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Human Rights and Non-discrimination in the 'War on Terror'

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Summary Contents

a denunciatory function. By the same token, the primary purposes of special legal regimes relating to terrorism are the official condemnation of those forms of violence that are seen as particularly serious attacks on the state, the stigmatisation of the perpetrators, and the reassurance of the public. The political need for such a symbol of resolute government action is especially great in a time of perceived crisis. It is this need for a symbolic act of condemnation, combined with international pressure to take decisive steps against terrorism, which has led states around the globe to react with the swift adoption of new anti-terrorism regimes—often providing for unprecedented governmental powers—to the events of September 11 and later attacks.

At the same time, the inherently denunciatory function and highly political nature of the concept of terrorism have meant that all attempts to draw up an objective generic definition of 'terrorism' have proved futile: the international community has not been able to agree on a definition of the term. As a consequence, the determination of the scope of national anti-terrorism regimes is in the almost complete discretion of the respective governments and legislatures and thus heavily dependent on political considerations. In this sense, the danger of discrimination is intrinsic in the establishment of special anti-terrorism regimes.

This problem has been aggravated by political developments after September 11. In a time when the achievements in the fight against terrorism have become one of the central benchmarks by which to measure governmental performance, governments are faced with a difficult dilemma: they want to be seen as decisively confronting the terrorist threat, yet the exact source of this threat remains largely elusive. While international terrorist networks undoubtedly pose a real danger, it has become increasingly difficult to locate and identify the constituent elements of these networks. Consequently, instead of addressing this threat, which is real and specific but hard to pin down, governments may feel tempted to adopt measures directed at a more general danger that is seen as somehow underlying, or indeed superseding, the specific threat.

These measures are invariably guided by the paradigm of prevention, and their scope is just as diffuse as the danger they are designed to prevent. Inevitably, they rely on vague profiles of those thought to be behind the threat, inferring their alleged radical ideological beliefs from broad characteristics such as nationality, race, national or ethnic origin, and religion. In this sense, 'terrorist' has come to describe—more than ever before—a particular type of person rather than a type of violence.

The use of criteria such as nationality, race, national or ethnic origin, and religion to define the scope of contemporary anti-terrorism measures raises important issues with regard to the right to non-discrimination. In the subsequent chapters, I explore these issues through a detailed analysis of particular anti-terrorism measures adopted by the three states under consideration. But first of all, a common standard of non-discrimination that can be used to assess the measures of these different states needs to be elaborated.

3

The Human Right to Non-discrimination

The claim to equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all other liberties.

Hersch Lauterpacht, 1945[1]

The right to equality and non-discrimination is one of the cornerstones of the concept of human rights and, accordingly, occupies a prominent position not only 'in most written constitutions'[2] but, nowadays, also in international law. The notion of equality found its first legal articulation in the French Declaration of the Rights of Man of 1789, which proclaimed that 'men are born and remain free and equal in rights'.[3] Today, the written constitutions of at least 111 states guarantee the right to equality or the corresponding prohibition of discrimination.[4] At the international level, all important human rights instruments include the principle of non-discrimination, and the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, describes it as 'a fundamental rule of international human rights law'.[5] In addition, the concept of non-discrimination has inspired specialist treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[6] and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[7]

[1] H Lauterpacht, *An International Bill of the Rights of Man* (1945) 115.

[2] ibid.

[3] La Déclaration des Droits de l'Homme et du Citoyen France, 26 August 1789, Art 1 ('Les hommes naissent et demeurent libres et égaux en droits'). An English translation of the Declaration is available on the website of the Avalon project, at <http://www.yale.edu/lawweb/avalon/rightsof.htm>.

[4] M Bossuyt, *L'Interdiction de la discrimination dans le droit international des droits de l'homme* (1976) 78 (finding that out of 122 states examined, only eleven did not guarantee the right to non-discrimination in their constitution and that even most of these eleven states grant it an important status on another than the constitutional level).

[5] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna, 25 June 1993, UN Doc A/CONF.157/23, para 15.

[6] International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 21 December 1965, 660 UNTS 195.

[7] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 18 December 1979, 1249 UNTS 513.

While the fundamental importance of the concept of equality and non-discrimination is undisputed, its precise content and practical application is far less clear. 'Equality' and 'non-discrimination' are normally described as the positive and negative statement of the same principle: the maxim of equality requires that equals be treated equally; the prohibition of discrimination precludes differential treatment on unreasonable grounds.[8] However, this does not necessarily mean that equality can (or should) be reduced to formal equality, understood as the mere absence of explicit and direct forms of discrimination. Rather, also apparently consistent treatment can constitute discrimination if it leads to unequal results. On the other hand, it is also commonly accepted that not every difference in treatment violates the right to equality and non-discrimination. After all, it is inevitable that laws and government actions, including those designed to counter terrorism, classify persons, and often these classifications will involve an unequal distribution of rights and liberties. The crucial question is whether these distinctions are justified or not—what are the elements that make differential treatment lawful or unlawful?

A short note on terminology is in order. In international human rights law and the relevant literature, the concept of equality and non-discrimination is expressed, alternately, as a 'right' or 'entitlement',[9] a 'guarantee',[10] a 'principle',[11] and a 'prohibition' (the 'prohibition of discrimination').[12] 'Principle of non-discrimination' and 'prohibition of discrimination' are general terms that are also commonly used in other fields of law besides human rights law (such as international economic law).[13] In order to highlight the distinction to these other uses of the concept, I mainly refer to equality and non-discrimination as a '(human) right'. Furthermore, because my primary concern is with the negative aspect of the concept, I use—at least in the context of the analysis of specific anti-terrorism measures—the term 'non-discrimination' rather than 'equality'.

[8] eg, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, 19 January 1984, Inter-American Court of Human Rights (Series A) No 4 (1984), Separate Opinion of Judge Rodolfo E Piza, para 10 ('... it appears clear that the concepts of equality and non-discrimination are reciprocal, like the two faces of one same institution. Equality is the positive face of non-discrimination. Discrimination is the negative face of equality'); *Minority Schools in Albania case*, Permanent Court of International Justice, Series A/B, No 64, 19 (1935) ('Equality in law precludes discrimination of any kind'); Protocol No 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory report, ETS No 177, para 15; AF Bayefsky, 'The Principle of Equality or Non-discrimination in International Law' (1990) 11 *Human Rights Law Journal* 1, 1; BG Ramcharan, 'Equality and Nondiscrimination' in Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 246, 252; Bossuyt, n 4, 37.

[9] eg, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171, Art 26.

[10] ibid.

[11] eg, Bayefsky, n 8.

[12] eg, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, 213 UNTS 222, Art 14.

[13] eg, T Cottier and P Mavroidis (eds), *Regulatory Barriers and the Principle of Non-discrimination in World Trade Law* (2000).

This chapter starts, in Section 3.1, by showing that all the states considered here are bound by the right to non-discrimination, even if their respective obligations arise from different sources. The right is contained in the most important international human rights treaties and has, at least to some extent, acquired the status of customary international law. Non-discrimination is also guaranteed by regional human rights instruments and, significantly, by the national laws of all states at issue. This convergence strengthens the authoritativeness of the corresponding international standard.

Section 3.2 explores the precise content of the right to non-discrimination. Although the various international and regional non-discrimination provisions do not share a single meaning, the relevant judicial bodies have elaborated a number of consistent definitional elements. Even where there are national variations to the right to non-discrimination, the tests employed by the courts to distinguish between permissible and impermissible differential treatment share the same basic approach. Therefore, based on the jurisprudence of these (international, regional, and national) bodies and courts, I develop a common standard of non-discrimination that can be used to assess the anti-terrorism measures of the different states at issue.

Section 3.3 addresses the question of whether the existence of a terrorist threat alters states' obligations under the right to non-discrimination. Does this right also apply during a declared state of emergency? The applicability of the guarantee of non-discrimination may also be controversial when states resort to military force to counter perceived terrorist threats. What is the applicable law in such situations? Does the right to non-discrimination also protect those captured during armed conflict?

3.1 Sources of the right to non-discrimination

This section explores, first, the philosophical foundations of the right to non-discrimination and, then, its sources in international, regional, and national law. The discussion focuses on prohibitions of discrimination on those grounds that are most relevant in the anti-terrorism context.

3.1.1 Philosophical foundations

The study of equality reaches back to the work of Aristotle who first formulated the maxim that equals should be treated equally and unequals unequally.[14] However, modern notions of individual equality only emerged with the dissolution of feudalism and the rise of capitalism.[15] They were developed by philosophers such

[14] Aristotle, *The Nicomachean Ethics of Aristotle* (1911) Book V3, paras 1131a–b.

[15] See S Fredman, *Discrimination Law* (2002) 4.

as Thomas Hobbes and John Locke who believed that all—or, more precisely, all *men* who *own property*[16]—were equally free in the state of nature and thus endowed with the same natural rights.[17] In the words of Locke: 'Men [are] by Nature all free, equal and independent.'[18] Likewise, in Immanuel Kant's view, each human being is owed, 'by virtue of his humanity', the right to equal individual liberties.[19] It is in this 'innate right'[20] that Kant grounded his categorical imperative, requiring that every person should be treated 'as an end, never merely as a means',[21] and, as he also put it, that everyone should '[a]ct only in accordance with that maxim through which [they] can at the same time will that it become a universal law.'[22] Thus, according to Kant, the right to equal individual liberties implies the establishment of a legal system that is based on the principles of universality and generality, and it is this universality that gives the law its legitimacy. As Jürgen Habermas has summarised the Kantian position, 'the form of a general law legitimates the distribution of liberties, because it implies that a given law has passed the universalization test and been found worthy in the court of reason'.[23]

The fundamental importance of the right to equality and non-discrimination is also emphasised by leading contemporary liberal philosophers such as John Rawls and Ronald Dworkin. Equality with regard to basic liberties is the first principle of Rawls's theory of justice: 'Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all'.[24] Indeed, equality is the very precondition of Rawls's 'original position', the hypothetical starting point from which a fair agreement on principles of political justice can be reached.[25] Hence, there is a presumption against any distinctions infringing on the initial position of equal liberty and the burden of proof is on those who wish to discriminate. This presumption can only be rebutted if the inequality in question will work for the advantage of every party involved.[26]

Equality is also at the heart of Dworkin's rights thesis. Any government that professes to take rights seriously, he argues, must accept the concepts of human

[16] In Locke's view, the right to equality was preserved for those owning property and a despotical power could be exercised over the unpropertied classes. J Locke, *Two Treatises of Government* (1988) Second Treatise, paras 173–4. He also approved of the power of a master over his servants and of a husband over his wife; ibid, Second Treatise, para 2.

[17] T Hobbes, *Leviathan* (1998) ch 13, paras 1–2; Locke, n 16, Second Treatise, paras 4–5.

[18] Locke, n 16, Second Treatise, para 95.

[19] I Kant, *The Metaphysical Elements of Justice: Part 1 of the Metaphysics of Morals* (1965) 38.

[20] ibid.

[21] I Kant, *Groundwork of the Metaphysics of Morals* (1998) 38.

[22] ibid 31.

[23] J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) 120.

[24] J Rawls, *A Theory of Justice* (1999) 266.

[25] J Rawls, 'Reply to Alexander and Musgrave' in Clayton and Williams (eds), *The Ideal of Equality* (2000) 21, 33.

[26] J Rawls, 'Justice as Fairness' (1958) 67 *Philosophical Review* 164, 166–7.

dignity and political equality.[27] Accordingly, everyone has the fundamental right to treatment as an equal, that is, to be treated with the same respect and concern as anyone else.[28] This principle of equal concern forms the foundation of individual rights[29] and is the 'sovereign virtue' of political community.[30] Crucially, for Dworkin equality implies the political virtue of integrity, which requires that the state act on a single, coherent set of principles.[31] Integrity includes a legislative principle, preventing lawmakers from passing laws that are based on arbitrary distinctions, and an adjudicative principle, demanding that judges interpret the law as a coherent system of standards.[32] It is from adhering to these principles that, according to Dworkin, a state ultimately derives its legitimacy.[33]

Equality and non-discrimination is thus one of the key principles on which liberal theories of the state are founded. The constitutions of states that would claim to be liberal democracies therefore regularly include a guarantee of the right to equality and non-discrimination, and the right has gained an equally important status in international law.

