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The Selective"War on Terror": Executive Detention of Foreign Nationals and the Principle of Non-Discrimination

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THE SELECTIVE "WAR ON TERROR": EXECUTIVE DETENTION OF FOREIGN NATIONALS AND THE PRINCIPLE OF NON-DISCRIMINATION

Daniel Moeckli[*]

> *We have never had a trial. We were found guilty without one. We are imprisoned indefinitely and probably forever. We have no idea why. We have not been told what the evidence is against us. We are here. Speak to us. Listen to us.*[1]

> *[T]he message [of a culture of formalism] is that there must be limits to the exercise of power, that those who are in positions of strength must be accountable and that those who are weak must be heard and protected . . . .*[2]

The detention of suspected terrorists at the instance of the executive, without charge or trial, is one of the most draconian measures a state can adopt to combat terrorism. Winston Churchill famously described the power of the executive to imprison an individual as "in the highest degree odious."[3] U.S. Supreme Court Justice Stevens called it "the hallmark of the totalitarian state."[4] Nevertheless, the two leading forces of the "war on terror," the United States and the United Kingdom, found it necessary to resort to this particularly extreme form of deprivation of liberty after September 11, 2001. What is perhaps even more remarkable is that both these states made their respective detention powers applicable to foreign, but not to domestic, terrorist suspects.

The recent landmark decision of the British House of Lords in *A v. Secretary of State for the Home Department* highlighted the fundamental problems that the reliance of contemporary anti-terrorism measures on

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1. Letter from nine men detained in Belmarsh prison under the British anti-terrorism powers described in this Article, signed "The forgotten detainees." *Listen to Us*, GUARDIAN, Feb. 26, 2004, *available at* http://www.guardian.co.uk/letters/story/0,,1156318,00.html.

2. MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, at 502 (2001).

3. A.W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIOUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN 391 (1992) [hereinafter SIMPSON, HIGHEST DEGREE ODIOUS].

4. United States v. Montalvo-Murillo, 495 U.S. 711, 723 (1990) (Stevens J., dissenting).

distinctions according to citizenship raises with regard to the international human rights principle of non-discrimination.[5] The Law Lords held that the preventive detention powers of the Anti-Terrorism, Crime and Security Act (ATCSA),[6] passed by British parliament in November 2001, violated the non-discrimination guarantee of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[7] because no reasonable and objective justification existed for limiting the scope of their application to *foreign* terrorist suspects.[8] As a reaction to the judgment, the British government repealed the detention scheme and replaced it with lesser forms of restriction that are applicable irrespective of nationality.[9] In contrast, the parallel U.S. system providing for asymmetric detention powers remains in force.

The purpose of this Article is to assess whether unequal treatment of non-citizens with regard to anti-terrorism detention may ever be compatible with the international human rights principle of non-discrimination. An analysis of executive detention powers from a non-discrimination perspective may not only reveal possible inconsistencies of domestic anti-terrorism regimes with the framework of international law, but, as the reactions of the British government and public to the House of Lords decision demonstrate,[10] it can also have a profound political impact: insisting on non-discriminatory powers can pave the way for a more principled debate about the acceptability of restrictions of liberty in the fight against terrorism. Requiring political actors to articulate their claims in terms of universally applicable rules is an important instrument of restraining state power and helps protect those who are most likely to be subjected to its worst excesses. Justice Jackson stressed this crucial function of the equality guarantee more than fifty years ago:

> [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can

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5. A v. Sec'y of State for the Home Dep't [2004] UKHL 56, [2005] 2 A.C. 68, paras. 58–63 (appeal taken from Eng.) (U.K.).

6. Anti-terrorism, Crime and Security Act, 2001, c. 24, § 23 (U.K.).

7. Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 1955 U.N.T.S. 221 [hereinafter European Convention].

8. A v. Sec'y of State for the Home Dep't, [2005] 2 A.C. 68, paras. 67–68.

9. Prevention of Terrorism Act, 2005, c. 2, §§ 1, 2 (U.K.).

10. For these reactions, see *infra* text accompanying notes 195–97.

> take no better measure to assure that laws will be just than to require that laws be equal in operation.[11]

Part I of this Article will illustrate that it is far from a new phenomenon that executive detention powers are mainly directed against non-citizens. Even though efforts to curb the power of the executive branch to deprive people of their liberty were made as early as in medieval times, certain grounds have always been seen as sufficient to justify this far-reaching measure. Historically, the most important justification relied upon by governments was national security: foreign citizens thought to pose a risk to the security of the nation have regularly been preventively detained in times of crisis. More recently, states have often invoked their power to regulate immigration to justify the detention of foreigners.

Just like executive detention powers in general, so has the more specific power to preventively detain suspected terrorists normally been targeted at groups viewed as alien. The U.S. Antiterrorism and Effective Death Penalty Act of 1996 made this focus explicit by linking counter-terrorism to immigration control.[12] The detention powers adopted after September 11 in both the United Kingdom and the United States continue this tradition of making the detention of terrorist suspects ancillary to the enforcement of immigration law. Part II will set out the relevant legal schemes of these states.

Whether detention powers conform to legal guarantees of the principle of non-discrimination cannot be answered without consideration of the objectives they are designed to achieve. The central elements of any discrimination analysis, comparability and proportionality, must be judged in relation to the actual aim pursued by the measure in question. Part III will therefore analyze the policy rationales behind the British and U.S. powers of preventive detention. Although they have been placed in an immigration context, these powers, it is argued, in fact serve to counter terrorism rather than to enforce the immigration laws.

Part IV will demonstrate that the United Kingdom and the United States are bound by international law to respect the principle of non-discrimination and that this obligation is reinforced by corresponding domestic norms of both states, requiring equal treatment. Importantly, this common standard of equality includes a prohibition of differential treatment on the basis of citizenship.

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11. Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring).

12. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1268–81 (1996) (codified as amended in scattered sections of U.S.C.). For a more detailed description, see *infra* Part II.A.

Part V will assess the compatibility of asymmetric detention powers with this requirement of non-discrimination. Three sub-tests are particularly critical to this assessment: What is the applicable standard of review? Are foreign terrorist suspects in a comparable situation to suspected terrorists who are nationals? Is there an objective and reasonable justification for the difference in treatment? Answering these questions in relation to the detention powers in issue enables the elaboration of a set of standards that can be applied to the preventive detention of terrorist suspects in general.

I. EXECUTIVE DETENTION

The expression "executive detention" or "administrative detention" is commonly used to mean detention at the behest of the executive branch of government without charge and without trial, often for an indefinite period. Since the purpose of such detention is typically the prevention of future harm rather than punishment, the term "preventive detention" is equally apposite. This is also true for the detention of terrorist suspects, and, accordingly, the adjectives "executive," "administrative" and "preventive" can be used interchangeably in the present context. The term "internment" more specifically describes confinement ordered by the executive during wartime.

Already these summary descriptions reveal the two critical elements that distinguish executive detention from imprisonment for criminal offences. First, the detainees are not held because they have done anything wrong, but because they might do something wrong in the future. Second, the decision that someone poses a threat is the result of an administrative process, rather than of a public trial before a court. Both the fact that the assessment as to dangerous propensity is inherently discretionary and that there is a lack of judicial involvement in the decision-making process make executive detention a particularly serious deprivation of liberty, placing individuals under the complete control of the state. As a consequence, such detainees are in an especially vulnerable position that may be further exacerbated by the secrecy that often surrounds this form of detention.

It is therefore not surprising that efforts to establish basic safeguards against arbitrary detention date back a long time. With the Magna Carta 1215[13] and the Petition of Right 1628[14] as its pillars, the common-law

13. Magna Carta provides: "No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land." Magna Carta 1215, 17 John, c. 39, *reprinted in* JAMES CLARKE HOLT, MAGNA CARTA 461 (2d ed. 1992).

tradition produced, very early on, a system of procedural devices and norms designed to prevent the abuse of detention powers. In this sense, freedom from arbitrary detention could be called the oldest of human rights.[15] Today, the fundamental importance of the right to personal freedom is reflected in its widespread codification in the Universal Declaration of Human Rights,[16] the International Covenant on Civil and Political Rights (ICCPR),[17] such international "soft law"[18] standards as the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[19] and the U.N. Standard Minimum Rules for the Treatment of Prisoners,[20] regional human rights treaties including the European Convention for the Protection of Human Rights and Fundamental Freedoms,[21] the American Convention on Human Rights[22] and

14. Petition of Right 1628, 4 Car., c. V, *available at* http://www.constitution.org/eng/petright.htm (declaring the remedy of habeas corpus).

15. *See also* Tom Bingham, *Personal Freedom and the Dilemma of Democracies*, 52 INT'L & COMP. L.Q. 841, 842 (2003).

16. Universal Declaration of Human Rights arts. 3, 9, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc A/810 (Dec. 10, 1948).

17. International Covenant on Civil and Political Rights arts. 9, 10, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

18. The term "soft law" is commonly used to describe non-binding international instruments, often adopted by way of UN General Assembly resolutions. They exercise a considerable influence on the international decision-making process as states frequently rely on them and are reluctant openly to contravene them. Thus, they engender legal expectations and may entail a presumption of illegality when action is taken contrary to them. *See* Gerald Fitzmaurice, *Hersch Lauterpacht—The Scholar as Judge* (pt. 2), 38 BRIT. Y.B. INT'L L. 1, 8–12 (1962); Christoph Schreuer, *Recommendations and the Traditional Sources of International Law*, 20 GERMAN Y.B. INT'L L. 103, 115–18 (1977); *Contemporary Views on the Sources of International Law: The Effect of U.N. Resolutions on Emerging Legal Norms*, 73 AM. SOC'Y INT'L L. PROC. 300, 327–28 (1979) (comment made by Myres S. McDougal during discussion of Oscar M. Garibaldi's discussion of *The Legal Status of General Assembly Resolutions*); Michael Bothe, *Legal and Non-Legal Norms—A Meaningful Distinction in International Relations?*, 11 NETH. Y.B. INT'L L. 65, 85–86 (1980); Tadeusz Gruchalla-Wesierski, *A Framework for Understanding "Soft Law,"* 30 MCGILL L.J. 37, 46 (1984).

19. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, annex, at 298, U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49 (Dec. 9, 1988).

20. Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. Res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977) [hereinafter Standard Minimum Rules for the Treatment of Prisoners].

21. European Convention, *supra* note 7, art. 5.

the African Charter on Human and Peoples' Rights,[23] as well as numerous national constitutions.[24]

It should be noted, however, that all these standards do not guarantee a right to be free from executive detention but rather impose limits on the use of this far-reaching power by restricting the permissible grounds for detention[25] or providing for certain procedural safeguards.[26] Executive detention is thus not generally prohibited. In fact, it is, in one form or another, a common feature of most legal systems. Executive detention powers are employed, for example, against criminal suspects, vagrants, the mentally ill, drug addicts, those believed to pose a risk to national security, and immigrants.[27] It is the last two categories of persons who have been the subjects of the most pervasive instances of executive detention.

States have generally been seen as allowed to restrict the right to liberty in times of crisis, and the internment of those thought to pose a national security risk has a long history. In the United Kingdom, the first of a series of Habeas Corpus Suspension Acts, allowing the executive to hold individuals on treason charges without bringing them to trial, was introduced as early as 1688.[28] During the second part of the nineteenth century, Ireland was governed with the use of detention powers which were shielded from any form of judicial supervision.[29] The British government again relied upon preventive detention powers in both world wars to intern 30,000 and 28,000 "enemy aliens" respectively.[30] Finally, as Brian Simpson has pointed out, the power of executive detention was "always valued in the colonies"[31] and, even in the waning years of the

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22. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, art. 7, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

23. Organization of African Unity: Banjul Charter on Human and Peoples' Rights, art. 6, Jan. 7–19, 1981, *reprinted in* 21 I.L.M. 58, 60 (1982).

