EXTRAORDINARY MEASURES – A COMPARATIVE APPROACH TO CRAFTING A NEW LEGAL FRAMEWORK FOR PREVENTIVE DETENTION OF SUSPECTED TERRORISTS

BY

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ABSTRACT

Preventive detention as a counter-terrorism tool is fraught with conceptual and procedural problems and risks of misuse, excess and abuse. Many have debated the inadequacies of the current legal frameworks for detention, and the need for finding the most appropriate legal model to govern detention of terror suspects that might serve as a global paradigm. This dissertation undertakes to fill that analytical gap by analyzing and comparing in depth the laws relating to detention of terror suspects in a sample of seven countries, detention under the LOAC, as well as the principles relating to detention in five general human rights treaties. The sample highlights some conceptual problems and demonstrates that the procedures governing the use of preventive detention are deficient in each framework. These deficiencies often have an adverse and serious impact on the human rights of detainees, thereby delegitimizing the use of preventive detention. In order to halt these abuses in the many countries that use preventive detention, the legal framework governing detention must be properly tailored to guarantee the human rights of detainees in a meaningful way, without adversely compromising counter-terrorism tools.

This study is concerned with the phenomenon of preventive detention, irrespective of how it is labeled. For the purposes of the analysis that follows, “preventive detention” refers to detention before or without charge for the purpose of preventing a future terrorist act. This means detention in three types of situation: (1) when a person is arrested on suspicion of being about to commit a terrorist offense. For example, he is suspected of having carried out some early steps of terrorist activity but has not done any sufficiently overt act to enable police to make an immediate charge. The person may
detained for incapacitation and/or interrogation purposes; (2) when a person is detained under immigration law for security reasons; and (3) when a person who cannot be criminally prosecuted because of issues such as the danger of compromising sources, is detained for security reasons.

This dissertation (1) argues that the three main legal frameworks by which preventive detention can be evaluated are not tailored to the current global terrorist threat, and do not provide adequate protections for the human rights of individuals; (2) shows that very few common core principles can be extracted from the analysis of domestic detention laws, the LOAC and the detention provisions in five general human rights treaties; (4) explains why there is a need for a new set of common core principles; (4) advocates the placing of human rights concerns at the heart of a framework for detention of terror suspects; and (5) recommends a new approach, by suggesting key minimum criteria based mainly on international human rights law principles and some best practices drawn from the domestic laws. These minimum criteria are aimed at curing the current flaws and deficiencies in the law and could form the basis for crafting fundamental core principles. They are designed to give a base line of guidance to the many countries that choose to use the tool of preventive detention.

KEY WORDS

Preventive detention, terror suspects, comparative law, international human rights law, legal framework to detain terror suspects
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A1 Introduction

This Section analyzes detention laws in the United Kingdom, Australia, Canada, India, Israel, France and the United States, both from the law enforcement and law of armed conflict (LOAC) perspective, where applicable. The United Kingdom is the chosen starting point for the analysis that follows, for reasons both historic and modern. The laws of many of the countries surveyed here have their foundations in English common law, either because they are former colonies, or because they have chosen to draw on English law as their source. During the British Empire, emergency legislation that included detention was enacted in many colonies and territories to deal with terrorism and insurgency. In numerous countries that legislation has been built on, long after the British departed.

Chapter 2 evaluates preventive detention in the United Kingdom. The definition of terrorism in the United Kingdom’s Terrorism Act of 2000 had an enormous influence on post 9/11 anti-terrorism laws in many countries, including Australia, Canada, Hong Kong and South Africa. Each of those countries has adapted the definition of terrorism
in the light of their domestic history, law and politics. The examples of Australia, Canada and India are examined in Chapter 3, and Israel is the subject of Chapter 4. France in Chapter 5 gives an example of the law enforcement model in a civil law country. The domestic law of the United States is discussed in Chapter 6, and the U.S. use of LOAC is the subject of Chapter 7. In A3, all the laws analyzed in A2 are evaluated to see what, if any, commonality exists between them, that can be used in the crafting of common core detention principles.

In order to assess the proportionality of counter-terrorism measures generally and preventive detention in particular, it is essential to understand by way of background the current terrorist threat in each of the countries surveyed in this dissertation. Each Chapter begins with a discussion of the current terrorist threat, that particular country’s counter-terrorism strategy and continues with a description and analysis of what constitutes preventive detention and how it operates.

As a starting point from a global perspective, in 2011 over 10,000 terrorist attacks occurred in some 70 countries, causing almost 45,000 casualties and over 12,500 fatalities. In 2012, 6,771 terrorist attacks occurred in 85 countries, causing over 21,600 casualties and over 11,000 fatalities. More than 1,280 were kidnapped or taken hostage.

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Europol report that in Europe in 2012 there were 219 attacks, with 17 fatalities, although the British Independent Reviewer of Terrorist Legislation has been critical of the reliability of these statistics. In fact, available statistics for terror attacks since 2001 vary considerably from source to source. The most conservative reading of the statistics suggests that in the last twelve years the number of global terrorist attacks appears to have escalated almost threefold, despite the proliferation of counter-terrorism laws and policies.

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6 Europol TE-SAT 2013, EU TERRORISM SITUATION AND TREND REPORT, ¶1.1, (European Police Office, 2013). The majority of these attacks were in France and Spain.  
8 E.g., it appears from available data that in 2001, according to U.S. Department of Justice data, there were 355 international terror attacks killing 3,295 and injuring 2,283, whereas Rand documents 1,732 international and domestic terror attacks in 2001, killing 4,571 and injuring 6,403, see Statistics on Terrorism, Johnston’s Archive, (May 6, 2013), http://www.johnstonsarchive.net/terrorism/intlterror.html; and Matthew Lee & Lolita C. Baldor, Terrorists Statistics Reports Assigned to Academic Group, Hufffington Post, (May 21, 2013), http://www.huffingtonpost.com/2013/05/21/terrorism-statistics-reports_n_3315141.html. They provide data suggesting that one of the worst years since 2001 was 2006. They show that according to U.S. Department of State statistics, there were 14,367 attacks killing 20,453 and injuring 38,283, but according to Rand data there were 4,961 attacks, killing 9,175 and injuring 16,006. One reason for the variation in data may relate to how terrorism is interpreted in Afghanistan, Iraq and Israel, see Statistics on Terrorism, Johnston’s Archive. However, the U.S. methodology may be changing, according to Matthew Lee & Lolita C. Baldor, Terrorists Statistics Reports Assigned to Academic Group, Hufffington Post, (May 21, 2013), http://www.huffingtonpost.com/2013/05/21/terrorism-statistics-reports_n_3315141.html.  
9 Statistics on Terrorism, Johnston’s Archive, supra, note 8. The most conservative estimate of domestic and international terror attacks is found in Rand data, showing is 1,732 attacks in 2001, with 4,961 attacks in 2006, whereas United States National Counterterrorism Center (U.S.N.C.T.C) figures show 355 attacks in 2001 and 14,367 attacks in 2006. According to a 2012 report of the U.S.N.C.T.C., (the only source for that year), over 10,283 terrorist attacks occurred in 2011 in some 70 countries, causing almost 45,000 casualties and over 12,500 fatalities. 75% of the 10,283 involved attacks on non-combatants, i.e. civilians in Iraq, Afghanistan and Pakistan, see Country Reports on Terrorism 2011, supra note 4. In 2012, 6,771 terrorist attacks occurred in 85 countries, causing over 21,600 casualties and over 11,000 fatalities. More than 1,280 were kidnapped or taken hostage. See Country Reports on Terrorism 2012, supra note 5.
CHAPTER 1 – THE PROBLEM

1.1 Introduction

The catastrophic terror attacks in the United States on September 11, 2001 ("9/11") were the trigger for many countries to re-evaluate their counter-terrorism strategies and laws. As a result, many countries adopted stringent counter-terrorism legislation in the last twelve years.¹ Notwithstanding this, the number of terrorist attacks around the world appears to have escalated at least threefold.²

As terrorists do not appear to be fully deterred by the prospect of arrest, trial and punishment after an attack, or even of death in the course of an attack,³ many states have resorted to more preemptive counter-terrorism methods to prevent terrorist acts, such as targeted killing, surveillance and preventive detention. These methods could be termed “necessary evils,” and each of them may be effective in forestalling terrorist activity to a lesser or greater extent, but often at a high price involving the sacrifice of individual human rights.

The focus of this dissertation is to evaluate preventive detention as a tool to forestall terrorist attacks. Preventive detention is used in at least forty countries, which between them are home to approximately 70% of the world’s population.⁴ However,

¹ The escalation in the number of terrorist attacks can of course be attributed to different reasons, including global conditions, and it cannot be known how many more attacks might have taken place without all the lawmaking and preventive activity. Indeed, the “lack of emphasis on measuring effectiveness” of counter-terrorism methods since 9/11 has been described as “astounding.” See SUSAN DONKIN & SIMON BRONITT, Critical Perspectives on the Evaluation of Counter-terrorism Strategies. Counting the Costs of the “War on Terror’ in Australia, in COUNTER-TERRORISM, HUMAN RIGHTS AND THE RULE OF LAW, 171 (Ancieto Masterrer & Clive Walker, eds.), Edward Elgar Publishing Limited, 2013).

² JOHNSTON'S ARCHIVE, STATISTICS ON TERRORISM, (May 6, 2013), http://www.state.gov/j/ct/rls/crt/2012/210017.html; and see Introduction to Section A infra.


⁴ See Appendix 1 for list of countries.
preventive detention as a counter-terrorism tool is fraught with conceptual and procedural problems and risks of misuse, excess and abuse. It is sometimes necessary to use it to save lives, but it has numerous drawbacks. Many scholars have debated the inadequacies of the current legal frameworks for detention, and the need for finding the most appropriate legal model to govern detention of terror suspects that might serve as a global paradigm. However, to date no one has examined together and comprehensively detention under the law enforcement model,\(^5\) the law of armed conflict (LOAC) model\(^6\) and the international human rights model\(^7\) and compared each one against the others.

This dissertation undertakes to fill that analytical gap by analyzing and comparing in depth the laws relating to detention of terror suspects in a sample of seven countries, detention under the LOAC, as well as the principles relating to detention in five general human rights treaties. The sample highlights some conceptual problems and demonstrates that the procedures governing the use of preventive detention are deficient in each framework. These deficiencies often have an adverse and serious impact on the human rights of detainees, thereby delegitimizing the use of preventive detention. In order to halt these abuses in the many countries that use preventive detention, the legal framework governing detention must be properly tailored to guarantee the human rights of detainees in a meaningful way, without adversely compromising counter-terrorism tools.

I argue that detention can be a valuable tool in appropriate circumstances to forestall terror attacks, provided certain safeguards are in place. Only a close and detailed

\(^{5}\) The law enforcement model treats terrorism as a crime in accordance with the domestic law of states. Persons are arrested and detained in circumstances permitted by the criminal law.

\(^{6}\) The LOAC model applies in time of war. Detentions are designed to prevent combatants returning to the battlefield and are tied to the duration of hostilities.

\(^{7}\) The international human rights law model is drawn from five general international human rights treaties that purport to underpin the domestic detention laws and arguably how detentions are conducted under LOAC.
analysis of the elements and practical working of preventive detention in different countries and the relevant international conventions will provide the clues to finding the fundamental elements needed for crafting an acceptable legal framework.

Each of the seven countries examined has independently developed its counter-terrorism laws, and specifically its detention laws, in response to particular threats in ways that reflect local domestic history, custom and culture. Unsurprisingly, those domestic laws may not be tailored to deal with the current and continuing global terrorist threat. Neither is the law of armed conflict designed to detain terror suspects.

The potential reach of preventive detention to many people signals the importance and necessity of ensuring that this tool is used in the most rights-compliant way, without compromising the essential counter-terrorism work of law enforcement authorities. And the more it is used within a human rights-compliant framework and in accordance with the rule of law, the less likely it is to attract complaints that it is unfair, immoral and contrary to principles of justice.

This dissertation (1) argues that the three main legal frameworks by which preventive detention can be evaluated are not tailored to the current global terrorist threat, and do not provide adequate protections for the human rights of individuals; (2) shows that very few common core principles can be extracted from the analysis of domestic detention laws, the LOAC and the detention provisions in five general human rights treaties; (4) explains why there is a need for a new set of common core principles; (4) advocates the placing of human rights concerns at the heart of a framework for detention of terror suspects; and (5) recommends a new approach, by suggesting key minimum

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8 This approach is discussed to a limited extent by Monica Hakimi, *International Standards for Detaining Terror Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 40 CASE W. RES. J. INT'L L. 593,
criteria based mainly on international human rights law principles and some best practices drawn from the domestic laws. These minimum criteria are aimed at curing the current flaws and deficiencies in the law and could form the basis for crafting fundamental core principles. They are designed to give a base line of guidance to the many countries that choose to use the tool of preventive detention.

1.2 Preventive detention

1.2.1 Conceptual issues

Preventive detention is not a novel concept: it long pre-dates 9/11 in many countries of the world. For example, it was first known in an elemental way in Magna Carta and its modern form in the United Kingdom may date from its use in India in the interests of national security in the mid-nineteenth century. In the United States, preventive detention appears to date from 1786 when the Massachusetts legislature passed a law permitting preventive detention in order to deal with a rebellion.

The concept of preventive detention is extremely problematic because people are treated in the same way as either persons on remand post-charge and pre-trial, or as convicted criminals, merely because some level of suspicion exists that they might commit a terrorist act at some time in the future. Yet there are times when detention may be the only means to remove a potential terror suspect from the streets.

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640 (2009), (“An alternative legal framework already exists under human rights law in the form of administrative detention. Yet in order for administrative detention to fill the void for a sustainable detention regime in the fight against terrorism, the law in this area must be further developed.”).

9 Magna Carta, §39 “No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.” (U.K.). (1215). See also PREVENTIVE DETENTION AND SECURITY LAW, A COMPARATIVE SURVEY, 5 (Andrew Harding & John Hatchard, eds.), (Kluwer Academic Publishers, 1993): “many of the provisions of Magna Carta presuppose the occurrence of irregular detentions at the behest of the King.”


One very important rationale for detention is incapacitation of terror suspects and disrupting terror plots. Indeed, “the most natural inclination of a government facing threats of terrorism is to incapacitate suspected terrorists: if someone has the will and capability to commit terrorism, then keep that person off the streets.”12

Another rationale for detention may be to facilitate interrogation of a suspect in isolation before he is charged and entitled to rights to silence and to consult counsel.13

The scope of those rights and the timing of when the rights apply differ from country to country. One reason why the Bush Administration embraced the LOAC approach of treating suspects as enemy combatants may have been because it thought suspects held under LOAC without charge would not have these due process rights.14

Nonetheless, this is a counter-terrorism tool that carries a grave risk of abuse, because of conceptual and procedural flaws relating to its use. While many think preventive detention is a necessary and useful counter-terrorism tool, others have expressed legitimate concerns. For example, David Cole encapsulates the problem that in the counter-terrorism context preventive detention relates to future conduct, which is impossible to predict with complete accuracy, and where there is a risk of detaining innocent people.15 This is “inconsistent with basic notions of human autonomy and free

12 MATTHEW WAXMAN, Administrative Detention, 51 in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM, (Benjamin Wittes, ed.) (Brookings Institution Press, 2010).
The prediction problem is not unique to the terrorism context – it applies equally to detention of persons after they have served a prison sentence, such as sex offenders, when such post-sentence incarceration is said to be therapeutic and not punitive.\(^\text{17}\)

Some commentators approach the problem of preventive detention by discussing the balance (or lack of balance) between liberty of the individual and security of the people as a whole.\(^\text{18}\) Many scholars have offered suggestions for different models to be used as a framework for preventive detention, such as within the context of administrative detention,\(^\text{19}\) investigative detention,\(^\text{20}\) pre-charge detention,\(^\text{21}\) or security detention.\(^\text{22}\) These models will be discussed throughout this dissertation.

As the review of current practice reveals, preventive detention is a “fact of life.”\(^\text{23}\) It has its uses, and it has its flaws. It is not a perfect counter-terrorism tool by any means,

\(^{16}\) Id.
\(^{17}\) Christopher Slobogin, Preventive Detention in Europe, the United States and Australia, in PREVENTIVE DETENTION: ASKING THE FUNDAMENTAL QUESTIONS, 31-54 (Patrick Keyzer, ed., Intersentia, 2013). See Kansas v. Hendricks, 521 U.S. 346, 358 (1997), where a person who is ‘dangerous beyond [his] control’ can be detained if there is also a prediction of dangerousness. In Kansas v. Crane, 534 U.S. 407 (2002), the Court held that lack of control merely required proof of serious difficulty in controlling behavior. The bar can be as low as personality disorders, (Slobogin at 39). See also M v. Germany, [2010] ECHR No. 19359/04 and Fardon v. Australia, HRC UN Doc CCPR/C/98/D1629/2007 (May 10, 2010).
\(^{18}\) See e.g. Monica Hakimi, A Functional Approach to Targeting and Detention, 110 Mich. L. Rev. 1365, 1409 (2012): “As the liberty costs increase, the benefits of containing the threat must be more substantial to remain proportional;” Brendan Gogarty, Benedict Bartl, & Patrick Keyzer, The Rehabilitation of Preventive Detention, in PREVENTIVE DETENTION: ASKING THE FUNDAMENTAL QUESTIONS, 111 (Patrick Keyzer, ed., Intersentia, 2013): “the right to personal liberty is not absolute, with the state having a legitimate right to ensure public safety.”
\(^{19}\) MATTHEW WAXMAN, Administrative Detention, supra note 12; Andrew McCarthy, We Need an Administrative Detention Law, National Review Online, (Sep. 21, 2009), [http://www.nationalreview.com/articles/228277/we-need-administrative-detention-law/andrew-c-mccarthy](http://www.nationalreview.com/articles/228277/we-need-administrative-detention-law/andrew-c-mccarthy
\(^{20}\) See e.g. DAN STIGALL, COUNTERTERRORISM AND THE COMPARATIVE LAW OF INVESTIGATIVE DETENTION, 160 (Cambria Press, 2009).
\(^{21}\) CLAIRE MACKEN, COUNTER-TERRORISM AND DETENTION OF SUSPECTED TERRORISTS, (Routledge, 2011).
\(^{23}\) PREVENTIVE DETENTION AND SECURITY LAW – A COMPARATIVE SURVEY, supra note 9, at 2.
as will be seen throughout this work, and it “is not susceptible to absolute answers.”

This dissertation does not make any recommendations about whether any state should, or should not opt for preventive detention as a counter-terrorism tool. Flaws and deficiencies in the three main frameworks will be identified and addressed. If countries elect to use preventive detention, guidance is suggested on how to employ this tool in a manner that is protective of human rights, without significantly compromising the effectiveness of counter-terrorism efforts.

1.2.2 Terminology issues

This study is concerned with the phenomenon of preventive detention, irrespective of how it is labeled. For the purposes of the analysis that follows, “preventive detention” refers to detention before or without charge for the purpose of preventing a future terrorist act. This means detention in three types of situation: (1) when a person is arrested on suspicion of being about to commit a terrorist offense. For example, he is suspected of having carried out some early steps of terrorist activity but has not done any sufficiently overt act to enable police to make an immediate charge. The person may detained for incapacitation and/or interrogation purposes; (2) when a person is detained under immigration law for security reasons; and (3) when a person who cannot be criminally prosecuted because of issues such as the danger of compromising sources, is detained for security reasons.

Preventive detention is a term that has been used by different countries and different scholars in several contexts. For example, it variously describes detention

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25 Preventive detention is also known as “preventative detention” in Australia, or “administrative detention” in Israel.
before charge, detention without charge or trial, detention pending trial, and detention for investigation purposes.

Some national laws also currently permit detention of persons perceived as dangerous to others in a variety of situations. These include persons accused of criminal offenses awaiting trial, persons accused of immigration violations awaiting deportation, persons who have served a sentence but pose a continuing risk, and persons with mental disorders who pose a risk to themselves or others. The common denominator is that this type of detention is security based.

Sometimes, confusingly, countries give one label to detention, when in fact detention is imposed for some additional or different purposes. For example, the United Kingdom permits detention without charge of terror suspects for fourteen days. The rationale is ostensibly to amass sufficient evidence to charge the suspect. Whilst this is true, another implicit purpose of this detention is simply to take a suspected terrorist of the street, i.e. to incapacitate a suspect or disrupt potential plots.

United States law permits the detention of persons who have done nothing other than witness an alleged crime, if there is probable cause to believe that they have relevant

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26 See, e.g. PREVENTIVE DETENTION AND SECURITY LAW, A COMPARATIVE SURVEY, supra note 9 at 4-5: “a situation where a person is detained for reasons either political or connected with national security or public order or safety”; DAN E. STIGALL, COUNTERTERRORISM AND THE COMPARATIVE LAW OF INVESTIGATIVE DETENTION, supra note 20, “investigative detention”; PREVENTIVE DETENTION, 1 (Stanislaw Frankowski & Dinah Shelton, eds.), (Kluwer Academic Publishers, 1992), “pre-trial detention”.

27 See e.g. David Cole, Out of Shadows: Preventive Detention, Suspected Terrorist, and War, supra note 15, at 700. Also see Chapter 6 infra.

28 Preventive detention may have been used in London to prevent terror attacks during the Olympics in 2012, see DAVID ANDERSON Q.C., REPORT OF THE INDEPENDENT REVIEWER ON THE OPERATION OF THE TERRORISM ACT 2000 AND PART 1 OF THE TERRORISM ACT 2006, THE TERRORISM ACTS IN 2012, ¶3.14(b) (Jul. 2013), https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/07/Report-on-the-Terrorism-Acts-in-2012-FINAL_WEB1.pdf (“the 2013 Report”): “There were a number of disruptions to extremist networks before the Games, including arrests, some of which attracted media attention. Together with high levels of visible protective security, this may have served as a deterrent to other extremists, as well as removing potential threats to the Games.” Also see Chapter 2 infra.
testimony and would not appear of served with a subpoena. In the aftermath of 9/11 the “material witness” laws were frequently used as a pretext to preventively detain suspected terrorists.\textsuperscript{29} In a number of countries, including Australia, Canada, the United Kingdom and the United States, immigration law is frequently used for counter-terrorism purposes to preventively detain non-national suspected terrorists.\textsuperscript{30}

Preventive detention is also permitted under the LOAC, but a number of extremely complicated issues have emerged from the U.S. detention of suspected terrorists at Guantánamo and in Afghanistan. In the case of wars between two or more states, or certain types of protracted internal conflicts involving the state and organized armed groups,\textsuperscript{31} detention is governed to a limited extent by the Geneva Conventions.\textsuperscript{32} As discussed in Section 1.5 below, the LOAC as set out in the Geneva Conventions is not tailored to address contemporary transnational terrorism, which now can involve random and intermittent attacks anywhere in the world by non-state actors. These sporadic attacks may continue intermittently and indefinitely. LOAC detention does not fit neatly into the category of preventive detention that is the main subject of scrutiny in this dissertation. However, Israel’s references to LOAC in its detention cases, and the United States’ use of LOAC to detain terror suspects captured overseas are relevant and important within

\textsuperscript{29} See Chapter 6 \textit{infra}.
\textsuperscript{30} See Chapters 2, 3 and 6 \textit{infra}.
the overall discussion of preventive detention of terror suspects. These are discussed in Chapters 4 and 7.

1.3 Terrorism

1.3.1 Lack of agreed definition

It is important to understand what the tool of preventive detention is aimed at preventing, as well as its context and limits. In the absence of an internationally agreed definition of terrorism, the following working definition is adopted for the purposes of this discussion: the unlawful use, or threat, of violence by non-state actors, against persons, property, critical infrastructures or key resources, intended to intimidate or coerce a government, or all or part of the general public, in furtherance of political, religious or ideological objectives.

To date at least 109 variations of the term can be found, together with a proliferation of scholarly literature on the subject. Not only is there no international

33 See Al-Sirri v. Secretary of State for the Home Department (United Nations High Commissioner for Refugees intervening), [2013] 1 AC 745 (U.K.) at ¶37, “there is as yet no internationally agreed definition of terrorism, [and] no comprehensive international Convention binding Member States to take action against it...”
34 This working definition is specifically limited to activities by individuals or groups that are not endorsed by a State.
36 See e.g. BRUCE HOFFMAN, INSIDE TERRORISM, supra note 35, at 40, terrorism, is “the deliberate creation and exploitation of fear through violence in the pursuit of political change;” BEN SAUL, DEFINING TERRORISM IN INTERNATIONAL LAW, 66 (Oxford University Press, 2006); “terrorism can be deductively defined as follows: (1) any serious, violent, criminal act intended to cause death or serious bodily injury, or to endanger life, including acts against property; (2) where committed outside an armed conflict; (3) for a political ideological, religious, or ethnic purpose; and (4) where intended to create extreme fear in a person, group, or the general public, and (a) seriously intimidate a population or part of a population, or (b0 unduly compel a government or international organization to do or to abstain from doing any act. (5) Advocacy, protest, dissent or industrial action which is not intended to cause death, serious harm, or serious risk to public health or safety does not constitute a terrorist act;” MARTHA CRENSHAW, EXPLAINING TERRORISM: CAUSES, PROCESSES AND CONSEQUENCES, 1-32 (Routledge, 2010).
consensus on the meaning of terrorism: in some countries such as the United States, no single national agreement of a terrorism definition exists, with some twenty-two variations of the term.

Why is it so important to have a definition of terrorism? Lord Carlile of Berriew Q.C. writes that the definition “is of real practical importance. It triggers powers, as well as contributing to the description of offences.” Ben Saul comments that it is important to define terrorism because the term has legal consequences.

One result of the lack of agreement internationally is that some countries have expanded their definitions of terrorism in domestic law, in some cases with “vague, unclear or overbroad definitions of terrorism,” which have adversely affected the exercise of some fundamental freedoms.

For example, the United Kingdom has one of the broadest definitions of terrorism, including the use or threat of action, instigation of or preparation for action, and even

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39 Lord Carlile of Berriew Q.C., Independent Reviewer of Terrorism Legislation, The Definition of Terrorism, 6 ¶12, Cm. 7052, (Mar. 2007).
40 Ben Saul, Defining Terrorism in International Law, supra note 36, at 5: “Defining terrorism would help to confine the term and prevent its abuse. The absence of a definition enables States to unilaterally and subjectively determine what constitutes terrorist activity, and to take advantage of the public panic and anxiety engendered by the designation of conduct as terrorist to pursue arbitrary and excessive counter-terrorism responses.”
43 Id. Also see Ben Saul, Legislating from a Radical Hague: the United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism, LEIDEN J. INT’L L. 2011 24(3) 677, 685: “many states utilized the authority of the resolution [1373] to define terrorism to suit their own political purposes and to camouflage assaults on fundamental rights, as well as to deviate from procedural protections ordinarily enjoyed by suspects in criminal proceedings or other law-enforcement settings.”
44 Terrorism Act 2000 c.11, §1 (U.K.), and see Chapter 2.
glorification of terrorism.\footnote{\textit{Terrorism Act 2006, c.11, §2, (U.K.) and see Chapter 2.}} In October 2013, in \textit{R. v. Gul}, in the course of holding that the statutory definition of terrorism includes any or all military attacks by a non-state armed group against any or all state or inter-governmental organization armed forces in the context of a non-international armed conflict, the U.K. Supreme Court expressed concerns about the breadth of the definition of terrorism and its impact on counter-terrorism measures, including detention.\footnote{\textit{R. v. Gul, [2013] UKSC 64, ¶¶29-40, 63-64 (U.K.) This case is analyzed in detail in Chapter 2, and non-international armed conflicts are discussed in Chapter 7.}}

The broader the definition of terrorism, the more opportunity there is for governments to preventively detain terror suspects for offenses that lie far from core terrorist activity as described in the working definition above. For example, in Saudi Arabia, a new penal law enacted on December 16, 2013 “defines terrorism as ‘disturbing public order,’ ‘endangering national unity,’ and ‘defaming the state or its status,’ among other endeavors. A criminal procedure law change that came into effect December 6 legalizes indefinite detention of prisoners without charge or trial.”\footnote{\textit{Lori Plotkin Boghardt, \textit{Saudi Arabia: Outlawing Terrorism and the Arab Spring}, Policy Watch 2187, WASH. INSTITUTE FOR NEAR EAST POLICY (Dec. 27, 2013), https://www.washingtoninstitute.org/policy-analysis/view/25640.}} India permits preventive detention for terrorist activity that includes the causing of “damage to the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin or of any other material.”\footnote{\textit{Unlawful Activities (Prevention) Act, 2012 No. 3 (2013), §4 (India) and see Chapter 3.}} Thus a uniform agreed definition of preventive detention is essential to ensure that its scope and use are confined within acceptable legal parameters. The guidance in Chapter 12 is designed to limit preventive detention to use within the scope of the above working definition.
1.3.2 International counter-terrorism measures after 9/11

Views differ as to when contemporary terrorism began. Since the 1970s a number of countries enacted measures to combat domestic as well as international terrorism, but the catastrophic terrorist attacks in the United States on September 11, 2001 (“9/11”) “threw a wrench into the works – rattling, then redefining, not only our critical distinctions of law between peace and war, but also our very conception of the rule of law when we are in danger at home.” The response to 9/11 was “an unprecedented global phenomenon…. All countries responded in a manner that reflected their own particular histories and legal, political and social cultures.” Several of the measures taken allegedly in response to 9/11 have been extremely controversial: in particular preventive detention; rendition, targeted killing and coercive interrogation techniques.

United Nations Security Council Resolution 1373, issued within weeks of 9/11, required member states to take appropriate steps to prevent acts of terrorism, funding and support of terrorists and acts of terrorism. This Resolution, which does not contain a definition of terrorism and does not mention the role of human rights, was the trigger or excuse for many member states to introduce new counter-terrorism policies, laws and

50 E.g. France, Spain, Germany, India, the United Kingdom, as described in Chapters 2, 3 and 5 infra.
51 Gabriella Blum & Phillip B. Heymann, Laws, Outlaws And Terrorists, xii (MIT Press, 2010).
53 Many of the measures including preventive detention actually pre-date 9/11.
54 U.N. Doc. S/RES/1373 (Sept. 28, 2001), (e.g., ¶2b decides that member states shall “take the necessary steps to prevent the commission of terrorist acts”).
measures.\footnote{KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM, supra note 52, at 2-3.} Some laws were innovative,\footnote{An example of an innovative measure was the crime of glorifying terrorism that was introduced in the United Kingdom, Terrorism Act, 2006, supra note 45, at §1, (U.K.).} but many measures built on and expanded existing legislation.\footnote{E.g. increasing powers of surveillance.} Other laws were new in the sense that they might not have been in use immediately before 9/11, or they might have been used for a purpose other than counter-terrorism.\footnote{E.g., where bail is refused in general criminal cases.}

In 2003, the U.N. Security Council repeated the call for states to prevent terrorism, but required states to “ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”\footnote{UN Doc. S/RES/1456, ¶6, (adopted Jan. 20, 2003).} The Security Council also created the Counter-Terrorism Committee to monitor implementation of counter-terrorism measures.\footnote{UN Doc. S/RES/ 1373, supra note 54, at ¶6.}

In 2006 the U.N. General Assembly adopted a resolution that urged states to protect human rights whilst countering terrorism,\footnote{UN Doc. A/RES/60/158, (Feb. 28, 2006).} and later that year, member states adopted the United Nations Global Counter-Terrorism Strategy,\footnote{UN Doc. A/RES/60/288 (Sep. 20, 2006). Also see KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM, supra note 52, at 67-70.} which included a list of measures to prevent and combat terrorism as well as measures to “ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.”\footnote{UN Doc. A/RES/60/288, supra note 62, at §IV.}
A number of regional international frameworks were also created for combating terrorism. On September 21, 2001 representatives of the Organization of American States convened in Washington D.C. and resolved *inter alia* to work together to combat terrorism and draft an Inter-American Convention against Terrorism. The Convention was adopted on March 6, 2002 and entered into force on October 7, 2003.

The Council of Europe adopted a Framework Decision on Combating Terrorism in June 2002. This prescribed that certain types of offenses should be designated as terrorist offenses, whilst at the same time reminding member states that fundamental rights and freedoms had to be respected. In 2005 the European Union published its Counter-Terrorism Strategy, which had at its heart four pillars: prevent; protect; pursue; and respond.

1.3 The effect of many different laws

The result of all this activity is a cornucopia of different laws and regulations: some criminalizing various activities; and others providing tools to combat terrorist activity, with greater co-operation between law enforcement authorities across national borders. Although preventive detention had been in use to forestall terror attacks in some countries prior to 9/11, such as the United Kingdom, India and Israel, other countries,

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64 Some efforts pre-dated 9/11. For example, the Organization of American States established the Inter-American Committee Against Terrorism in 1999 and its purpose was to "develop cooperation to prevent, combat, and eliminate terrorist acts and activities." OEA/Ser. P AG/RES. 1650 (XXIX-O/99) (Jun.7, 1999).


such as Australia, and the United States (via the law of armed conflict)\textsuperscript{69} also turned to preventive detention in one form or another. This dissertation examines the detention laws of a number of countries, together with relevant provisions of five general international human rights treaties.\textsuperscript{70} It also highlights how the law of each country surveyed has been framed not only by its history and experience with combating terrorism, but also by long-standing legal systems, institutional conventions and domestic norms.\textsuperscript{71}

The laws and tools differ from country to country, as one would expect. The laws may differ as to what constitutes an act of terrorism, what grounds authorities must have to arrest and detain suspects, and what tools are available to prevent terror attacks. Furthermore, from the civil liberties perspective, due process, speech and association rights vary considerably from place to place.

The flaws and deficiencies in due process rights are best illustrated by considering the following hypothetical example that is based on, and expands on some of the facts of the 2006 transatlantic liquid bomb plot.\textsuperscript{72} The purpose of the example is to give a preview

\begin{footnotesize}
\textsuperscript{69} As discussed in Chapter 6, the United States had used certain forms of preventive detention long before 9/11 – e.g. in detention pending trial, material witness laws, detention of sex offenders, civil commitment and quarantine.


\textsuperscript{71} \textit{Frank Foley, Countering Terrorism in Britain and France}, 327, (Cambridge University Press, 2013).

\textsuperscript{72} Duncan Gardham, \textit{Airline bomb plot: investigation 'one of the biggest since WW2,'} \textit{The Telegraph}, (Sep. 8, 2009), \url{http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/6152185/Airline-bomb-plot-investigation-one-of-biggest-since-WW2.html}; Duncan Gardham, \textit{Suicide bombers convicted at end of}
of the analysis that follows in subsequent chapters, which reveals a number of issues that
detention law purports to address, but does not do so adequately, or at all.

1.4 Hypothetical example

Following a tip-off from a confidential informant, British customs (border)
authorities at Heathrow Airport find a very large number of batteries in the luggage of a
British national, (“the Planner”). They let him go on his way, but inform the British
security service MI5, who place the Planner under surveillance. After listening into the
Planner’s telephone calls and monitoring his emails with *inter alia* a U.S. national
working as a travel agent in New York, (“the Agent”), MI5 suspect that the Planner is
making preparations in respect of some terrorist activity involving airplanes and cities in
the United States and other countries. As a result of further information derived from
confidential informants, MI5 start to suspect that a very large network of persons in the
United Kingdom might be involved, and place many more persons under surveillance.

MI5 also intercept a number of telephone calls and discover a lot of email traffic
passing between the Planner, the Agent, and a number of other people. These include (i) a
man in Mumbai suspected of having connections with Al Qaeda bomb makers, (“the
Facilitator”); (ii) a computer technology specialist in Jerusalem suspected of having links
to Hezbollah, (“the Programmer”); and (iii) a manufacturer of 100ml bottles of soda in
Melbourne, (“the Manufacturer”). The email traffic and telephone calls, although
somewhat cryptic in nature, suggest that an attack may be imminent within a few weeks

*Britain’s biggest terrorism investigation*, THE TELEGRAPH, (Jul. 8, 2010),
http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/7879970/Suicide-bombers-convicted-at-end-
of-Britains-biggest-terrorism-investigation.html.
involving flights from the United Kingdom to unspecified cities in the United States, followed by similar attacks in other countries.

The British share their suspicions with the American, Indian, Israeli and Australian authorities. The British say that they need about another week to compile sufficient admissible evidence to charge and prosecute, but the American authorities persuade their Indian counterparts to arrest the Facilitator immediately, with a view to transferring him to U.S. custody.

Because this arrest will alert the rest of the group that they are under suspicion, all the other law enforcement agencies decide they need to arrest everyone else immediately too. MI5 arrests the Planner, together with twenty other suspects, the FBI arrests the Agent, the Shabak (Israeli Security) arrests the Programmer, and Australian Federal Police (AFP) arrest the Manufacturer. All of the suspects want to know why they have been arrested, and wish to challenge their detention. They demand to speak with a lawyer, and want to tell their families where they are.

1.4.1 The London arrests

The Planner is detained without charge. On arrival at the police station he is informed that he has been arrested on reasonable suspicion of terror offenses. He requests a lawyer but is told that this right is being delayed for forty-eight hours in order to protect the security of the investigation. His request to contact a family member is also delayed for forty-eight hours for the same reason. After forty-eight hours, he is told that his detention is going to be extended, and he demands the right to contest this decision. He is now entitled to consult a lawyer.
He is brought before a court where the prosecution tells the judge that it needs further time to investigate. Some of the evidence against the Planner is inadmissible in court because it is derived from intercepted sources, and the only other evidence cannot be disclosed to him for fear of compromising confidential informants. The judge orders that the Planner be told the gist of the evidence against him, sufficient to enable him to instruct his lawyer. At the end of this hearing, the judge extends the detention for a further five days. At the end of the five days, the Planner is returned to court and the prosecution is successful in extending the detention for another seven days. At the end of the fourteen days detention, the Planner is charged with offenses under terrorism legislation.

At trial the Planner is acquitted. Most of the case against him derived from either intercept evidence or confidential informants, so insufficient admissible evidence could be placed before the jury. However, MI5 still reasonably believed that the Planner was involved in terrorism-related activity and that steps were needed to protect the public from a risk of terrorism. As a result, Terrorism Prevention and Investigation Measures were imposed on the Planner, involving a twelve-hour curfew and restrictions on communications with other persons. Although the Planner challenged these measures in the review hearing, the measures will remain in place for up to two years.

1.4.2 The New York arrest

The Agent is told he has been arrested on suspicion of conspiracy to commit terrorist offenses. He is left in a cell for twelve hours and then is taken to an interrogation room. He is told he has the right to remain silent, and to have an attorney. He requests the attorney and wishes to call his wife to tell her where he is. These requests are granted.
The Agent is questioned in the presence of his lawyer and invokes his right to silence. He is then returned to his cell, and forty hours after the arrest was made he is charged with conspiracy to commit terror offenses.

He is taken to court six hours later to contest whether probable cause exists for his arrest and charge. The prosecution has told the judge in camera that the evidence supporting the charge is classified because it is derived from the testimony of confidential informants. The judge rules that a summary of that evidence must be given to the Agent and his attorney to provide the Agent with substantially the same ability to make his defense as would the disclosure of the specific classified information. After giving the Agent an opportunity to respond to that evidence, the judge rules that he finds that there is probable cause to support the arrest and charges, and bail is denied pending trial.

1.4.3 The Mumbai arrest

Indian authorities arrest the Facilitator and tell him that he is suspected of acting in a manner prejudicial to national security. He is permitted to call a friend to notify him of the arrest. He is not entitled to consult with a lawyer because he is held in preventive detention. Because he is not an Indian citizen, and because he is detained for security reasons, he has no rights to challenge his detention. Furthermore, his detention conditions are rather unsanitary. The Indian authorities are meanwhile in contact with American authorities concerning the requested transfer of the Facilitator to U.S. custody. There is some confusion about his nationality. At first the Indian authorities believed him to be an American citizen, which would have resulted in the Facilitator facing trial in a U.S. federal court.
Now Indian authorities have seen evidence that the facilitator is a Canadian national. Certain members of the United States Congress are demanding that he be placed in LOAC detention because of his alleged links to Al Qaeda. The Indian authorities transfer the Facilitator to U.S. authorities, and he is detained for three months in a navy brig off the coast of North Carolina for interrogation purposes. During this time the Facilitator does not have access to a lawyer, nor is he able to obtain a determination from the U.S. government as to his status. At the end of the three months on the navy brig, the Facilitator is transferred to FBI custody. He is charged with conspiracy and providing material support to a foreign terrorist organization, and sent for trial in a Federal court.

1.4.4 The Jerusalem arrest

The Shabak arrest the Programmer in Jerusalem on suspicion of a security offense but do not give him details. Evidence derived from confidential informants prompt the Shabak to believe the Programmer is a danger to the State, and they obtain a court order to place him in administrative detention. The Programmer is denied access to a lawyer for six days, but is entitled to have a family member informed about his detention after forty-eight hours. He is detained in a tiny cell with five other people. He is taken to court after forty-eight hours to have the detention order confirmed, but he is not given access to any of the confidential evidence. The judge tells the Programmer that he has seen the evidence, and has considered it from the Programmer’s point of view. The judge states that he is satisfied both that disclosure of the evidence might impair public security, and that the evidence is sufficient to persuade him to confirm administrative detention order. The Court will review the position in six months.
1.4.5 The Melbourne arrest

The AFP apply for, and are granted, a preventive detention order in respect of the Manufacturer, on the grounds that the order would substantially assist in preventing the occurrence of a terrorist act. After he is placed in detention the Manufacturer is given a copy of the order. The APF decide not to give him a summary of the reasons for detention because they believe that to do so might prejudice national security. During the first forty-eight hours he has no rights to challenge detention. After forty-eight hours the State of Victoria can apply to extend the detention for a further twelve days. The Manufacturer will need to obtain the leave of a court to revoke the order. Alternatively, instead of this continued detention, the Australian Security Intelligence Organization might apply for a detention warrant for interrogation purposes, involving detention for up to another fourteen days.

The Manufacturer can inform his family that he is safe, but cannot tell them he has been detained. If he does, he risks conviction of a criminal offense that carries a five year prison sentence. The Manufacturer wants to talk to a lawyer, but the lawyer can only advise him about his rights during detention, and all communications between the Manufacturer and his lawyer will be monitored.

1.4.6 Analysis of the hypothetical example

In all of the above situations, the law enforcement authorities acted in compliance with their relevant domestic laws, and to a greater or lesser extent in accordance with detention provisions and jurisprudence relating to the human rights treaty that each country has ratified. In all cases (other than the United States in respect of LOAC detentions in Guantánamo and Afghanistan), the countries have accepted that they are
obliged to respect and comply with international human rights law. Israel has been in a state of emergency since 1948, and has derogated from all the guarantees against arbitrary detention, but must still afford detainees the right to challenge detention.\footnote{ICCPR, supra note 70, at art. 4 permits derogation in a state of emergency from a number of guarantees, including from art. 9 which governs the right to liberty. It is not possible to derogate from the right to permit detainees to challenge detention, see CCPR General Comment No. 29. States of Emergency, (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶16 (2001).}

Yet the example highlights (i) that in some cases the domestic laws do not comply with international human rights law, and (ii) that international human rights law itself is flawed and deficient in a number of important procedural matters.

The first problematic issue relates to the right to challenge detention. Human rights law provides every detainee with this right to a greater or lesser extent.\footnote{ICCPR, supra note 70, at art. 9(4); European Convention, supra note 70, at art. 5(4); American Convention, supra note 70, at art. 7(6); African Charter, supra note 70, at art. 7(1); and Arab Charter supra note 70, at art. 14(7).} The example showed that neither the Facilitator in Mumbai, nor the Manufacturer in Melbourne, was permitted to challenge the detention.\footnote{India Const. art. 22(5) merely provides that if an order of preventive detention has been made, “the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.” No further details appear in either the Constitution or the Code of Criminal Procedure. In Australia, under the Criminal Code Act (Cth.) 1995, §105.51, federal detention orders can only be challenged if there is an error of law, and that challenge may only take place after the detention order has expired. See Chapter 3 infra.} This complies with both Australian and Indian domestic law, but violates the ICCPR, the human rights treaty of which both countries are parties. The ICCPR and similarly worded treaty provisions in the European Convention, the American Convention and the Arab Charter are deficient in failing to express exactly when a detainee must be brought before a court to challenge their detention. The African Charter is deficient in not affording a specific right to challenge detention.
The use of ‘secret evidence’ is another important issue relevant to the procedure of challenging detention. Governments frequently have evidence that cannot be divulged because of the risk of harming national security interests. This evidence may derive from confidential informants, or from electronic sources, and for the purposes of this example will be referred to as classified information. As will be seen in subsequent chapters, four countries have different ways of handling this type of evidence so that the detention can be evaluated and challenged. This involves a balancing act between preventing the detainee, and sometimes his lawyer, from seeing the evidence in the interests of security, as against providing a mechanism that enables the detainee to be given some level of information.

In this example the Planner in London could be told the gist of the case against him, sufficient to equip him for giving instructions to his lawyer.\(^\text{76}\) The Agent in New York was entitled to be given a summary of the facts designed to place him in the same position as if he had seen the classified information.\(^\text{77}\) The Facilitator in Jerusalem has to rely on a judge to interpret the classified evidence from the Facilitator’s point of view.\(^\text{78}\) Very little guidance is found on this international human rights law, other than general treaty provisions relating to be told the reasons for arrest,\(^\text{79}\) and the right to a fair trial,\(^\text{80}\) which relates to a criminal prosecution (or a civil suit). Treaty language, other than that

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\(^\text{76}\) Secretary of State for the Home Department v. AF (FC) [2004] UKHL 56, ¶¶65, 66 (U.K.) See Chapter 2, infra.

\(^\text{77}\) 18 U.S.C. app 3. §6(c)(1). See Chapter 6, infra.


\(^\text{79}\) ICCPR, supra note 70, at art. 9(2); European Convention, supra note 70, at art. 5(2); American Convention, supra note 70, at art. 7(4); Arab Charter, supra note 70, at art. 14(3).

\(^\text{80}\) ICCPR, supra note 70, at art. 14; European Convention, supra note 70, at art. 6; American Convention, supra note 70, at art. 8; African Charter, supra note 70, at art. 7(1); Arab Charter, supra note 70, at art. 13.
in the European Convention, does not specifically relate to challenging detention.  

European Convention jurisprudence \(^82\) drives the stance adopted in United Kingdom law, and decisions of the Israel Supreme Court \(^83\) govern the Israeli approach. This deficiency in human rights law procedure must be addressed in the context of ensuring that terror attacks may be prevented, that co-conspirators are not tipped off, that evidence is not tampered with and witnesses are not harmed.

The example also demonstrated that the Planner in London could not have access to a lawyer or make contact with his family for forty-eight hours.  

The Programmer in Israel could not communicate with his lawyer for six days, but could contact his family after forty-eight hours.  

The Manufacturer in Melbourne’s communications with lawyers could be monitored. After forty-eight hours, he could contact his family but only to say he was safe, not that he was detained.  

The Facilitator in Mumbai could be denied access to a lawyer altogether in certain circumstances. Very little guidance is found in human rights law relating to access to lawyers, or informing relatives about detention. This deficiency in human rights procedure must be addressed in the context of ensuring that co-conspirators are not tipped off, that evidence is not tampered with and witnesses are not harmed.

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\(^81\) European Convention, supra note 70, at art. 6.(1) This provision includes proceedings for the “determination of civil rights.”  


\(^83\) See e.g. A. v. State of Israel, CrimA 6659/06 (Jun. 11, 2008), and Chapter 4 infra.  

\(^84\) Terrorism Act 2000, supra note 44, at Sch. 8, §§6, 8.  

\(^85\) Criminal Procedure Law (Powers of Enforcement – Arrest), 1996, §35D. (Isr.).  


\(^87\) Criminal Code Act (Cth.) 1995, 105.38 (Austl.).  

\(^88\) Criminal Code Act (Cth.) 1995, 105.35. (Austl.).  

\(^89\) India Const. art 22(3)(b).  

\(^90\) See discussion in Chapters 8, 9 and 10 infra.
If countries choose to use preventive detention, their laws and procedures will vary. I argue that any person who is detained anywhere in the world must be able to find out why and on what grounds he has been arrested, must be able to tell someone where he is and why, must know that he will be treated fairly, and must be able to take action to challenge his detention without delay.

For that to happen, the flaws and deficiencies demonstrated above need to be addressed and a set of minimum standards for preventive detention principles is required to fix the problems. Thus an analysis of a sample of domestic laws, the LOAC and relevant international rights law will be undertaken, with a view to extracting elements of commonality and best practice.

1.5 The problem of selecting the appropriate legal framework

Selecting the legal framework that best fits the current problems of combating international terrorism is fraught with difficulty. Most states that use preventive detention in the counter-terrorism context regard it as a law enforcement tool. Those states treat terrorism as criminal activity and preventive detention is a measure that can be used within their domestic criminal law framework. The United States, however, has been using domestic criminal law to arrest terror suspects within the United States, but has largely relied on the LOAC to detain those captured overseas, who it deems affiliated with al-Qaeda, the Taliban or associated forces. Indeed, the United States has “almost singularly asserted the authority to detain non-battlefield terrorism suspects in accordance with the LOAC.”

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91 Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, supra note 8, at 626.
The problem is that neither the law enforcement model nor the LOAC model is a perfect fit with the current increasingly transnational variety of terrorism.\textsuperscript{92} Blum and Heymann encapsulate the issue best: “The new type of attacks did not resemble any threat that law enforcement was intended to handle, nor did it resemble any of those wars that the laws of war were designed to address.”\textsuperscript{93}

Kent Roach notes that criminal law itself has changed – “[n]ew laws make what would have been secret intelligence into potential evidence of new terrorist crimes…The twin processes of the judicialization of intelligence concepts into criminal law provide fundamental challenges to intelligence agencies and criminal law.”\textsuperscript{94}

Eric Posner comments that “[o]rdinary law enforcement methods are not effective against foreign terrorists in the modern era because foreign terrorists can train, recruit, obtain weapons, and hatch their plots in foreign countries with weak governments that cannot fully control their territory, making it impossible for the United States to demand extradition or conduct joint law enforcement operations.”\textsuperscript{95}

Robert Chesney and others posit that law enforcement options “simply do not provide sufficient capacity to capture individuals or to otherwise disrupt their activities.


\textsuperscript{93} GABRIELLA BLUM & PHILLIP B. HEYMANN, LAWS, OUTLAWS AND TERRORISTS, supra note 51, at xii.

\textsuperscript{94} KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERORISM, supra note 52, at 19.

And in some circumstances, these tools are equally inadequate to the task of long-term incapacitation.”

The LOAC also does not work perfectly in the context of suspected terrorists. Traditionally the LOAC has been understood to regulate conduct in conflicts between states. As such, it too is an uncomfortable fit with sporadic attacks by non-state actors that might continue intermittently for decades or longer. Kent Roach describes the American military detention model as a “fundamental mismatch when it comes to terrorists,” and Charles Kels notes that international armed conflicts cannot apply to the fight against Al Qaeda in general, nor does the non international armed conflict model work. It is “ill-suited to accommodate the struggle against a transnational terrorist network, because it was never meant for such things.”

Michael Hoffman comments that extending the entire law of inter-State warfare to terrorist groups and military operations against them “would have the effect of re-legalizing private warfare...a recipe for total chaos.”

The United States’ use of detention in the LOAC is grounded in a piece of legislation tied to the perpetrators of the 9/11 attacks: the Authorization for the Use of

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96 ROBERT CHESNEY, JACK GOLDSMITH, MATTHEW C. WAXMAN & BENJAMIN WITTES, A STATUTORY FRAMEWORK FOR NEXT-GENERATION TERRORIST THREATS, 5 (Hoover Institution, Stanford University, 2013).


98 Charles G. Kels, The Perilous Position of the Laws of War, HARV. NAT’L SECURITY J. (Dec. 6, 2012), http://harvardnsj.org/2012/12/the-perilous-position-of-the-laws-of-war/. See also Emanuel Gross, Fighting Terrorism with One Hand Tied Behind the Back: Delineating the Normative Framework for Conducting the Struggle Against Terrorism within a Democratic Paradigm, 29 Wis. INT’L L. J. 1,13 (2011): “international laws covering the conduct of war do not properly take into account the needs of states forced to defend themselves against terrorism.”

Military Force (AUMF).\(^{100}\) Congress passed this measure on September 18, 2001, but it is becoming increasingly outdated and obsolete.\(^{101}\) The Obama Administration, federal court jurisprudence and the National Defense Authorization Act (NDAA) of 2012\(^{102}\) as amended, expanded the original authority to cover those associated with al-Qaeda and the Taliban,\(^{103}\) but the increase of activity in Syria, Libya and Mali, and the emergence of groups such as the al-Nusra Front in Syria, Ansar al-Sharia in Libya,\(^{104}\) as well as Hezbollah,\(^{105}\) has little or no meaningful ties to al-Qaeda.\(^{106}\) Government and intelligence authorities and academics have now started to debate the extent to which the AUMF framework can realistically be stretched in the light of these emerging challenges.\(^{107}\)

The human rights dimension further complicates the issue. Preventive detention “involves the deprivation of one of the most fundamental of all human rights recognized in international law – the right to personal liberty.”\(^{108}\) This right, enshrined in Article 3 of

\(^{100}\) Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001). It authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” See infra, Chapter 7.

\(^{101}\) Greg Miller & Karen DeYoung, Officials debate stretching 9/11 law, WASH. POST, at A1, A11, (Mar. 7, 2013), citing Jack Goldsmith: “The AUMF is becoming increasingly obsolete because the groups that are threatening us are harder and harder to tie to the original A.Q. organization.”


\(^{103}\) Id; Press Release, Department of Justice, Office of Public Affairs, Department of Justice Withdraws “Enemy Combatant” Definition for Guantanamo Detainees (Mar. 13, 2009), available at http://www.justice.gov/opa/pr/2009/March/09-ag-232.html. See infra, Chapter 7. However the United States has not sought to detain any associate of these groups under LOAC authority.

\(^{104}\) Greg Miller & Karen DeYoung, Officials debate stretching 9/11 law, supra note 101.


\(^{106}\) Greg Miller & Karen DeYoung, Officials debate stretching 9/11 law, supra note 101.

\(^{107}\) Id; and see e.g. ROBERT CHESNEY, JACK GOLDSMITH, MATTHEW C. WAXMAN & BENJAMIN WITTES, A STATUTORY FRAMEWORK FOR NEXT-GENERATION TERRORIST THREATS, supra note 96; and see Chapter 7 infra.

\(^{108}\) PREVENTIVE DETENTION, supra note 26, at 1.
the Universal Declaration of Human Rights (“UDHR”))\textsuperscript{109} and set out in many human
rights treaties,\textsuperscript{110} is constantly being balanced against the necessity of states to take
measures to prevent acts of terrorism. Some scholars, such as Monica Hakimi, advocate
using the framework of administrative detention under international human rights law,\textsuperscript{111}
but an analysis of the relevant treaties shows that there are very few common core
principles relating to detention.\textsuperscript{112}

This dissertation will demonstrate that none of the three existing frameworks (law
enforcement, LOAC and international human rights) is perfectly tailored at this time to
provide guidance on detention of suspected terrorists. Furthermore, the domestic laws,
the LOAC and the five general human rights treaties do not yield sufficient common
material for a comprehensive guidance on the substantive and procedural aspects of
preventive detention. The dissertation will then draw on such areas of commonality that
can be found, together with best practices, in order to craft a comprehensive set of
minimum preventive detention standards.

Should terrorism have a unique body of law separate from criminal law and
LOAC? Are special rules for preventing terrorism justified? Conte and Ganor advocate a
separate body of terrorism law, on the basis that acts of terror differ from other criminal

\textsuperscript{109}Universal Declaration of Human Rights. Adopted by the General Assembly of the United Nations in Res.
217 A (III), U.N. Doc. A/RES/217(111) Dec.10, 1948. UDHR has not been formally adopted as a legally
binding document but the international community has recognized its importance as the basis for
fundamental human rights.

\textsuperscript{110}ICCPR, \textit{supra} note 70; European Convention, \textit{supra} note 70; American Convention, \textit{supra} note 70;
African Charter Human Rights, \textit{supra} note 70; Arab Charter, \textit{supra} note 70.

\textsuperscript{111}Monica Hakimi, \textit{International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed
Conflict-Criminal Divide, supra} note 8, at 614-7. Administrative detention is security detention that is not
connected to the criminal law model, and does not depend on criminal arrest or charge.

\textsuperscript{112}See Chapter 12 \textit{infra}. 
activity predominately because of the motivation of the terrorists, the fact that they measure their conduct “against the codex of the ideology they are pursuing,” and the fear-inducing consequences of acts of terrorism. Thus, they posit that “standard criminology does not apply.”

Even if the idea of a separate body of law for terrorism seems too drastic or unnecessary, should terrorism be treated differently from homicide, or drugs offenses and other serious crimes within the current frameworks? Should special rules be in place permitting terror suspects to be detained to forestall an attack, but not rules for detaining persons to prevent a homicide or supplying drugs? In practice, both French and British laws provide examples of how special or enhanced procedures have been added to general criminal laws and procedures to deal with terrorist offenses.

This dissertation suggests that terrorism is different from the other types of criminal offenses for two main reasons. First, terrorism is driven by a political or ideological purpose, as opposed to a desire to gain a purely personal benefit or for a personal purpose, such as to get money, or personal gratification and so forth. Second, it seems that a fundamental element of terrorism is the aim of intimidating members of the general public. In addition, terrorist crimes differ from other offenses because even one

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113 ALEX CONTE & BOAZ GANOR, LEGAL AND POLICY ISSUES IN ESTABLISHING AN INTERNATIONAL FRAMEWORK FOR HUMAN RIGHTS COMPLIANCE WHEN COUNTERING TERRORISM, 17-18, INTERNATIONAL POLICY INSTITUTE FOR COUNTER-TERRORISM (2005), http://www.ict.org.il/Portals/0/Articles/20471-Ganor_Conte_Human_Rights.pdf. They comment that one of the main motivations for regular criminal activity is personal gain, whereas terrorists are motivated by altruism – “a higher cause or ideology that is greater than his or her personal motivations or gains. He or she acts for the furtherance of that external cause (whether it be a localized secessionist movement or global jihad) and the benefit this has to both the cause and the people of it. Combined with the honor derived from such conduct in this life, and the rewards in the next, the motivations of a terrorist are far beyond those of an ‘ordinary’ criminal offender.”
114 Id. So if the ideology mandates killing non-believers, that killing would be seen as lawful and appropriate.
115 Id., at 21-23.
116 Id. at 18.
117 E.g. in both countries terror suspects can be detained in police custody for longer periods than suspects arrested in connection with other criminal offenses, and access to lawyers can be delayed in terror cases.
Chapter 1 – The Problem

April 30, 2014

attack has the potential to create significant and devastating effects on large numbers of people. This is why some states have decided that extraordinary measures, including preventive detention, may be needed to supplement normal criminal laws and procedures. This dissertation argues that preventive detention to forestall a terror attack may be merited if a less invasive method cannot be used to achieve the same ends, provided a number of other criteria are also satisfied, as described in Chapter 12.

1.6 The scholarly literature

An abundance of literature exists on the subject of proposed models for preventive detention of suspected terrorists. The suggestions range from leaving the criminal law as it is, to making adjustments to U.S. domestic criminal law and/or the LOAC, to creating a model based on administrative measures, to creating a special national security court system, to calling for a total overhaul of the current law.

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118 Much of it was published in the United States to coincide with President Obama taking office in January 2009 and relates to U.S. policy.
119 ROBERT H. WAGSTAFF, TERROR DETENTIONS AND THE RULE OF LAW, xx (Oxford University Press, 2014): (“...the time-tested criminal law is the best way to confront suspected acts of terrorism. Inventing a new preventative paradigm that compromises due process is normatively indefensible and ultimately counterproductive”); Jennifer Daskal, The Way Forward: A New System of Preventive Detention? Let’s Take a Deep Breath, 40 CASE W. RES. J. INT’L L. 561, (2009), (the current criminal justice system is adequate to detain those whom the U.S. should be seeking to detain).
120 See e.g. PHILIP B. HEYMANN & JULIETTE KAYYEM, PROTECTING LIBERTY IN AN AGE OF TERROR, (MIT Press, 2005); STEPHANIE COOPER BLUM, THE NECESSARY EVIL OF PREVENTIVE DETENTION IN THE WAR ON TERROR, 208-19, (Cambria Press, 2008); Philip Heymann, Detention, HARV. NAT’L SECURITY J. supra note 92, (amending Speedy Trial Act to permit longer periods of pre-trial detention and using the Quarles exception in Miranda to permit questioning for a longer period between arrest and charge); Jennifer C. Daskal, The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone, 161 U. PA L. REV, 1165, 1209 (2012), (LOAC detention outside a zone of active hostilities should be limited to threats that are clearly tied to the zone of active hostilities, and depends on an individualized threat assessment, a least harmful means tests as well as procedural safeguards). Monica Hakimi, A Functional Approach to Targeting and Detention, supra note 18, at 1369, (advocates a functional approach to detention both in the law enforcement and LOAC arena, with three principles: liberty-security, where the security benefit must outweigh the costs to individual liberty; the mitigation principle, where states must lessen the costs by pursuing reasonable, less intrusive measures to contain a threat; and the mistake principle, where states have to exercise due diligence to reduce mistakes).
121 See e.g. Andrew C. McCarthy, We Need an Administrative Detention Law, supra note 19, (Although administrative detention is not perfect, “an administrative-detention system would enable government to prevent an attack from happening, grab all the players it is reasonable to suspect, and have an adequate amount of time to pull together a prosecutable terrorism case before the suspects can flee.”); Monica
Some of the literature takes a more international approach, and makes very specific suggestions as to the circumstances in which preventive detention should be permitted. As this dissertation has approached its subject from an international perspective, some examples of this literature are selected for discussion here.

