Daniel Moeckli. ***Human Rights and Non-discrimination in the 'War on Terror'.*** Oxford: Oxford University Press, 2008. Pp. xxvi, 270. £60. ISBN: 9780199239801.

Since 11 September 2001, countries across the world have adopted an enormous range of anti-terrorism laws with the potential to undermine even the most basic and long-established human rights. Fundamental principles such as *habeas corpus* and public trial before an independent and impartial tribunal have been thrown into question. Administrative detention without trial is no longer, in Justice John Paul Stevens's words, 'the hallmark of the totalitarian state', but already a reality in some democracies and under serious consideration in others.

In this insightful study, Daniel Moeckli argues that the post-11 September anti-terrorist regime rests on several assumptions. The terrorist threat can no longer be traced to a clearly defined organization, such as the IRA or the Red Army Faction, but emanates instead from a grouping simultaneously ubiquitous and shadowy which is said to threaten not only one particular state but the entire value system of the Western world. As this ill-defined group allegedly has the potential to conduct attacks with devastating consequences, governments feel increasingly impelled to take preventive measures to head off any possible threat. Yet since the threat cannot be associated with any particular context, profiles of potential terrorists have to be constructed along the lines of the civilizational challenge to the Western world from religious fundamentalism in which the terrorist threat is allegedly rooted. Moeckli argues that 'as a consequence, broad group characteristics that are believed to be indictors for an involvement in this challenge have become the central criteria for defining the targets of anti-terrorist measures'. However, the introduction of a legal regime which treats one group as inherently more likely to be terrorists than the population in general evidently raises the question whether such measures are compatible with the right to non-discrimination.

The author sets the scene for his study by tracing the creation after 11 September 2001 of special anti-terrorist legal regimes at the United Nations, regional, and national levels, drawing attention to a range of issues likely to endanger the protection of human rights ranging from the obligation on states under UN Security Council Resolution 1373 to establish terrorist acts as serious criminal acts without defining what constitutes a terrorist act to the extraordinary haste and limited scrutiny with which national legislatures adopted sweeping anti-terrorist laws. He argues that the new anti-terrorist legal regime was introduced for largely symbolic reasons and reflects a wider tendency in western democracies to 'govern through security'. The book then turns to explore the content of the human right to non-discrimination, arguing that the norm is firmly established in customary international law as well as in treaty law, at both the international and the regional levels; in Moeckli's view, the norm covers discrimination on grounds of race or ethnicity, religion or – crucially – citizenship or nationality.

Moeckli analyses the laws and law enforcement practices of Germany, the United

Kingdom, and the United States in four areas – executive detention, fair trial, enforcement of immigration laws, and use of police powers – in the light of the prohibition of discrimination. The author identifies a range of potentially discriminatory measures, such as part 4 of the UK Anti-Terrorism, Crime and Security Act 2001 which allowed indefinite detention without trial of foreign suspected terrorists who could not be deported or the creation of US Military Commissions to try non-US citizens who may be unlawful enemy combatants. In each area, the author sets out the relevant national laws and practice before considering what standard of review the courts have applied when hearing challenges to these norms, whether people in a comparable group to the group affected have been treated differently, and whether there is an objective and reasonable justification for the differential treatment. Having reviewed these four fields, Moeckli concludes that 'discrimination pervades the anti-terrorism efforts of all three states considered', albeit limited by the courts in cases such as *A v. Home Secretary*.[1]

Although a central part of Moeckli's thesis is that discrimination on grounds of nationality is clearly as unlawful as discrimination on grounds of race or religion, this approach to some extent overlooks the fact that states have long been reluctant to accept restrictions on their ability to discriminate on grounds of nationality. The author demonstrates by reference to Article 2 of the Universal Declaration, Articles 2(1) and 26 ICCPR, Articles 2 and 5 ICERD, and Article 14 of the European Convention, as well as customary law such as the *South West Africa* case,[2] that a right to non-discrimination exists. However, Moeckli's treatment of whether this right encompasses discrimination based on nationality rather than on race is very brief, referring only to an inconsistent jurisprudence of the UN Human Rights Committee and to a single case of the European Court of Human Rights.[3] Moreover, while the author notes that Protocol No. 12 to the European Convention containing a general prohibition on discrimination has been ratified neither by Germany nor by the United Kingdom, he does not engage with the fact that the Protocol has attracted only 17 ratifications in total from the 47 member states of the Council of Europe, making it by far the least accepted Protocol to the Convention. As Moeckli points out towards the end of his book, national legislation predating 2001 sometimes deliberately set out to preserve states' right to discriminate on grounds of nationality; section 19 of the UK Race Relations Act 1976, which allows the national authorities to discriminate on grounds of nationality but not race in carrying out immigration functions, is a clear example of this. Furthermore, while the author draws attention to Article 21 of the EU Charter of Fundamental Rights as including a 'free standing non-discrimination guarantee', it is notable that this provision omits any reference to nationality.

In this light, it is perhaps unsurprising that the author is able to demonstrate that laws concerning executive detention or enforcement of immigration laws are applied in a discriminatory manner depending upon nationality. In his analysis of the use of police powers, however, Moeckli demonstrates – using considerable empirical evidence – how the enormous discretionary powers conferred on the police in the wake of 11 September have been targeted selectively against particular ethnic groups. Statistics alone demonstrate that there is little objective and reasonable justification for the police identifying terrorist suspects on racial grounds. The German *Rasterfahndung* – a data mining method whereby the police search personal data sets of public bodies or private agencies according to the presumed characteristics of suspects – led to the processing between 2001 and 2005 of some 8.3 million people and the identification of 32,000 suspects, but has not led to the detection of a single terrorist. Similarly, stop and searches under anti-terrorism legislation in the UK, under which people of black or Asian origin are some three times more likely to be stopped than white people, have

[1] [2005] UKHL 71.

[2] [1966] ICJ Rep 6.

[3] App. No. 17371/90, *Gaygusuz v. Austria*, 23 EHRR (1996) 364.

recorded a success rate of 0.06 per cent. Such practices are not only illegal, unsuitable, and ineffective, but through producing a natural sense of alienation and resentment highly counter-productive in practice.

Even if the legal nature of the norm requiring non-discrimination on grounds of nationality is less clear-cut than the author contends, this does not detract from the power of this book's conclusions. Moeckli demonstrates that discrimination – whether between citizens purely on grounds of race or religion or between citizen and foreigner ostensibly on grounds of nationality but in reality on racial or religious grounds – lies at the heart of the anti-terrorist policies of the three states under consideration. Since the 'war on terror' will be temporally infinite and spatially global, the only limitation which has made the creation of extraordinary governmental anti-terrorist powers acceptable to the majority in the states under study is the assurance that these powers will not be applied to them. Indefinite detention without trial, trial before a military tribunal, or frequent police checks can be accepted by the public so long as these powers apply only to foreign nationals or ethnic minorities; indeed, 'the clearer the distinction between "us" and "them", the greater the acceptance of these measures by the public becomes . . .. [T]he construction of a "suspect community" is not only a consequence but also a fundamental prerequisite of the war on terror.' Human rights are intrinsically universal. Moeckli's invaluable study demonstrates that discriminatory anti-terrorist laws, through stigmatizing a particular group as a suspect community outside the protection of international human rights law, pose a grave challenge to the very concept of the universality of human rights itself.

Toby King

Email: Tobias.KING@ec.europa.eu

European Commission[*]

doi: 10.1093/ejil/chq081

[*] The views expressed are wholly personal and do not represent the views of the European Commission.