24. *See, e.g.*, U.S. CONST. amend. V.

25. *See* European Convention, *supra* note 7, art. 5(1).

26. *See* ICCPR, *supra* note 17, art. 9.

27. *See* European Convention, *supra* note 7, art. 5(1) (expressly authorizing the detention of all these categories of persons except those thought to pose a risk to national security). *See id.* art. 15(1) (stating with regard to this latter group, however, that states can provide for executive detention by derogating from the right to liberty on the ground that there is a public emergency threatening the life of the nation).

28. ROBERT J. SHARPE, THE LAW OF HABEAS CORPUS 94 (2d ed. 1989).

29. SIMPSON, HIGHEST DEGREE ODIOUS, *supra* note 3, at 3–4; A.W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE 79–80 (2001) [hereinafter SIMPSON, HUMAN RIGHTS].

30. SIMPSON, HIGHEST DEGREE ODIOUS, *supra* note 3, at 15, 163.

31. SIMPSON, HUMAN RIGHTS, *supra* note 29, at 876.

British Empire, used to incarcerate tens of thousands of troublesome political opponents.[32] In the United States, the Enemy Alien Act, adopted in 1798 and still on the books today, authorizes the President during a declared war to detain or expel any citizen of a country with which the United States is at war.[33] This power was invoked against the British in the War of 1812 and to detain about 2,300 Germans and Austro-Hungarians during World War I.[34] In the Second World War, executive orders issued by President Roosevelt were relied upon in addition to the Enemy Alien Act to intern 110,000 persons of Japanese descent in isolated desert camps.[35] Internment initiatives such as these have later been heavily criticized and are now widely regarded as excessive. Today, contemporary international human rights instruments guaranteeing the right to liberty put important restrictions on the ability of states to adopt executive detention powers for national security reasons,[36] even though the right to liberty can be derogated from when there is a public emergency threatening the life of the nation.[37]

The fact that detention based on national security has become less accepted by the international community may be one of the reasons why the existence of another type of crisis has frequently been asserted in more recent years to justify executive detention powers: the perceived immigration crisis. The right of the state to control immigration and to detain non-nationals pending either their admission or expulsion is generally recognized in international law,[38] and immigration detention is a common practice among states today. As the influx of immigrants into western countries has come to be seen as a serious danger requiring restrictive and deterrent action, many states have enacted legislation to en-

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32. In 1954, for instance, 30,000 people were arrested in Kenya in an operation designed to identify Mau Mau supporters. *Id.* at 879–80.

33. Enemy Alien Act, 50 U.S.C. §§ 21–24 (2002).

34. DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 92 (2003).

35. *See* Korematsu v. United States, 323 U.S. 214 (1944).

36. *See* European Convention, *supra* note 7, art. 5(1) (does not list national security as one of the permissible grounds for detention).

37. *See* ICCPR, *supra* note 17, art. 4; European Convention, *supra* note 7, art. 15; American Convention, *supra* note 22, art. 27. For good overviews of the subject, see JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1992); ANNA-LENA SVENSSON-MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION (1998).

38. For an overview, see Daniel Wilsher, *The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives*, 53 INT'L & COMP. L.Q. 897 (2004). Article 5(1)(f) of the European Convention explicitly authorizes immigration detention. European Convention, *supra* note 7, art. 5(1)(f).

hance their powers to detain foreign citizens and to authorize longer periods of detention.[39] As a consequence, in the United States, for example, the immigration authorities detained more than 230,000 non-citizens in the fiscal year 2003;[40] the corresponding figure for the United Kingdom has been put at approximately 35,000.[41] Despite stable or falling rates of asylum-seekers entering western countries, and even though relevant guidelines of the United Nations High Commissioner for Refugees provide that as a general rule asylum-seekers should not be detained,[42] recent years have also seen an increase in the number of this category of foreign nationals being detained.[43]

As this short account demonstrates, foreign citizens have always been the main target of executive detention powers. While states have often invoked threats to national security to justify the preventive detention of non-nationals, in recent years they have also relied upon the far-reaching powers linked to the right to control immigration. In fact, these two grounds for detention, national security and immigration control, which were originally seen as separate though closely related areas, are now becoming increasingly intertwined. For reasons to be explained in Part III of this Article, some states have adopted detention powers pursuing national security aims within an immigration context. The executive detention of suspected foreign terrorists is the prime example of this approach.

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39. For Europe, see Jane Hughes & Ophelia Field, *Recent Trends in the Detention of Asylum Seekers in Western Europe*, *in* DETENTION OF ASYLUM SEEKERS IN EUROPE: ANALYSIS AND PERSPECTIVES 5 (Jane Hughes & Fabrice Liebaut eds., 1998); for the United States, see Paolo Morante, *Detention of Asylum Seekers: The United States Perspective*, *in* DETENTION OF ASYLUM SEEKERS IN EUROPE, *supra*, at 85.

40. U.S. Immigration and Customs Enforcement, *Fact Sheet: ICE Office of Detention and Removal Operations*, May. 4, 2004, http://www.ice.gov/text/news/factsheets/dro050404.htm.

41. Amnesty International, *United Kingdom: Seeking Asylum is Not a Crime: Detention of People Who Have Sought Asylum*, at 43, AI Doc. EUR 45/015/2005 (June 20, 2005), *available at* http://web.amnesty.org/library/pdf/EUR450152005ENGLISH/$File/EUR4501505.pdf.

42. U.N. High Commissioner for Refugees, *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers*, Guideline No.2 (Feb. 1999). *See also* U.N. High Commissioner for Refugees, Executive Committee, *No. 44 Detention of Refugees and Asylum-Seekers* (1986), http://www.unhcr.ch/cgi-bin/texis/vtx/excom/opendoc.htm?tbl=EXCOM&page=home&id=3ae68c43c0.

43. *See* Hughes & Field, *supra* note 39, at 7–17; U.N. High Commissioner for Refugees, *Reception Standards for Asylum Seekers in the European Union*, at 31–32 (July 2000); Amnesty International, *supra* note 41, at 43.

II. EXECUTIVE DETENTION OF SUSPECTED TERRORISTS

One national security matter that has regularly led states to resort to powers of executive detention is terrorism. Governments often claim that they cannot bring suspected terrorists to trial because of the sensitivity of the evidence involved in these sorts of cases or the high standard of proof required.[44] The authority to disable, or at least isolate suspects despite a lack of evidence admissible in court is an alternative to trial that many states have not been willing to forego. Both the United Kingdom and the United States had deployed this instrument already before September 11 to target particular groups of alleged terrorists. Since the attacks of that date, states all over the world have reinforced their respective powers.

A. Before September 11

In the United Kingdom, the power of detention without trial had already been in force for decades prior to September 11. However, it was never applied universally, but remained limited to Northern Ireland, where it was primarily deployed against the Republican minority.[45] It was a regular feature of a series of anti-terrorism laws both during the fifty years under the Northern Ireland government[46] and under "direct rule,"[47] even though it was not used after 1975[48] and finally repealed in 1998.[49]

The United States has also limited the scope of application of its executive detention powers, but has done so by placing them within an

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44. For example, in support of its detention powers under the ATCSA and the house arrest powers under the new Prevention of Terrorism Act 2005, the British government argued that the use of intercept evidence or other sensitive information in court could alert suspected terrorists or compromise sources. *See, e.g.*, Statement of the Home Secretary (Mr. Charles Clarke) in the House of Commons of Feb. 22, 2005, 431 PARL. DEB., H.C. (6th ser.) (2005) 152.

45. *See generally* R.J. Spjut, *Internment and Detention Without Trial in Northern Ireland 1971–1975: Ministerial Policy and Practice*, 49 MOD. L. REV. 712 (1986) [hereinafter Spjut, *Internment and Detention*].

46. The legal basis for internment was created by the Civil Authorities (Special Powers) Acts (Northern Ireland) 1922. The powers were used 1922–1924, 1938–1945 and 1956–1961. *Id*. at 713. For a historical account, see JOHN MCGUFFIN, INTERNMENT (1973).

47. *See* Emergency Provisions (Northern Ireland) Acts, 1973–1998. For an assessment, see R.J. Spjut, *Executive Detention in Northern Ireland: The Gardiner Report and the Northern Ireland (Emergency Provisions) (Amendment) Act 1975*, 10 IRISH JURIST 272 (1975); Spjut, *Internment and Detention*, *supra* note 45.

48. SECRETARY OF STATE FOR THE HOME DEPARTMENT, INQUIRY INTO LEGISLATION AGAINST TERRORISM, 1996, Cm. 3420, at 99.

49. Emergency Provisions (Northern Ireland) Act, 1998, c. 9, § 3.

immigration context. The Antiterrorism and Effective Death Penalty Act of 1996 was passed in response to the Oklahoma City bombing in 1995 and is still in force today.[50] Although a U.S. citizen had perpetrated the attack, the most draconian measures of the Act are only applicable to foreign terrorist suspects. In this sense, it can be seen as a precursor to the post-September 11 anti-terrorism laws. The Act authorizes the Attorney General to initiate special "Alien Terrorist Removal Procedures" against non-citizens allegedly involved in terrorism and to detain them until removal.[51] If no country is willing to receive them, they may be held indefinitely.[52]

B. After September 11

The attacks of September 11 led not only the United Kingdom and the United States, but also numerous other countries to introduce new (or strengthen existing) executive detention powers. This can be seen as characteristic of a wider trend towards the reliance on preventive policies to counter terrorism. Since the current terrorist threat is generally perceived as an unprecedented, diffuse ideological challenge that is increasingly difficult to attribute to individual perpetrators, laws and strategies adopted in the wake of September 11 are primarily designed to anticipate this indeterminate danger, including by disabling potential terrorists, rather than to bring terrorist perpetrators to justice.[53] Countries that have,

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50. Jennifer A. Beall, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 IND. L.J. 693, 693 (1998).

51. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1259–60 (1996) (codified at 8 U.S.C. §§ 1531–37). The removal procedures, which take place before a special court, sharply curtail procedural rights: the non-citizen may be prevented from examining classified evidence; unlawfully obtained evidence is admissible. 8 U.S.C. § 1534(d)(5), (e)(1)(A).

52. 8 U.S.C. § 1537(b)(2)(C).

53. Evidence for this trend towards ever more prophylactic measures can be found in the major new anti-terrorism laws of both the United Kingdom and the United States. Apart from authorizing preventive detention, the British ATCSA introduced measures intended to prevent the financing of terrorism (Parts I and II), facilitate the sharing of information between different public authorities and the retention of communications data (Parts III and XI), and improve the security of dangerous substances that may be used or targeted by terrorists (Part VII). Furthermore, it tightened the asylum proceedings (Part IV). Anti-terrorism, Crime and Security Act, 2001, c. 24, §§ 1–32, 58–75, 102–07 (U.K.). The core parts of the USA Patriot Act expanded surveillance and intelligence sharing powers (Title II), introduced new measures to prevent the financing of terrorism (Title III), and tightened the immigration laws (Title IV). Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. 107-56, §§ 201–25, 301–03, 311–30, 351–66,

accordingly, adopted new laws authorizing the administrative detention of terrorist suspects include Australia,[54] Canada,[55] India,[56] Indonesia,[57] and Pakistan.[58]

In these states, anyone can be detained at the instance of the executive, albeit only for limited periods of time. In contrast, the United States and, at least originally, the United Kingdom chose, in line with their previous legislative measures, to provide for stringent indefinite detention powers, but to restrict the scope of their application: they were made ancillary to immigration control and thus limited to *foreign* terrorist suspects. After the House of Lords had ruled that the detention of only foreign nationals was discriminatory, the British government eventually replaced the executive detention powers with lesser forms of restriction of liberty that

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371–77, 401–05, 411–18, 421–28, 115 Stat. 272, 278–363. Various other provisions similarly focus on prevention. *See, e.g.*, *id.* §§ 501–02.