Stella Burch Elias examines preventive detention, from an international law perspective. She constructs a taxonomy of eight criteria upon which she bases her analysis. Each criterion serves as a foundation for developing an international legal framework that can be adapted to national contexts. The criteria are designed to ensure that preventive detention is applied only to those who represent the central threat of modern terrorism and who cannot be handled without straining ordinary criminal justice processes or law of armed conflict doctrines.
comparative analysis.\textsuperscript{125} Although she says that the starting point for this taxonomy is “settled international consensus (enshrined in treaties and customary international law),”\textsuperscript{126} this dissertation shows in Section B that although individual treaties yield sets of core principles, international human rights law as a body, with diverse interpretations of treaties by judicial bodies, is not sufficiently settled and clear to yield very many common core principles.

Burch Elias focuses on thirty-two countries, of which the majority are common law based democracies, together with some European civil law countries, and argues that policy makers should determine which of three overarching frameworks (pre-trial detention, immigration detention or security detention) offers the most appropriate approach to detain terror suspects.\textsuperscript{127} However, her argument is tailored towards the United States and she favors a pre-trial detention framework as a guide and departure point for discussion for the U.S. approach to detention. This is because the United States shares many of the “civic values, human rights standards, constitutional provisions, political traditions, national security concerns, and legal system tenets with the countries who use pre-trial detention.”\textsuperscript{128}

\textsuperscript{125} Id., at 114. The eight criteria are: (i) the legal basis for detention; (ii) notification of charges; (iii) initial appearance before a judicial, administrative or other authority; (iv) period of time in detention without charge or trial; (v) access to legal counsel; (vi) right to a fair and public hearing; (vii) judicial review; and (viii) rules regarding interrogation.
\textsuperscript{126} Id.
\textsuperscript{127} Id., at 100, 108, 129-131. Using the eight criteria set out in the article, and whilst acknowledging that there is often no bright line distinction between the frameworks, she allocates countries to the most extreme individual rights-stripping framework, even if the policy of the country uses more than one of the systems. Thus Brazil, Colombia, Denmark, France, Germany, Italy, Norway, Greece, Ireland, Spain, Turkey and the United Kingdom are allocated to the pre-trial detention framework, Canada, New Zealand, and South Africa are allocated to the immigration detention framework, and Pakistan, India, Kenya, Tanzania, Sri Lanka, Zambia, Mozambique, Malaysia, Nigeria, Russia, Singapore, Swaziland, Trinidad & Tobago are allocated to the national security detention framework. She described Australia and Israel as mixed framework countries, a sub-set of the national security framework, because she considers that they have many procedural protections found in pre-trial detention countries.
\textsuperscript{128} Id., at 209-10.
Claire Macken examines whether preventive detention of suspected terrorists in State counter-terrorism policy is consistent with the prohibitions on arbitrary arrest and detention in international human rights law, although she focuses on the laws of the United Kingdom and Australia, and the ICCPR and the European Convention. Macken rejects preventive detention per se, but proposes a pre-charge detention model, in that a person can be arrested and detained only when there is “a suspicion that he or she has engaged in conduct that would be a criminal offense, even if at the time of arrest the police have insufficient evidence to bring an actual criminal charge.” This is in fact very similar to the Burch Elias proposal mentioned above, especially as Macken comments that this detention model could be described as investigative detention “for the purpose of obtaining evidence for use at a subsequent criminal prosecution.” She recommends that detention under this model should last no longer than fourteen days.

Monica Hakimi builds on earlier work advocating administrative detention found in human rights law, which in her view needed “further development.” She contends that current law that governs detention (and targeted killing) of non-state actors is in “disarray” because of methodology that establishes different standards in four regulatory domains, (the “domain” method): law enforcement; emergency; armed conflict for civilians; and armed conflict for combatants. Because the standards vary, “so too may

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130 Id., at 170.
131 Id., at 136, (citing a definition of investigative detention proposed by DAN E. STIGALL, COUNTER-TERRORISM AND THE COMPARATIVE LAW OF INVESTIGATIVE DETENTION, supra note 20, at 6).
132 Id., at 137.
133 Monica Hakimi, International Standards for Detaining Terror Suspects: Moving Beyond the Armed Conflict-Criminal Divide, supra note 8, at 640.
134 Monica Hakimi, A Functional Approach to Targeting and Detention, supra note 18, at 1366.
substantive outcomes.” ¹³⁵ She advocates what she terms a “functional” approach to detention both in the law enforcement and LOAC arena, with three governing principles: liberty-security, where the security benefit must outweigh the costs to individual liberty; the mitigation principle, where states must lessen the costs by pursuing reasonable, less intrusive measures to contain a threat; and the mistake principle, where states have to exercise due diligence to reduce mistakes.¹³⁶

She argues that the functional approach would be a better guide for decision makers to develop law relating to preventive detention of terror suspects, and address the domain problems for several reasons. First, one problem with the “domain” method is that some states consider that mere membership in a terrorist group is a reason to detain.¹³⁷ As Hakimi points out that in any of the “domains” referred to above, “membership in a group may be evidence of a threat but does not alone justify security detention.”¹³⁸ Second, the authority to detain should diminish with time. “Extended security detention should be permitted only when the detainee poses a very serious threat (liberty-security principle) and the state has verified, using a fairly high standard of certainty and an independent review process, that detention is justifiable (mistake principle).”¹³⁹ Third, states should ordinarily “incapacitate terrorism suspects through the criminal process (mitigation and mistake principles). But postponing or forgoing the criminal process is sometimes reasonable.”¹⁴⁰

¹³⁵ Id.
¹³⁶ Id., at 1369, and §IV 1407-20.
¹³⁷ E.g. The United States has used this as one criteria to detain in Guantánamo Bay.
¹³⁸ Monica Hakimi, A Functional Approach to Targeting and Detention, supra note 18, at 1416.
¹³⁹ Id.
¹⁴⁰ Id.
Hakimi believes that this functional approach “would help cure the practical problems of the domain method. It would enable decision makers to develop the law incrementally. Using the functional approach, they might converge on areas of agreement by crafting novel outcomes and without risking a slippery slope. Moreover, the functional approach would better hold decision makers accountable. Decisions would have to be justified on the merits, instead of by ipse dixit reference to a contested domain or underspecified standard.”\textsuperscript{141} However, Hakimi does acknowledge that her suggested approach would not “guarantee particular outcomes or even that outcomes would eventually be settled.”\textsuperscript{142} She hopes that any scheme that is chosen by decision makers will “provide a common language with which decision makers own up to their positions, debate their differences, find areas of agreement, and condemn those who stray from shared expectations.”\textsuperscript{143}

Christopher Slobogin has devised a set of seven principles that might govern preventive detention.\textsuperscript{144} His work focuses mainly on preventive detention of dangerous persons, either post conviction, or because of mental abnormality, but three of his principles, relating to legality, risk-proportionality, and related least drastic means, seem useful in the context of preventive detention of terror suspects.\textsuperscript{145}

\textsuperscript{141} Id., at 1419.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Christopher Slobogin, \textit{Preventive Detention in Europe, the United States and Australia, in Preventive Detention: Asking the Fundamental Questions, supra note 17}, at 45.
\textsuperscript{145} Id., “(1) the principle of legality, which requires commission of a crime or imminently risky conduct before preventive detention takes place; (2) the risk-proportionality principle, which requires that government prove a probability and magnitude of risk proportionate to the duration and nature of the contemplated intervention; (3) the related least drastic means principle, which requires the government to adopt the least invasive means of accomplishing its preventive goals, and thus may well preclude confinement and at least requires treatment that reduces confinement.”
None of the above approaches are sufficiently comprehensive for the purposes of crafting criteria for global core principles to govern preventive detention of terror suspects, because they have not surveyed a comparable field and do not specifically address the procedural deficiencies identified in this dissertation. However, they each provide very useful material that will be taken into account in the recommendations in Chapter 12.

1.7 Methodology

This dissertation is essentially a comparative work. To date the comparative work on preventive detention\(^\text{146}\) has not resulted in the designation or emergence of a framework that is adequately tailored or developed to address the problems posed by contemporary transnational terrorism. No truly comprehensive analysis of the different meanings and uses of current preventive detention and related problems has been attempted, involving the comparison of the domestic laws in different countries against each other, as well as against preventive detention in international law, particularly in the Geneva Conventions and five general human rights treaties.

\(^{146}\) See e.g. most comprehensively, *Preventive Detention*, supra note 26, at 1, comparing preventive detention in Bangladesh, India, Kenya, Malawi, Malaysia, Nigeria, Pakistan, Singapore, South Africa, Sri Lanka, Swaziland, Tanzania, Trinidad and Tobago, UK, Zambia and Zimbabwe; *Preventive Detention and Security Law, A Comparative Survey*, supra note 9, comparing preventive detention in United States, Sweden, Switzerland, Austria, Japan, Soviet Union and Poland, with some discussion of relevant international human rights law; Stella Burch Elias, *Rethinking “Preventive Detention” from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects*, supra note 124, comparing the laws of Australia, Brazil, Canada, Colombia, Denmark, France, Germany, Greece, India, Ireland, Israel, Italy, Kenya, Malaysia, Mozambique, New Zealand, Nigeria, Norway, Pakistan, Russia, Singapore, South Africa, Spain, Sri Lanka, Swaziland, Tanzania, Trinidad & Tobago, Turkey, the United Kingdom, and Zambia. There have been comparisons in the literature also between the laws of two or three countries, such as Dan E. Stigall, *Counterterrorism and the Comparative Law of Investigative Detention*, supra note 20, comparing the laws of the United States, United Kingdom and France; or the law of armed conflict and one or two countries’ laws, such as Stephanie Cooper Blum, *The Necessary Evil of Preventive Detention on the War on Terror*, supra note 13, comparing the laws of the United States, United Kingdom and Israel.
The goal in using comparative law methodology in this work is to adopt what Amos Guiora describes as the ultimate role of a comparativist: “to examine different regimes – recognizing that profound differences exist – with the intention of identifying strengths from distinct paradigms and cobbling together a functional model for addressing similar issues.”\(^\text{147}\) This task is undertaken with the words of Kim Lane Scheppele in mind, warning that “ideal human rights views contrasted with the details of an actually existing anti-terror campaign will overestimate what is possible, while a security-only view overestimates the disruptive effects of rights, particularly if doctrine in one system is being compared with practice in another.”\(^\text{148}\)

Some scholars have questioned the utility of comparative law analysis.\(^\text{149}\) In addition, scholars have long debated whether to conduct comparative law analysis in any


\(^\text{149}\) E.g. Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 NOTRE DAME L. REV. 1217, 1219 (1998): Comparative law analysis “is not an objective ‘method’ that yields clear conclusions about the proper scope of uniform international standards. It cannot give us the normative basis for making judgments about when common standards ought to be enforced and when diversity should be given freer play….but inter-state comparisons can have both theoretical and practical value… Comparative law has the paradoxical capacity to deepen our understanding and appreciation of the particularities of legal traditions while at the same time helping us transcend their differences by relating them to one another;” Cesar Mirabelli, *Preliminary Reflections on Fundamental Rights as the Basis of a Common European Law, in The Millenium Lectures: The Coming Together Of The Common Law And The Civil Law*, 237 (Basil S. Markensis, ed. Hart Publishing, 2000): “Comparative methods can be used to understand similarities and differences between different legal models, improving comprehension of each of these and the reasons behind different legislative solutions. Furthermore, comparisons allow one to judge the effectiveness of the models under consideration in relation to fundamental rights, which represent both foundations and goals that are shared by different legal systems. Comparative analysis can, finally, contribute to the design of new laws and to legal harmonization…Through fundamental rights and comparative law we can appreciate the value of both unity in things that are essential, and diversity in things that distinguish without dividing;” Mads Andenas & Duncan Fairgrieve, *Intent on making mischief: seven ways of using comparative law, in Methods Of Comparative Law*, (ed. Pier Giuseppe Monateri, Research Handbooks in Comparative Law, 2012). Comparative law plays a role in resolving fundamental issues such as the relationship between national and international law, in implementing international and European human rights law, in developing constitutional review, in review of administrative action, and in developing effective remedies.
meaningful and useful way is even possible. The greatest dilemma comes from the question of similarities and differences among legal cultures. As Gary Watt notes, the main challenge is “to acknowledge that complex and manifold relations exist between laws and the local cultures from which laws emerge, and the challenge is to respect those relations.”

It appears that “the division between the proponents of similarity-orientated and those of difference-orientated comparison” constitutes “the most visible methodological cleavage in contemporary comparative law.” The key tenets are that “incomparables cannot usefully be compared” and that “findings of sameness are necessarily based on a repression of pertinent differences.”

For example, the functionalist approach is that “the problems of justice are basically the same in time and space throughout the world.” Thus to functionalists such as Zweigert and Kötz, “the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results.” According to Bomhoff, “the objects of comparison are the ‘solutions’ different legal orders and cultures have found to the uniform problems that face them.”

Comparative law also plays a role in developing the substantive law in different areas, including in finding normative solutions to questions of a more technical kind.

See e.g. Jacco Bomhoff, Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law, 31 Hastings Int’l & Comp. L. Rev. 555, 560 (2008).

Gary Watt, Comparison as deep appreciation, in Methods of Comparative Law, 86 (ed. Pier Giuseppe Monateri, Research Handbooks in Comparative Law, 2012).


Id. at 561.

Id., at 564, citing Zweigert & Kötz, An Introduction To Comparative Law, 34 (1971).

Id.

Id., at 564.
and functionalist studies are interested in “outcomes rather than processes that lead to these outcomes.”

By contrast, Pierre Legrand, who has written extensively on this subject, believes that “the comparatist must adopt a view of law as a polysemic signifier which connotes inter alia cultural, political, sociological, historical, anthropological, linguistic, psychological and economic referents.” For Legrand, difference is key - “comparison must involve ‘the primary and fundamental investigation of difference;’" and further that “[c]omparative legal studies must assume the duty to acknowledge, appreciate and respect alterity.” The differences of culture are so great, that he is not convinced that it is possible to do the job of comparison properly or usefully: “Law is a cultural phenomenon…therefore differences across legal cultures can only ever be overcome imperfectly.” Furthermore, “[u]nless the comparatist can learn to think of law as a culturally-situated phenomenon and accept that the law lives in a profound way within a culture-specific – and therefore contingent – discourse, comparison rapidly becomes a pointless discourse.”

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160 Id., at 123-4, citing MICHEL FOUCAULT, LES MOTS ET LES CHoses, 68 (Gallimard, 1966).
162 Id., at 288.
Franz Werro warns that researching foreign law from the standpoint of sameness “bears the risk of doing violence to some interesting and important differences.”¹⁶⁴ If comparatists accept that difference and cultural diversity are assets, a different approach is needed for research,¹⁶⁵ involving interdisciplinarity, to understand history, politics, literature, economics and other forces that explain the rationale for the law.¹⁶⁶ He advocates “close reading,” involving a rigorous literary analysis of juridical discourses,¹⁶⁷ or a repeated physical and emotional immersion in the country of the law under scrutiny.¹⁶⁸

This method is not without critics. Koen Lemmens questions the extent to which it is practical for comparative lawyers to immerse themselves in different cultures: “[i]f ‘immersion’ were a precondition for sound comparative research, most scholars could only study one or at most two legal orders – those they have fully internalized.”¹⁶⁹ Peters and Schwenke assess the problem that “legal comparison is trapped in cultural frameworks.”¹⁷⁰ “The alleged incommensurability of frameworks means nothing else but total incomparability across history and culture. Because of irreconcilable differences, the comparatist cannot know, let alone compare and adjudicate different legal cultures. In short: incommensurability implies failure of comparison.”¹⁷¹ Patrick Glenn comments:

“Reconciliation of diversity and contradiction within the parameters of the fundamental,

¹⁶⁵ *Id.*, at 136.
¹⁶⁶ *Id.*, at 137.
¹⁶⁸ *Id.*, at 139.
¹⁷¹ *Id.*
defining information of each tradition is thus one of the major tasks which each tradition must face. Incommensurability within a legal tradition is something which no legal tradition has ever acknowledged and which no legal tradition ever could acknowledge, since this would imply a form of schism incompatible with the ongoing normativity of the tradition, for all adherents to the tradition.”\textsuperscript{172}

John Bell contends that the textual, “hermeneutic perspective both recognizes and transcends this problem of alterity. The comparative lawyer has to present the foreign legal system in a form which is faithful to what it looks like from the inside, even though the comparatist is not him or herself an insider. However the hermeneutic perspective does not see this externality of the comparatist as a problem.”\textsuperscript{173} Bell concedes that any account of a legal system has to reflect the embeddedness of legal culture within a wider social culture. He believes that this “makes the presentation more challenging for the comparatist, who has to learn about the society and not just the legal system, but it does not make it impossible… Of course, in any such analysis, the foreign legal system will remain ‘other,’ …but the “otherness does not result in incommensurability.”\textsuperscript{174} Bell concludes that “Legrand is right to warn of the difficulty of the task, but it would not be right to suggest that it is impossible for a comparative lawyer to interpret a foreign legal system. Following the hermeneutical method, the comparatist’s presentation of the foreign law will try to reflect the perspective of the typical internal lawyer, but not to reproduce his or her way of explaining the law… this will not be necessarily unfaithful to

\textsuperscript{172} H. Patrick Glenn, \textit{Are Legal Traditions Incommensurable?} 49 AM. J. COMP. L. 133, 142 (2001)
\textsuperscript{174} \textit{Id.} at 168-9.
the original. It will simply be different.”¹⁷⁵ In sum, Bell does not believe it necessary to adopt “either the methodology of focusing on difference or the methodology of focusing on similarity. The integrity of the comparative enterprise requires that enquiry is open both to similarity and difference.”¹⁷⁶

The enquiry in this dissertation elects to adopt the approaches suggested by Werro, Bell and Guiora, because approaching the study only from the perspective of similarities or only looking for differences, might result in the overlooking of something important. Furthermore, the wider approach that takes account of other matters such cultural differences, history and politics is essential to get as much as possible of the whole picture. This enquiry will be open to searching for both similarity and difference, with the intention of identifying strengths from distinct paradigms, as a tool for finding and crafting global minimum standards to guide the states that choose to use preventive detention as a counter-terrorism tool.

1.8 Scheme of the dissertation

It is not possible to analyze the detention laws of every country in this dissertation. In the first instance the survey has been restricted to countries where the source materials are in English or a language in which the author is fluent.

The relevant laws of the United Kingdom, the United States, Australia, Canada, India, Israel, and France have been chosen for in depth analysis, with other countries referenced in passing. These countries were selected as the starting point because the legal systems (other than France) derive to some extent from English common law and each of these countries has had a distinctive approach to fighting terror, as will be seen in

¹⁷⁵ Id., at 171.
¹⁷⁶ Id. at 174.
the sections *infra*. France has had to combat terrorism for at least fifty years and is chosen as an example of how preventive detention is used in a civil law country. All these countries, except Australia and Canada, have had a long history of combating terrorism. However, those two countries merit examination because after 9/11 each introduced extremely repressive measures without adequate procedures, more as a reaction to the global terrorist threat than to serious threats on their home soil.\(^{177}\)

Section A focuses on detention laws in the United Kingdom, Australia, Canada, India, Israel, France and the United States, both from the law enforcement and LOAC perspective, where applicable. After a short introduction in A1, A2 comprises Chapters 2 through 7, devoted to a discussion of the laws in each country. Each Chapter begins with a discussion of the current terrorist threat and counter-terrorism strategy of each country, and this is followed by a description and analysis of the detention laws in those countries.

Chapter 2 examines the detention laws of the United Kingdom. Many elements of those laws were challenged on the grounds of violation of human rights in domestic courts as well as in the European Court of Human Rights. The British government has frequently reacted to judicial and public censure by changing the offending laws. Two examples are mentioned here. First, even before an ECHR ruling that condemned five types of coercive interrogation techniques as inhuman or degrading treatment,\(^{178}\) the government decided to ban these methods\(^{179}\) because of a public outcry and an

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179 Samantha Newbery, *Intelligence and Controversial British Interrogation Techniques: the Northern Ireland Case, 1971–2*, 20 IRISH STUD. INT’L AFF, 103, 117 (2009), *citing* the Parker Report, (H.M. Stationery Office 1972): “the majority recommended that the ‘five techniques’ continue so long as safeguards against excessive use were instituted, and the minority found that the techniques were unlawful and not morally justifiable.”
inconclusive public enquiry.\textsuperscript{180} Second, the House of Lords (now called the Supreme Court) held that provisions in the Anti-Terrorism, Crime and Security Act 2001 permitting the indefinite detention of aliens in an immigration law context,\textsuperscript{181} did not comply with the European Convention.\textsuperscript{182} That decision was the direct catalyst for the repeal of those provisions. The British approach of adapting policy in response to censure in order to comply with international human rights standards, has resulted in the shaping of many examples of good counter-terrorism practice that will serve as a model for the recommendations in Chapter 12.

Chapter 3 discusses the laws of Australia, Canada and India, all of which have been modeled on British law. Australia has introduced fifty-four counter-terrorism laws since the events of 9/11,\textsuperscript{183} many of them involving inchoate offenses.\textsuperscript{184} These laws were enacted as a reaction to terror attacks in other parts of the world: Australia itself has disrupted “four significant terrorist plots” since 9/11.\textsuperscript{185} Yet the preventive detention laws have never been used, investigative detention by Australian Security Investigation Officers has not been used between 2003 and 2012, and only two control orders were made in respect of Australian citizens. In any event, no effective mechanism exists to challenge any of these counter-terrorism tools. Other than in challenges to the two control orders, the possibility of significant domestic judicial scrutiny has been absent. Even if

\begin{footnotesize}
\begin{enumerate}
\item Id., at 118, \textit{citing} The National Archives, Foreign and Commonwealth Office, 87/157, Douglas-Home to missions and posts, (Mar. 2 1972): “Heath’s government decided ‘in the British way...to err on the side of caution and not...permit the [five] techniques to be used in future as an aid to interrogation’ by, or on behalf, of British forces.”
\item Anti-Terrorism, Crime and Security Act 2001, c.24, §23 (U.K.).
\item A. v. Secretary of State for the Home Department, [2004] UKHL 56.
\item Nicola McGarrity, \textit{‘Let the Punishment Fit the Offence’: Determining Sentences for Australian Terrorists}, 2 INT’L J. CRIM. JUST. 1, (2013).
\item BRET WALKER, INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR, DECLASSIFIED ANNUAL REPORT 20 DECEMBER 2012, 28 Commonwealth of Australia, (2013).
\end{enumerate}
\end{footnotesize}
the opportunity had presented itself to review the lawfulness of these tools, the hands of domestic judges would have been tied. The lack of a Bill of Rights prevents judges from applying a constitutional remedy to invalidate laws that violate human rights. Australia has taken little, or no heed of heavy Human Rights Committee criticism. Therefore no improvement can be expected until Australia makes a decision to improve the way it handles its human rights obligations.

In contrast, Canada’s first counter-terrorism strategy\(^{186}\) highlights the importance of human rights, as enshrined in the Canadian Charter of Rights and Freedoms,\(^{187}\) and in international human rights and international humanitarian law,\(^{188}\) whilst at the same time declaring that “[s]ecurity is also a human right.”\(^{189}\) Canada made frequent use of immigration law to detain foreign terror suspects, by issuing security certificates, and holding the suspects in indefinite detention, subject to six-monthly reviews.\(^{190}\) After Canadian Supreme Court criticism,\(^{191}\) the government introduced measures to address some of the procedural problems relating to divulging sensitive evidence to detainees,\(^{192}\) and to ensuring that foreigners and permanent residents were treated alike as regards the timing of challenging detention.\(^{193}\) However, despite the alleged importance given to

\(^{186}\) **GOVERNMENT OF CANADA, BUILDING RESILIENCE AGAINST TERRORISM: CANADA’S COUNTER-TERRORISM STRATEGY,** 7 (2011).


\(^{188}\) **GOVERNMENT OF CANADA, BUILDING RESILIENCE AGAINST TERRORISM: CANADA’S COUNTER-TERRORISM STRATEGY,** supra note 186, at 11.

\(^{189}\) Id, “Security is also a human right. Terrorism is an attack against those very rights that are fundamental to Canadian society, such as freedom of thought, expression and association, and the right to life, liberty and security of the person.”

\(^{190}\) **Immigration and Refugee Protection Act,** S.C. (2001) c.27, §§81, 82.1 (Can.).

\(^{191}\) **Charbonneau v Canada,** 1 S.C.R. 350, ¶¶57-62 (2007) (Can.).


\(^{193}\) **Immigration and Refugee Protection Act,** supra note 190, at §82.1.
protecting human rights, the Canadian Supreme Court has not found potential indefinite detention to be problematic from a human rights or constitutional standpoint.

India, like Australia, has blatantly disregarded Human Rights Committee censure for failing to afford proper process in many aspects of preventive detention. The Constitution specifically prohibits a preventively detained person receiving an explanation for his detention, access to a lawyer or the right to challenge detention in a court within twenty-four hours.\textsuperscript{194} In addition, when India acceded to the ICCPR in 1972, it made a declaration that Article 9 ICCPR had to be applied within the parameters of Article 22 of the Constitution of India.\textsuperscript{195} Thus, according to India, it does not have to comply with Article 9. Thus, again like Australia, little improvement can be expected on the due process front until India completely changes its approach to protecting human rights.

Detention in Israel is the subject of Chapter 4. A different set of issues are presented: first, because Israel has been in a perpetual state of emergency since the State was established in 1948 and administrative detention applicable in Israel for suspects who cannot be prosecuted, is found in emergency legislation.\textsuperscript{196} This means that under international law, Israel may derogate from some of its human rights guarantees;\textsuperscript{197} second, because the Israeli Supreme Court brings a distinctive twist on LOAC to its

\textsuperscript{194} India Const., art. 22(2), (3)(b).

\textsuperscript{195} [Declaration on India re Article 9]: “India takes the position that the provisions of the article shall be so applied so as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India. There is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State.”

\textsuperscript{196} Emergency Powers (Detention) Law, \textit{supra} note 78. Similar provisions promulgated by military order apply in the Occupied Territories, \textit{see e.g.} Order Regarding Security Provisions [consolidated version] (Judea and Samaria) (No. 1651) \textit{supra} note 86, at Article B, Temporary Order.

\textsuperscript{197} ICCPR, \textit{supra} note 70, at art. 4 permits derogation from some guarantees in times of emergency. As Israel has derogated from the ICCPR, it is not obliged to ensure that detention is not arbitrary. Israel is not, however, released from the right to afford detainees the right to challenge detention, because that right is non-derogable.
interpretation of the constitutionality of various detention measures; and third, because Israel adopts a unique approach to providing sensitive evidence to detainees. Israel has taken great pains to establish what it believes to be fair procedures to govern administrative detention, but these still fall short of international human rights standards in a number of important respects. In particular, administrative detention is potentially indefinite, the use of ‘secret evidence’ is extremely problematic, and delays in permitting access to lawyers have caused concerns.

Chapter 5 concerns law enforcement detention in France, a civil law country. France is included in this study because a real tension in France exists between the right to freedom from arbitrary arrest and detention, enshrined in the French Bill of Rights of 1789, the ICCPR and the European Convention, and the right to security, which is described in legislation as a fundamental right. The European Convention is directly applicable in French law, but France has been repeatedly censured for violations, such as excessive duration of detention, delayed and restricted access to lawyers and ill-treatment of detainees. The government has made a few minor improvements to how

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198 In evaluating the proportionality of administrative detention pursuant to the Incarceration of Unlawful Combatants Law, 5762-2002, supra note 78, the Supreme Court reasoned that civilians participating in hostilities against the State of Israel, are unlawful combatants. They are subject to the Fourth Geneva Convention relative to civilians (GC IV) and can be detained when they represent a threat to the security of the state. An unlawful combatant would not, however, be entitled to the same degree of protection to which innocent civilians are entitled under GC IV. The Court held indefinite detention to be proportionate, relying once more on the applicability of international humanitarian law, in particular to GC III, which allows prisoners of war to be interned until hostilities have ended. See A. v. Israel, A. v. State of Israel, supra note 83, at ¶¶13 and 49, citing the Third Geneva Convention, relative to prisoners of war, art. 118, providing that detention is possible until the cessation of hostilities.

199 The judge will see all the evidence, without the detainee or his representative being present, and may decide to accept evidence without disclosing it to the detainee or his lawyer if he is “satisfied that disclosure of the evidence to either of them may impair state security or public security. See Emergency Powers (Detention) Law, 5739-1979, supra note 78, at §6(c).

200 Loi No. 2003-239, art.1 (Fr. 18 Mar. 2003).

201 ANNA OEHMICHEN, TERRORISM AND ANTI-TERROR LEGISLATION: THE TERRORISED LEGISLATOR?, 292 (Intersentia, 2009), describing how France has a monist tradition.
detainees are treated. The French tradition appears to place security of the state over liberty of the individual.

Chapter 6 discusses the domestic approach of the United States to detaining terror suspects. Suspects arrested without a warrant must be brought promptly before a court, for a judicial authority to confirm that probable cause existed for the arrest. Promptness means not more than forty-eight hours.\textsuperscript{202} The chapter highlights two “devices” that have been employed to achieve detention of terror suspects without charge: the material witness statute, and immigration law. Material witness warrants can be used to arrest and detain persons believed to be material witnesses to a crime, if a judicial officer determines that such a person would flee if served with a subpoena to testify at grand jury proceeding or a trial.\textsuperscript{203} Yet after 9/11, material witness warrants were used to detain persons without charge in cases where probable cause for arrest had not been established.\textsuperscript{204} Under immigration law, aliens can be detained without charge, without a showing of probable cause of any crime, merely to determine their immigration status, including in situations where there are visa violations.\textsuperscript{205} Although immigration detention may not be indefinite,\textsuperscript{206} it can be very lengthy. Both of these “devices” are flawed in that they do not afford adequate due process to detainees. For example, detainees are not informed of rights, or given adequate, or any, information as to why they are detained.

\begin{itemize}
\item \textsuperscript{202} \textit{County of Riverside v. McLaughlin}, 500 U.S. 44, 56 (1991).
\item \textsuperscript{203} 18 U.S.C. §3144 (2006).
\item \textsuperscript{204} \textit{HUMAN RIGHTS WATCH, WITNESS TO ABUSE: HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11, 19}, (2005).
\item \textsuperscript{205} 8 U.S.C. §1226 (2008).
\item \textsuperscript{206} Zadvydas v. Davis, 533 U.S. 678, 699 (2001): “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.”
\end{itemize}
Detainees have difficulty in gaining access to lawyers, and in immigration cases, in obtaining bail.²⁰⁷

Chapter 7 focuses on the use of the LOAC model to detain terror suspects, within the context of the United States’ war with al-Qaeda and its affiliates. One fundamental problem with this particular type of “conflict” relates to the tying of the duration of detention to the end of hostilities. As terror attacks by al-Qaeda are sporadic and occur in many different locations, some with little connection to U.S. interests, by what metric will the United States determine that this conflict is over? Will they wait three months, three years, thirty years, or more after the “last” attack to decree that the conflict has ended? Other problems with LOAC detention derive from flawed procedures for challenging detention from a human rights perspective. For example, persons held in Guantánamo have the right to apply for the remedy of habeas corpus in the United States District of Columbia federal court,²⁰⁸ but access to lawyers has been made difficult and the type of evidence that the court may admit is problematic from a human rights point of view. Detainees in Afghanistan may not challenge their detention in the United States in federal court,²⁰⁹ and are only afforded an even more inferior and flawed process.

A3 draws all the Section A chapters together and concludes that for the purpose of crafting comprehensive guidance, some broad cohesion can be seen. However the one clear common thread running through the discussions in each chapter, is that the procedural aspects of preventive detention in every country, in both the law enforcement

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²⁰⁹ Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010).
and LOAC frameworks, are flawed and deficient from a human rights perspective, to a greater or lesser extent.

Section B analyzes the international human rights law framework of detention. After a short introduction in B1, B2 continues in Chapters 8 through 11 with a comparison of the provisions in five general human rights treaties, and the operation of the treaties, together with a brief mention of preventive detention in operation in a number of countries, including in Algeria, Bahrain, Bolivia, Cuba, Ethiopia, Kenya, Lebanon, Malaysia, Nepal, Nigeria, Saudi Arabia, Spain, Swaziland, Turkey and Zambia.

Chapter 8 examines what detention means under the ICCPR, and assesses the procedural aspects. This treaty does not adequately address the need for States to clearly articulate grounds for national security detentions. Furthermore, it does not mention anything about detainees having access to lawyers, or contact with family members. The former is essential to guarantee fairness in proceedings challenging detention, and the latter is necessary to protect against incommunicado and secret detention.

Chapter 9 carries out the same analysis with regard to the European Convention. Unique amongst the all other general human rights treaties analyzed, this Convention only permits detention on six specified grounds. This is a narrower detention power than that found in the other treaties that merely permit detention “in accordance with grounds specified by law.” The jurisprudence of the ECHR is extremely well developed and influences many countries on how to shape their laws. For example, as discussed in connection with Chapter 2, the United Kingdom has made changes to its laws to reflect some of the ECHR judgments. However, like the ICCPR, the European Convention does

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not deal with giving detainees access to lawyers or contact with family members. Therefore, the Convention lacks some important guarantees to provide fairness in challenging detentions and to protect against incommunicado and secret detention.

Chapter 10 conducts the identical analytical exercise in respect of the American Convention. The Inter-American Commission and the Inter-American Court of Human Rights have ruled on many important decisions relating to liberty, but very few of these are in the prevention of terrorism context. This Convention also lacks some important guarantees to provide fairness in challenging detentions and to protect against incommunicado and secret detention.

Chapter 11 examines the African Charter and Arab Charter. The African Charter affords the least procedural fairness in that it does not specifically permit detention to be challenged. The African Commission on Human Rights case law has not dealt with cases relating to detention, and has not provided any interpretive guidance on the wording of the Charter. The Arab Charter is the youngest of all these human rights treaties and no case law or interpretive guidance exists. These Charters also lack a number of important guarantees to provide fairness in challenging detentions and to protect against incommunicado and secret detention.

B3 draws the detentions provisions in the Section B treaties together and concludes that although international human rights law underpins domestic law in all of the countries surveyed, it too, has a number of deficiencies, and cannot provide an adequately comprehensive framework for the detention of terror suspects.

The dissertation concludes with Chapter 12. I contend that where countries have chosen to use preventive detention, in order to comply with the rule of law, global
minimum standards that cure current deficiencies in procedure are needed. These criteria are required to regulate how detention is used, and to protect the human rights of detainees without compromising the ability of law enforcement authorities to prevent terror attacks.

After drawing on the lessons learned from evaluating the problems encountered in both the law enforcement and LOAC models of preventive detention, many of which relate to inadequate process, I argue that in order to craft useful reference guidelines for countries, the best approach is to draw on elements of international human rights law, and some examples of good practice from domestic laws. The guidelines focus on the procedural aspects of preventive detention where gaps are revealed in existing law, or where I believe further clarification is needed as to process.

I recommend a set of ten minimum criteria to guide all states that choose to use preventive detention. Each principle is subjected to three tests: (1) whether it is compatible with international human rights standards; (2) if the principle is adopted, how would it affect the ability of law enforcement authorities to prevent terrorist acts; and (3) if the principle is adopted, what changes are needed in the LOAC and domestic laws of the countries surveyed in Section A. Finally, I return to the hypothetical example described in 1.4 above, to show the effect of applying the principles to that scenario. The principles are:

1. Clarify the requirement that preventive detention must be on grounds authorized by law;
2. Provide guidance to understand the meaning of arbitrary detention;
3. Provide guidance to giving detainees the reason for detention;
4. Eliminate incommunicado detention;
5. Afford all detainees proper and consistent access to legal counsel;
6. Improve the procedures for indefinite detention;
7. Provide consistency to the right and process of challenging detention in a court, with rights of appeal;
8. Ensure fair treatment of detainees;
9. Provide all detainees with a right to seek compensation for violation of human rights;
10. Provide a mechanism for independent oversight of detention.
2.1 The terrorist threat and counter-terrorism strategy

Historically and currently, the United Kingdom has had to deal with many terrorist threats and attacks to its interests abroad.\(^1\) Many of these relate to Northern Ireland.\(^2\) The history of that conflict, both on domestic soil and in the Province itself, and the legal measures adopted, are discussed briefly below.\(^3\) Since the 1970s the nature of the terrorist threat has changed. In addition to the threat from the Irish Republican Army and its affiliates, many terror attacks in the United Kingdom and on British interests overseas were perpetrated by Middle Eastern groups, and since 9/11, by Islamist extremists.\(^4\)

In 2011 the threat came from two distinct sources: terrorism from Islamic fundamentalists,\(^5\) emanating from terrorist groups based in Pakistan, Yemen and Somalia, including British born terrorists;\(^6\) and at the same time, Irish terrorism was on the

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1. It is beyond the scope of this dissertation to discuss how the British handled insurgents and terrorists in former British territories and colonies, such as India, Malaya etc.
4. CONTEST 2009, supra, note 2 at ¶1.06-1.22.
5. LORD CARLILE, REPORT TO THE HOME SECRETARY OF INDEPENDENT OVERSIGHT OF PREVENT REVIEW AND STRATEGY, 4, ¶10, H.M. Government (May 2011, (U.K.)).
increase. The British Home Secretary noted that in 2010 almost three times as many people were arrested for terrorist offences in Northern Ireland as for international terrorist offences across the UK. The Secretary of State for Northern Ireland reported to the U.K. Parliament in July 2013, that with twenty six national security attacks in 2011, twenty four in 2012, ten in 2013 at the date of her report, the terrorist threat level was “severe”, meaning highly likely. In a U.K. Home Office report for 2012 published in March 2013, the terrorist threat was described as “more diverse than before, dispersed across a wider geographical area, and often in countries without effective governance.” Kidnapping has been an increasingly common terrorist tactic.

The Global Terrorism Database is an open-source resource reporting information on terrorist events around the world from 1970 through 2012. It shows 635 terrorist incidents in Great Britain between 1970 and the end of 2012. Home Office statistics published in December 2013 with data up to June 30, 2013, reveal that 2,465 persons have been arrested on terrorist-related offenses since September 11, 2001. Of that number,
935 (i.e. 38%) were charged, generating 524 terrorist-related charges and 411 non-terrorist-related charges. The remaining 62% were released.13

Although no British government official statistics exist relating to the type of terrorist arrest, i.e. identifying whether the threat derived from Islamist or other sources, research suggests that 138 persons with Islamist connections were involved in terror plots between September 11, 2001 and 2010, of which 69% were British nationals.14

Since then, the Independent Reviewer of Terrorist Legislation15 issued a report covering the period up to July 2013. He comments that the terror threat is “far from negligible.”16 He identified five plots in the public domain occurring between 2010 and the end of 2012 that resulted in arrest, trial and conviction, and also highlighted a “limited number of other plots during the period in question, which are believed to have involved attack planning but which were disrupted or otherwise dissipated without becoming publicly known.”17 Other plots involved lone wolves,18 and attacks on British

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15 Independent review of terrorist legislation has existed in the United Kingdom since the 1970s. In the Prevention of Terrorism Act 2005, annual review by the Independent Reviewer was placed on a statutory basis. These reports are prepared for the Home Secretary and are laid before Parliament. The Reviewer frequently gives evidence to parliamentary Committees. See INDEPENDENT REVIEWER OF TERRORISM LEGISLATION, THE REVIEWER’S ROLE, https://terrorismlegislationreviewer.independent.gov.uk/about-me/
17 Id., at ¶¶2.11-2.26. The plots in the public domain are Operation GUA involving plans to attack the London Stock Exchange in December 2010, a plot based in Birmingham involving plans to conduct a bombing campaign in September 2011, a plot involving plans to attack a Territorial Army base in April 2012, preparations to attack a demonstration by the English Defence League in June 2012, and a plot involving preparations to attack the town of Wootton Bassett in July 2012.
18 Id. at ¶¶2.21-2.26.
interests overseas. The most recent attack in the United Kingdom involved the slaughter of a British soldier in Woolwich by two Islamist terrorists in May 2013.

From 2006 the British security services assessed the level of terrorist threats as fluctuating between “critical” (an attack is expected imminently), and “severe” (an attack is extremely likely). Since July 2011 the threat level on the United Kingdom mainland from international terrorism was reset at “substantial” (an attack without warning is a strong possibility), whilst in Northern Ireland the threat level remains “severe”. Yet the Independent Reviewer of Terrorism Legislation comments that “[t]here is no reliable and publicly-accessible analysis of the threat, such as might assist in evaluating the necessity and proportionality of the many anti-terrorism laws that exist in the United Kingdom.”

However, he does not doubt that “Britain has experienced a credible terrorist attack plot about once a year since 9/11.”

In 2003 the government launched a counter-terrorism strategy named CONTEST. In 2009, it revised the strategy to take account of the evolution of the terrorist threat. The revised strategy had four strands: Pursue – to stop terrorist attacks; Prevent - to stop people becoming terrorists or supporting violent extremism; Protect – to strengthen

19 Id., at ¶¶ 2.39-2.53.
22 DAVID ANDERSON Q.C., INDEPENDENT REVIEWER OF TERRORISM LEGISLATION, TERRORISM PREVENTION AND INVESTIGATION MEASURES IN 2012, 12, ¶1.16 (Mar. 2013), [hereinafter TERRORISM PREVENTION AND INVESTIGATION MEASURES IN 2012].
23 Id., at 13, ¶1.19 (c), citing Jonathan Evans, Director General of MI5, Address at Lord Mayor’s Annual Defense and Security Lecture, Mansion House, ¶11, (Jun. 25, 2012).
24 CONTEST 2009, supra note 2 at 6.
protection against terrorist attack; and Prepare – where an attack cannot be stopped, to mitigate its impact.\(^{25}\)

The United Kingdom Counter-Terrorism Review published in January 2011\(^ {26}\) identified a number of serious flaws in the Prevent strategy of 2009\(^ {27}\). “In trying to reach out to those at risk of radicalization, funding sometimes even reached the very extremist organizations that Prevent should have been confronting.”\(^ {28}\) Additionally, the Prevent strategy had failed to tackle extremist ideology,\(^ {29}\) and certain measures of purported outreach had resulted in the stigmatization of Muslim communities.\(^ {30}\)

The new Prevent strategy introduced in June 2011 had three objectives in tackling extremism and radicalization:

- respond to the ideological challenge of terrorism and the threat we face from those who promote it; prevent people from being drawn into terrorism and ensure that they are given appropriate advice and support; and work with sectors and institutions where there are risks of radicalization which we need to address.\(^ {31}\)

The CONTEST 2012 report reiterates that “ideological challenge is the core” of the Prevent work.\(^ {32}\)

Additionally, the preventative detention powers described below, as well as powers relating to surveillance and stop and search\(^ {33}\) had attracted much criticism from civil

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\(^{25}\) Id., at 11 ¶0.19.


\(^{27}\) Updated anti-extremism strategy published, B.B.C. NEWS, (Jun. 7. 2011) [http://www.bbc.co.uk/news/uk-13679360], (quoting Teresa May, Home Secretary).

\(^{28}\) Id.

\(^{29}\) PREVENT REVIEW, supra note 26 at 8, ¶24;

\(^{30}\) PREVENT STRATEGY, H.M. GOVERNMENT, CM 8092, 7 at ¶3.21, (Jun. 2011, (U.K.)).

\(^{31}\) CONTEST 2012, supra note 10 at ¶2.46.

\(^{32}\) For a description of the U.K.’s laws on surveillance and stop and search, see, e.g. Diane Webber, Can We Find and Stop the “Jihad Janes”? 19 CARDOZO J. INT’L & COMP. L. 91, 96-109 (2011).
The Review of Counter-Terrorism and Security Powers concluded that some counter-terrorism measures were “neither proportionate nor necessary” and recommended a number of changes to the law to “correct the imbalance that has developed between the State’s security powers and civil liberties, restoring those liberties wherever possible and focusing those powers where necessary.” The changes relating to preventive detention are discussed below. The other changes include ending the indiscriminate use of stop and search powers, and amending intrusive surveillance powers relating to communications data.

2.2 The United Kingdom’s Terrorism Laws – an Overview

The United Kingdom has been combating terrorism for more than a century. The United Kingdom has always treated, and continues to treat terrorism as a crime, to be prosecuted in the regular criminal courts, even whilst the British army went to the aid of the police in Northern Ireland, as described below. Offenses criminalizing various acts of terrorism are enshrined in numerous statutes. Clive Walker has commented that the Terrorism Act 2000 “represents a valuable attempt to fulfill the role of a code against terrorism, though it fails to meet the desired standards in every respect.”

35 PREVENT REVIEW, supra note 26, at 5.
36 Id., at 3.
37 Id. The UK government recommended the change in the law following a European Court of Human Rights ruling in Gillan and Quinton v. United Kingdom, (2010), Application No. 4158/05, 50 EHRR 45 (Jan 12, 2010), that the stop and search provisions violated the right to privacy in Article 8 ECHR.
38 Id. at 5.
39 Terrorism Act, 2000, §1 c.11 (U.K.).
40 See e.g., Terrorism Act, 2000, supra note 39; Anti-Terrorism, Crime and Security Act, 2001 c.24 (U.K.); Prevention of Terrorism Act, 2005, c.2 (U.K.); Terrorism Act, 2006, c.11 (U.K.); Counter-Terrorism Act, 2008, c.28 (U.K.). There are corresponding statutes for Northern Ireland.
This permanence is unremarkable. The twenty-first century concept of normality in criminal justice embodies the contingency and reality of ‘special’ powers dealing with ‘special’ situations or risks, whether terrorism, serious frauds, sex offenders or the anti-social. This trend towards fragmentation and specialization may be warranted, provided sensible safeguards and scrutiny are secured….In addition, permanence is not the same as the ‘normalization’ of special powers or the ‘contamination’ of ‘normal’ laws.42

In his 2012 annual report, the Independent Reviewer of Terrorism Legislation, opined that “the threat from terrorism remains a substantial one, amply justifying the existence of some terrorism-specific laws.”43 Since 2010, a trend of “cautious liberalization” of anti-terror laws can be discerned, illustrated for example by reducing the period of detention without charge from twenty-eight to fourteen days and replacing control orders with Terrorism Prevention and Investigation Measures,44 as described below.

As discussed in Chapter 1, terrorism has been very widely defined, and this is directly relevant to the scope of counter-terrorism tools, including preventive detention. The wide definition of terrorism was the issue before the U.K. Supreme Court in R. v. Gul.45 Gul was born in Libya but is a British citizen. Police found videos of different varieties of terrorist attacks on his computer, together with commentaries praising the bravery and martyrdom of the attackers and encouraging others to emulate them.

The prosecution contended that these videos were terrorist publications and Gul was charged with several counts of distributing or circulating terror-related material. He was convicted of five counts, and appealed. The question before the Supreme Court was whether the definition of terrorism included any or all military attacks by a non-state

42 Id., at ¶1.158.
43 TERRORISM LEGISLATION REPORT 2012 supra note 16 at ¶12.3.
44 Id., at ¶1.7. He describes the liberalization as cautious because the measures were moderate and in some cases supplemented by draft legislation to be used if the threat level worsens, see ¶1.9.
armed group against any, or all, state or inter-governmental organization’s armed forces in a non-international armed conflict. The Supreme Court ruled that it did.

The relevance of mentioning this case in this chapter derives from dicta concerning the wide-ranging scope of the definition of terrorism. Lord Neuberger referred to the July 2013 report on the terrorism legislation in 2012 by the Independent Reviewer of Terrorism Legislation. This report highlighted that a consequence of the broad definition of terrorism was the granting of “unusually wide discretions to all those concerned with the application of the counter-terrorism law, from Ministers exercising their power to impose executive orders to police officers deciding whom to arrest or to stop at a port and prosecutors deciding whom to charge.” Lord Neuberger added two further undesirable consequences: the effect on querying the lawfulness of executive acts relating to detention and the extent of inchoate offenses. Yet the Court did not cut down the wide meaning of the definition of terrorism; indeed, it commented that there were good reasons for it.49

The Independent Reviewer of Terrorism Legislation comments that the purpose of specific terrorism offenses is to prevent terrorism. He notes that some of these offenses, particularly those that are inchoate or associational, will be rather controversial and

46 Id., at ¶34, citing TERRORISM LEGISLATION REPORT 2012, supra note 16.
47 TERRORISM LEGISLATION REPORT 2012, supra note 16 at ¶4.3(c).
48 R. v. Gul, supra note 45 at ¶37: “First, the lawfulness of executive acts such as detention, search, interrogation and arrest could be questioned only very rarely indeed in relation to any actual or suspected involvement in actual or projected acts involving “terrorism”, in circumstances where there would be no conceivable prospect of such involvement being prosecuted. Secondly, the fact that an actual or projected activity technically involves “terrorism” means that, as a matter of law, that activity will be criminal under the provisions of the 2000 and 2006 Acts, long before, and indeed quite irrespective of whether, any question of prosecution arises.”
49 Id., at ¶38.
50 TERRORISM LEGISLATION REPORT 2012, supra note 16 at ¶11.2.
explains the risks,\textsuperscript{51} but points out that that “intense judicial scrutiny has generally determined that these sections, as interpreted by the courts, are fit for purpose.”\textsuperscript{52} The breadth of terror offenses impacts directly on the scope of measures like preventive detention.

The U.K. criminal law framework has been modified from time to time to ensure conformity with the European Convention on Human Rights, (“European Convention”).\textsuperscript{53} The United Kingdom’s Human Rights Act 1998\textsuperscript{54} incorporated most of the European Convention into U.K. domestic law with effect from 2000. It required courts to read and give effect to legislation in a way that was compatible with European Convention rights,\textsuperscript{55} and gave courts the power to declare that United Kingdom legislation was incompatible with European Convention provisions.\textsuperscript{56} It is an on-going process. In 2010/2011 a thorough review of the United Kingdom’s counter-terrorism strategy was carried out in response to many concerns raised about the compatibility of counter-terrorism measures with international human rights law,\textsuperscript{57} and changes to the law are in progress.

\textsuperscript{51} Id., at ¶11.3. “Preventive offences are easier to justify when the harm potentially prevented is very grave (as is certainly the case with some terrorist acts), when an intention to harm exists and when the prohibited action is not at too many removes from the harmful act. Where these conditions are not satisfied, the intervention of the criminal law risks “chilling” the exercise of perfectly lawful expressive, associational and research activity.”

\textsuperscript{52} Id., at ¶11.5.


\textsuperscript{54} Human Rights Act 1998, c. 42 (U.K.).

\textsuperscript{55} Id., at §2.

\textsuperscript{56} Id., at §4. However a declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and is not binding on the parties to the proceedings in which it is made. (§4(6)).

\textsuperscript{57} PREVENT REVIEW, supra note 26.
Detention without charge\textsuperscript{58} and control orders,\textsuperscript{59} which have now been replaced by Terrorism Prevention and Investigation Measures (“T-Pims”),\textsuperscript{60} are discussed below. These are measures that are specifically designed to detain in order to prevent a terrorist act, but it should also be noted that U.K. law permits forms of preventive detention both prior to deportation of aliens who have completed a sentence of imprisonment,\textsuperscript{61} as well as in the case of immigration deportations,\textsuperscript{62} on grounds that continued presence in the United Kingdom would not be “conducive to the public good”.

2.3 A Note on Northern Ireland\textsuperscript{63}

Northern Ireland is mentioned separately here in order to analyze the use of the army to deal with Irish terror groups. Was their role one of law enforcement, or were they operating under a LOAC framework?

Terrorist activity by various permutations of the Irish Republican Army (IRA), has occurred in Northern Ireland since 1921 through 1998. One of the prime reasons for the many years of violence, known as the ‘Troubles,’ derives from ethnic nationalism and the long-running dispute of whether Northern Ireland is a part of the United Kingdom or

\footnotesize{\textsuperscript{58} Terrorism Act, 2000, supra note 39.}
\footnotesize{\textsuperscript{59} Prevention of Terrorism Act, 2005, supra note 40.}
\footnotesize{\textsuperscript{60} Terrorist Prevention and Investigation Measures Act, 2011, c.23 (U.K.).}
\footnotesize{\textsuperscript{61} See, e.g., Lumba v Secretary of State for the Home Department, [2011] UKSC 12, (Mar. 23, 2011, (Eng.)).}
\footnotesize{\textsuperscript{63} See, e.g. LAURA K. DONOHUE, COUNTERTERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM 1922-2000, (Irish Academic Press, 2001); LAURA K. DONOHUE, THE COST OF COUNTERTERRORISM, supra note 3 at 35-57; COMBATING TERRORISM IN NORTHERN IRELAND, supra note 3; and Diane Webber, Preventive Detention in the Law of Armed Conflict: Throwing Away the Key? 6 J. NAT’L SECURITY L. & POL’Y 167 (2012).}
Even after the peace agreement of 1998, the United Kingdom has faced, and continues to face, a threat on the mainland from Irish terror groups.\textsuperscript{65}

Over the period a number of waves of particularly prolonged serious violence occurred in Northern Ireland, as well as sporadic terrorist attacks on the mainland, (the last in 2001),\textsuperscript{66} necessitating the passage of legislation both in Northern Ireland and in the United Kingdom to maintain order. In various periods between 1922 and 1975 the Northern Ireland government was able to detain preventively and indefinitely anyone suspected of “being about to act in a manner prejudicial to the preservation of peace and the maintenance of order,” and was able to restrict the movement of people who were not detained.\textsuperscript{67} Between 1922 and 1972, 940 people were interned in Northern Ireland.\textsuperscript{68}

In 1968 a renewed onslaught of serious violence escalated to such an extent that the police in Northern Ireland were unable to control the situation. The British government decided to intervene and in August 1969 it dispatched the British Army to restore order. Their role was to provide “military aid to the civil power,”\textsuperscript{69} but to “support the civil authority, not usurp it.”\textsuperscript{70} The British government regarded the situation as “terrorism, not war,”\textsuperscript{71} despite the fact that the “conflict reached almost civil war like

\begin{footnotes}
\item \textsuperscript{64} James Dingley, \textit{Introduction in Combating Terrorism in Northern Ireland, supra} note 3 at 12.
\item \textsuperscript{65} CONTEST 2011 \textit{supra} note 6 at 9, ¶1.10.
\item \textsuperscript{66} \textit{Id.}
\item \textsuperscript{67} LAURA K. DONOHUE, \textit{The Cost of Counterterrorism, supra} note 3 at 37.
\item \textsuperscript{68} Richard B. Finnegan, \textit{What Lessons Can Be Learned from a Sui Generis Case in Courts and Terrorism} 73 (Mary L. Volcansek John F. Styack Jr., Eds., Cambridge University Press, 2011). \textit{See also} Bradley W.C. Bamford, \textit{The United Kingdom’s “War Against Terrorism,”} \textit{16 Terrorism & Pol. Violence} 737, 747 (2004); FRANK FOLEY, \textit{Countering Terrorism in Britain and France}, 189, (Cambridge University Press, 2013). The criminal justice system was also modified to permit trials of terror suspects without a jury, i.e. by a judge sitting alone, which also had relaxed evidential requirements, such as permitting convictions based on confessions. These courts were known as “Diplock” courts, as they had been introduced by a judge, Lord Diplock, and these non-jury courts continued until 2007.
\item \textsuperscript{69} MICHAEL HEAD & SCOTT MANN, \textit{Domestic Deployment of the Armed Forces}, 30 (Ashgate Publishing Company, 2009).
\item \textsuperscript{70} James Dingley, \textit{Introduction, in Combating Terrorism in Northern Ireland, supra} note 3 at 4.
\item \textsuperscript{71} \textit{Id.} at 6.
\end{footnotes}
Internment was authorized again, special courts were established without jury trial for dealing with IRA terrorist activity, and brutal interrogation practices were introduced. The military strategy has been described as “disastrous,” because the combination of the above-mentioned practices was the spur for an increase in violence in Northern Ireland itself as well as in terrorist attacks on mainland United Kingdom throughout the 1970s and 1980s. The military strategy also generated much litigation in the European Court of Human Rights.

After the abolition of the Northern Ireland Parliament in 1972 and the institution of Direct Rule from the United Kingdom, the British government re-evaluated its political and military strategy, and adopted a policy of “police primacy” in 1976. The police in Northern Ireland, known as the Royal Ulster Constabulary, have certain unique features that developed in response to the need to deal with a lethal terror threat since the 1920s. They evolved into a formalized military security force, and had to perform a full range of normal policing duties as well as policing with paramilitary features. The aim of the new police primacy strategy was to delegitimize Republican violence and render the activities of the IRA simply criminal. Police primacy made the clear statement that

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73 Id., at 140, (“at first the security forces were told to avoid any confrontation, and they failed to establish a presence in dangerous areas, and also ignored all signs of the emerging threat”).
74 Richard B. Finnegan, What Lessons Can Be Learned from a Sui Generis Case, supra note 68 at 84.
76 Id., at 179-80.
78 Id., at 180.
the government did not regard the situation as a war but a matter of law and order – the terrorists were criminals not combatants.\textsuperscript{79}

\section*{2.4 Detention without charge}

On the United Kingdom mainland, persons reasonably suspected to be terrorists, (i.e. persons who are or have been concerned in the commission, preparation or instigation of acts of terrorism),\textsuperscript{80} may be arrested without a warrant.\textsuperscript{81} As the definition of terrorism covers the use or \textit{threat} of action, this means that people can be arrested without actually being in the act of committing or having committed an offense. As the Independent Reviewer of Terrorism Legislation\textsuperscript{82} points out,

\begin{itemize}
  \item Sir Alistair Irwin & Mike Mahoney, \textit{The military response, in COMBATING TERRORISM IN NORTHERN IRELAND}, 218 (James Dingley, Ed.), (Routledge, 2009).
  \item Terrorism Act, 2000, \textit{supra} note 39 at §40 (U.K.), (terrorism means the “use or threat of action” involving, inter alia, serious violence against a person, endangering a person’s life, creating a serious risk to the health or safety of the public or a section of the public. Terrorist offenses include §§ 11 to 13 (offenses relating to proscribed organizations), §§15 to 19, 21A and 21D (offenses relating to terrorist property), §§38B and 39 (disclosure of and failure to disclose information about terrorism), § 54 (weapons training), §§56 to 58A (directing terrorism, possessing things and collecting information for the purposes of terrorism) §§59 to 61 (inciting terrorism outside the United Kingdom), ¶14 of Sch. 5 (order for explanation of material: false or misleading statements), ¶1 of Sch. 6 (failure to provide customer information in connection with a terrorist investigation), ¶18 of Schedule 7 (offenses in connection with port and border controls). The definition of “terrorism acts” has been further extended in Anti-Terrorism, Crime and Security Act, 2001, \textit{supra} note 40 at § 113 (1)(c); Terrorism Act, 2006, \textit{supra} note 40 at §34 and Counter-Terrorism Act, 2008, \textit{supra} note 40 at §27.
  \item Terrorism Act 2000, \textit{supra} note 39 at § 41, and Sch.8 (U.K.). Note also that Schedule 7 of this Act gives an examining officer (police, immigration or customs) the right at the U.K. border to detain for up to nine hours a person for the purpose of determining whether he appears to be a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism. There does not even have to be reasonable suspicion that the person has been so concerned. The detainee is required to give the examining officer any information and documents that he is requested to give. An example of this law in operation is the case of the detention at a London airport of David Miranda, partner of a Guardian newspaper journalist who covered the story of the U.S. whistleblower Edward Snowden. See e.g. Nicholas Watt, \textit{Theresa May rejects claim Miranda was detained with no legal basis}, THE GUARDIAN, (Aug. 21, 2013), \url{http://www.theguardian.com/politics/2013/aug/21/theresa-may-david-miranda-legal-basis}. In R. v. Gul, \textit{supra} note [ ] at ¶64, the Court commented on the power to stop and detain at ports, and stated that this power “is not subject to any controls” and that this type of detention “represents the possibility of serious invasions of personal liberty.”\textsuperscript{79}
  \item Independent review of anti-terrorism legislation has existed in the UK since the 1970s. In the Prevention of Terrorism Act 2005, review by the Independent Reviewer was placed on a statutory basis.
  \item The European Court of Human Rights adjudicated on the meaning of reasonable suspicion in O’Hara v. United Kingdom, Appl. No. 37555/97 Eur. Ct. H. R., (Jan. 16, 2002), ¶35, 36: “terrorist crime poses particular problems, as the police may be called upon, in the interests of public safety, to arrest a suspected terrorist on the basis of information which is reliable but which cannot be disclosed to the suspect or
\end{itemize}
(i) it is a notably wide power of arrest, in particular because the arresting officer need have no specific offence in mind. It is enough, under section 40(1)(b), for there to be a reasonable suspicion that a person is or has been concerned in the commission, preparation or instigation of acts of terrorism. The acts need not have been identified at the time of arrest. Additionally, suspects can be arrested and prosecuted in the U.K. for committing certain terrorist offences outside the United Kingdom. The law therefore permits detention both to prevent an attack and investigate and collect sufficient evidence to charge and prosecute. Yet some scholars regard the arrest without warrant as excessive and oppressive and damaging to community relations.

