

Similarly, one could examine the data for Prevent referrals in the United Kingdom. If the disparity in Prevent referrals arises naturally as a result of the threat facing the United Kingdom (which is perceived by authorities to principally originate from ‘Islamist’ groups), then we would expect Muslims referred to Prevent to be assessed as ‘radicalised’ and moved onto the final, more serious stage of the process (the Channel programme). In fact, the results show the opposite. Using the most recent data, 26 percent of ‘Islamist’ referrals make it to the Channel programme while 43 percent of referrals for right-wing extremism do.²⁷⁷ Similarly, one could examine the raids undertaken under the state of emergency in France. The state may argue that targeting mosques and homes of Muslims made sense given the attacks were perpetrated by so-called Islamist groups, but few criminal investigations resulted from these actions—only 25 out of 3,242 administrative searches resulted in investigations for a terrorism-related offence, and 21 out of those 25 were for the vaguely defined offence of ‘apology of terrorism.’²⁷⁸ Just as the hit rate analysis showed that it was not, in fact, ‘common sense’ to target

274 David A. Harris, ‘The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection’ (2003), 66:71 *Law and Contemporary Problems*, p. 79.

275 Ibid, p. 81.

276 Ibid, p. 82.

277 Data analysis performed by Patrick Ball of the Human Rights Data Analysis Group (HRDAG) in the small expert meeting for this project held at the office of the International Secretariat of Amnesty International on 7 June 2019. The data is available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/763254/individuals-referred-supported-prevent-programme-apr2017-mar2018-hosb3118.pdf

278 Amnesty International, *Upturned Lives: The Disproportionate Impact of France’s State of Emergency*, EUR 21/3364/2016 (2016), p. 33.

Black and Latinx people, so these figures show that singling out Muslims as ‘terrorists’ cannot be justified by ‘common sense.’

Researchers can also challenge the ‘common sense’ argument by referring to research that questions the association of certain religious and cultural behaviours with predisposition to terrorism. Theories of radicalisation that presume a linear path or ‘conveyor belt’ from certain radical beliefs to acts of violence has been routinely criticised.²⁷⁹ The UN Special Rapporteur on counter-terrorism and human rights noted that ‘a more accurate understanding is that the path to radicalisation is individualized and non-linear, with a number of common “push” and “pull” factors but no single determining feature’ and that ‘there can be too much focus on religious ideology as the driver of terrorism and extremism.’²⁸⁰ If neither radical beliefs nor particular religious practices are causally related to terrorism, then measures targeting people who hold those beliefs or exhibit those practices cannot be justified as appropriate and effective measures to counter-terrorism.

4.2. Lack of available evidence

Finding evidence of discrimination can be difficult.²⁸¹ Rarely do those who discriminate admit why they treated a person or group differently. Governments in Europe proclaim their commitment to antiracism and equality and are careful to avoid explicit discriminatory language in their laws and policies. Where documentary evidence of discrimination exists, it is likely to be in the hands of the authorities. Those who have suffered discrimination lack access to evidence, and often come from positions of structural disadvantage which make proving their claim of discrimination even harder.

This research guide has outlined various ways to compile evidence of discrimination in the counter-terrorism context. Another option for researchers facing evidentiary difficulties is to initiate litigation. Litigation prompts disclosure, which refers to the mandatory production of evidence from both sides in a legal case. In France and Belgium, civil judges can order investigative measures (*mesures d’instruction*) including disclosure of documents.²⁸²

279 See, e.g., Arun Kundnani, *The Muslims Are Coming! Islamophobia, Extremism and the Domestic War on Terror* (2014); Open Society Justice Initiative, *Eroding Trust: The UK’s Prevent Counter-Extremism Strategy in Health and Education* (2016); CNCDH, ‘Statement of Opinion on the Prevention of Radicalisation’ (2017); Arun Kundnani and Ben Hayes, *The Globalisation of CVE Policies: Undermining Human Rights, Instrumentalising Civil Society*, Transnational Institute (2018).

280 UN Special Rapporteur on counter-terrorism and human rights, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism’ (2016), UN Doc. A/HRC/31/65 (2016), para. 15.

281 The ECtHR itself has recognised this in *Nachova v. Bulgaria* (43577/98 and 43579/98), European Court of Human Rights (2005), para. 13.

282 France, Civil Procedure Code, Articles 143 to 154; Belgium, Judicial Code, Article 877.

A criminal complaint of discrimination gives prosecutors and, in some jurisdictions, judges the right to investigate and gather evidence.

