Racial Profiling Versus Right to Freedom from Discrimination: An Analysis from the Aviation Security Domain

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Abstract

Right to freedom from been discriminated against is a right not to place a person or group of persons above or downgrad below others irrespective of religion, colour, sex, or race in all aspects of human life. Racial profiling is an investigative tool adopted by the aviation security practitioners to detect a prospective aviation offender based on the individual's race. The opponent of racial profiling seriously argued against this tool as limiting the right to freedom from discrimination of man. The proponent, countering the opponent, opined that it is a means of countering terrorism against civil aviation. While this is the state of affairs across the world, many States have been reacting to these conflicting interests. The paper therefore examines the position of these interests under the aviation security domain and the balance of conflicting interests between this right and the interest of the aviation security practitioners. The paper relies on qualitative method of legal research including primary and secondary sources, and interview of passenger who is affected. The paper finds that the right to protect civil aviation safety and security has been whittling down the application of the right to freedom from discriminatory provisions. The paper concludes that, although the intention of the proponent is to protect civil aviation against any of the unlawful interference, this can only be the case where race is combined with other factor(s) to conduct profiling on passenger.

Introduction

Right to be treated equally is a fundamental right to the existence of human being. In other word, this right has been statutorily recognized in both national[1] and international laws.[2] Before September 11, 2001, 81 % of the respondent seriously condemned the

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[1] Constitution of the Federal Republic of Nigeria, 1999 as amended, section 36.

[2] See Universal Declaration of Human Rights, 1948 Charter of the United Nations, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 Or G.A. Res. 217 A (III), U.N. Doc. A/810 at 71 (1948) Or GA Res 217A (III), Un GAOR, 3rd sess, 183rd plen mtg, UN Doc. A/810 (10 December 1948) ; International Covenant on Civil and Political Rights adopted on 16 December 1966 enforced on 23 March 1976, GA res. 2200A (xxi), 21 UN GAOR Supp. (No 16) at 62, UNDoc. A/6316 (1966) Or 999 UNTS 171 and 1057 UNTS 407 [1980] ATS 23/6 ILM 368 (1967); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) adopted by General Assembly Resolution 2106 (XX) of 21 December 1965 and entered into force on 4 January 1969, Distr. GEN CERD/c/35/Add.1 of 2000 Or Australian Treaty Series Number, [1975] ATS 40; Convention on the Elimination Of All Forms of Discrimination Against Women (CEDAW), 1979 adopted on 18 December 1979 and entered into force on 3 September 1981, GEN. ASS 34/180 of 18 December 1979 Or UNTS Vol. 1249, p.13; and African Charter on Human Rights, 1981, adopted on 27 June 1981 and entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5,21 I.L.M 58 (1982).

adoption of racial profiling as a method of detecting criminals,[3] this was probably based on the fact that the provisions of the laws on freedom from discrimination has been tampered with by the law enforcement agent of the United States of America through the application of racial profiling on African-American drivers on the pretext to promote national security.[4] These profiling measures have been challenged in lawsuits alleging unlawful discrimination.[5] Some also question the effectiveness of profiling strategies relative to random searches.[6]

Concepts of Racial Profiling, Freedom from Discrimination and Aviation Security

Right to freedom from discrimination

"Non-discrimination" is one of the most fundamental human rights under the international human rights law.[7] Black's Law Dictionary defines discrimination to mean "differential treatment, especially a failure to treat persons equally when no reasonable distinction can be found between those favoured and those not favoured".[8] It is also "the effect of a law or established practice that confers privileges on a certain class or that denies privilege to a certain class because of race, age, sex, nationality, religion, or handicap".[9] Human Right Committee[10]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, natural 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.*[11]

A combined reading of the definition and meaning of discrimination reveals that discrimination may be-positive or negative. On one hand, a positive discrimination connotes taking advantage of a particular law or an established practice on any event, by placing a class of people over and above other class because of their race, colour, religion,

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[3] See Samuel R. Gross and Debra Livingston, Racial Profiling under Attack, Vol. 102, *Columbia Law Review* (2002) 1413.