Suspects may be detained initially without charge for forty-eight hours, with their status subject to review every twelve hours by a police officer who has not been involved in the investigation. The suspect has the right to make representations to the review officer about continued detention. Continued detention is only permissible if the review officer is satisfied that it is necessary in certain specified conditions. Whilst detained, a suspect has the right to have a person informed of the detention. Access to counsel is

produced in court without jeopardizing the informant. However, though Contracting States cannot be required to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing confidential sources of information, the Court has held that the exigencies of dealing with terrorist crime cannot justify stretching the notion of “reasonableness” to the point where the safeguard secured by Article 5 § 1 (c) is impaired. It may also be observed that the standard imposed by Article 5 § 1 (c) does not presuppose that the police have sufficient evidence to bring charges at the time of arrest. The object of questioning during detention under sub-paragraph (c) of Article 5 § 1 is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. Thus facts which raise a suspicion need not be of the same level as those necessary to justify a conviction, or even the bringing of a charge which comes at the next stage of the process of criminal investigation.” (Emphasis added).

85 Terrorism Act 2006, supra note 40, at §17 (U.K.).
86 CLIVE WALKER, TERRORISM AND THE LAW, supra note 41 at 153, ¶¶4.43-4.
87 Terrorism Act 2000, supra note 39, at Sch. 8, §24.
88 Id., at Sch. 8, §26.
89 Id., at Sch. 8, §23.
90 Id., at Sch. 8, §6.
permitted, but in certain circumstances access may be delayed for up to forty-eight hours as well as restricted in terms of having to take place within the sight and hearing of a police officer. Once suspects have seen an attorney, those attorneys are entitled to be present at police interviews, unless specified exceptions apply.

Police interviews are video taped, and suspects must be advised of their right to silence, although this right is not as extensive as in the United States. British juries are allowed to draw adverse inferences from a suspect’s refusal to answer questions, both in pre-charge questioning, and during trial. The 2008 Counter-Terrorism Act introduced the concept of post-charge questioning, and extended the application of drawing adverse inferences from silence, to this stage of questioning. However, if interviews take place when access to counsel has been delayed at the behest of the police, no inferences may be drawn from a suspect’s silence. The 2011 Review recommended that post-charge questioning should be introduced as an “additional investigative tool” and the impact of this measure on pre-charge detention should be “kept under review.”

After forty-eight hours, a senior police officer must apply to a judicial authority for a warrant to extend the detention for a period no longer than seven days from the date of arrest. The grounds for extending the detention are either to obtain relevant evidence by questioning the suspect, or to obtain relevant evidence by other means, or to preserve

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91 Id., at Sch. 8, §§§7, 8, 9; Police & Criminal Evidence Act 1984 Code H, Revised Code of Practice in connection with the detention, treatment and questioning by police officers of persons in police detention under section 41 of, and Schedule 8 to, the Terrorism Act 2000, the treatment and questioning by police officers of detained persons in respect of whom an authorization to question after charge has been given under section 22 of the Counter-terrorism Act 2008, §6.9 and Annex B (Oct. 2013).
92 Id.
94 Counter-Terrorism Act 2008, supra note 40 at §22 (U.K.).
95 Police and Criminal Evidence Act 1984 Code H, supra note 91 at §§ 6.7, 10.9 and Annex C.
96 PREVENT REVIEW supra note 26 at 5, ¶30(iii).
97 Terrorism Act 2000, supra note 39 at Sch. 8 Pt. III, §29.
relevant evidence.\textsuperscript{98} The suspect must be given a notice, specifying the grounds upon which further detention is sought.\textsuperscript{99} The suspect or his attorney has the right to contest each application to extend the detention in court, but in certain circumstances a suspect and his lawyer may be excluded from the hearing.\textsuperscript{100} The warrant will only be issued if the judicial authority is satisfied that there are reasonable grounds for believing that the further detention is necessary, and that the investigation relating to the detention is being conducted diligently and expeditiously.\textsuperscript{101} After seven days in custody, an application can be made to a court for an extension of detention for up to a further seven days.\textsuperscript{102} It is unclear from the statute if the suspect is entitled to contest that application.

In 2003 the maximum period of detention was increased to fourteen days\textsuperscript{103} and this was doubled to twenty-eight days in 2006, but with a safeguard that the maximum period of pre-charge detention would reduce to fourteen days after one year, unless renewed by an affirmative order.\textsuperscript{104} The government introduced a Bill to increase the twenty-eight day period to forty-two days, but the bill was defeated by the House of Lords in October 2008.

Since the extension of the pre-charge detention period in 2006, only six people have

\begin{footnotesize}
\begin{enumerate}
\item \cite{Id. at §321(A)}
\item \cite{Id. at §31.}
\item \cite{Id. at §33.}
\item \cite{Id. at §32.}
\item \cite{Id. at §36.}
\item Criminal Justice Act 1993, §3061(4), c.44 (U.K.).
\item Terrorism Act 2006, \textit{supra} note 40 at §§ 23(7), 25, amending Terrorism Act 2000, \textit{supra} note 39 at Sch. 8 §363. After the first seven days, an extension of the warrant from a judicial authority had to be sought for up to a further fourteen days, and thereafter extensions could be sought for further periods not exceeding an additional seven days. Note that non-terrorist suspects may be detained for up to an initial period of forty eight hours, and this can be extended up to ninety six hours – Police & Criminal Evidence Act 1984, §44, c.60 (U.K.).
\end{enumerate}
\end{footnotesize}
been held for the maximum period of twenty-eight days, and no-one has been held for longer than fourteen days since 2007. In 2010-11 no individuals were held in pre-charge detention for longer than six days. In 2011, of the fifty-four persons arrested under the Terrorism Act 2000, three were held for more than seven days, (for between ten and twelve days), and forty-eight per cent were dealt with within two days. In 2012, there were 249 people arrested for terrorism related offenses. Of the forty-nine persons arrested under the Terrorism Act 2000, 45 were held for seven or fewer days, and thirty-seven were charged with terrorist-related offenses.

When a counter-terrorism review was pending in 2010-11, the government decided to renew the power to detain for a maximum period of twenty eight days for a further period of six months instead of the usual year long renewal. After pre-charge detention was examined in the review of counter-terrorism strategy, the government accepted the recommendation in the review that the maximum period for pre-charge detention should

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106 PREVENT REVIEW supra note 26 at 7.
107 HOME OFFICE, OPERATION OF POLICE POWERS 2010/11, supra note 105. Although 54 people were arrested under the Terrorism Act 2000, there were in fact 170 terrorism-related arrests in 2011.
108 Id.
110 Id.
111 Id., at ¶2.6.
113 PREVENT REVIEW supra note 26 at 5, 7-14. The government also noted the use of the “Threshold Test”, instead of pre-charge detention in certain cases. This test is a procedure described in the Prosecutor’s Code, whereby a suspect can be charged at an earlier stage than is normally required. For the threshold test to be used certain conditions need to be met including that there are reasonable grounds for believing that further evidence (to meet the evidential test) will become available within a reasonable period. See THE CODE FOR CROWN PROSECUTORS, The Crown Prosecution Service, available at http://www.cps.gov.uk/publications/code_for_crown_prosecutors/threshold.html
be reduced to fourteen days with immediate effect, by permitting the 2010 order\textsuperscript{114} to lapse at midnight on January 24, 2011. The Protection of Freedoms Act 2012 provides that the maximum period for pre-charge detention is to be fourteen days.\textsuperscript{115}

Two Bills have been published which provide for the possibility of extending the maximum period to twenty-eight days temporarily in an emergency,\textsuperscript{116} but debate continues as to whether the power to extend the detention period in exceptional circumstances should be enshrined in primary legislation, or be an “order-making power conferred on the Home Secretary, with safeguards.”\textsuperscript{117}

\textbf{2.5 Legal Challenges to Detention Without Charge}

The detention regime has been modified several times in response to a number of challenges both in domestic courts and the European Court of Human Rights (“ECHR”), some of which are described below.

\textbf{a. Equal treatment of British citizens and aliens}

The United Kingdom’s attempt to lock up ‘suspected international (i.e. alien) terrorists’ indefinitely pending deportation was struck down in December 2004 by the House of Lords who ruled that indefinite detention was incompatible with Article 5 of the European Convention.\textsuperscript{118} A former Home Secretary, Charles Clarke, said that the governing legislation relating to detention without charge was being applied in a “disproportionate and discriminatory manner” against non-British citizens, whereas the government seemed to be “able to deal with the British-born without such draconian

\textsuperscript{114} Terrorism Act 2006 (Disapplication of Section 25) Order 2010, supra note 112 at §2.
\textsuperscript{115} Protection of Freedoms Act 2012, §57, c.9, (U.K.).
\textsuperscript{116} Draft Detention of Terrorist Suspects (Temporary Extension) Bills, Cm 8018, (Feb. 2011, (U.K.)).
\textsuperscript{118} A (F.C.) and Others (F.C.) v. Secretary of State for the Home Department, [2004] UKHL 56 (Eng.).
measures.”  At the time these aliens were originally detained in 2001, British citizens could be held for up to seven days without charge. Thus, all persons on British soil, suspected of terrorist involvement, irrespective of immigration status, are now treated in the same way.

b. **Excluding suspect from all or part of detention challenge hearings**

In Ward v Police Services of Northern Ireland, the suspect and his lawyer had been excluded for about ten minutes from the court hearing dealing with extending the period of detention, whilst the prosecution explained to the judicial authority what topics they wanted to cover in further interviews with the suspect, in a “closed evidence” process. The Appellate Committee (comprising five judges of the Supreme Court sitting in the highest court of Northern Ireland) noted that “[t]he interview must be conducted fairly. But advance notice of the topics to be covered is not a pre-requisite of fairness. The judicial authority may want to know what the topics are in order to be satisfied that the warrant or an extension of it should be granted.”

The Committee concluded that the power to exclude was lawful. It had been conceived in the interests of the detained person and not those of the police. It gives the [detained] person...the right to make representations and to be represented at the hearing. But it recognizes too the sensitive nature of the inquiries that the judicial authority may wish to make to be satisfied, in that person’s best interests, that there are reasonable grounds for believing that the further detention that is being sought is necessary. The more penetrating the examination of this issue

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120 Terrorism Act, 2000, supra note 39 at Sch. 8 ¶29.
122 Exclusion is permitted by Terrorism Act 2000, supra note 39 at Sch. 8 ¶33. In Ward v. Police Service of Northern Ireland, supra note 121 at ¶ 23, the Appellate Committee referred to the grounds for withholding information, as set out in Terrorism Act 2000 Sch. 8 ¶34, “which include such risks to the public interest as interfering with or harming evidence, making more difficult the apprehension, prosecution or conviction of a person suspected of terrorism and making prevention of the prevention of an act of terrorism more difficult as a result of a person being alerted.”
123 Ward v. Police Service of Northern Ireland, supra note 121 at ¶22.
becomes, the more sensitive it is likely to be. The longer the period during which an extension is permitted, the more important it is that the grounds for the application are carefully and diligently scrutinized.\textsuperscript{124}

As to the rationale of excluding the suspect from the hearing, the Court opined that closed hearings were in the “best interest” of the detainee, as they “enabled the judicial authority rigorously and conscientiously to explore the basis of the application for their detention.”\textsuperscript{125} The judiciary thus seems to be assuming a role protecting the suspect.

c. **Informing detainees of reason for detention**

In *Sher v The Chief Constable of Greater Manchester Police,*\textsuperscript{126} the claimants were arrested without a warrant on suspicion on terrorism\textsuperscript{127} and detained without charge for thirteen days. They challenged the legality of every aspect of their treatment, but the essential complaint was that they were “never told the basis on which they were being detained in sufficient detail in order to allow them properly to challenge their continued detention without charge, and that the legislation under which they were detained was incompatible with the European Convention.”\textsuperscript{128} Both British domestic law and European law require that an arrested man is to be told what is the act for which he has been arrested.\textsuperscript{129} Here each claimant was told that they were being arrested because each was reasonably suspected of being a terrorist, and the court considered that nothing more was required at the time of arrest, noting that “a general statement of that sort will not usually amount to a breach of Article 5.2, *provided of course* that thereafter, further information

\textsuperscript{124} *Id.*, at ¶27.
\textsuperscript{125} *Id.*, at ¶121.
\textsuperscript{127} Terrorism Act, 2000, *supra* note 39 at §41.
\textsuperscript{128} Sher & Ors. v. The Chief Constable of Greater Manchester Police & Ors., *supra* note 126 at ¶2.
as to how and why such suspicions are held is promptly given to the suspect.”

As far as the compatibility claims were concerned, the claimant complained that in contrast to control order cases, where special advocates can make representations about closed evidence (see below), here decisions about further detention were made entirely on the basis of “closed evidence”. The court rejected this claim, by following the precedent of *Ward v. Police Service of Northern Ireland* discussed above. Neither of the points raised in this case have been appealed.

(d) Extraterritorial application of the European Convention to the U.K.

In *Al-Jedda v. United Kingdom*, the claim was brought by an Iraqi-born British national. He was arrested in Iraq by US forces in October 2004, and then transferred into the custody of British forces, and was detained in a British detention facility for over three years on the basis that his internment was “necessary for imperative reasons of security in Iraq.” The detention was periodically reviewed, but no procedures were in place for disclosure of evidence, nor for an oral hearing. The detainee was permitted to submit written representations to the review committee.

He challenged the lawfulness of his detention before the British courts. After his claims were rejected at each domestic court level, culminating in rejection by the House of Lords in December 2007, he brought a claim to the ECtHR, alleging a breach of Article 5(1) of the European Convention. The main issues in this case were: i) whether the applicant had been within the authority and control of the United Kingdom in order to establish jurisdiction to hear European Convention claims, (the British government

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130 Sher & Ors. v. The Chief Constable of Greater Manchester Police & Ors., *supra* note 126 at ¶91.
132 Id., at ¶10.
133 R. (on the application of Al-Jedda) v. Secretary of State for Defence, [2007] UKHL 58 (Eng.).
maintained that British troops had been exercising the international authority of the Multi-National Force, acting pursuant to a binding United Nations Security Council decision, rather than the sovereign authority of the United Kingdom); and if so, ii) whether his detention violated Article 5.

As to i), the Grand Chamber held that the applicant was within the authority and control of the United Kingdom throughout his detention, and therefore within the jurisdiction of the United Kingdom. Thus the European Convention was applicable to his case. As regards ii), The Grand Chamber noted that “the list of grounds of permissible detention in art. 5(1) does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time.” In this case the U.K. government did not contend that the detention was justified under the list of grounds, nor did they purport to derogate under article 15. The Grand Chamber concluded that there was no legal basis to displace article 5, and therefore the applicant’s detention constituted a violation of article 5.

(e) Compatibility with Article 5 ECHR

In Duffy, a court in Northern Ireland rejected a challenge that Schedule 8 of the Terrorism Act 2000 (the part dealing with extending detention after the first 48 hours has elapsed) was incompatible with Article 5 ECHR. The court confirmed that during the

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134 Al-Jedda v. United Kingdom, supra note 131 at ¶¶85, 86.
135 Id., at ¶100.
136 Id.
137 Id., ¶110. Also, on the same day, the Grand Chamber delivered judgment in Al-Skeini v. United Kingdom, Appl. No. 55721/07, Eur. Ct. H.R., (2011) 53 E.H.R.R. 18. That case related to the refusal of the British government to conduct an independent investigation into the death of five Iraqi citizens killed by British troops in Iraq. The judgment confirmed the extraterritoriality application of the ECHR to acts of British troops in Iraq. The exercise of authority and control by British troops of individuals killed in security operations established a jurisdictional link between the deceased and the U.K. for the purposes of article 12 of ECHR, at ¶149.
138 In the matter of an application for judicial review by Colin Duffy and others (No. 2), [2011] NIQB 16.
review process, there was a continuing need to demonstrate reasonable suspicion: “Issues of proportionality and justification are … fundamental aspects of the review process.”  

The applicants complained that Article 5 required that a person be charged well before the expiration of the detention period, but the court found no authority to support that proposition.  

The applicants sought to appeal to the Supreme Court in London, but their application was refused.  

2.6 Control Orders

Control orders were “neither punitive nor retributive.”  The true purpose of the regime “was quite simply to protect members of the public from a risk of terrorism by preventing or restricting the controlled person’s involvement in terrorism-related activity.”  

A control order was an order that could be made against an individual imposing obligations, (such as curfews) connected with preventing or restricting involvement by that individual in terrorism-related activity. As one British judge described them: “[a]t one extreme they are not far short of house arrest, which is plainly a form of detention or imprisonment. But they can be designed in such a way that their cumulative effect does

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139 Id., at ¶30.
140 Id., at ¶36.
142 Secretary of State for the Home Department (Respondent) v. MB (FC) (Appellant), [2007] UKHL 46, ¶24. (U.K.).
143 DAVID ANDERSON Q.C., FINAL REPORT OF THE INDEPENDENT REVIEWER PURSUANT TO SECTION 14(3) OF THE PREVENTION OF TERRORISM ACT 2005, CONTROL ORDERS IN 2011, ¶2.2 (Mar. 2012), [hereinafter DAVID ANDERSON, CONTROL ORDERS FINAL REPORT]. The report sets out all the shortcomings of the control order regime.
144 LORD CARLILE OF BERRIEQ.C., SIXTH REPORT OF THE INDEPENDENT REVIEWER PURSUANT TO SECTION 14(3) OF THE PREVENTION OF TERRORISM ACT 2005, ¶19 Feb. 3, 2011, (“There are currently up to 25 types of measures in use… In 2010 the average duration of a curfew was 11.9 hours per day.”), [hereinafter LORD CARLILE, SIXTH REPORT].
145 Prevention of Terrorism Act, 2005, supra note 40, sets out control order regime. See §1(4) for examples of obligations that may be imposed.
not deprive the controlled person of his right to liberty within the meaning of article 5(1).”

The test for imposing a control order was stated in the Court of Appeal decision of Secretary of State for the Home Department v. MB: “Whether it is necessary to impose any particular obligation on an individual in order to protect the public from the risk of terrorism involves the customary test of proportionality. The object of the obligations is to control the activities of the individual so as to reduce the risk that he will take part in any terrorism-related activity.”

This measure was controversial from its inception, because it could be used without a person being charged or convicted, orders were made based on “closed” or classified evidence which was not shown to the controlee (although controlees were entitled to be apprised of the essence of the case against them), and because some of the restrictions were extremely intrusive.

The Prevention of Terrorism Act envisaged two distinct species of control order – derogating and non-derogating. The former contained obligations incompatible with the right to liberty under Article 5 of the European Convention on Human Rights. The latter could impose conditions that fell short of actual deprivation of liberty under Article 5. No control orders derogating from Article 5 were ever made - only non-derogating control orders have been made. Since March 2005 there were fifty-two people on

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146 Secretary of State for the Home Department v. AF (FC) supra note 118 at ¶77, (citing Secretary of State for the Home Department v. MB, supra note 142 at ¶11).

147 Secretary of State for the Home Department v. MB [2006] EWCA Civ 1140, ¶63 (U.K.).

148 PREVENT REVIEW, supra note 26 at ¶7.

149 This is because the obligations do not fall within the exceptions set out in the Article, and such a control order will only be lawful if the United Kingdom derogates from the European Convention.

150 PREVENT REVIEW, supra note 26 at 41. Also see LORD CARLILE, SIXTH REPORT, supra, note 144 at ¶13. This comment on derogation should not be confused with the Derogation Order made on Nov. 11, 2001 when a public emergency was deemed to exist in the UK, apparently justifying the making of extended detention orders of foreign nationals under the 2001 anti-terrorism legislation. Although the determination of a state of emergency, justifying derogation, was upheld in A (F.C.) and Others (F.C.) v. Secretary of
control orders,\textsuperscript{151} of which twenty-four were British subjects and twenty-eight were foreign nationals.\textsuperscript{152} At the time control orders were abolished in December 2011, nine persons, all British citizens, were on control orders.\textsuperscript{153} The longest period anyone was subject to a control order was in excess of fifty-five months,\textsuperscript{154} and of the fifty-two control orders, only fifteen were in place for over two years.\textsuperscript{155}

Non–derogating control orders could only be made against a person reasonably suspected of involvement in terrorist-related activity,\textsuperscript{156} whether a British national or not, and whether the terrorist activity was domestic or international. The control order had to be considered necessary for purposes connected with protecting the public from a risk of terrorism.\textsuperscript{157} In respect of a derogating control order a court had to be satisfied that there was evidence “capable of being relied on by the court as establishing that the individual is or has been involved in terrorism-related activity.”\textsuperscript{158} Thus a higher standard was required when liberty was to be deprived. Control orders could be made with court permission, or in certain urgent cases without prior permission, provided such order was promptly referred to a court to justify its validity.\textsuperscript{159}

When the matter came before a court, either for prior permission or review after the event, the Special Advocate system established by the Special Immigration Appeals

\textsuperscript{151}DAVID ANDERSON, CONTROL ORDERS FINAL REPORT, \textit{supra} note 143 at ¶3.13.
\textsuperscript{152}Id., at ¶3.14.
\textsuperscript{153}Id.
\textsuperscript{154}Id., at ¶3.47.
\textsuperscript{155}Id., at ¶3.48.
\textsuperscript{156}Prevention of Terrorism Act 2005, \textit{supra} note 40 at §2.
\textsuperscript{157}LORD CARLILE, SIXTH REPORT, \textit{supra} note 144 at ¶9.
\textsuperscript{158}Prevention of Terrorism Act 2005, \textit{supra} note 40 at §4.
\textsuperscript{159}Id., §3
Commission (SIAC) in 1997,\textsuperscript{160} was used, and still applies to the new regime. Special advocates are court appointed lawyers who have been security-cleared. They are entitled to see material, which for reasons of national security, cannot be made public. Neither the detainee nor his lawyer are entitled to see this material, nor may the special advocate discuss the documents under consideration with, or show them to the defendant’s regular lawyers. “The special advocate acts in the ‘best interests of an [appellant]. He does not act for the [appellant] and the [appellant] is not his client. He owes the [appellant] no duty of care in relation to the role he undertakes.”\textsuperscript{161}

Although the use of special advocates may at first sight seem a significant impediment to protecting civil liberties, in practice, special advocates strive to gain an acceptable open summary of the closed materials. Once the closed materials have been revealed to them, special advocates dedicate a great amount of time in fighting for disclosure.\textsuperscript{162} Nevertheless, the special advocate system has drawn much criticism, particularly in relation to the fact that special advocates are not permitted to communicate the contents of closed materials to their clients. This concern is one of several subjects discussed in a parliamentary Green Paper (a consultation paper produced by the government).\textsuperscript{163}

The Foreign Secretary has justified the use of closed materials as being “surely fairer to ensure that sensitive material can be considered in court under these

\textsuperscript{160} Special Immigration Appeals Commission Act 1997, c. 68, §6 (U.K.).
\textsuperscript{161} SPECIAL ADVOCATES: A GUIDE TO THE ROLE OF SPECIAL ADVOCATES AND THE SPECIAL ADVOCATES SUPPORT OFFICE, (Special Advocates Support Office, Nov. 2006).
arrangements, than that it is excluded altogether.”164 In their response to the Green Paper, the Special Advocates expressed their concerns and described the shortcomings of the closed material procedures (CMPS).165 They query why, in its survey of international approaches to the problem of sensitive information, the Green Paper did not discuss the way the United States gives security-cleared counsel access to certain materials and trusts them not to reveal sensitive information to their clients.166 Judges too, have concerns about the procedures.167

The 2011 counter-terrorism review recommended that control orders be abolished. They were replaced by new measures on December 14, 2011 and these are described in the next section. It will be seen that the closed materials procedures are retained. The

165 JUSTICE AND SECURITY GREEN PAPER, H.M. GOVERNMENT, RESPONSE TO CONSULTATION FROM SPECIAL ADVOCATES, ¶15, (Dec 16, 2011, (U.K.)), http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/09_Special%20Advocates.pdf: “Our experience as SAs involved in statutory and non-statutory closed material procedures leaves us in no doubt that CMPs are inherently unfair; they do not ‘work effectively’, nor do they deliver real procedural fairness. The fact that such procedures may be operated so as to meet the minimum standards required by Article 6 of the ECHR, with such modification as has been required by the courts so as to reduce that inherent unfairness, does not and cannot make them objectively fair.”
166 Id., ¶29(i).
167 See e.g. Al Rawi v. The Security Service, [2011] UKSC 34 (U.K.), per Lord Kerr at ¶93: “The appellants’ second argument proceeds on the premise that placing before a judge all relevant material is, in every instance, preferable to having to withhold potentially pivotal evidence. This proposition is deceptively attractive - for what, the appellants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstandng challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one’s opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable.” Also at ¶94: “…the challenge that the special advocate can present is, in the final analysis, of a theoretical, abstract nature only. It is, self evidently and admittedly, a distinctly second best attempt to secure a just outcome to proceedings. It should always be a measure of last resort; one to which recourse is had only when no possible alternative is available. It should never be regarded as an acceptable substitute for the compromise of a fundamental right…”
Independent Reviewer reports that none of the former controlees has been successfully prosecuted for a terrorism offense, because they are persons “in respect of whom the police will almost certainly already have confirmed that there is no evidence available that could realistically be used for the purposes of a prosecution.” Furthermore, “persons will normally choose not to commit terrorist offences while subject to restrictions which give the authorities a good opportunity to observe any such offences being committed.”168 However, the Independent Reviewer comments that the chief value of the replacement regime will “continue to lie in the ‘prevention’ rather than the ‘investigation’ of terrorism.”169

2.7 Legal Challenges to Control Orders

In recent years the main issues in litigation concerned the provision of fair hearings, and related to the problem that control orders were frequently made on the basis of evidence that could not be disclosed to the controlee because of national security concerns.

a) Deprivation of liberty

In Secretary of State for the Home Department v. JJ, the House of Lords adjudicated on whether control orders violated article 5(1) by amounting to a deprivation of liberty.170 The Court took notice of the ECHR principles set out in a number of cases, including Guzzardi v Italy,171 where

the court has insisted that account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution or implementation of the penalty or measure in question (... Guzzardi, paras 92, 94). There may be no deprivation of liberty if a single feature of an individual’s situation is taken on its

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168 DAVID ANDERSON, CONTROL ORDERS FINAL REPORT, supra note 143 at ¶3.51.
169 Id., ¶3.52.
own but the combination of measures considered together may have that result (Guzzardi, para 95).\textsuperscript{172}

In this case the Court held that a curfew between the hours of 4pm and 10 a.m. (18 hours) amounted to a deprivation of liberty.\textsuperscript{173} Since this case, no periods of curfew have exceeded 16 hours.\textsuperscript{174}

b) Informing detainees of the nature of the case against them

In 2007 in Secretary of State for the Home Department v MB (FC), the House of Lords considered whether the making of a control order based on entirely undisclosed material, without any specific allegation of terrorism-related material in open material, violated Article 6 of the European Convention which guarantees a right to a fair trial.\textsuperscript{175} The court held that control orders could be quashed if the court determines that the detainee has not had a fair trial. Baroness Hale opined: “Both judge and special advocates will have stringently to test the material which remains closed. All must be alive to the possibility that material could be redacted or gisted in such a way as to enable the special advocates to seek the client’s instructions on it.”\textsuperscript{176} Baroness Hale was thereby advocating the creation of open material.

The issue of how much information should be given to a controlee was considered by the ECHR in A and Others v. United Kingdom in February 2009.\textsuperscript{177} In finding some violations of Article 6, the court said that it was essential that as much information about the allegations and evidence against each applicant was disclosed without compromising national security or the safety of others. If full disclosure was not possible, the difficulties

\textsuperscript{172} Secretary of State for the Home Department v. JJ, supra note 170 at ¶16.
\textsuperscript{173} Id., ¶21, 23, 24.
\textsuperscript{174} DAVID ANDERSON, CONTROL ORDERS FINAL REPORT, supra note 143 at ¶2.29.
\textsuperscript{175} Secretary of State for the Home Department v. MB (FC), supra note 142.
\textsuperscript{176} Id. at ¶66.
\textsuperscript{177} A. v. The United Kingdom, supra note 150.
caused by this should be counterbalanced to enable the applicant to challenge the allegations effectively. It endorsed the special advocate system, holding that SIAC was best placed to ensure that no material was unnecessarily withheld from the controlee, who must be given sufficient information to enable him to give effective instructions to the special advocate, although the amount would have to be decided on a case by case basis.\(^\text{178}\)

In June 2009, in *Secretary of State for the Home Department v. AF (FC)*, the House of Lords acknowledged the requirement to give a controlee sufficient information to enable him to give effective instructions to his lawyer in judicial review proceedings, or in any court hearings. Lord Phillips stated:

> Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed material the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.\(^\text{179}\)

He continued, “The Grand Chamber [of the ECHR] has now made it clear that the non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him…”\(^\text{180}\) but he also confirmed that it may be acceptable not to disclose the source of evidence.\(^\text{181}\)

The effect of these decisions is that provided the above requirements were met, control orders were not invalid or in violation of the European Convention. Since the House of Lords’ decision in June 2009,\(^\text{182}\) three control orders have been revoked because

\(^{177}\) *Id.* at ¶¶218, 219, 220.

\(^{178}\) *Id.* at ¶65.

\(^{179}\) *Id.* at ¶66.

\(^{180}\) *Id.* at ¶65 (Eng.).

\(^{181}\) *Id.* at ¶59 (Eng.).

\(^{182}\) *Id.* at ¶59.
the courts decided that the controlees did not know the essence of the case against them. In addition, the High Court has ruled that bail applications for terror suspects “should be treated the same as control order cases, under which terror suspects must be given an “irreducible minimum” of information about the case against them before being held under that regime”.

2.8 Terrorism Prevention and Investigation Measures (“TPIMs”)

The Home Office has conducted annual reviews of various counterterrorism measures, including control orders, and the most recent was published in January 2011. In the wake of all the criticism described above, the British Home Secretary recommended the introduction of a new control order regime from 2012, colloquially called “TPIMs”. The new regime is meant to be “more flexible and focused” but critics say it is “little more than ‘control orders lite.’” TPIMs are designed to relate more closely to current civil law restrictions. The aim of the measures is to have a “protective effect, whether through disruption or through facilitating investigation. The police will then be under a strengthened legal duty to ensure that the person’s conduct is kept under continual review with a view to bringing a prosecution.”

\[183\] LORD CARLILE, SIXTH REPORT, supra note 144 at ¶15.
\[184\] See e.g. R (Cart) v. Upper Tribunal, R (U) and (XC) v. Special Immigration Appeals Commission [2009] EWHC 3052 (Admin) (U.K.); R (on the application of BB) v. Special Immigration Appeals Committee and the Secretary of State for the Home Department [2011] EWHC 336 (Admin) (U.K.).
\[185\] PREVENT REVIEW, supra note 26.
\[186\] Id., at ¶¶ 41-43.
\[188\] PREVENT REVIEW, supra note 26 at ¶23.
\[189\] Id., at ¶26.
TPIMs are imposed by notice by the Home Secretary who must *inter alia* have reasonable grounds to believe that the individual is or has been involved in terrorism-related activity and be satisfied that it is necessary to apply any of a wide range of measures from the regime to protect the public from a risk of terrorism.\(^{190}\) TPIMs may not exceed two years’ duration,\(^{191}\) but during the currency of a notice the Home Secretary must keep under review whether it is necessary to continue the measures.\(^{192}\) The Home Secretary must consult with police about whether there is evidence available to prosecute the suspect,\(^{193}\) and permission from the High Court must be sought before the measures may be imposed.\(^{194}\)

After permission is given, and the suspect is served with the notice detailing the measures, the High Court conducts a review hearing as soon as is reasonably practicable.\(^{195}\) There is a right of appeal against any decision to vary or extend the notice,

\(^{190}\) *Terrorism Prevention and Investigation Measures Act*, *supra* note 60 at §§2, 3, Sch.1.
Section 2(1) "The Secretary of State may by notice (a “TPIM notice”) impose specified terrorism prevention and investigation measures on an individual if conditions A to E in section 3 are met.
Section 3 Conditions A to E

(1) Condition A is that the Secretary of State reasonably believes that the individual is, or has been, involved in terrorism-related activity (the “relevant activity”).

(2) Condition B is that some or all of the relevant activity is new terrorism-related activity.

(3) Condition C is that the Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for terrorism prevention and investigation measures to be imposed on the individual.

(4) Condition D is that the Secretary of State reasonably considers that it is necessary, for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity, for the specified terrorism prevention and investigation measures to be imposed on the individual.

(5) Condition E is that—

(a) the court gives the Secretary of State permission under section 6, or

(b) the Secretary of State reasonably considers that the urgency of the case requires terrorism prevention and investigation measures to be imposed without obtaining such permission.”

\(^{191}\) *Id.*, at §5.

\(^{192}\) *Id.*, at §11.

\(^{193}\) *Id.*, at §10.

\(^{194}\) *Id.*, at §§6-9.

\(^{195}\) *Id.*
or any refusal to vary or discharge the notice.\textsuperscript{196} In addition to judicial scrutiny, the Home Secretary must issue a quarterly report,\textsuperscript{197} and the Independent Reviewer is required to report annually.\textsuperscript{198} The TPIM powers are for a period of five years.\textsuperscript{199}

If secret evidence is required, the special advocate system will be used,\textsuperscript{200} but the Act is silent on when it is required to give the gist of allegations to the controlee. The Independent Reviewer has queried whether the obligation to give the suspect the gist of the case against him will apply to TPIMs.\textsuperscript{201}

The Independent Reviewer has summarized and commented on the principal differences between control orders and TPIMs.\textsuperscript{202} One difference he considered “of real significance”\textsuperscript{203} is that the ‘reasonable suspicion’ test for the imposition of control orders\textsuperscript{204} is replaced by the harder test of ‘reasonable belief.’\textsuperscript{205} Other differences are that curfews are limited to overnight,\textsuperscript{206} and geographical restrictions are more relaxed.\textsuperscript{207} The Independent Reviewer also noted that TPIMs may apply to foreign nationals.\textsuperscript{208}

In response to concerns that there might be exceptional circumstances requiring measures that are more stringent than TPIMs, the Government published the Enhanced Terrorism Prevention and Investigation Measures Bill\textsuperscript{209} in September 2011.\textsuperscript{210} This Bill

\begin{itemize}
\item \textsuperscript{196}Id., at §16.
\item \textsuperscript{197}Id., at §19.
\item \textsuperscript{198}Prevention of Terrorism Act, 2005, supra note 40 at §13.
\item \textsuperscript{199}Terrorism Prevention and Investigation Measures Act, supra note 60 at §21.
\item \textsuperscript{200}Id. at Sch.4.
\item \textsuperscript{201}DAVID ANDERSON Q.C., FINAL REPORT OF THE INDEPENDENT REVIEWER PURSUANT TO SECTION 14(3) OF THE PREVENTION OF TERRORISM ACT 2005, CONTROL ORDERS IN 2011, supra note [ ] at ¶5.36.
\item \textsuperscript{202}Id., at ¶¶5.9-5.36.
\item \textsuperscript{203}Id., at §5.11
\item \textsuperscript{204}Prevention of Terrorism Act 2005, supra note 40 at §2.
\item \textsuperscript{205}Terrorism Prevention and Investigation Measures Act, supra note 60 at §3(1).
\item \textsuperscript{206}Id., at Sch.1 §1(2)(c).
\item \textsuperscript{207}Id., at Sch. 1 §§1-4.
\item \textsuperscript{208}DAVID ANDERSON, CONTROL ORDERS FINAL REPORT, supra note 143 at ¶5.27.
\item \textsuperscript{209}Enhanced Terrorism Prevention and Investigation Measures Bill, CM 8166 (Sep. 2011) (U.K.).
\end{itemize}
would apply a wider range of measures and enhanced notices would only be issued in accordance with procedures in the Bill, if the Home Secretary were satisfied on a balance of probabilities that the individual is involved in terrorist-related activity. Thus these Bills impose a more onerous threshold for the Government to cross in order to issue enhanced measures.

In sum, this legislation would reintroduce the stricter restrictions characteristic of control orders, while granting the enhanced safeguards of TPIMs.

The first annual report by the Independent Reviewer on the operation of TPIMs in 2012 was published in March 2013. Ten men were subject to TPIMs in 2012, of which nine were British citizens who had previously been subject to control orders and the tenth was a foreign national. All were suspected of Islamist terrorism. One absconded on December 26, 2012 and remains at large. The Independent Reviewer commented that the allegations against some of the men were “at the highest end of seriousness, even by the standards of international terrorism,” but none of the ten could be prosecuted because open court evidence sufficient to secure a conviction could not be introduced in an open criminal court. Nine men were subject to TPIMs in 2013, one of whom

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210 DAVID ANDERSON, CONTROL ORDERS FINAL REPORT, supra note 143 at ¶5.30-5.35. Enhanced T-Pims are only designed to be used “in the event of a very serious terrorist threat that cannot be managed by other means.”

211 Enhanced Terrorism Prevention and Investigation Measures Bill, supra note 209 at Sch. 1.

212 Id., at §2(1).

213 DAVID ANDERSON, CONTROL ORDERS FINAL REPORT, supra note 143 at ¶5.34.


215 Id.

216 Id., at ¶4.7.

217 Id., at ¶4.8.


219 DAVID ANDERSON, TPIMS FIRST REPORT, supra note 214 at ¶5.

220 Id., 5, ¶¶7.8-23. Even if intercept evidence was admissible in UK courts, that would not have enabled a criminal prosecution to be brought in any of the cases. The main problem relates to the problems of compromising informants.
absconded in November 2013.\textsuperscript{222} 64 applications were made to vary measures in TPIM notices, of which 45 applications were refused.\textsuperscript{223} The Independent Reviewer concluded that so far, TPIMs have been effective in preventing terrorist related activity, but not in enabling terrorist related activity to be detected.\textsuperscript{224}

In assessing the fairness of TPIM notices, whilst the Independent Reviewer acknowledged that no closed material procedure can be wholly fair, he noted that the TPIM regime had been largely shaped by the experiences of legislators, officials and judges in constructing a closed material procedure for control orders that was “ECHR-compliant and aspire[d] to the highest standards of procedural fairness required in civil cases.”\textsuperscript{225}

The Independent Reviewer concluded that the power to impose TPIMs was appropriately used in the period under review, whilst emphasizing the importance of ensuring that the measures are proportionate.\textsuperscript{226} A few potential TPIM cases were not put before the Home Office for permission to impose measures because it was believed that the necessary disclosure from sensitive human or technical intelligence sources would be harmful to national security.\textsuperscript{227}

In sum the Independent Reviewer concluded that TPIMs provided “a high degree of protection against untriable and undeportable persons who are judged on substantial

\begin{itemize}
\item \textsuperscript{221} \textit{Q & A: TPIMs explained,} BBC NEWS (Nov. 4, 2013), http://www.bbc.co.uk/news/uk-24803069.
\item \textsuperscript{223} DAVID ANDERSON, TPIMS FIRST REPORT, supra note 214 at ¶4.4.
\item \textsuperscript{224} \textit{Id.}, at ¶11.5, 11.7, 11.10.
\item \textsuperscript{225} \textit{Id.}, at ¶11.19-21. In the case of seven of the 10 TPIM subjects, open judgments were handed down in 2012 confirming that the imposition of TPIMs was fair and reasonable. \textit{See} SSHD v. BM, [2012] EWHC 714 (Admin); SSHD v. BF, [2012] EWHC 1718 (Admin); SSHD v. AM, [2012] EWHC 1854 (Admin); SSHD v. AY, [2012] EWHC 2054 (Admin); SSHD v. CC & CF, [2012] EWHC 2837 (Admin); SSHD v. CD, [2012] EWHC 3026 (Admin).
\item \textsuperscript{226} DAVID ANDERSON, TPIMS FIRST REPORT, supra note 214 at ¶11.28.
\item \textsuperscript{227} \textit{Id.}, at 5, ¶11.27.
\end{itemize}
grounds to be dangerous terrorists, while acknowledging that it is unacceptable to place persons who have not been charged with, or convicted of, a crime under indefinite constraint,\textsuperscript{228} and that it is necessary to give some constructive thought to exit strategies for use when TPIMs expire.\textsuperscript{229} As at January 27, 2014, only one person is now subject to TPIMs and he will be free of them in October 2014.\textsuperscript{230}

2.9 Summary

The UK’s detention framework has been described as being pre-trial,\textsuperscript{231} investigative,\textsuperscript{232} and pre-charge.\textsuperscript{233} Although the model appears to be designed to detain suspects until sufficient evidence is obtained for the purpose of prosecution, the Home Office statistics on arrests can be interpreted another way. In 2012-13, 249 people were arrested on terrorist related charges. 42% of those arrested were charged, of which only 35% were terrorism related charges.\textsuperscript{234} The pattern was similar in previous years.\textsuperscript{235}

\begin{footnotesize}
\begin{enumerate}
\item Id., at ¶11.56.
\item Id., at ¶11.34, 11.39-46.
\item See e.g. Stella Burch Elias, Rethinking “Preventive Detention” From a Comparative Perspective: Three Frameworks For Detaining Terrorist Suspects; 41 COLUM. HUM. RTS. L. REV. 99, 131 (2009).
\item See e.g. STEPHANIE COOPER BLUM, PREVENTIVE DETENTION IN THE WAR ON TERROR, 133, (Cambria Press, 2008); CLAIRE MACKEN, COUNTER-TERRORISM AND THE DETENTION OF SUSPECTED TERRORISTS, 140 (Routledge, 2011).
\item HOME OFFICE, OPERATION OF POLICE POWERS 2012/2013, supra note 109 at ¶1.1.
\item Of 206 people arrested under several terrorism statutes in 2011-12, 35% were charged of which 53% were terrorist related. 48% were released without charge, see HOME OFFICE, OPERATION OF POLICE POWERS UNDER THE TERRORISM ACT 2000 AND SUBSEQUENT LEGISLATION: ARRESTS, OUTCOMES AND STOPS AND SEARCHES, GREAT BRITAIN 2011/12, at ¶1.1. [hereinafter HOME OFFICE, OPERATION OF POLICE POWERS 2011/12] (Sep. 13, 2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/116756/hospb1112.pdf; in 2010/11, 47 were charged and 86 were released out of 167 arrests. Only thirty seven per cent of arrests under suspicion of terrorism resulted in a charge and of those charges, forty two per cent were under the terrorism legislation, see HOME OFFICE, OPERATION OF POLICE POWERS 2010/11, supra note 105.
\end{enumerate}
\end{footnotesize}
Thus, despite the label of pre-charge detention, which is an accurate description, the statistics can also be read to suggest that this type of detention may frequently be used preventively. This is corroborated by 2011 Review of Counter-Terrorism, which states: “[t]o preempt a terrorist incident the police may need to arrest at an earlier point than would normally be the case”236 and “[t]errorist suspects often need to be held in detention during the post-arrest phase of the investigation because of the public safety risk which they may represent.”237

Thus the United Kingdom has a dual-purpose model. It permits detention for the purposes of investigation, to facilitate decisions about whether or not to charge and prosecute. As a by-product, the model also permits preventive detention of terrorist suspects without charge for up to fourteen days.

The United Kingdom wields a delicate balance between security and liberty. In the face of significant actual threats and attacks, it understandably pushes the security side of the scale as far as it can. When prompted by the courts, the United Kingdom has pulled back and responded to findings of human rights violations by promptly changing its laws. For example, discriminating between British citizens and foreigners in terms of the length of detention periods238 resulted in the repeal of the Anti-Terrorism, Crime and Security Act, 2001 and the coming into force of the Prevention of Terrorism Act 2005. When the length of curfews under control orders reached eighteen hours and the ECHR considered that period amounted to a deprivation of liberty,239 the government pulled

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236 PREVENT REVIEW, supra note 26 at ¶5.
237 Id., at ¶6.
238 A (F.C.) and Others (F.C.) v. Secretary of State for the Home Department, supra note 142.
239 Secretary of State for the Home Department v. JJ, supra note 170.
back and reduced the curfew limit to sixteen hours. The government also listened to complaints about control orders and replaced them with TPIMs.

The ECHR has repeatedly “found internment and preventive detention without charge to be incompatible with the fundamental right to liberty under Article 5§1, in the absence of a valid derogation under Article 15.” 240 Yet at the time of writing there are no cases pending in the UK domestic courts or the ECHR challenging the duration of detention in the pre-charge detention regime of up to twenty-eight days that existed between 2006 and January 2011, nor in respect of the current fourteen day limit. 241

Although the United Kingdom is a party to the International Covenant on Civil and Political Rights (“ICCPR”), 242 the ICCPR is not directly applicable in the United Kingdom, 243 yet it supplies the periodic reports pursuant to ICCPR requirements. The Human Rights Committee expressed concern in its concluding observations to the United Kingdom’s 2007 report, that pre-charge detention was set at that time to increase from fourteen to twenty-eight days, but it did not express specific concerns about the fourteen day period. It merely made a general comment: “The State party should ensure that any

240 A. v. United Kingdom, supra note 150 at ¶172. For a discussion of derogation under Article 15, see Chapter 9, infra; also see Al-Jedda v. United Kingdom, supra note 131 at ¶¶85, 86.
241 See discussion about Articles 5 and 15 European Convention, and comparison with provisions in other human rights treaties in Chapters 8 through 11, infra.
243 The British Government has no plans to incorporate the ICCPR into British domestic legislation. It considers that most of the ICCPR rights are duplicated by provisions in the European Convention, and are protected under the Human Rights Act. The rights that are not duplicated in the European Convention are protected under other statutory provisions. See U.N. Human Rights Committee, Replies to the List of Issues (CCPR/C/GBR/Q/6) to be Taken up in Connection with the Consideration of the Sixth Periodic Report of the Government of the United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/Q/6/Add.1, at ¶¶ 1, 2, 3, 4, 18 June 2008; U.N. Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/6, at §6 (Jul. 30, 2008).
terrorist suspect arrested should be promptly informed of any charge against him or her and tried within a reasonable time or released.”

Almost every element of contemporary English detention law has been challenged on the grounds of violation of human rights in domestic courts as well as in the European Court of Human Rights. The difficulties encountered in applying the detention laws and policies caused H.M. Government to do some serious and responsible re-thinking and re-crafting of the British counter-terrorism strategy. This experience provides important lessons for the drafters of global core detention principles.

244 Id., at §15. Thus the practice did not appear to violate Article 9 ICCPR, which prohibits arbitrary detention.
CHAPTER 3 – SOME EXAMPLES OF COUNTRIES WITH STRONG FOUNDATIONS IN UNITED KINGDOM LAW

3.1 AUSTRALIA

3.1.1 The terrorist threat and counter-terrorism strategy

Since 2003 the threat level in Australia has been pitched at “medium,” meaning that a terrorist attack could occur.¹ In the 2010 Counter-Terrorism White paper, the terrorist threat was described as “real.” Furthermore, “attacks could occur at any time.”² In October 2011, the Australian Security Intelligence Organization (ASIO) published its report for 2010-2011. It highlighted that the most immediate threat derived from Jihadist terrorism,³ whilst remaining alert to the terrorist threat posed both in Australia and abroad by other ideologies and motivations.⁴ The threat was predominantly homegrown.⁵ The report noted that since 9/11 four “significant terrorist plots” in Australia had been disrupted involving people inspired by Middle Eastern or South Asian ideology.⁶ Less than forty people have been prosecuted, of which thirty-seven were Australian citizens.⁷

In its report for the year 2011-12, ASIO reported that the challenge of terrorism was “real and persistent, with the greatest threat continuing to be terrorism motivated by a violent jihadist ideology.”⁸ In the most recent report for the year 2012-13, the danger was described as “real, ongoing and evolving. The terrorism threat posed by traditional

⁴ Id., at 6.
⁵ Id.
⁶ Id., at 2.
⁷ Id., at 5.
extremist networks and groups is being compounded by self-radicalizing lone actors motivated both by an extremist ideology which advocates ‘stand-alone, stay at home’ attacks and participation in violent extremism overseas.”9 As at January 2014, the “terrorism threat on Australian soil remains undiminished.”10

Australia’s counter-terrorism strategy is very similar to that of the United Kingdom. The aim of Australia’s counter-terrorism strategy as set out in a 2010 White Paper is to protect its people and interests from terrorism, using four elements: intelligence analysis; taking “all necessary and practical action” to protect the country and its citizens; providing an “immediate and targeted response” to attacks; and building a strong community to resist the development of violent extremism and terrorism on the home front.11 One key difference derives from the federal nature of Australia, where the Commonwealth (federal) Parliament has worked in tandem with the states and territories in formulating counter-terrorist laws.12 Australia’s counter-terrorism strategy is “based on the idea of cooperation and coordination between the Commonwealth and the states and territories.”13 The Commonwealth’s counter-terrorism legislation is supplemented by state and territory legislation to ensure that there is consistent national coverage.14

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11 Australian Government, Counter-Terrorism White Paper, supra note 2 at 19.
13 Id.
14 Id., at 138. Also see Council of Australian Governments, Commonwealth and States and Territories Agreement on Terrorism and Multi-Jurisdictional Crime, ¶3, (Apr. 5, 2002), http://archive.coag.gov.au/coag_meeting_outcomes/2002-04-05/docs/terrorism.pdf, where the leaders of the Governments agreed “To take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation, including roll back provisions to ensure that the new Commonwealth law does not override State law where that is not
The 2012 National Counter-Terrorism Plan states that “Australia’s strategic approach to terrorism recognizes the need to prepare for, prevent, respond to, and recover (PPRR) from a terrorist act.”\footnote{\textsc{National Counter-Terrorism Committee, National Counter-Terrorism Plan}, ¶7 (3d Ed., 2012), Commonwealth of Australia.} Prevention means “measures taken to eliminate or reduce the occurrence or severity of a terrorist act. This is achieved through the collection, analysis and dissemination of intelligence; the conduct of investigations by law enforcement and security agencies; the implementation of strategies to engage and protect the community and potential terrorist targets; and the disruption of a terrorist act.”\footnote{Id., at ¶31.}

### 3.1.2 Australia’s counter-terrorism laws – an overview

Australia has a very wide definition of terrorism, even wider than the British definition, in its reach to financial systems, essential government services, public utilities and transport systems.\footnote{Criminal Code Act (Cth.)1995, §100.1 (1), (2) and (3). (Austl.), http://www.comlaw.gov.au/Details/C2011C00590/Htm/Text.} It encompasses actions and threats of actions,\footnote{Id., at §100.1 (1) and (4).} providing and receiving training for terrorist acts,\footnote{Id., at §101.2.} possessing things in connection with terrorist acts,\footnote{Id., at §101.4.} collecting or making documents likely to facilitate terrorist acts,\footnote{Id., at §101.5.} and doing acts in preparation or planning for terrorist acts.\footnote{Id., at §101.6.}

The 2010 Counter-terrorism Strategy unequivocally states that “terrorism is a crime and the Government will pursue terrorists within proper legal frameworks and in
accordance with the rule of law."\(^{23}\) The 2012 Counter-Terrorism Plan repeats this and explains the definition of a terrorist act:

Terrorism is, first and foremost, a crime. Australia has established a criminal offense regime to maximise the potential for preventive actions. Central to this regime is a clear definition of a terrorist act. In summary, a ‘terrorist act’ is an action or threat intended to advance a political, ideological or religious cause by coercing or intimidating an Australian or foreign government or the public, by causing serious harm to people or property, endangering life, creating a serious risk to the health and safety of the public or seriously disrupting trade, critical infrastructure or electronic systems….Excluded from the definition is non-violent protest or industrial action. Built around this definition is a set of terrorism offenses, including the penalties for preparatory and support activities.\(^{24}\)

Before 9/11, with one limited exception, no specific laws either at national or state level criminalized terrorist activity.\(^{25}\) Since 9/11, Australia has introduced more than forty new counter-terrorism laws.\(^{26}\) Each stage of enacting Australia’s counter-terrorism laws has been a reaction to an attack by al-Qaeda in some part of the world, and the measures have become increasingly more stringent.\(^{27}\) Control orders were introduced after the London bombings in 2005. Andrew Lynch has commented that “[t]he arrival in Australia of control orders for those perceived to constitute a terrorist threat to the community was largely disconnected from domestic experience and instead must ultimately be understood as an act of appropriation.”\(^{28}\)

\(^{23}\) AUSTRALIAN GOVERNMENT, COUNTER-TERRORISM WHITE PAPER, supra at 23.
\(^{27}\) Michael C. Tolley, Australia’s Commonwealth Model and Terrorism, supra note 12 at 135.
\(^{28}\) Andrew Lynch, Control Orders in Australia: A Further case Study in the Migration of British Counter-terrorism Law, supra note 25 at 185.
Many new offenses “expanded inchoate offenses into what has been called the ‘precrime’ and even the’ pre-precrime’ stage.”\(^{29}\) For example, amongst a number of offenses relating to preparation for terrorism,\(^{30}\) one of the most controversial offenses introduced in 2002 involves a person who “possesses a thing” and the thing is connected with the preparation of a terrorist act, even if the thing is not connected to a specific terrorist act.\(^{31}\) The Independent National Security Legislation Monitor has commented that the inchoate anti-terrorist offenses are “striking in that they criminalize conduct at a much earlier point than has traditionally been the case.”\(^{32}\) In 2013 only thirty-eight men had been charged with terror offenses and twenty-three have been convicted.\(^{33}\) Of those convicted, ten were convicted for conspiring to do an act in preparation for, or planning a terrorist act.\(^{34}\)

The laws that permit preventive detention and control orders\(^{35}\) encroach on civil liberties far more than the United Kingdom laws on which the Australian model is based, as discussed below. Yet these laws have been used rarely. Neither the states nor the

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\(^{30}\) Criminal Code Act (Cth.) 1995, supra note 17 at §§101.2 -101.6 (Austral.).

\(^{31}\) Id., at §101.4.

\(^{32}\) BRETT WALKER, INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR, DECLASSIFIED ANNUAL REPORT 20 DECEMBER 2012, 28 Commonwealth of Australia, (2013). He cites a passage from Lodhi v. R., [2006] NSWCCA 121 per Spigelman C.J: “Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, e.g. well before an agreement has been reached for a conspiracy charge.”

\(^{33}\) Nicola McGarrity, ‘LET THE PUNISHMENT FIT THE OFFENCE’: DETERMINING SENTENCES FOR AUSTRALIAN TERRORISTS, supra note 26 at 1.

\(^{34}\) BRETT WALKER, INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR, DECLASSIFIED ANNUAL REPORT, supra note 32 at 28.

\(^{35}\) Criminal Code Act (Cth.) 1995, supra note 17 at §§101.2 -101.6 (Austral.).
Commonwealth has used preventive detention at all, and very few control orders appear to have been made. The Attorney General is required by statute to file annual reports detailing the number of preventive detention orders and control orders that have been made during each year.\textsuperscript{36} It has not been possible to find all the data, but some records exist. No preventive detention or control orders were made in the years 2005-06,\textsuperscript{37} 2008-9,\textsuperscript{38} 2009-10,\textsuperscript{39} 2010-11,\textsuperscript{40} 2011-12,\textsuperscript{41} or 2012-13.\textsuperscript{42} In the 2006-2007 report, there were no preventive detention orders, but one interim control order was made.\textsuperscript{43} No reports appear to be accessible for the year 2007-2008. However the Independent National Security Legislation Monitor confirms that only two control orders have ever been made, both in 2007, in respect of Jack Thomas and David Hicks.\textsuperscript{44}

Three reasons may explain the little, or no, use of the preventive detention and control order powers. First, Australia has not faced many terror threats comparatively speaking. Second, unlike the United Kingdom, Australia has had a number of very wide-

\textsuperscript{36} \textit{Id.}, at §§105.47, 104.29.
\textsuperscript{44} \textsc{Bret Walker, Independent National Security Legislation Monitor, Declassified Annual Report}, supra note 32 at 18-25.
ranging preparatory offenses under which terror suspects could be prosecuted since 2002.

Third, again unlike in the United Kingdom, Australian law permits the use of intercept evidence in the prosecution of terror suspects.

3.1.3 Preventive detention

Preventive detention was introduced in 2005 in response to the London bombings. Under federal law, an Australian Federal Police (AFP) officer may apply for a preventive detention order to be made to “prevent an imminent terrorist act occurring” or to preserve evidence from a recent terrorist act. Although the stated aim of law enforcement is to act preventively in the early stages, this law can only be used when the planning is in its final stages.

In the case of preventing a terrorist act, the initial issuing authority (a senior AFP officer) must have reasonable grounds for suspicion, and various criteria have to be met. Some of the standards in those criteria, such as the “reasonable grounds” for suspicion, and “reasonably necessary” requirement are vague and difficult to contest. Furthermore, the statute also permits the detention of someone in order to collect

45 Criminal Code Act (Cth.) 1995, supra note 17 at §105.1.
47 Criminal Code Act (Cth.) 1995 supra note 17 at §105.4, “(4) A person meets the requirements of this subsection if the person is satisfied that:
   (a) there are reasonable grounds to suspect that the subject:
      (i) will engage in a terrorist act; or
      (ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
      (iii) has done an act in preparation for, or planning, a terrorist act; and
   (b) making the order would substantially assist in preventing a terrorist act occurring; and
   (c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

(5) A terrorist act referred to in subsection (4):
   (a) must be one that is imminent; and
   (b) must be one that is expected to occur, in any event, at some time in the next 14 days.”

48 Katherine Nesbitt, supra note 46 at 77.
evidence of a recent terrorist attack, yet there need not be any connection between the detainee and any terrorist activity.

An initial preventive detention order may not exceed twenty-four hours. The period of detention under the initial order can be extended on the grounds of reasonable necessity during that twenty-four period, but detention may not exceed twenty-four hours in total. A continued detention order may be applied for. A magistrate or judge appointed by the appropriate Minister, may authorize detention for another twenty-four hours. Thus federal preventive detention may not exceed forty-eight hours from the time detention began pursuant to the initial detention order.