Litigation is also a helpful avenue because of the doctrine of the burden of proof. Courts are often wary of placing undue evidentiary burdens on victims of discrimination where information is not accessible to them. The ECtHR has held that ‘where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation’ for any differential treatment.²⁸³ The Canadian British Columbia Human Rights Tribunal in the *Radek* case said that ‘[i]f the remedial purposes of the [Human Rights Code] are to be fulfilled, evidentiary requirements must be sensitive to the nature of the evidence likely to be available... evidentiary requirements must not be made so onerous that proving systemic discrimination is rendered effectively impossible for complainants.’²⁸⁴ The Supreme Court of Canada has furthermore recognised that a claimant cannot be expected to prove matters that cannot be within their knowledge.²⁸⁵

The CJEU has said that a failure by the alleged discriminating authority to provide information in relation to a claim of discrimination may be taken into account when establishing facts from which a *prima facie* case of discrimination is made.²⁸⁶ It held that personal data protection norms could be a justification for not providing information, but where no information is given, even in redacted form, this is more suspect.

Litigation may not be available or appropriate in all situations. This research guide has advised researchers to collect sufficient evidence to establish a *prima facie* case of discrimination and present this to authorities. Shifting of the burden of proof occurs in courts precisely because discriminating institutions have access to information that they do not wish to reveal. This should be mirrored in the research context. Researchers should acknowledge, as has been acknowledged by courts, that direct evidence of discrimination is rare and be willing to infer discrimination from circumstantial evidence—this includes drawing inferences from evasive or equivocal responses to questions in interviews or where officials cannot provide a valid reason for their decisions.

Recommendation

²⁸³ *D.H. and others v. Czech Republic*, para. 179.

²⁸⁴ *Radek v. Henderson Development (Canada) and Securiguard Services (No 3)* 2005 BCHRT302 [513].

²⁸⁵ *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, para. 80.

²⁸⁶ C-104/10, *Patrick Kelly v. National University of Ireland (University College, Dublin)* (2011) ECLI:EU:C:2011:506., paras. 39 and 54; C-415/10, *Galina Meister v. Speech Design Carrier Systems GmbH* (2012) ECLI:EU:C:2012:217, para. 45.

Researchers should consider pursuing litigation in order to prompt disclosure of relevant evidence, where evidence of discrimination is otherwise unavailable. Where litigation is not possible or appropriate, and some evidence remains unattainable, researchers should be aware that the absence of direct evidence is not lethal to establishing a *prima facie* claim of discrimination.

4.3. Non-disclosure of evidence on national security grounds

A particular obstacle to collecting evidence of discrimination in the counter-terrorism context is the lack of transparency of national security-related activities. Individuals may be subject to raids, surveillance, immigration decisions, and administrative actions with little or no explanation or justification, and no right to challenge the measures. The criminal justice system is increasingly avoided by many states in favour of administrative measures with looser evidentiary requirements, fewer safeguards, and less oversight. This often leaves room for insidious stereotyping, but leaves a person subjected to such measures with limited power to challenge them. Across Europe, there is a 'growing reliance... on the use of secret evidence in courts' to the detriment of human rights.²⁸⁷ The reliance on secret evidence poses a challenge to effective oversight and accountability in national security matters—see section 4.4 below.

One strategy to gain access to evidence held by authorities is the use of freedom of information (FOI) laws, which allow the public to access information held by the state. The right to information is recognised under international law and codified in the Council of Europe Convention on Access to Official Documents, as well as in EU law (with respect to information from EU institutions).²⁸⁸ Organisations like MuckRock and Access Info Europe offer useful resources and guidance regarding FOI requests.²⁸⁹ Researchers should also consider working with investigative journalists and FOI lawyers who can advise on precautions, like wording such requests precisely, to reduce the likelihood of non-disclosure.

In both legal proceedings (see section above) and in response to freedom of information requests, states may refuse to disclose information on national

²⁸⁷ Didier Bigo et al, *National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges* (2014), European Parliament, p. 9.

²⁸⁸ Regulation (EC) No. 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council, and Commission documents: Council of Europe, 'Convention on Access to Official Documents', CETS No. 205 (2009).

²⁸⁹ <https://www.muckrock.com/project/foia-101-tips-and-tricks-to-make-you-a-transparency-master-234/>; <https://www.access-info.org/#>

security grounds. In the case of litigation, the principle of equality of arms generally requires both parties to have access to information relevant to a case. If some information might lawfully be withheld on grounds of national security, this would be limited to ‘circumstances where the state demonstrates that disclosure would likely cause an identifiable harm to a specific valid national security interest, that the restriction is necessary and proportionate to protect that interest, and that non-disclosure will not impair the essence of a right to a fair trial’.²⁹⁰ Where the state holds evidence that would likely cause an identifiable harm if disclosed, ‘it should nonetheless be released if the public interest in disclosure, or fairness or other considerations in favour of the accused having sight of the evidence, are greater than the harm likely to flow from that disclosure’.²⁹¹ The ECtHR has held that individuals must have access to sufficiently detailed information to permit them to effectively challenge allegations against them.²⁹² More detailed guidance regarding non-disclosure on national security grounds in litigation is available in the Amnesty International Fair Trial Manual.²⁹³

In relation to freedom of information processes, most laws on freedom of information allow the state to withhold information on national security grounds in certain limited circumstances. The 2013 Global Principles on National Security and the Right to Information (Tshwane Principles) are a useful resource for challenging attempts by governments to withhold national security-related information.²⁹⁴ The principles are derived from international law and have been endorsed by UN and the Council of Europe bodies.