3.1.2 International law

The origins of the right to non-discrimination in international law go back to the system of minorities protection established after the First World War under the auspices of the League of Nations. A series of treaties guaranteed the protection of minorities as a condition of the post-war territorial settlements, and declarations were required from several states before they were permitted to join the League.[34] In these treaties and declarations, members of racial, linguistic, or religious minorities were guaranteed the right not to be discriminated against in the exercise of civil and political rights.[35] However, these guarantees were limited to those minorities that were resident in the specified states.

3.1.2.1 United Nations Charter

The notion that fundamental rights should be enjoyed by all persons everywhere, without distinction, was codified only after the Second World War. The United Nations (UN) Charter lists as one of the basic purposes of the UN the promotion of human rights, in particular equality and non-discrimination. According to Article 1(3) of the Charter, the UN is intended 'to achieve international

[27] R Dworkin, *Taking Rights Seriously* (1977) 198–9.

[28] ibid 199, 272–8.

[29] ibid 272–3.

[30] R Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (2000) 1.

[31] R Dworkin, *Law's Empire* (1986) 166.

[32] ibid 176–224.

[33] ibid 190–5.

[34] See W McKean, *Equality and Discrimination under International Law* (1983) 20–6.

[35] ibid 24.

co-operation in ... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.'[36] Further formulae emphasising the right to non-discrimination are found in the Preamble and Articles 13(1)(b), 55(c), and 76(c). One delegate to the Third Committee went so far as to say that the 'United Nations Organization had been founded principally to combat discrimination in the world.'[37] Consequently, the UN has created several organs to address issues of discrimination, including, in particular, the Sub-commission on the Prevention of Discrimination and the Protection of Minorities (since 1999 called Sub-commission on the Promotion and Protection of Human Rights).[38]

3.1.2.2 International human rights instruments

Numerous instruments aimed at the realisation of the fundamental notion that human rights should be equally guaranteed for all persons have been adopted under the auspices of the UN. The Universal Declaration of Human Rights (UDHR) of 1948, the basic statement of human rights, guarantees the right to equality and non-discrimination in several of its provisions.[39] Although the UDHR is not a treaty and was not originally thought to give rise to international legal obligations, substantial parts of it, including important aspects of the prohibition of discrimination, are now widely regarded as customary international law binding on all states.[40]

The most relevant *treaty* provisions for the present purpose are the general non-discrimination norms of Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR),[41] the more specific prohibition of discrimination on the grounds of race or national or ethnic origin stipulated by

[36] Charter of the United Nations, 26 June 1945, Art 1(3).

[37] Quoted after McKean, n 34, 59.

[38] For an overview of the Sub-commission's functions and activities, see its website at <http://www.ohchr.org/english/bodies/subcom/index.htm>.

[39] Universal Declaration of Human Rights (UDHR), GA Resolution 217A (III), 10 December 1948, UN Doc A/810, Arts 1 ('All human beings are born free and equal in dignity and rights'), 2(1) ('Everyone is entitled to all the rights and freedoms set forth in this Declaration, without any distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'), 7 ('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').

[40] See Section 3.1.2.4 below.

[41] ICCPR, Arts 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 recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'), 26 ('All persons are equal before the law and are entitled without 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').

the ICERD,[42] and the guarantee of non-discrimination in the field of refugee protection provided by Article 3 of the Convention relating to the Status of Refugees (Refugee Convention).[43] All the states considered here have ratified these treaties, except for the United States, which has not signed the Refugee Convention. The United States has, however, ratified the 1967 Protocol relating to the Status of Refugees, which obliges states to apply the substantive provisions of the Refugee Convention to all refugees.[44] Similarly, although the United States has made a declaration that Articles 1 through 27 of the ICCPR are not self-executing and thus not enforceable in US courts until implemented by congressional legislation,[45] the legal validity of such declarations is disputed.[46] They can, in any event, not affect the United States' obligations under international law. In addition to these instruments that are particularly relevant in the anti-terrorism context, numerous further human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR)[47] or the Convention on the Rights of the Child (CRC),[48] also include guarantees of non-discrimination.

Non-discrimination norms are commonly subdivided into subordinate and autonomous provisions.[49] Whereas subordinate provisions prohibit discrimination only in the enjoyment of the rights and freedoms otherwise set forth in the respective instrument, autonomous (or free-standing) norms guarantee non-discrimination in themselves. Article 2(1) of the UDHR, Article 2(1) of the ICCPR, and Article 3 of the Refugee Convention limit the scope of the rights to be protected against discrimination to those recognised in the respective instruments and are thus subordinate norms. Article 7 of the UDHR, Article 26 of the ICCPR,

[42] ICERD, in particular Arts 2(1)(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'), 5 ('... 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').

[43] Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 150, Art 3 ('The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion, or country of origin').

[44] Protocol relating to the Status of Refugees, 31 January 1967, 606 UNTS 267.

[45] 138 *Congressional Record* 8068, 8071 (1992) (discussing the US Senate Resolution of advice and consent to the ratification of the ICCPR). In addition, the United States has made an Understanding that it interprets Articles 2(1) and 26 to permit distinctions that '... are, at minimum, rationally related to a legitimate governmental objective'; ibid. However, it is not clear that this test differs in any respect from the 'reasonable and objective' test used by the UN Human Rights Committee and described in Section 3.2 below.

[46] See, eg, 'Symposium: The Ratification of the International Covenant on Civil and Political Rights' (1993) 42 *DePaul Law Review* 1167; L Henkin, 'U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker' (1995) 89 *American Journal of International Law* 341.

[47] International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, 993 UNTS 3, Art 2(2).

[48] Convention on the Rights of the Child (CRC), 20 November 1989, 1577 UNTS 3, Art 2.

[49] Bayefsky, n 8, 3.

and Articles 2 and 5 of the ICERD, on the other hand, all provide for a general guarantee of equality before the law and equal protection of the law without discrimination and are thus autonomous norms. As the UN Human Rights Committee has pointed out in relation to Article 26 of the ICCPR, this provision 'prohibits discrimination in law or in fact in any field regulated and protected by public authorities'.[50] The ICCPR thus imposes a general obligation on states parties neither to enact legislation with a discriminatory content nor to apply laws in a discriminatory way.[51] In relation to the ICERD, the UN Committee on the Elimination of Racial Discrimination has expressly stated that its prohibition of discrimination also applies to measures taken in the fight against terrorism.[52]

As far as the prohibited grounds of distinction are concerned, the UDHR and the ICCPR prevent states from discriminating on any ground 'such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[53] At least the ICCPR is subject to the general rules of treaty interpretation laid down in the Vienna Convention on the Law of Treaties,[54] so that its terms must be interpreted in accordance with their ordinary meaning.[55] The formulations 'such as' and 'other status' make clear that the ICCPR provisions are open-ended as to the prohibited grounds of distinction. In contrast, the lists of prohibited grounds of distinction found in the ICERD and the Refugee Convention are self-contained. Article 1(1) of the ICERD defines 'racial discrimination' as distinctions 'based on race, colour, descent, or national or ethnic origin', while Article 3 of the Refugee Convention provides for the equal protection of refugees 'without discrimination as to race, religion or country of origin'.

Even though the UDHR, the ICCPR, and the ICERD only explicitly list national origin, but not citizenship status or nationality, as prohibited grounds of distinction, discrimination based on these latter criteria is also prohibited. In *Gueye v France*, the UN Human Rights Committee held that nationality falls within the ICCPR's reference to 'other status'.[56] Similarly, in its General Comment No 15 it has made clear that the non-discrimination guarantee of the ICCPR

[50] UN Human Rights Committee, *General Comment No 18: Non-discrimination* (1989), para 12.
[51] ibid.
[52] UN Committee on the Elimination of Racial Discrimination, *General Recommendation No 30: Discrimination against Non-citizens* (2004), UN Doc CERD/C/64/Misc.11/rev.3, para 10.
[53] UDHR, Art 2(1); ICCPR, Arts 2(1), 26.
[54] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art 31. This norm reflects customary international law; eg, *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (1995) ICJ Reports 6, 18. The UN Human Rights Committee has expressly confirmed that the ICCPR is subject to the rules of interpretation laid down in the Vienna Convention. *Alberta Union v Canada*, Communication No 118/1982, 18 July 1986, UN Doc CCPR/C/28/D/118/1982.
[55] Vienna Convention on the Law of Treaties, Art 31(1) ('A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose').
[56] *Gueye v France*, Communication No 196/1985, 6 April 1989, UN Doc CCPR/C/35/D/196/1985, para 9.4.

extends to non-citizens and that all Covenant rights 'must be guaranteed without discrimination between citizens and aliens'.[57] The only exceptions to this rule concern a few specific rights that are explicitly limited to nationals, such as political rights and the right to enter or reside in a country.[58] Even as far as immigration is concerned, foreign nationals do, however, enjoy the protection of the non-discrimination guarantee and may thus not be discriminated against on the basis of other grounds than their citizenship status, such as their race or national origin.[59] Likewise, in its General Recommendation No 30 of 2004, the UN Committee on the Elimination of Racial Discrimination has pointed out that Article 1(2) of the ICERD, which provides for the possibility of differentiating between citizens and non-citizens, must be construed narrowly so as to avoid undermining the basic prohibition of discrimination.[60] According to the Committee, the general rule is that states must guarantee equality between citizens and non-citizens in the enjoyment of human rights; any unreasonable differential treatment based on citizenship or immigration status will constitute discrimination under the ICERD.[61] This rule is a reflection of the principle that arguably constitutes the very foundation of the international human rights system: human rights are universal, to be enjoyed by all persons, regardless of their membership in a particular political community, simply by virtue of their being human.[62]

To summarise, the states at issue have ratified several international human rights treaties that prevent them from discriminating against people based on certain grounds; these grounds include race, national or ethnic origin, religion, citizenship status, and nationality.

3.1.2.3 'Soft law'

In addition to these binding obligations, a wealth of non-binding international instruments, commonly known as 'soft law',[63] establish more detailed non-discrimination guidelines and standards. These instruments, often adopted by way of General Assembly resolution, exercise a considerable influence on the international decision-making process as states frequently rely on them and are

[57] UN Human Rights Committee, *General Comment No 15: The Position of Aliens under the Covenant* (1986), para 2.
[58] ibid, paras 2, 5.
[59] ibid, para 5. See Section 6.3 below for a more detailed discussion.
[60] UN Committee on the Elimination of Racial Discrimination, *General Recommendation No 30: Discrimination against Non-citizens* (2004), UN Doc CERD/C/64/Misc.11/rev.3, para 2.
[61] ibid, paras 3–4.
[62] See UDHR, Art 1.
[63] There is a vast body of literature on the concept of international soft law. See, eg, C Schreuer, 'Recommendations and the Traditional Sources of International Law' (1977) 20 *German Yearbook of International Law* 103; M Bothe, 'Legal and Non-legal Norms: A Meaningful Distinction in International Law?' (1980) 11 *Netherlands Yearbook of International Law* 65; T Gruchalla-Wesierski, 'A Framework for Understanding "Soft Law"' (1984) 30 *McGill Law Journal* 37; C Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850.

reluctant openly to contravene them. Thus, they engender legal expectations and may entail a presumption of illegality when action is taken contrary to them.[64]

A number of 'soft law' instruments that include specific non-discrimination provisions are of particular relevance to the anti-terrorism context. The Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live expressly guarantees a range of rights to non-citizens, including the right to equality before the courts.[65] As far as the treatment of persons in detention is concerned, the right to non-discrimination, including on the basis of nationality, is codified in Principle 5 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[66] and Rule 6(1) of the Standard Minimum Rules for the Treatment of Prisoners.[67] The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief of 1981 requires states to adopt effective measures to prevent and eliminate discrimination on the grounds of religion or belief.[68] Finally, according to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992, states must take similar steps to protect the rights of such minorities.[69] Importantly, all these General Assembly resolutions were adopted unanimously, including support from the United States, the United Kingdom, and Germany.[70]

3.1.2.4 Customary international law

The importance that the international community attributes to the right to non-discrimination is underlined by the fact that it is now widely acknowledged that the prohibition of discrimination exists independently of treaties because it constitutes a rule of customary international law and/or a general principle of law in the sense of Article 38(1)(c) of the Statute of the International Court of Justice (ICJ).[71] In his famous and influential dissenting opinion in the *South-West Africa Cases*, Judge Tanaka of the ICJ stated already in 1966 that 'the norm of

[64] See Schreuer, n 63, 115–18; Bothe, n 63, 85–6; Gruchalla-Wesierski, n 63, 46; G Fitzmaurice, 'Hersch Lauterpacht: The Scholar as Judge' (1962) *British Yearbook of International Law* 1, 8–12; MS McDougall, 'Contemporary Views on the Sources of International Law: The Effect of U.N. Resolutions on Emerging Legal Norms' (1979) 73 *Proceedings of the American Society of International Law* 300, 328.