[4] Black's Law Dictionary, 8th edition, at p. 1286.

[5] See *Green v. TSA,* Case No. C04-763 Z, (W.D. Wash., .led 2004); see also *Anderson v. Cornejo*, 355 F.3d 1021 (7th Cir. 2004).

[6] Nicola Persico and Petra E. Todd, *Passenger Profiling, Imperfect Screening, and Airport Security*

[7] See Ismail Mustapha Adua, International law on aircraft hijacking: The practice in Malaysia and Nigeria, (Ph.D Thesis, IIUM, Malaysia, 2014), p. 121.

[8] Black's Law Dictionary, at p. 500.

[9] Ibid.

[10] Human Right Committee (HRC) is established under Article 28 of the International Covenant on Civil and Political Rights (ICCR) adopted by the General Assembly on December 16, 1966, entered into force on March 23, 1976. GA Res. 2200(XXI) UN Doc. A1 6316 (1966); 999 UNTS 171. See also Abdul Ghafur Hamid, *Public International Law: A Practical Approach, (3rd edn.),* (Malaysia: Sweet and Maxwell Asia, 2011), p.305. Note that HRC consist of 18 elected members who are persons of high moral character and recognized competent in the field of legal profession. AbdulGhafar, 308-309.

[11] HRC General comment No 18, paragraph 7. This definition shares the same features with that of International Convention on the Elimination of all Forms of Racial Discrimination ICERD), 1966, Article 1 (1) and Convention on the Elimination of all Forms of Discrimination Against Women CEDAW, 1979, Article 1.

ethic, age, nationality and imparity. On the other hand, a negative discrimination is where the effect of law or established practice denies a class of people certain privilege or enjoyment, thereby placing them below and under another class of people because of race, colour, religion, ethic, age, nationality and imparity. Superiority and inferiority are the deciding factors in the determination of whether or not the effect of a law or a practice is discriminatory. It submitted that, in this paper, discrimination is define as end result of the application of law or practice that confers certain privilege on a class of people which make them to be superior to those class of people who are denied with such a privilege that make them inferior to the superior.

It is further submitted that the practices of the two classes of discrimination in any event is unlawful.

Thus, if 'discrimination' is found in the application of any law or practice such law or practice would not only be illegal but unlawful in accordance with the provisions of the international,[12] regional[13] and national laws[14] on human right.

Racial profiling

The term "race" may refer to group of people who share the same language, history, culture etc.[15] It can therefore be said that persons of the same cultural, traditional and biological affiliation are of the same race. According to Aggar, Profiling is 'a rapid risk analysis based on suspicious signs in a passenger's documentation, itinerary, appearance, or behavior'.[16]According to this definition, profiling is an investigative tool adopted by law enforcement agent to determine the criminal propensity of an individual based on suspicion.

Dan Korem defines it to mean 'ability to assess a comprehensive amount of information about a person's personality. [17] In Aviation Security parlance, the term has been adopted and extended to include 'identifying enough information about an individual's intent to determine if he or she is a threat to aviation security'.[18] The sum total of these definitions is that profiling is an investigative tool that reveals a passenger ability to pose a threat to civil aviation. It therefore requires an outstanding and objective

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[12] United Nations Declaration on Human Rights, 1948, art. 1 and 2; International Convention on Civil and Political Rights, art. 2; International Covenant On Economic, Social and Cultural Rights adopted on 16 December 1966 and enforced on 3 January 1976, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49 Or UN Doc. A/6316 (1966) Or 933 UNTS 3; 6 ILM 368 (1967), art. 2 para 2; International Convention on the Elimination of All Forms of Racial Discrimination, art. 14; and International Convention on the Rights of Persons with Disabilities Treaty Series 2515 (2006) Or A/RES/61/106, art.2 and 4 respectively.