Principle 3 states that:

‘No restriction on the right to information on national security grounds may be imposed unless the government can demonstrate that: (1) the restriction (a)

290 Amnesty International, *Left In the Dark: The Use of Secret Evidence in the United Kingdom*, EUR 45/014/2012, (2012), p. 14. The right to fair trial under Article 14 of the ICCPR does not explicitly allow for limitations on the rights provided for within it. The Human Rights Committee has held that even in situations of emergency threatening the life of the nation, in which some derogation may be permitted under Article 4, certain elements of Article 14 can never be limited or suspended (see General Comment No. 29 on states of emergency, UN Doc CCPR/C/21/Rev.1/Add.11 (2001), paras. 15 and 16). If Article 14 nevertheless includes some implicit scope for limitations to its guarantees of fairness, on grounds of national security, any such limitation would be subject to the general principles set out by the Human Rights Committee in its General Comment No. 31, UN Doc CCPR/C/21/Rev.1/Add.13, para. 6. See also *Rowe and Davis v. the United Kingdom* (28901/95), European Court of Human Rights (2001), para. 61; *Užkauskas v. Lithuania* (16965/04), European Court of Human Rights (2010), para. 46.

291 Ibid, citing *Užkauskas v. Lithuania* (16965/04), European Court of Human Rights (2010), para. 47.

292 *A and Others v. United Kingdom* (3455/05), European Court of Human Rights (2009), para. 220.

293 Amnesty International, *Fair Trial Manual-Second Edition*, POL 30/002/2014, (2014), chapters 6.2, 8.4. <https://www.amnesty.org/download/Documents/8000/pol300022014en.pdf>

294 Open Society Justice Initiative, ‘Global Principles on National Security and the Right to Information’ (Tshwane Principles), (2013), <https://www.justiceinitiative.org/uploads/bd50b729-d427-4fbb-8da2-1943ef2a3423/global-principles-national-security-10232013.pdf>

is prescribed by law and (b) is necessary in a democratic society (c) to protect a legitimate national security interest; and (2) the law provides for adequate safeguards against abuse, including prompt, full, accessible, and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts.'

A restriction is 'necessary' when:

- i. *'Disclosure of the information must pose a real and identifiable risk of significant harm to a legitimate national security interest.'*
- ii. *'The risk of harm from disclosure must outweigh the overall public interest in disclosure.'*
- iii. *'The restriction must comply with the principle of proportionality and must be the least restrictive means available to protect against the harm.'*
- iv. *'The restriction must not impair the very essence of the right to information.'*

In balancing the harm from disclosure with public interest, factors favouring disclosure include that disclosure could 'enhance the government's accountability', 'contribute to positive and informed debate on important issues or matters of serious interest' and 'reveal the reasons for a government decision' – all relevant in the discrimination context.

Evidence of human rights violations, including the right to non-discrimination, 'is subject to a high presumption of disclosure, and in any event may not be withheld on national security grounds in a manner that would prevent accountability for the violations or deprive a victim of access to an effective remedy.'²⁹⁵ Indeed, the right to an effective remedy for human rights violations includes the right of anyone who has been the victim of a human rights violation to access relevant information concerning those violations.²⁹⁶

States cannot refuse to disclose information regarding serious human rights violations by invoking national security.²⁹⁷

The withholding or redacting of information on national security grounds can, in most countries, be challenged before a court or independent oversight body. The HRC has criticised states for failing to justify adverse security assessments.

²⁹⁵ Principle 10(a)(2), Tshwane Principles

²⁹⁶ See para 15 of HRC, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004), UN Doc. CCPR/C/21/Rev.1/Add. 1326: states "must ensure that individuals also have accessible and effective remedies to vindicate" the rights protected by the ICCPR. On information that authorities should make available regarding the handling of protests, including to protect against discriminatory treatment of protestors, see Open Society Justice Initiative and Committee on the Administration of Justice, *Principles and Guidelines on Protest and the Right to Information* (2018), <https://www.justiceinitiative.org/publications/principles-and-guidelines-on-protest-and-the-right-to-information>.

²⁹⁷ *Gomes Lund et al v. Brazil*, Inter-American Court of Human Rights, 24 November 2010, para. 202.