At the end of that period, under federal law the detainee must either be charged or released, but the states have enacted “complementary legislation” that permits the period of detention to be extended to up to fourteen days. An Australian Crown Prosecutor, Ben Power, has analyzed the state detention laws and concluded that although the legislation varies to some extent, every state authorizes detention without charge to prevent an “anticipated act of terrorism” for up to fourteen days. Each state and territory

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49 Criminal Code Act (Cth.) 1995, supra note 17 at §105.4
   (6) A person meets the requirements of this subsection if the person is satisfied that:
   (a) a terrorist act has occurred within the last 28 days; and
   (b) it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act;
   and
   (c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

50 Katherine Nesbitt, supra note 46 at 77.
51 Criminal Code Act (Cth.) 1995, supra note 17 at §105.8 (5).
52 Id., at §105.10 (3).
53 Id., at §105.10 (5).
54 Id., at §§105.12 (3) & (5).
has broadly similar legislation governing the issue of preventive detention orders, with
provisions relating to details that must be given to detainees, access to a lawyer, but
rights of challenge are more extensive than those in the federal legislation, as discussed
immediately below.57

The police must explain the substance of the order to the detainee, and inform the
detainee of his or her rights whilst detained.58 The detainee must be given a summary of
the grounds for detention,59 but if information is deemed likely to prejudice national
security, it need not be included.60 The detainee must be given a copy of the order as soon
as reasonably practicable.61 This means that detainees may not see the application, or the
underlying evidence and supporting materials.62

Rights to challenge the detention order are limited. Detainees must be told that
they have a right to make representations to a senior AFP officer to have the detention
order revoked63 but the statute does not explain the mechanism for this. The law is
unclear as to whether the detainee may be represented by a lawyer for this purpose.
Additionally, limited rights to apply for habeas corpus exist under federal law, but only in
the event of errors of law.64 Appeals may be made to the Administrative Appeal Tribunal,

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57 See for New South Wales, Part 2A, Terrorism (Police Powers) Act, No. 115 of 2002; for the Northern
(Preventative Detention) Act No. 73 of 2005; for South Australia, Terrorism (Preventative Detention) Act
2005; for Tasmania, Terrorism (Preventative Detention) Act No. 71 of 2005; for Western Australia,
Terrorism (Preventative Detention) Act 2005; for Victoria, Terrorism (Community Protection)
(Amendment) Act 2006; and for the Australian Capital Territory, Terrorism (Extraordinary Temporary
58 Criminal Code Act (Cth.) 1995, supra note 17 at §§105.28, 105.29, 105.30, 105.31 (Austl.).
59 Id., at §105.8.
60 Id., at §105.8 (6A).
61 Id., at §105.32.
62 Katherine Nesbitt, supra note 46 at 78.
63 Criminal Code Act (Cth.) 1995 supra note 17 at §§105.17(7), 105.28(2)(da) (Austl.).
64 Id., at §105.51
but only after the detention order has expired.\(^{65}\) Thus no meaningful right of challenge exists. Slightly more process is available to persons detained by the states.\(^ {66}\) For example, in both ACT and NSW, detainees can apply to a court to have a detention order revoked or set aside, and in Victoria, a detainee must seek leave of the court to apply for revocation.\(^ {67}\)

The detainee will have access to a lawyer, but only to discuss the rights of a person who is the subject of an order.\(^ {68}\) The police are entitled to monitor contact and communication between detainees and lawyers.\(^ {69}\) The detainee also has the right to notify specified persons that he or she is safe, but may not inform them that he or she is being detained.\(^ {70}\) Indeed, it is a criminal offense for either the detainee or his lawyer to disclose the existence of a preventive detention order, punishable with up to five years imprisonment.\(^ {71}\) In some circumstances the police may apply for a prohibited contact order.\(^ {72}\)

During the forty-eight hour period the detainee may not be questioned by the police except to verify identity and check on well-being.\(^ {73}\) However, after release from preventive detention, a suspect could be transferred to criminal custody and be

\(^{65}\) Id.
^{68}\) Criminal Code Act (Cth.) 1995 supra note 17 at §105.37.
^{69}\) Id., at 105.38.
^{70}\) Id., at §105.35.
^{71}\) Id., at §105.41.
^{72}\) Id., at §105.14A.
^{73}\) Id., at §105.42.
questioned about alleged criminal offenses\textsuperscript{74} or be placed in investigative detention by the Australian Security Intelligence Organization (ASIO) as described in the next section.

3.1.4 Investigative detention

Under the general criminal law a person suspected of a terrorist offense (which covers a wide range of activity, as mentioned above) may be arrested and detained for questioning without charge for up to four hours.\textsuperscript{75} This period can be extended by warrant of a magistrate up to a total of twenty-four hours.\textsuperscript{76} However, the period of twenty-four hours does not include “dead time” such as sleeping, meal breaks and contacting a lawyer.\textsuperscript{77} The case of Mohamed Haneef, who was detained for twelve days without charge pursuant to the Crimes Act\textsuperscript{78} prompted a change in the law to prevent prolonged detention. Since December 2010, “dead time” may not exceed seven days.\textsuperscript{79} In practice this means that pre-charge detention can last for up to eight days.

The Australian Security Intelligence Organization Act 1979 as amended (ASIO Act) permits the ASIO to seek a questioning and detention warrant from the issuing authority (a magistrate or judge) in relation to a terrorism offense.\textsuperscript{80} However, between 2003 and the end of 2012, no questioning and detention warrants have been issued.\textsuperscript{81} The Director General of the ASIO must first obtain approval from the relevant Minister that all necessary criteria have been satisfied.\textsuperscript{82} Application may then be made to

\begin{thebibliography}{9}
\bibitem{Crimes Act 1914 §§IAA, IC (Austrl.)} Crimes Act 1914 §§IAA, IC (Austrl.).
\bibitem{Id. at §23CA(4).} Id. at §23CA(4).
\bibitem{Id., at §23DF(7).} Id., at §23DF(7).
\bibitem{Id., at §23DB(9).} Id., at §23DB(9).
\bibitem{Crimes Act 1914, supra note 74 at §23DB(11).} Crimes Act 1914, supra note 74 at §23DB(11).
\bibitem{Australia Security Intelligence Act 1979, No. 113 as amended, §34 (Austrl.).} Australia Security Intelligence Act 1979, No. 113 as amended, §34 (Austrl.).
\bibitem{BRE\ TM \ \ \ \ Walker, INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR, DECLASSIFIED ANNUAL REPORT, supra note 32 at app. G.} BRE\ TM \ Walker, INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR, DECLASSIFIED ANNUAL REPORT, supra note 32 at app. G.
\bibitem{Id., at §34F} Id., at §34F
\end{thebibliography}
an issuing authority, who must be satisfied, that all the relevant criteria have been met. The standard is that of “reasonable grounds.” A key feature is that it is a measure of last resort to collect intelligence. A person may be detained and questioned for up to 168 hours (seven days).

The person being questioned must supply the information, and documents requested by the ASIO, and it is a criminal offense not to comply, punishable by imprisonment. It is also an offense to make a statement that is materially misleading or false.

Questioning and detention warrants have many of the same problems as prevention detention orders. The warrant must be explained to the detainee, but without any requirement to explain the grounds for detention. No meaningful process of challenging the warrants exists, and the only recourse is to complain about the warrant.

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(a) that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and
(b) that relying on other methods of collecting that intelligence would be ineffective; and
(c) that there is in force under section 34C a written statement of procedures to be followed in the exercise of authority under warrants issued under this Division; and
(d) that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:
   (i) may alert a person involved in a terrorism offence that the offence is being investigated; or
   (ii) may not appear before the prescribed authority; or
   (iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.

83 Id., at §34G

1. An issuing authority may issue a warrant under this section relating to a person, but only if:
   (a) the Director-General has requested it in accordance with subsection 34F(7); and
   (b) the issuing authority is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.

84 Id., at §34G(4).
85 Id., at §34L.
86 Id.
87 Id., at §34J.
and/or treatment, in appropriate circumstances.\textsuperscript{88} Contact with family is forbidden except if authorized in the warrant,\textsuperscript{89} and communications and contact with lawyers may be restricted and monitored.\textsuperscript{90} The lawyer must be given a copy of the warrant.\textsuperscript{91}

\subsection*{3.1.5 Control orders}

Australian control orders are based on the British model, but there are a number of differences. In the United Kingdom, the now abolished control orders could only have been made against a person reasonably suspected of involvement in terrorist-related activity.\textsuperscript{92}

In Australia, control orders may be issued if a court is satisfied on a balance of probabilities either that the order would substantially assist in preventing a terrorist act, or if the subject of the order has provided training to, or received training from, a listed terrorist organization.\textsuperscript{93} In the case of the first limb, the Act is silent about whether a terrorist act must be imminent, nor does the Act require mention of any specific terrorist activity.\textsuperscript{94} As to the person who has received training, Kent Roach has criticized this status based approach, and queries whether is this a sufficiently reliable indicator that he or she is likely to commit a terrorist act so as to warrant the placing of restrictions on liberty.\textsuperscript{95} The list of restrictions that might be imposed more or less mirror those found in British control orders, together with an additional condition that a person must receive specified counseling or education.\textsuperscript{96}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{Id.}, at §§34K10, 34K11.
\item \textsuperscript{90} \textit{Id.}, at §§34ZO, 34ZP, 34ZQ.
\item \textsuperscript{91} \textit{Id.}, at §34ZQ.
\item \textsuperscript{92} Prevention of Terrorism Act 2005, c.2, §2 (U.K.).
\item \textsuperscript{93} Criminal Code Act (Cth.) 1995, \textit{supra} note 17 at §104.4.
\item \textsuperscript{94} Katherine Nesbitt, \textit{supra} note 46 at 86.
\item \textsuperscript{95} KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM, \textit{supra} note 29 at 340.
\item \textsuperscript{96} Criminal Code Act (Cth.) 1995, \textit{supra} note 17 at §104.5(3)(l).
\end{itemize}
\end{footnotesize}
The Attorney General’s consent is needed before a senior AFP member can apply to a court for an interim control order. Various details must be supplied in support of an application, but the summary of the grounds need not include any information prejudicial to national security. Once a court has made an order for an interim control order, that order must be served on the subject within seventy-two hours, giving the person at least forty-eight hours notice to attend court for the confirmation of the control order. Amongst other matters, the interim order must include a list of the restrictions as well as a summary of the grounds for making the order, but as before, those grounds need not include any information prejudicial to national security. In its response the U.N. Working Group on Arbitrary Detention, the Australian Human Rights Commission highlights the problem that no right exists for a suspect to appear before a court before the order is made.

The Act does not deal with the type of evidence that might, or might not, be admissible in the confirmation hearing. The subject of the order may make representations to the court, either in person or through a representative. Although there has been heavy criticism of the British requirements that the gist of the case must be given to the subject of the control order, and Special Advocates will represent them, (as described in Chapter 2), none of these civil liberty “safeguards” are present in the Australian model.

97 Id., at §104.2.
98 Id., at §§104.2(3), 104.2(3A).
99 Id., at §§104.5, 104.12.
100 Id., at §104.5(2A).
101 AUSTRALIAN HUMAN RIGHTS COMMISSION, RESPONSE TO QUESTIONNAIRE FROM THE WORKING GROUP ON ARBITRARY DETENTION, JUDICIAL REVIEW OF LAWFULNESS OF DETENTION, supra note 66 at ¶73.
Confirmed control orders may last for no more than twelve months from the date of the interim order,\(^{103}\) but the number of successive control orders that may be made in respect of the same person is not capped.\(^{104}\) Unlike in the case of British control orders, the Australian authorities have no responsibility to review the viability of criminal prosecution; in Australia the AFP Commissioner must apply to revoke a control order when the grounds upon which the order was issued cease to exist.\(^{105}\)

The Independent National Security Legislation Monitor has recommended that preventive detention orders and control orders be abolished because they are “not effective, not appropriate and not necessary.”\(^{106}\)

### 3.1.6 Immigration detention

A brief mention should be made of Australia’s immigration laws. No special laws have been enacted to use detention in the immigration context as a means of preventing suspect terrorists from acting, because Australia’s immigration laws are generally quite harsh, and until 2008 permitted mandatory indefinite detention of unlawful noncitizens.\(^{107}\) Several non-citizen suspected terrorists have been detained pursuant to the

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\(^{103}\) *Id.*., at §104.16(1)(d).

\(^{104}\) *Id.*., at §104.16(2)


\(^{106}\) BRETT WALKER, INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR, DECLASSIFIED ANNUAL REPORT 20 DECEMBER 2012, *supra* note 32 at 40, 58.

immigration powers. Little in the way of procedural fairness is afforded to non-citizens.

3.1.7 Legal challenges

a) Domestic courts

Two control orders had been challenged as at 2011. The first case concerned an interim control order that was imposed on Jack Thomas after an appeal court reversed his conviction for receiving support from al-Qaeda. The magistrate granted the control order on the basis of involuntary evidence that had been ruled inadmissible by the appeal court and should not have been used to support the applicant’s conviction. On appeal, the High Court held that the interim control order was constitutional. A majority held that the control order legislation was supported by the defense and external affairs powers in the Constitution. A majority also held that courts are able to impose orders restraining liberty on the basis of a future risk. Thomas also argued that the court did not have the constitutional power to issue a control order because it was an exercise of a non-judicial function. A majority of the court rejected this argument. Thomas’s control order had an


111 Id., 343.


113 Id., ¶18, Per Gleeson CJ: “It is not correct to say, as an absolute proposition, that, under our system of government, restraints on liberty, whether or not involving detention in custody, exist only as an incident of adjudging and punishing criminal guilt;” and ¶79, per Gummow & Crenna JJ: “Orders, which are not orders for punishment following conviction, but which involve restraints upon the person to whom they are directed, can be made after a judicial assessment of a future risk.”

114 Andrew Lynch, Control Orders in Australia: A Further case Study in the Migration of British Counter-terrorism Law, supra, note 25 at 171, citing Thomas v Mowbray, HCA 33, supra note 110 at ¶15, per
extended duration of twelve months while he challenged its constitutional validity. It was not renewed after it expired.\textsuperscript{115}

The second challenge was brought by David Hicks at the end of a short prison sentence served in Australia after his release from Guantánamo Bay.\textsuperscript{116} He was made the subject of a control order on the basis that the order would substantially assist in preventing a terrorist act, and because he had received training from al-Qaeda. His control order was confirmed in February 2008,\textsuperscript{117} and expired in December 2008.\textsuperscript{118} Kent Roach observes that the focus on status – the fact that a person has had terrorist training – means that control orders can still be imposed, even if intelligence authorities conclude those persons no longer present a security risk.\textsuperscript{119} The Australian control order is thus quite different from its UK relation.

b) \textbf{International}

Australia has clashed on several occasions with the United Nations Human Rights Committee (“HRC”) about its immigration detention policy. Australia is a signatory to the ICCPR,\textsuperscript{120} and as far as detention is concerned, is obliged to respect Article 9, which

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{A graph showing the relationship between temperature and pressure.}
\end{figure}

\begin{table}
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Temperature} & \textbf{Pressure} \\
\hline
20°C & 1 atm \textsuperscript{1} \\
30°C & 2 atm \textsuperscript{2} \\
40°C & 3 atm \textsuperscript{3} \\
\hline
\end{tabular}
\caption{Temperature and pressure data.}
\end{table}

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\textsuperscript{115}Id., at 168.
\textsuperscript{116} \textit{Kent Roach, The 9/11 Effect: Comparative Counter-Terrorism}, supra note 29 at 344-6, \textit{citing} Jabbour v Hicks, FMCA 2139 (2007) (Austral.).
\textsuperscript{117} Jabbour v Hicks, FMCA 178 (2008) (Austral.).
\textsuperscript{118} Andrew Lynch, \textit{Control Orders in Australia: A Further case Study in the Migration of British Counter-terrorism Law}, supra note 25 at 169.
\textsuperscript{119} \textit{Kent Roach, The 9/11 Effect: Comparative Counter-Terrorism}, supra note 29 at 346.
\textsuperscript{120} International Covenant on Civil and Political Rights, Dec. 19, 1966, U.N.T.S. 171, [hereinafter referred to as ICCPR].
guarantees freedom from arbitrary arrest. However, the ICCPR has not been incorporated into Australian law, so it “lacks legal force and political legitimacy.”

Although the cases described below cases do not relate to preventive detention per se, the HRC’s analysis of Article 9 in the Australian cases, is relevant to the implementation of Australia’s preventive detention in the counter-terrorism context, as well as useful for the purposes of the search for core principles in this dissertation.

A. v Australia concerned a Cambodian national who arrived in Australia by boat, seeking refugee status. He was held in detention for over four years, pursuant to Australia’s mandatory immigration detention law. The HRC interpreted ‘arbitrary’ in Article 9 to mean that detention should not be inappropriate or unjust, and that it must be necessary and proportionate. Although the HRC did not consider that the mandatory detention law was arbitrary per se, they stated that there was no justification for indefinite and prolonged detention, and that every detention should be periodically

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121 Id., at Art. 9: “1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

122 George Williams, Anti-terror legislation in Australia and New Zealand, in GLOBAL ANTI-TERRORISM LAW AND POLICY, in GLOBAL ANTI-TERRORISM LAW AND POLICY, 545-6 (Victor V. Ramraj, Michael Hor, Kent Roach & George Williams, Eds.), (Cambridge University Press, 2012).


124 Id., at ¶9.2.

125 Id., at ¶9.3.
reviewed. Furthermore, they found a violation of Article 9(4) because the detainee had no right to challenge his detention.

The HRC has elaborated on the interpretation of arbitrary in three further Australian cases of immigration detention. In *C. v Australia*, detention was required to be “reasonable, proportionate and necessary.” In *Danyal Shafiq v Australia*, the test to ascertain arbitrary detention was to inquire whether the detention is “reasonable, proportionate and justifiable in all the circumstances.” In *D and E v Australia*, the HRC emphasized the need for a State to “demonstrate that other, less intrusive measures could not have achieved the same end” as continued detention.

Australia has come under HRC attack because of the lack of due process available to challenge detention. Two states, Australian Capital Territory (ACT) and Victoria have enacted human rights legislation that contain language echoing Article 9(4) ICCPR, but the Australian Human Rights Commission considers the application of the rights to be of limited effect. Although the states require their public authorities to act consistently with the human rights legislation, if there are inconsistencies between the

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126 *Id.*, at ¶9.4.
127 *Id.*, at ¶9.5.
132 Human Rights Act 2004 (ACT) §18(6): “Anyone who is deprived of liberty by arrest or detention is entitled to apply to a court so that the court can decide, without delay, the lawfulness of the s release if the detention is not lawful.”
133 Charter of Human Rights and Responsibilities Act 2006 (Vic.), §21(7): Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must (a) make a decision without delay; and (b) order the release of the person if it finds that the detention is unlawful.”
states’ human rights legislation and other state legislation, a declaration of inconsistent interpretation may be issued, but this will not affect the validity of the state law.\textsuperscript{135}

In August 2013 the HRC adjudicated on two cases involving immigration detention\textsuperscript{136} of fifty-two people who have been held “for nearly five years without trial, on secret evidence, with no prospect of release.”\textsuperscript{137} The majority of the detainees have been deemed security risks.\textsuperscript{138}

3.1.8 Summary

Generally, Australia’s attitude to its responsibilities under the ICCPR, including those related to detention, is problematic. The Democratic Audit of Australia, under the auspices of the Australian National University, noted in 2006 that the HRC had given forty-four decisions concerning Australia, and had found against it in twelve cases.\textsuperscript{139} It noted that: “[i]n response to almost every finding against Australia, the Commonwealth Government has reiterated that the Human Rights Committee is not a court and its views are not binding.”\textsuperscript{140}

This problem is not helped by the fact that Australia’s Constitution does not contain a Bill of Rights. Detention is mentioned in the Constitution in a very limited way, in Chapter V, which deals with the States.\textsuperscript{141} Michael Tolley comments that without a

\textsuperscript{135}Id., at ¶¶27-33.
\textsuperscript{136}M.M.M v. Australia, HRC Communication No. No. 2136/2012, (Aug. 20, 2013); F.K.A.G. v. Australia, HRC Communication No. 2094/2011, (Aug. 20, 2013). In both these cases the detention was deemed arbitrary and violated Article 9(1) and also violated 9(2) and 9(4) because of deficiencies in process.
\textsuperscript{138}Id.
\textsuperscript{139}HILARY CHARLESWORTH, HUMAN RIGHTS: AUSTRALIA VERSUS THE UN, Democratic Audit of Australia, Australian National University, 2, (Aug. 2006):
\textsuperscript{140}Id., at 3.
\textsuperscript{141}AUSTRALIAN CONSTITUTION § 120: “Custody of offenders against the laws of the Commonwealth. Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.”
federal bill of rights, the judiciary is virtually powerless to invalidate these laws that deprive suspects of any meaningful judicial review.\textsuperscript{142} George Williams puts this another way, saying that the absence of a bill of rights means that when constitutional constraints are involved, judges are “generally limited to applying the structural features of the Constitution – for example, limitations on legislative power derived from federalism or the separation of judicial power…[but in] almost all cases there is simply no constitutional remedy for the violation of human rights.”\textsuperscript{143} He notes that generally, there is no mechanism through which courts can analyze whether the violation of human rights is necessary or proportionate.\textsuperscript{144} So the only “check” comes from political debate and the goodwill of political leaders.\textsuperscript{145}

The detention legislation has produced a raft of significant problems, which include the following. Detainees are unable to have private conversations with lawyers as contact may be monitored. Preventive detention may be ordered without the subject knowing why, and without any meaningful method of judicial challenge. Questioning and detention warrants are coercive because failure to answer questions is a crime in itself. Little, or no, meaningful method exists to challenge judicially preventive detention, or investigative detention by the ASIO. Control orders may be imposed without the subject knowing why, and there is no mechanism comparable to the British Special Advocates, whereby a lawyer appointed to look after the detainee’s interests may have access to evidence and make representations to the court, albeit without being able to communicate the gist of the evidence to the detainee.

\textsuperscript{142} Michael C. Tolley, \textit{Australia’s Commonwealth Model and Terrorism}, \textit{supra} note 12 at 144, 145.  
\textsuperscript{143} George Williams, \textit{Anti-terror legislation in Australia and New Zealand, in GLOBAL ANTI-TERRORISM LAW AND POLICY}, \textit{supra} note 122 at 544.  
\textsuperscript{144} \textit{Id.}, at 544-5.  
\textsuperscript{145} \textit{Id.}, at 545.
3.2 CANADA

3.2.1 The terrorist threat and counter-terrorism strategy

Over the past few decades, “several hundred” Canadian citizens have been killed or injured in terrorist incidents.146 Terrorism is a “serious and persistent threat to the security of Canada and its citizens.”147 Canada’s current threat comprises three main components: violent Sunni extremists both at home and abroad; other international terrorist groups, such as LTTE; and domestic, issue based extremists.148 The Royal Mounted Police has noted that “fifty terrorist organizations are present in some capacity in Canada, and, as of May 2010, CSIS was investigating over 200 individuals in Canada suspected of terrorism-related activities.”149

In Canada, “terrorism is a crime and will be prosecuted.”150 Before 9/11 the most serious terrorist attacks derived from the Front de Liberation du Quebec, culminating in the ‘October Crisis’ in 1970,151 and the Air India Bombings by Sikh extremists in 1985.152 Since 9/11, despite many threats,153 one significant near-miss in 2006 resulting in the prosecution of 18 people,154 and a thwarted plot to derail a passenger train in April

147 Id., 6.
148 Id., 7-9. See also YONAH ALEXANDER, et al., CANADA AND TERRORISM: SELECTED PERPETRATORS, Inter-University Center for Terrorism Studies, (Sep. 2013), (providing profiles of Canadian citizens and foreign residents who have become involved in Jihad movements).
152 Id., 369-74.
2013, no actual attack has taken place on Canadian soil. Violations of anti-terrorist legislation have occurred, but available data is unclear as to how many terror prosecutions have taken place, merely suggesting that there have been between twenty and thirty prosecutions.156

In February 2013, the Globe and Mail published details of a secret 2011 report (released to them under the Access to Information Act157), which disclosed that violent extremists were more likely to be Canadian citizens than immigrants.158 Of the twenty-four people charged as at February 2013 under Canadian anti-terrorism legislation, eighteen were Canadian citizens.159 Another ‘secret’ document, released under the Access to Information Act to CBC News in January 2013, also notes that “Canada’s spy agency sees the ‘insider threat’ as a rising security risk for Canadians at home and abroad.”160 Yet, in April 2013 two individuals were arrested in connection with an alleged plot to derail a passenger train in Toronto,161 and neither of them were Canadian citizens.162 In

156 KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM, supra note 29 at 406-10; PUBLIC PROSECUTION SERVICE OF CANADA, ANNUAL REPORT 2007-08, at 8; PUBLIC PROSECUTION SERVICE OF CANADA ANNUAL REPORT 2008-09, 9; ANNUAL REPORT 2009-10, at 10, PUBLIC PROSECUTION SERVICE OF CANADA; PUBLIC PROSECUTION SERVICE OF CANADA ANNUAL REPORT 2010-11, at 7; PUBLIC PROSECUTION SERVICE OF CANADA; PUBLIC PROSECUTION SERVICE OF CANADA ANNUAL REPORT 2011-12, at 12; PUBLIC PROSECUTION SERVICE OF CANADA; PUBLIC PROSECUTION SERVICE OF CANADA ANNUAL REPORT 2012-13, at 9.
159 Id.
May 2013, a Tunisian national who had allegedly met and attempted to radicalize one of the two arrested in connection with the Toronto plot, was arrested in New York.\footnote{163} 

Canada proclaimed its first official national security policy in 2004,\footnote{164} and released its first official Counter-Terrorism Strategy on February 13, 2012,\footnote{165} which seems to resonate of the UK strategy. Here too, there are four strands to the strategy. In this document they are prevent, detect, deny, and respond.\footnote{166} The Strategy is built on six principles: building resilience; the notion that terrorism is a crime and will be prosecuted; adherence to the rule of law; cooperation and partnerships; proportionate and measured response; and a flexible and forward-looking approach.\footnote{167} 

The Strategy highlights the importance of human rights, as enshrined in the Canadian Charter of Rights and Freedoms,\footnote{168} and in international human rights and international humanitarian law,\footnote{169} whilst at the same time declaring that “[s]ecurity is also a human right.”\footnote{170}
3.2.2 Canada’s counter-terrorism laws – an overview

After 9/11, Canada enacted the Anti-Terrorism Act in 2001, which added many new terrorist offenses to the Criminal Code. The definition of terrorism includes “conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counseling in relation to any such act or omission.” Acts of mere preparations are not criminalized. Many of the offenses are inchoate and Kent Roach has described this as the “piling of inchoate liability on top of inchoate crimes.” The law does not require “a proximate nexus to any planned act of terrorism,” and many offenses are designed to ensure that the courts interpret them as broadly as possible.

The Anti-terrorism Act 2001 introduced preventive detention without charge for up to seventy-two hours. Detainees had the right under the Canadian Charter to be told the reason for their arrest and be given prompt access to a lawyer. At the end of detention a judge could order the suspect to enter into a peace bond for up to a year. Refusal to enter into a peace bond carried a sentence of one-year imprisonment and breach of a peace bond was punished by two years imprisonment. No preventive arrests were made since the provision was enacted, and the preventive detention provision was allowed to expire in 2007.

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171 Anti-Terrorism Act, S.C. 2001, c.41 (Can.).
172 Criminal Code, R.S.C., 1985, c. C-46, §83.01 (Can.).
173 Id., at §83.01(1)(b).
174 CRAIG FORCSE, CATCH AND RELEASE: A ROLE FOR PREVENTIVE DETENTION IN CANADIAN ANTI- TERRORISM LAW, supra note 55.
178 Criminal Code, supra note 172 at §83.3.
The current methods of preventive detention used in Canada are described and analyzed below. It is beyond the scope of this dissertation to discuss the detention of persons detained by Canadian forces in Afghanistan, or Canadian citizens outside Canada, such as Maher Arar, Abdullah Almalki, AAhmad Abou-Elmaati, Muayyed Nureddin (all detained and tortured in Syria) and Omar Khadr detained in Guantanamo Bay, all of which has been extensively analyzed elsewhere.\(^{180}\)

### 3.2.3 Immigration detention

After 9/11, as in the United Kingdom, United States and Australia, Canada used and continues to use immigration law as a method of anti-terrorism preventive detention. It enacted the Immigration and Refugee Protection Act in 2001.\(^{181}\) Immigration and public safety officials can declare in a security certificate that a permanent resident or a foreign national may not be admitted into Canada on security grounds,\(^{182}\) which include engaging in terrorism,\(^{183}\) being a danger to the security of Canada,\(^{184}\) or being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in terrorism.\(^{185}\)

The liability rules are broader than the terrorism offenses introduced into the Criminal Code by the Anti-terrorism Act, and membership in a terrorist organization can

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\(^{180}\) Id., at 410-16; and see e.g. International Civil Liberties Monitoring Group, Canada’s Anti-Terrorism Laws in Violation of International Human Rights Standards, 4-5, Submission of Information by the International Civil Liberties Monitoring Group to the Office of the High Commissioner for Human Rights (OHCHR) in relation to the Human Rights Council’s Universal Periodic Review (UPR) of Canada to take place in February 2009, (2009), available at http://fileservr.cfsadmin.org/file/iclmg/1598bb0106ab8b8f1e2bce5a89254cc32526a333.pdf

\(^{181}\) Immigration and Refugee Protection Act, S.C. (2001) c.27 (Can.).

\(^{182}\) Id., at §34(1).

\(^{183}\) Id., at §34(1)(c).

\(^{184}\) Id., at §34(1) (d).

\(^{185}\) Id., at §34(1)(f).
be proven on standards that are less onerous than the normal criminal law standard of beyond a reasonable doubt.\textsuperscript{186}

The immigration and public safety ministers can issue a warrant for the arrest and detention of a person named in a security certificate, if they have reasonable grounds to believe that the person is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal.\textsuperscript{187} Once a person is detained he must appear before a federal judge for a review of the detention after forty-eight hours, and then every six months until deportation.\textsuperscript{188} As the Supreme Court prohibited the deportation of persons to countries where there is a “substantial risk of torture,”\textsuperscript{189} detention may be extremely lengthy. In a later case, the Court, “by its silence, held that over five years’ administrative detention without charge, without an end in sight, did not breach section 12 [of the Charter],”\textsuperscript{190} which prohibits cruel and unusual punishment.

Security certificates are subject to judicial review by specially designated judges to determine reasonableness in federal court. Special Advocates will be appointed by the court to represent detainees in cases where evidence may not be disclosed to the detainee or his regular counsel, on the grounds of national security or possible danger to the safety of any person.\textsuperscript{191} Similarities to, and differences from the British use of Special Advocates in control order cases are apparent. Despite issues with regard to the use of secret evidence, which is discussed below, a higher level of disclosure to the detainee is

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\textsuperscript{186} \textsc{Kent Roach, The 9/11 Effect: Comparative Counter-Terrorism, supra} note 29 at 396.
\textsuperscript{187} \textit{Immigration and Refugee Protection Act, supra} note 181 at §81.
\textsuperscript{188} \textit{Id.}, at §82.1.
\textsuperscript{189} \textsc{Kent Roach, The 9/11 Effect: Comparative Counter-Terrorism, supra} note 29 at 402, \textit{citing Suresh v Canada, 1 S.C.R. 3, ¶¶47, 58 (2002) (Can.).}
\textsuperscript{190} \textsc{Rayner Thwaites, The Liberty Of Non-Citizens: Indefinite Detention In Commonwealth Countries, supra} note 109 at 262, commenting on Charkaoui v Canada, 1 S.C.R. 350, ¶95 (2007) (Can.).
\textsuperscript{191} \textit{Immigration and Refugee Protection Act, supra} note 181 at §§83, 85.1.
required than in the United Kingdom. Another significant difference is that the special advocate is entitled to see all of the government’s evidence against the detainee. A judge must give directions as to the extent of any contact between the Special Advocate and detainee, because evidence may not be disclosed to the detainee after the special advocate has seen it.

3.2.4 Preventive detention in the general criminal law

Very limited circumstances exist to arrest without a warrant and detain a suspect for up to twenty-four hours. A peace officer may arrest a person if he or she has reasonable grounds to believe that the suspect has committed, or is about to commit an indictable offense. The Supreme Court of Canada “graft[ed] on an objective test to this subjective belief by the peace officer.” All terrorist offenses are indictable, but no powers are in place to detain longer in the case of terrorist offenses.

3.2.5 Recognizances with conditions – peace bonds

Another cousin of the British control order is available to limit the freedom of potentially dangerous persons, including suspected terrorists. A provincial court judge can impose a recognizance with conditions, otherwise known as peace bonds, if he is satisfied that there are reasonable grounds to fear that a person may commit a terrorism offense. The suspect will be present in court for the recognizance hearing, but the

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194 Criminal Code supra note 172 at §495.
196 Criminal Code, supra note 172 at §83.01.
197 Id., at §810.01.
198 Id., at §§810.01(2), 810.01(3).
Code is silent as to the type of evidence that is acceptable, and the extent to which the suspect can challenge it.

A judge may impose a number of conditions regulating conduct for twelve months, but the period can be extended to two years if the suspect has been convicted previously of certain offenses. A judge may impose twelve months imprisonment on the suspect if he or she refuses to enter into the recognizance. If the suspect breaches any of the conditions, the punishment is up to two years imprisonment. Appeal is limited to the right of the suspect to apply to a court to vary the conditions.

3.2.6 Legal challenges

a) Domestic courts

The seminal case of Charkaoui v Canada in 2007 was the trigger for several important changes to the law. The case concerned the detention pursuant to security certificates of Adil Charkaoui, a permanent resident, and two foreign nationals, Hassan Almrei and Mohamed Harkat, both of whose rights to remain in Canada had not been confirmed. All had been detained for some years but Charkaoui and Harkat had been released on conditions.

First, the Supreme Court ruled that the way secret evidence was used at the time violated the right to a fair hearing pursuant to Article 7 of the Charter of Rights and
Freedoms ("Charter"), because Article 7 requires that in order to deprive a person of liberty, a fair process is essential. That process has to involve a hearing, and the right to know, and answer the case against one. However, that right is not absolute, particularly when there are national security concerns. This ruling led to the introduction of Special Advocates, as described above.

Second, the Court considered whether the detention of foreign nationals without warrant violated the guarantee against arbitrary detention in Article 9 of the Charter. It decided that as a security certificate had been signed on national security grounds, the detention was not arbitrary. At the time this case was litigated, there was a difference in the way permanent residents and foreign nationals were treated as regards the review process. The former had to be brought before a judge within forty-eight hours of detention, but the latter could not seek a review for 120 days. The Supreme Court held that the treatment of foreign nationals violated Article 9. That ruling resulted in a change in the law ensuring that both permanent residents and foreign nationals are entitled to a review after forty-eight hours.

The Court concluded that the principles in the Charter of fundamental justice and the guarantee of freedom from cruel and unusual treatment were not violated by long form, adequate substitutes may be found. But the principles must be respected to pass the hurdle of s. 7. That is the bottom line.”

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206 Constitution Act 1982, Art. 7, (Can.), available at http://laws.justice.gc.ca/eng/charter/CHART_E.PDF. (Section 7 of the Charter guarantees the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.).
207 Charkaoui v Canada, supra note 204 at ¶¶19, 20, 23, 28.
208 Id., at 29: “This basic principle has a number of facets. It comprises the right to a hearing. It requires that the hearing be before an independent and impartial magistrate. It demands a decision by the magistrate on the facts and the law. And it entails the right to know the case put against one, and the right to answer that case. Precisely how these requirements are met will vary with the context. But for s. 7 to be satisfied, each of them must be met in substance.”
209 Id., at ¶¶57-62.
210 Id., at ¶89.
211 Id., at ¶¶91, 94.
212 Immigration and Refugee Protection Act, supra note 181 at §82.1.
periods of immigration detention or onerous conditions of release, provided that meaningful opportunities are given to the detainee to challenge continued detention, and onerous or restrictive release conditions. Chief Justice McLachlin observed: “[t]he longer the period, the less likely that an individual will remain a threat to security.”

The Court declared that the immigration legislation did not authorize indefinite detention, and provided a meaningful review process. In rejecting the applicant’s claim that the legislation discriminated between citizens and non-citizens, the Court distinguished the U.K. case of A. v Secretary of State on the basis that the U.K. legislation at the time did provide for indefinite detention. The fact that the Court concluded that equality rights were not violated, precluded it from considering whether there were more proportionate means to address the terrorist threat – this was a central issue in A.

Another case with human rights connotations is that of Abdullah Khadr, a Canadian citizen. The United States suspected that Khadr was supplying weapons to al-Qaeda forces in Pakistan and Afghanistan, and paid $500,000 to the Pakistani Intelligence Agency ISI to abduct him in Pakistan in 2004. He was held in secret detention for about fourteen months, interrogated by American and Pakistani authorities tortured, denied consular access for several months and not permitted to challenge his

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213 Charkaoui v Canada, supra note 204 at ¶¶107-23.
214 Id., at ¶117.
215 Id., at ¶112.
216 Id., at ¶127.
218 Charkaoui v Canada, supra note 204 at ¶¶127, 130.
detention in a court. When he was finally repatriated to Canada, the United States sought to have him extradited on terrorist charges.\footnote{United States of America v. Khadr, 2011 ONCA 358, ¶1(May 6, 2011).}

At the initial extradition committal hearing, although Justice Speyer did not accept that Khadr had been subjected to prolonged torture, he found that “the sum of the human rights violations suffered by Khadr is both shocking and unjustifiable”.\footnote{Id., at ¶2.} He ordered Khadr released after Khadr had spent a period of four and a half years in pre-extradition custody. In the Appeal Court, Justice Sharpe dismissed the appeal by the United States, saying “[t]here is no appeal against the extradition judge’s finding that the human rights violations were shocking and unjustifiable. Because of the requesting state’s misconduct, proceeding with the extradition committal hearing threatened the court’s integrity…[Justice Speyer did not err in saying:] In civilized democracies, the rule of law must prevail.”\footnote{Id., at 76.}

The Court did not believe that denying the appeal would permit a suspected terrorist to walk free, because Khadr was liable to prosecution in Canada.\footnote{Id., at 76.}

Justice Sharpe stated that Justice Speyer had not erred in giving primacy to the rule of law.

The rule of law must prevail even in the face of the dreadful threat of terrorism. We must adhere to our democratic and legal values, even if that adherence serves in the short term to benefit those who oppose and seek to destroy those values. For if we do not, in the longer term, the enemies of democracy and the rule of law will have succeeded. They will have demonstrated that our faith in our legal order is unable to withstand their threats.\footnote{Id., at 76.}
In November 2011, the Supreme Court of Canada refused to hear an appeal by the United States.\textsuperscript{225}

b) International

\textit{Ahani v Canada},\textsuperscript{226} concerned an Iranian citizen, who submitted a communication to the Human Rights Committee in January 2002, alleging \textit{inter alia} that article 9 of the ICCPR had been violated by his arbitrary detention in Canada for five years since 1993 without access to bail, detention review and habeas corpus. He had been declared inadmissible to Canada on the grounds that there were reasonable grounds to believe that he would engage in terrorism, that he was a member of an organization that had engaged in terrorism, and that he had engaged in terrorism. He was deported to Iran in June 2002.

The Committee decided that the claim was admissible in respect of the first five years of detention, up to 1998, but thereafter the claim was inadmissible because of failure to exhaust domestic remedies in Canada.\textsuperscript{227}

The Committee observed that “an individual must have appropriate access, in terms of article 9, paragraph 4, to judicial review of the detention, that is to say, review of the substantive justification of detention, as well as sufficiently frequent review.”\textsuperscript{228} A majority of the eighteen members of the Committee found a violation of article 9, paragraph 4 because of the number of years between the commencement of detention and the date of the decision ruling whether the issue of the certificate was reasonable.\textsuperscript{229}

\textsuperscript{227} \textit{Id.}, at ¶9.2.
\textsuperscript{228} \textit{Id.}, at ¶10.2.
\textsuperscript{229} \textit{Id.}, at ¶10.3.
Yet the majority also considered that the ineligibility of a foreign national to apply for release from detention for 120 days was not a violation of article 9, on the basis that such a period of detention in this case “was sufficiently proximate to a decision of the Federal Court.” This seems surprisingly deferential to the Canadian law of the time, but perhaps that ruling turned on specific facts. In any event, it was not until the decision of the Canadian Supreme Court in Charkaoui that a change was triggered in Canadian law.

3.2.7 Summary

Security certificates have failed as a counter-terrorism policy. After thirty-eight decisions in the federal court and two in the Supreme Court, Charkaoui’s security certificate was withdrawn in 2009. After fourteen court judgments, Almrei’s security certificate was quashed in 2009. As at 2011, three security certificates remained, but each detainee had been released on a form of control order.

The result of challenges to the security certificate regime has therefore been that it has “morphed into a de facto and controversial control order regime.” In any event, apart from problems about duration, and use of secret evidence, the usefulness of security certificates is limited. They do not address the Canada’s problem of home grown terror

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230 Id., at ¶10.4.
231 Charkaoui v Canada, supra note 204.
233 Id., at 405, n.179.
234 Id., 404, citing Charkaoui v Canada, FC 1030 (2009) (Can.).
235 Id., 404-5, n. 179, and citing Almrei v Canada, FC 1263 (2009).
236 Id., 405.
237 Id., 405.
suspects, because security certificates may not be issued in relation to Canadian citizens.

As far as peace bonds are concerned, it is easy to break the onerous conditions. Moreover, “a peace bond with a hair trigger could allow a state to use prosecution and punishment for easily proved and trivial violations of the peace bond as a means of achieving robust ant-terrorism preventive detention.”

3.3 INDIA

3.3.1 The current terrorist threat and counter-terrorism strategy

“Scores” of insurgent and terrorist groups are operating in the country. India currently faces terror threats from Islamist militants such as Indian Mujahedin, which carried out a number of bombing attacks in 2008 that killed 152 civilians, and in 2010 that killed seventeen. This group also claimed responsibility for the Delhi High Court bombing in 2011. Terror threats also emanate from the Maoist insurgents (Naxalites), whose activities claimed the lives of in excess of 100 police and paramilitary personnel in 2010. The government reports that it has broken up fifty-one terrorism cells and foiled forty-three plots since the Mumbai attacks in 2008 that killed 166 people.

Current counterterrorism strategy includes the establishment of a new National Counter-Terrorism Centre (NCTC), which is designed to streamline intelligence

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238 BUILDING RESILIENCE AGAINST TERRORISM: CANADA’S COUNTER-TERRORISM STRATEGY, GOVERNMENT OF CANADA, supra note 150 at 7-9.
239 CRAIG FORC ESE, CATCH AND RELEASE: A ROLE FOR PREVENTIVE DETENTION IN CANADIAN ANTI-TERRORISM LAW, supra note 55 at 21.
240 Eben Kaplan & Jayshree Bajoria, Counterror in India, COUNCIL ON FOREIGN RELATIONS, (Nov. 27, 2008)
243 HUMAN RIGHTS WATCH, WORLD REPORT 2011, supra note 241 at 316.
244 Rama Lakshmi, India’s counterterror measures in disarray, WASH. POST at A7, (May 2, 2012).
collection and analysis in place of the “hundreds of organizations” that deal with counter-terrorism activities.\(^{245}\) However, the implementation of this strategy has been delayed, due to “turf wars and the increasingly fractured nature of Indian politics.”\(^{246}\) Chief ministers from twelve states have joined together to oppose the establishment of the NCTC.\(^{247}\)

### 3.3.2 India’s counter-terrorism laws – an overview

India has faced serious threats from terrorists and other forms of politicized violence for decades.\(^{248}\) The Global Terrorist Database has recorded more than 4,100 terrorist attacks in India between 1970 and 2004.\(^{249}\) In that period India ranked sixth highest in the list of countries experiencing terror attacks.\(^{250}\) In 2008 the Mumbai mass shooting attacks killed 174.\(^{251}\) Terror attacks occurred in Mumbai in July 2011, killing twenty-nine and injuring 130, and in New Delhi in September 2011 where fifteen were killed and fifty injured.\(^{252}\) In addition, Naxalites (Maoist forces) killed nearly 250 civilians as well as over 100 members of the security forces in 2011.\(^{253}\)

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\(^{247}\) Id. As at June 2013, the establishment of the NCTC is still nowhere near realization. See [PTI, Centre, states need to work together for NCTC: Home Minister Sushilkumar Shinde, TIMES OF INDIA, ECONOMIC TIMES](http://economictimes.indiatimes.com/news/politics-and-nation/centre-states-need-to-work-together-for-nctc-home-minister-sushilkumar-shinde/articleshow/20542335.cms)


\(^{249}\) [Terrorism in India by the Numbers: Statistics from UM’s Global Terrorism Database](http://newsdesk.umd.edu/sociss/release.cfm?ArticleID=1797).

\(^{250}\) Id.

\(^{251}\) Mumbai gunman Qasab sentenced to death, [BBC NEWS](http://news.bbc.co.uk/2/hi/8664179.stm).


\(^{253}\) Id.
3.3.3 Preventive detention in India

Preventive detention without trial is another progeny of British colonial law. Detention in India dates from 1784, when the East India Company Act permitted the Governor-General to secure and detain any persons “suspected of carrying on correspondence or activities prejudicial or dangerous to the peace and safety of British settlements or possessions in India.”\(^{254}\) A line of colonial legislation followed,\(^{255}\) to combat the political terrorism in India that began at the start of the twentieth century. “210 ‘revolutionary outrages’” and “101 more attempts in Bengal involving over one thousand terrorists” took place between 1906 and 1917 and “189 incidents in Bengal during the years 1930-1934.”\(^{256}\)

The pre-independence detention legislation culminated in the Defence of India Act 1939,\(^{257}\) which was modeled on British war-time emergency measures.\(^{258}\) That act authorized the detention of a person if the government was “satisfied…that such detention was necessary to prevent him from acting in any manner prejudicial to the defense and safety of the country.”\(^{259}\)

After independence, the new government was faced with an immediate dilemma – it wanted to “ensure the maximum liberty” for the individual, but at the same time it wanted to “nip in the bud every threat to national security from within.”\(^{260}\) The

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\(^{255}\) Id., citing regional legislation dealing with preventive detention in Bengal, Madras and Bombay in the early 19\(^{th}\) century, the Defence of India Act 1915, and the Rowlatt Act 1919.

\(^{256}\) Peter Heehs, *Terrorism in India during the freedom struggle*, HISTORIAN, Vol. 55, Iss. 3 469 (Spring 1993).

\(^{257}\) Defence of India Act No. XXXV (1939).

\(^{258}\) C.M. Abraham, *India – An Overview*, supra note 254 at 60.

\(^{259}\) Id.

Constitution has a very short statement dealing with protection of life and liberty,\textsuperscript{261} and after a series of stormy and acrimonious debates in the Constituent Assembly,\textsuperscript{262} provisions relating to preventive detention were inserted into the Constitution.\textsuperscript{263}

The Constitution gives with one hand and takes away with the other. Article 22(1) guarantees that a detainee is informed of the grounds for arrest, and is given access to a lawyer. Article 22(2) requires that a detainee is brought before a court within twenty-four hours of arrest to have the detention confirmed. However, these guarantees do not apply

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\indent \textsuperscript{261}India Const., Art. 21, amended by The Constitution (Ninety-fourth Amendment) Act, 2006: “No person shall be deprived of his life or personal liberty except according to procedure established by law.”
\indent \textsuperscript{262}C.M. Abraham, \textit{India – An Overview}, supra note 254 at 60.
\indent \textsuperscript{263}India Const., supra note 261 at art. 22. (1) “No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.
\indent (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
\indent (3) Nothing in clauses (1) and (2) shall apply—
\indent (a) to any person who for the time being is an enemy alien; or
\indent (b) to any person who is arrested or detained under any law providing for preventive detention.
\indent **(4) No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless—
\indent (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:
\indent Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or
\indent (b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).
\indent (5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.
\indent (6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.
\indent (7) Parliament may by law prescribe—
\indent *(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);
\indent **(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and
\indent (c) the procedure to be followed by an Advisory Board in an inquiry under ***[sub-clause (a) of clause (4)].”
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to “enemy aliens” or persons “arrested under any law providing for preventive detention.”

A series of detention laws followed. In fact, with the exception of two brief periods, Indian law has provided for preventive detention since independence. The general criminal law, as set out in the Code of Criminal Procedure, allows an police officer “knowing of a design to commit a cognizable offense” to arrest without a warrant “if it appears that the offense cannot otherwise be prevented.” The suspect may only be detained for twenty-four hours, “unless his further detention is required or authorized under any other provisions of this Code or of any other law for the time being in force.” One state, (Maharashtra) has amended the Code to permit detention under this section to continue for up to thirty days. Once arrested, the accused must be told full particulars of the offense or the grounds for the arrest. Normally the accused has to be brought before a magistrates’ court within twenty-four hours. If an investigation cannot be completed within twenty-four hours, a magistrate can remand a suspect in custody for an initial period of up to fifteen days, and thereafter for up to a period of ninety days in cases that might merit imprisonment for ten years or more.

National security legislation has generally worked in tandem with the provisions of the Code of Criminal Procedure, but extended the periods of detention under general

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264 Id., at arts. 22(1), 22(2).
266 Code of Criminal Procedure 1973 (CrPc), §151(1).
267 Id., at §151(2).
268 Id., at §151(3), and Maharashtra Act 7 of 1981 (w.e.f. 27-5-1980).
269 Id., at §50.
270 Id., at §76. Human Rights Watch have reported that many people are detained for more than 24 hours before the first court appearance, HUMAN RIGHTS WATCH, THE “ANTI-NATIONALS,” ARBITRARY DETENTION AND TORTURE OF TERRORISM SUSPECTS IN INDIA, 44 (Feb. 2011).
criminal law. On the heels of the ratification of the Constitution, the Preventive Detention Act 1950272 (PDA) was passed. This statute lapsed in 1969, and in 1971 the Maintenance of Internal Security Act273 was passed, and it expired in 1978. This was followed by the National Security Act 1980 (NSA),274 which generated a “rich, dizzyingly complex body of case law interpreting nearly every phrase of the act.”275 That Act permitted preventive detention for up to twelve months of an individual “with a view to preventing him from acting in any manner ‘prejudicial to’ various state objective including national security and public order.”276 The courts “endorsed a very broad interpretation of ‘acts prejudicial to the maintenance of public order,’”277 whilst commenting that “the nature and scope of judicial review is difficult to define with any precision in preventive detention cases.”278

The law guarantees “a limited regime of procedural rights” which “arguably, fall well short of established international human rights standards.”279

The NSA remains in force and has been supplemented by additional laws designed as counter-terrorism measures. More contemporary legislation includes the Terrorist and Disruptive Activities Prevention Act 1985 (TADA),280 which was enacted

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272 Preventive Detention Act, No. 4 (1950).
274 National Security Act, No. 65 (1980).
276 Id., at 328, citing National Security Act §3(1)(a).
277 Id., at 330.
278 Id., at 333.
279 Id., at 338; See also C. Raj Kumar, Human Rights Implications of National Security Laws in India: Combating Terrorism while Preserving Civil Liberties, 33 DENV. J. INT’L L. & POL’Y 195, 213 (2005): “the NSA has minimal procedural safeguards…”
280 Terrorist and Disruptive Activities (Prevention) Act, No. 28 (1987), It was first enacted in 1985 as a temporary measure for two years, but reintroduced through an Ordinance in 1987, with provision to extend it. It was extended periodically and permitted to lapse in May 1995.
specifically to counter the separatist movement in the Punjab and adjoining states.\textsuperscript{281} It prescribed exceptions to the Indian Penal Code whereby prolonged detention was facilitated. Arrests were permitted without warrant and the periods of police and judicial custody in pre-trial remand were extended to a period of up to one year.\textsuperscript{282} TADA’s “sweeping powers were predominantly used not to prosecute and punish actual terrorists, but rather as a tool that enabled pervasive use of preventive detention and a variety of abuses by the police, including extortion and torture.”\textsuperscript{283} A government statistic in 1993 shows that “only 0.81 percent of 52,268 individuals detained under TADA since its enactment had been convicted.”\textsuperscript{284}

Equally, if not more controversial legislation followed: the Prevention of Terrorism Act 2002 (POTA).\textsuperscript{285} Although neither TADA nor POTA were preventive detention laws \textit{per se}, they appear to have existed in “a parallel legal system in aid of the Criminal Justice System.”\textsuperscript{286} POTA broadened the definition of terrorism to include membership, support and financial assistance, thus broadening the scope of the law generally.\textsuperscript{287} The definition was broadened still further by the enactment of the Unlawful Activities (Prevention) Amendment Act of 2012, which added as a terrorist offense the causing of “damage to the monetary stability of India by way of production or smuggling

\textsuperscript{282} Id., at 423.
\textsuperscript{283} Anil Kalhan, Gerald P. Conroy, Mamta Kaushal, Sam Scott Miller & Jed S. Rakoff, \textit{Colonial Continuities: Human Rights, Terrorism and Security Laws in India}, \textit{supra}, note [ ] at 147. They also note that there is evidence that “thousands of individuals, virtually all of them Sikh, had been arbitrarily arrested under TADA for prolonged periods without being told the charges against them.”
\textsuperscript{284} Id., 148.
\textsuperscript{285} Prevention of Terrorism Act No. 15 (2002).
\textsuperscript{286} \textsc{Ujjwal Kumar Singh, The State, Democracy and Anti-Terror Laws in India, 69} (Sage Publications, 2007).
\textsuperscript{287} Ujjwal Kumar Singh, \textit{Mapping anti-terror regimes in India}, 421 \textit{in} \textit{GLOBAL ANTI-TERRORISM LAW AND POLICY}, \textit{supra} note 281 at 429.
or circulation of high quality counterfeit Indian paper currency, coin or of any other material.”

It also contained two very repressive measures relating to detention, which were inconsistent with the provisions of the ICCPR. The period of pre-trial investigation without possibility of bail was reduced from one year to 180 days. However, this had the effect of extending the period of time permitted for the prosecutor to file a charge sheet to 180 days. Also, although POTA required police to inform the accused persons of their right to counsel and meet counsel during the course of an investigation, legal counsel was not entitled to remain present throughout the period of interrogation.

In addition, the substantive bail standard was nearly impossible for an accused person to meet. If the prosecutor opposed bail, the court could only release the accused if there were “reasonable grounds to believe that the accused is not guilty of the alleged offense and not likely to commit any offense while on bail.” The effect of this was to permit the prosecutor, rather than the court to determine whether bail would be granted. If the prosecutor opposed bail before filing the charge sheet, it would have been almost impossible for the accused to prove innocence, not only without a trial, but also without knowing the allegations or the grounds on which bail was opposed. POTA was repealed in 2004. It had “functioned more as a preventive detention law than as a law intended to obtain convictions for criminal violations – but without heeding even the

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290 Id., at 159, citing Prevention of Terrorism Act §49(2)(a)-(b).
291 Id., citing Prevention of Terrorism Act §52(4).
292 Id., at 160, citing Prevention of Terrorism Act §49(6) –(7).
293 Id., at 160.
limited constitutional protections required for preventive detention laws, much less the
exacting standards of international law.”

After POTA was repealed, an earlier statute, the Unlawful Activities (Prevention)
Act 1967 was amended to become the Unlawful Activities (Prevention) Act 2004
(UAPA). This legislation did not deal with preventive detention, which continued
under NSA. After the Mumbai shootings in 2008, UAPA was amended again, and
introduced a number of sections dealing with preventive detention. Any officer “knowing
of a design” to commit an offense under the Act, or “having reason to believe” that a
person has committed an offense under the Act, has the power to authorize the arrest of
such a person. Like POTA, bail can be denied for up to 180 days for investigation
purposes.

3.3.4 Legal challenges

a) Domestic – some examples

i) On the right to silence

In October 2011, in connection with the government’s application to challenge the
unusual decision not to authorize the detention of the defendant, the Madras High Court
ruled that an accused does not have an absolute right to silence. Judge Nagamuthu said:

During the course of investigation, an accused cannot be compelled to make any
statement that is likely to incriminate him. However, for an accused, the freedom
to keep silence, emanating from Article 19(1)(a) of the Constitution of India, is
subject to reasonable restrictions provided in Section 161(2) of the Code of
Criminal Procedure. Thus, if an accused is sought to be interrogated by the police,

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294 Id., at 174.
295 Unlawful Activities (Prevention) Act No. 37 (1967).
296 Unlawful Activities (Prevention) Act No. 29 (2004).
297 Unlawful Activities (Prevention) Amendment Act No. 35 (2008).
298 Id., at §43(A).
299 Id., at §43(D).
300 For a discussion of relevant cases, see UJJWAL KUMAR SINGH, THE STATE, DEMOCRACY AND ANTI-
TERROR LAWS IN INDIA, supra note 286 at 102-142.
he is bound to truly answer all questions relating to the case and cannot claim absolute right to silence. The only exception is that he need not answer any question, the answer to which is likely to incriminate him.\textsuperscript{301}

ii) On NSA

In \textit{A.K. Roy v. India},\textsuperscript{302} the constitutionality of the NSA was challenged. The Supreme Court held that preventive detention was not unconstitutional\textsuperscript{303} but the power to detain preventively should be construed narrowly.\textsuperscript{304}

iii) On TADA

In \textit{Katar Singh v. State of Punjab},\textsuperscript{305} the Supreme Court ruled that TADA was constitutional as regards the detention provision. It emphasized the necessity to strike a balance between liberty and security,\textsuperscript{306} but acknowledged ways in which the law might be misused.\textsuperscript{307}


\textsuperscript{303} \textit{Id.}, at 301 “Laws providing for preventive detention are expressly dealt with by that article [22] and their scope appropriately defined…. So long as a law of preventive detention operates within the general scope of the affirmative words used in the respective entries of the union and concurrent lists which give that power and so long as it does not violate any condition or restriction placed upon that power by the Constitution, the Court cannot invalidate that law on the specious ground that it is calculated to interfere with the liberties of the people.”

\textsuperscript{304} \textit{Id.}, at 324 “While construing laws of preventive detention like the National Security Act, care must be taken to restrict their application to as few situations as possible. Indeed, that can well be the unstated premise for upholding the constitutionality of clauses like those in section 3, which are fraught with grave consequences to personal liberty, if construed liberally.”

\textsuperscript{305} Kartar Singh v. State of Punjab, (1994) SCC (3) 569.

\textsuperscript{306} A.K. Roy v. Union of India, \textit{supra} note 302 at ¶ 351 “No doubt, liberty of a citizen must be zealously safeguarded by the courts; nonetheless the courts while dispensing justice in cases like the one under the TADA Act, should keep in mind not only the liberty of the accused but also the interest of the victim and their near and dear and above all the collective interest of the community and the safety of the nation so that the public may not lose faith in the system of judicial administration and indulge in private retribution.”

\textsuperscript{307} \textit{Id.}, at ¶ 352 “It is true that on many occasions, we have come across cases wherein the prosecution unjustifiably invokes the provisions of the TADA Act with an oblique motive of depriving the accused persons from getting bail and in some occasions when the courts are inclined to grant bail in cases registered under ordinary criminal law, the investigating officers in order to circumvent the authority of the courts invoke the provisions of the TADA Act. This kind of invocation of the provisions of TADA in cases, the facts of which do not warrant, is nothing but sheer misuse and abuse of the Act by the police.”
iv) On POTA

In *People’s Union for Civil Liberties v. Union of India*, the Supreme Court ruled that POTA was constitutional as regards the detention provisions.

b) International

Mention has been made above of the incompatibility of many of the preventive detention provisions under each of the laws, with the ICCPR. When India acceded to the ICCPR in 1979, it issued a declaration concerning the application of Article 9 ICCPR to the Constitution of India. In its view, Article 9 ICCPR had to be applied within the parameters of Article 22 of the Constitution of India. Thus non-citizens of India and those arrested pursuant to Indian preventive detention laws are not entitled to the protections of Article 22 of the Constitution of India or Article 9 ICCPR.

India’s most recent periodic report pursuant to Article 40 ICCPR was filed in 1996. The report relating to Article 9 discussed TADA, which had expired by the time the report was filed. The Indian government argued that the Supreme Court had ruled that the detention provisions in TADA were constitutional, and declared that the

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309 *Id.* at 479 “The offences under POTA are more complex than that of ordinary offences. Usually the overt and covert acts of terrorism are executed in a chillingly efficient manner as a result of high conspiracy, which is invariably linked with anti-national elements both inside and outside the country. So an expanded period of detention is required to complete the investigation. Such a comparatively long period for solving the case is quite justifiable. Therefore, the investigating agencies may need the custody of accused for a longer period.”
310 ICCPR, *supra* note 120.
311 [Declaration on India re Article 9]: “India takes the position that the provisions of the article shall be so applied so as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India. There is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State.”
313 *Id.*, ¶¶74-82.
period of pre-trial detention had been reduced from one year to 180 days.\textsuperscript{315} In August 1997, the HRC published its concluding observations, and invited India to review and withdraw certain of its reservations and declarations, including that relating to Article 9.\textsuperscript{316} It also expressed concern at the continuing widespread use of preventive detention and pointed out that India’s declaration in respect of the ICCPR did not exclude the requirement to inform an arrested person promptly of the reason for their arrest.\textsuperscript{317}

Human Rights Watch has published a number of reports relating to India. Their 2008 report \textit{inter alia} criticized the vague and overbroad definitions of terrorism,\textsuperscript{318} the unlawful restrictions on freedom of association,\textsuperscript{319} and condemned the provisions in UAPA\textsuperscript{320} relating to arbitrary detention.\textsuperscript{321} They echoed the words of the HRC in 1997 that pre-trial detention for up to 180 days was a violation of Article 9 ICCPR.

Human Rights Watch’s 2011 special report on arbitrary detention and torture in India describes the numerous continuing violations of due process rights relating to detention, including failure to bring suspects before a court within twenty four hours of arrest, delayed access to counsel, and excessive periods of detention.\textsuperscript{322} The U.S.


\textsuperscript{317} Id., at ¶¶24,25.

\textsuperscript{318} HUMAN RIGHTS WATCH, BACK TO THE FUTURE, INDIA’S 2008 COUNTERTERRORISM LAWS, 5-7. (Jul. 2008).

\textsuperscript{319} Id., at 8-10.

\textsuperscript{320} Unlawful Activities (Prevention) Amendment Act, \textit{supra} note 297.