[13] African Charter on Human Rights, 1981, adopted on 27 June 1981 and entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5,21 I.L.M 58, art. 19; European Declaration on Human Rights, drafted in 1950 enter into force on 3 September 1953, 213 UNTS 222, art. 14; American Declaration on Human Rights, OAS Treaty Series No. 36; 144 UNTS 123; 9 ILM 99 (1969).

[14] For example Constitution of the Federal Republic of Nigeria, 1999 as amended section 42.

[15] Oxford Advance Learner's Dictionary, 7th edition, Oxford University Press, Oxford, 2005, p. 1194.

[16] Martin Aggar, '*Passenger Profiling: dispelling the myths surrounding the controversy*' Vol. 11, (2005) Aviation Security International, 20-22.

[17] Dan Korem, 'The art of profiling: reading people right the first time' (Rechardson,TX: International Focus Press, 1997).

[18] Jefferey Price and Jefferey Forest, 'Practical Aviation Security: Predicting and Preventing the Future Threats' (Butterworth Elsavier: Oxford, 2009) p. 209.

vigilance for a profiler to be able to achieve the purpose of profiling. A profiler should therefore perfect ability to interpret body language, behaviour and conversation of passengers within a reasonable time.[19] In some countries profiling are being adopted to conduct screening and searching of passengers irrespective of their race, colour, religion, ethic, age, nationality and imparity or disability, with clear intent to fix out would-be aviation offender(s).[20] A profiling may be vitiated when it is conducted by specifically describing a suspect with race or any of the aforementioned vitiating elements.

However, the tool was adopted in the United States of America to mean 'Racial profiling'.

Racial profiling therefore is defined as "the law enforcement practice of using race, national origin, or ethnicity as a salient basis for suspicion of criminal activity".[21] Deborah defines the term as "any police-initiated action that relies on the race, ethnicity, or national origin rather than the behaviour of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity".[22] American Civil Liberty Union (ACLU) defines it as a "discriminatory practice by law enforcement official of targeting individual's for suspicion of crime based on the individual's race, ethnicity, religion or national origin".[23]

It is submitted that the term can be defined in relation to aviation security as the practice of the aviation security officer or agent that relies on the race rather than the behaviour of airline passenger or information that leads the security officer or agent to a particular passenger who has been identified as being, or having been, suspicious of criminal intent. For example, aftermath of September 11, 2001 where four airlines of the United States of America were hijacked and used as weapons of mass destructions, the aviation security officers have been conducting special and additional screening and searching of Arabs, Muslims and South Asians in virtually all the airports.

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[19] Ibid.

[20] For example in Nigeria, the profiling was applied without discrimination. This conclusion was arrived at when the author was travelling to Malaysia from Murtala Muhammed International Airport, Ikeja, Nigeria in 2014. This was also applied in Israeli airports. See Jefferey Price and Jefferey Forest, 'Practical Aviation Security: Predicting and Preventing the Future Threats' (Butterworth Elsavier: Oxford, 2009) p. 212.

[21] Black's Law Dictionary, at p. 1286.

[22] Deborah Ramirez, Jack McDevitt, Amy Farrell, *"A Resource Guide on RacialProfiling Data Collection System: Promising Practices and Lessons Learned"* Northern Eastern University School of Law Research Paper, November 1, 2001, p. 3 < SSRN. http://ssrn.com/abstract=2001598 or http://dx.doi.org/10.2139/ssrn.2001598 > accessed July 1, 2015.

[23] American Civil Liberty Union, *"Racial Profiling: Definition"* < https://www.aclu.org/racial-profiling-definition. accessed on July 1, 2015.

Aviation security

Civil aviation has suffered from series of unlawful interference such as aircraft hijacking,[24] sabotage of aircraft, [25] and hostage taking of passengers.[26] Others include destruction of airport and its facilities,[27] and the use of aircraft as weapon of mass destructions.[28]The consequences these unlawful interference include death of airline passengers, severe injuries, and loss of properties including the passengers' baggage and the airline operators' aircraft. To prevent the commission and to suppress the effects of these heinous acts, the aviation stakeholders must aptly secure this institution-civil aviation.