[65] GA Resolution 40/144, 13 December 1985, UN Doc A/RES/40/144.

[66] GA Resolution 43/173, 9 December 1988, UN Doc A/RES/43/173.

[67] Standard Minimum Rules for the Treatment of Prisoners, adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders (1955), UN Doc A/CONF/611, annex I; approved by the Economic and Social Council by its Resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[68] GA Resolution 36/55, 25 November 1981, UN Doc A/RES/36/55.

[69] GA Resolution 47/135, 18 December 1992, UN Doc A/RES/47/135.

[70] See the respective voting records, available on the website of the GA, at <http://www.un.org/documents/resga.htm>.

[71] On the distinction between these two non-treaty sources of international human rights law, see B Simma and P Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1992) 12 *Australian Yearbook of International Law* 82.

non-discrimination or non-separation on the basis of race has become a rule of customary international law'[72] as well as a general principle of law.[73] This proposition has been corroborated by later ICJ judgments,[74] state practice,[75] including pronouncements by international conferences,[76] and leading scholars.[77] Several authors have persuasively argued that discrimination on other grounds than race is now also prohibited under international law, even in the absence of treaty obligations.[78] This view draws mainly upon the fact that, because the UDHR has been invoked so many times since its adoption, at least its key provisions have become part of customary international law,[79] and that the right to non-discrimination is one of them. As Judge Ammoun stated in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*: 'One right which must certainly be considered a preexisting binding customary norm which the Universal Declaration of Human Rights codified is the right to equality, which by common consent has ever since the remotest times been deemed inherent in human nature.'[80]

At least important aspects of the right to non-discrimination thus bind all states, irrespective of their ratification of human rights treaties. Even more fundamentally, the right to non-discrimination on the grounds of race, sex, and religion arguably forms part of *jus cogens* according to Article 53 of the Vienna Convention on the Law of Treaties and can thus not be set aside by treaty or

[72] *South-West Africa Cases (Second Phase)* (1966) ICJ Reports 6, 293. See also ibid 455 (Padilla Nervo, J, dissenting).

[73] ibid 299–300.

[74] *Barcelona Traction (Second Phase)* (1970) ICJ Reports 3, 32; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* (1971) ICJ Reports 16, 130.

[75] eg, Restatement (Third) of the Foreign Relations Law of the United States, Vol 2, Section 702 (listing the prohibition of systematic racial discrimination as one of the norms embodying customary international law).

[76] eg, UNESCO Declaration on Race and Racial Prejudice, adopted by UNESCO General Conference (20th Sess), 27 November 1978, Art 9 (reaffirming that 'the principle of equality in dignity and rights of all human beings and all peoples, irrespective of race, colour and origin, is a generally accepted and recognized principle of international law').

[77] eg, I Brownlie, *Principles of Public International Law* (2003) 546; MN Shaw, *International Law* (2003) 266.

[78] H Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995/96) 25 *Georgia Journal of International and Comparative Law* 287, 342; RB Lillich, 'Civil Rights' in Meron (ed), *Human Rights in International Law* (1984) 115, 133.

[79] See Final Act of the International Conference on Human Rights, held in Teheran in 1968, UN Doc A/CONF32/41 (1968), para 2 (proclaiming unanimously that the UDHR 'constitutes an obligation for the members of the international community'); Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights, 25 June 1993, UN Doc A/CONF157/23, in particular preambular paras 3, 8; J Humphrey, 'The International Bill of Rights: Scope and Implementation' (1976) 17 *William and Mary Law Review* 527, 529; L Sohn, 'The Human Rights Law of the Charter' (1977) 12 *Texas International Law Journal* 129, 133; Lillich, n 78, 116–17 (referring to further practice both within and outside the UN).

[80] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* (1971) ICJ Reports 16, 76.

acquiescence.[81] This view is supported by the fact that discrimination on these grounds is prohibited even in times of emergency,[82] and that the UN Human Rights Committee has made it clear that reservations to the non-discrimination guarantee of Article 2(1) of the ICCPR are not acceptable.[83]

3.1.3 Regional law

The right to non-discrimination is also guaranteed by all important regional human rights conventions. The most influential regional treaty is probably the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[84] which, together with the rich jurisprudence developed under it by the European Court of Human Rights, has had a profound impact on the formation of human rights standards on the international level and in other regions.[85] The ECHR has been ratified and transformed into their respective domestic laws by both the United Kingdom and Germany.[86] Therefore, and due to its outstanding international importance, it is accorded a relatively great degree of attention in this book. Article 14 of the ECHR prohibits discrimination on the basis of an open-ended number of grounds,[87] precluding any kind of differential treatment that has no objective and reasonable justification.[88] Article 14 is, however, a subordinate norm, limiting the scope of the rights protected against discrimination to those otherwise set forth in the Convention. In contrast, Protocol No 12 to the ECHR, which entered into force in 2005, contains an autonomous prohibition of discrimination.[89] The Protocol has been signed

[81] McKean, n 34, 277–84; L Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (1988) 467–82; Brownlie, n 77, 488–9.

[82] ICCPR, Art 4(1). See SR Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency* (1989) 124.

[83] UN Human Rights Committee, *General Comment No 24: Reservations to the Covenant or Optional Protocols or Declarations under Article 41 of the Covenant* (1994), para 9.

[84] European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, 213 UNTS 222.

[85] eg, JG Merrills, *The Development of International Law by the European Court of Human Rights* (1993).

[86] For the United Kingdom, see the Human Rights Act 1998, which came into force on 2 October 2000. For Germany, see Gesetz über die Konvention der Menschenrechte und Grundfreiheiten (Act on the Convention of Human Rights and Fundamental Freedoms), 7 August 1952, BGBl II, 685.

[87] ECHR, Art 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*' (emphases added)).

[88] In *Rasmussen v Denmark*, the European Court of Human Rights did not even find it necessary to state the particular ground of distinction involved when considering a case under Article 14 of the ECHR. *Rasmussen v Denmark* (1984) 7 EHRR 371, para 34.

[89] Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No 177, Art 1 ('(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').

but not yet ratified by Germany, while the United Kingdom has not signed it. At the European Union (EU) level, the Charter of Fundamental Rights, which is addressed to the institutions and bodies of the Union and to the member states when they are implementing EU law,[90] also contains a free-standing non-discrimination guarantee.[91]

The American Convention on Human Rights (ACHR),[92] signed but not ratified by the United States, the African Charter on Human and Peoples' Rights,[93] and the Arab Charter on Human Rights[94] each include both subordinate and autonomous prohibitions of discrimination. Finally, the right to non-discrimination is guaranteed by regional non-treaty standards such as the American Declaration of the Rights and Duties of Man.[95] The Inter-American Court of Human Rights has held that, since the Declaration defines the human rights referred to in the Charter of the Organization of American States (OAS), it is a source of international obligations for all member states of the OAS, including the United States.[96]

Various regional expert bodies have specifically stressed that states are required to respect the right to non-discrimination even when fighting terrorism. The Guidelines on Human Rights and the Fight against Terrorism adopted by the Committee of Ministers of the Council of Europe state that '[a]ll measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding... any discriminatory or racist treatment.'[97] General Policy Recommendation No 8 on Combating Racism while Fighting Terrorism of the European Commission against Racism and Intolerance (ECRI) calls on member states to refrain from adopting anti-terrorism laws and regulations 'that discriminate directly or indirectly against persons or groups of persons, notably

[90] Charter of Fundamental Rights of the European Union, [2000] OJ C364, 7 December 2000, Art 51(1).

[91] ibid, Art 21(1) ('Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited').

[92] American Convention on Human Rights (ACHR), 22 November 1969, 1144 UNTS 123, Arts 1, 24.

[93] African Charter on Human and Peoples' Rights, reprinted in 21 ILM 58 (1982), Arts 2, 3.

[94] Arab Charter on Human Rights, reprinted in (1997) 18 *Human Rights Law Journal* 151, Arts 2, 9, 35.

[95] American Declaration of the Rights and Duties of Man, OAS Resolution XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev 9 (2003), Art 2 ('All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor').

[96] *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, 14 July 1989, Inter-American Court of Human Rights (Series A) No 10 (1989).

[97] *Guidelines on Human Rights and the Fight against Terrorism*, adopted by the Committee of Ministers of the Council of Europe on 11 July 2002, Guideline No II.

on grounds of "race", colour, language, religion, nationality or national or ethnic origin' and to ensure that any anti-terrorism measures are implemented in a non-discriminatory manner.[98] Likewise, the Inter-American Commission on Human Rights, in its Report on Terrorism and Human Rights, has emphasised that states, 'when developing and executing anti-terrorism measures', must 'fully and strictly comply with the obligation to ensure all persons equal protection of the law and of the rights and freedoms protected thereunder, and the corresponding prohibition of discrimination of any kind.'[99]

3.1.4 National law

As explained in the introduction to this chapter, virtually all modern constitutions include provisions guaranteeing equality and non-discrimination. Of the states considered here, the United States and Germany have codified this guarantee in their written constitutions. In the United Kingdom, equality before the law is considered to be a fundamental principle of justice.

3.1.4.1 United States

The Equal Protection Clause of the Fourteenth Amendment to the US Constitution provides that '[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws.' It thus guarantees that similar individuals will be dealt with in a similar manner by the government and prohibits unreasonable classifications.[100] Although the Equal Protection Clause of the Fourteenth Amendment by its own terms only applies to *state* governments, the Supreme Court has interpreted the Due Process Clause of the Fifth Amendment to test *federal* classifications under the same standard of review.[101] The guarantees of both the Fourteenth and the Fifth Amendments extend to all 'persons' rather than being confined to 'citizens'. Accordingly, the Supreme Court has recognised that the Equal Protection Clause is applicable 'to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality'[102] and, in the case of a non-citizen, '[w]hatever his status under the immigration laws'.[103] Likewise, the Court has held that 'the Due Process Clause

[98] ECRI, *General Policy Recommendation No 8 on Combating Racism while Fighting Terrorism*, 17 March 2004.

[99] Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, 22 October 2002, Doc OEA/Ser.L/V/II.116, Recommendations, preambular para and Recommendation No 14.

[100] J Tussman and J tenBroek, 'The Equal Protection of the Laws' (1949) 37 *California Law Review* 341, 344 (the classic treatise on the Equal Protection Clause).

[101] eg, *Bolling v Sharpe* 347 US 497 (1954).

[102] *Yick Wo v Hopkins* 118 US 356, 369 (1886).