\textsuperscript{321} HUMAN RIGHTS WATCH, BACK TO THE FUTURE, INDIA’S 2008 COUNTERTERRORISM LAWS, \textit{supra} note 318 at 13-15.

\textsuperscript{322} HUMAN RIGHTS WATCH, THE “ANTI-NATIONALS,” ARBITRARY DETENTION AND TORTURE OF TERRORISM SUSPECTS IN INDIA, \textit{supra} note 270 at 44-60.
Department of State country report for India in 2011 also describes a number of human rights abuses, including those relating to detention.323

3.3.5 Summary

The main problem with Indian detention laws is their incompatibility with Article 9 of the ICCPR, as described above. India’s Constitution permits preventive detention and purports to afford safeguards, which are apparently meaningless as they do not apply to persons “arrested under any law providing for preventive detention.”324

Despite India’s many protestations that its preventive detention provisions are constitutional, the periods of detention are excessive, with many violations of due process rights. Little prospect of any improvement in the near future is expected.

324 India Const., supra note 261 at arts. 22(1), 22(2).
CHAPTER 4 – ISRAEL

4.1 The current terrorist threat and counter-terrorism strategy

Israel has had to deal with terrorism continuously since it became a state in 1948. Unlike most of the other countries surveyed in this dissertation, where the main terrorist threat emanates from Al-Qaeda and affiliates, the principal threat to Israel derives from Palestinian armed groups operating from Palestinian territories, as well as from Hezbollah, which has a strong base in southern Lebanon.¹

Israel’s approach to national security has to be viewed through the lens of Jewish history and culture, three strands of which coalesce into “one comprehensive prism.”² Israel’s approach can perhaps best be summarized as “an incessant struggle for both physical and cultural survival.”³ Indeed, “in no time in the history of the State, has the country’s leadership ever felt able to conduct a national security assessment in an atmosphere that even remotely resembles tranquility.”⁴ Israel is unique in this respect, due to the “longevity of the mutual hostility and enmity that has characterized Israel’s relationships with her immediate geographical neighbors and in the protracted nature of the various conflicts which those sentiments have spawned.”⁵

Israel has had to deal with relentless terrorism from Palestinian militants and other groups such as Hezbollah. Israelis – and Palestinians – are involved in a “direct,

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¹ Gabriella Blum, Judicial review of counterterrorism operations, 47 JUSTICE 17, 18 (2010).
² AMICHI A. COHEN & STUART A. COHEN, ISRAEL’S NATIONAL SECURITY LAW, 30 (Routledge, 2012). The three strands are: i) the legacy of Jewish political traditions developed against a backdrop of extreme and chronic vulnerability during the period of Exile from Israel between the destruction by the Romans of the second Jewish commonwealth in the first century CE to the establishment of the State of Israel in 1948, e.g. including the experiences of pogroms and the Holocaust; ii) the experiences of the Jewish community living in Palestine during the British mandate; and iii) the intense focus on national security defined in military terms that has been necessary since the establishment of the State of Israel in 1948.
³ Id.
⁴ Id. at 44.
⁵ Id.
immediate and continuous manner… Whether in the manner of suicide bombings or rockets launched at civilian populations, no part of Israel has been immune from attack.”\(^{6}\)

To understand Israel’s response to terrorism and its use of detention one has to keep in mind what Israel experiences on a continual daily basis.

The scale of the relentless terrorist threat is simply astounding, with no end in sight. Between September 29, 2000 and the end of 2009, Israel’s Security Agency (Shabak) reports 28,874 terror attacks killing 1,178 and wounding 8,022.\(^{7}\) In 2010, there were 798 terror attacks resulting in 9 fatalities and 28 casualties.\(^{8}\) In 2011 there were 976 terror attacks, killing 22 and wounding 125.\(^{9}\) In 2012, the numbers escalated to 1,988 attacks, killing 10 and injuring 309.\(^{10}\) The huge increase in attacks is largely due to the activity during the Pillar of Defense operation between November 14 and 21, 2012. In 2013, Shabak reported 1271 attacks in Judea and Samaria, and 55 in the Gaza Strip, killing 44 and injuring 269.\(^{11}\)

Because Israel was “[b]orn into battle,” and has been “almost continuously engaged in some form of confrontation with one or more of its neighbors” … “issues relating to national security intrude on almost every aspect of Israeli life.”\(^{12}\) Yet no written national security or counter-terrorism strategy exists as such.\(^{13}\)

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7 Israel Security Agency, Terror Data and Trends, Analysis of Attacks in the Last Decade, http://www.shabak.gov.il/English/EnTerrorData/decade/Fatalities/Pages/Assaultattacks.aspx. In that period approximately 32% of the attacks were in the form of rocket or mortar attacks from the Gaza Strip.
8 Israel Security Agency, Terror Data and Trends, http://www.shabak.gov.il/English/EnTerrorData/Reports/Pages/default.aspx., (last visited Mar. 4, 2014). Approximately 45% of the attacks were in the form of rocket or mortar attacks from the Gaza Strip.
9 Id.
10 Id.
11 Id.
13 Id.
4.2 Israel’s counter-terrorism laws – an overview

Israeli law treats terrorist activities as crimes, and terrorists are prosecuted whenever reliable evidence is found.\textsuperscript{14} Indeed, the Israel Security Agency’s 2013 Annual Summary reports that in 2013 about 2,500 terror suspects were arrested and that after interrogations, 1,782 indictments were served.\textsuperscript{15} Yet security offenses comprise less than one per cent of convictions in Israeli courts.\textsuperscript{16}

However, Israel operates a mixture of models. Israel has been at war with some or all of its neighbors since the inception of the State in 1948. As well as treating terrorist acts as crimes, Israel has sought to explain some of its measures by recourse to the international law permitted in times of armed conflict.\textsuperscript{17} In one case the Supreme Court said that Israel has considered itself to have been in a continuous armed conflict with terrorist organizations active in Judea, Samaria and the Gaza Strip “since the first intifada”\textsuperscript{18} (which began in 1987),\textsuperscript{19} and in a situation of severe armed combat in the form of “constant, continual, and murderous wave of terrorist attacks” since September 2000 in the territories of Judea, Samaria and the Gaza Strip, as well as in Israel proper.\textsuperscript{20}

\textsuperscript{16} KENT ROACH, \textit{THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM}, supra note 14 at 111.
\textsuperscript{17} Interview with Advocate Dvorah Chen, supra note 14.
\textsuperscript{18} Public Committee Against Torture in Israel v. Government of Israel, HCJ 769/02, ¶16 (Dec. 11, 2005).
\textsuperscript{19} Mitchell Bard, \textit{The First Intifada: History and Overview}, JEWISH VIRTUAL LIBRARY, http://www.jewishvirtuallibrary.org/jsource/History/intifada.html
\textsuperscript{20} Public Committee Against Torture in Israel v. Government of Israel, HCJ 769/02, supra note 18 at ¶16.
According to the Israeli approach in many cases, including in the “Targeted Killings case”, then President of the Israeli Supreme Court, Aharon Barak explained that the applicable normative system was the law relating to international armed conflicts.\textsuperscript{21}

He noted that “[a]longside the international law dealing with armed conflicts, fundamental principles of Israeli public law…may apply.”\textsuperscript{22} The parts of international law that are of customary character are part of Israeli law, but the non-customary parts of international law are not enacted in Israeli domestic law.\textsuperscript{23}

Although Israel is party to the four Geneva Conventions,\textsuperscript{24} GC IV has not been enacted through domestic Israeli legislation. However, its customary provisions are part of Israeli law.\textsuperscript{25} Israel’s position is that the laws of belligerent occupation in GC IV do not apply to activities in Judea, Samaria and the Gaza Strip, but Israel does honor the humanitarian provisions of GC IV.\textsuperscript{26} Because the terrorists do not distinguish between military and civilian targets, and do not fulfill the criteria to be classified as combatants,\textsuperscript{27}

\textsuperscript{21} \textit{Id.} at ¶18, \textit{citing} ANTONIO CASSESE, INTERNATIONAL LAW, 420 (2\textsuperscript{nd} ed. 2005): “An armed conflict which takes place between an Occupying Power and rebel or insurgent groups – whether or not they are terrorist in character – in an occupied territory, amounts to an international armed conflict.”
\textsuperscript{22} Public Committee Against Torture in Israel v. Government of Israel, HCJ 769/02, \textit{supra} note 18 at ¶18.
\textsuperscript{23} \textit{Id.}, at ¶19.
\textsuperscript{25} Public Committee Against Torture in Israel v. Government of Israel, HCJ 769/02, \textit{supra} note 18 at ¶20.
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} GC III Art. 4A. (The conditions to be fulfilled are: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war).
which would afford them the protections of GC III, they are regarded as civilians who are unlawful combatants.

Thus the law of armed conflict is “based upon a delicate balance” of the rights of the individual, weighed against the military need to maintain and protect the security of the country and its citizens. Thus “human rights are protected by the law of armed conflict, but not to their full scope.” The use of international law and the thread of this delicate balancing of rights can be seen throughout Israel’s approach to counter-terrorism, in which detention plays a large part.

4.3 Pre-trial detention in Israel

Two types of detention are used in Israel, the first in accordance with domestic criminal law, and the second in accordance with administrative law, which will be discussed in sections 4.4 and 4.5.

Under the criminal law, in cases where prosecution is envisaged, if there are reasonable grounds to suspect that an offense has been committed, together with one

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28 GC III gives combatants a number of rights, including the right to be treated formally as a prisoner of war if detained on the battlefield.
29 Public Committee Against Torture in Israel v. Government of Israel, HCJ 769/02, supra note 18 at ¶28. See Chapter 7 infra, for fuller discussion of the law of armed conflict.
30 Id., at ¶22.
32 Criminal Procedure Law (Powers of Enforcement – Arrest) 1996, §§12 - 28. The most detailed definition of an act of terrorism is found in the prohibition on Terrorist Financing Law 5765/2004: “(a) an act that constitutes an offence or a threat to commit an act that constitutes an offence that was committed or was planned to be committed in order to influence a matter of policy, ideology or religion if all of the following conditions are fulfilled:
(1) it was committed or was planned to be committed with the goal of causing fear or panic among the public or with the goal of coercing a government or another governing authority, including the government or governing authority of a foreign country to take action or to refrain from taking action; for the purposes of this paragraph – foreseeing, as a nearly certain possibility, that the act or the threat will cause fear or panic among the public is equivalent to having a goal to cause fear or panic among the public;
(2) the act that was committed or that was planned or the threat included:
   (a) actual injury to a person’s body or his freedom, or placing a person in danger of death or danger of grievous bodily injury;
   (b) the creation of actual danger to the health or security of the public;
ground out of a number of other criteria, suspects may be arrested with or without a judicial warrant, for interrogation and investigation. 33 Arrests with a warrant are preferred.34

In Israel, suspects who have not been charged must normally appear before a court after twenty-four hours in detention. In the case of security offenses, where suspension of an interrogation may impede an essential investigation that could save lives, the detention period can be extended for further interrogation for an initial period of up to forty-eight hours.35 A judge can extend this period for fifteen days twice, up to thirty days, and thereafter with the approval of the Attorney General in additional increments of fifteen days up to a maximum seventy-five days.36 A new request has to be made to the court justifying why detention should be extended on each occasion that the detention is sought.37

Prior to 2012, in the Occupied Territories an initial period of ninety six hours applied for security offenses, but an IDF officer could extend that period for up to eight days from the time of detention, if convinced that suspension of the interrogation would cause real harm to the interrogation, or that suspending the interrogation might damage an essential investigation intended to protect lives. Thereafter a judge could authorize

33 Id., at §§12 - 28. There is a longer list of additional criteria if arrests are made by police without a judicial warrant, and the additional criteria in both types of arrest include reasonable grounds to suspect that the suspect will endanger the safety of any person, public security or national defense.
34 Id., at §4.
36 Id. Also see Criminal Procedure Law (Detainee Suspected of Security Offense) (Emergency Order), 2006, §4, amending §17 Criminal Procedure Law (Powers of Enforcement – Arrest), 1996.
37 Interview with Advocate Dvorah Chen, supra note 14.
successive periods of thirty days, up to ninety days. Appeal judges could authorize a further period of three months.\textsuperscript{38}

Detention can also take place if bail is refused between indictment and trial. Cases are meant to conclude within nine months of the date of indictment but the Supreme Court has the power to prolong this period in tranches of three months for an unlimited number of times. Every time the prosecution seeks an extension of remand without bail, the defendants must come before the court.\textsuperscript{39}

In 2012 the periods of extended detention in the Occupied Territories were reduced to six days in the case of concerns that interruption of interrogation would harm the investigation, and to two days instead of thirty, for the first order by a judge. The judge can order successive periods of fifteen days, up to sixty days instead of ninety. Appeal judges can detain for additional thirty days, making a total of three months instead of six months.\textsuperscript{40}

The security service Shabak can prevent the detainee having access to a lawyer for ten days. This denial of access can be extended by a court up to a total of twenty-one days, at a hearing in which the detainee will be produced in court.\textsuperscript{41} The detainee will not have had access to a lawyer for that hearing but he can address the judge. In his absence, if his family has retained and given instructions to a lawyer, that lawyer can address the court before the ruling is made.\textsuperscript{42} Human rights groups have complained about the lack of access to lawyers whilst people are detained for pre-charge interrogation purposes. For

\textsuperscript{38} Id. Also see Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770-2009, Chap. C.
\textsuperscript{39} Interview with Advocate Dvorah Chen, supra note 14.
\textsuperscript{40} Ido Rosenzweig & Yuval Shany, IDF Publishes Amending Order Reducing Detention Periods in the West Bank [2.2.2012], supra note 35.
\textsuperscript{41} Criminal Procedure Law (Powers of Enforcement – Arrest), 1996, supra note 32 at §35D.
\textsuperscript{42} Interview with Advocate Dvorah Chen, supra note 14.
example, in the period between 2005-2007, the average period of incommunicado detention was 16.7 days.\(^43\) It is not known if the 2012 law referred to above addresses this concern.

A new counter-terrorism Bill, the Struggle Against Terrorism Law 2011, which is designed to draw together in one place a comprehensive and updated anti-terror law, was passed in June 2013.\(^44\) It is designed to apply in times other than an emergency,\(^45\) and deals with preventive arrests as well as introducing a form of control order along the lines of the U.K. model.\(^46\) Details of this law are not yet available in English other than in a very limited overview,\(^47\) so this cannot be analyzed in any meaningful way at this time

4.4 Administrative detention in Israel

In addition to the criminal law, and on a totally separate track, Israel operates a preventive detention regime called “administrative detention.”\(^48\) The goals of

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45 Daphne Barak-Erez, Israel’s Anti-Terrorist Law: Past, Present and Future, supra note 14 at 618.

46 Id.; KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM, supra note 14 at 112.


administrative detention are not arrest, trial, conviction and punishment. It is purely and simply a tool to prevent terrorist attacks, but was never intended to replace the enforcement of criminal law. Essentially, it involves detention without charges or trial. However, administrative detention may only be imposed if it is the only means available to detain the person, i.e. if prosecution is not an option. The rationale of this regime is prevention of “danger to state or public security posed by a particular person whose release would likely threaten the security of the state and the ordinary course of life.”

Two separate administrative detention policies are in place, one for Israel and the other for the Occupied Palestinian territories. In Israel, administrative detention has its roots in British colonial law. In 1945, during the Mandate, the British government enacted as primary emergency legislation the Defence (Emergency) Regulations to deal with resistance. That law permitted detention without trial by order of military commanders for renewable periods of six month, and provided a limited power to appeal to an advisory committee.

These regulations were incorporated into Israeli law after independence, virtually unchanged, until Israel enacted the Emergency Powers (Detention) Law of 1979 (EPDL). The 1979 law only applies during a state of emergency. It currently applies


Id., at §1.
as Israel has been in a continuous state of emergency since the State was created.\textsuperscript{54} The new counter-terrorism legislation, which has attracted criticism from human rights groups, will have implications for this detention law, because this law (when it comes into force) will apply at all times, and not just in times of emergency.\textsuperscript{55}

\begin{quote}
“A particular person,”\textsuperscript{56} presumably both citizens and non-citizens, can be detained if the defense minister has reasonable cause to believe that reasons of state security or public security require it (although these terms are not defined). Detainees have access to counsel. Within forty-eight hours of arrest detainees are brought before a district court for judicial review.\textsuperscript{57} Hearings are held \textit{in camera},\textsuperscript{58} but the detainee has a right to be present.\textsuperscript{59} The judge will see all the evidence, without the detainee or his representative being present, and may decide to accept evidence without disclosing it to the detainee or his lawyer if he is “satisfied that disclosure of the evidence to either of them may impair state security or public security.”\textsuperscript{60} The language of this statute does not require the court to balance the individual’s interests against those of the state at this stage. The approach of the Israeli Supreme Court with regard to the use of this secret evidence is discussed below.

Release will be ordered if the court does not find objective reasons of state security or public security to justify detention, or if the detention was made in bad faith or

\textsuperscript{54} EMANUEL GROSS, THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM, \textit{supra} note 48 at 124.
\textsuperscript{56} Emergency Powers (Detention) Law, 5739-1979, \textit{supra} note 52 at §2(a).
\textsuperscript{57} \textit{Id.}, at §4.
\textsuperscript{58} \textit{Id.}, at §9.
\textsuperscript{59} \textit{Id.}, at §8.
\textsuperscript{60} \textit{Id.}, at §6(c).
for irrelevant reasons.\textsuperscript{61} Appeal may be made to the Supreme Court.\textsuperscript{62} Judges have confirmed detention because of the likelihood of the suspect posing a danger to the community.\textsuperscript{63} Detention orders made by the President of the District Court are limited to six months and subject to review every three months also by the President of the District Court, but they can be renewed unlimited times.\textsuperscript{64} Every time an extension is ordered, a new request has to be made by the Minister of Defense, with an explanation of why it is necessary to prolong the detention.\textsuperscript{65}

In 2000 more than twenty Lebanese citizens challenged their continuing detention. Some of them had been held in administrative detention since 1991, after serving sentences of imprisonment following convictions for membership of hostile organization and involvement in attacks against Israeli forces. They were being held as “bargaining chips” in negotiations under way to release prisoners and missing persons held by Israel’s security forces.\textsuperscript{66} Up to the point of this appeal, a number of hearings had taken place over the years, and the majority of the lower court, including Judge Barak (as he then was), had been satisfied that the return of prisoners was a purpose and interest that was included within the framework of national security, even where there was no danger from the detainees themselves.\textsuperscript{67} Thus up to this point the courts had held that prisoners could be held as bargaining chips.

\textsuperscript{61} Emergency Powers (Detention) Law, 5739-1979, \textit{supra} note 52 at §4(c).
\textsuperscript{62} \textit{Id.}, at §7.
\textsuperscript{63} Emanuel Gross, \textit{Human Rights, Terrorism and the problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?} \textit{18 ARIZ J. INT'L & COMP. L.} 721, 763 (2001), \textit{e.g. citing A.D.A. 1-2/88 Aqbariya v. State of Israel, 42(1) P.D. 840, 844-45 (Heb.), “whether there is sufficient evidence to point to the fact that if the detainee were released, he would almost certainly pose a danger to public or State security.”}
\textsuperscript{64} Emergency Powers (Detention) Law, 5739-1979, \textit{supra} note 52 at §§1, 5.
\textsuperscript{65} Interview with Advocate Dvorah Chen, \textit{supra} note 14.
\textsuperscript{67} \textit{Id.}, at ¶3.
Here on appeal, President Barak changed his mind and noted that “[a] balance is required – a delicate and difficult balance – between the liberty and the dignity of the individual and national security and public safety.” In this case, a majority of the court (6:3) ruled that it was not lawful to administratively detain a person “from whom no danger is posed to national security and who merely constitutes a “bargaining chip.” This type of detention does “a severe harm to human dignity, as the detainee is perceived as a means to achieving a goal and not as a goal in and of itself.” It is also prohibited by international law. President Barak confirmed that the purpose of the EPDL “was to apply to the detention of a person from whom himself a danger is posed to security, and not beyond this.”

President Barak also noted that administrative detention “cannot go on endlessly. The more the period of detention that has passed lengthens, so too are weightier considerations needed to justify an additional extension of the detention. With the passage of time the means of administrative detention is no longer proportional.”

In 2002, the international atmosphere that prevailed after the events of 9/11 set the scene for Israel to enact another extreme law: the Incarceration of Unlawful Combatants Law. This law applies to “unlawful combatants” who are defined as persons who have “participated either directly or indirectly in hostile acts against the State of Israel” or are members of a “force perpetrating hostile acts against the State of Israel” where “the conditions prescribed in Article 4 of the Third Geneva Convention of 12th August 1949

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68 Id., at ¶18.
69 Id., at ¶19.
70 Id., at ¶20.
71 Id., at ¶21.
72 Id., at ¶25.
73 Interview with Advocate Dvorah Chen, supra note 14.
with respect to prisoners-of-war and granting prisoner-of-war status in international humanitarian law, do not apply to him.”

Detention may be ordered where the Chief of General Staff has “reasonable cause to believe that a person being held by the State authorities is an unlawful combatant and that his release will harm State security.” The status of unlawful combatant “rejects the dichotomy in the Geneva Conventions that divide persons into civilians or lawful combatants.”

A presumption exists that a person who is a member of a force perpetrating hostile acts against the State of Israel or who has participated in hostile acts of such a force, either directly or indirectly, shall be deemed to be a person whose release would harm State security as long as the hostile acts of such force against the State of Israel have not yet ceased, unless proved otherwise.

The first part of this presumption introduces the notion of association as a criterion for detention, rather than actual deeds, rather like in the U.S. detention authority under the law of armed conflict model, discussed infra.

Access to counsel is permitted within seven days of detention and judicial review takes place within fourteen days of arrest, with a right of appeal to the Supreme Court within thirty days. Detention may continue (with reviews every six months) until a minister of defense determines that the group with which the detainee is associated has ceased hostilities against Israel or a court has decided that the detainee’s release would

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75 Id., at §2. Also see Chapter 4 for an explanation of unlawful combatants under the law of armed conflict.
76 Id., at §3(a).
79 Id., at §6.
80 Id., at §5(a).
81 Id., at §5(d).
not threaten state security.\textsuperscript{82} As in the EDPL, the court may make an order based on secret evidence.\textsuperscript{83}

\textit{A v. State of Israel}\textsuperscript{84} concerned the legality of the detention under the Unlawful Combatants Law of two appellants from Gaza who allegedly belonged to Hezbollah. They petitioned the Supreme Court (sitting as the Court of Criminal Appeals). Two questions were before the Court: i) to what extent the Internment of Unlawful Combatants Law complied with international humanitarian law; and ii) whether the law passed constitutional muster against Israel’s Basic Law: Human Dignity and Liberty. The Court emphasized that the purpose of the legislation was to “remove from the cycle of hostilities someone who belongs to a terrorist organization or who takes part in hostilities against the State of Israel….The law does not apply to innocent civilians.”\textsuperscript{85}

Consideration of the first question was dependent on the premise that Israel is engaged in an international armed conflict with the terrorist organizations operating outside Israel.\textsuperscript{86} Although there is nothing in the text of the statute that states that the Incarceration of Unlawful Combatants Law applies to non-citizens of Israel, the Court interpreted the law to permit “the internment of foreign persons who belong to a terrorist organization or who participate in hostilities against the security of the state, and it was intended to prevent these persons returning to the cycle of hostilities against Israel.”\textsuperscript{87} In

\textsuperscript{82} Id. at §5(c).
\textsuperscript{84} A. v. State of Israel, CrimA 6659/06 (Jun. 11, 2008).
\textsuperscript{85} Id., at ¶6.
\textsuperscript{86} Id., at ¶9, \textit{citing} Public Committee Against Torture in Israel v. Government of Israel, \textit{supra} note 18 at ¶¶18, 21.
\textsuperscript{87} Id., at ¶¶6, 11: “the express reference by the legislature to international humanitarian law, together with the requirement stipulated in the wording of the law that there is no prisoner of war status, show that the law was intended to apply only to foreign parties who belong to a terror organization that operates against the security of the state.”
practice, the law has only been used for foreigners residing in the Gaza Strip, and not against Palestinians residing in Judea and Samaria.\textsuperscript{88}

This Court and (earlier decisions\textsuperscript{89}) treated unlawful combatants as a sub-category of civilians, “using the approach of customary international law, according to which the category of ‘civilians’ includes everyone that is not a ‘combatant.’”\textsuperscript{90} However in internment cases, all that need be shown is that “the conditions of the definition of ‘unlawful combatant’ in Section 2 are proved.”\textsuperscript{91} According to the Court, the relevance of this is that an unlawful combatant is subject to GC IV and can be detained when they represent a threat to the security of the state.\textsuperscript{92} An unlawful combatant would not, however, be entitled to the same degree of protection to which innocent civilians are entitled under GC IV.\textsuperscript{93}

Nonetheless the Court satisfied itself that the legislation did not create a new reference group from the viewpoint of international law, but “merely determines special provisions for the detention of ‘civilians’ (according to the meaning of this term in international humanitarian law) who are ‘unlawful combatants.’”\textsuperscript{94} The then President of the Supreme Court, Dorit Beinisch dismissed suggestions that detention under this legislation was neither criminal arrest, nor administrative detention, but a third category of detention, unrecognized by both Israeli and international law.\textsuperscript{95}

In its interpretation of the law in question the Court commented that the definition of unlawful combatant which covers both a person taking part in hostilities as well as

\textsuperscript{88} Interview with Advocate Dvorah Chen, \textit{supra} note 14.
\textsuperscript{89} See \textit{e.g.} Public Committee Against Torture in Israel v. Government of Israel, \textit{supra} note 18.
\textsuperscript{90} A. v. State of Israel, \textit{supra} note 84 at ¶12.
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Id.}, at ¶13.
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{Id.}, at ¶14.
\textsuperscript{95} \textit{Id.}, at ¶15.
someone who is a member of a hostile force, should be interpreted with reference to the security purpose of the law, and require proof of an individual’s threat as a ground for administrative detention.\textsuperscript{96} In respect of the membership criterion,

it is not necessary for that person to take a direct or indirect part in the hostilities themselves, and it is possible that his connection and contribution to the organization will be expressed in other ways that are sufficient to include him in the cycle of hostilities in its broad sense, in such a way that his detention will be justified under the law.\textsuperscript{97}

This is a very broad and nebulous standard, but the same connection linking membership of a group to terrorist status or detention authority can be seen in the laws of other countries.\textsuperscript{98}

The Court stated that the Incarceration of Unlawful Combatants Law should be interpreted in accordance with the holding in previous cases that “since administrative detention is an unusual and extreme measure, and in view of its violation of the constitutional right to personal liberty, clear and convincing evidence is required in order to prove a security threat that establishes a basis for administrative detention.”\textsuperscript{99} Clear and convincing evidence is required in order to prove that the detainee is an unlawful combatant, (including being a person who merely “belonged to a terror organization and made a contribution to the cycle of hostilities in its broad sense”) and also in the judicial review of the decision to continue detention.\textsuperscript{100} “[A]dequate administrative evidence is

\begin{footnotes}
\item[96] \textit{Id.} at ¶¶19, 20, 21.
\item[97] \textit{Id.}
\item[99] A. v. State of Israel, \textit{supra} note 84 at ¶22, citing \textit{e.g.} Ajuri v. IDF Commander in West Bank, [2002] IsrSC 56(6) 352 at 372.
\item[100] A. v. State of Israel, \textit{supra} note 84 at ¶22.
\end{footnotes}
required, and a single piece of evidence with regard to an isolated act carried out in the distant past is insufficient.”

The Court subjected the statute to a very thorough constitutional scrutiny. In the Court’s opinion, *prima facie*, the law violated Section 5 of the Basic Law, but that right to liberty “is not absolute, but a violation of the right is sometimes required to protect essential public interests” and the balancing formula is to be found in Section 8 of the Basic Law. The Court held that the legislative purpose of this law, of removing terrorists from their cycle of hostilities against Israel, was a proper one.

With echoes of the approach of the European Court of Human Rights to apply a “margin of appreciation,” the Israeli Court applied a relatively broad “margin of constitutional appreciation” or a “margin of proportionality” to the three sub-tests of fundamental criteria it usually applied to assess proportionality. The Court decided that the law satisfied the rational connection test.

101 Id.

102 Id., at ¶27, citing Basic Law (5752-1992), §5 Human Dignity & Liberty: “A person’s liberty shall not be denied or restricted by imprisonment, arrest, extradition or in any other way.”

103 Id., at ¶28, citing Basic Law (5752-1992), §8 Human Dignity & Liberty: “The rights under this Basic Law may only be violated by a law that befits the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive, or in accordance with a law as aforesaid by virtue of an express authorization therein.”

104 Id., at ¶30. “Protecting the security of the state is an urgent and even essential public need in the harsh reality of unceasing murderous terrorism that attacks innocent people indiscriminately. It is difficult to exaggerate the security importance of preventing members of terrorist organizations from returning to the cycle of hostilities against the State of Israel in a period when there is relentless terrorist activity that threatens the lives of the citizens and residents of the State of Israel.”

105 See Chapter 9, infra.

106 A. v. State of Israel, supra note 84 at ¶31. The three subtests of fundamental criteria are i) “the rational connection test that requires the legislative measure that violates the constitutional right to correspond to the purpose that the law is intended to realize;” ii) “the least harmful measure test, which requires the legislation to violate the constitutional right to the smallest degree possible while achieving the purpose of the law;” and iii) “the test of proportionality in the narrow sense, according to which the violation of the constitutional right must be commensurate with the social benefit arising from it....The limits of the margin of constitutional appreciation are determined by the court in each case on its merits and according to its circumstances, with a view to the nature of the right that is being violated and the extent of the violation thereof, as compared with the nature and substance of the competing rights or interests.”

107 Id. at ¶32.
The Court then conducted a very lengthy examination of proportionality. It rejected the suggestions that detainees should be given a criminal trial or held pursuant to the Emergency Powers (Detention) Law, as alternative measures to administrative detention under this law.\(^\text{108}\) It then considered whether the specific arrangements relating to hearings were proportionate. It found the arrangements relating to providing the detainee with a hearing no later than fourteen days from the issue of the order were within the margin of proportionality,\(^\text{109}\) and that six monthly reviews were consistent with the provisions of GC IV in international humanitarian law and thus proportionate.\(^\text{110}\)

Next the use of secret evidence was discussed. The Court noted that “[r]eliance on inadmissible administrative evidence and on privileged material for reasons of state security lies at the heart of administrative detention.”\(^\text{111}\) Thus “the judge is required to question the validity and credibility of the administrative evidence that is brought before him and to assess its weight.”\(^\text{112}\) Reliance on secret evidence was deemed to be “part and parcel of administrative detention” and proportionate.\(^\text{113}\) On the question of access to lawyers, the Court noted that the “right to legal counsel is also not absolute and it may be restricted if this is essential for protecting the security of the state.”\(^\text{114}\) A delay of seven days would not prevent the detainee seeing his lawyer within the fourteen day deadline to appear before a court, and thus was proportionate.\(^\text{115}\)

\(^{108}\) *Id.*, at ¶¶33, 35.  
\(^{109}\) *Id.*, at ¶39.  
\(^{110}\) *Id.*, at ¶42.  
\(^{111}\) *Id.*, at ¶43.  
\(^{112}\) *Id. and citing* Justice A. Procaccia in Khadri v. IDF Commander in Judea and Samaria HCJ 11006/04 (unreported decision of Dec. 13, 2004) at ¶6:” the court has a special duty to act with great care when examining privileged material and to act as the ‘mouth’ of the detainee where he has not seen the material and cannot defend himself.”  
\(^{113}\) *Id.*  
\(^{114}\) *Id.*, at ¶44, citing Sufian v. IDF Commander in Gaza Strip, HCJ 3412/93, [1993] IsrSC 47(2) 843 at 849.  
\(^{115}\) *Id.*, at ¶44.
The Court went on to consider the issue of duration of detention. The only mention of duration in the statute is derived from the sections headed “Presumption”\textsuperscript{116} and “Determination regarding hostile acts.”\textsuperscript{117} No maximum period of detention is specified, other than tying it to the end of hostilities against Israel by the force to which the detainee belongs. The Court found this to be proportionate, relying once more on the applicability of international humanitarian law, in particular to GC III, which allows prisoners of war to be interned until hostilities have ended.\textsuperscript{118}

This is the same approach taken by the U.S. Administration towards persons who are “part of” or “substantially supporting Al Qaeda, the Taliban and associated groups.”\textsuperscript{119} The Court did emphasize that “the question of proportionality of the duration of detention under the law should be examined in each case on its merits and according to its specific circumstances,”\textsuperscript{120} and that a detention order under this law “cannot continue indefinitely.”\textsuperscript{121} It noted that the purpose of periodic judicial review every six months was to examine whether the threat presented by the detainee to the security of the state justified continued detention, and in making that assessment the court should take into account the length of time that has passed since the order was made.\textsuperscript{122}

Finally the Court considered whether the combination of measures in this law satisfied the test of proportionality in the narrow sense – whether the violation of the right

\textsuperscript{116} Incarceration of Unlawful Combatants Law, 5762-2002, supra note 74 at §7.
\textsuperscript{117} Id., §8.
\textsuperscript{120} A. v. State of Israel, supra note 84 at ¶46.
\textsuperscript{121} Id.
\textsuperscript{122} Id., citing A v. Minister of Defence, CrimFH 7048/97, [2000] IsrSC 44(1) 721, 744.
to personal liberty was reasonably commensurate with the public benefit that arises from this law, and concluded that the test was satisfied.\footnote{\textit{Id.}, at ¶49.}

### 4.5 Administrative detention in the Occupied Territories

In the Occupied Territories administrative detention is enforced pursuant to military order.\footnote{B'TSELEM, \textit{THE BASIS FOR ADMINISTRATIVE DETENTION IN ISRAELI LAW}, (Jan. 1, 2011), \url{http://www.btselem.org/administrative_detention/israeli_law}.} If a military commander has “reasonable grounds to believe that a certain person must be held in detention for reasons to do with regional security or public security”\footnote{Order Regarding Security Provisions [consolidated version] (Judea and Samaria) (No. 1651) 5770-2009, Article B, Temporary Order §285(a).} he may order that person to be detained for a period of up to six months. The period of detention can be renewed unlimited times, provided the military commander has reasonable grounds to presume that regional or public security require the continued detention.\footnote{\textit{Id.}, at §285(b).}

The main difference from detention in Israel is that detainees have to be brought before a court for judicial review within eight days of arrest\footnote{\textit{Id.}, at §287.} instead of forty eight hours, after forty eight hours detainees can receive visits from the Red Cross and their families can be informed as to their whereabouts. Appeals may be made to a judge of the military court of appeals.\footnote{\textit{Id.}, at §288.} As with the other previously discussed administrative detention laws, a judge may rely on evidence that is not disclosed to the detainee or his legal representative,\footnote{\textit{Id.}, at §290.} and the hearing is \textit{in camera}.\footnote{\textit{Id.}, at §291.}
In addition to administrative detention per se, a control order type of regime is also in place, called “restraining orders and supervision,” which may only be used if the military commander deems it “necessary for imperative reasons of security.” Restraining orders cover restrictions on movement, contacts, employment and possession of objects. The order can be challenged in a hearing before an appeal committee of one member, and the adjudicator is permitted to rely on evidence not disclosed to the appellant or his representative. Assigned residence and special supervision orders may also be issued, and appeals are conducted in accordance with the same rules as restraining orders. Hearings in respect of these orders are not open to the public.

Marab v. IDF Commander in the West Bank challenged the legality of detention under Defense in Time of Warfare (Temporary Order) (Judea and Samaria) (Number 1500) – 2002, and Defense in Time of Warfare (Temporary Order) (Amendment) (Judea and Samaria) (Number 1502) – 2002. These Orders were promulgated because the then current order, Defense Regulations Order (Judea and Samaria) (Number 378) – 1970, appeared inadequate to detain large numbers of persons in connection with Operation Defensive Wall, which was aimed at destroying the infrastructure of terrorist groups that had carried out many attacks since September 2002.

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131 Id., at Art. C.
132 Id., at §295.
133 Id., at §296(A).
134 Id., at §296(C).
135 Id., at §§297(A), 297(B).
136 Id., at §§297(E), 297(H), 297(I).
137 Id., at §298.
138 Marab v. IDF Commander in the West Bank, HCJ 3239/02 (Feb. 3, 2003)
139 Id., at ¶¶1-4. Order 1500 permitted initial detention for 18 days without a judicial order, and without judicial review during that period, and without access to a lawyer for a further 15 days, although
The petitioners in *Marab* questioned whether the law permitted detention for the purposes of investigation, and challenged the right to delay judicial review for twelve or eighteen days, and access to lawyers for thirty two days. Despite the fact that Israel has maintained that Article 9 ICCPR does not apply because it is in a state of emergency, President Barak began his consideration of the legal issues with a discussion of Article 9. He noted the prohibition against arbitrary detention and stated that it accorded with Israeli law: “[a] person may be detained for investigatory purposes – in order to prevent the disruption of an investigation or to prevent a danger to the public presented by the detainee – where the proper balance between the liberty of the individual and public interest justifies the denial of that right.” 140 The balance required in order to detain for investigatory purposes both in “regular” criminal detention and administrative detention “demands that the detaining authority possesses an evidentiary basis sufficient to establish suspicion against the individual detainee.” 141 President Barak stated that internal Israeli law corresponded to international law on this matter and that the fundamental principles of Israeli administrative law applied to the military commander in the West Bank. 142 Crucially he emphasized: “[t]he fundamental principles which are most important to the matter at hand are those regarding the duty of each public authority to act reasonably and proportionately, while properly balancing between individual liberty and public necessity.” 143

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140 *Marab v. IDF Commander in the West Bank*, *supra* note 138 at ¶20.
141 *Id.*
142 *Id.*
143 *Id.*
The Court went on to consider the question of detention during an occupation in times of war, pursuant to the Fourth Geneva Convention (GC IV). Although noting that GC IV did not contain any specific article authorizing detention for investigative purposes, the Court decided that this authority could be “derived from the law in the area and is included in the general authority of the commander of the area to preserve peace and security.” The Court concluded that the detention authority in the military orders applicable to the area applies when there is a “cause for detention.” The cause here was that “the circumstances of the detention raise the suspicion that the detainee endangers or may be a danger to security.” However the detention authority is limited to “where there exists an individual cause for detention against a specific detainee,” i.e. “the existence of circumstances which raise the suspicion that the individual detainee presents a danger to security.

In answer to the complaint about the lack of judicial review, the Court emphasized that “judicial intervention with regard to detention orders is essential to the principle of rule of law,” and “it is an inseparable part of the development of the detention itself.” The Court held that the detention periods of eighteen days and twelve days before judicial review were excessive, and the proper approach was that adopted by international law, which requires that a judge be approached promptly. The Court left the matter of fixing the length of a shorter period to the respondents.

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144 Id., at ¶21.
145 Id., at ¶23.
146 Id.
147 Id., at ¶26.
148 Id., at ¶32.
149 Id., at ¶34.
150 Id., at ¶35.
On the issue of delaying access to lawyers, the Court commented that the right to meet with a lawyer was not an absolute right, but “rather a relative right, and it should be balanced against other rights and interests.”151 Meetings between lawyers and detainees could be delayed “if significant security considerations justify the prevention of the meeting.”152 Thus although the standard rule would permit prompt meeting with lawyers, significant security considerations, such as having meetings “during warfare or close to it,” may prevent this.153 The Court did not accept that lack of access to lawyers rendered the detainees incommunicado, because they would be moved to a detention facility within forty eight hours of arrest, and would be permitted to have their families informed of their whereabouts and would be able to receive visits from the Red Cross.154

The human rights group B’Tselem publishes monthly reports on the number held in administrative detention. In 2002-03 this exceeded 1,000, and the numbers have slowly reduced, with some peaks and troughs, to 175 as at the end of January 2014, all of whom are held pursuant to military order.155 As to duration of detention, the most recent in depth report gives details of the position as at the end of November 2009. Out of 291 detainees held in November 2009, one had been detained for more than four years, 25 for between two and four years, 93 for between one and two years, 103 for between six months and a year, and 69 for under six months. The table indicating trends of duration

151 Id., at ¶43.
152 Id.
153 Id., at ¶44.
154 Id., at ¶46.
155 B’TSELEM, STATISTICS ON PALESTINIANS IN THE CUSTODY OF ISRAELI SECURITY FORCES, http://www.btselem.org/statistics/detainees_and_prisoners (last accessed Mar. 4, 2014). Note that there are significant differences in the numbers of detainees according to who is preparing the report. For example the B’Tselem numbers are those supplied by the Israelis, and they give the number of detainees in 2008 as 4,630, but the Palestinian Authority for Prisoner Affairs gives the number as 5,818. See THE PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL & NADI AL ASIR PALESTINIAN PRISONER SOCIETY, WHEN THE EXCEPTION BECOMES THE RULE: INCOMMUNICADO DETENTION OF PALESTINIAN SECURITY DETAINEES, supra note 43 at 12, fn.6.
from November 1, 2011 to February 23, 2014 does not give numbers or percentages but seems to suggest that of the 175 detained as at February 2014, a small group has been held for between one and two years, and the largest group has been held for less than six months.\footnote{156}{Id., \texttt{http://www.btselem.org/administrative
detention/statistics}, (last accessed Mar 4, 2014).}


This criticism has been countered by Israel’s claim that “the Supreme Court balances human rights and national security on a case by case basis: this approach manifests itself in an almost total willingness to hear any case challenging any counter-terrorism activity, without reservations of standing or justiciability.”\footnote{158}{STEPHANIE COOPER BLUM, THE NECESSARY EVIL OF PREVENTIVE DETENTION IN THE WAR ON TERROR, 128 (Cambria Press 2008), quoting Yigal Mersel, Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary during the Terror Era, N.Y.U. J. INT’L. L \& POL., 38, 67-120 (Nov. 2006).}

In order to introduce some procedural fairness into the administrative detention hearings, the Israel Supreme Court has developed the “judicial management model,”\footnote{159}{Daphne Barak-Erez \& Matthew C. Waxman, Secret Evidence – The Due Process of Terrorist Detentions, \textit{supra} note [ ] at 18.} a practice that has “no basis in law.”\footnote{160}{\textit{Id.}, at 21, quoting Itzhak Zamir, \textit{Human Rights and National Security}, 23 ISR. L. REV. 375, 399 (1989).} The case will be decided in camera, and the judge alone sees and reviews all the evidence. At no time will either the accused or his lawyer be given access to any classified information. This is because protecting the source of the
intelligence information is “of the fundamental essence.” The Court has played a special role in trying to compensate for not giving the evidence to the detainee by applying a heightened scrutiny to the evidence. The Court examines the evidence in a critical fashion, even from the viewpoint of the detainee. The judge has to test the quality and credibility of the evidence and the government’s case generally. The Supreme Court has made it clear that the state must disclose the basic allegations to the accused, as an independent duty, as well as make full disclosure to the court. This has similarities with the use of Special Advocates in U.K., Canadian and Australian law.

Doubts have been expressed as to whether the provision of core allegations is sufficient for a detainee to mount an effective defense. Furthermore, defense lawyers and even some Israeli judges have agreed that “the judicial management model suffers from inherent weaknesses that prevent, at least to some extent, meaningful and independent judicial assessment of the secret evidence.”

4.6 U.N. Human Rights Committee (HRC) involvement

Ever since it ratified the ICCPR, Israel has issued a declaration each year in accordance with Article 4, stating that it is not subject to Article 9 because it is in a

163 Id.
164 Id., at 22, quoting A v. State of Israel, para. 43, Crim.A. 6659/06 (Isr. 2008).
165 Id., at 23, quoting Sofi v State of Israel, Administrative Petition Appeal 2595/09 (Isr. unpublished, Apr. 1, 2009).
166 Id., at 35 – 47.
167 Id., at 24.
169 Daphne Barak-Erez & Matthew C. Waxman, Secret Evidence – The Due Process of Terrorist Detentions, supra note 48 at 24, referring to art. 4. (“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly
persistent state of emergency. In order for this declaration to be valid Israel had to state that it had complied with Article 4. Article 4 refers to an extreme situation, where there is a threat to the life of the nation as a whole, and debate has ensued as to whether Israel’s state of emergency meets the requirements of the article and the continuous and persistent threats faced by Israel validate its declaration of a state of emergency.

Israel’s submission of its third periodic report in November 2008 to the Human Rights Committee (HRC) stated that it had been considering “refraining from extending the state of emergency any further.” However, before terminating the state of emergency, various laws would have to be revised. Israel’s report on compliance with Article 9 did not deal with administrative detention, which by dint of the declaration as to the state of emergency, would not apply. It restricted its report to the application of Article 9 to its internal criminal law, in particular to issues relating to access to counsel, and detention pre-indictment and after sentence. It also discussed the Application of Article 10, (treatment of persons deprived of their liberty) to the Incarceration of Unlawful Combatants Law of 2002, and highlighted the case of A v. State of Israel.

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173 HRC Israel’s 3rd Report, supra note 170 at ¶158.

174 Id.

175 Id., at ¶¶250-269.

176 Incarceration of Unlawful Combatants Law, 5762-2002, supra note 74.
(discussed above) in which the Supreme Court sitting as the Criminal Court of Appeals ruled that the 2002 law was constitutional.\textsuperscript{177}

In the HRC’s 2009 list of issues, Israel was asked to comment on the status of the state of emergency, and the frequent use of and details concerning administrative detention as well as an explanation of why access to counsel was delayed.\textsuperscript{178} Israel gave certain details relating to administrative detention, describing the use of such measures as obligatory and essential to fight terrorism in the light of the current security situation.\textsuperscript{179} In connection with the state of emergency, Israel further stated that new draft counter-terrorism legislation was under review.\textsuperscript{180} In their concluding observations on this aspect of the report, the HRC merely urged Israel to complete their review of relevant legislation as soon as possible, refrain from using administrative detention, and ensure that detainees have prompt access to counsel.\textsuperscript{181}

Three years later, on May 8, 2012, the Israeli Supreme Court rejected a petition brought by the Association for Civil Rights in Israel (which had been pending for 13 years) requesting an end to the state of emergency.\textsuperscript{182} The Court held that there is a need to continue with the process of replacing, revoking, and enacting relevant pieces of legislation needed to disentangle a large number of laws from the state of emergency declaration (on whose continued existence their validity depends). As long as this process has not been completed, and the actual security

\textsuperscript{177} A v. The State of Israel, supra note 84.
\textsuperscript{178} U. N. Human Rights Committee, List of Issues to be Taken up in connection with the Consideration of the Third Periodic Report of Israel, ¶¶ 8, 16, 17 CCPR/C/ISR/3, (Nov. 17, 2009).
\textsuperscript{179} U. N. Human Rights Committee, Replies of the Government of Israel to the List of Issues (CCPR/C/ISR/Q/3/) to be taken up in connection with the consideration of the third periodic report of Israel (CCPR/C/ISR/3), 27-29 CCPR/C/ISR/Q/3/Add.1, (Jul. 12, 2010).
\textsuperscript{180} Id, 28.
\textsuperscript{181} U. N. Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations of the Human Rights Committee, 3 CCPR/C/ISR/CO/3, (Sep. 3, 2010).
conditions in the region require the employment of such laws in order to ensure the safety of the Israeli population, the Court should not intervene with the decision of the authorities to continue and renew the state of emergency.\textsuperscript{183}

4.7 Summary

Israel is in a continual struggle to protect its citizens from the constant terror attacks it deals with on a daily basis. At the same time the Supreme Court is trying to dispense justice in accordance with human rights law as best it can against this backdrop of relentless terror attacks: “in devising any and all of its counter-terrorism strategy, the Israeli government takes into account the highly probable review of the lawfulness of the strategy by the Supreme Court.”\textsuperscript{184}

Of all the countries surveyed in Section A, Israel is the one that faces the greatest number of threats, and has the most liberty-repressive measures involving the right to detain indefinitely. This has given rise to many complaints from human rights organizations, despite Israel’s efforts to put in place various measures to give some sort of process to detainees.

One of the most problematic aspects of this model is the use of secret evidence and the unusual, almost impossible, role played by judges who try to put themselves in the position of the defendant as well as issue rulings as to whether it is right and proper to detain.

Another major problem involves the issue of the perpetual state of emergency. It remains to be seen what legislative reforms are in the new law, and what will be deemed appropriate to address the problem of securing the safety of citizens in the unique situation of daily incidents, and Israel’s struggle to survive. However, the use of

\textsuperscript{183} Id.
\textsuperscript{184} Gabriella Blum, \textit{Judicial review of counterterrorism operations}, supra note 1 at 19.
administrative detention at all times, and not just in times of emergency will most likely violate Article 9 ICCPR.
CHAPTER 5 – FRANCE

5.1 The terrorist threat and counter-terrorism strategy

France has a long history of dealing with terrorism. In the last fifty years terrorism has emanated from a number of different sources. The Algerian War of Independence in the 1960s spawned both left and right-wing terrorism attacks. In the 1970s the threat came from Palestinian terrorists. During the 1980s France was plagued by persistent bomb attacks in Paris from groups sponsored by Iran and Syria, and by attacks from extreme left groups such as Action Directe, and separatist Basque, Breton and Corsican groups. From the 1990s onwards the threat has derived mainly from Islamic fundamentalists.

Islamist terrorism attacks were carried out at first by the Algerian group *Le Groupe Islamique Armé* (GIA) against French interests in Algeria and in France in the early 1990s, triggered by the GIA’s animosity towards France because of its colonial history in Algeria. In 1996 French officials perceived that the source of the Islamist threat had started to broaden beyond disaffected Algerians, to networks with links to other European countries and Pakistan, with a more universal hostility towards the West in general. In the late 1990s the GIA split and some members formed the *Groupe Salafiste pour la Prédication and le Combat* (GSPC), which had connections with al-Qaeda. Since the mid-1990s, the government and security agencies have perceived that Islamist terrorists have had hostile and unrestrained intentions towards France, focused

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1 *Detention of Terrorism Suspects in Britain and France, Hearing Before the Commission on Security and Co-operation in Europe, Jul. 15, 2008, (Statement of Jeremy Shapiro), available at*
3 *Id.*, at 285.
4 *Id.*, at 26.
on maximizing casualties.5 The Islamist threat continued to evolve after 9/11, comprising Al-Qaeda, the GSPC and freelance militants,6 many of whom were French nationals of Algerian descent.7

The current terrorist threat in France and to French interests overseas8 is mainly from Al Qaeda and its affiliates. In a 41-month period between 2002 and 2010, France arrested approximately 2,650 people on suspicion of terrorism, of which 900 were in cases of Islamist terrorism.9 Approximately forty per cent of those people, i.e. over 1,000, were put under formal investigation, with the rest released.10

In the Fall of 2010, France underwent a spate of false bomb attack alerts in Paris,11 and received warnings of imminent attacks from Al Qaeda in the Arabian Peninsula.12 A series of kidnappings of French nationals by Al Qaeda groups took place in the Niger region.13 In October 2011 the French Interior Minister warned that the threat of a terror attack remains “real,” with the alert level set at red, the second highest in a

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5 Id., at 293.
6 Id., at 32.
7 Id., at 41.
9 FRANK FOLEY, COUNTERING TERRORISM IN BRITAIN AND FRANCE, supra note 2 at 288.
10 Id.
A number of plots on French soil have been thwarted since 9/11, but the first actual domestic incident since 1996 was carried out in March 2012 by a lone wolf, Mohamed Merah. Over the course of several days he shot dead three off-duty French soldiers, and attacked a Jewish school, killing three children and a rabbi. Merah was a French national of Algerian descent who, in a call to a French television station, claimed allegiance to Al-Qaeda.

In France terrorism is treated as part of ordinary domestic criminal law, but with some special features. In response to the attacks in the 1980s and 1990s, France adopted a “preemptive approach” focusing on intelligence-gathering, prosecuting to dismantle terrorist networks in their embryonic stages, and removing foreign terrorism suspects and those accused of fomenting radicalization and recruitment to terrorism. Even before 9/11, France had “perhaps the most developed counterterrorism machinery in Europe.”

France has a body of terrorism legislation which sets out a list of various criminal acts carried out by individuals acting alone or in conjunction with others. These include, for example, attacks on life, hijacking and offenses involving explosives, and conspiracy to commit terrorism. Terrorism crimes are defined broadly, allowing investigation and prosecution “before any concrete act has taken place,” as well as the arrest, detention and questioning of individuals suspected of associating with others involved in terrorist activities.

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15 See e.g. FRANK FOLEY, COUNTERING TERRORISM IN BRITAIN AND FRANCE, supra note 2 at 35-37.
16 Id., at 38.
17 HUMAN RIGHTS WATCH, PREEMPTING JUSTICE. COUNTERTERRORISM LAWS AND PROCEDURES IN FRANCE, 10 (Jul. 2008); JACQUELINE HODGSON, THE INVESTIGATION AND PROSECUTION OF TERRORIST SUSPECTS IN FRANCE, supra note 1 at 4, 36-40.
18 HUMAN RIGHTS WATCH, PREEMPTING JUSTICE. COUNTERTERRORISM LAWS AND PROCEDURES IN FRANCE, supra note 17 at 6.
19 Id., at 7.
networks.\textsuperscript{21} The offense that has caused the greatest controversy is participation in a group formed with the intent to commit a terrorist act, provided that material facts indicate preparation for such an act.\textsuperscript{22} This is the charge most frequently used to arrest and detain terror suspects.\textsuperscript{23} This wide-ranging offense carries a maximum of ten years in prison.\textsuperscript{24} Several groups, including the International Federation of Human Rights\textsuperscript{25} and Human Rights Watch, have complained about the breadth of this charge, and its wide interpretation, which gives rise to a low standard of proof for arrest,\textsuperscript{26} and has the effect of “open[ing] the door to arbitrary enforcement.”\textsuperscript{27}

However, once faced with Islamist terrorism, French counter-terrorist agencies shifted their approach from conventional crime–solving to using a “preventive logic.”\textsuperscript{28} This had two prongs: passing legislation in 2006 whereby a group or association of wrongdoers commits a crime punishable with 20 years in prison, when it “aims to prepare terrorist acts susceptible of involving the death of one or many people;”\textsuperscript{29} and arresting

\begin{footnotesize}
\textsuperscript{21} JACQUELINE HODGSON, THE INVESTIGATION AND PROSECUTION OF TERRORIST SUSPECTS IN FRANCE, \textit{supra} note 1 at 4.
\textsuperscript{22} C. Pén. art. 421-2-1 (Fr.): “The participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles shall in addition be an act of terrorism”.
\textsuperscript{23} HUMAN RIGHTS WATCH, PREEMPTING JUSTICE. COUNTERTERRORISM LAWS AND PROCEDURES IN FRANCE, \textit{supra} note 17 at 11.
\textsuperscript{24} FRANK FOLEY, COUNTERING TERRORISM IN BRITAIN AND FRANCE, \textit{supra} note 2 at 205.
\textsuperscript{25} Federation Internationale des Ligues des Droits de l'Homme (FIDH).
\textsuperscript{26} HUMAN RIGHTS WATCH, PREEMPTING JUSTICE. COUNTERTERRORISM LAWS AND PROCEDURES IN FRANCE, \textit{supra} note 17 at 2, 20: “The elements of the crime, as developed in jurisprudence, include: the existence of a group of several people united in a collective criminal purpose; each member must have full awareness of this purpose and the fact that it is a criminal undertaking; and this purpose must be demonstrated through one or more material acts. There is no requirement that any of the participants take concrete steps to implement execution of a terrorist act.”
\textsuperscript{27} ANNA OEHMICHEN, TERRORISM AND ANTI-TERROR LEGISLATION: THE TERRORISED LEGISLATOR?, 309 (Intersentia, 2009), (discussing the comments of the FIDH).
\textsuperscript{28} \textit{Id.}, at 49.
\textsuperscript{29} \textit{Id.}, at 49, 210-11, \textit{citing} C. Pén. art. 421-6 (Fr.).
\end{footnotesize}
terror suspects earlier in the investigatory process.\textsuperscript{30} In addition, further anti-terror legislation was passed in the years after 9/11, much of it relating to investigation.\textsuperscript{31}

The French have concentrated their counter-terrorism efforts inside the country, with the goal of preventing terrorists from entering French territory, “and to anticipate, as much as legally permissible, curbing to neutralize terrorists at the preparatory stage of their actions.”\textsuperscript{32} Surveillance is a key counter-terrorism tool. For years the General Directorate of External Security (DGSE) have been collecting the electromagnetic signals emitted by computers and telephones in France, and the flow of signals between France and countries abroad, and this data is shared with six other French intelligence services.\textsuperscript{33} Thus, in their counter-terrorism strategy there is an emphasis on prevention and disruption as well as on repression,\textsuperscript{34} or “preventive judicial neutralization.”\textsuperscript{35} Deportation of foreign nationals has also been an important preventive tool.\textsuperscript{36}

The military play a very limited part. They have some involvement in patrols used to prevent the risk of terrorism inside France, they collect intelligence abroad, and may be

\textsuperscript{30} Id., 49

\textsuperscript{31} See e.g. ANNA OEHMICHEN, TERRORISM AND ANTI-TERROR LEGISLATION: THE TERRORISED LEGISLATOR?, supra note 27 at 313-326,


\textsuperscript{34} Olivier Cahn, The Fight Against Terrorism and Human Rights: The French Perspective, supra note 32 at 480; JACQUELINE HODGSON, THE INVESTIGATION AND PROSECUTION OF TERRORIST SUSPECTS IN FRANCE, note 1, supra, at 4.

\textsuperscript{35} HUMAN RIGHTS WATCH, PREEMPTING JUSTICE. COUNTERTERRORISM LAWS AND PROCEDURES IN FRANCE, supra note 17 at 11, (quoting Christophe Chaboud, a former head of the special anti-terrorism unit of the Ministry of Interior).

\textsuperscript{36} FRANK FOLEY, COUNTERING TERRORISM IN BRITAIN AND FRANCE, supra note 2 at 303-7. Deportations have been made of supporters of terrorism, as well as Muslim clerics on the grounds of incitement to hatred or violence. Individuals have very limited scope to prevent deportation. The lodging of an administrative appeal does not suspend deportation as it does e.g. in the U.K., and again contrary to the practice in the U.K., French courts have tended to accept the government’s view that individuals can be sent back to certain authoritarian regimes. This practice has generated several rulings from the United Nations Committee Against Torture that France is in breach of the Convention Against Torture.
requested to restore law and order or deal with specific emergencies resulting from a terror attack.\textsuperscript{37}

An understanding of the “judge-centered model with inquisitorial roots, in which the defense in particular plays a subsidiary role,”\textsuperscript{38} is necessary to gain an appreciation of the French counter-terrorism strategy. The public prosecutor, or \textit{procureur} has significant power from pre-trial investigation through to case disposition. He has the status of a \textit{magistrat}, and is considered a judicial authority in French law, as well as being “a player in local criminal justice policy-making and inter-agency co-operation.”\textsuperscript{39}

The vast majority of terrorist cases in France are dealt with in the Trial Court of Paris, whose investigating magistrates have become “real experts in terrorism”.\textsuperscript{40} These magistrates work in partnership with the French domestic intelligence service (DST) and have created a formidable body to combat terrorism.\textsuperscript{41}

By way of background, basic rights and freedoms in France are guaranteed in several constitutional texts, often called the \textit{bloc de constitutionnalité} (constitutional block).\textsuperscript{42} France ratified the European Convention on December 31, 1973, and it is directly applicable in French law, because France has a monist tradition.\textsuperscript{43} Article 55 of the French Constitution states that “[t]reaties or agreements duly ratified or approved

\begin{footnotes}
\item[37] Olivier Cahn, \textit{The Fight Against Terrorism and Human Rights: The French Perspective}, supra note 32 at 476.
\item[39] \textit{Id.}, at 1362-3, 1368.
\item[41] \textit{Id}; Olivier Cahn, \textit{The Fight Against Terrorism and Human Rights: The French Perspective}, supra note 32 at 471.
\item[42] ANNA OEHMICHEN, \textit{TERRORISM AND ANTI-TERROR LEGISLATION: THE TERRORISED LEGISLATOR?}, \textit{supra note} 27 at 293; BERNARD RUDDEN, \textit{A SOURCE-BOOK ON FRENCH LAW}, 23 (Clarendon Press, 1991): Other than the Constitution of 1958, the 1789 Declaration of the Rights of Man, the Constitution of 1946 invokes \textit{les principes fondamentaux reconnus par les lois de la République}. This last source “is not to be found in a text as such, but in certain fundamental principles which can be seen to underlie a law ‘of the Republic.’”
\end{footnotes}
shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.\textsuperscript{44} The law relating to terrorism is found in the Criminal Code, and the Code of Criminal Procedure.\textsuperscript{45}

The French system of preventive detention in terrorism cases is an enhanced version of the regime of preventive detention used in general criminal cases.\textsuperscript{46} During 2010, 700,000 suspects were reported as being held without charge.\textsuperscript{47} This staggering figure relates to all criminal arrests, not solely those related to terrorism. Europol statistics show that during 2012, 186 terrorist suspects were arrested in France. Ninety-one of the arrests related to religiously inspired terrorism and ninety five to separatist terrorism.\textsuperscript{48} During 2012, 94 persons were convicted of terrorist offenses, an enormous increase on the numbers reported for the previous two years.\textsuperscript{49}

5.2 \textit{Garde à Vue (“GAV”)}\textsuperscript{50}

A suspect is defined as a person who is suspected of having committed, or is attempting to commit an offense.\textsuperscript{51} The criteria for suspicion are “one or more plausible


\textsuperscript{45} \textit{ANNA OEHMICHEN, TERRORISM AND ANTI-TERROR LEGISLATION: THE TERRORISED LEGISLATOR? supra} note 27 at 293-4.