Aviation security can therefore be defined as the protection of aircraft, airline and passengers against any of the unlawful interference.[29] In this connection, the International Civil Aviation (ICAO) in conjunction with the international community has, by legal and technical means, done much to secure civil aviation.

Legally, the ICAO has adopted various anti-unlawful interference Conventions such as Tokyo Convention 1963,[30] Hague Convention 1970,[31] and Montreal Convention 1971.[32] Others include 2010 Beijing Convention, and 2010 Protocol to the 1970 Hague Convention.[33] This legal approach was made to suppress any of the unlawful interference with civil aviation, the effectiveness of which has been felt on the decrease of civil aviation crimes across the world. Nigeria is a party to these Conventions.

Technical methods primarily involve pre-boarding and boarding of aircraft measures have been adopted to secure civil aviation. On one hand, Pre-boarding measures include passengers' screening, passengers' profiling, and searching of aircraft for explosive. On the other hand, boarding measures involve locking of cockpit door of the aircraft, carriage of aircraft security officer, and installation of Close Circuit Television

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[24] For the various definition of hijacking, see Ismail Mustapha Adua, International Law on Aircraft Hijacking: The Practice in Malaysia and Nigeria (Unpublished PhD Thesis, IIUM, 2014) Pp. 54-61. See also section 56 of the Nigerian Civil Aviation Act 2006.

[25] For the meaning and definition of Sabotage of aircraft, see Section 57 (2) of the Nigerian Civil Aviation Act 2006; Ismail Adua Mustapha and K.I Adam, An Overview of the International and Nigerian Legal Framework for Prevention of Aircraft Sabotage, Vol. 17 (2) (2014) Centrepoint Journal (Humanities Edition) p.6; see also Ismail Mustapha Adua, International Law on Aircraft Hijacking: The Practice in Malaysia and Nigeria (Unpublished PhD Thesis, IIUM, 2014) Pp. 62-64.

[26] Ismail Mustapha Adua, International Law on Aircraft Hijacking: The Practice in Malaysia and Nigeria, op cit, pp. 65-67.

[27] See 2010 Beijing Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, done at Beijing on 10 September 2010, 50 ILM 144 (2011), art. 1.

[28] See for example, 9/11 event.

[29] See Annex 17 to Chicago Convention, 8th Edition, April 2006. See also Jiefang Huang, "Aviation Safety and ICAO", Netherlands: Kluwer Law International, 2009, p. 5.

[30] Tokyo Convention On Offences and Certain Other Acts Committed On Board Aircraft, 1963, 704 UNTS 219, 20 U.S.T 2941, T.I.A.S No. 6768.

[31] Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, 80 UNTS 105, 22 U.S.T. 1641, T.I.A.S No. 7192.

[32] Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, UNTS 177, 24 U.S.T 564, T.I.A.S. No. 7570.

[33] 2010 Protocol Supplementary to the Convention for the Unlawful Seizure of Aircraft done at Beijing on 10 September 2010, 50 ILM 144 (2011).

(CCTV) in the aircraft.[34] These methods are adopted to prevent unlawful interference and for the purpose of maintaining aviation security.

It is submitted that the adoption of profiling as a means of detecting would-be aviation offender is no doubt fruitful means. However, racial profiling has been subject to serious criticism on the ground that it offends human right to freedom from discrimination.

The main question is whether the adoption of racial profiling in Nigeria airport as a measure to secure civil aviation can totally extinguish right to be free from discrimination? If the answer is negative, under what condition(s) will racial profiling be allowed?