[103] *Plyler v Doe* 457 US 202, 210 (1982).

applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent'.[104]

3.1.4.2 United Kingdom

According to Dicey, equality before the law is one of three components of the rule of law, which, in turn, is one of the most fundamental principles of the British constitution.[105] In the same vein, the Privy Council has observed that the principle of equality 'is one of the building blocks of democracy and necessarily permeates any democratic constitution'.[106] In *Arthur JS Hall v Simons*, Lord Hoffmann held that it is a 'fundamental principle of justice... that people should be treated equally and like cases treated alike', any exception requiring sound justification.[107] As made clear by the House of Lords, the equality guarantee applies to everybody within the United Kingdom, including foreign citizens.[108]

The Diceyan conception of equality before the law has been criticised for not being concerned with the content of the law but only with its enforcement and application.[109] According to these critics, the constitutional principle of equality goes in fact further and forbids not only the unequal application of equal laws, but also unequal laws.[110] Whatever the precise content of the original constitutional principle of equality, the Human Rights Act 1998 now 'give[s] further effect' to the rights guaranteed by the ECHR,[111] including its Article 14,[112] which precludes any kind of differential treatment with regard to the Convention rights. Both primary and subordinate legislation must be interpreted in a way that is compatible with the Convention rights,[113] and courts can make a declaration of incompatibility if they think that a particular law cannot be interpreted in such a way.[114]

[104] *Zadvydas v Davis* 533 US 678, 693 (2001). See also *Kwong Hai Chew v Colding* 344 US 590, 596–7, n 5 (1953) (holding that the Fifth Amendment does not allow 'any distinction between citizens and resident aliens'); Revised Restatement of the Law (Third), Section 722 ('(1) An alien in the United States is entitled to all the guarantees of the Constitution of the United States other than those expressly reserved for citizens. (2) Under Subsection (1), an alien in the United States may not be denied the equal protection of the laws, but equal protection does not preclude reasonable distinctions between aliens and citizens, or between different categories of aliens').

[105] AV Dicey, *Introduction to the Study of the Law of the Constitution* (1959) 202.

[106] *Matadeen v Pointu* [1999] 1 AC 98, 109 (Lord Hoffmann).

[107] *Arthur JS Hall v Simons* [2002] 1 AC 615, 688.

[108] *Khawaja v Secretary of State for the Home Department* [1984] AC 74, 111 (Lord Scarman holding that '[e]very person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others').

[109] eg, I Jennings, *The Law and the Constitution* (1959) 49; J Jowell, 'Is Equality a Constitutional Principle?' (1994) *Current Legal Problems* 1, 4.

[110] Jowell (1994), n 109, 7; TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (1993) 39–47, 163–82.

[111] Human Rights Act 1998, preamble.

[112] ibid, s 1.

[113] ibid, s 3.

[114] ibid, s 4.

Finally, discrimination on 'racial grounds', including grounds of colour, race, nationality, or ethnic or national origins, is also prohibited by the Race Relations Act 1976.[115] Since its amendment in 2000, this act applies not only to acts of private persons but also to the exercise of public functions by public authorities.[116]

3.1.4.3 Germany

The right to equality and non-discrimination is codified in Article 3 of the Grundgesetz, the German constitution. Paragraph 1 of this article, the general equality clause, declares that 'all human beings are equal before the law'[117] and thus requires that essentially similar matters are not arbitrarily treated differently and that essentially different matters are not arbitrarily treated equally.[118] Paragraph 3 of Article 3 further specifies that 'nobody may be discriminated against or favoured on the grounds of their gender, birth, race, language, national or social origin, faith, religion or political opinion'.[119] Like all other constitutional rights, the right to equality and non-discrimination binds 'the legislature, the executive, and the judiciary'.[120] According to the jurisprudence of the Bundesverfassungsgericht, the German constitutional court, the general equality guarantee of Article 3(1) of the Grundgesetz protects all persons, including foreign nationals.[121] In addition to this constitutional guarantee, the right to non-discrimination of the ECHR is also directly applicable in Germany, as the Convention has been incorporated into national law by an act of parliament.[122]

3.2 Content of the right to non-discrimination

While it is undisputed that the right to equality and non-discrimination is one of the key concepts of any legal system based on respect for individual rights, it is

[115] Race Relations Act 1976 (as amended), ss 1 and 3(1).

[116] ibid, s 19B.

[117] Grundgesetz, Art 3(1) ('Alle Menschen sind vor dem Gesetz gleich').

[118] See the decision of the Bundesverfassungsgericht, the German constitutional court, in BVerfGE 4, 144 (155)—*Abgeordneten-Entschädigung* ('Der Gesetzgeber ist an den allgemeinen Gleichheitssatz in dem Sinne gebunden, daß er weder wesentlich Gleiches willkürlich ungleich noch wesentlich Ungleiches willkürlich gleich behandeln darf'). See also H Jarass and B Pieroth, *Grundgesetz für die Bundesrepublik Deutschland* (2000) 99; M Sachs, 'Die Massstäbe des allgemeinen Gleichheitssatzes: Willkürverbot und sogenannte neue Formel' (1997) *JuS (Juristische Schulung)* 124.

[119] Grundgesetz, Art 3(3) ('Niemand darf wegen seines Geschlechtes, seiner Abstammung, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt werden').

[120] ibid, Art 1(3) ('Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht').

[121] BVerfGE 30, 409 (412) ('Art. 3 Abs. 1 GG wirkt international. Er gilt für alle Menschen und damit auch für Ausländer'). See also BVerfGE 51, 1 (22)—*Rentenversicherung im Ausland.*

[122] Gesetz über die Konvention der Menschenrechte und Grundfreiheiten, 7 August 1952, BGBl II, 685.

less clear what it entails in practice. The purpose of this section is to extract from the jurisprudence of the relevant international and regional human rights bodies, as well as national courts, the basic criteria that allow distinguishing between permissible and impermissible differential treatment. However, the appropriate non-discrimination standard will also depend on the particular measure in question and the ground of distinction, so that its details may vary with the anti-terrorism law or practice examined.

Central to all non-discrimination provisions is Aristotle's classical equality maxim according to which equals must be treated equally and unequals unequally. This maxim is, however, per se normatively indeterminate: it does not answer the question of who are equals and what constitutes equal treatment, or, in other words, which differences in treatment are wrongful and which are legitimate. As Peter Westen has argued, for the principle to have meaning it must incorporate some external values that determine which persons and treatments are alike.[123] The line between wrongful and acceptable discrimination will normally be difficult to locate with precision, because it is, in most cases, a function of consequentialist considerations rather than deontological norms.[124] Both international human rights bodies and national courts have developed a range of criteria by which wrongful discrimination can be distinguished from reasonable differentiation.

The UN Human Rights Committee, for the purposes of the ICCPR, has defined 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'.[125] Hence, 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.'[126]

But it is in the jurisprudence of the European Court of Human Rights that the elements of wrongful discrimination have been most clearly articulated. The Court interpreted Article 14 for the first time in the *Belgian Linguistics Case* and has since repeated those conclusions in many cases:

> [T]he principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the

[123] P Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537, 547.

[124] L Alexander, 'What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies' (1992) 141 *University of Pennsylvania Law Review* 149, 153.

[125] UN Human Rights Committee, *General Comment No 18: Non-discrimination* (1989), para 7.

[126] ibid, para 13.

exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[127]

As already these general statements make clear, and as I will demonstrate in more detail below, the right to non-discrimination as guaranteed by international law entails more than merely formal equality or equality as consistency.[128] Also apparently consistent treatment can constitute discrimination if it has disproportionate effects on a particular group. On the other hand, not every difference in treatment is automatically impermissible. Rather, a number of specific criteria that follow, directly or indirectly, from the above statements must be considered to distinguish between wrongful and legitimate differential treatment. These criteria, which are applied by all the judicial bodies relevant in the present context, are set out below and concern the issues of discriminatory intention (3.2.1), comparability (3.2.2), legitimate aim (3.2.3), and proportionality (3.2.4). Furthermore, this section explores what standard of review (3.2.5) and burden of proof (3.2.6) courts apply when they have to assess discrimination claims.

3.2.1 No discriminatory intention required

The texts of the relevant human rights treaties, as well as the practice of international judicial bodies, suggest that, under international law, it is not necessary to show a discriminatory intention or purpose to establish discrimination. Rather, also seemingly equal treatment that has the effect of disproportionately disadvantaging a particular category of persons, often described as 'indirect discrimination',[129] is prohibited. In his dissenting opinion in the *South West Africa Cases*, Judge Tanaka found that a violation of the right to non-discrimination 'can be asserted without regard to... motive or purpose'.[130] This can also be inferred from the explicit definition of discrimination of Article 1(1) of the ICERD, which prohibits any distinction based on the listed grounds 'which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise' of human rights.[131] The same definition of discrimination has been adopted by the

[127] *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252, para 10.

[128] For an insightful critique of the reduction of equality to formal equality, see IM Young, *Justice and the Politics of Difference* (1990).

[129] See, eg, for the ICCPR context, *Derksen v Netherlands*, Communication No 976/2001, 15 June 2004, UN Doc CCPR/C/80/D/976/2001, para 9.3. For a critique of the equation of unintentional discrimination with indirect discrimination, see K Frostell, 'Gender Difference and the Non-discrimination Principle in the CCPR and the CEDAW' in L Hannikainen and E Nykänen (eds), *New Trends in Discrimination Law: International Perspectives* (1999) 29, 51.

[130] *South-West Africa Cases (Second Phase)* (1966) ICJ Reports 6, 306.

[131] Emphasis added. Exactly the same formulation can be found in CEDAW, Art 1.

UN Human Rights Committee for the purposes of the ICCPR[132] and applied in its case law. In *Althammer v Austria*, for example, the Committee stated that 'a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate'.[133]

Equally, there is no requirement under the ECHR to establish intent to discriminate. The European Court indicated as early as in the *Belgian Linguistics* case that the existence of discrimination might also relate to the *effects* of state measures.[134] It has reinforced this view in the cases of *Hugh Jordan v United Kingdom*, *McKerr v United Kingdom*, *Kelly and Others v United Kingdom*, and *Shanaghan v United Kingdom*, where the applicants complained that the overwhelming majority of people killed by the security forces in Northern Ireland were Catholics or nationalists and that only few of these killings resulted in prosecutions or convictions.[135] Even though the Court found that the alleged disproportionate effect had not been established in these particular cases, it declared: 'Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group.'[136] In the United Kingdom, the House of Lords has similarly held that, under the Race Relations Act, the reason why someone has been treated less favourably is irrelevant: discrimination can be established regardless of the alleged discriminator's intention.[137] Likewise, the German constitutional Court has made clear that a law that is neutral on its face but has discriminatory effects in practice violates Article 3 of the Grundgesetz.[138]

The US Supreme Court, by contrast, has held that the equal protection principle of the Fourteenth and Fifth Amendments only prohibits intentional governmental discrimination.[139] However, according to the court, the discriminatory purpose must not necessarily be express or appear on the face of the law, but may also be inferred from the discriminatory impacts shown to exist in fact.[140]

[132] UN Human Rights Committee, *General Comment No 18: Non-discrimination* (1989), paras 6–7.

[133] *Althammer v Austria*, Communication No 998/2001, 22 September 2003, UN Doc CCPR/C/78/D/998/2001, para 10.2. See also *Zwaan-de Vries v Netherlands*, Communication No 182/1984, 9 April 1987, UN Doc CCPR/C/29/D/182/1984, para 16; *Simunek et al v the Czech Republic*, Communication No 516/1992, 31 July 1995, UN Doc CCPR/C/54/D/516/1992, para 11.7.

[134] *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252, para 10.

[135] *Hugh Jordan v United Kingdom*, Application No 24746/94, 4 May 2001; *McKerr v United Kingdom*, Application No 28883/95, 4 May 2001; *Kelly and Others v United Kingdom*, Application No 30054/96, 4 May 2001; *Shanaghan v United Kingdom*, Application No 37715/97, 4 May 2001. All four judgments concerned a similar set of facts.

[136] *Hugh Jordan v United Kingdom*, ibid, para 154. Exactly the same formula can be found in the other three judgments.

[137] *Nagarajan v London Regional Transport* [2000] 1 AC 501, 511; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, para 82 (Baroness Hale).

[138] BVerfGE 8, 51 (64)—*Parteispenden-Urteil*.

[139] The leading case is *Washington v Davis* 426 US 229 (1976).

[140] ibid 241–2.

Moreover, all express discrimination is by definition considered intentional.[141] Therefore, in its practical operation, the US equal protection guarantee is not as different from the prohibition of discrimination under international law as might appear at first sight. This especially applies with regard to the sort of anti-terrorism measures covered in this book, as most of these are, in any event, explicitly aimed at particular groups.