54. In 2003, the Australian Security Intelligence Organisation Act 1979 was amended to authorize the detention for questioning by the Australian Security Intelligence Organisation of persons who are believed to be able to provide information that will "substantially assist the collection of intelligence that is important in relation to a terrorism offence." Australian Security Intelligence Organisation Act, 1979, § 34C(3)(a). Detention under such a "warrant for questioning" can last for a period of seven days. *Id.* § 34HC. Further warrants may be issued, which can in turn be used as the basis for further periods of seven day detention. *Id.* § 34D(1)(a).

55. Under the Anti-Terrorism Act, if there are reasonable grounds to believe that a terrorist activity will be carried out and reasonable grounds to believe that this is necessary to prevent the carrying out of a terrorist activity, a peace officer may ask a judge to order a person to enter into recognizance to keep the peace and be of good behavior. If the person refuses to enter into the recognizance, he or she can be detained for up to one year. Anti-Terrorism Act, 2001 S.C., ch. 41, § 83.3 (Can).

56. The Prevention of Terrorism Act, passed by Parliament in 2002, authorizes the detention of terrorist suspects without charge or trial for 90 days. The Prevention of Terrorism Act, No. 15 of 2002; India Code (2002), § 49(2). A Special Court can extend this period to 180 days on application by the Public Prosecutor. *Id.* § 49(2)(b).

57. Government Regulation in Lieu of Law No. 1, enacted in 2002, permits the police to detain terrorist suspects for seven days without charge, based on any intelligence reports as "preliminary evidence," and for a further six months for investigation and prosecution. Government Regulation in Lieu of Legislation of the Republic of Indonesia No. 1/2002 on Combating Criminal Acts of Terrorism, 2002, §§ 25(2), 26(1), 28 (Indon.), *available at* http://www.law.unimelb.edu.au/alc/indonesia/perpu_1.html.

58. The Anti-Terrorism (Amendment) Ordinance, promulgated in 2002, provides that any person suspected of affiliation with a terrorist organization or with any group or organization suspected to be involved in terrorism or sectarianism can be arrested and detained without charge for a period which may be extended for up to one year. Anti-Terrorism (Amendment) Ordinance, 2002, § 11EE (Pak.), *available at* http://www.satp.org/satporgtp/countries/pakistan/document/actsandordinences/anti_terrorism_ordin_2002.htm.

are applicable to both citizens and foreign nationals. In the United States, however, the detention powers are still in force.

1. United Kingdom

Following the U.S. detention model, rather than the internment scheme previously deployed in Northern Ireland, the British government placed their post-September 11 detention powers within an immigration context.[59] The legal basis for the detention of foreign terrorist suspects without charge and trial was created by the ATCSA, which came into force on December 14, 2001. Part 4 of the ATCSA authorized the Home Secretary to certify a person as a "suspected international terrorist" if he "reasonably (a) believes that the person's presence in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist."[60] The only means of challenging the Home Secretary's certification was by way of appeal to the Special Immigration Appeals Commission (SIAC).[61] Upon certification as a "suspected international terrorist," a non-British citizen could be detained without charge or trial for an unspecified period of time if his or her removal or deportation was prevented as a result of the United Kingdom's international obligations or for practical reasons.[62] Because Article 5(1)(f) of the European Convention only allows member states to detain non-nationals as long as deportation proceedings are in progress and there is a realistic prospect of removal,[63] the United Kingdom had to derogate from this part of the European Convention.[64]

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59. *See* Ben Brandon, *Terrorism, Human Rights and the Rule of Law: 120 Years of the UK's Legal Response to Terrorism*, 2004 CRIM. L. REV. 981, 990–93 (2004).

60. Anti-terrorism, Crime and Security Act, 2001, c.24, § 21(1) (U.K.).

61. *Id.* §§ 21(8), 25.

62. *Id.* § 23. Detainees cannot be removed where, for example, removal or deportation to a country where the individual concerned may face the death penalty is prevented by the United Kingdom's obligation under Protocol No. 6 to the European Convention concerning the Abolition of the Death Penalty. Further, the European Court of Human Rights has ruled that no one can be removed to a state where he or she would face a real risk of being subjected to treatment contrary to the prohibition of torture. *See* Chahal v. United Kingdom, App. No. 22414/93, 23 Eur. H.R. Rep. 413, para. 1 (1997); Soering v. United Kingdom, App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989), paras. 90–91. Finally, removal or deportation could be impossible for practical reasons, for instance, because the individual concerned is a stateless person or because the authorities are unable to find a country willing to accept him or her.

63. *See* Chahal v. United Kingdom, 23 Eur. H.R. Rep. 413, para. 113.

64. Human Rights Act 1998 (Designated Derogation) Order, 2001, S.I. 2001/3644 (U.K), *available at* http://www.uk-legislation.hmso.gov.uk/si/si2001/20013644.htm.

The then Home Secretary, David Blunkett, certified and detained sixteen persons under the ATCSA powers.[65] Two of them chose to leave the United Kingdom, as the detainees are entitled to do.[66] Eleven detainees challenged the lawfulness of the derogation order and Part 4 of the ATCSA before SIAC.[67] In July 2002, SIAC quashed the derogation order and granted a declaration that the detention powers contained in the ATCSA were incompatible with Articles 5 and 14 of the European Convention insofar as they permitted detention of suspected international terrorists in a way that discriminated against them on the ground of nationality.[68] Upon appeal by the Home Secretary, the Court of Appeal overturned the decision of SIAC, holding that there were objective and justifiable grounds for selecting only non-British citizens for detention.[69] Finally, on December 16, 2004, in their remarkable decision in *A v. Secretary of State for the Home Department*, an almost unprecedented nine-member bench of the House of Lords allowed the appeals of the detainees against the Court of Appeal's decision.[70] Although eight of the nine Law Lords were satisfied that the government was entitled to take the view that there was a public emergency justifying derogation from the European Convention,[71] the majority also ruled that the derogating measure, i.e., the indefinite detention without trial of foreign terrorist suspects, was not a proportionate means to address the terrorist threat and therefore violated the right to liberty.[72] Furthermore, the House of Lords held that in providing for the detention of foreign, but not British, terrorist suspects, Part 4 of the ATCSA breached the prohibition of discrimination contained in Article 14 of the European Convention.[73] Accordingly, it quashed the derogation order and made a declaration that Section 23 of

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65. SECRETARY OF STATE FOR THE HOME DEPARTMENT, COUNTER-TERRORISM POWERS: RECONCILING SECURITY AND LIBERTY IN AN OPEN SOCIETY: A DISCUSSION PAPER, 2004, Cm. 6147, at 6, http://www.archive2.official-documents.co.uk/document/cm61/6147/6147.htm [hereinafter COUNTER-TERRORISM POWERS]. A further individual was certified, but detained under other powers. *Id.*

66. *Id.*

67. *Id.* at 10.

68. A v. Sec'y of State for the Home Dep't, 2002 WL 31676209, at *1277 (Special Imm. App. Comm'n July 30, 2002) (U.K.).

69. A v. Sec'y of State for the Home Dep't, [2002] EWCA Civ. 1502, [2004] Q.B. 335, para. 153 (U.K.).

70. A v. Sec'y of State for the Home Dep't, [2005] 2 A.C. 68, paras. 96–97.

71. *Id.* paras. 25–29 (Lord Bingham), 75 (Lord Nicholls), 115–20 (Lord Hope), 154 (Lord Scott), 166 (Lord Rodger), 208 (Lord Walker), 226 (Baroness Hale), 240 (Lord Carswell). The only Law Lord to deny the existence of a public emergency was Lord Hoffmann. *Id.* paras. 95–97.

72. *Id.* paras. 30–44 (Lord Bingham).

73. *Id.* paras. 45–73.

the ATCSA was incompatible with Articles 5 and 14 of the European Convention.[74]

As a consequence of the ruling of the House of Lords, the government saw itself forced to repeal Part 4 of the ATCSA and to replace it with anti-terrorism powers that are equally applicable to foreign and British citizens. The Prevention of Terrorism Act, adopted in March 2005, gives the Home Secretary the power to impose so-called control orders on those he believes are involved in terrorist activities, subjecting them to restrictions such as curfew, electronic tagging, a ban on the use of telephones or the internet, restrictions on those the subject may associate with, and house arrest.[75]

2. United States

Following September 11, the United States created several new legal authorities that allow the executive branch to detain terrorist suspects. First, the major piece of legislation introduced as a reaction to the events of September 11, the USA Patriot Act, gives the Attorney General wider authority to detain immigrants who endanger national security.[76] Second, a regulation issued by the Department of Justice (DOJ) on September 20, 2001, extends the detention powers of the immigration authorities.[77] Third, on September 18, 2001, Congress enacted the Authorization for the Use of Military Force Joint Resolution, entitling the President "to use all necessary and appropriate force" against those associated with the terrorist attacks of September 11.[78] It is this authorization that the President has relied upon to designate over 650 foreign nationals as "enemy combatants" and to detain them indefinitely at the military base in Guantánamo Bay, Cuba.[79] The "enemy combatant" treatment was later extended to two U.S. citizens.[80] The fact that the U.S. authorities claim that those designated as "enemy combatants" were captured in the course

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74. *Id.* para. 73.

75. Prevention of Terrorism Act, 2005, c. 2, §§ 1, 2 (U.K.).

76. USA Patriot Act, Pub. L. 107-56, § 412. *See infra* text accompanying notes 82–86.

77. Disposition of Cases of Aliens Arrested Without Warrant, 8 C.F.R. § 287.3(d) (2001). *See infra* text accompanying notes 88–89.

78. Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001).

79. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the U.S. Supreme Court upheld, in principle, the executive's authority to detain "enemy combatants" captured abroad, whether they be foreign or U.S. citizens.

80. The two are Yaser Hamdi and José Padilla. Timothy Lynch, *Power and Liberty in Wartime*, 2004 CATO SUP. CT. REV. 23, 25–29 (2004). After almost three years of military detention, Hamdi was released on October 11, 2004. Jerry Markon, *Hamdi Returned to Saudi Arabia*, WASH. POST, Oct. 12, 2004, at A02.

of an armed conflict makes their detention a special case, a detailed analysis of which would go beyond the limited scope of this Article. Rather, the discussion here centers on the detention of immigrants based on the two first-mentioned legal authorities. It should, however, be noted that the basic principles resulting from the present analysis are equally applicable to detention during armed conflict.[81]

Title IV of the USA Patriot Act introduced a number of amendments tightening the Immigration and Nationality Act. Most importantly, Section 412 of the Patriot Act[82] authorizes the Attorney General to certify and detain non-citizens if he has "reasonable grounds to believe" that they are engaging, or have engaged, in a terrorist activity or otherwise endanger national security.[83] The Act allows for detention for a period of seven days, after which the Attorney General must begin deportation

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81. The guarantee of non-discrimination also applies during armed conflict and is, indeed, one of the fundamental principles underlying international humanitarian law, running like a red thread through the four 1949 Geneva Conventions and their two Additional Protocols of 1977. For an overview, see Jelena Pejic, *Non-discrimination and Armed Conflict*, 841 INT'L REV. RED CROSS 183 (2001). In particular, Article 3, common to the four Geneva Conventions, and Article 75 of Additional Protocol I, which are recognized as reflecting customary international law, require persons in the hands of a party to the conflict to be treated without any distinction based on their nationalities. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, *adopted* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, *adopted* June 8, 1977, 1125 U.N.T.S. 3. *See* 3 THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 40–41 (J.S. Pictet ed., 1960) (stating that nationality is one of the prohibited grounds of distinction encompassed by the reference of Common Article 3 to other similar criteria). Other international humanitarian law norms specifically prohibit discriminatory treatment of prisoners of war and protected persons on the basis of their nationalities. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 16; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 13, *adopted* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

82. Section 412 amends the Immigration and Nationality Act by adding § 236A (codified at 8 U.S.C. § 1226a). USA Patriot Act, Pub. L. 107-56, § 412(a).