In *Ilyasov v. Kazakhstan*, the applicant was denied entry to Kazakhstan on national security grounds on the basis of classified information. The HRC criticised the fact that the applicant was not given any reasons for the decision or the possibility of accessing evidence to challenge it. It found a violation of his right to family life based on the lack of verification ‘in any contested legal procedure’ of the assessment that the applicant posed a risk to national security.²⁹⁸ The ECtHR has similarly held that

*‘the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive’s assertion that national security is at stake.’*²⁹⁹

It is important to recognise that failure to obtain access to all information held by the authorities is not lethal to a claim of discrimination—see the reasoning in *Latif v. Bombardier* below. Often an individual will have access to some reasons for a counter-terrorism decision, but not all. A decision to conduct surveillance or impose an administrative measure may be based on both concrete evidence and stereotyping. As discussed in section 3.3.4 on stereotyping above, researchers only need to be sure that the stereotypes have played a role in the decision—they do not need to be the sole reason for a decision.

Recommendation

Researchers should use freedom of information (FOI) requests to secure information from official sources, referring to guidance available on FOI requests in the counter-terrorism context.

298 *Ilyasov v. Kazakhstan*, UN Human Rights Committee, UN Doc. CCPR/C/111/D/2009/2010 (2014), para. 7.7.

299 *Liu v. Russia No 2* (29157/09), European Court of Human Rights, (2011), para. 87; *Al-Nashif v. Bulgaria* (50963/99), European Court of Human Rights (2002), paras. 123–124

Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)–Supreme Court of Canada, 2015 (also known as the *Latif* case)³⁰⁰

Quebec’s Human Rights and Youth Rights Commission sued aerospace company Bombardier on behalf of Javed Latif, a Canadian pilot of Pakistani origin, for discrimination based on ethnic or national origin. Bombardier had refused Latif admission to a training programme because U.S. authorities did not grant Latif security clearance. U.S. authorities provided no reason why Latif was refused the security clearance needed to fly on his U.S. licence. He had been a pilot since 1964, had held a U.S. pilot’s licence since 1991, and a Canadian pilot’s licence since 2004, and had last been granted U.S. security clearance in October 2003, just six months before the refusal. His claim eventually failed before the Canadian Supreme Court but the case contains useful lessons for the counter-terrorism context in Europe.

How did the applicants seek to prove discrimination in this case?

The Commission’s allegation of discrimination against Bombardier was based on three arguments: (1) Bombardier’s refusal was based entirely on the U.S. decision to deny Latif security clearance; (2) the U.S. decision was a national security measure undertaken as part of the response to the attacks of 9/11; and (3) these measures ‘directly targeted Arab or Muslim people or, more broadly, people from Muslim countries, including Pakistan.’³⁰¹ The first two arguments were accepted by Bombardier.

Providing evidence to support the third argument—the connection between the adverse conduct and the protected characteristic—was, as in most discrimination cases, the biggest hurdle for the Commission. The Commission’s evidence included the following:

1. Expert evidence from an academic specialising in the discriminatory impact of post-9/11 security measures, who argued that racial profiling against Arabs and Muslims existed in U.S. counter-terrorism programs.
2. Data showing that four out of the five candidates, Latif included, who were refused security clearance by the U.S. were from Arab or Muslim countries.
3. Latif’s ‘spotless record’, which the Commission argued was ‘incompatible with the conclusion that he posed a threat to aviation or national security in the United States.’³⁰²

As the U.S. Department of Justice was not a party to the proceedings, it was not subject to discovery and, thus, not compelled to provide any explanation as to why Latif was refused security clearance. Latif had asked the U.S. authorities to review his file and was informed that the decision was based ‘on all the data we collected, which included new information’ since the grant of security clearance just six months prior.³⁰³ He was also told that there ‘is no appeals process for non-US citizens.’³⁰⁴ Latif made further attempts to get information from the U.S. authorities but failed. Four years later, the U.S. authorities lifted the prohibition on Latif’s training without providing any details or explanation.

The first instance tribunal held that Bombardier was guilty of discrimination against Latif on ethnic or national origin grounds, relying predominantly on the expert evidence regarding racial profiling in U.S. counter-terrorism measures since 9/11. This decision was overturned in the Court of Appeal and then appealed to the Supreme Court of Canada. The Supreme Court ruled against the Commission, stating that the Commission had not

300 *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc (Bombardier Aerospace Training Center)* 2015 SCC 39, [2015] 2 S.C.R. 789.

301 *Ibid*, para. 74.

302 *Ibid*, para. 95.

303 *Ibid*, para. 16.

304 *Ibid*, para. 16.

provided enough evidence to establish a *prima facie* case. The Commission had not shown that Latif's 'ethnic or national origin played any role in DOJ's unfavourable reply to his security screening request.'³⁰⁵ It acknowledged that no direct evidence for the DOJ's decision was available, so circumstantial evidence must be relied upon. However, it found that circumstantial evidence insufficient.