3.2.2 Comparability

According to the consistent case law of international human rights bodies and national courts, persons claiming to be discriminated against must, first of all, show that there has been a difference in treatment. Thus, the applicant will need to identify others who, although in a comparable position, are treated better. Under the European Convention system it must be established that persons in 'analogous'[142] or 'relevantly similar'[143] situations, under the US Constitution that persons who are 'similarly situated',[144] are treated differently. Alternatively, the right to non-discrimination may also be violated if persons whose situations are significantly different are treated equally.[145] The comparability must be judged with respect to the purpose of the law or measure under consideration.[146] If no similar situations exist, there is normally no need to proceed in the analysis of the case. However, international human rights bodies often tend to merge this comparability test with the assessment as to whether an objective justification for the difference in treatment exists,[147] that is, the legitimate aim and proportionality tests, described in the next two sections.

3.2.3 Legitimate aim

Once it is established that persons in comparable situations have been treated differently, the focus of the assessment shifts to the existence of an objective and reasonable justification for the differential treatment. The first part of this objective justification test requires that the difference in treatment pursue a

[141] RA Sedler, 'The Role of "Intent" in Discrimination Analysis' in Loenen and Rodrigues (eds), *Non-discrimination Law: Comparative Perspectives* (1999) 91, 91–2.

[142] *Lithgow v United Kingdom* (1986) 8 EHRR 329, para 177.

[143] *Fredin v Sweden* (1991) 13 EHRR 784, para 60.

[144] Tussman and tenBroek, n 100, 344.

[145] See, eg, the decision of the European Court of Human Rights in *Thlimmenos v Greece* (2001) 31 EHRR 411, para 44.

[146] See, eg, Tussman and tenBroek, n 100, 346 (for the United States); *A v Secretary of State for the Home Department* [2004] UKHL 56, para 235 (for the United Kingdom).

[147] For the UN Human Rights Committee, see T Choudhury, 'Interpreting the Right to Equality under Article 26 of the International Covenant on Civil and Political Rights' (2003) *European Human Rights Law Review* 24, 34–5. For the European Court of Human Rights, see S Livingstone, 'Article 14 and the Prevention of Discrimination in the European Convention on Human Rights' (1997) 1 *European Human Rights Law Review* 25, 30.

legitimate aim.[148] Normally, it will not be difficult for states to satisfy the legitimate aim requirement, as almost any treatment can be claimed to pursue some rational aim.[149] Some authors have therefore criticised the legitimate aim test as being a mere rhetorical assertion and redundant.[150] Certainly in the case of anti-terrorism measures, states will usually be able to meet this requirement quite easily by referring to national security interests.[151]

3.2.4 Proportionality

The assessment as to whether differential treatment is justified or not is thus, in practice, mainly controlled by the second leg of the justification test, requiring a reasonable relationship of proportionality between the difference in treatment and the legitimate aim sought to be realised. Proportionality is expressly referred to in the discrimination case law of both the European Court of Human Rights[152] and the German Constitutional Court,[153] and is, indeed, a general principle present throughout the ECHR[154] and German constitutional law.[155] Since the introduction of the Human Rights Act, also the British courts apply the proportionality test, at least as far as ECHR rights are concerned.[156] Furthermore, the proportionality requirement is, albeit less explicitly, part of the discrimination test employed by the UN Human Rights Committee,[157] as well as of the case law

[148] For the ICCPR, see UN Human Rights Committee, *General Comment No 18: Non-discrimination*, para 13. For the ECHR, see *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252, para 10. According to the case law of the US Supreme Court, the nature of the aim required depends on the applicable standard of review and is described as a 'legitimate', 'important', or 'compelling' government interest. See Section 3.2.5.1 below.

[149] The European Court of Human Rights, for instance, has denied the existence of a legitimate aim in only two cases so far: *Darby v Sweden*, Application No 11581/85, 23 October 1990, para 33 and *Thlimmenos v Greece* (2001) 31 EHRR 411, para 47.

[150] OM Arnardóttir, *Equality and Non-discrimination under the European Convention on Human Rights* (2003) 42–5; KJ Partsch, 'Discrimination' in Macdonald, Matscher, and Petzold (eds), *The European System for the Protection of Human Rights* (1993) 571, 587, 591–2.

[151] See, eg, *Klass v Germany* (1978) 2 EHRR 214, para 46.

[152] See the formula of the *Belgian Linguistics Case* which has become part of the consistent case law of the European Court. *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252, para 10.

[153] BVerfGE 82, 126 (146)—*Kündigungsfristen für Arbeiter*.

[154] M-A Eissen, 'The Principle of Proportionality in the Case-Law of the European Court of Human Rights' in Macdonald, Matscher, and Petzold (eds), *The European System for the Protection of Human Rights* (1993) 125; J McBride, 'Proportionality and the European Convention on Human Rights' in Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (1999) 23.

[155] The Bundesverfassungsgericht has held that proportionality is a constitutional principle that follows directly from the rule of law and the very nature of constitutional rights. BVerfGE 19, 342 (348–9)—*Wencker*.

[156] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, in particular paras 23, 27. See J Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' (2000) *Public Law* 671; D Feldman, 'Proportionality and the Human Rights Act 1998' in Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (1999) 117.

[157] eg, *Gillot et al v France*, Communication No 932/2000, 26 July 2002, UN Doc CCPR/C/75/D/932/2000, paras 13.2, 13.17; *Jacobs v Belgium*, Communication No 943/2000, 17 August 2004, UN Doc CCPR/C/81/D/943/2000, para 9.5.

of the US Supreme Court, which requires a varyingly close relationship between the differential treatment and the aim pursued, depending on the applicable standard of review.[158]

As pointed out in Chapter 1, the principle of proportionality reflects, to some extent, the notion that there is a need to balance individual rights and the interests of the community. However, proportionality as required by international human rights law, as well as by the constitutional law of the states considered here, encompasses more than just a balancing test and demands a much more detailed assessment of a given difference in treatment than is suggested by the language of balance. The proportionality principle is generally divided into three sub-principles,[159] namely: (1) *suitability*: the means employed (in the present context the differential treatment that a given anti-terrorism measure involves) must be suitable to achieve the aim pursued;[160] (2) *necessity*: the measure must be necessary in the sense that no less restrictive measure is available;[161] and (3) *proportionality in the narrow sense*: the disadvantage imposed on the affected individuals and groups must not be disproportionate to the importance of the aim pursued.[162] Only the last of these sub-principles incorporates the balancing requirement. The same notion of an appropriate 'fit' between means and ends, that is, between the differential treatment that the measure in question involves and a legitimate aim, is also apparent in the requirement (especially applied by US courts and commentators) that the criterion on which the differential treatment is based must be neither under- nor over-inclusive.[163]

Assessing proportionality may thus necessitate the evaluation of a range of issues. What these issues are, and what their relative importance is, will vary according to the particular measure under consideration and the distinctions it involves. This makes it difficult to formulate a generic test that could be applied uniformly to all anti-terrorism laws and practices. Nevertheless, two sets of issues are particularly relevant in the present context and will be central to the proportionality assessment of all measures considered here. First, the first and third of the sub-principles listed above require that the differential treatment at issue must be suitable for, and effective in, advancing the aim sought to be achieved.[164] One of the key questions to be addressed in the subsequent chapters

[158] For a summary of the Supreme Court's relevant jurisprudence, see P Polyviou, *The Equal Protection of the Laws* (1980) chs 2, 5. See also Section 3.2.5 below.

[159] This tripartite test is originally derived from German law. R Alexy, *A Theory of Constitutional Rights* (2002) 66–9. It is, however, as the cases referred to below demonstrate, also applied by the European Court of Human Rights and is, as Lord Hoffmann has pointed out, in practice not significantly different from the approach taken by British courts. Lord Hoffmann, 'The Influence of the European Principle of Proportionality upon UK Law' in Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (1999) 107.

[160] eg, *Observer and Guardian v United Kingdom* (1991) 14 EHRR 153, paras 68–9.

[161] eg, *Informationsverein Lentia and others v Austria* (1993) 17 EHRR 93.

[162] eg, *National Union of Belgian Police v Belgium* (1975) 1 EHRR 578, para 49.

[163] For an overview, see Tussman and tenBroek, n 100, 347–53; Polyviou, n 158, 71–80.

[164] eg, *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, para 81.

will therefore be: are the anti-terrorism measures under consideration, and the differences in treatment they involve, suitable and effective means of countering terrorism? Second, the third sub-principle requires consideration of the negative implications of the measure in question, including with regard to the impacts it has on the affected groups.[165] Thus, what are the possible negative effects—or, in other words, the costs—of anti-terrorism measures that involve differential treatment of certain groups of people?

3.2.5 Standard of review

The stringency with which judicial bodies apply the aforementioned criteria to review discrimination claims will vary according to a number of factors and can range from a 'mere rationality' requirement to a 'strict scrutiny' test.[166] The factors influencing the intensity of judicial review include the ground on which a given difference in treatment is based, the nature of the legitimate aim pursued, and the importance of the individual interest at issue. This section introduces, first, the general concepts controlling the intensity of review. Next, it examines what standard of review the grounds of distinction most often implied by anti-terrorism measures entail. Finally, it discusses what the appropriate standard should be when the legitimate aim pursued is national security.

3.2.5.1 General concepts

In the context of the ECHR, the question of the intensity of review is closely linked to the doctrine of the margin of appreciation, first established by the European Court of Human Rights in the *Handyside* case.[167] There, the Court pronounced that '[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge' to make an initial assessment of the case and therefore enjoy a certain margin of appreciation.[168] For cases concerning discrimination, the Court has expressed the doctrine in the following terms:

> The Court has pointed out in several judgments that the Contracting States enjoy a certain 'margin of appreciation' in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background.[169]

[165] eg, UN Committee on the Elimination of Racial Discrimination, *General Recommendation No 14: Definition of Discrimination* (1993), para 2.

[166] AW Heringa, 'Standards of Review for Discrimination' in Loenen and Rodrigues (eds), *Non-discrimination Law: Comparative Perspectives* (1999) 25, 26–7.

[167] *Handyside v United Kingdom* (1976) 1 EHRR 737.

[168] ibid, para 48.

[169] *Rasmussen v Denmark* (1984) 7 EHRR 371, para 40.

Race and ethnicity

As explained above, the prohibition of discrimination on the basis of race has become a norm of customary international law and/or a general principle of law.[186] That racial distinctions are particularly suspect and will be very difficult ever to justify is further underlined by the widespread ratification of the ICERD,[187] as well as the finding of the European Commission of Human Rights that racial discrimination amounts to an affront to human dignity and may constitute inhuman and degrading treatment in breach of Article 3 of the ECHR.[188] Consequently, both the European Commission and the Court have held that 'a special importance should be attached to discrimination based on race'.[189] With regard to the related notion of ethnicity, the European Court has stressed that 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures'.[190]

The stigma attached to distinctions based on race is also reflected in the analytical model of the US Supreme Court, which subjects such distinctions to the 'strict scrutiny' test. The Court has held that '[a]t the very least, the Equal Protection Clause demands that racial classifications... be subjected to the "most rigid scrutiny" '.[191] If they are ever to be upheld, they must be shown to be necessary to promote a 'compelling' or 'overriding' government interest.[192] Significantly, no racial classification has been sustained by the Supreme Court since the Second World War cases of *Hirabayashi v United States*[193] and *Korematsu v United States*,[194] which concerned curfew and detention orders against Japanese Americans. This led Gerald Gunther to describe the 'strict scrutiny' test as '"strict" in theory and fatal in fact'.[195] Similarly, in the United Kingdom, the House of Lords has held that 'unless good reason exists', differences in treatment based on race 'are properly stigmatised as discriminatory'.[196]

[186] See Section 3.1.2.4 above.

[187] As of April 2007, 173 states were party to the ICERD. Website of the Office of the UN High Commissioner for Human Rights, at <http://www.ohchr.org/english/countries/ratification/2.htm>.

[188] *East African Asians v United Kingdom* (1973) 3 EHRR 76. See also the European Court's decision in *Jersild v Denmark* (1994) 19 EHRR 1, para 30 (stating that the Court was 'particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations').