\textsuperscript{46} \textit{See DAN E. STIGALL, COUNTERTERRORISM AND THE COMPARATIVE LAW OF INVESTIGATIVE DETENTION, 135-156} (Cambria Press, 2009).


\textsuperscript{48} \textit{E.U. TERRORISM AND SITUATION TREND REPORT, Annex 2, EUROPOL TE-SAT 2013,}

\textsuperscript{49} \textit{Id}, Annex 3.

\textsuperscript{50} \textit{See JACQUELINE HODGSON, FRENCH CRIMINAL JUSTICE,} (Hart Publishing 2005); Jacqueline Hodgson, \textit{The French Prosecutor in Question, supra} note 38.
reasons to suspect a person of having committed or attempting to commit an offense.”

If evidence points to a person’s involvement with a terrorist group, he or she can be arrested to prevent a terrorist act. The suspect may be held preventively in GAV for an extended period if a magistrate’s preliminary investigation reveals a serious risk of an imminent act of terrorism. The initial length of GAV detention in terroristic cases is four days (as opposed to forty-eight hours in normal criminal cases), and this period can be extended twice by a judge for further tranches of twenty-four hours, totaling six days. A French Government comparative study of GAV in 2010 indicates that in 2009, of 617,849 persons held in GAV that year, 105,336 were held for more than twenty-four hours.

The procureur or prosecutor has a dual role in GAV detention and interrogation: he is the person that is both involved in the police investigation of the potential crime and also authorizes detention for the first forty-eight hours. In terrorism cases the investigating magistrate must approve the detention of the suspect for an initial period after arrest, during which time the suspect may be questioned.

51 Loi No. 2002-1138 (Fr.). (Sep. 9, 2002).
52 Code de Procédure Pénale art. 77, (Fr.).
53 For example, on July 16, 2013, French authorities arrested and placed in garde à vue Norwegian neo-Nazi sympathizer, Kristian Vikernes, on suspicion of preparing to commit an act of terrorism on a large scale. Michael Sadkowski, Varg Vikernes : meurtre, black metal et néopaganisme, LE MONDE, (Jul. 16, 2013), http://www.lemonde.fr/societe/article/2013/07/16/varg-vikernes-meurtre-black-metal-et-neopaganisme_3448253_3224.html?xtmc=vikernes&xter=1. The Minister of the Interior, Manuel Valls, justified the arrest despite the fact that no target or plan had been identified, on the grounds that it was necessary when faced with terrorism to act before rather than after the event. (“M. Valls, tout en reconnaissant qu’il n’y a pour le moment “ni cible, ni projet identifié”, a justifié cette décision par la nécessité, face au terrorisme, “d’agir avant, et non pas après”.) Valls justifie l’arrestation préventive du Norvégien Vikernes, LE MONDE, (Jul. 16, 2013), http://www.lemonde.fr/societe/article/2013/07/16/un-norvégien-neonazi-interpelle-en-correze_3448207_3224.html
54 Code de Procédure Pénale art. 706-88, (Fr.).
56 Jacqueline Hodgson, The French Prosecutor in Question, supra note 32 at 1368, 1370.
57 FRANK FOLEY, COUNTERING TERRORISM IN BRITAIN AND FRANCE, supra note 2 at 181.
number of cases, the magistrates get involved at a very early stage and give their approval in advance for the arrest of the suspect.\textsuperscript{58}

In terrorism cases, extensions of detention may only be authorized by an independent judicial authority, called a \textit{juge des libertes et de la detention}.\textsuperscript{59} At the end of the detention period the suspect is either released or “put under examination” (mis en examen).\textsuperscript{60} This occurs in about four per cent of cases, when the inquiry is handed over to a \textit{juge d’instruction}, who has wider powers of investigation in what is called the \textit{instruction} inquiry, as well as having a judicial function.\textsuperscript{61} In order to put a suspect under examination, the authorities need to find “serious and concordant indications that an offense has been committed.”\textsuperscript{62} At this point the magistrate can take into account “purely administrative intelligence material” supplied by intelligence agencies, that has been collected by the agency in an administrative capacity, before they have begun working in a judicial framework to prepare a case for prosecution.\textsuperscript{63} If the authorities want detention to continue, the suspect is held in détention provisoire, described below.

Concerns about the dual role of the judges were one of the reasons that prompted the establishment in 2008 of the Léger Commission to review criminal justice.\textsuperscript{64} Although the Léger Commission believed that the \textit{procureur’s} role was key, the European Court of Human Rights (“ECHR”) had great misgivings about the judicial

\begin{itemize}
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Jacqueline Hodgson, \textit{The French Prosecutor in Question}, \textit{supra} note 38 at 1369.
\item \textsuperscript{60} FRANK FOLEY, \textit{COUNTERING TERRORISM IN BRITAIN AND FRANCE}, \textit{supra} note 2 at 183.
\item \textsuperscript{61} Jacqueline Hodgson, \textit{The French Prosecutor in Question}, \textit{supra} note 38 at 1369.
\item \textsuperscript{62} FRANK FOLEY, \textit{COUNTERING TERRORISM IN BRITAIN AND FRANCE}, \textit{supra} note 2 at 184.
\item \textsuperscript{63} Id., at 117, 185.
element of the procureur’s role.65 In April 2011 certain elements of the law relating to GAV were modified,66 as discussed below. However, the new legislation did not alter the role of the procureur in supervising the conduct of the GAV.67

The Code of Criminal Procedure (“CCP”) gives detainees a limited number of rights: the right to be told the reason for arrest, to be given a medical examination, and to inform someone of their arrest, although that right can be denied if that contact is considered prejudicial to the investigation.68 Until the law was changed in April 2011, although detainees had the right to silence, the police did not have to tell the detainees that they had that right.69

Until the recent change in the law, detainees’ access to lawyers whilst in GAV was extremely limited. Access was allowed after seventy-two hours, but if the detention was extended, access to a lawyer was not permitted until the ninety-sixth hour, and even then only for thirty minutes.70 Now detainees will be entitled to be notified of their right to have a lawyer present throughout the period of custody and during interrogations, but in terrorism cases, access to lawyers can still be delayed for seventy-two hours.71 There does not appear to be a right of appeal against garde à vue detention.

66 Loi n° 2011-392 du 14 avril 2011 relative à la garde à vue (Fr. Apr. 15, 2011).
68 HUMAN RIGHTS WATCH, PREEMPTING JUSTICE. COUNTERTERRORISM LAWS AND PROCEDURES IN FRANCE, supra note 17 at 57, citing Code de Procedure Penale, art. 63 (Fr.).
69 DAN E. STIGALL, COUNTERTERRORISM AND THE COMPARATIVE LAW OF INVESTIGATIVE DETENTION, supra note 46 at 4140.
70 Code de Procedure Penale, art. 63 (Fr.).
71 Loi n° 2011-392 supra note 66; Jacqueline Hodgson, Extending the right to legal advice to suspects in police custody in France, supra, note 67.
The law relating to GAV was amended in response to a number of both domestic and ECHR decisions, and certain aspects of the amended law have been challenged during 2010 and 2011. In July and October 2010 there were a number of cases concerning access to lawyers both in the domestic courts, and in the ECHR. These cases triggered the passing of the amended law. In July, the French Constitutional Council in the case of *Daniel W.*, declared it unconstitutional for a suspect not to have the benefit of counsel during questioning, and not to be informed of the right to silence. On October 14, 2010, in *Brusco v. France*, where the applicant had been denied access to a lawyer for twenty hours and not told of his right to silence, the ECHR ruled that these deprivations amounted to a violation of article 6 of the European Convention. On October 19, 2010, in three judgments, the French Supreme Court declared that *Brusco* should be followed and that persons in GAV should be entitled to the assistance of lawyers at all times. In addition, the right of a lawyer should be restricted only when there are compelling reasons based on the circumstances of the case.

A group of French criminal lawyers challenged the GAV amendments, on the grounds that they remained incompatible with Article 6 in a number of respects. For example, access to lawyers can still be delayed in terrorist cases, police can question a
suspects before his lawyer arrives, lawyers still have a mere thirty minutes with their
clients, they have limited access to the investigation files, lawyers may not attend
searches, they can only ask questions at the end of interviews, and police have the right to
bar questions they deem to interfere with the investigation.\textsuperscript{77} The Constitutional Council
ruled that the complaints had no merit.\textsuperscript{78} That decision “emphasizes the preliminary
nature of the garde à vue within the investigation and its separateness from any decision
to prosecute. Evidence is provisional and untested. In contrast, the applicant lawyers'
challenge is based more on the idea of the garde à vue as the first stage of the formal
accusation, triggering full Article 6 rights, including those of disclosure.”\textsuperscript{79}

5.3 \textbf{Détention Provisoire}

This is detention of a suspect under investigation for serious crimes including
terrorism.\textsuperscript{80} This tool can be used both \textit{after} a crime has been committed pending trial, as
well as \textit{before} a crime has been committed, as suspects can be held with or without
charge. For example, investigating magistrates can open an investigation into a possible
crime of conspiracy to commit terrorism and “deploy their expertise and judicial tools
\textit{before} terrorist acts take place, thereby creating a capacity… for preventing them in the

\textsuperscript{77} Clifford Chance, supra note 72; Jacqueline Hodgson, \textit{French lawyers fail in their challenge to the new
garde a vue regime}, supra note 74.

\textsuperscript{78} Jacqueline Hodgson, \textit{French lawyers fail in their challenge to the new garde a vue regime}, supra note 74,
\textit{citing} Décision n° 2011-191/194/195/196/197 QPC.

\textsuperscript{79} Id.

\textsuperscript{80} Code de Procedure Penale, art. 144: Pre–trial detention can only be imposed if it is the sole means of
\begin{enumerate}
\item to preserve material evidence or clues or to prevent either witnesses or victims being pressurized,
or fraudulent conspiracy between persons under judicial examination and their accomplices;
\item to protect the person under judicial examination, to guarantee that he remains at the disposal of
the law, to put an end to the offence or to prevent its renewal;
\item to put an end to an exceptional and persistent disruption of public order caused by the seriousness
of the offence, in which it was committed, or the gravity of the harm that it has
caused.
\end{enumerate}

first place.” Despite the presumption of innocence in French law, in exceptional cases, for the necessity of the investigation or for reasons of security, a suspect may be placed in détention provisoire, provided a judge is satisfied that lesser measures would not suffice. Orders are made after an adversarial hearing with submissions made by the prosecutor, the accused and his lawyer.

Since 2000, the initial maximum period for detention has been one year, but this can be extended after adversarial hearings, initially for six months, and thereafter for up to four years, as opposed to one year for non-terrorist offenses. (Prior to 2000, detention for serious crimes could be for an indefinite period.) The average length of détention provisoire in 2007 (the last year for which statistics are available) was 5.7 months.

During the detention when investigation and interrogation may continue, suspects must be told about their right to silence and they are not held incommunicado. Once a person is subjected to détention provisoire, the detainee can request a review of detention at any time.

### 5.4 Legal challenges

Many complaints have been made alleging violations of the European Convention. A number of legal challenges relate to the length of time spent in detention and treatment of detainees. The ECHR has determined détention provisoire to be excessive and that it

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82 *Id.,* 7.
83 Code de Procédure Pénale, art. 148.
violates Article 5(3), on a number of occasions. For example, in Bernard v. France, the applicant was arrested on suspicion of being a member of the Breton Revolutionary Army and harboring members of ETA who had recently stolen explosives. He was placed under investigation for conspiring to commit terrorist acts and possessing explosives, and was held in détention provisoire for almost three years.

In 1999 in Tomasi v. France, the ECHR found numerous violations: of Article 3 for ill-treatment whilst in custody; of Article 5(3) because the applicant was detained for five years and seven months; and of Article 6 (1) because of the excessive time taken to investigate the complaints of ill-treatment.

Twelve years on, the ECHR is still dealing with similar complaints brought against France. In 2011, in Mourmand v. France, the applicants made various complaints relating to the treatment of their brother and son who had died whilst in police custody. They alleged that he had been excessively detained pending investigation for more than thirteen months in violation of Article 5(3), that his right to life had not been protected, in violation of Article 2, he had not been given proper health care whilst in custody, in violation of Article 3, and that the investigation into the cause of death had been far too slow, in violation of Article 6(1). The case settled without an admission of liability on the part of France, with the applicants accepting twenty thousand Euros.

5.5 Summary

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Certain elements in each stage of the French detention model do not comply with the European Convention, as described above. Following the failure of the group of French lawyers to have some of the new GAV provisions declared unconstitutional by the Constitutional Council, it remains to be seen if the challenge is taken to the ECHR.

As noted above, the lengthy duration of detention provisoire has attracted much criticism. Between 1981 and 2002, France has been condemned by the ECHR seventy times for different human rights violations, including for excessive length of detention both before trial and after completion of sentence, and treatment of detainees during detention. Although France has reformed some aspects of the law relating to treatment of detainees, its only significant reaction to the condemnation in connection with the length of detention was to reduce the period in 2000 to the current levels.

So why, despite condemnation from Human Rights bodies and ECHR as described above, does France retain such draconian laws? Above all, the French intend to stop terrorist attacks before they happen. A tension in France exists between the right to freedom from arbitrary arrest and detention, enshrined in the French Bill of Rights of 1789, the ICCPR and the European Convention, and the right of security as a condition of the exercise of freedoms. In 2003 legislation stated that the right to security was a fundamental right and one of the conditions for the exercise of individual and collective freedom. To the French, it is the most important freedom, and supersedes other

88 Jacqueline Hodgson, French lawyers fail in their challenge to the new garde à vue regime, JACKIE HODGSON’S BLOG, supra note 74.
91 Loi No. 2003-239, art.1 (Fr. 18 Mar. 2003).
92 JACQUELINE HODGSON, FRENCH CRIMINAL JUSTICE, supra note 50 at 39, 45.
considerations. Their experience dealing with Algerian resistance both in Algeria and in France may have reinforced the importance of the ‘security first’ norm over adopting more proportionate responses to terrorism. Furthermore, the lack of public debate, and little public opprobrium suggests possible general public consensus about the security measures.

French citizens appear more willing to give up greater degrees of fundamental liberties, in exchange for the services, safety and stability that their government provides. Collective safety is more important than individual rights. The bottom line is that “freedom to walk the streets or take the subway without fear of bombs lies at the base of all civil liberties.”

93 Frank Foley, Countering Terrorism In Britain And France, supra note 2 at 5.
94 Id. at 61.
95 Id. at 63.
CHAPTER 6 – THE UNITED STATES, PART 1

This chapter will demonstrate that in the absence of a law that permits detention to forestall terrorist attacks, a number of devices have been employed achieve the very same goal, all of them lacking from a human rights perspective. The chapter begins by reviewing the current terrorist threat, counter-terrorism strategy and counter-terrorism laws to give context to the ensuing discussion of preventive detention.

6.1 Background

6.1.1 The terrorist threat

The events of 9/11 were so catastrophic, that people do not always recall that terrorism in the United States probably dates from the mid 1800s. At that time white supremacists, such as the Ku Klux Klan “routinely used threats, beatings, bombings, and murders to ensure that their message of intimidation and terror endured.”\(^1\) In the twentieth century, other than isolated incidents, modern terrorist activity in the United States began in the 1960s. The predominant domestic terrorist threat at that time came from leftist-orientated extremist groups.\(^2\) Terrorism became so significant that the FBI began formally recording statistics of annual terrorist activity in the mid-1970s.\(^3\) Since 2006 the National Counter-Terrorism Center (NCTC) has issued annual reports. The last

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detailed information that can be found on the Global Terrorism Database reports 2,362 terrorist incidents in the United States between 1970 and November 2011.  

The current terrorist threats have become “more complex and amorphous than at any time in the past decade. More U.S. citizens and residents have played important roles in planning and carrying out terrorist attacks on behalf of al- and its allies, and a diverse range of domestic-based jihadist groups have proliferated during the same period.”

In January 2014 the Director of National Intelligence testified to the Senate Select Committee on Intelligence that the current threat emanates from a “diverse array of terrorist actors, ranging from formal groups to homegrown terrorist extremists and ad hoc, foreign-based actors.” He opined that the threat from core al-Qaeda of complex, sophisticated and large-scale attacks against the United States homeland has been significantly degraded. In the Director’s opinion, the decentralization of al-Qaeda has generated new power centers and other threats, and homegrown al-Qaeda-inspired violent extremists are likely to pose the most frequent threat to the United States homeland.

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4 From 2006 onwards, an unclassified annual report covering terrorist incidents on a worldwide basis has been issued by the National Counter-Terrorism Center (NCTC) as required by Title 18 U.S.C. §2656f. §2656f(b) requires the State Department to include in its annual report on terrorism “to the extent practicable, complete statistical information on the number of individuals, including United States citizens and dual nationals, killed, injured, or kidnapped by each terrorist group during the preceding calendar year.” As “specific details about victims, damage, perpetrators, and other incident elements are frequently not fully reported in open source information” this may explain why NCTC reports do not give details of thwarted attacks.


7 Id.

8 Id.

9 Id.
The Heritage Foundation has identified fifty-six terror plots that were thwarted between 9/11 and July 2013.\(^\text{10}\) Four plots have been successful. The last of these took place on April 14, 2013\(^\text{11}\) when one U.S. naturalized citizen and his permanent resident brother planted two bombs that exploded during the Boston Marathon, killing three and injuring 264.\(^\text{12}\) The brothers appeared to be lone wolf actors, supposedly motivated by their opposition to American wars in Iraq and Afghanistan.\(^\text{13}\) Of the sixty plots, forty-nine could be considered homegrown terror plots.\(^\text{14}\)

### 6.1.2 Counter-terrorism strategy

The 2010 National Security Strategy stated that national security included a determination to prevent terrorist attacks against the American people by fully coordinating the actions that we take abroad with the actions and precautions that we take at home. It must also include a commitment to building a more secure and resilient nation, while maintaining open flows of goods and people. We will continue to develop the capacity to address the threats and hazards that confront us, while redeveloping our infrastructure to secure our people and work cooperatively with other nations.\(^\text{15}\)

This theme was continued in the 2011 National Counterterrorism Strategy, which emphasized that the U.S. is at war, not with “the tactic of terrorism or the religion of

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\(^{11}\) Id., The other three attacks were (1) the intentional driving of an SUV into a crowd of students at the University of North Carolina–Chapel Hill in 2006, (2) the shooting at an army recruitment office in Little Rock, Arkansas, in 2009, and (3) the shooting by U.S. Army Major Nidal Hasan at Fort Hood, also in 2009.


\(^{14}\) JESSICA ZUCKERMAN, STEVEN P. BUCCI & JAMES JAY CARAFANO, 60 TERROR PLOTS SINCE 9/11: CONTINUED LESSONS IN DOMESTIC COUNTERTERRORISM, supra note 19.

Islam…but with a specific organization – al Qa’ida.”

It states that the core principles of the counterterrorism strategy are adhering to U.S. core values, building security partnerships, applying counterterrorism tools and capabilities appropriately, and building a culture of resilience.

According to William Banks, “the developing counter-terrorism paradigm is beset with political squabbles over the means for detaining and interrogating suspects in domestic terrorism crises,” together with an increase in the use of drones and targeted killing, which is now seen as a “key tool.” Indeed, some suggest that the President has “avoided the complications of detention by deciding, in effect, to take no prisoners alive.”

The Washington Post reported in 2012 that the Obama Administration has been “secretly developing a new blueprint for pursuing terrorists, a next-generation targeting list called the ‘disposition matrix.’” This blueprint is “mapping plans for the “disposition” of suspects beyond the reach of American drones… The United States’ conventional wars are winding down, but the government expects to continue adding names to kill or capture lists for years.”

In May 2013, President Obama laid out a new strategic plan in a speech at the National Defense University, comprising inter alia: defining the “effort not as a

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17 Id., at 4.
18 William C. Banks, The United States a decade after 9/11, in Global Anti-Terrorism Law and Policy, supra note 5 at 456.
19 Id., at 469.
22 Id.
boundless ‘global war on terror,’ but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America;”…focusing on the gathering and sharing of intelligence, the arrest and prosecution of terrorists….As a matter of policy, the preference of the United States is to capture terrorist suspects. When we do detain a suspect, we interrogate them. And if the suspect can be prosecuted, we decide whether to try him in a civilian court or a military commission.23 (Emphasis added).

As to captures, there have to date only been two persons captured off-the-battlefield since President Obama took office in 2009. The first was Ahmed Warsame, a Somali member of al-Shabaab. He was detained for two months on a navy ship in law of armed conflict (LOAC) detention before being handed over to the F.B.I. Warsame was then charged in federal court with providing material support to terrorists.24 The second was Abu Anas al-Libi, who was captured by U.S. forces in Libya on October 6, 2013. He was detained for interrogation purposes on a navy ship in the Mediterranean for a week,25 before being brought to New York for criminal trial in a federal court.26 Another capture attempt was made on October 6, 2013, when U.S. Navy SEALs failed to capture Ikrima, a leader of al-Shabaab in Somalia.27

As far as the United States is concerned, the government appears to consider the country as being in a permanent war, and no clear end is in sight,\(^\text{28}\) despite the remarks by President Obama in May 2013.\(^\text{29}\) With Congress blocking the transfer of detainees held at Guantánamo Bay to the prisons on the U.S. mainland, and with the President continually pledging to close Guantánamo,\(^\text{30}\) there does not appear to be anywhere to detain any LOAC captures, other than on naval vessels out at sea. With the changes in the type of threat as mentioned in section 6.1.1, the time is ripe for a re-evaluation of detention strategy and practice. As President Obama remarked: “America is at a crossroads. We must define the nature and scope of this struggle, or else it will define us.”\(^\text{31}\)

### 6.1.3 The U.S. approach to counter-terrorism

The United States has adopted differing and sometimes inconsistent approaches to combating terror on domestic soil. Although the United States had used military force, or what might be termed a war model, as a response to or retaliation for terrorism attacks on overseas U.S. interests, often in conjunction with the tools of law enforcement,\(^\text{32}\) prior to 9/11, terrorism on U.S. soil was treated as criminal activity.\(^\text{33}\) After 9/11 too, many laws

\(^{28}\) Greg Miller, *Plan for hunting terrorists signals U.S. intends to keep adding names to kill lists*, *supra* note 21.

\(^{29}\) *The White House, Office of the Press Secretary, Remarks by the President at The National Defense University*, *supra* note 23.

\(^{30}\) *Id., see also American Civil Liberties Union, Guantánamo by the Numbers*, [https://www.aclu.org/national-security/guantanamo-numbers](https://www.aclu.org/national-security/guantanamo-numbers) (last visited Apr. 8, 2014), (showing that as at January 2014 154 persons are still detained, of which 76 have been cleared for release and 45 are deemed too dangerous to release, but evidence to prosecute them is lacking).

\(^{31}\) *The White House, Office of the Press Secretary, Remarks by the President at The National Defense University*, *supra* note 23.


\(^{33}\) *Id.*, at 173.
were enacted to criminalize different aspects of terrorist activity, as well as strengthen existing criminal laws.\(^{34}\) Criminal trials for terror offenses have continued since 9/11. In mid 2013, Human Rights First reported that since 9/11, over 500 persons have been convicted of terrorism-related charges in federal courts.\(^{35}\)

Yet, immediately after the 9/11 attacks “the Bush Administration rushed to the judgment that America’s old approach to fighting terrorism, which treated it as a crime like any other, was inadequate for the post 9/11 world. Almost without discussion, it was agreed that a new kind of enemy required new tactics.”\(^{36}\) The Bush Administration “immediately went on to a war footing,”\(^{37}\) using the LOAC as a counter-terrorism tool, in tandem with law enforcement. The Obama Administration has continued this trend, claiming that the Administration detains and conducts targeted killing of suspected terrorists in accordance with LOAC.\(^{38}\) As William Banks notes, “[a]t present, the developing counter-terrorism paradigm is beset with political squabbles over the means of detaining and interrogating suspects in domestic terrorism crises.”\(^{39}\) The LOAC approach is discussed in Chapter 7.

\(^{34}\) See e.g. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act), P.L. 107-56 (2001).
\(^{37}\) Diane Webber, Preventive Detention in the Law of Armed Conflict: Throwing Away the Key? 6 J. NAT’L SEC. L. & POL’Y 167, 174, and see Chapter 5 infra.
\(^{38}\) See e.g. Jeh C. Johnson, General Counsel, Department of Defense, National Security Law, Lawyers and Lawyering in the Obama Administration, Address at Yale University Law School, (Feb. 22, 2012); Eric Holder, Attorney General, Department of Justice, Address at Northwestern University School of Law, Chicago, (Mar. 5, 2012); John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, The Ethics and Efficacy of the President’s Counterterrorism Strategy, Address at Woodrow Wilson International Center for Scholars, Washington DC, Apr. 30, 2012.
\(^{39}\) WILLIAM C. BANKS, The United States A Decade After 9/11, supra note 5 at 456.
6.2 Preventive detention in U.S. law

The United States does not permit preventive detention *per se*. Under the general federal criminal law, suspects arrested without warrant\(^{40}\) must be brought before a magistrate promptly to ensure that there was probable cause for the arrest.\(^{41}\) In *County of Riverside v McLaughlin*, the Supreme Court held that “prompt” generally means within forty-eight hours.\(^{42}\) Even forty-eight hours may be deemed excessive if the suspect can prove unreasonable delay, which can include “delays for the purpose of gathering additional evidence to justify the arrest.”\(^{43}\)

In order to obtain a warrant to seize or arrest terror suspects for any charge, in order to comply with the Fourth Amendment,\(^{44}\) law enforcement officers are required to show probable cause that a crime has been, or is being, committed. There are some exceptions to the requirement to show probable cause, as discussed below.\(^{45}\) Although the meaning of probable cause has been refined over time,\(^{46}\) the Supreme Court has not used the words that a suspect was “about to” or “likely to” commit an offense, except in the

\(^{40}\) Suspects can be arrested without a warrant where there is probable cause, and the arrest takes place in public, U.S. v. Watson, 423 U.S. 411, 423 (1976), or where there are exigent circumstances, Payton v. New York, 445 U.S. 573, 583, (1980); Kentucky v. King, 31 S. Ct. 1849, 1854 (2011).

\(^{41}\) Gerstein v. Pugh, 420 U.S. 103, 125 (1975): a state “must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.” Also at 126, “the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention.”


\(^{43}\) Id.

\(^{44}\) U.S. Const. Amend. IV: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.”

\(^{45}\) Gerstein v. Pugh, *supra* note 41 at 111-2 “the standard for arrest is probable cause, defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense”; see also Diane Webber, *Extreme Measures: Does the United States Need Preventive Detention to Combat Domestic Terrorism?* 14 TOURO INT’L L. REV. 128, 164-9 (2010).

\(^{46}\) Id., at 166-8.
short investigative stop context, nor has the Court ruled on the issue of probable cause for arrests to prevent offenses, perhaps because by definition, probable cause relates to past or current activity.

The Obama Administration has examined the question of whether the forty-eight hour period of detention before charge should be extended. The review was ordered in the wake of criticism about the handling of the arrest of Nigerian Farouk Abdulmutallab. He had attempted to blow up a Northwest Airlines flight en route to Detroit on December 25, 2009. FBI agents interrogated Abdulmutallab without Mirandizing him for nearly an hour. Criticism erupted immediately, with cries that he “should have been designated an enemy combatant and shipped straight to Guantánamo,” and complaints that he was Mirandized at all.

Gaining intelligence is often hard to do once suspects have been arrested, because pursuant to Miranda, suspects have to be informed of their right to remain silent prior to custodial questioning. If the warning is not given, any statements of the suspect may not be used in court. However, where there is a need to question a suspect in order to protect public safety, as in the case of Quarles, there is no requirement to give the Miranda

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47 United States v. Cortez, 449 U.S. 411, 417 (1981), (“an investigative stop must be justified by requiring some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity”).
48 See discussion of Ashcroft v. al-Kidd, 131 S. Ct 2074 (2011), below at Section 4.3.2, where the Court declined to discuss the constitutionality of using material witness arrest warrants as a means of preventively detaining terror suspects.
50 Id., at 178-9.
51 Id., at 179.
52 Miranda v. Arizona, 384 U.S. 436, 479 (1966), “He must be warned prior to any [custodial] questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.”
warning, and any un-*Mirandized* statements made by a suspect in such cases are likely to be admissible in court.\(^{54}\)

A broader use has been advocated of the *Quarles* public safety exception to enable a longer period of questioning in the counterterrorism context.\(^{55}\) Yet the law only affords a window of up to 48 hours to interrogate before a suspect must be charged and brought before a court, if the fruits of the interview are to be used in a criminal trial.

President Obama ordered a thorough review of the guidelines governing the arrest procedure, and his lawyers began to evaluate whether Congress could pass a law permitting detention longer than the current forty-eight hour period.\(^{56}\) Whilst the deliberations were ongoing, another terrorist plot was disrupted on May 1, 2010. Faisal Shahzad, a U.S. citizen attempted to detonate a car bomb in Times Square, New York. He was questioned under the public safety exception “until agents could determine that there was no imminent terrorist threat.”\(^{57}\) After he was read his rights, he waived them and continued talking for almost two weeks.\(^{58}\)

Shortly after the Shahzad incident, the White House circulated to Congress a draft plan it had crafted. The plan included a proposal to codify the *Quarles* public safety exception into a “national security exception.”\(^{59}\) A second, more controversial, proposal

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54 David S. Kris, *Law Enforcement as a Counterterrorism Tool*, supra note 32 at 20, citing New York v. Quarles, *supra* note 53 at 655-656, and at 40, citing United States v. Khalil, 214 F.3d 111, 121-122 (2d Cir. 2000), where an un-*Mirandized* suspect was asked questions about pipe bombs found in his apartment and his statements were admissible in court.

55 *Id.*, at 77.

56 *Id.*, at 181.

57 *Id.*, at 189.


extended the period of time in which a suspect could be detained without charge.

According to Klaidman,

[...]he White House initially proposed extending the amount of time to seven days. That was scaled back after Harold Koh pointed out in a sharply worded memo to the White House that no Western nation permitted their police to hold a suspect involuntarily, and without a hearing, for more than four days. 60

Amidst all the predictable controversy, 61 the entire plan was “shelved.” 62 Thus the forty-eight hour status quo remains.

Preventive detention has been in use in the United States for many years. It is “an established part of U.S. law,…an integral feature of the American legal landscape.” 63

State and federal law permit the preventive detention of persons in diverse situations to prevent a variety of harms, including for example, refusal of bail to persons awaiting trial or deportation. In the context of pre-trial detention, a form of administrative detention exists as a measure to prevent terrorism by keeping suspects who are remanded in
custody, prior to trial, in solitary confinement and incommunicado.\textsuperscript{64} “Initial placement” of an inmate into administrative detention can be for up to one year.\textsuperscript{65}

Other preventive detention measures include quarantine of persons with communicable diseases, detention of the mentally ill, as well as the continued detention of convicted sex offenders after the completion of prison sentences.\textsuperscript{66} Klein and Wittes suggest that U.S. law avoids preventive detention except when it is deemed necessary to prevent grave public harms.\textsuperscript{67}

Turning specifically to the issue of preventively detaining terror suspects, Human Rights First has analyzed over one hundred cases relating to international terrorism that have been successfully prosecuted in the U.S. federal criminal system. Their survey highlights a wide range of relevant laws, including those dealing with immigration violations, money laundering, and fraud, that have been used successfully against suspected terrorists.\textsuperscript{68} However, very few laws offer scope for making an arrest before an offense has actually been committed, unless the definition of the crime includes acts of conspiracy, planning or preparation, attempts,\textsuperscript{69} or even making threats.\textsuperscript{70} In those

\textsuperscript{64} 28 C.F.R. §501.3(a): “…These special administrative measures ordinarily may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism…..” \textit{See e.g.} United States v. Hashmi, 621 F. Supp. 2d 76 (S.D.N.Y. 2008), who was held in solitary confinement for two and a half years, \textit{cited in} Laura Rover & Jeanne Theoharis, \textit{Preferring Order to Justice}, 61 AM. U. L. REV. 1331, 1358-85 (2012).

\textsuperscript{65} 28 C.F.R. §501.3(c).


\textsuperscript{67} Adam Klein & Benjamin Wittes, \textit{Preventive Detention in American Theory and Practice}, \textit{supra} note 66 at 88.


\textsuperscript{69} Arrests can be made for attempting to commit a terrorist act, provided there has been sufficient activity. Attempt generally involves the intent to do a bad act coupled with an act. The precise definition of what
situations any preventive detention would in fact be post charge, pre-trial detention if the suspect is refused bail. The United States has been able to use a number of offenses that by definition include inchoate elements to arrest and detain many suspects, by showing probable cause of early pre-crime activity.

For example, conspiracy has been used frequently to charge suspect terrorists at an early stage. An analysis of 415 charges found in 155 Al Qaeda related convictions between 1997 and 2012, reveals that 22 (5.30%) related to general conspiracy, and 121 (23.85%) related to conspiracy to commit specified offenses other than material support discussed below. In cases other than conspiracy to give material support, an agreement to commit an offense is a fundamental requirement, which by definition means that the growing phenomenon of the solo actor or “lone wolf” cannot be charged with that act must be has been the subject of much debate, and includes “an act sufficiently proximate to the intended crime” or “an act which in the ordinary course of events would result in the commission of the target crime except for the intervention of some extraneous factor,” or “an act of such a nature that it is itself evidence of the criminal intent with which it is done,” or “an act or omission constituting a substantial step in a course of conduct planned to culminate in [the actor’s] commission of the crime.” See WAYNE R. LAFAVE, 2 SUBST. CRIM. L., § 11.4 (West’s Key Number Digest, 2d ed. 2011).

70 See e.g. N.Y. PENAL §420.20 (Consol. 2009), (“1. A person is guilty of making a terroristic threat when with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she threatens to commit or cause to be committed a specified offense and thereby causes a reasonable expectation or fear of the imminent commission of such offense.”).

71 One recent example of this is the conviction of Abu Ghaith for conspiracy to kill Americans and for providing material support to terrorists, see Benjamin Weiser, Jurors Convict Abu Ghaith, Bin Laden Son-in-Law, in Terror Trial, N.Y. TIMES, (Mar. 26, 2014), http://www.nytimes.com/2014/03/27/nyregion/bin-ladens-son-in-law-is-convicted-in-terror-trial.html?r=0; Also see Daphne Eviatar, Bin Laden Relative Could Be Held Responsible for Deaths of Thousands, HUFFINGTON POST, (Mar. 21, 2014), http://www.huffingtonpost.com/daphne-eviatar/bin-laden-relative-could_b_5008736.html, (demonstrating that the breadth of conspiracy law. In this case it will “make a Kuwaiti preacher who made a handful of speeches for al Qaeda over a few short months in Afghanistan personally responsible for the deaths of thousands of people killed long before he ever came on the scene.”).

72 ROBIN SIMCOX & EMILY DYER, AL-QAEDA IN THE UNITED STATES: A COMPLETE ANALYSIS OF TERRORISM OFFENSES, 675, Table 11C, (Henry Jackson Society, 2013).

73 WAYNE R. LAFAVE, 2 SUBST. CRIM. L., supra note 69 at §12.

74 Reported numbers of lone wolves vary, e.g. In the United States there were 30 such cases between 1968 and 2007 (Ramon Spaaij, The Enigma of Lone Wolf Terrorism: An Assessment, 33 STUDIES IN CONFLICT AND TERRORISM 854, 859 (2010); Clark McCauley, Sophia Moskalenko & Benjamin Van Son, Characteristics of Lone-Wolf Violent Offenders: a Comparison of Assassins and School Attackers, 7 PERSPECTIVES ON TERRORISM, 4,5 (2013) citing CHARLES A. EBY, THE NATION THAT CRIED LONE WOLF:
conspiracy. Prosecutors can arrest suspects at a fairly early stage in the commission of an offense, provided that the relevant statute is sufficiently specific and certain elements of the agreement between parties exist. 75

The material support statutes 76 provide another example where arrests can be made on a showing of probable cause that early pre-crime activity has occurred. Violation of material support statutes resulted in 100 out of 415 Al-Qaeda related convictions (24.09%) between 1997 and 2012. 77 These laws are so broadly drafted that “they can be employed to incarcerate individuals preventively, without proving that they have undertaken any actual harmful conduct.” 78 18 U.S.C. §2339A 79 focuses on links

76 18 U.S.C. §2339A, §2339B.
77 ROBIN SIMCOX & EMILY DYER, AL-QAEDA IN THE UNITED STATES: A COMPLETE ANALYSIS OF TERRORISM OFFENSES, supra note 72 at 675, Table 11C. The data also shows that of 100 convictions for material support between 1997 and 2012, 24 were for providing material support to terrorists and 34 were for conspiring to provide material support to terrorists pursuant to §2339A, and 20 were for proving material support to a designated terrorist organization, and 22 were for conspiring to provide material support to a designated terrorist organization pursuant to §2339B.
78 David Cole, Out of the Shadows: Preventive Detention, Suspected Terrorists, and War, supra note 63 at 723-724 (2009). See also Robert M. Chesney, Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism, supra note 75 at 479, (showing that “§2339A is so broad that “it may impose a form of inchoate criminal liability that might otherwise exceed the reach of federal law.”).
79 18 U.S.C. §2339A: “(a) Offense.--Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A, or 2442 of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123(b) of title 49, or any offense listed in section 2332b(g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.
(b) Definitions.--As used in this section--
between an individual and specified crimes, and §2339B\textsuperscript{80} centers on links between an individual and specified organizations.\textsuperscript{81}

\textsuperscript{80} 18 U.S.C. §2339B: (a) Prohibited activities.--

(1) Unlawful conduct.--Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d) (2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989)…

(h) Provision of personnel.--No person may be prosecuted under this section in connection with the term “personnel” unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.

The scope of §2339A is vast. It has no connection to foreign terrorist organizations, but instead is predicated on forty-seven offenses (which are not necessarily terrorism crimes). These include bombing a place of public use, a government facility or a transportation system, or killing, injuring persons in the United States, or using a dangerous weapon in a way that involves conduct that transcends national boundaries. It is irrelevant whether or not the predicate offense occurs: all that is required is that the suspect provided support with the intent or knowledge that the support would be used for, or in preparation for, the predicate offense, as well as conspiracy to commit the predicate offense. This means that §2339A enables prosecutors to intervene in and disrupt nefarious activity at a very early stage. It covers both the activity of solo actors, who can provide themselves as personnel, as well as conduct amounting to mere preparation, provided that there is some connection with a predicate offense.

Chesney describes §2339A as having “quietly emerged as perhaps the single most important charge in post 9/11 prosecutions.” It has become “a very attractive and useful charge from the point of view of prevention, but by shifting the point of potential prosecutorial intervention further back along the continuum between thought and deed, the statute entails a variety of offsetting costs.” Those costs include the possibility of

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82 Id. at 475.
84 18 U.S.C. §2332(b).
85 Robert M. Chesney, Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism, supra, note 75 at 479-80.
88 Id., at 493.
false positives where liability turns mainly on the intentions of the suspect and where opportunities to gather further intelligence and evidence are lost once a suspect is arrested and charged.\textsuperscript{89}

§2339B criminalizes supporting the acts of others without establishing any sort of involvement by the suspect in a terrorist act, other than a suspect’s provision of material support to a foreign terrorist organization. Thus §2339B will not apply to the activities of an unaffiliated suspect so from one point of view, it is narrower in scope than §2339A. However, certain activities covered by §2339B have been subject to challenge for over breadth as well as violation of the First Amendment.\textsuperscript{90} At the time of writing, some examples of the type of activities that constitute material support, include speech advocating lawful and non-violent activity with a foreign terrorist organization,\textsuperscript{91} and translating and disseminating pro-jihadist materials.\textsuperscript{92}

Other than detention under the LOAC (which is the subject of Chapter 7) several other “devices” are used to detain certain groups of suspects preventatively.

6.2.1 Material Witness Statute\textsuperscript{93}

This statute is used to preventively detain people who have not committed a crime and who are not even suspected of committing a crime. The power dates from 1789.\textsuperscript{94} It has been described as “the most purely preventive detention authority within the criminal

\textsuperscript{89} Id.
\textsuperscript{90} See e.g. Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).
\textsuperscript{91} Id.
\textsuperscript{93} 18 U.S.C. §3144 (2006), “if the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title.” §3142 authorizes detention.
justice system.” Material witness warrants can be used to arrest and detain persons believed to be material witnesses to a crime if a judicial officer determines that such a person would flee if served with a subpoena to testify at grand jury proceeding or a trial. An order for detention is therefore made solely on the basis that the person might seek to avoid his civic duty of giving evidence. Although probable cause is required for a warrant, the authorities merely have to show probable cause that the person may have information relevant to a criminal investigation and will not respond to a subpoena. Commentators suggest that this is a lower standard than that required to arrest suspected criminals generally. A person can be detained until he or she is required to give evidence, although no material witness may be detained “if the testimony can be adequately secured by deposition, and if further detention is not necessary to prevent a failure of justice.”

Many commentators have criticized the misuse of this statute as a detention tool, because, for example, the Bush Administration failed to call its material witnesses to trial in many cases, and because of the handling of the cases of Jose Padilla, a U.S. citizen,

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95 Adam Klein & Benjamin Wittes, Preventive Detention in American Theory and Practice, supra note 66 at 133.
97 Id.
98 See e.g., Adam Klein & Benjamin Wittes, Preventive Detention in American Theory and Practice, supra note 66 at 138-140; Donald Q. Cochran, Material Witness Detention in a Post 9/11 World: Mission Creep or Fresh Start?, supra note 94 at 4-7; David Cole, Out of the Shadows: Preventive Detention, Suspected Terrorists, and War, supra note 63 at 704; STEPHANIE COOPER BLUM, THE NECESSARY EVIL OF PREVENTIVE DETENTION IN THE WAR ON TERROR, 3 (Cambria Press 2008). Also see below in Section 4.3.2.
99 Padilla was initially detained in May 2002 as a material witness to grand jury proceedings investigating the attacks on 9/11. After being detained as a material witness for a month with access to counsel, he was designated an enemy combatant and detained for three and a half years in military custody, initially with no access to counsel. He was then returned to civilian custody (just days before the government was due to respond to Padilla’s petition for certiorari to the Supreme Court), and tried and convicted of conspiracy to murder, maim and kidnap persons overseas in United States v. Padilla, 2007 U.S. Dist. Lexis 26077 (S.D.
and Ali Saleh Kahlah al-Marri, a citizen of Qatar, but a U.S. resident. Human Rights Watch asserted that after 9/11, the government used the material witness law for reasons other than obtaining testimony of witnesses, such as detaining terror suspects in cases where probable cause to arrest had not been established. Yet the Justice Department’s Office of Professional Responsibility’s inquiry into the use of the material witness law after 9/11 concluded that “the material witness statute was not misused in any of the cases it reviewed.”

One controversial case is that of Abdullah al-Kidd, who was detained in the United States at Dulles Airport, as he was about to board a plane for Saudi Arabia and held for 16 days in federal custody. He was then placed on supervised release for 14 months until the trial of a terror suspect, but was never called as a witness. Al-Kidd issued a complaint seeking damages.

Al-Kidd alleged that the then Attorney General John Ashcroft “authorized federal prosecutors and law enforcement officials to use the material-witness statute to detain

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Footnotes:

100 Al-Marri was initially detained in December 2001 as a material witness to grand jury proceedings investigating the attacks on 9/11. Two months later he was charged with fraud related offenses. Further fraud charges were added a year later. These charges were dismissed in June 2003 and Al-Marri was designated an enemy combatant and he was transferred to military custody, with no access to counsel for a year. He applied for habeas corpus and the denial was appealed all the way to the Supreme Court, but his case was dismissed as moot, because in February 2009 President Obama ordered him to be transferred to civilian custody to face criminal charges. See the line of habeas cases commencing with Al-Marri v. Rumsfeld, 360 F. 3d. 707 (2004).


individuals with suspected ties to terrorist organizations. It was alleged that federal officials had no intention of calling most of these individuals as witnesses, and that they were detained, at Ashcroft's direction, because federal officials suspected them of supporting terrorism but lacked sufficient evidence to charge them with a crime.”

Ashcroft filed a motion to dismiss based on absolute and qualified immunity, which the District Court denied. A divided panel of the United States Court of Appeals for the Ninth Circuit affirmed, holding that the Fourth Amendment prohibits pretextual arrests absent probable cause of criminal wrongdoing, and that Ashcroft could not claim qualified or absolute immunity.

Ashcroft appealed to the Supreme Court. Justice Scalia, writing for the Court, reversed the Ninth Circuit decision and held that there was no violation of the Fourth Amendment:

Because al-Kidd concedes that individualized suspicion supported the issuance of the material-witness arrest warrant; and does not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant; we find no Fourth Amendment violation. Efficient and evenhanded application of the law demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer.

The judgment was focused on the issue of whether Ashcroft could be held accountable. According to Justice Ginsburg,

[t]he word ‘suspicion,’ however, ordinarily indicates that the person suspected has engaged in wrongdoing…Material witness status does not ‘involve[e] suspicion, or lack of suspicion,’ of the individual so identified…This Court's decisions, until today, have uniformly used the term “individualized suspicion” to mean ‘individualized suspicion of wrongdoing.’… The Court's suggestion that the term ‘individualized suspicion’ is more commonly associated with “know[ing] something about [a] crime” or “throwing . . . a surprise birthday party” than with criminal suspects… is hardly credible. The import of the term in legal argot is not

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105 Id., at 2079.
107 Ashcroft v. al-Kidd, supra note 103 at 2083.
genuinely debatable. When the evening news reports that a murder ‘suspect’ is on the loose, the viewer is meant to be on the lookout for the perpetrator, not the witness. Ashcroft understood the term as lawyers commonly do: He spoke of detaining material witnesses as a means to ‘tak[e] suspected terrorists off the street.’

Justice Sotomayor commented: “Whether the Fourth Amendment permits the pretextual use of a material witness warrant for preventive detention of an individual whom the Government has no intention of using at trial is, in my view, a closer question than the majority's opinion suggests.” However, she did not consider that this case presented an occasion to address the proper scope of the material witness statute or its constitutionality. Thus the Court neatly sidestepped the issue of deciding the constitutionality of pretextual arrests of suspected terrorists pursuant to the Material Witness statute.

6.2.2 Immigration laws

Preventive detention pursuant to the immigration detention system affects more people than any other preventive detention regime in the United States. For example, in 2010, almost 392,000 people were held in immigration detention. Aliens can be detained without charge, without a showing of probable cause of any crime, merely to determine their immigration status, including in situations where there are visa

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108 Id., at FN3, (citations omitted).
109 Id., at 2090, (citations omitted).
110 Id.
111 Perhaps the matter will be discussed again if al-Kidd is able to progress in his claims against the United States and two FBI agents. See Robert Chesney, Victory for al-Kidd in material Witness Civil Suit, LAWFARE, (Jun. 28, 2012), http://www.lawfareblog.com/2012/06/victory-for-al-kidd-in-material-witness-civil-suit/.
112 Adam Klein & Benjamin Wittes, Preventive Detention in American Theory and Practice, supra note 66 at 140.
violations.\textsuperscript{114} Dan Stigall and David Cole have separately highlighted the invidious position of immigration detainees as regards to, for example, not being informed of rights, the use of secret information, difficulty in gaining access to lawyers, and obtaining bail.\textsuperscript{115} In 2009 Amnesty International argued that many of the conditions of immigration detention breach Article 9 ICCPR.\textsuperscript{116} In 2009 the U.S. Department of Homeland Security and Immigration and Customs Enforcement pledged to transform immigration detention by “shifting it away from its longtime reliance on jails and jail-like facilities, to facilities with conditions more appropriate for the detention of civil immigration law detainees.” However, Human Rights First reported in 2011 that little improvement could be discerned.\textsuperscript{117}

Aliens can be detained for a ninety-day removal period. This period can be extended, if the alien has been ordered removed and the attorney general has certified the alien to be a risk to the community or unlikely to comply with the removal order. In the event of connections with terrorism, the period can be even longer.\textsuperscript{118} In 2011 Klein and


Wittes noted that the period of detention can range from ninety to 180 days, and asylum seekers can be detained for an average of 102 days up to a year.

However, the detention cannot be indefinite. In Zadvydas v. Davis the Supreme Court held that “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.” Further, the Court noted that Congress had “doubted the constitutionality of detention for more than six months,” and it recognized that period as a limit on detention. This did not mean that every alien had to be necessarily released after six months, rather, “an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.”

The case of Ibrahim Turkmen is an example of the use of immigration law as a pretext to detain a terror suspect. He and seven non-U.S. citizens of Middle Eastern, South Asian or North African origin, were arrested after 9/11 on alleged immigration violations and treated as “of interest” to the government’s terrorist investigation. They were detained under a blanket “hold-until-cleared” policy, pursuant to which they were held without bond until cleared of terrorist ties by the FBI. Six of the detainees were Muslim and two were Hindu. They claimed inter alia that immigration violations were

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119 Adam Klein & Benjamin Wittes, Preventive Detention in American Theory and Practice, supra note 66 at 151.
120 HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS, TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM – A TWO YEAR REVIEW, supra note 117 at 13.
122 Id. at 701. The Court went on to say “After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the “reasonably foreseeable future” conversely would have to shrink. This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.”
123 Id.
used “as a cover, as an excuse” to investigate whether they were tied to terrorism, and that their excessive detention violated their Fourth and Fifth Amendment rights. The District Court rejected these claims.\footnote{124}

The Second Circuit confirmed that ruling and held that the detention was supported by the Immigration Judge’s findings of removability, which constituted “a good deal more than probable cause.”\footnote{125} The government had shown an “objectively reasonable belief that the detentions were authorized.”\footnote{126} Furthermore, no authority clearly established “an equal protection right to be free of selective enforcement of the immigration laws based on national origin, race, or religion at the time of plaintiffs' detentions.”\footnote{127} The approach of the courts indicates deference to the executive branch of government, and an unwillingness to evaluate the underlying counter-terrorism policy in place at that time.

\subsection*{6.2.3 Section 412 USA PATRIOT Act\footnote{128}}

This provision empowers the Attorney General unilaterally to detain aliens for seven days without charge, if he certifies that he has reasonable grounds (as opposed to probable cause) to believe that the person is a national security threat. This is another pure form of preventive detention of aliens only, but there is no equivalent law to deal with the homegrown U.S. citizen/national/resident terrorist threat. The detainee has a right of appeal to the U.S. Court of Appeals for the District of Columbia Circuit. After seven days, either charges must be filed or deportation proceedings begun. If removal is

\begin{footnotes}
\item[125] Turkmen v. Ashcroft, 589 F. 3d 542, 549 (2d Cir. 2009), \textit{(relying on and citing} Whren v. United States, 507 U.S. 806, 813 (1996): “a law enforcement official’s actual motivation for the Fourth Amendment seizure of a person is constitutionally irrelevant if the seizure is supported by probable cause.”\textit{)}.
\item[126] Id., at 550.
\item[127] Id.
\item[128] USA PATRIOT Act, \textit{supra} note 34 at §412.
\end{footnotes}
unlikely in the foreseeable future, the alien can still be detained if the attorney general re-certifies the national security risk every six months, thus raising the prospect of indefinite detention. Two of the most significant deficiencies of the section are that it allows indefinite detention on what may be called a technicality (the automatic re-certification as described above) and that it fails to provide adequate oversight from an authority outside the executive branch. However, the section has never been used, and thus has not been judicially tested.

### 6.2.4 Detention in a state of emergency

The laws of many countries permit the possibility of relaxing the obligation to guarantee *inter alia* the right to liberty when a state of emergency exists, subject to satisfying a number of criteria. International human rights jurisprudence sets the boundaries for preventive detention provisions found in domestic laws in times of actual and imminent terror attacks. The United States has a very limited version of this tool in the form of the Suspension Clause, which “implies a *de facto* preventive detention authority in very limited circumstances.” The Suspension Clause permits Congress to suspend the writ of habeas corpus in “times of Rebellion or Invasion” where public safety requires it. If the writ of habeas corpus is suspended, this means that anyone detained

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131 *This is discussed extensively in Section B.*

132 U.S. Const. art. 1 §9, cl. 2.

133 *David Cole, Out of the Shadows: Preventive Detention, Suspected Terrorists, and War,* supra note 63 at 702.
during this time would not be able to challenge detention.134 This power has been rarely invoked.135

6.3 Summary

If law enforcement officers want to detain persons to forestall terrorist acts, the scope to do so is extremely limited.136 Other than in a very small category of cases involving special or exigent situations,137 a suspect may not be arrested and detained, absent probable cause that a crime has been or is being committed.

The definition of probable cause has been discussed in many Supreme Court decisions138 and the difficulty of giving it a precise meaning has been debated in many scholarly articles.139 However, in addition to the difficulty of knowing exactly what probable cause means, it only applies when a crime has been or is being committed, or is being attempted. Unless the definition of the crime is sufficiently broad, arrest and prevention of a terrorist act may not be possible in cases where the only acts are those of preparation or planning, especially where a lone actor is involved.

Domestic criminal law does not permit terror suspects to be detained without charge for more than forty-eight hours. Both the current and previous Administrations

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134 Id.
135 Id.
136 A different set of problems are presented when a terror suspect is a United States citizen and is outside the United States, see DANIEL BYMAN & BENJAMIN WITTES, TOOLS AND TRADEOFFS: CONFRONTING U.S. CITIZEN TERRORIST SUSPECTS ABROAD, BROOKINGS INSTITUTION PRESS, (Jun. 17, 2013), http://www.brookings.edu/research/reports/2013/07/23-us-citizen-terrorist-suspects-awlaki-jihad-byman-wittes, describing the different options open to the U.S. government: targeted killing, capturing abroad and criminal prosecution in U.S. federal court; military detention; prosecution in the foreign country; and toleration.
139 See e.g. Craig S. Lerner, The Reasonableness of Probable Cause, 81 TEX. L. REV. 951 (Mar. 2003); Bruce K. Antkowiak, Saving Probable Cause, 40 SUFFOLK U. L. REV. 569 (2007); Thomas Y. Davies, The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment “Search and Seizure” Doctrine, 100 J. CRIM. L. & CRIMINOLOGY 933, 1009 (Summer 2010).
have employed a number of devices in order to detain people without charge for longer than forty-eight hours. The Bush Administration stretched laws relating to immigration and material witnesses to achieve this end. However, immigration law did not assist if the suspect was a U.S. citizen, and some connection to a crime committed by someone (albeit tenuous) was required in order to use the material witness law. These devices are deficient from the human rights perspective, in that they do not afford adequate due process. In addition, the Bush and the Obama Administrations have employed another device: that of the LOAC as the framework to detain indefinitely persons categorized as some sort of “combatant.” This is the subject of the next chapter.
CHAPTER 7 – The United States – Part 2

7.1 Introduction

In the immediate aftermath of 9/11 the United States “almost singularly asserted the authority to detain non-battlefield terrorism suspects” in accordance with the law of armed conflict (LOAC), by defining them as enemy combatants, or unprivileged enemy belligerents. Both before and since the attacks on 9/11, perpetrators or suspects have been arrested within domestic criminal law on suspicion of al-Qaeda-inspired attacks (or any other terror attacks) that have occurred or are being planned to take place on U.S. soil, or against U.S. interests overseas. Outside of Afghanistan and Iraq in the case of on-the-battlefield detentions, these persons were treated as criminals and terrorists, as opposed to participants in an armed conflict.

This Chapter examines the preventive detention of a discrete group of persons, held under the LOAC in the context of what used to be called “the Global War on Terror”

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1 An earlier version of this chapter appears in Diane Webber, Preventive Detention in the Law of Armed Conflict: Throwing Away the Key? 6 J. NAT’L SEC. L. & POL’Y 167 (2012).
2 Monica Hakimi, International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide, 40 CASE W. RES. J. INT’L L. 593, 626 (2009). However, Israel uses administrative detention according to LOAC to an extent, see Chapter 4 infra.
3 See e.g. Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004), (discussing the meaning of the term enemy combatant: “There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the "enemy combatant" that it is seeking to detain is an individual who, it alleges, was "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged in an armed conflict against the United States"
(A) has engaged in hostilities against the United States or its coalition partners;
(B) has purposefully and materially supported hostilities against the United States or its coalition partners; or
(C) was a part of al Qaeda at the time of the alleged offense under this chapter.”).
and is now termed as “Overseas Contingency Operations” or efforts to “counter violent extremism,” or simply a war against al-Qaeda and its affiliates. To put the issue into context, 154 persons were in LOAC detention in Guantánamo as at mid-March 2014, and between March 2012 and February 2013, 3,397 persons were transferred from U.S. custody to the Afghan National Detention facility in Parwan. U.S. forces formally handed Bagram prison over to the Afghan authorities in March 2013. Yet it appears

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13 Id. See also: UK confirms extended detention of up to 90 Afghans, BBC NEWS, (May 29, 2013), http://www.bbc.co.uk/news/uk-22699473; United Kingdom forces have been holding between 80 and 90 Afghan nationals for up to 14 months without charge at Camp Bastion in Helmand province. Also see Kim Sengupta, Secret detention row forces UK to hand over suspects to Afghans, THE INDEPENDENT, (May 29, 2013), http://www.independent.co.uk/news/uk/ukcrime/secret-detention-row-forces-uk-to-hand-over-suspects-to-afghans-8635471.html; The British Defense Secretary said the U.K. was working to try to ensure safe conditions for handing the detainees over to the Afghan system.
that not all the detainees have been handed over. An unspecified number of Afghan nationals, and 53 non-Afghans remain in U.S. custody.

Since President Obama has been in office only two off-the-battlefield LOAC detentions have taken place, of Ahmed Warsame and Abu Anas al-Libi, mentioned in Chapter 6. With only these two detentions in the last four years, and an increased penchant by the current Administration for targeted killing of terror suspects, can it be inferred that going forward the issues relating to off-the-battlefield LOAC detention might only be relevant for those persons who were detained during the Bush Administration? President Obama has asserted that as a matter of policy, “the preference of the United States is to capture terrorist suspects.” Thus even if the United States uses military action to “clear out al-Qaeda strongholds” in areas such as Somalia, Yemen or Mali, that action perhaps might involve detention, and preventive detention will remain relevant. However, irrespective of what happens in the future, a number of people are still detained, and for them the issues are live and important.

Much debate has focused on the appropriate legal framework for preventive detention. Should terrorists be treated as criminals, using traditional criminal law

\underline{15} See e.g. Daniel Klaidman, \textit{Kill Or Capture}, 119 (Houghton Mifflin Harcourt 2012).


methods of detection, interrogation, arrest, and trial? By contrast, should suspected terrorists be treated as though they were involved in an armed conflict, which would involve detention and trial according to a completely different set of rules and procedures? How should those two models be balanced?

In traditional wars between states, the choice of law is likely to be fairly clear-cut. However, as discussed more fully below, while the U.S. continues its battle to counter violent extremism, neither model appears to be a perfect fit to deal with twenty-first century asymmetric terrorism.

Other than the framework problem, other core issues about the LOAC model include questions relating to duration of the conflict, including how to define the point when conflict ends, the process of status adjudication, and release, location of capture, and nationality of detainees. Most of the attention of the courts has been directed at detainees at Guantánamo Bay, but this chapter also examines the status of some detainees at Parwan, Afghanistan (formerly held at Bagram), and questions the suitability of the current LOAC model for the U.S. to detain suspected terrorists in the future, both within and outside of Guantánamo, off-the-battlefield.

This chapter argues that over a decade after 9/11, the law dealing with detention is still unclear. The form of preventive detention of suspected terrorists that is deemed necessary by the U.S. government does not fit within the current domestic U.S. criminal law framework or the U.S Constitution; hence the reliance on the LOAC.