The court found that the expert evidence was insufficiently related to the facts of the case, in part because it did not discuss the precise aviation security programme under which the U.S. decision was made and because it focused on issues during 2001–2003 when the U.S. decision occurred in 2004. It said, in general, that '[i]t cannot be presumed solely on the basis of a social context of discrimination against a group that a specific decision against a member of that group is necessarily based on a prohibited ground... Evidence of discrimination, even if it is circumstantial, must nonetheless be tangibly related to the impugned decision or conduct.'³⁰⁶ The court said the data provided (see (2) above) was insufficient, referring to the fact that Bombardier submitted a list of 30 candidates from Arab of Muslim countries who did receive U.S. clearances. It further held that Latif's spotless record was 'not determinative of the threat he might pose to national security.'³⁰⁷

Lessons

- Expert evidence must be narrowly tailored to the facts of the claim. The Supreme Court criticised the Commission for failing to produce evidence that covered the specific programme and time period in question.
- Direct evidence is commonly not available in national security cases, but this is not lethal to the claim. In this case, the U.S. Department of Justice gave no reasons as to why they refused Latif security clearance. As an administrative national security decision, the Department of Justice was under no obligation to provide reasons and Latif did not have the right to appeal. However, this lack of reasoning by the Department of Justice is not why this case failed. The court acknowledged that, in the absence of direct evidence, circumstantial evidence can be sufficient to establish a *prima facie* case. The court dismissed the circumstantial evidence provided on very specific grounds. Had the evidence been sufficiently specific and relevant to the case, it seems the court, like the first instance tribunal, could have inferred that discrimination had taken place, showing that it is possible to make a finding of discrimination even when the reasons for a national security decision are not provided.

305 Ibid, para. 80.

306 Ibid, para. 88.

307 Ibid, para. 96.

4.4. Limited oversight and accountability in the counter-terrorism context

Another challenge to demonstrating discrimination in the counter-terrorism context are limitations on the ability of oversight and accountability mechanisms to scrutinise counter-terrorism law and policy. Generally, ombudspeople, equality bodies, parliamentary committees, and NHRIs can play an important role in identifying and challenging discriminatory practices by the state. At the regional level, the ECtHR and CJEU provide venues for challenging state actions and obtaining remedies for human rights violations, in addition to judicial authorities at the national level.

In the counter-terrorism context, this role is often more limited. Counter-terrorism or intelligence and security agencies may be officially excluded from the mandate of equality bodies and ombudspeople.³⁰⁸ Judicial accountability is limited by the margin of appreciation granted to states in national security cases by the ECtHR, though this margin ‘in cases connected with national security is no longer uniformly broad’,³⁰⁹ and the ‘high degree of trust in claims made by governments and intelligence communities in judicial proceedings’.³¹⁰ In the United Kingdom, despite the existence of a specific authority mandated to review counter-terrorism legislation (the Independent Reviewer of Terrorism Legislation), academics have assessed UK counter-terrorism review as suffering from structural challenges: secrecy of information, executive control over modalities of review (e.g., mandates and appointments), limited push-back from parliament where a hegemonic consensus on counter-terrorism persists, and a lack of trust between the state and counter-terrorism review actors.³¹¹

Researchers should engage with ombudspeople, equality bodies, and NHRIs to ensure that they exercise their oversight functions in relation to discrimination in the counter-terrorism field. Statements and research from these bodies can be particularly convincing to government and in the media. They may also have greater access to government actors and evidence, permitting them to establish claims of discrimination in situations where civil society cannot adduce sufficient evidence. The Independent Reviewer

308 For example, the Race Relations (Northern Ireland) Order 1997 exempts actions ‘done for the purpose of safeguarding national security or of protecting public safety or public order’, with later legislation making clear that the actions of the security and intelligence services are exempt.

309 European Court of Human Rights, ‘National Security and European case-law, Division de la Recherche/Research Division’ (2013), Council of Europe, available at: www.echr.coe.int

310 Didier Bigo et al, ‘National Security and Secret Evidence in Legislation and before the Courts: Exploring the challenges’, European Parliament (2014).

311 J. Blackbourn, F. de Londras & L. Morgan, *Accountability and Review in the Counter-Terrorist State*, (Bristol University Press, 2019).

of Terrorism Legislation in the United Kingdom, for example, has security clearance and is privy to otherwise withheld information.