[189] *East African Asians v United Kingdom* (1973) 3 EHRR 76, para 207. This view was endorsed by the Court in *Cyprus v Turkey*, Application No 25781/94, 10 May 2001, para 306.

[190] *Timishev v Russia*, Application Nos 55762/00 and 55974/00, 13 December 2005, para 58.

[191] *Loving v Virginia* 388 US 1, 11 (1967).

[192] eg, *McLaughlin v Florida* 379 US 184, 196 (1964); *Adarand Constructors, Inc v Peña* 515 US 200, 227 (1995).

[193] *Hirabayashi v United States* 320 US 81 (1943).

[194] *Korematsu v United States* 323 US 214 (1944).

[195] G Gunther, 'The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court' (1972) 86 *Harvard Law Review* 1, 8.

[196] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, para 9.

Finally, race is one of the characteristics that, according to Article 3(3) of the German Grundgesetz, can generally not serve as a legitimate basis for distinction and thus entail strict scrutiny.[197]

Religion

That differential treatment based on religion is inherently suspect is indicated by the unanimous adoption by the General Assembly of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief[198] and the fact that discrimination on the ground of religion is now widely regarded as a breach of customary international law.[199] Accordingly, the European Court of Human Rights held in *Hoffmann v Austria* that '[n]otwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable.'[200] The strict tone of this judgment, as well as a number of other decisions by the European Court finding a violation of the prohibition of religious discrimination, suggest that the margin of appreciation is narrow in cases where the ground of distinction is religion.[201] Similarly, the British House of Lords regards religion as one of the grounds of distinction 'which by common accord are not acceptable, without more, as a basis for different legal treatment'.[202] In Germany, classifications based on religion are subject to strict scrutiny, as religion is one of the traits listed in Article 3(3) of the Grundgesetz.[203]

Citizenship and nationality

As far as differences in treatment based on citizenship and nationality are concerned, it is difficult to discern a consistent standard of review in the case law of the various international bodies and national courts. The UN Human Rights Committee found in several cases distinctions on the basis of nationality to be in violation of Article 26 of the ICCPR, but does not seem to treat such distinctions as inherently suspect.[204] In contrast, in *Gaygusuz v Austria*, the European Court of Human Rights expressly required strict scrutiny by stating that 'very weighty

[197] See BVerfGE 85, 191 (205–6)—*Nachtarbeitsverbot*.

[198] See Section 3.1.2.3 above.

[199] eg, Restatement (Third) the Foreign Relations Law of the United States, Vol 2, Section 702, Comment (j) and Reporters' Notes (8). See also further references listed in Shaw, n 77, 267.

[200] *Hoffmann v Austria* (1993) 17 EHRR 293, para 36.

[201] eg, *Canea Catholic Church v Greece* (1999) 27 EHRR 521; *Thlimmenos v Greece* (2001) 31 EHRR 411. In *Cyprus v Turkey*, Application No 25781/94, 10 May 2001, paras 309–11, the Court found that the discriminatory treatment on the basis of ethnic origin, race, and religion complained of was so severe as to amount to degrading treatment in violation of Article 3 of the ECHR.

[202] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, para 9.

[203] See Section 3.2.5.1 above.

[204] See, eg, *Gueye v France*, Communication No 196/1985, 6 April 1989, UN Doc CCPR/C/35/D/196/1985; *Simunek et al v the Czech Republic*, Communication No 516/1992, 31 July 1995, UN Doc CCPR/C/54/D/516/1992; *Adam v Czech Republic*, Communication No 586/1994, 25 July 1996, UN Doc CCPR/C/57/D/586/1994; *Karakurt v Austria*, Communication No 965/2000, 29 April 2002, UN Doc CCPR/C/74/D/965/2000.

While this vague formula may encompass a whole range of different factors influencing the scope of the margin of appreciation,[170] a few classes of cases that will automatically attract strict scrutiny can be induced from the Court's case law. In particular, the Court has identified certain grounds of differential treatment, including those most often employed by anti-terrorism measures, as especially serious and therefore as requiring very weighty reasons for justification.[171] In addition, the margin of appreciation will be affected by the nature of the individual interests at stake—where a particularly important aspect of an individual's existence is in issue, the Court will be less likely to afford the state broad discretion.[172] However, the width of the margin also depends on the nature of the general interest with which the individual rights concerned conflict; national security is one area where states have traditionally been allowed a wide margin.[173]

Although the UN Human Rights Committee does not normally expressly refer to the doctrine of the margin of appreciation, its jurisprudence regarding the strictness of review reveals a similar approach to that of the European Court. It, too, attaches importance to the ground of distinction and has stated that any difference in treatment 'based on one of the specific grounds enumerated in article 26, clause 2 of the Covenant... places a heavy burden on the State party to explain the reason for the differentiation.'[174] Some grounds of distinction, such as race and sex, are recognised as particularly suspect and call for greater scrutiny.[175]

The British courts largely follow the European Court of Human Rights' approach and subject the government's justification for differential treatment to intense scrutiny if they think that the ground of distinction implicates a person's dignity, as in the case of race, sex, religion, and sexual orientation.[176] In addition, where fundamental individual interests are at stake, the intensity of review will be greater than where matters of social or economic policy are concerned.[177]

According to the jurisprudence of the German constitutional court, differential treatment of different groups of persons must be subject to strict judicial review.[178] Classifications will be particularly difficult to justify if they are based

[170] J Schokkenbroek, 'The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation' (1998) 19 *Human Rights Law Journal* 20.

[171] See Section 3.2.5.2 below.

[172] eg, *Dudgeon v United Kingdom* (1981) 4 EHRR 149, para 52; *X and Y v Netherlands* (1986) 8 EHRR 235, paras 24 and 27; *Buckley v United Kingdom* (1996) 23 EHRR 101, paras 74–6.

[173] See Section 3.2.5.3 below.

[174] *Müller and Engelhard v Namibia*, Communication No 919/2000, 28 June 2002, UN Doc CCPR/C/74/D/919/2000, para 6.7.

[175] See Lord Lester of Herne Hill and S Joseph, 'Obligations of Non-discrimination' in Harris and Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995) 563, 589.

[176] S Fredman, 'From Deference to Democracy: The Role of Equality under the Human Rights Act 1998' (2006) 122 *Law Quarterly Review* 53, 73–6.

[177] eg, *A v Secretary of State for the Home Department* [2004] UKHL 56, paras 39–41 (Lord Bingham), 79–81 (Lord Nicholls), 107–8 (Lord Hope), 196 (Lord Walker).

[178] BVerfGE 55, 72 (88–9)—*Präklusion I.*

on one of the characteristics listed in paragraph 3 of Article 3 of the Grundgesetz (gender, birth, race, language, national or social origin, faith, religion, and political opinion). This clause reinforces the general equality guarantee, excluding, in principle, the listed traits as a legitimate basis for differential treatment.[179] Furthermore, the stronger a classification affects fundamental rights, the closer judicial scrutiny will be.[180]

In contrast to the vague formulae articulated by the European Court and the UN Human Rights Committee (according to which the applicable standard of review depends largely on an ad hoc consideration of the factors involved in the particular case), the US Supreme Court has elaborated a system of three different, fairly fixed standards to review equal protection challenges. The first standard is the 'rational relationship' or 'rational basis' test, which gives a strong presumption of constitutionality to the governmental action; the Court only invalidates a classification if it has no rational relationship to any legitimate interest of government.[181] Under the 'intermediate scrutiny' test, the classification must have a substantial relationship to the promotion of an important interest of government.[182] Finally, classifications affecting fundamental individual interests,[183] including the interests of persons charged with criminal offences,[184] as well as distinctions based on certain suspect criteria,[185] entail 'strict scrutiny': the classification must be necessary, or narrowly tailored, to advance a compelling government interest.

3.2.5.2 'Suspect' grounds of discrimination

Apart from the nature and importance of the general and individual interests at stake, judicial bodies thus use the ground on which the differential treatment is based as the most important element in determining the intensity of review. According to the jurisprudence of both international human rights bodies and domestic courts, a number of grounds are inherently suspect and therefore entail stricter scrutiny. The grounds attracting the greatest degree of attention and most likely to be declared unjustified are sex, illegitimacy, race and ethnicity, religion and, to a lesser extent, nationality. As the three latter grounds are particularly relevant in the anti-terrorism context, they are now considered in more detail.

[179] BVerfGE 85, 191 (206–7)—*Nachtarbeitsverbot*. See also B Schmidt-Bleibtreu and F Klein, *Kommentar zum Grundgesetz* (1995) 204.

[180] BVerfGE 82, 126 (146)—*Kündigungsfristen für Arbeiter*.

[181] For a summary of the Supreme Court's relevant jurisprudence, see, for instance, Polyviou, n 158, 659–65; JE Nowak and RD Rotunda, *Constitutional Law* (1995) 600–20.

[182] See Polyviou, n 158, 221–4; Nowak and Rotunda, n 181, 602–5.

[183] The basis for the doctrine of fundamental interests was established in the case of *Skinner v Oklahoma* 316 US 535 (1942).

[184] eg, *Griffin v Illinois* 351 US 12 (1956). For an overview, see Nowak and Rotunda, n 181, 942–6.

[185] See Section 3.2.5.2 below.

reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention'.[205]

The US Supreme Court's jurisprudence with regard to distinctions according to citizenship and nationality is inconsistent. In the distribution of economic benefits by states, classifications based on citizenship are 'inherently suspect and subject to close judicial scrutiny', since '[a]liens as a class are a prime example of a "discrete and insular" minority for whom such heightened judicial solicitude is appropriate.'[206] John Hart Ely has stated the case for strict scrutiny in a similar way: 'Aliens cannot vote in any state, which means that any representation they receive will be exclusively "virtual". That fact should at the very least require an unusually strong showing of a favourable environment for empathy.'[207] Yet as far as federal laws are concerned, the Supreme Court applies a more lenient standard of review: the federal power to regulate immigration and naturalisation, it has argued, entails greater judicial deference.[208]

Under German constitutional law, classifications based on citizenship and nationality are tested under the general equality clause of Article 3(1) of the Grundgesetz, as they are not among the criteria expressly listed in Article 3(3), which would entail strict scrutiny. However, since they are very closely related to the criteria of national origin and race, which are listed in Article 3(3), and since foreign nationals are particularly at risk of being subject to indirect discrimination based on one of these criteria, judicial review must nevertheless be close.[209]

3.2.5.3 National security matters

In cases that touch upon national security interests, including terrorism cases, judicial bodies have tended to apply a lenient standard of review, according the executive or the legislature a wide scope of discretion. In the case of international courts or bodies, this judicial self-restraint has grown out of respect for national sovereignty, of which a state's right to defend itself in times of crisis is seen as the bedrock. The European Court of Human Rights, for instance, has traditionally granted a wide margin of appreciation to member states in national security matters.[210] This has been particularly the case when governments have claimed the existence of a public emergency under Article 15 of the ECHR.[211] In the 1978

[205] *Gaygusuz v Austria* (1996) 23 EHRR 364, para 42.
[206] *Graham v Richardson* 403 US 365, 372 (1971).
[207] JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) 161.
[208] *Mathews v Diaz* 426 US 67 (1976).
[209] See Jarass and Pieroth, n 118, 134.
[210] eg, *Klass v Germany* (1978) 2 EHRR 214, paras 48–50; *Leander v Sweden* (1987) 9 EHRR 433, para 59.
[211] eg, *Ireland v United Kingdom* (1978) 2 EHRR 25, paras 207, 214; *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539, paras 43, 59–60. For a thorough analysis of the margin of appreciation doctrine in cases of derogation from ECHR guarantees, see M O'Boyle, 'The Margin of

case of *Ireland v United Kingdom* the Court expressed the reasons for doing so in the following terms:

> The limits on the Court's powers of review... are particularly apparent where Article 15 is concerned. It falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it.[212]

In its more recent jurisprudence, however, the Court has been moving away from this deferential attitude,[213] concluding in a whole range of cases that the government interferences at issue were not required by the exigencies of a public emergency due to a terrorism situation[214] or for the protection of national security more generally.[215] Above all, it has made it clear that the mere fact that national security interests are involved does not automatically entail a wide margin of appreciation.[216]

While the doctrine of the margin of appreciation is as such not applicable in national law,[217] domestic courts have traditionally been equally deferential to the executive and legislative branches in national security cases.[218] Two main reasons can be identified for this: first, the idea that, according to the democratic principle, public interest considerations should be made by elected representatives,

Appreciation and Derogation under Article 15: Ritual Incantation or Principle?' (1998) 19 *Human Rights Law Journal* 23.