83. *Id.* § 412(a)(3) (codified at 8 U.S.C. § 1226a(a)(3)). For divergent assessments of this provision, see Shirin Sinnar, *Patriotic or Unconstitutional? The Mandatory Detention of Aliens under the USA Patriot Act*, 55 STAN. L. REV. 1419 (2003) (arguing that section 412 violates the Fifth Amendment's due process guarantee); Mark Bastian, *The Spectrum of Uncertainty Left by Zadvydas v. Davis: Is the Alien Detention Provision of the USA Patriot Act Constitutional?*, 47 N.Y.L. SCH. L. REV. 395, 410–21 (2003) (arguing that section 412 is constitutional); Dana Keith, *In the Name of National Security or Insecurity?: The Potential Indefinite Detention of Noncitizen Certified Terrorists in the United States and the United Kingdom in the Aftermath of September 11, 2001*, 16 FLA. J. INT'L L. 405, 455–63 (2004) (arguing that the Supreme Court would be likely to uphold section 412).

proceedings, bring criminal charges against the detainees, or release them.[84] For non-citizens against whom the government initiates deportation proceedings, detention must continue until they are "decertified" by the Attorney General. This requirement applies even if the detainee is granted relief from removal.[85] A non-citizen whose removal is unlikely in the "reasonably foreseeable future" may be detained for additional six-month periods if his or her release would "threaten the national security of the United States or the safety of the community or any person."[86] The Act thus permits the Attorney General to certify foreign nationals as threats to national security and to hold them indefinitely. There is no guidance as to the process the Attorney General must follow in making the decision to certify an individual as a suspected terrorist; in particular, the Act does not provide for a hearing or for notice of the basis of certification.[87]

In practice, the U.S. authorities have mainly relied on an interim immigration regulation, adopted shortly after the September 11 attacks, to detain foreign nationals in connection with the investigation of the attacks. For, this regulation on custody procedures, issued by the DOJ on September 17, 2001, grants even more far-reaching powers than the USA Patriot Act.[88] It allows immigration authorities to detain non-citizens suspected of being in violation of an immigration law without charge for up to forty-eight hours and for an "additional reasonable period of time" in the event of "emergency or other extraordinary circumstance."[89] The regulation fails to define the terms "reasonable period of time," "emergency" or "extraordinary circumstance" and does not require that the non-citizen's detention relate to the external circumstances. Notably, no link with alleged terrorism needs to be made. The immigration authorities may even indefinitely detain individuals who are not charged with any crime or immigration law violation and against whom no deportation proceedings have been initiated. The detainees do not have to be in-

84. USA Patriot Act, Pub. L. 107-56, § 412(a)(5) (codified at 8 U.S.C. § 1226a(a)(5)).

85. *Id.* § 412(a)(2) (codified at 8 U.S.C. § 1226a(a)(2)).

86. *Id.* § 412(a)(6) (codified at 8 U.S.C. § 1226a(a)(6)).

87. *See* Sinnar, *supra* note 83, at 1432–33.

88. *Compare* Disposition of Cases of Aliens Arrested Without Warrant, 8 C.F.R. § 287.3(d) (2001) (". . . a determination will be made within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time, whether the alien will be continued in custody or released . . ."), *with* USA Patriot Act, Pub. L. 107-56, § 236A(6) ("An alien . . . whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months . . .").

89. Disposition of Cases of Aliens Arrested Without Warrant, 8 C.F.R. § 287.3(d) (2001).

formed of the reasons for their detention and are not guaranteed a right to contest it.[90]

Exactly how many foreign terrorist suspects have been detained in connection with the September 11 investigation, and on what legal basis, is unclear because the executive shrouded much of its detention program in secrecy. The DOJ stopped publishing figures in November 2001 when the number of non-citizens held by law enforcement agencies at the federal, state and local levels had reached around 1,200.[91] The Inspector General of the DOJ, who carried out an investigation into allegations of mistreatment of the September 11 detainees, identified 762 foreign nationals who were detained by the Immigration and Naturalization Service on immigration law violations.[92] Taking advantage of its wide powers under the new regulation on custody procedures, the immigration authorities held many of them for weeks or even months without charging them.[93] Once charges were filed, they were mostly because of minor immigration law violations such as visa overstaying which would not normally warrant arrest.[94] Moreover, the detainees were subject to the so-called "hold until cleared" policy that the government adopted after September 11, requiring the immigration authorities not to deport or release detainees until the FBI has cleared them of any connection to terrorism.[95] This clearance process lasted an average of eighty days from the time of arrest and in many cases considerably longer.[96] As the review by the Inspector General established, the policy was applied in an indiscriminate manner, resulting in the continued detention of many individuals for whom there were no reasonable grounds for suspicion of a connection to terrorism.[97] Even numerous detainees who had agreed to leave the country and whose immigration cases had been completed were kept in deten-

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90. For a detailed analysis of the regulation, see NYU Immigrant Rights Clinic*, Indefinite Detention Without Probable Cause: A Comment on INS Interim Rule 8 C.F.R. § 287.3*, 26 N.Y.U. REV. L. & SOC. CHANGE 397 (2001).

91. Amy Goldstein & Dan Eggen, *U.S. to Stop Issuing Detention Tallies*, WASH. POST, Nov. 9, 2001, at A16.

92. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 2 (2003) [hereinafter OIG].

93. *Id.* at 27–36. The OIG identified five detainees who were served with a charge, on average, 168 days after their arrest. *Id*. at 31.

94. *Id.* at 195.

95. *Id.* at 37–71.

96. *Id.* at 51–52.

97. *Id.* at 70.

tion as a consequence of the policy.[98] Ultimately, almost all of those detained in the first few weeks after the attacks were cleared of terrorist ties and removed or released.[99] Only three of the foreign nationals arrested by the immigration authorities were charged with terrorism-related crimes; two of them were acquitted, one was convicted.[100] Despite this lack of established effectiveness, the U.S. authorities have in recent years continued to heavily rely on immigration law as part of their anti-terrorism efforts.[101]

III. RATIONALES FOR THE DETENTION POWERS

The conformity of the executive detention powers described in Part II with the principle of non-discrimination can only be assessed in relation to the objectives the detention powers pursue. The considerations set out below led both the United Kingdom and the United States to adopt their new anti-terrorism detention powers within an immigration context. However, it is argued that this choice of an immigration context cannot conceal the real primary aim of these powers: they serve to protect national security rather than to enforce the immigration laws.

The first reason why terrorism is dealt with in an immigration context is linked to the emergence of a new kind of threat perception in the wake of September 11: the contemporary terrorist threat is increasingly seen as a fundamental civilizational challenge emanating from abroad. This perception was reinforced by the immigration history of the September 11 hijackers who had all entered the United States on valid visas, and some of whom had, unnoticed by the authorities, overstayed.[102] Accordingly, new counter-terrorism measures such as preventive detention powers are primarily targeted at those who try to enter the country or have entered recently, serving not only to incapacitate potential terrorists, but also to deter them from entering or staying in the first place. This rationale has been made explicit, for example, by a senior civil servant of the British

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98. *Id.* at 108. *See also* Christopher Drew & Judith Miller, *A Nation Challenged: The Detainees; Though Not Linked to Terrorism, Many Detainees Cannot Go Home*, N.Y. TIMES, Feb. 19, 2002, at A01.

99. Dan Eggen, *U.S. Holds 6 of 765 Detained in 9/11 Sweep*, WASH. POST, Dec. 12, 2002, at A20.

100. *See* COLE, *supra* note 34, at 26.

101. *See* Mary Beth Sheridan, *Immigration Law as Anti-Terrorism Tool*, WASH. POST, June 13, 2005, at A01.

102. *Entry of the 9/11 Hijackers into the United States*, STAFF STATEMENT NO. 1 (National Commission on Terrorist Acts Upon the United States, Washington D.C.), Jan. 26, 2004, at 4, 8, *available at* http://www.9-11commission.gov/staff_statements/staff_statement_1.pdf.

Home Office who argued that the detention powers under the ATCSA were needed to prevent the perception in other countries, particularly Muslim countries, "that the United Kingdom was weak in its response to international terrorists operating in its territory."[103] In a similar vein, the Home Secretary has claimed that "the existence and use of the powers have helped to make the UK a far more hostile environment for international terrorists to operate in, with the result that some have been deterred from coming here, and others have left entirely, to avoid being certified and detained."[104] These statements not only reveal from where the terrorist threat is perceived to emanate, but also highlight the symbolic purpose of detention powers. At the same time, this policy of deterrence corresponds to the rationale underlying the general tightening of immigration controls.

Second, the adoption of security measures that only apply to those without a voice in the democratic process is, for governments, the least politically costly way of reacting to terrorist incidents. Preventive detention powers applicable to both foreign nationals and citizens, in contrast, would be unlikely to find the support of a majority. It was again the British Home Office that has put this point most clearly, when explaining its reasons for limiting executive detention to non-citizens:

> While it would be possible to seek other powers to detain British citizens who may be involved in international terrorism it would be a very grave step. The Government believes that such draconian powers would be difficult to justify. Experience has demonstrated the dangers of such an approach and the damage it can do to community cohesion and thus to the support from all parts of the public that is so essential to countering the terrorist threat.[105]

As far as non-citizens are concerned, "such draconian powers" are, however, seen as justifiable; the support from the foreign part of the public is apparently considered less essential. Accordingly, the detention powers of the ATCSA were passed with a comfortable majority in the House of Commons.[106] The suggested control orders under the new Prevention of Terrorism Act 2005, applicable to both British and foreign citizens, on the other hand, caused a political storm, compelling the government to make important concessions.[107] Similarly, in the United

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103. A v. Sec'y of State for the Home Dep't, [2005] 2 A.C. 68, paras. 125, 181 (paraphrasing a statement by Mr. Whalley, witness before the House of Lords).

104. 430 PARL. DEB., H.C. (6th ser.) (2005) 306.

105. COUNTER-TERRORISM POWERS, *supra* note 65, at 9.

106. The vote was 341 to 77. 375 PARL. DEB., H.C. (6th ser.) (2001) 404.

107. *See infra* text accompanying notes 196–97.

States, the preventive detention campaign directed at more than one thousand immigrants and the incarceration of hundreds of foreign nationals at Guantánamo Bay have generated only little public attention and have faced hardly any political opposition. In stark contrast, there was a public outcry when the first two U.S. citizens were taken into military custody.[108]

Third, immigration law has traditionally been treated as a distinct area where the state is accorded particularly far-reaching powers and where fewer safeguards (such as access to a lawyer or to a court) apply than in criminal law. The imposition of especially stringent rules and enforcement measures on individuals on the basis of their nationality is, of course, inherent in immigration law and, as explained in Part I above, the executive detention of foreign nationals has accordingly been a long-standing and accepted feature of immigration law. The justification for new detention powers may thus be enhanced if they can be presented as being rooted in this tradition, i.e., as pursuing immigration control purposes.