As part of a longer-term strategy on discrimination in the counter-terrorism context, NGOs should demand greater accountability and oversight of the activities of intelligence and security agencies,³¹² as well as the imposition of a duty on public authorities to identify and prevent discrimination in the exercise of their functions.³¹³ The French Defender of Rights has stressed the need for ‘positive obligations on the part of all potential perpetrators of discrimination’, including proactive policies to analyse discrimination and instruments ‘aimed at preventing it.’³¹⁴ One tool to achieve this is the equality impact assessment, as commonly used in the United Kingdom, which assesses the potential or past impact of laws and policies on the right to equality. Assessments tend to be conducted by the agency in question, or oversight or equality bodies. Such assessments help overcome the evidential burden on targets of discrimination by obliging the potential discriminator to identify discrimination. The Canada Human Rights Commission has a template human rights impact assessment specifically crafted for security measures.³¹⁵

Recommendation

Researchers should engage with ombudspeople, equality bodies, and NHRIs to ensure that they advocate with their governments for the mandate to exercise their oversight functions in relation to counter-terrorism and national security, including discrimination in the counter-terrorism field. Where such a mandate already exists, researchers should engage with oversight bodies and provide information regarding violations of the right to non-discrimination in the counter-terrorism field.

312 There is a substantial body of literature on intelligence and national security oversight. See, e.g., P. Gill, ‘Intelligence, Threat, Risk and the Challenge of Oversight’, 27:2 *Intelligence and National Security* (2012); Venice Commission, ‘Report on the Democratic Oversight of the Security Services’ (2007); A. Wills, M. Vermeulen ‘Parliamentary Oversight of Security and Intelligence Agencies in The European Union’, European Parliament, (2011). On national security oversight by NHRIs, see L. Glušac, ‘National Human Rights Institutions and Oversight of the Security Services’ 10:1 *Journal of Human Rights Practice* (2018).

313 ECRI, ‘General Policy Recommendation No. 7 on National Legislation to Combat Racism And Racial Discrimination’ (2018), paras. 8 and 13.

314 French Defender of Rights, *Discrimination and Origins: the Urgent Need for Action* (2020), p. 57.

315 <https://www.chrc-ccdp.gc.ca/eng/content/human-rights-impact-assessment-security-measures-0>

4.5. Structural nature of discrimination

One of the challenges facing those seeking to conduct research and advocacy on discrimination in the counter-terrorism context is bias within the human rights sector itself. Denial or blindness towards racism is the norm among those who have power, and the human rights sector is not immune from perpetuating these wider power structures. Proving discrimination relies on inference; there will almost never be ‘smoking gun’ evidence and there will always be a potential non-discriminatory reason for any difference in treatment. Those with no direct experience of racial or religious discrimination are perhaps inevitably less likely to infer discrimination, especially in relation to their own society. Claims of discrimination are often dismissed by those in power, including within human rights organisations, as overly political, biased or themselves racist, particularly in continental Europe where a ‘tradition of *silence about race*’, means even use of the words ‘race’ or ‘racism’ may be controversial.³¹⁶ Even the ECtHR is not exempt from this pattern, as demonstrated by the dissenting judgements in *D.H. v. the Czech Republic*.³¹⁷ While there is no single recommendation that can fix such a structural problem, recognition of these dynamics and their impact on when and where discrimination is inferred is, at a minimum, helpful.

More broadly, the law is an imperfect tool for attaining substantive equality; structural imbalances of power are more often reproduced than disrupted and individual challenges struggle to encapsulate systemic and institutional racism within security services and wider society. Antidiscrimination law is a particularly imperfect tool in the counter-terrorism context. Terrorism is a politically charged concept that has defied definition under international law. The violent actions of the powerful are generally seen as legitimate while political violence from the less powerful has been classed as terrorism. This classification is ‘a way of depicting them [terrorists] as fanatic and irrational’ and ‘pav[ing] the way for the use of force.’³¹⁸ The early classification of political violence by Muslims as terrorism, and other violence as merely criminal, affects the subsequent implementation of terrorism laws. In Australia, for example, 17 out of 18 proscribed organisations are so-called Islamist organisations. Law enforcement activities flowing from this classification disproportionately impact Muslims. Once racialised explanations and associations with certain crimes disseminate through society and the justice system, ‘they can effectively become self-fulfilling prophecies.’³¹⁹

³¹⁶ Lilla Farkas, ‘The Meaning of Racial or Ethnic Origin in EU Law: Between Stereotypes and Identities’, European Commission: Directorate-General for Justice (2017), para 4.2.2.

³¹⁷ In his dissenting opinion Judge Borrego Borrego accuses the Grand Chamber of ‘fighting racism with racism’ (para. 14). Judge Zupančič dismisses the claims as ‘politically charged argumentation.’ *D.H. and Others v. the Czech Republic* (57325/00), European Court of Human Rights (2007).

³¹⁸ Daniel Moeckli, *Human Rights and Non-Discrimination in the ‘War on Terror’* (Oxford: Oxford University Press, 2007), p. 24.

³¹⁹ Medact, *False Positives*, p. 27.