[212] *Ireland v United Kingdom* (1978) 2 EHRR 25, para 207.
[213] Cameron situates the beginnings of this trend in the early 1990s. I Cameron, *National Security and the European Convention on Human Rights* (2000) 435–7.
[214] eg, *Aksoy v Turkey* (1996) 23 EHRR 553, paras 76–8; *Demir v Turkey*, Application Nos 21380/93, 21381/93, 21383/93, 23 September 1998, paras 49–57; *Nuray Sen v Turkey*, Application No 41478/98, 17 June 2003, paras 22–8; *Elci v Turkey*, Application Nos 23145/93 and 25091/94, 13 November 2003, para 684.
[215] eg, *Observer and Guardian v United Kingdom* (1991) 14 EHRR 153; *Vereniging Weekblad Bluf! v Netherlands* (1995) 20 EHRR 189; *Vogt v Germany* (1995) 21 EHRR 205; *Sidiropoulos v Greece* (1998) 27 EHRR 633; *Sürek and Özdemir v Turkey*, Application Nos 23927/94 and 24277/94, 8 July 1999; *Smith and Grady v United Kingdom* (1999) 29 EHRR 493; *Özgür Gündem v Turkey* (2001) 31 EHRR 1082; *Slivenko v Latvia*, Application No 48321/99, 9 October 2003; *Zarakolu and Belge Uluslararasi v Turkey*, Application No 26971/95, 13 July 2004.
[216] *United Communist Party of Turkey v Turkey* (1998) 26 EHRR 121, para 46 (holding that '[s]tates have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision' as far as the banning of a political party for reasons of national security is concerned). This was confirmed in *Socialist Party of Turkey v Turkey*, Application No 26482/95, 12 November 2003, para 44. See also Cameron, n 213, 437 and further cases cited there.
[217] For the United Kingdom, see, for example, R Singh, M Hunt, and M Demetriou, 'Is there a Role for the "Margin of Appreciation" after the Human Rights Act?' (1999) *European Human Rights Law Review* 14.
[218] For an overview, see L Lustgarten and I Leigh, *In from the Cold: National Security and Parliamentary Democracy* (1994) 320–59.

not by unelected judges; and, second, what has been termed 'institutional capacity', that is, the notion that other branches of government have special expertise in national security matters and are better equipped than the judiciary to know and evaluate risk.[219]

These rationales for judicial restraint in national security matters have been articulated, for example, by the House of Lords in its decision in *Secretary of State for the Home Department v Rehman*.[220] In this case, which concerned the deportation of a Pakistani citizen suspected of terrorism involvement, their Lordships held that the Special Immigration Appeals Commission (SIAC) was not entitled to substitute its view of whether a person constitutes a danger to national security for that of the executive branch. As Lord Hoffmann explained, 'such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.'[221] Lord Slynn added that due weight must be given 'to the assessment and conclusions of the Secretary of State in the light at any particular time of his responsibilities, or of Government policy and the means at his disposal of being informed of and understanding the problems involved. He is undoubtedly in the best position to judge what national security requires even if his decision is open to review.'[222]

However, these arguments for a deferential approach in national security matters are not persuasive. With regard to the first argument, the judiciary's alleged lack of democratic legitimacy, David Feldman has rightly objected that legitimacy can also arise independently from democracy. Judicial decisions do have a legitimacy, deriving from their reference to objective legal standards and the very fact that courts are independent from political processes.[223] Courts have the responsibility to decide what the law requires and are charged by parliament with defining the boundaries of a rights-based democracy; they cannot delegate this responsibility to the executive or legislative branch.[224] The second objection to judicial involvement in security matters, the judiciary's supposed lack of competence or expertise, is equally questionable. The executive and legislative branches are not necessarily better placed to make, or scrutinise, security assessments. The

[219] For analyses of these reasons for judicial deference in the British context, see J Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' (2003) *Public Law* 592, 595; D Feldman, 'Human Rights, Terrorism and Risk: The Roles of Politicians and Judges' (2006) *Public Law* 364, 372–84. For defences of judicial deference in terrorism cases from a US perspective, see EA Posner and A Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (2007) and J Yoo, 'Courts at War' (2006) 91 *Cornell Law Review* 573.

[220] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47.

[221] ibid, para 62.

[222] ibid, para 26.

[223] Feldman, n 219, 374–7.

[224] Jowell (2003), n 219, 597–9.

government inevitably has to rely on information from the police and security services—bodies with an interest in overstating the risk—and may not be keen or able to evaluate critically that information, while parliament has normally no access to the sources on which the government's assessment is based.[225] Courts, especially when they rely on special procedures such as closed hearings, may thus be in a better position to receive and review intelligence material than legislatures and they are more likely to critically evaluate that material than governments.

There are clear signs that the British courts are becoming increasingly conscious of their crucial function in national security cases, taking their constitutional role more seriously. Perhaps the best example for this is *A v Secretary of State for the Home Department*, the House of Lords' decision on the legality of detention without trial under the Anti-terrorism, Crime and Security Act (ATCSA) 2001.[226] There, the Law Lords insisted—despite the terrorism context—on a strict review of the measures adopted by the government after September 11. The judiciary, they argued, cannot simply abdicate its responsibility of reviewing governmental actions for their compliance with fundamental rights by invoking a lack of democratic accountability or institutional capacity.[227]

Also the US Supreme Court had originally been willing to grant the executive wide discretion, especially in the infamous setting of the relocation and internment of American citizens of Japanese ancestry during the Second World War. In *Korematsu v United States*,[228] it upheld the evacuation of all persons of Japanese descent from the West Coast military area by invoking the military dangers at stake: 'There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.'[229] However, the *Korematsu* decision is now widely regarded as one of the most shameful chapters in the Supreme Court's history. In the 1980s, Congress paid reparations to those who were interned[230] and a federal district court overturned Fred Korematsu's conviction for disobeying the evacuation order.[231] In its decision, the district court stressed that the Supreme Court's ruling in *Korematsu* 'stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability'.[232]

[225] Feldman, n 219, 380.

[226] *A v Secretary of State for the Home Department* [2004] UKHL 56. See Ch 4 below for a more detailed discussion of this case.

[227] ibid, paras 39–42 (Lord Bingham).

[228] *Korematsu v United States* 323 US 214 (1944).

[229] ibid 223–4.

[230] Civil Liberties Act of 1988, Public Law No 100-383, 102 Stat 904 (acknowledging that 'a grave injustice was done to both citizens and permanent residents of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II').

[231] *Korematsu v United States* 584 F Supp 1406 (DC Cal, 1984).

[232] ibid 1420.

A general trend can thus be identified whereby courts in different jurisdictions are moving towards a more stringent review in national security cases. This shift may, to some extent, also reflect the change in the understanding of security referred to in Chapter 1: courts seem to see liberty and security no longer simply as opposing aims but as closely interlinked. The President of the Israeli Supreme Court, Aharon Barak, for instance, recognised in a case concerning the violent interrogation of a terrorist suspect that '[p]reserving the rule of law and recognition of individual liberties constitute an important component of [a democracy's] understanding of security.'[233] If one accepts this view, then restrictions of human rights also represent a loss to security and must, therefore, be based on compelling government interests and be subject to close scrutiny.

3.2.6 Burden of proof

The standard of review that a court applies to consider a given discrimination claim has important implications for the applicable burden of proof.[234] According to the established jurisprudence of the relevant courts, it is up to the individual complaining of discrimination to establish prima facie discrimination, whereupon the burden of proof shifts to the state to show that there is an objective justification for the differential treatment.[235] This means that the complainant must demonstrate differential treatment, the basis for this treatment, and the existence of other groups of persons in a comparable situation. It is then up to the government to establish that the difference in treatment pursues a legitimate aim in a proportionate way.[236] As explained in the previous section, this onus of proof will be especially difficult to meet in cases that are subject to close judicial scrutiny, in particular cases involving suspect grounds of discrimination and classifications affecting fundamental interests.

3.3 The right to non-discrimination in states of emergency and situations of armed conflict

Does the existence of a terrorist threat alter states' obligations under the right to non-discrimination described in the previous sections? This section examines, first, what the consequences are when a government declares a state of emergency.

[233] A Barak, 'Foreword: A Judge on Judging. The Role of a Supreme Court in a Democracy' (2002) 116 *Harvard Law Review* 16, 148.

[234] For the ECHR, see Arnardóttir, n 150, 86–91.

[235] See, for example, for the ECHR, D Harris, M O'Boyle, and C Warbrick, *Law of the European Convention on Human Rights* (1995) 478.

[236] eg, *South-West Africa Cases (Second Phase)* (1966) ICJ Reports 6, 309 (Tanaka, J, dissenting) ('Equality being a principle and different treatment an exception, those who refer to the different treatment must prove its *raison d'être* and its reasonableness').

Does the non-discrimination guarantee remain in force? It then explores the applicability of the right to non-discrimination in situations where states resort to military force to counter perceived terrorist threats. Is the right also guaranteed by international humanitarian law?

3.3.1 States of emergency and human rights law

Most national constitutions authorise the executive or the legislature to restrict human rights to a greater extent during a state of emergency than would normally be permissible.[237] In Germany, an amendment to the Grundgesetz, passed in 1968, has created a number of special emergency powers.[238] In the United Kingdom, a range of special emergency laws, including the Civil Contingencies Act 2004, give the government wide-ranging powers to deal with different crisis situations.[239] In those states where an explicit constitutional authorisation for the suspension of human rights does not exist, such as the United States,[240] some doctrine of constitutional necessity is normally relied on as a legal basis for taking extraordinary action.[241] None of these national emergency regimes expressly authorises the government to suspend the right to non-discrimination.

Similarly, at the international level, human rights treaties generally allow states to derogate from some of their guarantees when there is a public emergency threatening the life of the nation.[242] Derogations are, however, only possible under the following, narrowly defined, circumstances: (1) there exists a public emergency threatening the life of the nation; (2) the state of emergency must be officially proclaimed; (3) the derogating state must immediately inform the other state parties of the derogation; (4) the derogating measures must be strictly required by the exigencies of the situation; and (5) the derogating measures must be consistent with other obligations under international law.[243] All the relevant

[237] For overviews, see International Commission of Jurists, *States of Emergency: Their Impacts on Human Rights* (1983); O Gross and F Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006) 35–46, 54–62.

[238] Siebzehntes Gesetz zur Ergänzung des Grundgesetzes ('Notstandsgesetze'), 24 June 1968, BGBl I, 709.

[239] Civil Contingencies Act 2004, Pt II.

[240] The only US constitutional right that contains an explicit suspension clause is the writ of habeas corpus. US Constitution, Art I, s 9, cl 2.

[241] Gross and Ní Aoláin, n 237, 46–54. For a US example, see *Korematsu v US* 323 US 214 (1944).

[242] ICCPR, Art 4; ECHR, Art 15; ACHR, Art 27. For good discussions of the subject, see J Oraá, *Human Rights in States of Emergency in International Law* (1992); J Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Human Rights during States of Emergency* (1994); A-L Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (1998).