In fact, however, the main objective pursued by the detention powers considered here is not enforcement of the immigration laws but protection of national security. This is already apparent from the legislative history of these powers: they are part of wider anti-terrorism packages adopted as a reaction to the attacks of September 11. As a matter of fact, the former U.S. Attorney General, John Ashcroft, has freely admitted that the new immigration regulation, described in Part II.B.2 above, serves to authorize the executive detention of foreign terrorist suspects for purposes of criminal investigation and prevention of further attacks: "We seek to hold them as suspected terrorists, while their cases are being processed on other grounds."[109] This point was reemphasized by the Assistant Attorney General who stated that the government's policy was to "use whatever means legally available" to detain persons who might present a threat.[110] The "hold until cleared" policy must also be seen in this light: the fact that even foreign nationals who had agreed to leave were kept in detention confirms that the government's aim was not enforcement of the immigration laws but investigation and prevention of criminal activity. Equally, with regard to the detention powers under the British ATCSA, the House of Lords has made clear that it would be wrong to

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108. *See, e.g.*, Editorial, *Why Mr. Hamdi Matters*, WASH. POST, Aug. 11, 2002, at B06**;** Editorial, *Detaining 'Enemy Combatants'*, N.Y. TIMES, Jan. 10, 2003, at A22.

109. Joyce H. Price, *Ashcroft Urges Stricter Laws to Jail Alien Suspects Longer*, WASH. TIMES*,* Oct. 1, 2001, at A1.

110. OIG, *supra* note 92, at 13.

view them as an immigration issue.[111] Instead, it pointed out that, "[t]he undoubted aim of the relevant measure . . . was to protect the UK against the risk of Al-Qaeda terrorism."[112] In other words, the powers at issue were adopted for national security reasons and not for the control of immigration. This raises the question of whether executive detention powers that have, for different reasons, been adopted in an immigration context, and are thus only applicable to foreign nationals, but that are in fact designed to counter terrorism, conform to the principle of non-discrimination.

IV. THE PRINCIPLE OF NON-DISCRIMINATION

The United Kingdom and the United States both have an obligation under international law to respect the principle of equality or non-discrimination. They have both ratified the ICCPR, which prohibits discrimination in its Articles 2(1) and 26.[113] The body tasked with monitor-

111. A v. Sec'y of State for the Home Dep't, [2005] 2 A.C. 68, paras. 54 (Lord Bingham), 103 (Lord Hope).

112. *Id.* para. 54.

113. ICCPR, *supra* note 17, art. 2, para. 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."); *id.* art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."). The United States has made a declaration that Articles 1 through 27 of the ICCPR are not self-executing and thus not enforceable in U.S. courts until implemented by congressional legislation. 138 CONG. REC. 8068, 8071 (1992) (discussing the U.S. Senate Resolution of advice and consent to the ratification of the International Covenant on Civil and Political Rights). The legal validity of such declarations is disputed. *See, e.g.*, Symposium, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169 (1993); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 348 (1995). They can, in any event, not affect the United States' obligations under international law. Furthermore, 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." 138 CONG. REC. 8068, 8071 (1992). It is, however, not clear that this test differs in any respect from the "reasonable and objective" test used by the U.N. Human Rights Committee. General Comment 18: Non-discrimination, para. 13, U.N. Hum. Rts. Comm., 37th Sess., *in* COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI/GEN/1/Rev.1, at 4 (1994) [hereinafter HRC General Comment 18].

ing the implementation of the ICCPR, the U.N. Human Rights Committee, has pointed out that the latter provision "prohibits discrimination in law or in fact in any field regulated and protected by public authorities."[114] The ICCPR thus imposes a general obligation on party states neither to enact legislation with a discriminatory content nor to apply laws in a discriminatory way.[115] Furthermore, the basic (but non-binding) statement of human rights, the Universal Declaration of Human Rights, guarantees equality in several of its provisions.[116] Finally, more specific "soft law" standards governing the treatment of persons in detention, including Principle 5(1) of the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[117] and Rule 6(1) of the Standard Minimum Rules for the Treatment of Prisoners,[118] also prohibit any kind of discriminatory treatment.

Importantly, the authoritativeness of this international law obligation is strengthened by the existence of constitutional norms prohibiting discrimination in both states. In the United Kingdom, equality before the law has traditionally been regarded as forming part of the rule of law, one of the fundamental principles of the constitution.[119] In addition, the principle of non-discrimination provided by Article 14 of the European Convention has now been incorporated into domestic law by way of the Human Rights Act 1998.[120] Even though Article 14 is a subordinate norm, prohibiting discrimination only in the enjoyment of the rights and freedoms otherwise set forth in the Convention, this is of no relevance in the particular context of detention, since those detained can claim differential treatment with regard to the Convention's right to liberty. In the United States, non-discrimination is guaranteed by the equal protection clause of the Fourteenth Amendment of the Constitution as far as classifications by *state* governments are concerned.[121] The Supreme Court has

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114. *Id.* para. 12.

115. *Id.*

116. *See, e.g.*, Universal Declaration of Human Rights, *supra* note 16, art. 1 ("All human beings are born free and equal in dignity and rights."); *id*. art. 2, para. 1 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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."); *id*. art. 7 ("All are equal before the law and are entitled without any discrimination to equal protection of the law.").

117. G.A. Res. 43, *supra* note 19.

118. Standard Minimum Rules for the Treatment of Prisoners, *supra* note 20.

119. *See* ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202 (MacMillan & Co. 1941) (1885); Arthur J.S. Hall v. Simons, (2000) 3 WKLY. L. REP. 543, 560 (H.L.).

120. Human Rights Act, 1998, c. 42, § 1 (U.K.).

121. U.S. CONST. amend. XIV.

interpreted the due process clause of the Fifth Amendment to test *federal* classifications under the same standard of review.[122]

Under both international law and the domestic law of the United Kingdom and the United States, the guarantee of non-discrimination, as well as the substantive right to liberty, are not confined to citizens, but extend to foreign nationals, irrespective of their legal status in the host country.[123] Furthermore, the equality norms at issue are open-ended as to the prohibited grounds of distinction.[124] Consequently, differential treatment on the basis of citizenship is also prohibited,[125] except with respect to a

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122. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954).

123. The Human Rights Committee has stated that the guarantees of the ICCPR "apply to everyone . . . irrespective of his or her nationality or statelessness." General Comment 15: The Position of Aliens under the Covenant, para. 1, U.N. Hum. Rts. Comm., 27th Sess., *in* COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI/GEN/1/Rev.1, at 4 (1994) [hereinafter HRC General Comment 15]. The Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live expressly guarantees a list of rights to non-citizens, including the right not to be arbitrarily arrested or detained and the right to equality before the courts. G.A. Res. 40/144, arts. 5(1)(a) & 5(1)(c), U.N GAOR 116th plen. mtg., U.N. Doc. A/RES/40/53 (Dec. 13, 1985). Article 1 of the European Convention obliges the contracting states to secure the Convention rights "to everyone within their jurisdiction." European Convention, *supra* note 7, art. 1. For the United Kingdom, see A v. Sec'y of State for the Home Dep't, [2005] 2 A.C. 68, para. 106 (Lord Hope holding that the right to liberty "belongs to everyone who happens to be in this country, irrespective of his or her nationality or citizenship."); Khawaja v. Sec'y of State for the Home Dep't, (1983) 2 WKLY. L. REP. 321, 344 (H.L.) (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."). For the United States, see Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that the Fourteenth Amendment applies "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . ."); Kwong Hai Chew v. Colding, 344 U.S. 590, 596-97 n.5 (1953) (holding that the Fifth Amendment does not allow "any distinction between citizens and resident aliens"); Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (holding that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

124. Article 26 of the ICCPR prohibits discrimination "on any ground *such as* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*." ICCPR, *supra* note 17, art. 26 (emphases added). Similarly, Article 14 of the European Convention lists "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*." European Convention, *supra* note 7, art. 14 (emphases added). The Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution does not refer to the prohibited grounds of distinction. U.S. CONST. amend. XIV.

125. For the ICCPR, the Human Rights Committee has expressly held that nationality is included in the reference to "other status." Communication, U.N. Human Rights. Committee, Decision of the Human Rights Committee Under Article 5(4) of the Optional

few specific rights that only apply to nationals, such as political rights and the right to enter or reside in a country.[126]

Nevertheless, the fact that the executive detention powers considered in this Article make distinctions on the basis of nationality does not necessarily mean that they violate the principle of non-discrimination. Government actions inevitably classify persons; the crucial question is whether these classifications are justified or not. When assessing a discrimination claim, international human rights bodies and national courts will first examine whether there has actually been a difference in treatment, i.e., the applicant will need to identify others who, although in a comparable position, are treated better.[127] Once it is established that persons in analogous situations have been treated differently, the focus of the assessment shifts to the existence of a justification for the unequal treatment.

The first part of this justification test requires that the difference in treatment pursue a legitimate aim.[128] In the case of anti-terrorism measures, states will normally be able to meet this requirement quite easily by referring to national security interests. The assessment as to whether differential treatment is justified 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 realized. While proportionality is expressly referred to in the caselaw of the European Court of Human Rights,[129] and is indeed a general principle present throughout the European Convention,[130] the

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Protocol to the International Covenant on Civil and Political Rights (Gueye v. France), para. 9.4, U.N. Doc. CCPR/C/35/D/196/1985 (Apr. 6, 1989).

126. *See* HRC General Comment 15, *supra* note 123, para. 2.

127. For the ICCPR, see Tufyal Choudhury, *Interpreting the Right to Equality Under Article 26 of the International Covenant on Civil and Political Rights*, 2003 EUR. HUM. RTS. L. REV. 24, 31. For the European Convention, see Lithgow v. United Kingdom, App. No. 9006/80, 8 Eur. Hum. Rts. Rep. 329, 389 (1986) (Court opinion); Fredin v. Sweden, App. No. 12033/86, 13 Eur. Hum. Rts. Rep. 784, 797 (1991) (Court opinion). For the United States, see Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949).

128. For the ICCPR, see HRC General Comment 18, *supra* note 113, para. 13. For the European Convention, see Belgian Linguistics Case (No. 2), 1 Eur. Hum. Rts. Rep. 252, 284 (Eur. Ct. H.R. 1968). According to the caselaw of the U.S. Supreme Court, the nature of the aim required depends on the applicable standard of review and is described as either a "legitimate," "important," or "compelling government interest." *See, e.g.*, POLYVIOS POLYVIOU, THE EQUAL PROTECTION OF THE LAWS 177–298 (1980).

129. See the formula used in Belgian Linguistics Case (No. 2), 1 Eur. Hum. Rts. Rep. at 284, which has become part of the consistent caselaw of the European Court.

130. *See* Marc-André Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF

same concept also emerges in the Human Rights Committee's formula that the criteria for differential treatment must be "reasonable and objective"[131] and in the caselaw of the U.S. Supreme Court, which requires a varyingly close relationship between the differential treatment and the aim pursued, depending on the applicable standard of review.[132]

The strictness with which discrimination claims are reviewed by courts can range from a "mere rationality" requirement to a "strict scrutiny" test and will generally depend on such criteria as the public aim pursued, the individual interest at stake, and the ground on which differential treatment is based.[133] While the Human Rights Committee and the European Court of Human Rights make the determination of the applicable strictness of review largely dependent on an ad hoc consideration of the factors involved in the individual case,[134] the U.S. Supreme Court has elaborated a system of three different, fairly fixed, standards of review, requiring a "rational," "substantial," or "narrowly tailored relationship" of the difference in treatment to the government end.[135]

In sum, the United Kingdom and the United States are bound under international law to comply with a common standard of equality that corresponds in important respects to their respective domestic norms prohibiting discrimination.