Racial Profiling Of Passenger versus Human Right to Freedom from Discrimination

All Human rights laws to which Nigeria is a party, including the Nigerian 1999 Constitution enjoin respect for human right freedom from discrimination in whatever circumstance. The United Nations Declaration on Human Rights (UNDHR) 1948 provides:

> *All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*

Even though the UNDHR declaration is applicable in Nigeria, the Nigerian 1999 Constitution equally provides:

> *(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-*
> *(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions are not made subject; or*
> *(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions.*
>
> *(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.*

The totality of all the provisions of human rights laws and the Constitution of the Federal Republic of Nigeria is that nobody should, in any circumstance and whatever form, be discriminated against. Thus, the application of law or practice in anywhere or event which is subject of race, colour or any of the vitiating elements as mentioned in the human rights laws contravenes the principle of non-discriminatory envisaged in the human rights laws.

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[34] For detail discussion on boarding measures, see Ismail Adua Mustapha, *International Law on Aircraft Hijacking: The Practice in Malaysia and Nigeria*,(PhD Thesis, International Islamic University, Malaysia, 2014),Pp. 149-174, 223; and 287.

In the international arena, Alex Conte and Boaz in a paper on counterterrorism measures and human rights compliance,[35] set forth in detail the doctrinal structure that address the principle of human rights texts on racial discrimination and profiling as well as recent reports on racial profiling and counterterrorism from the United Nations Committee on the Elimination of Racial Discrimination (CERD) and the Inter-American Commission on Human Rights.[36] The CERD has expressly provided counterterrorism measures may not discriminate on the grounds of race or national or ethnic origin.

It needs be stated that there is no legal challenge to the non-conformity with the principle and constitutional provision to freedom of discrimination. However, empirical research has showed that a passenger had challenged the racial profiling cum discriminatory nature of pre-boarding screening of passengers at Murtala Muhammed International Airport, Ikeja, Lagos.

The Case of Immam Yakub Aliagan

A passenger, Yakub Aliagan[37] narrated his ordeal on his way from Nigeria to Malaysia sometimes in November 2013. Apart from his violation of rights to privacy and health, he felt being discriminated against, when he was called aside, among other passengers, to undergo a special security screening because of his beard and Muslim way of dressing. He therefore challenged the screener on why he should be the only one who has to undergo such a special screening and checking. According to him, the aviation security said that he looks like a member of "Boko Haram"[38] and that was why the screener needed to conduct such a screening.[39]

Juxtaposing the concern of the victim and the defence of the aviation security practitioner, the question readily comes to mind is: are the aviation security practitioners

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[35] Alex Conte and Boaz Ganor, "Legal and Policy Issues in Establishing an International Framework for Human Rights Compliance When Countering Terrorism," ICT Paper available at http://www.ict.org.il/pdf/Ganor_Conte_Nov05.pdf (2005).

[36] *See* Committee on the Elimination of Racial Discrimination, "Statement on Racial Discrimination and Measures to Combat Terrorism," in *Report of the Committee on the Elimination of Racial Discrimination*, and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, both discussed in Conte and Ganor 2005: 37—38. See also Council of Europe, Guidelines on human rights and the fight against terrorism council of Europe publishing, Strasbourg, 2002, at 5, Guideline III; See also Inter-America commission on human rights report on terrorism and human rights (Inter-America Commission on Human Rights, 2002), articles 51 and 55.

[37] Dr. Imam Yakub Aliagan, a lecturer at the department of Islamic Studies, Faculty of Arts, University of Ilorin, Ilorin, Kwara state, Nigeria.

[38] Boko Haram, is "an Islamist religious sect and terrorist group, believes that Nigeria is run by non-believers, even when Nigeria had a Muslim president. The group's goal is to establish a fully Islamic state in Nigeria, including the implementation of criminal sharia courts across the country. The sect calls itself Jama'atul Alhul Sunnah Lidda'wati wal jihad, or "people committed to the propagation of the prophet's teachings and jihad." The name, Boko Haram, was given to the group by residents of Maiduguri, Borno state where the group was formed. "Boko" means "fake", but is used to signify Western education, while "Haram" means "forbidden", so Boko Haram colloquially translates into "Western education is sin."" See Ngex Nigeria: BOKO HARAM < *http://www.ngex.com/nigeria/bokoharam.htm*> (accessed 5 December 2013).