[243] See ICCPR, Art 4; ECHR, Art 15; ACHR, Art 27; UN Human Rights Committee, *General Comment No 29: States of Emergency* (2001). These requirements can also be found in the decisions of the European Court of Human Rights in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15; *Ireland v United Kingdom* (1978) 2 EHRR 25; *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539. See also the following 'soft law' standards: Paris Minimum Standards of Human

treaties identify a number of human rights as non-derogable, meaning that they can never be restricted or suspended, not even in times of emergency.[244] Although none of the treaties explicitly lists the right to equality and non-discrimination as one of these non-derogable rights, it is indirectly included in the ICCPR as a basic condition regarding the suspension of Covenant rights: Article 4(1) provides that derogating measures must 'not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'. A very similar formulation can be found in Article 27(1) of the ACHR. Accordingly, the UN Human Rights Committee has stated that 'there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances'.[245]

In any event, the 'strictly required by the exigencies of the situation' test, contained in all derogation clauses, makes the lawfulness of derogating measures involving discrimination highly unlikely. This also applies with regard to the ECHR, even though it does not include an explicit prohibition of discrimination in the derogation clause, and regardless of the ground of discrimination. For, given that under international human rights law differences in treatment are permissible as long as they are supported by objective and reasonable grounds,[246] it is difficult to see how restrictions of the right to non-discrimination that go beyond these permissible reasonable limitations could ever be 'strictly required'.[247] To put it the other way round, a derogating measure that violates the right to non-discrimination under one of the human rights treaties, either because it has no legitimate aim (that is, no relation to the emergency) or because it is disproportionate to the threat, is very unlikely to satisfy the 'strictly required' test under the respective derogation clause. The two tests under the right to non-discrimination on the one hand and the derogation clauses on the

Rights Norms in a State of Emergency, International Law Association (1984), reprinted in (1985) 79 *American Journal of International Law* 1072; UN Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (1985).

[244] The ICCPR, in Article 4(2), lists the following rights as non-derogable: the right to life; the prohibition of torture; the prohibition of slavery; the prohibition of imprisonment because of inability to fulfil a contractual obligation; the principle of legality in the field of criminal law; the recognition of everyone as a person before the law; the freedom of thought, conscience, and religion. The UN Human Rights Committee has made it clear that the fact that certain provisions have been expressly listed in Article 4(2) does not mean that other articles may be subjected to derogation at will. UN Human Rights Committee, *General Comment No 29: States of Emergency* (2001), para 6. For instance, the Committee has stated that the prohibition of arbitrary deprivations of liberty as well as fundamental requirements of fair trial must be respected even during a state of emergency; ibid, paras 11, 16. See also ECHR, Art 15(2); ACHR, Art 27(2); Turku Declaration on Minimum Humanitarian Standards, reprinted in *Report of the Sub-commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session*, UN Doc E/CN.4/1995/116 (1995).

[245] UN Human Rights Committee, *General Comment No 29: States of Emergency* (2001), para 8.

[246] See Section 3.2 above.

[247] For the ICCPR, see S Joseph, J Schultz, and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2004) 826. For the ECHR, see Oraá, n 242, 177–82.

other are essentially the same,[248] so that a difference in treatment that fails to meet one test will normally fail to meet the other as well.

Of the states considered here, the United States and the United Kingdom have officially declared states of emergency following the events of September 11. On 14 September 2001, the US President declared that a national emergency exists by reason of the terrorist attacks.[249] However, the US government has never indicated its intention to derogate from any of the human rights treaties it has ratified. The British government declared a state of emergency on 13 November 2001 and derogated from Article 5(1) of the ECHR, the right to liberty and security of person.[250] This derogation made it possible for the government to introduce the (now repealed) Part 4 of the ATCSA 2001, which contained the power to indefinitely detain non-citizens without charge or trial.[251] For the same reason, the United Kingdom also derogated from the right to liberty guaranteed by Article 9 of the ICCPR.[252] However, neither the United Kingdom nor any of the other states at issue have derogated from one of the provisions guaranteeing the right to non-discrimination, so that they remain bound by these international obligations.

3.3.2 Armed conflict and international humanitarian law

When states use military force to counter terrorism, disputes as to the applicable legal standards may arise, especially as far as the treatment of those captured during such military operations is concerned. Since my primary focus in this book is not on military countermeasures to terrorism, I cannot deal with these issues in detail.[253] Nevertheless, some of the measures that I will examine do raise questions as to the applicable body of law,[254] so that a few fundamental points need to be briefly clarified.

It is now well established in international jurisprudence that, while the existence of an armed conflict triggers the applicability of the special body of international humanitarian law, the protection of human rights law does not

[248] Oraá, n 242, 181.

[249] 'Proclamation 7643—Declaration of National Emergency by Reason of Certain Terrorist Attacks', 37 *Weekly Compilation of Presidential Documents* 1310 (14 September 2001).

[250] Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001/3644. On 18 December 2001, the United Kingdom transmitted to the Secretary General of the Council of Europe a *note verbale* providing the information required by Article 15(3) of the ECHR.

[251] See Section 4.2.2.1 below.

[252] 'Notification of the United Kingdom's derogation from Article 9 of the International Covenant on Civil and Political Rights', 18 December 2001, available at <http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm>.

[253] For detailed discussions, see, eg, GL Neuman, 'Humanitarian Law and Counterterrorist Force' (2003) 14 *European Journal of International Law* 283; GH Aldrich, 'The Taliban, al Qaeda, and the Determination of Illegal Combatants' (2002) 96 *American Journal of International Law* 891.

[254] See especially Ch 5 below.

necessarily cease.[255] As the Inter-American Commission on Human Rights has pointed out, there is an integral linkage between the law of human rights and humanitarian law in that they share a common purpose of protecting human life and dignity, and there may be a substantial overlap in the application of these bodies of law.[256] In the words of the UN Human Rights Committee, international humanitarian and human rights law are 'complementary, not mutually exclusive'.[257] Accordingly, the ICJ, in its advisory opinion on the Israeli Wall, has made clear that 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights'.[258] As explained in the previous section, none of the states considered here has derogated from the right to non-discrimination. Therefore, the human rights norms guaranteeing non-discrimination remain in force even when these states engage in armed conflict. However, as also pointed out by the ICJ, in wartime it may be necessary to refer to the law of armed conflict as the *lex specialis* to define precisely the meaning of human rights norms.[259]

It is therefore all the more important to stress that international humanitarian law explicitly states that the right to non-discrimination also applies to people captured during armed conflict. In fact, non-discrimination is one of the fundamental principles underlying international humanitarian law,[260] running like a thread through the four 1949 Geneva Conventions[261] and their two Additional Protocols of 1977.[262] The most important guarantees against discrimination include Common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I. These provisions are recognised as reflecting customary

[255] The literature on the relationship between international humanitarian law and human rights law is vast. A good bibliography can be found in (1998) 324 *International Review of the Red Cross* 572. See also R Provost, *International Human Rights and Humanitarian Law* (2002).

[256] *Coard et al v United States*, Case 10.951, Report No 109/99, Annual Report of the Inter-American Commission on Human Rights, 29 September 1999, para 39.

[257] UN Human Rights Committee, *General Comment No 31: Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004), para 11.

[258] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (Advisory Opinion)* (2004) ICJ Reports 136, para 106. See also *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996) ICJ Reports 226, para 24.

[259] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996) ICJ Reports 226, paras 24–5.

[260] J Pejic, 'Non-discrimination and Armed Conflict' (2001) 841 *International Review of the Red Cross* 183–94.

[261] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

[262] Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

international law[263] and thus also bind states that have not ratified the respective treaties, including the United States, which has not ratified the Additional Protocols.[264] They set out a range of minimum standards requiring persons in the hands of a party to the conflict to be treated humanely and 'without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria'.[265] The reference to 'other similar criteria' includes nationality: the negotiating history of the Geneva Conventions reveals that it was not the intention of the drafters to allow distinctions based on nationality.[266] Further international humanitarian law norms specifically prohibit discriminatory treatment of prisoners of war (POWs),[267] protected persons,[268] victims of non-international armed conflicts,[269] the wounded, sick, and shipwrecked.[270] Hence, even in the direst of circumstances, during an international or internal armed conflict, states are bound to respect the right to non-discrimination.

Conclusion

All the states dealt with in this book have an obligation under international, regional, and national law to respect the right to non-discrimination when they adopt measures to combat terrorism. The most important international non-discrimination standard, binding all of them, is that of the ICCPR. The interpretation

[263] See *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* (1986) ICJ Reports 14, para 218 (holding that Common Article 3 constitutes the minimum yardstick in both non-international and international conflicts); *Prosecutor v Mucic et al*, ICTY, Case No IT-96-21 (Appeals Chamber), 20 February 2001, para 143 (stating that '[i]t is indisputable that common Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based'). On the customary international law nature of Article 75 of Additional Protocol I, see T Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 62–70; J-M Henckaerts and L Doswald-Beck (eds), *Customary International Humanitarian Law* (2005) Vol I, Rules 87–92, 99–103 and Vol II, Ch 32.

[264] See United States Army, *Operational Law Handbook*, JA 422 (1997) 18–2, available at <http://www.cdmha.org/toolkit/cdmha-rltk/PUBLICATIONS/oplaw-ja97.pdf> (demonstrating the acceptance of Article 75 of Additional Protocol I as customary by the United States); C Greenwood, 'Customary Law Status of the 1977 Additional Protocols' in Delissen and Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead. Essays in Honour of Frits Kalshoven* (1991) 93, 103.

[265] Additional Protocol I, Art 75(1). Common Article 3 lists as prohibited grounds of distinction race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

[266] JS Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary: Vol 3: Geneva Convention Relative to the Treatment of Prisoners of War* (1960) 40–1.

[267] Third Geneva Convention, Art 16.

[268] Fourth Geneva Convention, Arts 13, 27.

[269] Additional Protocol II, Arts 2(1), 4(1).

[270] First Geneva Convention, Art 12; Second Geneva Convention, Art 12; Additional Protocol I, Art 9(1); Additional Protocol II, Art 7(2).

and practical application of this standard by the UN Human Rights Committee largely coincides with the jurisprudence developed by the European Court of Human Rights under the most influential regional human rights convention, the ECHR. Finally, the respective national non-discrimination norms, as well as the tests applied by domestic courts to assess compliance with them, correspond in many ways to the international and regional standards and tests. This is true not only for the United Kingdom and Germany, but also for the US Constitution and the relevant case law of the Supreme Court. In this sense, there is a basic content of the obligation not to discriminate that is the same for all the states considered here, a common standard that can be applied throughout this study.

This standard encompasses elements (such as 'reasonable justification' or 'proportionality') that only become more concrete once specific measures are judged against it. In the context of the present analysis of anti-terrorism measures, some of the elements of the discrimination test will be unproblematic. There is generally no need to establish a discriminatory intention, and those allegedly discriminated against will often not find it difficult to identify others who are in a comparable position (for instance, other terrorist suspects who are treated differently because they are nationals). Conversely, states will regularly be able to meet the legitimate aim requirement by referring to national security interests. Thus, the assessment will, as in most discrimination cases, mainly hinge upon the proportionality test, which requires that the distinction on which a given measure is based is assessed for its suitability and effectiveness in relation to the aim pursued and for its effects on individuals and groups.

As far as the intensity with which courts will review anti-terrorism measures is concerned, two major—but divergent—forces are at work. On the one hand, such measures are often based on grounds of distinction that human rights bodies and courts treat as inherently suspect and, therefore, as entailing a strict review and requiring very weighty reasons for justification. On the other hand, the judiciary has traditionally accorded governments and legislatures a wide scope of discretion in cases that touch upon national security interests. However, there are clear signs that—both at the national and international level—courts are now moving away from this deferential attitude, taking more seriously their constitutional (or treaty) duties to define the scope of protected rights.

The existence of a terrorist threat does not, as such, alter states' obligations under the common standard of non-discrimination just delineated. Although states may derogate from some of their international human rights obligations during a declared state of emergency, derogations are only permissible under a number of narrowly defined circumstances. Furthermore, any derogating measure would have to be strictly required by the exigencies of the situation—a test unlikely to be met by a derogating measure that involves discrimination. In any event, none of the states considered here has indicated its intention to derogate from one of the international non-discrimination provisions. Finally, states are

also bound by the prohibition of discrimination when they use military force to counter perceived terrorist threats: the right to non-discrimination remains applicable even during times of armed conflict.

In the following chapters, I will use the common non-discrimination standard that has now been developed to test various anti-terrorism laws and practices adopted after September 11 by the United States, the United Kingdom, and Germany: is the distribution of liberty between different categories of persons that these measures involve compatible with the right to non-discrimination? One security measure that is of particular concern from this perspective is the preventive detention of foreign terrorist suspects.