HUMAN RIGHTS 125 (Ronald Macdonald, Franz Matscher & Herbert Petzold eds., 1993); Jeremy McBride, *Proportionality and the European Convention on Human Rights*, *in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 23 (Evelyn Ellis ed., 1999).

131. HRC General Comment 18, *supra* note 113, para. 13.

132. For a summary of the Supreme Court's relevant jurisprudence see, for instance, POLYVIOU, *supra* note 128.

133. *See* Aalt Willem Heringa, *Standards of Review for Discrimination*, *in* NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES 25, 26–27 (Titia Loenen & Peter R. Rodrigues eds., 1999).

134. In the context of the European Convention, the strictness of review corresponds to the doctrine of the margin of appreciation. For cases concerning discrimination, the European Court has expressed this doctrine in the following terms:

> [T]he 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; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States.

Rasmussen v. Denmark, App. No. 8777/79, 7 Eur. H.R. Rep. 371 (1985), para. 40. Although the Human Rights Committee does not normally expressly refer to the doctrine of the margin of appreciation, its jurisprudence with regard to the strictness of review reveals a similar approach to the one of the European Court.

135. *See* POLYVIOU, *supra* note 128, at 177–298.

V. CONFORMITY WITH THE PRINCIPLE OF NON-DISCRIMINATION

This Part assesses the conformity of the post-September 11 detention powers of the United Kingdom and United States against the common standard of non-discrimination elaborated in Part IV. The basic principles emerging from this assessment can be applied to the executive detention of terrorist suspects by any state that has an obligation under international law to respect the principle of non-discrimination.

The British and U.S. legal frameworks considered here treat foreign nationals suspected of terrorism involvement differently from domestic terrorist suspects insofar as only the former can be preventively detained. This difference in treatment must be assessed according to the criteria set out in Part IV. One criterion that is relatively unproblematic in the case of detention powers is the legitimate aim requirement: states can easily meet this requirement by asserting that the detention of foreign terrorist suspects serves the protection of national security. The outcome of discrimination challenges to the preventive detention of foreign terrorist suspects will thus mainly turn on the following questions: With what scrutiny must the detention powers be reviewed? Are foreign terrorist suspects in a comparable situation to suspected terrorists who are nationals? Is the preventive detention of only those terrorist suspects who are non-citizens a proportionate means to achieve the legitimate goal of countering the terrorist threat? These questions are now considered in turn.

A. Standard of Review

That the degree of scrutiny applied by courts to review detention powers can be of decisive importance for the outcome of respective legal challenges is demonstrated by the case concerning the British ATCSA. Whereas the Court of Appeal relied on a deferential approach[136] and, consequently, upheld the detention scheme, the House of Lords subjected it to close scrutiny, concluding that it violated fundamental guarantees of the European Convention.[137] A closer examination of the proper standard of review courts should apply to assess the issues of comparability and proportionality is therefore required before entering into a substantive analysis of those issues.

The detention of foreign terrorist suspects is at the intersection of two areas where courts have traditionally exercised great deference towards the executive and the legislature: national security and immigration. As far as national security is concerned, *international* courts and bodies have

136. A v. Sec'y of State for the Home Dep't, [2004] Q.B. para. 40 (Lord Woolf, C.J.).
137. *See infra* text accompanying notes 157–60.

often accorded domestic authorities a wide margin of appreciation, mainly out of respect for national sovereignty, of which the state's right to defend itself in times of crisis is seen as the bedrock.[138] Two further reasons explain the traditional deference given by *national* courts to the executive, the military and the legislature: first, the idea that, according to the democratic principle, public interest considerations should be made by elected representatives, not by unelected judges; and, second, what has been termed "institutional capacity," i.e., the notion that other branches of government may have special expertise in national security matters and are better equipped than the judiciary to know and evaluate risk in this area.[139] Accordingly, examples of judicial self-restraint in national security matters can be found in the caselaw of both British[140] and U.S. courts.[141] In the field of immigration, judicial deference stems from the perception that the power to exclude and deport foreigners is an important incident of sovereignty properly belonging to the government, due to its close relationship with national security, foreign relations and other highly political issues.[142] This power has therefore traditionally been seen in the United Kingdom as a prerogative of the Crown[143] and in

138. For an explanation of the approach of the European Court of Human Rights, see, for example, Ireland v. United Kingdom, (1979–1980) 2 Eur. Hum. Rts. Rep. (ser. A) 25, 91 (1978) (Court opinion) (holding that "[i]t 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."). For a thorough analysis of the margin of appreciation doctrine in cases of derogation from European Convention guarantees, see Michael O'Boyle, *The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle?*, 19 HUM. RTS. L.J. 23 (1998).

139. Jeffrey Jowell, *Judicial Deference: Servility, Civility or Institutional Capacity*, PUB. L., 2003, at 592, 595 (U.K.).

140. *See, e.g.*, R v. Sec'y of State for the Home Dep't, *ex parte* Cheblak, (1991) 1 WKLY. L. REP. 890, 906–08 (A.C.); Sec'y of State for the Home Dep't v. Rehman [2001] UKHL 47, para. 62 (Lord Hoffmann stating, "It is also that 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.").

141. *See, e.g.*, *Korematsu*, 323 U.S. at 223–24 (upholding the evacuation of all persons of Japanese descent from the West Coast military area by reference to the military dangers at stake).

142. For the United States, see Chae Chan Ping v. United States, 130 U.S. 581, 604–05 (1889); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952); Mathews v. Diaz, 426 U.S. 67, 81 (1976). For the United Kingdom, see, for instance, Int'l Transp. Roth GmbH v. Sec'y of State for the Home Dep't, [2002] EWCA Civ 158, Q.B. 728, paras. 86–87 (appeal taken from Eng.).

143. The two leading cases are *Musgrove v. Chun Teeong Toy*, [1891] A.C. 272 (P.C.) (appeal taken from Can.) (U.K.) and *Attorney-General for the Dominion of Canada v.*

the United States as a "plenary power" of Congress.[144] Stephen Legomsky has demonstrated how these doctrines have resulted in strikingly similar patterns of judicial self-restraint in the immigration caselaw of British and U.S. courts.[145]

However, the following two reasons call for strict scrutiny as far as the review of powers authorizing the preventive detention of foreign terrorist suspects is concerned. First, in a rights-based system, the judiciary is tasked with reviewing governmental actions for their compliance with certain fundamental rights and it cannot simply abdicate this supervisory responsibility by invoking a lack of institutional capacity or arguing that governmental powers in the fields of national security and immigration are inherent in sovereignty.[146] In national security matters, both international and domestic, including British and U.S., courts have increasingly come to recognize this and have generally been moving towards a more stringent review: the mere fact that national security interests are involved, they have held, does not automatically entail a lenient standard of review.[147] A similar trend can be observed in cases concerning immigration, so that even if the detention of foreign terrorist suspects was to be seen as an immigration matter, it would have to be subject to strict scrutiny. For although the regulation of immigration, i.e., the setting of admission and removal terms, may be a matter for the legislature and the executive, it does not follow that *detention* pursuant to immigration con-

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Cain, [1906] A.C. 542 (P.C.) (appeal taken from Can.) (U.K.). For a critical analysis of the royal prerogative in the field of immigration, see CHRISTOPHER VINCENZI, CROWN POWERS, SUBJECTS AND CITIZENS 89–112 (1998).

144. For a summation of the plenary power doctrine, see, for example, Kleindienst v. Mandel, 408 U.S. 753, 766–69 (1972); Fiallo v. Bell, 430 U.S. 787, 792 (1977).

145. *See generally* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA, pt. IV (1987) (explaining that, in general, the U.K. and U.S. judiciaries have both produced highly deferential immigration decisions, even though the two countries possess quite different political environments and disparate social norms).

146. *See* Jowell, *supra* note 139, at 597–99.

147. For the international level, see, for instance, United Communist Party of Turkey v. Turkey, App. No. 19392/92, 26 Eur. Hum. Rts. Rep. 121, 149 (1998) (Court opinion). For the United Kingdom, see A v. Sec'y of State for the Home Dep't, [2005] 2 A.C. 68, para. 41 (Lord Bingham quoting Simon Brown LJ in Int'l Transp. Roth GmbH v. Sec'y of State for the Home Dep't, [2003] Q.B. 728, para. 27: ". . . the court's role under the 1998 Act is as the guardian of human rights. It cannot abdicate this responsibility."). In the United States, a federal district court overturned Korematsu's conviction, stressing that the Supreme Court's decision in this case "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." Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

trol should not be subject to substantive judicial control.[148] This has been recognized by the U.S. Supreme Court in its recent decision in *Zadvydas v. Davis*, holding that the plenary power of Congress in immigration matters "is subject to important constitutional limitations."[149]

Second, according to the established practice of both international and domestic courts, the intensity of review must be particularly great where fundamental interests are at stake.[150] That the right to personal liberty is one of the most fundamental human rights is already apparent from its long history and widespread codification,[151] and has been repeatedly recognized by international,[152] British,[153] and U.S. courts.[154] Even in a terrorist context, the European Court of Human Rights has stressed the importance of the protection against arbitrary deprivation of liberty and has insisted on a strict review.[155] On this basis, the House of Lords, in the case concerning detention under the ATCSA, decidedly rejected the government's argument—previously accepted by the Court of Appeal—that it should be allowed a considerable margin in deciding whom to subject to powers of preventive detention.[156] Although the executive may be better placed than the judiciary to assess the existence of a terrorist threat, the Law Lords held, the measures it adopts in response to this threat must be subject to close scrutiny by the courts, particularly if they affect the

148. *See* Wilsher, *supra* note 38, at 931. *See also* LEGOMSKY, *supra* note 145, at 309–310, 320 (noting that courts have invalidated federal provisions affecting foreign affairs as violative of constitutional provisions affecting individual rights); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 862 (1987).

149. Zadvydas v. Davis, 533 U.S. 678, 695 (2001).

150. For the position of the European Court of Human Rights, see, for example, Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) para. 52 (1981); Buckley v. United Kingdom, App. No. 20348/92, 23 Eur. H.R. Rep. 101, 129 (1996). For the position of the U.S. Supreme Court, see, for instance, Plyler v. Doe, 457 U.S. 202, 221 (1982).

151. *See supra* Part I.

152. The European Court of Human Rights has referred to "the fundamental importance of the guarantees contained in Article 5" and the consequent need to narrowly construe any exception. Kurt v. Turkey, App. No. 24276/94, 27 Eur. H.R. Rep. 373, 447 (1998).

153. *See, e.g.*, In Re S.-C. (Mental Patient: Habeas Corpus), [1996] Q.B. 599, 603 (U.K.).

154. The Supreme Court has stressed: "We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (quoting United States v. Salerno, 481 U.S. 739, 750 (1987)).

155. *See* Aksoy v. Turkey, App. No. 21987/93, 23 Eur. H.R. Rep. 553, 588 (1996).

156. A v. Sec'y of State for the Home Dep't, [2005] 2 A.C. 68, para. 29.

right to liberty.[157] For the courts are, as Lord Bingham put it, "specialists in the protection of liberty,"[158] and the more far-reaching the deprivation of liberty at issue, the closer the scrutiny applied by the courts must be.[159] These considerations led even the only Law Lord who sided with the government, Lord Walker, to conclude: "Measures which result in the indefinite detention in a high-security prison of individuals who have not been tried for (or even charged with) any offence, and who may be innocent of any crime, plainly invite judicial scrutiny of considerable intensity."[160] This must hold true not only for the British context but for the executive detention of terrorist suspects in general.

B. Comparability

Under the detention powers at issue, foreign terrorist suspects are treated differently from nationals suspected of involvement in terrorism. For a discrimination claim to succeed, it must, however, first be established that this latter group is a suitable comparator. Are suspected terrorists who are citizens in a comparable, i.e., analogous or relevantly similar, situation to those who are foreign nationals?