The following analysis examining the detention of this discrete group of persons will demonstrate that regardless of whether the LOAC framework is appropriate in the

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19 See Chapter 6 infra.
20 See below and Chapter 1 infra.
context of terrorism, its procedures are flawed and inadequate from a human rights perspective. Irrespective of whether this discrete group is labeled as combatant or terrorist, the rule of law requires that the governing law must adequately protect their fundamental human rights.\(^{21}\) This includes the right to liberty. The current state of the LOAC does not provide an adequate blueprint to deal with either current or future detention challenges.

LOAC derives from two sources: international treaties,\(^{22}\) and customary international law.\(^{23}\) Opinions differ as to the extent of the application of human rights law. Europeans, the International Committee of the Red Cross (ICRC), the International Court of Justice (ICJ), and human rights activists maintain that human rights law “always applies, hand in hand with the LOAC on the battlefield.”\(^{24}\) The view of the United States is that human rights law does not, or should not, apply on the battlefield. In the event of overlap, the LOAC will trump international human rights law (IHRL),\(^{25}\) and on the battlefield (in international armed conflicts) the LOAC will apply to the exclusion of

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\(^{24}\) Id. at 24. See also HRC Opinions adopted by the Working Group on Arbitrary Detention at its sixty-sixth session, 29 April-3 May 2013, No. 10/2013 (United States of America), Communication addressed to the Government, Concerning Mr. Obaidullah, ¶¶24, 31, 32 (A/HRC/WGAD/2013/10 (June 12, 2013), citing Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, p. 639 at ¶ 77: Article 9(1) and (2) ICCPR applies in principle to any form of detention, “whatever its legal basis and the objective being pursued.”


Chapter 7 – LOAC

April 30, 2014
IHRL. However, in non-international armed conflicts, between a government and armed groups, very few GC provisions apply, and IHRL prevails. For example, IHRL principles are found in GC IV. When there are gaps in treaty law, customary international law applies.

Conflicts arising between two or more of the parties to the GCs are known as international armed conflicts and the rules of the GCs and AP I apply as they did during the brief period when the United States participated in the war in Afghanistan between October and December 2001.

Thereafter, the status of the conflict involving the U.S. has generally not been that of an international armed conflict, other than the first stages of the conflicts in Afghanistan and Iraq. Some of the later stages of the U.S. presence in Afghanistan and Iraq can fit into the traditional understanding of a non-international armed conflict, with the United States supporting the respective current governments in their fight against

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26 Id., at 25. Solis notes that Europe holds the contrary view.
27 Id., e.g., Art. 5, dealing with derogations has echoes of Art. 15 ICCPR, and AP I, Arts. 72 and 75 reflect human rights law principles. See also Section C infra.
29 GCs, supra note 22, at art 2. For further definition of Prosecutor v. Tadic, IT-94-1, Appeals Chamber Decision on Jurisdiction, (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995) ¶70: “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups within a State.”
30 Non-international armed conflicts are sometimes hard to define. See e.g. Prosecutor v. Tadic, IT-94-1-T, Judgment, (Int'l Crim. Trib. for the Former Yugoslavia, May 7, 1997) ¶562: the test for the existence of a non-international armed conflict “focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, at a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.” Also see Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9* (Jul. 17, 1998): stating that non-international armed conflicts “are not situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.” Rather, they are “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups;” Also see UN Human Rights Council, Fourteenth Session, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UNGA, A/ HRC/14/24/Add.6, ¶52 (May 28, 2010), setting out further tests for identifying non-international armed conflicts.
insurgents, but waging a “war on terror” or “countering violent extremism” around the world wherever al-Qaeda may be, does not.\textsuperscript{31} As terror attacks led, or inspired by, al-Qaeda are not carried out by states (and parties to the GCs), the attacks cannot be classified as international armed conflicts either.

The relevance of the distinction, for the purpose of this dissertation, is that in international armed conflicts, all of the GCs and APs apply. By contrast, in non-international armed conflict, only Common Article 3 of the GCs (so named because the same article appears in all four GCs in the same place) and perhaps AP II apply.\textsuperscript{32} Common Article 3 is a relatively short statement prescribing humane treatment and listing a number of prohibited acts.\textsuperscript{33} It does not mention detention.

Jelena Pejic of the ICRC states that the basis for, and standards of, detention are governed by AP I, Common Article 3, AP II and customary international law, but these provisions do not set out the rights sufficiently.\textsuperscript{34} In reviewing the standards for preventive detention under the name of “internment” or “administrative detention” of members of armed groups, the ICRC discusses the rights of unlawful combatants, as well as participants in non-international armed conflicts. Although the U.S. has not ratified AP I, it accepts that much of AP I has become part of customary international law.\textsuperscript{35} AP I merely provides for humane treatment “as a minimum,”\textsuperscript{36} and gives detainees the right to be informed promptly of the reasons for detention, and the right, except where the detention is for “penal offences,” to be released as soon as possible, or at least “as soon as

\begin{itemize}
\item \textsuperscript{31} GARY D. SOLIS, THE LAW OF ARMED CONFLICT, supra note 23, at 106.
\item \textsuperscript{32} Id., at 153.
\item \textsuperscript{33} GCs, supra note 22, at art 3.
\item \textsuperscript{34} Jelena Pejic, Procedural Principles and Safeguards for Internment/ Administrative Detention in Armed Conflict and Other Situations of Violence, 87 INT’L REV. RED CROSS 375, 377 (2005).
\item \textsuperscript{35} GARY D. SOLIS, THE LAW OF ARMED CONFLICT supra note 23 at 134-135.
\item \textsuperscript{36} AP I, supra note 22 at art. 75.
\end{itemize}
the circumstances justifying the . . . detention . . have ceased to exist.” Pejic points to AP I Article 72, which states that the provisions of AP I are additional to GC IV and international human rights law.

In the case of non-international armed conflicts, Common Article 3 contains no language to assist regulation of detention, other than the guiding principle of humane treatment. Nor does AP II (which the U.S. has also not ratified, but which President Obama hopes soon will be). AP II provides for humane treatment, as a minimum, and the preamble reminds readers that human rights laws and treaties offer a basic protection for individuals. Yet it seems that the fundamental provisions of GC III are replicated in Common Article 3 and AP II.

GC III provides for detention of prisoners of war during international armed conflicts. Article 21 states that “prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.” Additionally, Article 118 permits the detention of prisoners of war “for the duration of hostilities.” In two places, GC IV deals with the rights of detained civilians, also in the context of international armed conflicts. Article 42 allows for internment “if the security of the Detaining Power makes it absolutely necessary.” Article 43 sets out a procedure for prompt review after

37 Id. at art. 75(3).
38 Jelena Pejic, Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence supra note 34 at 378.
40 AP II, supra note 22 at arts. 2, 4, 5, 6.
41 Jelena Pejic, Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence supra note 34 at 378-379.
43 GC III, supra note 22 at art. 21.
44 Id., at art. 118.
detentions, followed by a minimum of twice yearly further reviews. Article 78 authorizes internment if an “Occupying Power” considers it necessary for “imperative reasons of security.” There is a right of appeal and periodic further reviews.

ICRC experts comment that imperative reasons of security do not include information gathering, nor must detention be used as an alternative to criminal prosecution. They found that there is a power to capture persons deemed to pose a serious security threat, and such persons may be detained as long as they continue to pose a threat. They argue that neither the LOAC nor international human rights law provide an explicit legal basis for internment in non-international armed conflict – states should look to their own domestic law, provided it complies with the LOAC and international human rights law.

7.2 The U.S. Approach to Combating Terrorism: Detention at Guantánamo

The shift after the events of 9/11 from the traditional criminal law approach in terrorism cases to LOAC may have occurred for several reasons. United States’ domestic law does not generally permit detention to forestall terrorist attacks other than in a very few specific situations as discussed in Chapter 6. U.S. domestic criminal law does not permit detention to incapacitate terrorists, disrupt terror plots, or gather

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46 Id. at 863.
47 Id. at 870. Many scholars have commented that international armed conflict procedures should apply to non-international armed conflicts. See e.g. Ashley S. Deeks, Administrative Detention in Armed Conflict, 40 CASE W. RES. J. INT’L L. 403, 434 (2009), arguing that the core procedures in GC IV provide an excellent basis for detention; Ryan Goodman, The Detention of Civilians in Armed Conflict, 103 AM. J. INT’L L. 48, 50 (2009), arguing that GC IV contains the most closely analogous rules concerning the detention of civilians, and that it constitutes the best approximation of IHL rules when interpretive gaps arise. Contra see John B. Bellinger III & Vijay M. Padmanabhan, Detention Operations in Contemporary Conflict: Four Challenges for the Geneva Conventions and Other Existing Law, 105 AM. J INT’L L. 201, 209 (2011), arguing that the rules relating to international armed conflicts do not address the full range of detention issues in conflicts with non-state actors.
48 Allison M. Danner, Defining Unlawful Enemy Combatants: A Centripetal Story, 43 TEX. INT’L L. J. 1, 8 (Fall 2007).
information.\textsuperscript{49}

Immediately after the attacks “the Bush Administration rushed to the judgment that America’s old approach to fighting terrorism, which treated it as a crime like any other, was inadequate for the post 9/11 world. Almost without discussion, it was agreed that a new kind of enemy required new tactics.”\textsuperscript{50} The Administration immediately went onto a war footing.

On September 12, the U.N. Security Council passed a resolution recognizing the right of the U.S. to self-defense in response to the attacks, which it described as a “threat to international peace and security.”\textsuperscript{51} On September 18, Congress passed the Authorization for Use of Military Force (AUMF), which permitted the President to:

\begin{quote}
use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.\textsuperscript{52}
\end{quote}

Al-Qaeda was quickly deemed the organization that had masterminded the terror. The United States believed that al-Qaeda was based in Afghanistan, harbored by the Taliban.\textsuperscript{53} On October 7, the United States invaded Afghanistan,\textsuperscript{54} where efforts were directed against the Taliban, who at that time were regarded as the de facto government. By December 2001, the Taliban were defeated, and the United States and allies joined forces with the Northern Alliance, who gained control of the country.

\begin{flushright}
\textsuperscript{50} JANE MAYER, \textit{THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS} 34 (2008).
\end{flushright}
The Bush Administration contended that the GCs did not apply to al Qaeda or the Taliban. The Administration maintained that view until disabused of it by the Supreme Court in *Hamdan*. The Court held that Common Article 3 applied to the conflict with al-Qaeda, i.e. treating the conflict as a non-international armed conflict. Despite denying the applicability of the GCs to the terrorists, the Administration wanted to treat the conflict as an international armed conflict for the purposes of picking up and detaining terror suspects. The Administration believed that it would then have the authority to hold the suspects until the cessation of hostilities – a power normally applicable to POWs.

In *Hamdi*, which concerned the capture of a U.S. citizen on-the-battlefield during the international armed conflict with Afghanistan, the Supreme Court held that “indefinite detention for the purpose of interrogation is not authorized” in the AUMF, and “[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities.” Furthermore, the Court’s understanding of the laws of war “may unravel” if “the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war.”

Many circumstances indicate that this conflict is totally different from a traditional war, not least the debate as to whether the actors are combatants, who can claim the POW privilege, or merely terrorists.

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57 GC III, *supra* note 22, at art. 118.
59 *Id.*, at 520-521.
60 *Id.*
61 See e.g. Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 56 (Cambridge University Press, 2010), arguing that al Qaeda does not merit the status of POWs because they cannot meet the four requirements of GC III art. 4A. These are “(a) that of being commanded
7.3 Statutory power to detain: AUMF, NDAA 2012, NDAA 2013 and NDAA 2014

Where does the U.S. power to detain come from? Where are the rights, obligations and procedures found in the law? It seems clear that the power derives solely from U.S. domestic law. In *al-Bihani v. Obama* the U.S. Court of Appeals for the D.C. Circuit stated “the international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for the U.S. courts.” Thus the power to detain starts with the AUMF, which does not mention detention. However, in 2004, in *Hamdi v. Rumsfeld*, which concerned a U.S. citizen who had been detained for two years on U.S. soil as an enemy combatant, a plurality of the Supreme Court held that the AUMF authorized the detention of U.S. citizens.

The Obama administration adopted a new standard for the government’s authority to detain in early March 2009. Instead of relying on the Commander-in-Chief authority, the Administration claimed to “draw on the international laws of war.” That standard was set out in a filing with the District Court for the District of Columbia, and was still tied to the perpetrators of the 9/11 attacks, as well as persons “who were part of, or

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by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.”

62 Al-Bihani v. Obama, 590 F.3d 866, 871 (2010). In Al-Bihani v Obama, 619 F.3d 1, 2 (2010), the Court declared the comments in the earlier case as dicta and denied an application to rehear *en banc* “to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel's discussion of that question is not necessary to the disposition of the merits.” This bare determination was accompanied by lengthy concurring judgments opining on the role of international law in U.S. jurisprudence.


substantially supported, Taliban or al-Qaida forces or associated forces.”

On March 7, 2011, President Obama signed Executive Order 13,567, *Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force.* It set out a scheme of periodic review for persons detained in Guantánamo who had already been “designated for continued law of war detention” or “referred for prosecution, except for those detainees against whom charges are pending or a judgment of conviction has been entered.” At the same time, the White House Press Office issued an accompanying fact sheet which emphasized, among other things, the continued determination to “complete the difficult challenge of closing Guantánamo.”

However, Congress has persisted in blocking the transfer of Guantánamo detainees into the United States, either for prosecution or long-term detention, although there are slight signs of some movement in the current impasse with a provision in the NDAA of 2014 calling for a report analyzing what the legal status of Guantánamo detainees might be if they were transferred to the United States.

Most other issues in the Executive Order have been addressed in the legislation that followed but one other matter remains. In the White House fact sheet, under the heading of “Support for a Strong International Framework,” the Administration urged

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66 *Id.*, at §1(a).
69 *The White House, Office of the Press Secretary, Fact Sheet: New Actions on Guantánamo Policy*.
the Senate to approve the adoption of AP II (which has detailed humane treatment standards and fair trial guarantees in non-international armed conflicts) and stated that the U.S. government chooses “out of a sense of legal obligation” to treat the principles set forth in Article 75 of AP I as applicable to any person it detains in an international armed conflict, and it expects all other nations to adhere to these principles as well. However, it appears that the White House subsequently decided that Article 75 would not apply to Al Qaeda or the Taliban.

Numerous bills relating to detention followed swiftly after the Executive Order and after much heated debate and many amendments to the sections concerning detention, the National Defense Authorization Act (NDAA) of 2012 was signed into law on December 31, 2011.

Although the NDAA 2012 was “intended to codify the present understanding of

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71 This subject generated scholarly debate due to the fact that the White House statement purports only to refer to international armed conflicts, yet in Hamdan the Supreme Court determined that the U.S. conflict with al Qaeda is a non-international armed conflict. See, e.g., John Bellinger, Obama’s Announcements on International Law, LAWFARE (Mar. 8, 2011), http://www.lawfareblog.com/2011/03/obamas-announcements-on-international-law/; Jack Goldsmith, Why I Think the Obama Administration Did Not Extend Article 75 to Terrorists, LAWFARE (Mar. 11, 2011), http://www.lawfareblog.com/2011/03/why-i-think-the-obama-administration-did-not-extend-article-75-to-terrorists/; John Bellinger, Further Thoughts on the White House Statement About Article 75 LAWFARE (Mar. 13, 2011), http://www.lawfareblog.com/2011/03/further-thoughts-on-the-white-house-statement-about-article-75/.


73 H.R. 968, 112th Cong. (2011) and H.R. 1540, 112th Cong. (2011), introduced by House Armed Services Committee Chairman Howard “Buck” McKeon (the latter was the bill that became law after much debate and many revisions); S. 1253, 112th Cong. (2011), introduced by Senator Carl Levin; S. 551, 112th Cong. (2011), introduced by Senator John McCain; and S. 553, 112th Cong. (2011), introduced by Senator Lindsey Graham (whose bill replaced an earlier version, S. 3707, that he had introduced in the 111th Congress.).


75 NDAA 2012, supra note 8.
the detention authority conferred by the AUMF, as interpreted and applied by the Executive and D.C. Circuit,” 76 the Act does not address many issues. These include the full scope of detention authority, particularly the circumstances in which U.S. citizens may be detained as enemy belligerents, and the extent of protections available to non-citizens held outside the United States, 77 which are discussed more fully below.

The NDAA of 2013 prohibited the indefinite detention of U.S. citizens and lawful permanent residents. 78 The position of U.S. citizens and permanent residents apprehended abroad was not clarified, nor the position of aliens without permanent resident status who are arrested in the U.S., but these persons were permitted to seek habeas corpus review of their detention and were entitled to the Constitution’s due process rights. 79

Is the AUMF becoming obsolete as terrorist groups have diminishing connections to al-Qaeda? 80 Bizarrely, the Department of Defense is reluctant to disclose a list of exactly who it considers to be affiliates of al-Qaeda, on the grounds that revealing such a

77 Id.
(1) by re-designating subsection (b) as subsection (c); and
(2) by inserting after subsection (a) the following:
‘‘(b)(1) An authorization to use military force, a declaration of war, or any similar authority shall not authorize the detention without charge or trial of a citizen or lawful permanent resident of the United States apprehended in the United States, unless an Act of Congress expressly authorizes such detention.
‘‘(2) Paragraph (1) applies to an authorization to use military force, a declaration of war, or any similar authority enacted before, on, or after the date of the enactment of the National Defense Authorization Act For Fiscal Year 2013.
‘‘(3) Paragraph (1) shall not be construed to authorize the detention of a citizen of the United States, a lawful permanent resident of the United States, or any other person who is apprehended in the United States.’’
list “might cause damage to national security.”81 One view is that Congress should decide on “general statutory criteria for presidential uses of force against new terrorist threats, and requires the executive branch through a robust administrative process to identify groups that are covered by that authorization of force,” using a listing system similar to that currently in force for identifying foreign terrorist organizations.82 This proposal acknowledges that the listing approach might appear to codify permanent war, but offers suggestions to mitigate that danger, involving using very specific limiting language and having a sunset provision.83

By contrast, “it is simply not evident that any particular emerging terrorist groups—or self-radicalized individuals—pose the kind of threat to the United States that al-Qaeda posed on September 11, i.e., one that cannot be met with existing tools, but instead requires an open-ended authorization of military force and the invocation of the laws of armed conflict.”84 Nor do threats alone trigger armed conflict.85 A new AUMF is unnecessary and unwise.86 Alternative proposals have been suggested: that the terms of the current AUMF be clarified so that authorities and the public know which groups are covered by its terms;87 or that a sunset provision be introduced that is tied to the

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withdrawal from Afghanistan;\(^88\) or that the current AUMF should be repealed and replaced by an authorization linked to al-Qaeda in the Arabian Peninsula, if the situation merits it.\(^89\)

Introducing sunset provisions highlights the problem of what to do with prisoners held in Guantánamo that cannot be prosecuted but are too dangerous to release. Reports differ as to whether seventy-one\(^90\) or forty-six\(^91\) persons are currently in this category. Explaining which groups are covered by the current AUMF does make sense, but only if the type of threat now facing the United States is one that could be interpreted as reaching the level of war, as defined in international law.

7.3.1 Detention authority

The detention authority provisions in the NDAA 2012, most of which remain in place as at April 2014, have been subjected to an excellent and thorough scrutiny by a number of commentators.\(^92\) In Section 1021, Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the AUMF “includes the authority … to detain covered persons … pending disposition under the law of war.”\(^93\)

\(^{88}\) Id., at 18.

\(^{89}\) Id., at 19.


\(^{93}\) NDAA 2012, supra note 8 at §1021. For a discussion about the meaning of “under the laws of war,” see Lederman & Vladeck, The NDAA: The Good, the Bad, and the Laws of War – Part I, supra note 92. This section has been challenged as unconstitutional, see Hedges v. Obama, 12 Civ. 331 (S.D.N.Y., May 16,
The definition of “covered persons”\textsuperscript{94} replicates the definition adopted by the Administration in 2009.\textsuperscript{95} For some time the federal courts had been upholding the detention of persons who are part of, or members of al-Qaeda.\textsuperscript{96} This law put “Congress’s stamp on a dubious – and untested – interpretation of military detention authority” by leaving undefined what is meant by “substantial support” and “associated forces,” and raised the question of whether detention of people in these two categories was permitted under LOAC.\textsuperscript{97}

Four alternatives are listed as to “disposition under the law of war:”\textsuperscript{98} trial by military commission; trial by an alternative court or tribunal having lawful jurisdiction (which could be a federal court); transfer to the detainee’s country of origin or any other country; or detention without trial until the end of hostilities.\textsuperscript{99} Yet, linking the duration of detention to the end of hostilities (which is derived from GC III Article 118 and thus is normally applicable in international armed conflicts) is a difficult fit with the cessation of terrorist attacks. Jelena Pejic proposes that a principle based on AP I Article 75.3 offers a more appropriate approach.\textsuperscript{100} AP I Article 75.3 provides that detention should end as soon as the circumstances justifying the arrest, detention, or internment have ceased to

\begin{itemize}
  \item \textsuperscript{94} NDAA 2012, supra note 8 at §1021(b): a covered person is any person who is:
    \begin{enumerate}
      \item A person who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
      \item A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.
    \end{enumerate}
  \item \textsuperscript{95} Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantánamo Bay, supra note 65.
  \item \textsuperscript{97} Id.
  \item \textsuperscript{98} NDAA 2012, supra note 8 at §1021(c).
  \item \textsuperscript{99} Benjamin Wittes & Robert Chesney, NDAA FAQ: A Guide for the Perplexed, supra note 92.
  \item \textsuperscript{100} Jelena Pejic, Procedural Principles and Safeguards for Internment /Administrative Detention in Armed Conflict and Other Situations of Violence supra note 34 at 382.
\end{itemize}
exist. As AP I Article 75 is accepted as part of customary international law, it would neatly fill the gap in the law relating to detentions in non-international armed conflicts. However, even that definition does not really assist in the context of ongoing and sporadic terrorist attacks worldwide, which are hard to classify as armed conflicts.

Section 1021(d) of the NDAA affirms that nothing in the section is intended to limit or expand the authority of the President or the scope of the AUMF. Commentators are divided as to whether the legislation changes existing law. Section 1021(e) states that nothing in the section shall affect existing law relating to the detention of U.S. citizens, lawful permanent resident, or anyone else captured or arrested in the United States. Yet the law relating to detention is not settled. Although in Hamdi a plurality of the Supreme Court held that the AUMF authorized the detention of U.S. citizens, Hamdi was a U.S. citizen captured outside the United States during an international armed conflict. The issues raised in the cases of U.S. citizen Padilla and U.S. resident al-Marri, both of whom were arrested inside the United States, are still

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101 NDAA 2012, supra note 8 at §1021 (d).
102 See e.g. Benjamin Wittes & Robert Chesney, NDAA FAQ: A Guide for the Perplexed, supra note 92, commenting that that the detention authority is not expanded. Their view is that the D.C. Circuit courts have in fact articulated a broader standard than the NDAA’s “substantial support” category on the basis that the court permits detention of those who “purposefully and materially support” the enemy. The wording in the NDAA may result in a narrower approach by the courts. Contra Benjamin Wittes, Raha Wala Writes His Own FAQ, supra note 92, reporting on Wala’s fears that the authority has been expanded, although he is not sure that there is any practical difference between “material and purposeful” support and “substantial” support.
103 NDAA 2012, supra note 8 at §1021(e).
104 Hamdi v. Rumsfeld, supra note 3 at 517.
105 Jose Padilla, a U.S. citizen, was initially detained in the United States in May 2002 as a material witness to grand jury proceedings investigating the attacks on 9/11. After being detained as a material witness for a month with access to counsel, he was designated an enemy combatant and detained for three and a half years in military custody, initially with no access to counsel. He was then returned to civilian custody (just days before the government was due to respond to Padilla’s petition for certiorari to the Supreme Court), and tried and convicted of conspiracy to murder, maim and kidnap persons overseas, United States v. Padilla, 2007 U.S. Dist. LEXIS 26077 (S.D. Fla. Apr. 9, 2007). See the line of cases claiming habeas corpus commencing with Padilla v. Bush, 233 F. Supp. 2d. 564 (S.D.N.Y. 2002), culminating in Padilla v. Hanft, 432 F.3d. 582 (4th Cir. 2005).
106 Ali Saleh Kahlahl al-Marri, a U.S. resident, was initially detained in the United States in December 2001 as a material witness to grand jury proceedings investigating the attacks on 9/11. Two months later he
Therefore it is still unclear whether the AUMF gives a future President the authority to place a citizen or permanent resident of the United States, who is arrested inside the United States, in long-term military detention.

Section 1022 provides for military custody until “disposition under the laws of war” (as described in Section 1021) of covered persons. A covered person is one who: (i) is authorized to be detained pursuant to Section 1021; and (ii) has been captured “in the course of hostilities” (as defined in Section 1021); and (iii) has been determined to be “a member of, or part of al-Qaeda, or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda;” and (iv) has been determined “to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners.” Section 1022 does not apply to U.S. citizens at all or to lawful permanent residents with respect to conduct inside the United States, except to the extent permitted by the United States Constitution.

Military custody for this group of people is mandatory unless the President issues a waiver that must be certified to be in the national security interests of the United States. However, military detention is limited to certain categories of persons. One such category includes foreign persons captured inside or outside the United States.

108 President Obama has issued a waiver in respect of U.S. citizens and lawful permanent residents in PPD-110
110 NDAA 2012, supra note 8 at §1022(a).
111 Id. at §1022(b).
112 Id. at §1022(a)(4).
Another category covers lawful permanent residents, captured inside or outside the
United States in the course of AUMF-authorized hostilities, whose conduct took place
outside the United States, (that is, against U.S. interests abroad). This detention is subject
to the proviso that such persons are either members of, or part of (but not providing
support to), al-Qaeda or an associated force working with or directed by al-Qaeda and
that such persons participated in planning or carrying out an attack or attempted attack
against the United States or its coalition partners. Note that the section does not cover
persons who are part of the Taliban or its associated forces, nor, it seems, to arrests in the
United States made by the FBI or other law enforcement agencies.\footnote{113} Indeed, it is made
clear that nothing in the section will affect the authority of existing domestic law
enforcement agencies, even if the person is held in military custody.\footnote{114}

Mandatory military detention cannot occur until the government has made a
determination that a person is in the relevant category.\footnote{115} This can take a long time,
particularly as the NDAA provides that it is not required to make a status determination
until any ongoing interrogation – which does not appear to be subject to any time limit –
has been concluded.\footnote{116}

7.3.2 “Member of,” “part of,” and “support of” al-Qaeda

What does it mean to be a “member of” or “part of” al-Qaeda or the Taliban?
Often these criteria are bound up together in factual situations and court opinions. Using
membership as a criterion seems to be tricky. One view is that using membership or
support is both “too broad and too narrow” an approach, which has proven “prone to

\footnote{113} Benjamin Wittes & Robert Chesney, \textit{NDAA FAQ: A Guide for the Perplexed supra} note 92.
\footnote{114} NDAA 2012, \textit{supra} note 8 at §1022(2)(d).
\footnote{116} NDAA 2012, \textit{supra} note 8 at §1022(c)(2)(C).
overuse against individuals who, while perhaps individually dangerous, pose little or no threat of major terrorist attack.” It may be more appropriate to ask if an individual operates “under the effective control” of an organization.  

The meaning of membership continues to be a moveable feast. Even judges still do not agree on what conduct counts as membership, nor do they agree whether detention may be used in the distinct situation in which a non-member provides support to “clandestine non-state actors with indistinct and unstable organizational structures.” In 

_Bensayah v. Obama_, the government abandoned its claim that the petitioner’s detention was lawful because of support rendered to al-Qaeda, and the claim rested on membership alone. The court decided that the government’s authority to detain extends to individuals who are “functionally part of” al-Qaeda, but remanded the case to the district court to determine the issue. They did not deal with the issue of whether, as the government contended, the authority extended to individuals who “substantially supported Taliban or al-Qaeda forces or associated forces.”

The court concluded that it was “impossible to provide an exhaustive list of the criteria for determining whether an individual is ‘part of’ al-Qaeda.” A case-by-case, functional individualized approach was necessary to determine that question. Cases such as _Al Adahi v. Obama_ and _Salahi v. Obama_ emphasize the necessity of viewing

117 Matthew C. Waxman, _Administrative Detention of Terrorists: Why Detain, and Detain Whom?_ supra, note 49 at 31.
119 Bensayah v. Obama, 610 F.3d 718, 720 (D.C. Cir. 2010).
120 _Id._ at 722.
121 _Id._ at 725.
122 _Id._
123 _Al Adahi v Obama_, 613 F.3d 1102 (D.C. Cir. 2010), _cert. denied_, 131 S.Ct. 1001 (2011).
124 _Salahi v. Obama_, 625 F.3d 745, 752 (D.C. Cir. 2010).
all the evidence collectively in its entirety. In *Uthman v. Obama*, and in *Awad v. Obama*, the D.C. Circuit confirmed that each piece of evidence should not be weighed in isolation, but all the evidence must be considered as a whole.

This approach has been seen in a long line of cases, but in *Ali v Obama*, the D.C. Court of Appeals took seven pieces of evidence into account before reaching the conclusion that the detention was justified on the basis of facts suggesting that he was at an Al-Qaeda guest house for eighteen days prior to capture and participated in a terrorist training program by taking English lessons.

On the question of membership, the court in *Salahi* held that even though his “limited relationships” with certain al-Qaeda operatives “failed to prove that he was ‘part of’ al-Qaeda, those connections make it more likely that Salahi was a member of the organization when captured.” The court opined that the district court may have failed to consider that the “sporadic support” that Salahi “undoubtedly provided al-Qaeda demonstrates that he remained a member of the organization…”

Does the word “member” mean an individual who provides “mere support”? In *Gherebi v. Obama*, Judge Reggie B. Walton applied a combination of standards he deemed consistent with Common Article 3 and AP II to permit detention of anyone who is a “member of the armed forces” (defined in accordance with AP I) “of an organization that the President ‘determines planned, authorized, committed or aided’ the 9/11 attacks,

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126 Awad v. Obama, 608 F.3d 1, 7 (2010).
129 Id.
130 David Mortlock, *Definite Detention: The Scope of the President’s Authority To Detain Enemy Combatants*, 4 HARV. L. & POL’Y REV. 375, 389-404 (2010).
as well as any member of the ‘armed forces’ of an organization harboring”\textsuperscript{132} such members. Judge Walton did not reject outright the substantial support standard, except to determine membership of an organization.\textsuperscript{133}

In \textit{Hamlily v. Obama}\textsuperscript{134} Judge John D. Bates rejected the concept of substantial support as an independent basis for detention saying that it was “beyond what the law of war will support,”\textsuperscript{135} but he did accept it as a criterion for membership. He cited with approval Judge Walton’s statement in \textit{Gherebi}, that the key question was “whether the individual functions or participates within or under the command structure of the organization, i.e. whether he receives and executes orders or directions.”\textsuperscript{136}

There is no greater clarity about the meaning of support. Different district judges have adopted “as many as four distinct positions” in interpreting the meaning of support.\textsuperscript{137} The difference between the approaches is critical in cases involving “independent actors who provide financial and other support services to al-Qaeda.”\textsuperscript{138}

In \textit{Al-Bihani v. Obama}\textsuperscript{139} the petitioner had been a cook with a militia brigade associated with the Taliban. He claimed that although he carried a weapon, he never used it. The court noted that the Military Commissions Act (MCA) of 2006\textsuperscript{140} lists persons who materially supported hostilities as being subject to trial by military

\begin{itemize}
  \item \textsuperscript{132} David Mortlock, \textit{Definite Detention: The Scope of the President’s Authority To Detain Enemy Combatants, supra} note 130 at 390, citing \textit{Gherebi v. Obama, supra} note 131 at 68-70.
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. 2009).
  \item \textsuperscript{135} David Mortlock, \textit{Definite Detention: The Scope of the President’s Authority To Detain Enemy Combatants, supra} note 130 at 391, citing \textit{Hamlily v. Obama, supra} note 134 at 75.
  \item \textsuperscript{136} Id., at 391 (citing \textit{Hamlily v. Obama, supra} note 134 at 75).
  \item \textsuperscript{137} \textit{Benjamin Wittes, Robert Chesney & Rabia Bensalim, Emerging Law of Detention 17-21} (Brookings Institute, 2010) [hereinafter \textit{Emerging Law of Detention}]; \textit{Benjamin Wittes, Robert Chesney, & Larkin Reynolds, The Emerging Law of Detention 2.0: The Guantanamo habeas cases as lawmaking 24} (Brookings Institute 2011) [hereinafter \textit{Emerging Law of Detention 2.0]}.
  \item \textsuperscript{138} Id. at 21-22.
  \item \textsuperscript{139} \textit{Al-Bihani v. Obama, supra} note 62.
\end{itemize}
commission. It held that Al-Bihani was

lawfully detained whether the definition of a detainable person is, as the district court articulated it, ‘an individual who was part of or supporting Taliban or al-Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners,’ or the modified definition offered by the government that requires that an individual ‘substantially support’ enemy forces…. [F]or this case, it is enough to recognize that any person subject to a military commission trial is also subject to detention, and that category of persons includes those who are part of forces associated with al-Qaeda or the Taliban or those who purposefully and materially support such forces in hostilities against U.S. Coalition partners.\textsuperscript{141}

The court seems to be using two different standards of support, referring both to “substantial” and “purposeful and material.” As these are undefined qualitatively, it is hard to know what the difference is between them. In any event, as the court had decided that al-Bihani could be detained for being a member, the finding as to support is merely a non-binding dictum.\textsuperscript{142} Yet the court was clear that the services provided by al-Bihani rendered him “detainable under the ‘purposefully and material supported’ language of both versions of the [Military Commissions Act],” but added that “[t]hat language constitutes a standard whose outer bounds are not readily available.”\textsuperscript{143}

Whatever support means, grounding the definition of an unprivileged enemy belligerent (essentially a civilian) in the international laws of war, does not work so well in the context of providing support to terrorists, because it does not square with the LOAC definition of direct participation in hostilities.

\textbf{7.4 Process}

\textbf{7.4.1 Right to seek habeas relief in federal court}

The discussions in the preceding section all relate to cases in which detainees had

\textsuperscript{141} Al-Bihani v. Obama, supra note 62 at 872.

\textsuperscript{142} David Mortlock, \textit{Definite Detention: The Scope of the President’s Authority To Detain Enemy Combatants}, supra note 130 at 393.

\textsuperscript{143} Al-Bihani v. Obama, supra note 62 at 873.
claimed habeas corpus relief in District of Columbia courts. They were granted a right to claim habeas corpus relief through a series of Supreme Court cases that distinguished the precedent in *Johnson v. Eisentrager* that enemy aliens held beyond the sovereign territory of the United States had no constitutional right to claim habeas corpus relief.

In *Rasul v. Bush*, statutory habeas corpus protection was extended to detainees held at Guantánamo Bay. The Court distinguished *Eisentrager* on the grounds that the petitioners, who were two Australian and twelve Kuwaiti citizens, were “not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.”

Congress then passed the Detainee Treatment Act of 2005 (DTA), which appeared to proscribe jurisdiction to hear claims of Guantánamo detainees. *Hamdan* held that the DTA did not preclude federal courts from hearing habeas petitions that were pending at the date the Act was passed. A further attempt to prevent federal courts from hearing habeas petitions was set out in the Military Commissions Act (MCA) of 2006.

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144 *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950). The petitioners were German nationals who had been taken into custody by the U.S. military in China for continuing to take military action against the United States after Germany had surrendered. They were convicted of violations of the law of war by a U.S. military commission in China, and were sent to serve their sentence in a prison in Germany under U.S. control. In denying the applicability of habeas corpus, the Court highlighted the fact that the petitioners were not at any relevant time “within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.”


146 *Pursuant to 28 U.S.C. §§2241-2243."

147 *Rasul v. Bush*, supra note 145 at 476.


149 *Hamdan v. Rumsfeld*, supra note 56.

Finally, in Boumediene, the Court held that the procedures in the MCA were not an adequate or effective substitute for habeas corpus, so Section 7 of the MCA “operate[d] as an unconstitutional suspension of the Writ.” This means that detainees held in Guantánamo have the right to challenge their detention by claiming the constitutional privilege of habeas corpus in a federal court. The Court highlighted a number of factual differences to the situation in Eisentrager. For example, in Boumediene, the petitioners had not been convicted by a military commission; they were challenging their status as enemy combatants. In Eisentrager, the United States did not have “absolute and indefinite” control over the German prison, whereas Guantánamo is “within the constant jurisdiction of the United States.”

7.4.2 Access to lawyers

Detainees were not given access to lawyers until 2004, when the Supreme Court ruled that they had the right to assistance of counsel. Communications between lawyers and detainees may not be monitored by the government. In 2012, the D.C. District Court ruled the right of access to counsel continued after the detainees’ habeas petitions have terminated.

152 Id. at 732.
153 Id. at 767.
154 Id. at 768.
155 Id. at 769.
158 In re Guantánamo Bay Detainee Continued Access To Counsel, 892 F.Supp.2d 8 §VII (2012): “The Court has an obligation to assure that those seeking to challenge their Executive detention by petitioning for habeas relief have adequate, effective and meaningful access to the courts. In the case of Guantánamo detainees, access to the courts means nothing without access to counsel. And it is undisputed that petitioners here have a continuing right to seek habeas relief. It follows that petitioners have an ongoing right to access the courts and, necessarily, to consult with counsel.”
7.4.3 Duration of detention

How long may detention last? Duration of detention authority has been vigorously debated in the D.C. District Court, but the current final U.S. judicial word comes from the 2010 D.C. Circuit Court’s decision in Awad v. Obama. This affirms that “Al-Bihani makes plain that the United States’ authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities,”159 which is a nebulous standard in the context of “countering violent extremism.”

The formula relating to detention until the end of hostilities was most recently repeated in Ali v. Obama in December 2013.160 Judge Kavanaugh acknowledged Ali’s concern that even if his membership in a force associated with al-Qaeda justified detention as an enemy combatant for some period of time, it did not justify “a lifetime detention.”161 He commented

the 2001 AUMF does not have a time limit, and the Constitution allows detention of enemy combatants for the duration of hostilities…. absent a statute that imposes a time limit or creates a sliding-scale standard that becomes more stringent over time, it is not the Judiciary’s proper role to devise a novel detention standard that varies with the length of detention.162

Judge Edwards concurred with the holding in the case as he considered himself bound by precedent, but pointed to a “clear disjunction between the law of the circuit and the statutes that the case law purports to uphold. In other words, the “personal associations” test is well beyond what the AUMF and the NDAA prescribe.”163 He was troubled as to “whether the law of the circuit has stretched the meaning of the AUMF and the NDAA so

159 Awad v. Obama, supra note 126 at 11.
160 Ali v. Obama, supra note 127.
161 Id., at 19-20.
162 Id., at 20.
163 Id., at 22.
far beyond the terms of these statutory authorizations that habeas corpus proceedings like the one afforded Ali are functionally useless.\textsuperscript{164}

The problem of indefinite detention is still a very live issue, and has prompted renewed promises from President Obama to close Guantánamo, although he did not offer any suggestions about how to deal with the group of detainees who could not be prosecuted or released.\textsuperscript{165} David Remes has observed that of the 155 persons detained in Guantánamo at the end of December 2013, seventy-one are in indefinite detention, seventy-six have been cleared for release, six detainees are being tried by military commission, and two are serving sentences after military commission convictions.\textsuperscript{166} By contrast, the American Civil Liberties Union estimates that forty-six persons cannot be prosecuted.\textsuperscript{167}

A slight shift in position seems indicated by two events, first the repatriation of two detainees to Algeria in December 2013,\textsuperscript{168} and second, provisions in the NDAA of 2014, which refer to the possibility of release or transfer of detainees who have been determined not to represent a continuing threat to the national security interests of the United States.\textsuperscript{169}

However, process does not meet international human rights law standards. In June 2013, the HRC Working Group on Arbitrary Detention considered the case of Haneef

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\textsuperscript{164} \textit{Id.}, at 23.

\textsuperscript{165} \textsc{The White House Office Of The Press Secretary, Remarks By The President At The National Defense University, supra} note 16: “one issue will remain -- just how to deal with those GTMO detainees who we know have participated in dangerous plots or attacks but who cannot be prosecuted, for example, because the evidence against them has been compromised or is inadmissible in a court of law. But once we commit to a process of closing GTMO, I am confident that this legacy problem can be resolved, consistent with our commitment to the rule of law.”

\textsuperscript{166} Raffaela Wakeman, \textit{David Remes on Guantánamo in 2013, supra} note 90.

\textsuperscript{167} \textsc{American Civil Liberties Union, Guantánamo By The Numbers, supra} note 91.


\textsuperscript{169} NDAA of 2014, \textit{supra} note 69, at §1035.
Obaidullah. It decided that Obaidullah’s prolonged and indefinite detention by the United States in Guantánamo Bay since 2002 was arbitrary and constituted a violation of Article 9 ICCPR, that his rights to a fair trial and due process had been repeatedly violated, and that he had suffered discrimination because he had been subjected to prolonged detention due to his status as a foreign national.\textsuperscript{170} The Working Group referred to a statement that it had made in May 2013 together the Inter-American Commission of Human Rights and United Nations Rapporteurs on human rights and counter-terrorism, torture and health, in which it stressed “that even in extraordinary circumstances, when the indefinite detention of individuals, most of whom have not been charged, goes beyond a minimally reasonable period of time, this constitutes a flagrant violation of international human rights law and in itself constitutes a form of cruel, inhuman, and degrading treatment.”\textsuperscript{171}

7.4.4 Periodic review of detention

The NDAA of 2012 introduced status review procedures, which were to be issued with respect to all detainees who were ineligible to make habeas applications in a federal court (such as those in Afghanistan).\textsuperscript{172} This group of detainees was entitled to be represented by military counsel in status determination proceedings before a military judge.\textsuperscript{173}

\textsuperscript{170} HRC Communication No. 10/2013 (United States of America) concerning Obaidullah, \textit{supra} note 24 at ¶¶37-44.


\textsuperscript{172} There has been little progress on this front, but the NDAA of 2014 §1036 requires the making of a classified report on the status of detainees in Afghanistan who have been determined to represent an enduring security threat to the United States.

\textsuperscript{173} THE WHITE HOUSE, FACT SHEET: PROCEDURES IMPLEMENTING SECTION 1022 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR (FY) 2012 (Feb. 28, 2012), [hereinafter DETAINEE POLICY FACT SHEET].

\textsuperscript{174} MEMORANDUM, THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, PRESIDENTIAL POLICY
On February 28, 2012, President Obama issued a set of procedures for the implementation of Section 1022 (PPD-14), together with a fact sheet. In these procedures the President addressed some of the concerns he expressed in the signing statement for the NDAA. He issued seven waivers to the requirements of Section 1022(a)(1), including one with respect to lawful permanent residents of the U.S. arrested inside the U.S. on the basis of conduct taking place in the United States. He also gave authority to the Attorney General, in consultation with other national security officials, to issue further general, and individual waivers in appropriate circumstances.

PPD-14 purports to clarify some key phrases in the NDAA, notably of “covered persons” and “attack or attempted attack.” The former clarification sets out wording that is all but identical to the wording in Section 1021. The latter defines “attack” as the “completion of an act of violence or the use of force that involves serious risk to human life.” An “attempted attack” is defined as “an overt act or acts beyond a substantial step when (a) performed with specific intent to commit an attack; and (b) no further step or act by the individual would be needed to complete the attack.” This seems to be a rather narrow definition of attempt, as it requires overt acts beyond, that is, more than a

DIRECTIVE – REQUIREMENTS OF THE NATIONAL DEFENSE AUTHORIZATION ACT, PRESIDENTIAL POLICY DIRECTIVE/PPD-14 (Feb. 28, 2012), [hereinafter PPD-14 MEMORANDUM].
175 DETAINEE POLICY FACT SHEET, supra note 173.
176 Id., at §IIB.3.
177 Id. at §§IIIC, IID.
178 Id.
179 Id. at §IIB.
180 Id. at §IC.1.
181 Id. at §IC.2.
182 See, e.g., 21 AM. JUR. 2D Criminal Law §154 (2012): “An attempt consists of: (1) an intent to engage in crime; and (2) conduct constituting a substantial step towards commission of the crime. To prove attempt,
substantial step. What does this mean? What type of act is envisaged? Sub-paragraph (b) states “no further step or act would be necessary to complete the attack.” So if a gunman pointed a gun at a person, but did not pull the trigger, or if a bomber stood holding a detonator, but did not press it, would these actions be attempts as defined here? Also, the clarification of covered persons in PPD-14 IB(2)(b) covers planning, but does not cover acts of preparation, which could be overt acts made with specific intent, but not sufficiently substantial to qualify as attempts. Surely these types of acts would be more proximate than mere planning?

If a law enforcement (as opposed to military) arrest takes place, the Attorney General must be notified if the arresting authority believes that there is probable cause that the detainee is a covered person, and a screening process will take place as soon as practicable to establish whether there is such probable cause. The finding has to be made on the basis of “clear and convincing evidence.” Absent that evidence, or if a waiver applies, “no further action shall be required under section 1022(a)(i) of the NDAA or the procedures,” meaning that the detainee shall not be transferred to military custody. It is also noteworthy that the list of laws with which PPD-14 is required to be consistent does not include the International Covenant on Civil and Political Rights.

Section 1023 deals with procedures (to be issued within 180 days of the signing of

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183 PPD-14 MEMORANDUM, supra note 174 at §III.A.
184 Id. at §III.B.
185 Id. at §III.C. 3.
186 Id.
the 2012 Act) for the periodic review of detainees held at Guantánamo.\textsuperscript{188} One of the stated aims of the procedures is to “make discretionary determinations whether or not a detainee represents a continuing threat to the security of the United States.”\textsuperscript{189} What does continuing threat mean? How serious does this threat have to be? The continuing threat approach to detainee review in the NDAA differs from the test set out in the Executive Order of necessity to “protect against a significant threat to the security of the United States.”\textsuperscript{190} Civil libertarians may be less comfortable with “continuing threat” as opposed to “significant threat,” as the former suggests a lower threshold for the government.

### 7.4.5 Standard of Proof

In a number of cases judicial opinion differs on several fundamental matters, including on the standard of proof.\textsuperscript{191} For example, in a concurring judgment in \textit{Esmail},\textsuperscript{192} Judge Laurence H. Silberman relied on his interpretation of the Circuit Court opinion in \textit{al-Adahi v. Obama}\textsuperscript{193} that “in a habeas corpus proceeding the preponderance of evidence standard that the government assumes binds it, is unnecessary – and unrealistic.”\textsuperscript{194} In fact, in \textit{al-Adahi}, Judge A. Raymond Randolph said, in answer to the question of what factual showing the government has to make, that “the question is open. . . . [W]e have yet to decide what standard is required.”\textsuperscript{195} He noted that other courts have adopted the preponderance standard, but “their rationale is unstated.”\textsuperscript{196} He stated

\begin{itemize}
  \item \textsuperscript{188} NDAA 2012, \textit{supra} note 8 at §1023(a).
  \item \textsuperscript{189} \textit{Id.} at §1023(b)(1). It was not until October 2013, that the Department of Defense announced that the Periodic Review Board process was “now underway,” see U.S. Dept. of Defense, News Release No. 709-13 (ct. 9, 2013), \url{http://www.defense.gov/releases/release.aspx?releaseid=16302}.
  \item \textsuperscript{190} Exec. Order No. 13,567, \textit{supra} note 66 at §2.
  \item \textsuperscript{191} \textit{Benjamin Wittes, Detention and Denial: The Case for Candor After Guantánamo} 81, 84, (Brookings Institution Press, 2010)
  \item \textsuperscript{192} \textit{Esmail v. Obama}, 639 F.3d 1075 (D.C. Cir. 2011).
  \item \textsuperscript{193} \textit{Al-Adahi v. Obama}, \textit{supra} note 123 at 1104-1105.
  \item \textsuperscript{194} \textit{Esmail v. Obama}, \textit{supra} note 192 at 1078.
  \item \textsuperscript{195} \textit{Al-Adahi v. Obama}, \textit{supra} note 123 at 1103.
  \item \textsuperscript{196} \textit{Id.} at 1104.
\end{itemize}

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that that standard was not the norm in habeas cases, and he doubted “that the Suspension Clause requires the use of the preponderance standard.”

In al-Adahi, the petitioner agreed that the preponderance of evidence standard applied, so the court assumed it “arguendo.” In al-Bihani, the court merely confirmed that the preponderance of evidence standard was not unconstitutional. The panel in al-Adahi queried whether reliance on this standard was constitutionally required, and considered that conditional probability analysis was appropriate to assess whether detention is supported by a preponderance of the evidence.

In Hussein v. Obama, when giving the opinion of the Court, Judge Griffith commented that the Court had stated repeatedly that the AUMF “justifies holding a detainee at Guantanamo if the government shows, by a preponderance of the evidence, that the detainee was part of al-Qaeda, the Taliban, or associated forces at the time of his capture.” In his separate concurrence, Judge Edwards explained the meaning of this evidential standard: “Under the preponderance of evidence standard ‘the fact finder must evaluate the raw evidence, [and] find[] it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty.’” He did not believe that the evidence adduced in this case met that test, but instead, only satisfied the substantial evidence standard as

197 Id. at 1104-1105.
198 Id. at 1105.
199 Al-Bihani v. Obama, supra note 62, 878.
200 Al-Adahi v. Obama, supra note 123 at 1105. Conditional probability analysis involves considering the cumulative weight and effect of proffered evidence when assessing whether the government has satisfied its evidentiary burden. See JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, JUDICIAL ACTIVITY CONCERNING ENEMY COMBATANT DETAINEES: MAJOR COURT RULINGS, supra note 76 at 11.
201 Hussein v. Obama, No. 11-5344, 4 D.C. Court of Appeal (Jun. 18, 2013).
202 Id., 1 (of concurrence)
enunciated in Dickinson v. Zurko, (527 U.S. 150, 162 (1999)). That test required a reviewing court “to ask whether a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion.” He commented that the two tests had become conflated. Judge Griffith acknowledged Judge Edwards’ comments but opined that “nothing about this case requires us to settle the question because the preponderance standard is easily met here.”

7.4.6 Classified evidence in habeas proceedings

The U.S. government has been able to rely on classified evidence in habeas corpus cases as “part (or all) of its legal justification for detention.” Security cleared lawyers are entitled in principle to see the classified evidence, but may not disclose any of it to their clients, other than any classified information provided by the client. The lawyer may use it to formulate questions that may be informed by having seen the secret evidence. However, unless the detainee would otherwise have a right to examine the evidence – either because it is being used against him or her or because it is exculpatory – even the detainee’s lawyer will not see it. Even if the lawyer ought to have the right to see the evidence on behalf of his client, the government can still prevent him from seeing it if it successfully makes an ex parte and in camera application to the judge, arguing that the material is either highly sensitive, pertains to a highly sensitive source; or pertains to

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203 Id., 2, (of concurrence)
204 Id. 2, 5, (of concurrence).
205 Id., 4 (majority opinion) fn3.
208 DAVID COLE & STEPHEN I. VLADECK, Comparative Advantages: Secret Evidence and ‘Cleared Counsel’ in the United States, United Kingdom and Canada, supra note 206 at 177.
209 Id., at 177.
someone other than the detainee.\textsuperscript{210}\ Furthermore, disclosure of classified evidence to the
detainee’s counsel can be avoided if the government can provide alternative, unclassified
disclosures that are an effective substitute for the classified information.\textsuperscript{211} Cleared
counsel who act in different cases are entitled to share information amongst themselves,
in a secure facility.\textsuperscript{212}

Do these procedures violate the United States Constitution and international law?
They may not satisfy the requirements of due process,\textsuperscript{213} but the Supreme Court has not
ruled whether detainees at Guantánamo have constitutional due process rights.\textsuperscript{214} As to
international human rights law, the United States is party to the ICCPR.\textsuperscript{215} Article 9(4)
merely requires that a detained person be entitled to take proceedings before a court, so
that the court may decide without delay, whether the detention is lawful. The treaty is
silent as to the procedural details, and no jurisprudential guidance has been issued to shed
any further light. As matters stand, these procedures do not violate the ICCPR.\textsuperscript{216}

7.5 Detention in Afghanistan

Following the formal handover of the Parwan detention facility (formerly known

\textsuperscript{210} Id., citing Bismullah v Gates, 501 F 3d 178, 187–88 (D.C. Cir. 2007), and In re Guantánamo Bay

\textsuperscript{211} Id., citing Al Odah v United States, 559 F 3d 539, 547 (D.C. Cir. 2009).

\textsuperscript{212} Id., at 186.

\textsuperscript{213} Matthews v. Eldridge, 424 U.S. 319, 335 (1976) In analyzing due process requirements three factors
must be taken into account: “First, the private interest that will be affected by the official action; second,
the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if
any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the
function involved and the fiscal and administrative burdens that the additional or substitute procedural
requirement would entail.”

\textsuperscript{214} DAVID COLE & STEPHEN I. VLADÉCK, Comparative Advantages: Secret Evidence and ‘Cleared Counsel’
in the United States, United Kingdom and Canada, supra note 206 at 183.

\textsuperscript{215} ICCPR, supra note 197. This is the only general human rights treaty to which the United States is party.

\textsuperscript{216} These procedures relating to the use of secret evidence would be unlawful if they adopted by a party to
¶¶21-220, the ECHR ruled that a detainee must be given sufficient information to instruct his lawyer in
judicial review or any court hearings.
as Bagram) by the U.S. forces to the Afghan authorities in March 2013,217 an unspecified small number of detainees remain held there,218 of which about 53 are thought to be non-Afghans.219 The United States continue to have concerns about how to deal with a “less than a dozen…non Afghan nationals who are regarded as particularly dangerous.”220

Some concerns have been voiced that these detainees could be held indefinitely in Parwan, either by the United States or Afghanistan without any judicial oversight.221 The recent stance by the Afghans that they do not propose to continue holding foreign detainees, poses problems for the United States. Repatriation may not be an option, but Congress has not placed restrictions on bringing detainees currently held in Afghanistan into the United States.222

At first sight it might appear from documents produced by military authorities at Bagram as a result of a lawsuit brought by the American Civil Liberties Union (ACLU) that there was some sort of process for challenging detention. However, the reality is that some detainees have been held “for as long as six years without access to counsel or a meaningful opportunity to challenge their imprisonment.”223 The ACLU filed petitions in

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219 Adam Goldman & Karen deYoung, Military trial in U.S. being considered for Russian detained in Afghanistan, WASH. POST, supra note 14.
221 Rajiv Chandrasekaran, Afghan Officials Seeking Ability to Prolong Detentions, WASH. POST, (Jan. 27, 2011) at A7, (“Afghan justice and security officials want to adopt the U.S. practice of detaining suspected insurgents indefinitely without trial.”).
222 Adam Goldman, U.S. quietly whittles down foreign detainee population at facility in Afghanistan, supra note 220.
February 2010 on behalf of four detainees,\textsuperscript{224} but on May 21, 2010, the U.S. Court of Appeals for the District of Columbia ruled in \textit{al Maqaleh v. Gates} that jurisdiction to hear habeas petitions of detainees did not extend to those held at Bagram.\textsuperscript{225}

The \textit{al Maqaleh} court noted that the \textit{Boumediene} Court “only told us that ‘at least three factors’ are relevant”\textsuperscript{226} to ascertain the reach of the Suspension of the Writ clause: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.”\textsuperscript{227}

The \textit{al Maqaleh} court reasoned that if the \textit{Boumediene} Court had wanted to limit its understanding of the reach of the Suspension Clause to territories where the United States exercised de facto jurisdiction, it would not have needed to refer to the three factors mentioned above.\textsuperscript{228} The court specifically rejected the fact of U.S. control of Bagram under its lease of the military base, to trigger the extraterritorial application of the Suspension Clause. It did so on the grounds that this would “seem to create the potential for the extraterritorial extension of the Suspension Clause to noncitizens held in any United States military facility in the world, and perhaps to an undeterminable number of United States-leased facilities as well.”\textsuperscript{229}

The court reached its conclusion by applying the three mentioned \textit{Boumediene} factors to the facts of this case. Despite noting that the Unlawful Enemy Combatant

\begin{footnotesize}
\textsuperscript{225} Al Maqaleh v. Gates, 605 F.3d 84, 99 (D.C. Cir. 2010).
\textsuperscript{226} Id. at 98.
\textsuperscript{227} Boumediene v. Bush, supra note 151 at 766.
\textsuperscript{228} Al Maqaleh v. Gates, supra note 225 at 95.
\textsuperscript{229} Id.
\end{footnotesize}
Review Board process at Bagram afforded the petitioners even less protection than the Combatant Status Review Tribunal that the *Boumediene* petitioners complained about, the court concluded that analysis of the second and third factors referred to above weighed more heavily in favor of the United States.\(^{230}\) The court ruled that “the writ does not extend to Bagram confinement in an active theater of war in a territory under neither the *de facto* nor *de jure* sovereignty of the United States and within the territory of another *de jure* sovereign.”\(^ {231}\) It seems that this holding would apply to the case of any detainees remaining in U.S. custody in Iraq. But what about suspected terrorists captured in the future? The petitioners in *al Maqaleh* moved to amend their petitions on grounds that they had new evidence that would undermine the D.C. Circuit decision. On February 15, 2011, Judge Bates granted the motion, although he expressed doubts that the new evidence would significantly impact the analytical framework of *Boumediene*.\(^ {232}\) Judge Bates then suddenly scheduled a motions hearing for July 19, 2012.\(^ {233}\) Subsequent to that hearing the petitioners filed a supplemental memorandum in which, *inter alia*, they asserted that “the United States will retain exclusive custody and control of third country nationals like Petitioners in a separate facility even after the intended transfer of Afghan detainees to Afghan custody is complete.”\(^ {234}\) On October 19, 2012, Judge Bates handed down his judgment.\(^ {235}\) The petitioners had contended that there was

\(^{230}\) *Id.* at 97.

\(^{231}\) *Id.* at 98.


\(^{234}\) *Al Maqaleh v. Obama*, 06-1669, Petitioners’ Supplemental Memorandum and Materials in Further Opposition to Respondents’ Motion to Dismiss, 3 (Jul. 23, 2012).

new evidence in four respects, however Judge Bates did not accept any of their arguments.

One of those arguments related to executive manipulation – that the United States had chosen to keep detainees at Bagram specifically to avoid habeas jurisdiction. Judge Bates noted that executive manipulation “is not an explicit factor in three-part Boumediene test; on the other hand the Supreme Court’s concern that the ‘political branches [could] switch the Constitution on or off at will’ by strategically choosing detention sites clearly influenced its decision.”

Leaving aside the fact that Judge Bates had turned the “at least three factors” test in Boumediene to a categoric “the three-part Boumediene test,” the Court of Appeals in al Maqaleh had found that executive manipulation had not happened in that case. Judge Bates commented that the petitioners were really contending that “a decision to hold a detainee at any site other than Guantanamo is suspect.”

He opined that this contention would “create universal habeas jurisdiction, a result far beyond what Boumediene contemplated…[and] would be clearly at odds with the D.C. Circuit’s conclusions.”

This decision was confirmed on

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236 Id., ¶5 Petitioners “contend first that new evidence shows that the United States does intend to remain indefinitely at Bagram; second, that the United States has “facilitat[ed]” recent criminal trials run by the Afghan government at Bagram, and that the Afghan government desires foreign detainees to be removed and provided fair judicial process elsewhere, which shows that the practical obstacles to conducting litigation at Bagram are far less serious than the court of appeals believed; third, that the evidence shows that the United States was attempting to avoid habeas jurisdiction by detaining petitioners at Bagram; and fourth, that the procedures used to determine petitioners' status are unacceptable.”