Such critiques of international human rights law draw on the work of critical race and critical legal scholars, who have examined how apparently neutral and apolitical legal regimes maintain and perpetuate power in the hands of a dominant group and have thus criticised the law's narrowing of racism to discrete, identifiable acts of wrongdoing.³²⁰ The existence of state obligations under international law and the fact that many NGOs, IGOs, and equality bodies use international human rights law as their key framework means there is value in investigating racial injustice in terms of violations of the right to non-discrimination. But it is important to note that the legal framework is limited; not all forms of racism are racial discrimination under the law and, thus, antiracism should not be confined exclusively to legal demands and claims.³²¹ Proving discrimination according to international human rights law must be considered only one part of a broader set of actions necessary to address the systemic issues of racism and Islamophobia.

In relation to counter-terrorism, human rights actors should be calling not only for an end to discriminatory practices, but an end to classifying certain crimes as 'terrorism' based solely on the presumed political or ideological motive of the perpetrator, relying instead on the ordinary criminal justice system and, where necessary, on war crimes, crimes against humanity, and international criminal law. Reducing the ever-expanding reach of counter-terrorism legislation and challenging broader trends of securitisation are also crucial aims. More generally, human rights actors can call on governments to address broader, long-term determinants of violence and social harm, including by reallocating funds and resources away from security-focused interventions towards social services and welfare.³²²

Recommendation

Researchers should call on states to refrain from classifying certain crimes as 'terrorism' based solely on the presumed political or ideological motive of the perpetrator, relying instead on the ordinary criminal justice system and, where necessary, on war crimes, crimes against humanity and international criminal law.

320 Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2017).

321 Thank you to Ojeaku Nwabuzo and Asim Qureshi for raising this issue and the related limitations of the human rights framework as part of their feedback during a meeting on this guide.

322 UN Special Rapporteur on counter-terrorism and human rights, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism' (2016), UN Doc. A/HRC/31/65 (2016), paras. 49–50: Medact, *False Positives*, p. 64;

5. Conclusion and key recommendations

The principle of equality is central to human rights protection. Human rights researchers, advocates, and litigators play an important role in ensuring that the principle of equality is upheld by examining laws, policies, and practices and challenging those that are discriminatory, as well as by helping victims of human rights violations access effective remedies. To fulfil this important function, researchers, advocates, and litigators must be able to recognise and effectively document violations of the right to non-discrimination.

This research guide aims to help readers to recognise discrimination in the counter-terrorism context and to establish well-evidenced claims of discrimination grounded in international law. Discriminatory counter-terrorism laws and policies cause serious harm to individuals and to society. The stereotype linking Muslims in particular with ‘terrorism’ is prevalent across Europe and influences the way in which those with power—increasingly, unfettered and discretionary forms of power—make decisions. Counter-terrorism laws, policies, and measures that discriminate against Muslims contribute to a growing climate of suspicion and intolerance towards Muslims and can have devastating impacts on the lives of those directly affected by such measures. It is imperative that discriminatory counter-terrorism measures are effectively challenged, including through human rights research and advocacy.

Recommendations for best practice appear throughout the research guide. A small number of key recommendations are reproduced below.

5.1. Human rights organisations, researchers, and advocates

Human rights organisations, researchers, and advocates should:

- Engage in research to document discrimination in the counter-terrorism context, recognising that evidence of discrimination is often circumstantial and that the absence of direct evidence is not lethal to establishing a *prima facie* claim;
- Use a combination of methods and sources of information, outlined in this research guide, in order to establish the strongest case possible;
- Identify specific grounds of discrimination based on the context and available evidence, while also explaining the manner in which Muslims are increasingly racialised such that the grounds of race, religion, and ethnic origin are linked;

- Ensure any quantitative data regarding the impact of counter-terrorism laws and policies is combined with qualitative analysis of relevant counter-terrorism measures, and that, where possible, quantitative data is analysed according to a relevant benchmark or comparator;
- Use freedom of information (FOI) requests to secure information from official sources, referring to guidance available on FOI requests in the counter-terrorism context;
- Present evidence of the operation of stereotypes in decision-making and laws and a general context of discrimination, especially where an appropriate comparator cannot be identified;
- Identify and address potential justifications for less favourable treatment, assessing each possible justification in terms of the proportionality test;
- Present evidence of differential treatment to the relevant authorities and call on them to demonstrate that the difference in treatment was lawful;
- Consider pursuing litigation in order to prompt disclosure of relevant evidence, where evidence of discrimination is otherwise unavailable;
- Call on states to refrain from classifying certain crimes as 'terrorism' based solely on the presumed political or ideological motive of the perpetrator, relying instead on the ordinary criminal justice system and, where necessary, on war crimes, crimes against humanity and international criminal law; and
- Engage with ombudspeople, equality bodies, and NHRIs to ensure that they advocate with their governments for the mandate to exercise their oversight functions in relation to counter-terrorism and national security, including discrimination in the counter-terrorism field; where such a mandate already exists, engage with and provide information regarding violations of the right to non-discrimination in the counter-terrorism field.