The question of comparability cannot be answered in the abstract but must be judged in relation to the actual aim pursued by the measure under consideration.[161] As far as detention is used to enforce deportation, i.e., as an instrument of immigration control, it could be argued that foreign citizens and nationals are not comparable groups because only the former can be deported. However, the purpose of the detention of foreign terrorist suspects is not enforcement of deportation. Rather, as has been demonstrated in Part III, the British and U.S. detention powers are designed to prevent terrorism and mainly apply to precisely those foreign nationals who *cannot* be removed. Thus, in an anti-terrorism context, the difference between the two groups in terms of deportability becomes merely theoretical and therefore, irrelevant.

Nevertheless, the British Court of Appeal concluded that, even though they cannot be deported, the foreign terrorist suspects falling under the powers of the ATCSA were still not in a comparable situation to British terrorist suspects: they had only a right not to be removed, whereas the

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157. *Id.* paras. 39–42 (Lord Bingham), 79–81 (Lord Nicholls), 107–08 (Lord Hope), 196 (Lord Walker).

158. *Id.* para. 39 (quoting Judge La Forest in RJR-MacDonald Inc. v. Attorney Gen. of Canada, [1995] 3 SCR 199, para. 68).

159. *Id.* para. 178 (Lord Rodger).

160. *Id.* para. 192 (Lord Walker).

161. *See, e.g.*, *id.* para. 235 (Baroness Hale) (United Kingdom); Tussman & tenBroek, *supra* note 127, at 346 (United States).

latter had a right of abode. Therefore, foreign terrorist suspects fell into a different legal class.[162] This argument was decidedly rejected by the House of Lords. For, as Lord Rodger correctly pointed out, as far as detention in the present context is concerned, the critical factor is not the immigration status of those to be detained but the threat they are suspected of posing.[163] More precisely, those subject to the detention powers are chosen on the basis of the following characteristics: (i) they are suspected international terrorists; (ii) they cannot be successfully prosecuted; and (iii) they cannot be deported.[164] Both the terrorist suspects who are non-citizens and those who are nationals share these relevant characteristics. Thus, they are in an analogous situation. To hold otherwise would be to accept the choice of immigration control as a means to address the terrorist threat, when it is the correctness of that choice that is the disputed issue.

In sum, distinctions in terms of immigration status can only matter where the purpose of the detention is removal and those detained can actually be deported in timely fashion. The European Convention, for example, explicitly authorizes detention that is only applicable to immigrants, but only insofar as "action is being taken with a view to deportation or extradition."[165] By contrast, where detention is used to prevent criminal activity or to protect national security, the mere legal difference between foreign nationals and citizens is not a relevant characteristic of distinction, and states cannot make it more relevant simply by placing their detention powers within an immigration context.

C. Objective and Reasonable Justification

Once it is established that persons in a comparable situation have been treated differently, it must be judged whether an objective and reasonable justification for the differential treatment exists. Are there objective and reasonable grounds for singling out foreign terrorist suspects for preventive detention? The mere fact that states have generally been seen as allowed under international law to make distinctions on the ground of nationality in an immigration context and to detain foreign citizens in times of crisis does not in itself provide a sufficient justification. It is, as the House of Lords observed in *A v. Secretary of State for the Home Department*, "indeed obvious that in an immigration context some differen-

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162. A v. Sec'y of State for the Home Dep't, [2004] Q.B. paras. 47, 56 (Lord Woolf, C.J.).

163. A v. Sec'y of State for the Home Dep't, [2005] 2 A.C. 68, para. 171 (Lord Rodger).

164. *Id.* para. 235 (Baroness Hale).

165. European Convention, *supra* note 7, art. 5(1)(f).

tiation must almost inevitably be made between nationals and non-nationals . . . ."[166] Yet foreign citizenship cannot justify *every* difference in treatment. Rather, the question as to the existence of an objective and reasonable justification must be answered in relation to the concrete aim and effects of the differential treatment under consideration.[167] The aim in the present case is the prevention of terrorism, and the relevant question is whether it is necessary and appropriate to focus on immigration control in response to the danger posed by international terrorism.

In other words, the assessment as to whether differential treatment is justified or not is mainly controlled by the proportionality requirement. This principle, which is applied in one form or another under all the international and domestic legal systems at issue,[168] requires that there is a reasonable relationship of proportionality between the difference in treatment and the aim sought to be realized. This complex assessment as to whether a fair balance between individual rights and a public interest, here national security, has been struck may involve a whole range of different sub-tests. For the present purpose, it is helpful to group them into two chronologically successive stages of inquiry. First, in the shorter term, the distinction according to citizenship on which the detention powers are based, must be a suitable and effective means to address the terrorist threat. Second, the wider impacts of the differential treatment must be evaluated, particularly insofar as the long-term effectiveness of preventive detention is concerned.

1. Short-Term Suitability

The perception that the post-September 11 terrorist threat constitutes a qualitatively new phenomenon reflective of wider cultural differences has led states to increasingly rely on broad criteria to determine the scope of application of anti-terrorism regimes. The executive detention powers of both the United Kingdom and the United States are evidence of this approach: they are not even limited to presumed members of al-Qaeda, but extend to all foreign nationals who are suspected of having links with terrorist groups. However, is the citizenship status of the suspected terrorists a suitable criterion to determine the applicability of detention powers?

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166. A v. Sec'y of State for the Home Dep't, [2005] 2 A.C. 68, para. 56 (Lord Bingham).

167. *See, e.g.*, the European Court of Human Rights decision in the Belgian Linguistics Case (No. 2), 1 Eur. Hum. Rts. Rep. at 284.

168. *See supra* Part IV.

This question could only be answered in the affirmative if there was a difference in terms of dangerousness between citizens and non-citizens, i.e., if the terrorist threat stemmed exclusively, or at least almost exclusively, from the foreign section of the population. Yet the available evidence suggests that this is not the case. For the United Kingdom, the Newton Committee, a committee of Privy Counsellors set up under Section 122 of the ATCSA to review the operation of the Act, stated in their report to Parliament: "We have been told that, of the people of interest to the authorities because of their suspected involvement in international terrorism, nearly half are British nationals."[169] SIAC, who were also allowed to consider the material classified as confidential by the government, observed that it was clear that in the opinion of the Home Secretary there were suspected British terrorists at liberty in the United Kingdom.[170] And the House of Lords concluded that the material submitted by the government showed a "high level of involvement of British citizens . . . in the terrorist networks."[171] The London bombings of July 7, 2005 provided chilling evidence for these assessments.[172] Equally, it cannot be said that the terrorist threat to the United States stems only from foreign nationals. In fact, a large part of those charged by the U.S. authorities with terrorist offences allegedly related to al-Qaeda since September 11 are U.S. citizens[173] as are some of those held without charge as "enemy combatants."[174]

The scope of application of both the British and U.S. detention powers is thus based on an inappropriate criterion, and it is not surprising that the

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169. PRIVY COUNSELLOR REVIEW COMMITTEE, ANTI-TERRORISM, CRIME AND SECURITY ACT 2001 REVIEW: REPORT, Dec. 18, 2003, para. 193 [hereinafter PRIVY COUNSELLOR REVIEW COMMITTEE REPORT].

170. A v. Sec'y of State for the Home Dep't, [2004] Q.B. para. 37.

171. A v. Sec'y of State for the Home Dep't, [2005] 2 A.C. 68, para. 183 (Lord Rodger quoting para. 27 of the Amended Addendum to the Open Derogation Statement).

172. All the four suicide bombers were British citizens. Duncan Campbell & Sandra Laville, *British Suicide Bombers Carried Out London Attacks, Say Police*, GUARDIAN, July 13, 2005, *available at* http://www.guardian.co.uk/attackonlodon/story/0,,1527404,00.html.

173. As of May 2003, seventeen U.S. citizens and nine foreign nationals had been charged with such crimes. COLE, *supra* note 34, at 24. Also the few later cases concerning offences related to al Qaeda have involved U.S. citizens, including, for example, Iyman Faris, sentenced to twenty years in prison in October 2003 for planning to destroy a New York City Bridge. Press Release, Dep't of Justice, Iyman Faris Sentenced for Providing Material Support to al Qaeda (Oct. 28, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/October/03_crm_589.htm. Masoud Khan was sentenced to life in June 2004 for taking part in paramilitary training to prepare for holy war abroad. Jerry Markon, *Strict Sentences Meted in Va. Jihad Case*, WASH. POST, June 16, 2004, at A06.

174. Lynch, *supra* note 80, at 23–26.

corresponding detention initiatives have produced hardly any results in the form of terrorism charges. It is, of course, very difficult to assess the effectiveness of preventive detention campaigns, since governments will claim that they are targeted at exactly those against whom there is not sufficient evidence for bringing charges. Nevertheless, it would not seem completely unreasonable to expect that after months, or even years of detention, the authorities would be able to bring at least some of these cases before the courts. Yet of the more than one thousand foreigners preventively detained in the United States immediately after September 11, only three have been charged with any terrorism-related crime.[175] This contrasts starkly with the "success rate" from prior to September 11 when, on average, charges were brought against more than fifty percent of the U.S. citizens and foreign nationals arrested under criminal law on suspicion of terrorism involvement.[176] As far as the United Kingdom is concerned, none of the detainees held for more than three years under the ATCSA powers have ever been charged. These poor "success rates" to some extent also reflect the fact that the incapacitation of potential terrorists is not even the main purpose of the detention powers: as explained in Part III above, they serve just as much as a symbolic instrument of deterrence. Yet this policy of deterrence is flawed for the same reasons: citizenship is not a suitable criterion to define its target group; preventive detention would need to deter potential terrorists rather than immigrants.

The perception of the contemporary terrorist threat as being rooted in a broader civilizational conflict, considerations of political feasibility, and the traditional susceptibility of the immigration law to far-reaching restrictions of personal liberty have thus led both the British and the U.S. governments to rely on a criterion that is not only extremely broad, but also unsuitable to determine the applicability or non-applicability of preventive detention powers. The group targeted by the respective powers is not only broadly, but wrongly defined. In the words of the Newton Committee: "What is important is the nature of the threat, not the ideology behind it or the nationality of the perpetrator."[177]

2. Long-Term Consequences

The effectiveness, and therewith proportionality, of the citizenship distinction employed by the detention powers under consideration not only hinges on its short-term suitability to address the terrorist threat. Rather,

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175. COLE, *supra* note 34, at 26.

176. *See* CHRISTOPHER HEWITT, UNDERSTANDING TERRORISM IN AMERICA: FROM THE KLAN TO AL QAEDA 93 (2003).

177. PRIVY COUNSELLOR REVIEW COMMITTEE REPORT, *supra* note 169, para. 193.

the effects that this distinction produces in the longer term must also be taken into account. And in this regard there is evidence to suggest that preventive detention powers that are reserved to foreign citizens contribute to the alienation of exactly those communities whose co-operation with the police would be crucial in anti-terrorist investigations.

As far as the United Kingdom is concerned, the House of Lords did not enter into an analysis of the long-term implications of preventive detention—perhaps because it simply did not have a reason to do so, given its clear finding that the detention powers were in any event an unsuitable means to counter international terrorism. Other sources do, however, point to their potentially alienating effects. The Newton Committee stated that they had "heard evidence that the existence of these powers, and uncertainty about them, has led to understandable disquiet among some parts of the Muslim population."[178] The Commissioner for Human Rights of the Council of Europe wrote that the powers clearly have had "a negative affect [sic] on both the perception of Muslims by the rest of the population and the confidence of many Muslims in the fairness of the executive,"[179] and both the Leader of the Muslim Parliament of Great Britain and the President of the Muslim Association of Britain have criticized them as stigmatizing Muslims and fuelling extremism.[180] Similarly, the U.S. detention initiatives have reportedly contributed to a feeling of alienation and stigmatization among the Muslim and Arab communities in the United States.[181] The resulting disengagement may have important implications for the success rate of anti-terrorism investigations since, as the Newton Committee has correctly pointed out, "[i]t is important that legislation against terrorism should attract wide public acceptance to maximise its effectiveness."[182] Communities who feel unjustifiably targeted by stringent anti-terrorism measures are less likely to trust, and therefore cooperate with, law enforcement agencies.