[39] *Imam Yakub Aliagan, interview* conducted by the researcher during the 30th Convocation Ceremony of the *International Islamic University, Malaysia*, on 16 November, 2013.

contravened the principle of non-discriminatory and under what circumstance will a racial profiling is allowed?

The aviation security practitioners seriously condemned the use of racial or religious profiling. It is an ineffective, inefficient and insensitive approach to maintain aviation security.[40] The American Civil Liberties Union (ACLU) supports this position when it opposes the use of profiling base on race, religion or ethnicity. The Union argued that such discrimination would not only be unfair, unconstitutional but constitutes an ineffective mode of determining who may be a criminal.[41] David Harris[42] in his own view when given testimony before the Sub-committee of the Constitution, Civil Rights, and Civil Liberties of the United States House of Representatives on Judiciary Committee submitted that using racial profiling as a predictor to screen and search a passenger among tens of thousands of passengers in an airport takes eye of the screener and searcher of what really matter, that is behavioural profiling.[43]

The Leadership Conference on Civil and Human Rights, 2011 adopting the statement of the U.S Department of Justice on racial profiling conclude that adoption of racial profiling is based on "erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race. Racial profiling in law enforcement is not merely wrong, but also ineffective. Race-based assumptions in law in law enforcement perpetrate negative racial stereotype, and materially impair our efforts to maintain a fair and just society".[44] The submissions of the scholars on the subject is supported by the decision of the Supreme Court of the United States of America in *Whren's case*[45] that racial profiling contravenes the constitutional requirement of rule of law that individuals are equal in the eyes of the law and that they should be accorded equal protection of the law. It can be safely stated that no legal or scholarstic opinion that favours the adoption of racial profiling as a positive and legal method of questioning, screening and searching of passenger in an airport.

It is assumed that the consequences of racial profiling that affect its adoption as a lawful and legal method of providing and maintaining aviation security are multi-dimensional in nature. First, it forces the affected passengers to prove their innocence when actually the passengers do not engage or have no record of criminal activity. The

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[40] Jeffrey and Jeffrey, 208.

[41] American Civil Liberty;. See also The Committee on the Elimination of Racial Discrimnation, *Statement on Racial Discrimination and Measures to Combat Terrorism,* in Report of the Committee on the Elimination of Racial Discrimination, UN.Doc. A/57/18 of 4-22 March 2002, 5-23 August 2002, 107. See Conte, 530.

[42] David Harris is a professor of Law at the University of Pittsburg Law School and a recognized expert on racial profiling.

[43] David Harris, *Ending Racial Profiling: Necessity for Public Safety* and the Protection of Civil Rights, being a testimony before the Sub-committee of the Constitution, Civil Rights, and Civil Liberties of the United States House of Representatives on Judiciary Committee on 7th June, 2010 < http://judiciary.house.gov/hearings/pdf > 1st July 2015.

[44] See The Report of the Leadership Conference On Civil and Human Rights (The Leadership Conference), The Reality of Racial Profiling, in *"Restoring a National Consensus: The Need to End Racial Profiling in America"*, March 2011 at p.9, See also Department of Justice, "Guidance Regarding the Use of Race By Federal Law Enforcement Agencies", June 2003, < http://www.usdoj.gov/crt/split/documents/guidance_on_race.php > accessed 1st July, 2015.

[45] *Whren v. United States* 517 U.S. at 813.

victims are treated like terrorists (*Boko-haram in* Nigeria). Second, attention of the aviation security screeners are diverted away from investigating the real terrorists who have been linked with the commission of aviation offence by credible and reliable evidence. Third, because of the fact that more criminals are bound to escape security screening, the tendency to have increase in aviation offences is on the high side. Four, the resources of aviation industry, including man power will be wasted because of the ineffectiveness of the method (racial profiling) adopted to screening the passengers. Five, it contravenes the principle of non-discrimination enshrine in all human rights laws.