5.2. Oversight and accountability mechanisms

Mechanisms tasked with providing oversight and accountability, such as equality bodies, NHRIs, regional bodies, and UN treaty bodies, and special procedures should:

- Advocate with their governments for the mandate to exercise their oversight functions in relation to counter-terrorism and national security, including discrimination in the counter-terrorism field, where no such mandate already exists;
- Engage in research to document discrimination in the counter-terrorism context, including equality assessments of counter-terrorism laws and policies, where this is within their remit;
- Consult and engage with civil society in their work on counter-terrorism and national security, including discrimination in the counter-terrorism field;
- Encourage and facilitate the use of complaint mechanisms by victims of discrimination in the counter-terrorism context; and
- Call on states to collect and publish disaggregated data relating to their counter-terrorism actions.³²³

³²³ The question of whether the right to privacy and data protection laws permit this type of data collection has been amply explored elsewhere. See, for example, ECRI's conclusion that there are no 'legal obstacles to such monitoring' in 'Thematic Comment No. 3: the Protection of Minorities in the European Union', pp. 15–16.

Annex 1: Non-discrimination provisions in international and regional legal instruments

International treaties

Article 1–Charter of the United Nations (26 June 1945)

Article 1 and 2–Universal Declaration on Human Rights (10 December 1948)

Articles 1 and 2–International Labour Organization (ILO) Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (25 June 1958)

Article 9–United Nations Convention on the Reduction of Statelessness (30 August 1961)

Articles 2, 3 and 26 and 27–International Covenant on Civil and Political Rights (16 December 1966)

Articles 2 and 3–International Covenant on Economic Social and Cultural Rights (16 December 1966)

United Nations Convention on the Elimination of All Forms of Racial Discrimination (4 January 1969)

Article 1–United Nations Convention Against Torture (9 December 1975)

United Nations Convention on the Elimination of Discrimination Against Women (18 December 1979)

Articles 2 and 30–United Nations Convention on the Rights of the Child (20 November 1989)

Articles 2, 3, 4, 5 and 12–United Nations Convention on the Rights of Persons with Disabilities (13 December 2006)

Council of Europe

Article 14–European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950)

Protocol No. 12 (General prohibition of discrimination) [adopted 4 November 2000; in force from 1 April 2005]

European Union

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive)

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Framework Directive)

Articles 10, 19 and 157–Treaty on the Functioning of the European Union (1 December 2009) (‘Lisbon Treaty’)

Articles 20, 21 and 23–Charter of Fundamental Rights of the European Union (26 October 2012)

Annex 2: Relevant handbooks and research guides on discrimination law

ENAR, *Toolkit: Documenting the Discriminatory Impact of Counter-Terrorism and Counter-Radicalisation in the European Union* (2019), <https://www.enar-eu.org/Documenting-the-discriminatory-impact-of-counter-terrorism-and-counter-radicalisation-in-the-european-union>

European Union Agency for Fundamental Rights (FRA) and Council of Europe, *Handbook on European Non-Discrimination Law: 2018 Edition* (2018), <https://fra.europa.eu/en/publication/2018/handbook-european-non-discrimination-law-2018-edition>

European Network of Legal Experts in Gender Equality and Non-Discrimination, *A Comparative Analysis of Non-Discrimination Law in Europe: 2019 Edition* (2020), European Commission: DG for Justice and Consumers, <https://www.migpolgroup.com/wp-content/uploads/2020/05/A-comparative-analysis-of-non-discrimination-law-in-Europe-2019.pdf>

European Network of Legal Experts in the Non-Discrimination Field (written by Lilla Farkas), *How to Present a Discrimination Claim: Handbook on Seeking Remedies under the EU Non-Discrimination Directives* (2011), European Commission: DG for Justice, https://www.migpolgroup.com/_old/portfolio/how-to-present-a-discrimination-claim-handbook-on-seeking-remedies-under-the-eu-non-discrimination-directives/

Interights, *Non-Discrimination in International Law: A Handbook for Practitioners* (2011), <https://issuu.com/arambarra/docs/non-discrimination-in-international-law-a-handbook>

Łukasz Bojarski, Isabelle Chopin, Barbara Cohen, Uyen Do, Lilla Farkas & Romanița Iordache, *Awareness-Raising Seminars in the Areas of Non-Discrimination and Equality Targeted at Civil Society Organisations: Training Manual on Discrimination* (2012), European Commission: DG for Employment, Social Affairs and Inclusion, https://www.migpolgroup.com/_old/portfolio/awareness-raising-seminars-in-the-areas-of-non-discrimination-and-equality-targeted-at-civil-society-organisations-art-project-training-manual-on-discrimination/