The conclusion that, in the long term, executive detention powers directed against specific groups may have a counter-productive effect is

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178. *Id*. para. 196.

179. Council of Europe, Office of the Commissioner for Human Rights, *Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his Visit to the United Kingdom*, para. 32, CommDH (2005) 6 (June 8, 2005) [hereinafter Office of the Commissioner for Human Rights].

180. LIBERTY (NATIONAL COUNCIL FOR CIVIL LIBERTIES), THE IMPACT OF ANTI-TERRORISM POWERS ON THE BRITISH MUSLIM POPULATION 3–4 (2004), http://www.liberty-human-rights.org.uk/resources/policy-papers/2004/anti-terror-impact-britmuslim.PDF.

181. *See, e.g.*, NYU Immigrant Rights Clinic, *supra* note 90, at 425–26; David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 986 (2002).

182. PRIVY COUNSELLOR REVIEW COMMITTEE REPORT, *supra* note 169, para. 196.

further supported by the experiences made with previous internment initiatives in both the United Kingdom and the United States. A review of the Northern Ireland (Emergency Provisions) Act, for example, concluded that the Northern Irish internment powers, which were used almost exclusively against the Catholic community,[183] had been "a cause of distress and bitter resentment, so that people were provoked into sympathising with the terrorists and so internment acted as a recruitment boost."[184] And a former Home Secretary stated during the debate on the ATCSA that internment "is undoubtedly thought to have exacerbated rather than contained the IRA terrorist threat."[185] In fact, the first year following reintroduction of internment, 1972, was the most violent in Northern Irish history.[186] Similarly, the available evidence suggests that the U.S. mass internment of persons of Japanese descent during the Second World War contributed little to the security of the nation, instead engendering significant resentment among the Japanese part of the population.[187]

D. Result

Powers of executive detention that only apply to foreign terrorist suspects treat two groups who are in a comparable situation differently: suspected terrorists who are nationals and foreign terrorist suspects share all the relevant characteristics in relation to the aim of preventing terrorism. Both international human rights bodies and domestic courts would be likely to employ strict scrutiny to review claims that such powers are discriminatory. Thus, weighty reasons would have to be put forward to justify the difference in treatment on the basis of nationality. Such reasons do not exist. The distinction according to citizenship is an unsuitable means to prevent terrorism where the threat stems not exclusively from the foreign part of the population. Furthermore, the long-term negative

183. *See* Spjut, *Internment and Detention*, *supra* note 45, at 735–38.

184. J.J. Rowe, *Review of the Northern Ireland (Emergency Provisions) Act 1991*, 1995, Cm 2706, para. 119.

185. 629 PARL. DEB., H.L. (5th ser.) (2001) 199 (statement of Lord Jenkins of Hillhead).

186. LORD GARDINER ET AL., REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISM IN NORTHERN IRELAND 61 (1975).

187. *See* Restitution for World War II Internment of Japanese-Americans and Aleuts, Pub. L. No.100-383, 102 Stat. 903 (1988) (codified at 50 U.S.C. app. § 1989a(a) (2000)) (Congress's formal statement of apology to Japanese-Americans for the "grave injustice" of the U.S. internment camp policy during World War II).

effects of detention powers limited to foreign citizens support the conclusion that the difference in treatment is ineffective and disproportionate.

The principle of non-discrimination does not prevent states from detaining non-nationals where this is necessary to enforce the immigration laws since only they, but not citizens, are subject to immigration control. Yet where the aim pursued by detention is not enforcement of the immigration laws but protection of national security, differential treatment on the ground of citizenship can only be justified if there is a difference in terms of dangerousness between nationals and non-nationals. It is conceivable that such a difference might exist in a traditional war situation where states are pitted against each other, although any wartime internment would still necessitate derogation from the right to liberty guaranteed by international human rights instruments and would thus have to be "strictly required by the exigencies of the situation."[188] In contrast, in the so-called war on terror—where the battle lines are not drawn along the borders of states—the criterion of nationality cannot be of any relevance for the definition of the scope of application of detention powers. Consequently, differential treatment of non-citizens with regard to preventive anti-terrorism detention violates the international human rights principle of non-discrimination.

VI. CONCLUSION

This Article has argued that the post-September 11 detention powers targeting foreign nationals should be understood as a symbolic instrument of deterrence directed at a perceived civilizational threat, as a politically convenient way of demonstrating a strong reaction to terrorist attacks, and as steeped in a long tradition of reserving the most severe restrictions of the right to liberty to foreign citizens. These powers were passed as part of legislative packages propelled through parliaments in record time, without thorough consideration of the need for them or their effectiveness.[189] In fact, they are not even intended to address the terror-

188. ICCPR, *supra* note 17, art. 4(1); European Convention, *supra* note 7, art. 15(1).

189. The USA Patriot Act was approved by Congress less than four weeks after the first version had been introduced into the House of Representatives, bypassing much of the normal committee process. The Senate passed the bill after only three hours of debate; the bill was never considered by the Senate Judiciary Committee, and members were not given a report explaining its provisions. *See* Elizabeth A. Palmer, *House Passes Anti-Terrorism Bill That Tracks White House's Wishes*, CONG. Q. WKLY. REP., Oct. 13, 2001, at 2399. In the House, a bill that had been discussed in the Judiciary Committee was replaced with a new one which was whisked through the plenary on the same day. *See id.* Representative Scott complained in the relevant House debate: "This is not the bill that was reported and deliberated on in the Committee on the Judiciary. It came to us late

ist threat in a sustained and global manner, but merely to dislocate it: those subject to the powers can evade detention by opting to leave the country. In other words, the new preventive detention powers are part of a risk management strategy relying on exceptional short-term measures, rather than a principled approach to combating terrorism within clear legal constraints.

A critical analysis of these powers from a non-discrimination perspective makes it not only possible to highlight these flaws, but also to thereby pave the way for a debate about anti-terrorism measures that is framed in terms of generally valid rules and principles rather than short-term utilitarian arguments—a debate, in other words, that is grounded in a culture of formalism and universalism, guided by Kant's categorical imperative.[190] This (re)turn to formalism, recently and most prominently advocated by Martti Koskenniemi for the international law field,[191] should not be seen as apolitical.[192] Rather, it is adopted as a strategy of constraining state power and protecting the weak. In Koskenniemi's words, "nothing has undermined formalism as a culture of resistance to power, a social practice of accountability, openness, and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it."[193] In many ways, such a use of formalism also borrows from the work of historian E.P. Thompson, who

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on the floor. No one has really had an opportunity to look at the bill to see what is in it since we have been out of our offices. The report has just come to us. It would be helpful if we would wait for some period of time so that we can at least review what we are voting on, but I guess that is not going to stop us, so here we are." 147 CONG. REC. H7179, H7200 (2001). The British Anti-Terrorism, Crime and Security Bill was pushed through the upper and lower houses with similar speed. The Commons had only sixteen hours to scrutinize the 129 sections and eight schedules; they failed to consider many important elements of the bill at all and did not impose a single amendment on the government. See the critical assessments by Lord Stoddart of Swindon, 629 PARL. DEB., H.L. (5th ser.) (2001) 1155 and the JOINT COMMITTEE ON HUMAN RIGHTS, FIFTH REPORT, ANTI-TERRORISM, CRIME AND SECURITY BILL: FURTHER REPORT, 2001–2002, H.L 51, 2001–2002 H.C. 420, para. 2, *available at* http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/35/3504.htm. The House of Lords was granted somewhat more time, but even there the bill completed all the stages in eight days. This led the Joint Committee on Human Rights to express concern at the fact "that Parliament is being given insufficient time to examine such an important piece of legislation" and to criticize the process as "not a proper or sensible way to make legislation." *Id.* para. 2.

190. Kant's first formulation of the categorical imperative reads as follows: "Act only in accordance with that maxim through which you can at the same time will that it should become a universal law." IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 31 (Mary Gregor ed. & trans., Cambridge University Press 1998) (1785).

191. KOSKENNIEMI, *supra* note 2, at 494–509.

192. Robert Cryer, *Déjà vu in International Law*, 65 MOD. L. REV. 931, 946 (2002).

193. KOSKENNIEMI, *supra* note 2, at 500.

similarly embraced the rule of law as a bulwark for the defense of popular rights.[194]

The political conflict over new anti-terrorism measures in the United Kingdom, which was triggered by the House of Lords' finding that the original detention powers violated the principle of non-discrimination, illustrates the point. The first post-September 11 anti-terrorism law, the ATCSA, had been passed with a comfortable majority[195] and without attracting great public attention. The limitation of the scope of its preventive detention powers to foreign terrorist suspects was a politically convenient way of avoiding a discussion of the fundamental issues raised by this most severe form of deprivation of liberty. This paucity of principled debate stands in stark contrast to the history of the Prevention of Terrorism Act 2005—the government's response to the Law Lords' ruling.

The proposed measures, which, in order to comply with the ruling, were made applicable to both foreign and British citizens, led to a major public debate on the balance between security and liberty and to "parliament's longest and sometimes rowdiest sitting for 99 years."[196] The two major opposition parties opposed the Home Secretary's authority to subject anyone suspected of terrorism involvement to control orders as a matter of principle, claiming that it violated central tenets of justice going back to the Magna Carta.[197] The Act was only passed after the government had made substantial concessions, in particular by providing for greater involvement of the judiciary in the control order process.

The extension of the scope of anti-terrorism powers to British citizens due to the House of Lords decision thus reshaped the debate in crucial ways. The discussants were forced to consider the possibility of the law being applied against themselves (or at least their constituents), and, as a consequence, the discussion became not only more substantive but now had to be articulated in terms of generally valid rules and principles. This shift towards formal legal rules resulted in a curtailment of the executive's powers: preventive detention was replaced with lesser forms of

194. E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 258–69 (1975).

195. *See* 375 PARL. DEB., H.C. (6th ser.) (2001) 404; JOINT COMMITTEE ON HUMAN RIGHTS, SIXTH REPORT, ANTI-TERRORISM, CRIME AND SECURITY BILL, 2003–2004 H.L 38, 2003–2004 H.C. 381, *available at* http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/38/38.pdf.

196. Patrick Wintour & Alan Travis, *The Longest Day*, GUARDIAN, Mar. 12, 2005, *available at* http://www.guardian.co.uk/guardianpolitics/story/0,,1436033,00.html.

197. *See, e.g.*, Hannah K. Strange, *Blair Rejects Compromise on Terror Bill*, UNITED PRESS INT'L, Mar. 2, 2005.

restrictions of liberty, which, in addition, are subject to greater judicial control.

The import of a culture of formalism should not be overestimated: universally applicable, non-discriminatory rules are not necessarily good rules. The new Prevention of Terrorism Act still raises a number of important human rights concerns.[198] But at least "a practice that builds on formal arguments that are available to all under conditions of equality"[199] can protect those in the political minority from being subject to the unrestrained power of the state.

198. *See, e.g.*, Office of the Commissioner for Human Rights, *supra* note 180, paras. 9–25 (detailing some of these concerns).

199. KOSKENNIEMI, *supra* note 2, at 501.