It is submitted that legal jurisprudence in this area of law in Nigeria is under developed and that scholarly opinion on the matter is nowhere to be found. Recourse shall be made to the United State of America fill this gap. Harcourt while addressing the conflict between the principles of non-discrimination and national security under the equal protection jurisprudence in the United States stated that "the anti-discrimination principle is only violated if there is intentional discrimination with proven malice".[46] He found his support from the two decisions of the United States of American Supreme Court in *McCleskey v Kemp*[47] and *United States v Armstrong* [48]—"which extend the *Washington v Davis*[49] requirement of intent to the criminal justice sphere—provide that a successful equal protection challenge must rest on evidence of intentional discrimination, rather than on inference from unexplained disparate treatment".[50] If the Nigerian Aviation Security Practitioners (AVSEC) is engaging in racial profiling to promote security efficiency in all the Nigeria airports, it is not clear whether individuous intent would be present.

Furthermore, Bernard is of the opinion that racial profiling is permissible on the ground of compelling governmental interest.[51] It is submitted that one of the compelling government interests is national security including but not limited to the safety and security of civil aviation. Hence, freedom from discrimination is a derogable right on the ground that race is one of the factors considered in profiling a passenger.[52] In *Whren v United States*[53] the court held that using race among other factors to profile is permissible.

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[46] Harcourt, at p. 8.

[47] 481 US 279 (1987). In *McClesky*, the Court rejected an Equal Protection claim for lack of a showing of actual discriminatory intent, where petitioner produced evidence that murderers of white victims are 4.3 times more likely to be sentenced to death than murderers of African-American victims at 287, 291–99.

[48] 28 517 US 456 (1996). In *Armstrong*, the Court required evidence of discriminatory purpose in the context of a selective prosecution challenge. *Id* at 465.

[49] 426 US 229 (1976). In *Davis*, the Court articulated the principle that the Equal Protection Clause bars only intentional discrimination. Id at 239–41.

[50] Harcourt, at p.8.

[51] E.H. Bernard, *Muslim Profiles Post 9/11: Is Racial Profiling an Effective Counter terrorist Measure and Does It Violate the Right to Be Free From Discrimination?*, Chicago, John M Olin Law & Economics Working paper No 288 (2D Series) being a paper presented at the Oxford Colloquium on Security and Human Rights at Oxford University, March 17, 2006) n.p.

[52] Ibid,7-8; See also Alex Conte and Boazganor, *Legal and policy issues in Establishing an International Framework for Human Rights Compliance When Countering Terrorism*, ICT Paper
< http://www.ict.org.il/pdf/Ganor_Conte_Nov05.pdf >(accessed 20 January 2013).

[53] *Whren v. United States* 517 US 806 (1996); see also Bernard E Harcourt, *United States v. Brignoni-Ponce and United States v. Matinez-Fuerte: The Road to* Racial Profiling, in Carol Steiker (ed.), *Criminal Procedure Stories*, Foundations Press, 2006; cited in E.H. Barnard, 6.

Therefore, the better position is to use race as one of the factors to profile a passenger, especially where such race was adjudged as habitual aviation offenders.

Fighting *Boko haram* terrorists to actually reduce the incidence of terrorist acts where many people have lost their lives and properties worth billions of naira have been destroyed, would undoubtedly qualify as a compelling state interest. One very fundamental key to the success of this is the use of race in profiling should be *narrowly tailored* to serve this interest, given that the intentional use of race as a factor in conducting aviation security would trigger strict scrutiny.

In addition, Conte and Ganor critically analysed the disagreement between racial profiling and principle of non-discrimination within the human rights community and conclude that the principle of non-discrimination is a derogable right.[54] Following the line of Conte's argument is ACLU when it is of the opinion that profiling on the ground of racial discrimination is however permissible if the race is one of a number of factors used to describe a particular suspect.[55] In this respect, profiling based on racial or nationality discrimination can also be permissible if common hijackers (aviation offenders) are from the same nation.[56]

It is obvious that the contracting states must comply with their international human rights obligations when implementing aviation security provisions. However, protection of civil aviation against any of the unlawful interference is an international obligation which must be fulfil as a whole.[57] To counter any of the civil aviation offences effectively and efficiently, right to freedom from discrimination needs to be restricted. After all, the offenders are also tampering with basic fundamental human rights of passengers whenever any of the aviation offences is committed. It is suggested that passengers should rather sacrifice their right to freedom from discrimination to protect their right to life and human dignity.

The above submission found support from an empirical research carried out by the author at Muritala Muhammed International Airport, Ikeja, Lagos, Nigeria when some of the passengers claim that they understand the need to waive their fundamental human rights. Even though he felt being discriminated against, Aliagan argued that the current insecurity in the country where many people have lost their lives and properties warrants such a security check. He further stated that when other people were screened and checked, he felt relaxed and has confidence that they were all secured against unlawful interference with civil aviation.[58] He further concluded that aviation security demands for thorough screening and checking of passengers before boarding the aircraft; and that public interest should override his own private interest.[59]

To balance the interest of the competing parties, therefore, it can be said that aviation security must not be sacrificed; however the implementation and application of

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[54] See generally Harcourt, at pp. 7-8.

[55] American Civil Liberties Union, <http://www.adu.org/nationalsecurityfacts-airport-securityaccssedon > (accessed 20 January 2013).

[56] Akin Akintoye, Interwiewed by the researcher, Ilorin Kwara State, Nigeria, 23 January 2013.

[57] For instance, the 9/11 event considerably affects international community economically, socially, psychologically and emotionally.

[58] Ibid.

[59] Ibid.

theoretical and procedural steps to secure civil aviation must also be with caution so as not to tamper with the individual's fundamental right to freedom from discrimination.

Conclusion

From all indications, Right to freedom from discrimination is a natural right. That was why the international community has attached importance to the implementation of various laws and regulations on this right. No doubt, in compliance with these laws and regulations, the International Civil Aviation Organization issued a directive to all aviation stakeholders to conduct aviation businesses in compliance with the various human rights laws. Thus, the adoption of racial profiling in aviation industry looked contravening the human right principle of non-discrimination.

However, it appears that strict compliance with this human right principle will jeopardize and defeat the human right to safety and security in aviation sector. Aviation sectors have been suffering from series of attacks from within and outside the airport. The effects of unlawful interference with civil aviation have not been unnoticed. The innocent passengers and those on ground loss their lives and properties and the international community were put in cold blooded morning. Some of these interferences have been traced to Arab race. For example, the recent hijacking EgyptAir and *Al-Afriqiyah* Airbus A320 respectively in March and December 2016 have been traced to Libyan. The one of March was traced to an Egyptian[60] and that of December was traced to Libyan nationals.[61] The two countries have been classified as Arabian states. Then why would racial profiling not be an effective tool for the safety and security of civil aviation when it is obvious that some aviation offenders are from a particular race? The consequence of this gives credence and opportunity to the aviation security providers to adopt racial profiling as a means to detect criminal(s) from a particular race. It is the right to protect civil aviation safety and security that has restricted the application and whittled down the principle of right to freedom from discrimination.

However, although the intention of the proponent of racial profiling is to protect civil aviation against any of the unlawful interference, this can only be the case where race is combined with other factor(s) to conduct profiling on passenger as no particular method of screening of passengers is hundred percent full proofs.

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[60] *His name is* Seif Eldin Mustafa. See James Rothwell, EgyptAir plane flying from Alexandria to Cairo hijacked > *http://www.telegraph.co.uk* > accessed on 3 January 2017.

[61] *Emma Graham-Harrison, Hijackers* surrender after forcing Libyan plane to fly to Malta > http:www.the *guardian.com/world/2016/dec/23/Libyan*-afriqiyah-airways-passenger-plane-hijacked-diverted-to-*malta>accessed 3 January 2017.*