241 Al Maqaleh v Obama, supra note 235 at ¶10.

242 Id.
appeal by the D.C. Circuit on December 24, 2013.\footnote{Al Maqaleh v. Hagel, No. 12-5404, D.C. Cir. (Dec. 24, 2013.).} The case of Pakistani national Yunus Rahmatullah demonstrates the impossible position of a third country national. After his capture by British forces in Iraq in February 2004, he was handed over to U.S. forces, which in turn transferred him to Afghanistan in June 2004. Rahmatullah attempted to secure his release from Bagram by launching an application for habeas corpus in the British courts.\footnote{Rahmatullah v. Secretary of State for Foreign & Commonwealth Affairs and Secretary of State for Defence, [2011] EWHC 2008 (Admin). (Eng.).}

His application referred to terms in a Memorandum of Understanding (MoU) between the United Kingdom and United States,\footnote{An Arrangement for the Transfer of Prisoners of War, Civilian Internees, and Civilian Detainees between the Forces of the United States of America and the United Kingdom of Great Britain and Northern Ireland, and Australia, (Mar. 23, 2003).} in particular to terms providing that in effect the United Kingdom could request the return of detainees handed over to the United States, and that as the United Kingdom had handed a detainee to the United States, that detainee could not be transferred outside of Iraq without the agreement of the United Kingdom.\footnote{Id., at ¶¶4,5. In Rahmatullah v. Secretary of State for Foreign & Commonwealth Affairs and Secretary of State for Defence, [2011] EWCA Civ 1540 (Dec. 14, 2011 (Eng.)). At ¶37, the Master of the Rolls, Lord Neuberger discussed the context for the MoU, with reference to Geneva Convention III and Geneva Convention IV: “Although both the UK and the US are parties to the two Conventions, the President of the US had announced on 7 February 2002 the US Government's view that the two Conventions did not apply to the conflict with Al-Qaeda. During 2002, there were allegations that detainees in Afghanistan had been mistreated, and it became public knowledge that detainees had been transferred to Guantanamo Bay. The first MoU was necessary because, in order to comply with Article 12 of Geneva III and Article 45 of Geneva IV (see paragraphs 12 and 14 above), the UK had to satisfy itself of the willingness of the US to apply the Conventions to any prisoners of war or protected persons transferred by the UK to the US. For this purpose, a right to require the return of the transferred prisoner of war or protected person was necessary.”} In this case, apparently owing to an oversight, the United Kingdom had not been consulted about the transfer. Rahmatullah contended that the United Kingdom exercised sufficient control over him to bring about his release, or at the very least to enable a writ of habeas corpus to be issued in the British courts. His application in
the British High Court was denied and he appealed to the Court of Appeal, which ruled on December 14, 2011 that the United Kingdom had sufficient control over the applicant for the writ to issue, and ordered that the writ be issued.\textsuperscript{247} The British government wrote to the U.S. Department of Defense on December 16, 2011, requesting that Rahmatullah be released into their custody.\textsuperscript{248} The United States declined to do so, on the basis of the assertions that Rahmatullah was properly detained by the United States and if he were to be handed over to anyone, it should be to Pakistan.\textsuperscript{249} On February 23 2012 the British Court of Appeal concluded that in the circumstances the British government had made a sufficient return to the writ and could do little more.\textsuperscript{250} Rahmatullah appealed to the British Supreme Court, which heard argument on July 3, 2012 on the question of whether there was sufficient return to the writ, and on the government’s argument in cross-appeal that the Court of Appeal had erred in ruling that the writ of habeas corpus should issue.\textsuperscript{251}

The British Supreme Court handed down its judgment on October 31, 2012.\textsuperscript{252} Lord Kerr considered that Rahmatullah was a protected person under GC IV,\textsuperscript{253} that his forcible transfer from Iraq to Afghanistan was a \textit{prima facie} breach of Article 49 of GC IV,\textsuperscript{254} and that the “United Kingdom government was under a clear obligation, on becoming aware of any failure on the part of the United States to comply with any

\begin{thebibliography}{99}
\bibitem{247} Id., at ¶¶41, 54.
\bibitem{249} Rahmatullah v. Secretary of State for Foreign & Commonwealth Affairs and Secretary of State for Defence, No. 2, ¶¶4,5 [2012] EWCA Civ 182 (Eng).
\bibitem{250} Id., at ¶¶17,18.
\bibitem{252} Secretary of State for Foreign & Commonwealth Affairs v. Yunus Rahmatullah, [2012] UKSC 48 (Eng.).
\bibitem{253} Id., at ¶35.
\bibitem{254} Id., at ¶36.
\end{thebibliography}
provisions of GC [IV], to correct the situation or request the return of Mr Rahmatullah.”\textsuperscript{255} He concluded that Rahmatullah was unlawfully detained, and the illegality rested “not on whether the United States was in breach of GC [IV] but on the proposition that, conscious of those apparent violations, the United Kingdom was bound to take the steps required by article 45 of GC [IV].”\textsuperscript{256}

The crucial issue, according to all the judges, was the ability to exercise control over Rahmatullah’s detention.\textsuperscript{257} Lord Kerr concluded that the Court of Appeal decision did not require the British Government to engage in a process of persuasion. It does not involve an “attempt to dictate to the executive government steps that it should take in the course of executing Government foreign policy. Rather it requires the Government to test whether it has the control that it appeared to have over the custody of Mr Rahmatullah and to demonstrate in the return that it makes to the writ \textit{of habeas corpus} that, if it be the case, it does not have the control which would allow it to produce the body of Mr Rahmatullah to the court.\textsuperscript{258}

In the circumstances, Lord Kerr held that all that had been required of the Government was to demonstrate why, as a matter of fact, it was not possible to secure Rahmatullah’s return to the United Kingdom, and that the Government had made a sufficient return to the writ.\textsuperscript{259} The other judges all concurred on this issue. In June 2013, it is not known what has become of Rahmatullah.

In its May 2011 report following a visit to Afghanistan, Human Rights First stated that although there was a slight improvement in the process used during the Bush administration, the Detainee Review Boards still failed to provide detainees with adequate opportunity to defend themselves against charges of collaboration with

\begin{itemize}
\item \textsuperscript{255} Id., at ¶38. (referring to the duty under Art. 45 GC IV).
\item \textsuperscript{256} Id., at ¶53.
\item \textsuperscript{257} Id., at ¶25, 101, 117,
\item \textsuperscript{258} Id., at ¶63.
\item \textsuperscript{259} Id. at ¶70, 85.
\end{itemize}
insurgents and threatening the United States, and thus did not comply with international law.\textsuperscript{260} There was no access to legal counsel; instead detainees may have “personal representatives” who were U.S. soldiers with no legal training,\textsuperscript{261} and there were serious problems relating to the evidence that may be used against the detainees, as well as to the evidence that may be used in defense.\textsuperscript{262}

In his signing statement for the NDAA of 2012,\textsuperscript{263} President Obama had said that his Administration “will interpret section 1024 as granting the Secretary of Defense broad discretion to determine what detainee status determinations in Afghanistan are subject to the requirements of this section.”\textsuperscript{264} This suggested that the status review procedures in Guantánamo were likely to be made applicable to detainees in Afghanistan, but none appear to have been published as at December 2013. However, the Obama administration is considering using a military commission in the United States to try a Russian known as Irek Hamidullan, who is in a military facility in Afghanistan, in respect of his involvement in an attack on soldiers in 2009. A handful of other detainees may also be tried for miscellaneous offenses, but the vast majority are likely to be repatriated.\textsuperscript{265} It remains to be seen whether Congress will block this decision in the same manner that transfers of Guantánamo detainees have been thwarted.

7.6 Summary

A number of problems have been revealed in this chapter. For example, unresolved

\begin{itemize}
\item \textsuperscript{260} Daphne Eviatar, \textit{Detained and Denied in Afghanistan} 2, \textsc{Human Rights First} (May 2011).
\item \textsuperscript{261} \textit{Id.} at 3.
\item \textsuperscript{262} \textit{Id.} at 3-4.
\item \textsuperscript{263} NDAA 2012, \textit{supra} note 8.
\item \textsuperscript{264} \textsc{The White House Office Of The Press Secretary, Statement By The President On H.R. 1540} (Dec. 31, 2011), \textit{available at} http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540.
\item \textsuperscript{265} Adam Goldman & Karen deYoung, \textit{Military trial in U.S. being considered for Russian detained in Afghanistan}, \textsc{Wash. Post, supra} note 14.
\end{itemize}
issues include questions relating to who may be detained. The definitions for “part of” and “substantial support” are not clear. The authority for detention is still currently related to an attack committed by the Taliban, al Qaeda, and “associated forces” (the present standard adopted by the Obama administration). But what does “associated forces” mean? Does this include groups such as Lashkar-i-Taiba,? What about the groups that operate outside Pakistan, under the al Qaeda banner, of al Qaeda in the Arabian Peninsula, or al Qaeda in the Islamic Magreb, in Somalia, Yemen and Mali, as well as groups that “may embrace aspects of al Qaeda’s agenda but have no meaningful ties to its crumbling leadership base in Pakistan,” such as the al-Nusra Front in Syria and Ansar al-Sharia, linked with an attack on U.S. interests in Libya?

What if the threat diversifies to other terrorist groups with no connection at all to al Qaeda, such as Hezbollah? What if a suspected terrorist is inspired by jihad but acting alone? In many of these cases there would not appear to be a legal framework for the United States to detain the perpetrators preventively without trial. The LOAC model also fails to acknowledge the possibility of the homegrown terrorist – the U.S. citizen who travels overseas to a terrorist training camp and is captured overseas. Currently it is not clear what is to be done with such a detainee. Why should there be a difference in treatment relative to whether or not the detainee is a U.S. citizen?

\[\text{References}\]

266 Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantánamo Bay, supra note 65.
269 See, e.g., Maria Glod, Jeremy Markon & Tara Bahrampour, Md. Man Accused of Attempted Bombing, WASH. POST, Dec. 9, 2010, at A8, A9 (Antonio Martinez, a U.S. citizen who converted to Islam and changed his name to Muhammad Hussain, was charged with plotting to blow up a military installation. He was allegedly acting alone, “without direction from any outside terrorist group” but was obsessed with jihad and called Anwar al-Aulaki his “beloved sheikh.” His case and others like it surely fall squarely within the criminal law, not LOAC paradigm. However, not every case is as clear cut as this).
Petitioners in *al Maqaleh* questioned whether the U.S. could “evade judicial review of Executive detention by transferring detainees into active conflict zones, thereby granting the Executive the power to switch the Constitution on or off at will.”

Would the holding in *al Maqaleh* apply in places where the United States is in occupation, on a peace-keeping mission, or in other situations that are not deemed to be active theaters of war? Would it apply if the United States captured a suspected terrorist in Pakistan or Yemen and then held the suspect in a U.S. military base in Germany? Would this problem be addressed by Section 1024 of the NDAA of 2012?

Since 2010 commentators have opined that it has been left to the judges of the D.C. District Court and the D.C. Circuit Court of Appeals to formulate the law of detention. Unresolved questions relate to boundaries of the President’s detention power, burden of proof, and the type of admissible evidence that can be used in habeas proceedings. The denial of certiorari by the Supreme Court in a number of detainee cases, including *Al-Adahi*, *al-Odah, Ameziane, al-Bihani* and *Awad* suggested to some commentators that the Supreme Court has “no appetite for getting involved in the nitty gritty of the writing of the rules that will govern detention.” This view is perhaps reinforced by the fact that in June 2012 the Supreme Court denied certiorari in seven habeas cases, and

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270 *Al Maqaleh v. Gates*, *supra* note 225 at 98.
271 NDAA 2012, *supra* note 8 at §1024(c) deals with status review of persons that are not entitled to habeas review in a federal court.
272 EMERGING LAW OF DETENTION, *supra* note 137 at 64-65.
the practice has continued in 2013.  

Indefinite detention remains problematic. The war against al-Qaeda and its affiliates is not a traditional conflict. How will the enemy manifest itself, and where or when will it strike again? How will the United States finally determine that hostilities have ended? As terror attacks are sporadic and in different locations, what period of time must elapse after an attack before the United States can declare that the war against al-Qaeda is over? Will it start the countdown from the last terrorist event in the United States, or from the date of an event somewhere else in the world that caused U.S. casualties? What will happen if hostilities end but a group of individuals are still considered a threat?

There are claims that military detention without trial for an indefinite period addresses the problems of trying suspected terrorists in either federal courts or military commissions. However, military detention merely avoids the issue of having to decide an appropriate mode of trial. The fact remains that indefinite detention for terrorists does not sit comfortably in the LOAC paradigm.

Many problems relating to process have been identified. “The privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law.” Yet LOAC does not provide an adequate framework for this to happen. The practice described above relating to the use of classified evidence often does not afford detainees


the ability to know the case against them. Nor does LOAC provide meaningful time limits within which a habeas petition may be brought. From a human rights perspective LOAC detention, by its indefinite duration, by its failure to afford adequate procedures, and by the U.S. practice of applying it only to foreigners, is arbitrary.

This chapter has focused on the detention of persons in Guantánamo and Afghanistan. The Obama Administration continues to wrestle with the intractable problem of what to do with the Guantánamo detainees that cannot be prosecuted and are deemed too dangerous to release. The United States maintains that the LOAC prevails during an armed conflict to the exclusion of international human rights law. Yet the LOAC is insufficiently developed to afford adequate due process for detention of this special terrorist type of “combatant.” Section B demonstrates that international human rights law, too, has flaws and deficiencies. Although an acceptable solution for the current detainees remains elusive, consideration should be given to creating a legal framework for future off-the-battlefield detention that affords proper due process, as well as improving current procedures. The recommendations in Chapter 12 address some of the current framework deficiencies and may offer a way forward.
SECTION B – DETENTION IN INTERNATIONAL HUMAN RIGHTS LAW

B1 Introduction

This dissertation has now analyzed the preventive detention provisions in (1) the domestic criminal laws of the United Kingdom, Australia, Canada, India, Israel and the United States; and (2) in the law of armed conflict (LOAC) as used by Israel and the United States in Guantánamo Bay and Afghanistan. The aim of that exercise was to search for best practices and common core principles in order to compile a coherent guide to detention to which all states could refer. However, the comparative exercise in Section A highlighted many deficiencies in procedural matters. Furthermore, most detention principles are very broadly drafted and yield little guidance.

Continuing the search for global core principles, this Section examines detention of terror suspects under international human rights law,1 which underpins all of the domestic detention laws surveyed in this work, and arguably also LOAC detention.

This Section examines five general human rights treaties: the International Covenant for Civil and Political Rights (“ICCPR”),2 in Chapter 8; the European Convention on Human Rights (“European Convention”)3 in Chapter 9; the American

1 Detention in this context is sometimes referred to as administrative detention, (i.e. detention imposed by an administrative order without charge or trial). See e.g. Monica Hakimi, International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide, 40 Case W. Res. J. Int’l L. 593, 615, 640-1 (2009), (commenting that the option of administrative detention has been overlooked in the debate on non-battlefield detentions, but in any event, existing law needs further development, by refining process, making the standard of non-arbitrariness more robust, and ascertaining the boundaries between administrative detention and criminal process).


Convention of Human Rights ("American Convention") in Chapter 10; and the African Charter on Peoples’ and Human Rights ("African Charter") and the Arab Charter on Human Rights ("Arab Charter") in Chapter 11. After an analysis of the detention provisions in these five treaties and related jurisprudence, Section B3 draws the conclusion that each treaty by itself has a number of core principles relating to detention, but when compared against each other, very few global core principles emerge. As with the analysis in Sections A, the comparative review of the treaties reveals several procedural gaps and deficiencies.

Immediately after 9/11 the United Nations Security Council enacted Resolutions calling on the international community to take steps to prevent terrorist acts." It was not until 2003 that the Security Council gave any real importance to ensuring that counter-terrorism measures were also human rights compliant. Later still, the General Assembly’s Global Counter-Terrorism Strategy of 2006 placed significant emphasis on respecting human rights whilst urging action to prevent terrorism.

In 2009, a report of the International Commission of Jurists concluded that the current international human rights law framework is “sufficiently adaptable to counter

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any current threats or future threats” of terrorism, although it noted that “in many
countries round the world, the fear of terrorism has been allowed to override the need to
uphold human rights.”

Opinions differ as to the applicability of international human rights law in times
of armed conflict. The International Court of Justice (ICJ), International Committee of
the Red Cross (ICRC), Europeans and human rights adjudicatory bodies and groups
believe that international human rights law always applies, “hand in hand with LOAC on
the battlefield.” Conversely, Israel and the United States posit that “during situations of
armed conflict international humanitarian law is the lex specialis, to the exclusion of
human rights law applicable to the treatment of captured ‘enemy combatants.”

In the designated counter-terrorism instruments, scant mention is found of
international human rights in connection with detention. For example, in the Draft
Comprehensive Convention on International Terrorism, a clause mandates States to treat
detainees fairly in conformity with domestic and international laws, “including
international human rights law.” Similar provisions appear in several universal

10 ASSESSING DAMAGE, URGING ACTION, REPORT OF THE EMINENT JURISTS PANEL ON TERRORISM,
11 Id., at 17. See also KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM, supra note 7
at 427, 431; HUMAN RIGHTS WATCH, IN THE NAME OF SECURITY. COUNTERTERRORISM LAWS
WORLDWIDE SINCE SEPTEMBER 11, 15-16 (2012); REDRESS, EXTRAORDINARY MEASURES, PREDICTABLE
12 GARY D. SOLIS, THE LAW OF ARMED CONFLICT 24 (Cambridge University Press, 2010). See Legal
Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J.
Reports 2004 136, ¶106: “the protection offered by the human rights conventions does not cease in case of
armed conflict, save through the effect of provisions for derogation of any kind to be found in article 4 of
the International Covenant on Civil and Political Rights. As regards the relationship between international
humanitarian law and human rights law, there are thus three possible situations: some rights may be
exclusively matters of international humanitarian law; others may be exclusively matters of human rights
law; yet others may be matters of both these branches of international law.” This was reiterated and
confirmed in the ICJ’s judgment in Armed Activities on the Territory of the Congo (Democratic Republic
13 ASSESSING DAMAGE, URGING ACTION, supra note 10, at 51.
8: Art. 13: “Any person who is taken into custody or regarding whom any other measures are taken or
instruments, \(^{15}\) but not many regional instruments contain even that limited mention.\(^ {16}\)

Deprivation of liberty is, however, expressly dealt with in the human rights instruments themselves.

Relevant provisions concerning detention in each of five general human rights instruments,\(^ {17}\) one universal and four regional, are set out in Appendix 2 in tabular form, for side by side comparison.

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\(^{17}\) Detention is mentioned also in some specific universal instruments, such as in the International Convention for the Protection of All Persons from Enforced Disappearances, G.A. Res.61/177, U. N. Doc. A/RES/61/177 (2006), adopted Dec. 20, 2006. See Art. 2” “ For the purposes of this Convention, enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such person outside the protection of the law.” Some useful principles are found in Articles 17 and 18, which will be referred to in Chapter 12, but of the countries surveyed in this dissertation, only France and Spain have ratified this treaty. Detention is also covered in the Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sep. 2, 1990. See Art. 37(b):(b): “No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner that takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best
interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”
B2 – THE TREATIES

CHAPTER 8 - INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

8.1 Introduction

The detention provisions in the ICCPR provide the foundation for the treatment of detention in the regional human rights treaties. However, the treaty wording is very broad and has generated an enormous amount of interpretive jurisprudence and comment, from which can be gleaned many important criteria to form the basis of core global principles.

8.2 Jurisdiction

One thorny ongoing issue relates to jurisdiction, in the context of the territorial reach of the provisions of the ICCPR, and is pertinent to detention, particularly if a State captures and detains individuals outside its home territory. This issue is particularly relevant to whether the ICCPR applies to the practice of detention by the United States in Guantánamo Bay, Afghanistan and Iraq, and by Israel in the Occupied Territories.

Contrary to most other countries, the United States has consistently maintained that its

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1 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 2) Id., Article 9: “1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2 Id., Article 9: “2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3 Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4 Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5 Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”
human rights obligations do not apply extraterritorially.\(^3\) Israel’s position is that the ICCPR and similar instruments “did not apply directly to the current situation in the occupied territories.”\(^4\)

The United States eschews international human rights laws as far as detention in Guantánamo and Afghanistan are concerned, and presumably will do so in respect of any future detention in any place outside of the United States. As the LOAC itself is not designed to deal with the current transnational terrorist threat, something else is needed. The United States must conduct its detention of terror suspects in accordance with some more appropriate legal framework.

This Chapter begins with an analysis of whether detention outside a country’s home territory is governed by the ICCPR. The interpretation of Article 2 has been, and still is, the subject of extensive debate and discussion, by the Human Rights Committee (HRC)\(^5\) the International Court of Justice (ICJ),\(^6\) human rights organizations,\(^7\) and

\(^3\) See e.g., Marko Milanovic, ExTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, 58 (Oxford University Press, 2011): “Since Guantanamo is a territory under the sovereignty of Cuba that has only been leased by Cuba to the United States, it is not US territory for the purposes of Article 2(1) ICCPR, thus rendering the treaty inapplicable;” Beth Van Schaack, The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change, 90 INT’L L. STUDIES 20, 22-23 (2014): “Starting in 1995, but more consistently during the Bush administration, the United States in its filings before these human rights bodies has advanced a categorical and contrarian position that the obligations contained in the relevant human rights instruments have no extraterritorial application;” Charlie Savage, U.S., Rebuffing U.N., Maintains Stance That Rights Treaty Does Not Apply Abroad, N.Y. TIMES, (Mar. 13, 2014), http://www.nytimes.com/2014/03/14/world/us-affirms-stance-that-rights-treaty-doesnt-apply-abroad.html?_r=1.

\(^4\) Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, Advisory Opinion, I.C.J. Reports 2004 136, 179, at ¶110.


\(^7\) See e.g. HUMAN RIGHTS WATCH, IN THE NAME OF SECURITY. COUNTERTERRORISM LAWS WORLDWIDE SINCE SEPTEMBER 11, 6 (2012); INTERNATIONAL COMMISSION OF JURISTS, ASSESSING DAMAGE, URGING
scholars. The debate centers round whether the words in Article 2(1) “within its territory and subject to its jurisdiction” are to be interpreted conjunctively or disjunctively. The controversy derives from the interpretation of highlighted words of Article 2(1): “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant…” (emphasis added).

No presumptions can be found either against or in favor of extraterritoriality in international law, and the only guidance that can be discovered is in the “text, object and purpose of each particular treaty.” The basic rule governing interpretation of treaties is in Article 31 of the Vienna Convention, which prescribes looking at the ordinary meaning of the words. However, if the meaning is “ambiguous or obscure” or “leads to a

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8 See e.g. DOMINIC MCGOLDRICK, Extraterritorial Application of the International Covenant on Civil and Political Rights, 41-81 in EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, (Fons Coomans & Menno T. Kamminga (eds.)), (Intersentia, 2004); MICHAL GONDEK, THE REACH OF HUMAN RIGHTS IN A GLOBALISING WORLD: EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, 119, 132-37 (Intersentia, 2009); MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, supra note 3 at 10-11, 58-60, 222-227; Beth Van Schaack, The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change, supra note 3.
10 MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, supra note 3, at 10-11.
11 Vienna Convention on the Law of Treaties, U.N.T.S. vol. 1155, p. 331, dated May 23, 1969, entered into force Jan. 27, 1980, art. 31: “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.”
result which is manifestly absurd or unreasonable” then recourse may be had to “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.” As discussed in this chapter, it has often been necessary to turn to the travaux préparatoires, and even then, the debates have not always reached clear conclusions.

It might seem that the obvious way to read the words is conjunctively, as do the U.S. and Israel, but the literature suggests that the position is far from clear. Dominic McGoldrick suggests that the conjunctive interpretation could lead to a result that is inconsistent with the object and purpose of the ICCPR or one which is manifestly absurd. It is therefore pertinent to see what light, if any, is shed on the interpretation of the relevant words in the travaux préparatoires. The U.S. had introduced the notion of territory into the drafting, and had suggested the wording that found its way into the final form of Article 2(1).  

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12 Id., at art. 32.
13 Michal Gondek, The Reach Of Human Rights In A Globalising World: Extraterritorial Application Of Human Rights Treaties, supra note 8 at 239-243. “The USA supported the ‘cumulative’ or ‘conjunctive’ interpretation of the key phrase from Article 2(1) ICCPR, ignoring the jurisprudence of the Committee and focusing largely on its own interpretation of the travaux préparatoires;” Marko Milanovic, Extraterritorial Application Of Human Rights Treaties, supra note 3, at 58: “The United States has in particular relied on a restrictive interpretation of Article 2(1) ICCPR....According to the United States the language is clear....[it] is an interpretation that is in the US view supported by the ICCPR’s negotiating history.”
14 Michal Gondek, The Reach Of Human Rights In A Globalising World: Extraterritorial Application Of Human Rights Treaties, supra note 8 234-239. Israel believes that “the law of armed conflict alone applies to the situation in the Occupied Territories, which excludes the applicability of human rights” and also that as it has transferred certain civilian powers to the Palestinian Authority, this has “resulted in Israel’s lack of those powers.”
15 Dominic McGoldrick, Extraterritorial Application of the International Covenant on Civil and Political Rights, supra note 8, at 48.
Many commentators have analyzed the explanation given by the U.S. delegate, Eleanor Roosevelt, that the purpose of the wording in Article 2(1) was to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of contracting states.\(^\text{17}\) The context of her comments is important as she was concerned that the ICCPR might oblige state parties to enact legislation that affected persons who, although outside their state’s territory, were technically within its jurisdiction for certain purposes, such as those in the then occupied territories of Germany, Austria and Japan.\(^\text{18}\)

However, according to Michal Gondek, Eleanor Roosevelt did not clearly explain how the phrase ‘within the territory and subject to its jurisdiction’ was to be interpreted. He opines that the U.S. intended to avoid acquiring positive obligations “(i.e. to enact legislation) under the ICCPR with regard to persons in occupied territories in respect of situations that were outside its jurisdiction as an occupying power, rather than totally exclude the application of the Covenant outside the territory of the State Party.”\(^\text{19}\) In short, it may be that the rationale in this particular context was to avoid assuming obligations that a state could not meet.\(^\text{20}\) McGoldrick supports this interpretation, noting that the record in the \textit{travaux préparatoires} “clearly reflects an appreciation that in some


\(^{18}\)Id., at 99.

\(^{19}\)Id. at 103. See also Beth Van Schaack, \textit{The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change}, supra note 3 at 24: “The United States’ so called ‘legal position’ actually reflects a strategic policy choice to endeavor to evade scrutiny of its extraterritorial exploits on the merits.”
situations the expression ‘within its territory and subject to its jurisdiction’ would have to be read disjunctively if the Covenant rights were to be protected.”\(^{21}\)

Quite soon after the coming into force of the ICCPR in 1976, the HRC began to depart from the literal reading of the text, in the early 1980s.\(^{22}\) It then “abandoned the literal meaning altogether” in its General Comment No. 31 of 2004,\(^{23}\) instead prescribing a disjunctive interpretation - that the rights be available to all individuals who may find themselves “in the territory or subject to the jurisdiction of the State Party.”\(^{24}\)

The ICJ has commented that the *travaux préparatoires* confirm the HRC’s interpretation of Article 2(1),\(^{25}\) although Michael Dennis and Andre Surena consider it significant that the ICJ did not cite General Comment No. 31 in its opinion,\(^{26}\) but relied

\(^{21}\) DOMINIC MCGOLDRICK, Extraterritorial Application of the International Covenant on Civil and Political Rights, *supra* note 8, at 66.


\(^{23}\) Id. at 123, citing Human Rights Committee General Comment No. 31, *supra* note 5 at ¶10: “States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.” (Emphasis added).

\(^{24}\) Id.

\(^{25}\) Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, *supra* note 4, at ¶109: “The travaux préparatoires of the Covenant confirm the Committee’s interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4SR.194, para. 46; and United Nations, *Official record, of the General Assembly, Tenth Session, Annexes*, A/2929, Part II, Chap. V, para. 4 (1955)).”

on the HRC rulings in *Lopez Burgos*\(^{27}\) v. *Uruguay* and *Celiberti v. Uruguay*.\(^{28}\) The commentators are firmly of the view that the *travaux préparatoires* confirm the conjunctive interpretation.\(^{29}\) In support of their argument they point to the words of HRC member Christian Tomuschat in *Lopez Burgos* concerning the correct interpretation of Article 2(1) that “[t]he formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations.”\(^{30}\) However, they fail to cite the sentence that precedes the words just cited, as well as the last three sentences of the same paragraph, which seem to support the ruling in the case and do not advance the contention of Dennis and Surena that the conjunctive interpretation applies.\(^{31}\)

Milanovic comments that the U.S. interpretation not only excludes the application of the ICCPR to occupied territories but also to activities in leased territories, such as Guantánamo Bay.\(^ {32}\) He does not believe that the *travaux préparatoires* are clear about

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\(^{27}\) *Lopez Burgos* v. *Uruguay*, *supra* note 5.

\(^{28}\) *Celiberti de Casariego* v. *Uruguay*, *supra* note 22.


\(^{30}\) *Id.*, at 721, citing Christian Tomuschat in *Lopez Burgos* v. *Uruguay*, *supra* note 5.

\(^{31}\) Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, *supra* note 8, at 107, citing Individual Opinion of Christian Tomuschat in *Lopez Burgos* v. *Uruguay*, *supra* note 5 in Appendix: “To construe the words “within its territory” pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd results.....It may be concluded, therefore, that it was the intention of the drafters, whose sovereign decision cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity against their citizens living abroad. Consequently, despite the wording of article 2 (1), the events which took place outside Uruguay come within the purview of the Covenant.”

how the elusive phrase is to be interpreted, rather that they provide “an ample dose of confusion and doubt.” He continues:

the US negotiators at the time were not concerned so much with the application as such of the ICCPR to occupied territories, but with a purported obligation to *legislate* for such territories. This is the result they wanted to avoid….Similarly the US concern with leased territories was that the extension of human rights obligations might lead to questions of ‘conflicting authority between the lessor nation and the lessee nation’, i.e. to norm conflict.

Furthermore, in 2010 the ICJ made it clear that Article 9 applied “in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued.”

The United States has consistently maintained that the treatment of its detainees in Guantánamo, Afghanistan and Iraq is governed by the *lex specialis*, the law of armed conflict, and not international human rights law. The Human Rights Committee has disagreed, most recently in the June 2013 Opinion of the HRC Working Group on

33 *Id.*
34 *Id.*, at 224-5.
35 Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment I.C.J. Reports 2010 639, at ¶77 “The provisions of Article 9, paragraphs 1 and 2, of the Covenant, and those of Article 6 of the African Charter, apply in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued (see in this respect, with regard to the Covenant, the Human Rights Committee’s General Comment No. 8 of 30 June 1982 concerning the right to liberty and security of person (*Human Rights Committee, ICCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Person)*)). The scope of these provisions is not, therefore, confined to criminal proceedings; they also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure, such as those which may be necessary in order to effect the forcible removal of an alien from the national territory.”
Arbitrary Detention in the case of *Obaidullah*.\(^{38}\) He has been detained by the United States, first in Bagram, Afghanistan from July through October 2002 and then from October 2002 in Guantánamo. The Human Rights Committee has commented that the obligations of the United States under international human rights law extend to persons detained at Guantánamo Bay.\(^{39}\) The impasse continues, but some indications can be discerned of a “more relaxed understanding of the relationship between IHL and human rights law and an imperative to harmonize legal obligations when there is no direct contradiction between them.”\(^{40}\) The United States has confirmed its stance in recent discussions with the HRC.\(^{41}\)

### 8.3 Detention

The drafting of the ICCPR began in June 1947\(^{42}\) and work commenced at the outset on Article 9, which deals with detention. A key phrase in Article 9(1) is that no-one shall be subjected to “arbitrary arrest and detention,” and this phrase has been echoed in three of the four regional human rights instruments discussed below. Thus it is important to understand what it means. Again it is pertinent to look at the *travaux préparatoires*.

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\(^{38}\) H.R.C. Communication No. 10/2013 (United States of America), ¶31, A/HRC/WGAD/2013/10 (June 12, 2013), *and see* Chapter 7 infra.

\(^{39}\) *Id.*: “[i]t is at the core of this general rule that a state’s international law obligations equally apply to its acts abroad, and this of its agents abroad, and it is clear that it applies when individuals are held in detention... It is widely accepted that persons incarcerated by state authorities in detention facilities located outside the state’s territory are subject to the effective control of that state. To this end, the joint report of five special procedures mandate holders of the former Commission on Human Rights and the Opinions rendered by the Working Group have confirmed that the obligations of the United States under international human rights law extend to persons detained at Guantánamo Bay.”


The phrase “arbitrary arrest and detention” was used from the very outset of drafting, submitted by the Secretariat at the first session of the drafting committee in 1947.\(^{43}\) It echoes Article 9 of the Universal Declaration of Human Rights.\(^{44}\) Many of the drafters of the Declaration had considered that “arbitrary” was the “most vital word” in Article 9.\(^{45}\) In that first drafting session of the Covenant, Great Britain proposed a different set of wording which permitted detention only in specified circumstances,\(^{46}\) instead of using the broader phrase “arbitrary detention.” The British wording was a forerunner of Article 5(1)(c) of the European Convention on Human Rights discussed in Chapter 9, although the drafting of that Convention did not begin until February 1950.\(^{47}\)

By 1948 it seemed that the wording “no one shall be subjected to arbitrary arrest or detention” was acceptable to the drafting committee,\(^ {48}\) but discussion continued as to whether possible grounds justifying the deprivation of liberty should be set out in the Covenant.\(^ {49}\) By 1952 it was decided that “it seemed unlikely that any list proposed, whether restricted to some twelve grounds as in certain proposals or expanded to include about forty grounds suggested could cover all possible cases of legitimate arrest or

\(^{43}\) Id., at 187, Proposal E/CN.4/21, annex A (Secretariat) art. 6 and 7(9). (“Every one shall be protected against arbitrary and unauthorized arrest.”)

\(^{44}\) Universal Declaration of Human Rights, UNGA RES 217 A(III), (Dec. 10, 1948), Art. 9: “No one shall be subjected to arbitrary arrest, detention or exile.”


\(^{46}\) MARC J. BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, supra note 16, at 187, Proposal E/CN.4.21, annex B (GB), art. 10 (9). (“No person shall be deprived of his liberty save by an arrest which is effected for the purpose of bringing him before a court on a reasonable suspicion of having committed a crime or which is reasonably considered to be immediately necessary to prevent his committing a crime or breach of the peace.”)


\(^{48}\) MARC J. BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, supra note 16, at 189.

\(^{49}\) Id., at 190-191.
50 It was also argued that “by using the word ‘arbitrary’ all legislation would have to conform to the principle of justice.”

51 Ultimately, in 1958 the current wording of Article 9(1) was adopted unanimously.

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But what does “arbitrary detention” mean? The United Nations Department of Economic and Social Affairs Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile concluded in 1964 that “an arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with respect for the right to liberty and security of person.”

53 In 2012 the United Nations Working Group on Arbitrary Detention regarded deprivation of liberty in five classes of cases, as arbitrary detention under customary international law.

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No guidance can be found in the ICCPR itself as to when detention would be contrary to Article 9. In General Comment No. 29, the Human Rights Committee (HRC)
made specific mention of preventive detention, but this did not take definitional matters much further. In addition to the procedural requirements of Article 9, “[t]he right to personal liberty also encapsulated a substantive element, prohibiting detention under the provisions of a law, the purpose of which was incompatible with respect for the right to liberty and security of the person. Article 9(1) ICCPR was said to apply to all deprivations of liberty and specifically including preventive detention.”

A number of key HRC cases aid interpretation of “arbitrary detention.” In *Hugo van Alphen v. The Netherlands*, the HRC said:

The drafting history of article 9, paragraph 1 confirms that ‘arbitrariness’ is not to be equated with ‘against the law,’ but must be interpreted more broadly to include elements of inappropriateness, injustice, and lack of predictability. That means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.

Thus detention could not be inappropriate, unjust, unpredictable, unreasonable or unnecessary. The HRC further refined the interpretation of arbitrary detention by adding the element of proportionality in *A v. Australia*. In that case too, the HRC proscribed indefinite detention, commenting that “detention should not continue beyond the period

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55 *CLAIRE MACKEN, COUNTER-TERRORISM AND THE DETENTION OF SUSPECTED TERRORISTS*, 42 (Routledge, 2011), citing Human Rights Committee, General Comment No. 8, art. 9 at ¶4: “Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.”

56 *CLAIRE MACKEN, COUNTER-TERRORISM AND THE DETENTION OF SUSPECTED TERRORISTS*, *supra* note 55, at 43.

57 After March 23, 1976, when the First Optional Protocol, (opened for signature Dec. 16, 1966, entered into force Mar. 23, 1976, 999 UNTS 302; and list of signatories at [http://www2.ohchr.org/english/law/ccpr-one.htm](http://www2.ohchr.org/english/law/ccpr-one.htm)) came into effect, individuals of signatory states were able to take complaints of ICCPR violations to the Human Rights Committee.


for which the State can provide appropriate justification.”\textsuperscript{60} In \textit{C v. Australia}, the test was repeated, with the further refinement of a proviso that the state should demonstrate that “there were not less invasive means of achieving the same ends.”\textsuperscript{61}

Thus, in order that detention does not violate the Covenant by being arbitrary, the core principles are that detention has to be (i) appropriate, (ii) just, (iii) predictable, (iv) reasonable, (v) necessary, (vi) proportionate, (vii) it should not continue longer than can be justified, (viii) detention should not be imposed if a less invasive method can be used to achieve the same ends, and (ix) it must be on grounds and in accordance with procedures established by law. Claire Macken suggests that the above list may be “summarized as a statement of the ‘principle of proportionality.’”\textsuperscript{62} Yet her definition does not seem to cover all the elements listed above.\textsuperscript{63}

Although the HRC has opined on the duration of detention without judicial authority, i.e. the length of time a person could be detained without an opportunity to challenge the lawfulness of detention,\textsuperscript{64} and pre-trial detention,\textsuperscript{65} they have not issued any

\textsuperscript{60} \textit{Id.}, at ¶9.4.
\textsuperscript{62} \textit{Id.}, at 50.
\textsuperscript{63} \textit{Id.} “The principle of proportionality requires consideration as to whether a particular measure is for a legitimate aim, and if so, whether that measure is reasonably necessary to achieve that purpose, having regard to whether a less restrictive measure is available as an alternative to the measure in question.”
\textsuperscript{64} CCPR General Comment No. 8. (General Comments) (Right to liberty and security of persons) (Article 9) (Sixteenth session, 1982) U.N. Doc. HRI/GEN/1/Rev. 1 [8], ¶2: “Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days;” Komaravski v Turkmenistan, HRC Communication No. 1450/2006, (Aug. 5, 2008), CCPR/C/93/D/1450/2006, ¶7.4: “the length of custody without judicial authorization should not exceed a few days.”
\textsuperscript{65} CCPR General Comment No. 8, \textit{supra} note 64, at ¶3: Pre-trial detention should be an exception and as short as possible.”
opinions as to the duration of detention *per se*, other than a nebulous comment that it should not continue beyond a justifiable period.\(^{66}\)

Preventive detention *per se* does not feature explicitly in Article 9, but has been contemplated in General Comment No. 8,\(^{67}\) and in the case of *Campora Schweizer v. Uruguay.*\(^{68}\) In May 2013, a statement was issued by the Human Rights Council Working Group on Arbitrary Detention, the Inter-American Commission of Human Rights and United Nations Rapporteurs on Human Rights and Counter-Terrorism, Torture and Health. It called for the closure of the Guantánamo Bay detention facility, for an end to indefinite detention of persons and stressed “that even in extraordinary circumstances, when the indefinite detention of individuals, most of whom have not been charged, goes beyond a minimally reasonable period of time, this constitutes a flagrant violation of international human rights law and in itself constitutes a form of cruel, inhuman, and degrading treatment.”\(^{69}\)

Arbitrary detention remains a live issue. For example, in 2012 the Working Group on Arbitrary Detention, adopted 69 opinions concerning the detention of 198 persons in


\(^{67}\) CLAIRE MACKEN, COUNTER-TERRORISM AND THE DETENTION OF SUSPECTED TERRORISTS, *supra* note 55, at 95, citing CCPR General Comment No. 8, *supra* note 64, at ¶8: “Also if so-called preventive detention is used, for reasons of public security….it must not be arbitrary, and must be based on grounds and procedures established by law.”

\(^{68}\) *Id.*, citing David Alberto Campora Schweizer v. Uruguay, Communication 66/1980, (Mar. 15, 1980) UN Doc Supp. No. 40 (A/38/40), 117: “According to Article 9(1) of the Covenant, no one shall be subjected to arbitrary arrest or detention. Although administrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner, the Committee emphasizes that the guarantees enshrined in the following paragraphs of Article 9 fully apply in such instances.”

37 countries\(^\text{70}\) and also transmitted a total of 104 urgent appeals to 44 States concerning 606 individuals.\(^\text{71}\) In 2013 the HRC Working Group on Arbitrary Detention issued an opinion in the case of *Obaidullah*, and concluded that his detention by the United States, first in Bagram, Afghanistan from July through October 2002, and then from October 2002 in Guantánamo was arbitrary.\(^\text{72}\) Three reasons were given: first, that the domestic law used by the United States to detain Obaidullah did not conform to either human rights law or international humanitarian law because the detention was prolonged and indefinite;\(^\text{73}\) second, that the prolonged detention was due to Obaidullah’s foreign status. This was a discriminatory reason that made the detention arbitrary;\(^\text{74}\) and third the failure to afford Obaidullah with due process and fair trial protections gave the detention an arbitrary character.\(^\text{75}\)

### 8.4 Derogation

The ICCPR provides that in some defined situations states may be released from the obligation to guarantee certain rights.\(^\text{76}\) In this dissertation the focus is on the right to liberty in Article 9, and an analysis of the principles applicable when states may derogate from the right to ensure that arrest or detention must not be arbitrary, in times of emergency, pursuant to Article 4. Or to put it another way, the discussion concerns


\(^{71}\) *Id.*, at 13, A6 ¶23.

\(^{72}\) HRC Communication No. 10/2013 (United States of America), *supra* note 38, at ¶44 (June 12, 2013), and see Chapter 7 *infra*.

\(^{73}\) *Id.* at ¶37.

\(^{74}\) *Id.*, at ¶42.

\(^{75}\) *Id.*

\(^{76}\) One explanation of the rationale of derogation can be seen in Emilie M. Hafner-Burton, Lawrence R. Helfer & Christopher J. Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 *INTERNATIONAL ORGANIZATION* 673, 681 (2011): “governments responding to a crisis face a dual challenge. They must buy time and policy breathing space to adopt emergency measures, including measures that restrict civil and political liberties. And they must do so in a way that reduces the risk of censure from voters, interest groups, and domestic judges. A derogation from a human rights treaty helps to achieve both of these ends.”
whether states are relieved from providing certain guarantees in Article 9 if they wish to preventively detain persons in the face of an actual or imminent terrorist attack. It should be noted that in derogating, states must be mindful of and respect their obligations under international law. This has been interpreted as including consistency with other international human rights treaty obligations.

The formula using the words “in time of public emergency when the life of the nation is threatened, and when its existence has been officially proclaimed” evolved in discussions by the drafters of the Covenant after many other proposals had been considered and rejected. The travaux préparatoires reflect the view that each Government would have to decide for itself when such a situation existed, and each Government should be allowed a certain latitude in judgment. This discussion made reference to the ‘margin of appreciation’ standard of deference in the European Convention for Human Rights, which is discussed below, but that wording was not adopted. In fact, very little has been written about the use of a margin of appreciation by the HRC, and it is unclear whether it exists at all in practice in respect of the ICCPR. One view is that cases that can be found support the proposition that the HRC has been “speaking silently the language of the margin.”

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77 ICCPR, supra note 1, at Art. 4(1).
78 DIANE A. DESIERTO, NECESSITY AND NATIONAL EMERGENCY CLAUSES, 279 (Martinus Nijhoff, 2012).
80 Id., at 87, Third Committee 18th Session (1963), A/5655, §49.
81 Id.
83 ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW, supra note 82, at 6, citing JAMES CRAWFORD, Preface, ix, in YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE
In 1964, whilst drafting of the ICCPR was still ongoing, the United Nations Department of Economic and Social Affairs Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile reviewed derogation, and the use of preventive detention in times of emergency by nearly fifty countries.\(^8^4\) They concluded that the right to derogate could apply “to the extent strictly required by the exigencies of the situation,”\(^8^5\) echoing the phraseology in the then current draft of the ICCPR.

In September 1984 the United Nations Economic and Social Council issued the non-binding Siracusa Principles\(^8^6\) in 1985 the International Law Association adopted the non-binding Paris Minimum Standards of Human Rights Norms in a State of Emergency,\(^8^7\) and on August 31, 2001 the HRC issued General Comment No. 29,\(^8^8\) as guidance on how to interpret Article 4. Additionally, the HRC has issued comments in its review of State party reports as well as in individual communications, although case law on the subject is scarce.\(^8^9\)

The core principles that relate to derogation appear to be:

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\(^{84}\) U.N. DEPT. OF ECONOMIC AND SOCIAL AFFAIRS, STUDY OF THE RIGHT OF EVERYONE TO BE FREE FROM ARBITRARY ARREST, DETENTION AND EXILE, supra note 53, at ¶¶753-82.

\(^{85}\) Id., at ¶783.


\(^{89}\) CHRISTOPHER MICHAELSON, Permanent Legal Emergencies and the Derogation Clause in International Human Rights Treaties: A Contradiction? supra note 82, at 293.
(i) There has to be a state of emergency that threatens the life of the nation.\textsuperscript{90} The Siracusa Principles,\textsuperscript{91} and the Paris Minimum Standards\textsuperscript{92} provide some guidance. Both of these interpretation aids prescribe that the situation must be exceptional and relate to actual or imminent danger. Before 9/11, states such as Chile, Colombia, Peru and Uruguay have cited terrorism as causing a state of emergency.\textsuperscript{93} However, after 9/11 not many states derogated from the ICCPR, and none of the Latin American States that did derogate did so for reasons directly connected to the threat of international terrorism.\textsuperscript{94} However, as to threats, it is not possible to derogate to face “possible exceptional situations which have not yet arisen.”\textsuperscript{95}

(ii) A State wishing to derogate must have officially proclaimed a state of emergency,\textsuperscript{96} as a last resort.\textsuperscript{97} The reason for this is to “prevent states from derogating arbitrarily from their obligations where such an action was not warranted by events.”\textsuperscript{98}

\textsuperscript{90} CCPR General Comment No. 29, supra note 88, at ¶2.
\textsuperscript{91} Siracusa Principles, supra note 86, at ¶39: “A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called “derogation measures”) only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that:
(a) affects the whole of the population and either the whole or part of the territory of the State, and
(b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and project the rights recognized in the Covenant.
40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.
41. Economic difficulties per se cannot justify derogation measures.”
\textsuperscript{92} Paris Minimum Standards, supra note 87, at (A) “1. (a) The existence of a public emergency which threatens the life of the nation, and which is officially proclaimed, will justify the declaration of a state of emergency.
(b) The expression “public emergency” means an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.”
\textsuperscript{93} JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW, 22 (Clarendon Press Oxford, 1992).
\textsuperscript{94} CHRISTOPHER MICHAELSON, Permanent Legal Emergencies and the Derogation Clause in International Human Rights Treaties: A Contradiction? supra note 82, at 309.
\textsuperscript{95} Id., at 27.
\textsuperscript{96} CCPR General Comment No. 29. States of Emergency, supra note 88 at ¶2.
\textsuperscript{97} JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW, supra note 93 at 29.
(iii) Measures derogating from the ICCPR must be of an “exceptional and temporary” nature.\(^{99}\) The “restoration of a state of normalcy” should be the predominant objective of a derogating state.\(^{100}\) Thus derogating measures cannot be used to implement preventive detention as a counter-terrorism strategy,\(^{101}\) because a strategy by definition is unlikely to be temporary.

The principle relating to the use of emergency measures on a temporary basis only, is one that has generated much controversy over what have been described as ‘permanent or entrenched emergencies.’ Examples involving terrorist activity include Northern Ireland (over 80 years) Israel (over 50 years) and Turkey (15 years),\(^{102}\) Egypt, Uruguay and Argentina,\(^{103}\) as well as the U.S. “war” on terror against al-Qaeda.\(^{104}\) One main area of concern is that emergency legislation becomes normalized.\(^{105}\) For example, the emergency regulations dating from the British Mandate in Palestine remained in place when the State of Israel was established in 1948, and are still in effect in current


\(^{99}\) CCPR General Comment No. 29. States of Emergency, supra note, 88 at ¶2.

\(^{100}\) Id., ¶1. See also DIANE A. DESIERTO, NECESSITY AND NATIONAL EMERGENCY CLAUSES, supra note 78, at 258.

\(^{101}\) CLAIRE MACKEN, COUNTER-TERRORISM AND THE DETENTION OF SUSPECTED TERRORISTS, supra note 55, at 94.


\(^{103}\) CHRISTOPHER MICHAELSON, Permanent Legal Emergencies and the Derogation Clause in International Human Rights Treaties: A Contradiction? supra note 82, at 309.

\(^{104}\) Greg Miller, Plan for hunting terrorists signals U.S. intends to keep adding names to kill lists, WASH. POST, (Oct. 24, 2012) at A1: “The United States’ conventional wars are winding down, but the government expects to continue adding names to kill or capture lists for years… such operations are likely to be extended at least another decade. Given the way al-Qaeda continues to metastasize, some officials said no clear end is in sight… That timeline suggests that the United States has reached only the midpoint of what was once known as the global war on terrorism.”

\(^{105}\) See e.g. JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW, supra note 93 at 22; Oren Gross, “Once More Unto the Breach”: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies, 23 YALE J. INT’L L. 437, 455-6 (1998); Oren Gross, “Chaos and Rules” Should Responses to Violent Crises Always be Constitutional?, 112 YALE L. J. 1011, 1090 (2003); Edel Hughes, Entrenched Emergencies and the “War on Terror”: Time to Reform the Derogation Procedure in International Law?, supra note 102, at 3; CLAIRE MACKEN, COUNTER- TERRORISM AND THE DETENTION OF SUSPECTED TERRORISTS, supra note 55, at 94.
legislation. The continued use of the emergency regulations “became acceptable; it came to be considered as an evil perhaps, but an evil that one had to live with because of external circumstances imposed on the nation.”

(iv) Derogating measures must be necessary and proportionate. The HRC has from time to time expressed concern that insufficient attention has been paid to the principle of proportionality.

(v) Judicial review is not derogable in a state of emergency, in particular the right to apply to a court for a decision on the lawfulness of detention.

8.5 Process

Articles 9(2) and (4) provide a certain amount of process for detained persons. Article 9(2) states that anyone who is arrested shall be informed at the time of his arrest of the reasons for the arrest. A mere reference to the legal basis for detention is

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106 Oren Gross, “Chaos and Rules” Should Responses to Violent Crises Always be Constitutional? Supra note 105, at 1092, citing the official commentary to the Emergency Powers (Detention) Bill, 1 Amnon Rubinstein, Ha-Mishpat Ha-Konstitutsyoni Shel Medinat Israel 263 (5th rev. ed. 1996): “In the state of siege to which the State is subject since its establishment, one cannot relinquish special measures designed to ensure adequate defense of the State and the public against those who conspire to eliminate the State. Still, one should not be content with the existence of those radical regulations…Perceived necessity made thinkable what had previously been considered unthinkable.”

107 CCPR General Comment No. 29, States of Emergency, supra note 88, at ¶4: the measures have to be “limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage, and material scope of the state of emergency and any measures of derogation resorted to because of the emergency…[T]he obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers.”

108 Id, fn 3, citing concluding observations on Israel (1998), CCPR/C/79/Add.93, ¶11.

insufficient, the detainee is entitled to know the substance of the complaint, and to be sufficiently informed to take steps to challenge the detention.

Article 9(3) anyone arrested or detained on a criminal charge must be brought “promptly” before a judge and shall be entitled to trial within a reasonable time. In Berry v. Jamaica, the HRC held that there was a violation of Article 9(3) because he should have been brought “promptly” before a judge. The notion of promptness is considered key, and the HRC has found violations in cases of delays of “more than a few days.”

Article 9(3), which regulates pre-trial detention, technically does not apply to those preventively detained without charge, as it envisages that a charge has been preferred. Persons detained without charge are entitled to apply to a court pursuant to Article 9(4) so that the court may decide without delay if the detention is lawful, effectively habeas corpus proceedings. Article 9(4) does not say that the detainee must be brought before a court without delay, and the word “promptly” that applies in the bringing of a person who has been charged before a court pursuant to Article 9(3), is absent. The right to challenge detention must involve the facility of the court to order the release of a detainee if the detention is unlawful. An example where the domestic law

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does not permit release is Australia, which has been criticized by Human Rights groups and the HRC for this serious procedural flaw.\footnote{AUSTRALIAN HUMAN RIGHTS COMMISSION, RESPONSE TO QUESTIONNAIRE FROM THE WORKING GROUP ON ARBITRARY DETENTION, JUDICIAL REVIEW OF LAWFULNESS OF DETENTION, ¶23 (Nov. 8, 2013), \url{http://www.ohchr.org/Documents/Issues/Detention/DraftBasicPrinciples/AustralianNHRI.pdf}, citing A. v. Australia, supra note 59, at ¶9.5.}

Other aspects of process are not explicitly found in the text of the ICCPR. For example, the text does not mention what sort of evidence is required to justify detention. Review of the laws in Section A has revealed that the use of secret evidence is predominant in detention cases. To counter this, the Working Group on Arbitrary Detention has recommended that “no person should be deprived of liberty or kept in detention on the sole basis of evidence to which the detainee does not have the ability to respond.”\footnote{U.N.G.A. Human Rights Council, Report of the Working Group on Arbitrary Detention, \textit{supra} note 54, at 22, III D ¶72.}

Thus process provisions are inadequate and too weak to provide sufficient guarantees of due process to states on how and when detainees may challenge detention. Even the low standards are often not met by states. For example, in the case of \textit{Obaidullah}, several of his rights to due process were violated during his detention. He was not provided with formal reasons for his detention for more than two years, nor was he brought promptly before a judicial authority to challenge his detention.\footnote{HRC Communication No. 10/2013 (United States of America), \textit{supra} note 38, at ¶39.}

The U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that detained persons are entitled to legal representation “as prescribed by law.”\footnote{U.N. BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT, A/RES/43/173, (Dec.9, 1988), Principle 11: “A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.”} The ICCPR does not mention the right to legal counsel in
habeas proceedings, but the HRC may have implied that such a right exists. In *Berry v. Jamaica*, the petitioner had been detained for two and a half months on a murder charge before he was brought before a judge to challenge detention. The State maintained that he could have made a habeas application in that time, but the HRC noted the petitioner’s claim that throughout the period he had no access to legal representation. The HRC held that the right under Article 9(4) had been violated, “since he was not, in due time, afforded the opportunity to obtain, on his own initiative, a decision by a court on the lawfulness of his detention.” In *Obaidullah*, in the HRC’s discussion of numerous due process rights that had been violated, reference was made to the fact that the detainee had been denied legal counsel in all administrative and legal hearings. In *A. v. Australia*, the HRC “acknowledged the importance of access to counsel while accepting that some reasonable limits on that access did not violate Article 9(4).” Mere acknowledgment is not good enough. The ICCPR and its jurisprudence do not provide adequate guarantees to ensure that all detainees have meaningful access to lawyers.

Article 9(5) gives a right to claim compensation for unlawful arrest or detention. Breaches of the ICCPR are dealt with in two ways. First, a State Party to the ICCPR can issue a communication to another State to notify that State that it is not honoring its obligations, in accordance with the Article 41 procedure. If no satisfaction is obtained,
and all domestic remedies have been exhausted, the HRC\textsuperscript{124} will write to the offending State party, and request an explanation. After twelve months the HRC will issue a report, but all it can do is make recommendations. The second method is a written communication from an aggrieved individual who is subject to the jurisdiction of a State Party that has ratified the Optional Protocol,\textsuperscript{125} and who has exhausted all domestic recourses to justice. This procedure, too, is only able to yield justice in the form of a report with recommendations. For example, in \textit{Obaidullah}, although the HRC concluded that his detention by the United States, violated Article 9(1), (2) and (4), it merely recommended that the detainee be released and be paid compensation.\textsuperscript{126} It is powerless to make the release or the payment of compensation happen. The enforcement mechanism is therefore limited and poor.

\section*{8.6 Some other examples of problematic preventive detention measures}

This section provides a brief look at three states; Malaysia, Algeria and Nepal. They have been selected to show how procedural defects in the ICCPR permit these states to detain persons in flagrant disregard of human rights considerations.

Until 2012, Malaysia’s Internal Security Act permitted indefinite detention without charge, in unlimited tranches of periods of up to two years.\textsuperscript{127} This law was repealed in 2012\textsuperscript{128} and replaced with the Security Offences (Special Measures) Act 2012. The new Act permits a police officer to arrest without a warrant any person that he has

\textsuperscript{124}The Human Rights Committee was established to monitor how states were honoring their treaty obligations, and to hear complaints from state parties, and from individuals from states that have ratified Optional Protocol 1 to the ICCPR.

\textsuperscript{125}Optional Protocol 1 to the ICCPR, \textit{supra} note 1.

\textsuperscript{126}HRC Communication No. 10/2013 (United States of America), \textit{supra} note 38, at ¶46.


reason to believe is involved in security offenses.  The suspect may be detained without charge for up to 28 days for the purpose of investigation. If further investigation is needed, the suspect will be released but required to have an electric monitoring device attached to him. The suspect is entitled to be told the grounds for the arrest and detention “as soon as may be.” The police must immediately notify the arrested person’s next of kin of the arrest and detention. The suspect has the right to consult with a lawyer of his choice but access to that lawyer can be delayed for up to 48 hours in certain circumstances. No right of judicial review of the arrest and detention is explicitly stated in this Act, although the Constitution of Malaysia provides that a person must be brought before a magistrate within 24 hours of arrest for the magistrate to authorize continued detention.

Once a person has been charged with a security offense, bail is not permitted, subject to the following proviso: in cases other than terrorism offenses, (which are very broadly defined and different from security offenses) bail may be granted subject to the suspect wearing an electronic device if the suspect is under 18, or a woman, or ill or infirm. If a person is acquitted of a security offense, a judge may still order him to be detained pending the filing of a notice of appeal as well as until the disposition of an

130 Id., at §§4(4), 4(5).
131 Id., at §4(6).
132 Id., at §4(2).
133 Id., at §5(1)(a).
134 Id., at §5 (1)(b) and (2).
136 Penal Code, Act 574, Chapter VIA, §130.
appeal against acquittal.\(^{138}\) Human Rights watch notes that this could result in indefinite detention.\(^{139}\) In October 2013, new legislation amending the Prevention of Crime Act 1959 reintroduced preventive detention. The law now permits indefinite detention without trial of anyone who has committed (although not necessarily been convicted of) two or more serious offenses, on the grounds of preventing crime, public security or public order.\(^{140}\) The law permits an indefinite number of two year periods of detention and unsurprisingly, this has generated many protests from human rights groups.\(^{141}\) The defect in ICCPR treaty process derives from not having a ban on indefinite detention. The ICCPR itself is silent on duration, and the HRC have merely commented that detention should not continue longer than can be justified.\(^{142}\)

Some State Parties have been criticized by human rights bodies for the practice of secret and/or incommunicado detention,\(^{143}\) in the context of combating terrorism, despite the existence of the Enforced Disappearance Convention.\(^{144}\) For example, secret

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\(^{138}\) Id., §30.


\(^{142}\) A. v. Australia, supra note 59 at ¶9.4: “detention should not continue beyond the period for which the State can provide appropriate justification.”

\(^{143}\) U.N. HUMAN RIGHTS COUNCIL, JOINT STUDY ON GLOBAL PRACTICES IN RELATION TO SECRET DETENTION IN THE CONTEXT OF COUNTERING TERRORISM OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM, A/HRC/13/42 (Feb.19, 2010), hereinafter referred to as “STUDY ON SECRET DETENTION.”

detention is a frequent occurrence in Algeria. The Constitution guarantees against deprivation of liberty except “within the cases defined by the law and in accordance with the forms prescribed.” Generally, custody is limited to forty-eight hours, but can be extended exceptionally in accordance with conditions established by law. Detainees have the right to contact their families immediately. Human rights bodies report that Algeria uses secret detention. Yet Algeria continues to deny that the practice, despite recent findings to the contrary by the Human Rights Committee.

Another recent example of secret and incommunicado detention has been reported, involving Nepal, with secret detention attributed in the main to the royal Nepalese Army. The HRC considered the case of a terror suspect who was arrested on

145 Constitution of the Peoples’ Democratic Republic of Algeria 1989 (amended by the constitutional revision of 1996), art. 47.
146 Id., at art.48.
147 U.N. HUMAN RIGHTS COUNCIL, STUDY ON SECRET DETENTION, supra note 143, at ¶¶216-221, citing the reports by the Committee Against Torture, CAT/C/DZA/CO/3, ¶6, and two cases reported by the Working Group on Arbitrary Detention, of M’hamed Benyamina, Working Group on Arbitrary Detention, opinion No. 38/2006 (A/HRC/7/4/Add.1), and MohamedRahmouni, Working Group on Arbitrary Detention, opinion No. 33, 2008, (A/HRC/13/30/Add.1), both of whom were held in secret detention for six months.
148 Id., at ¶217. In the same paragraph that Algeria denied this practice, it appeared to justify these “rare exceptional measures”, as “effective in the effort against terrorism.”
149 See e.g., Guezout v. Algeria, HRC Communication No.1753/2008, CCPR/C/105/D/1753/2008, (Jul. 19, 2012), involving inter alia, 35 days of incommunicado detention, where the HRC noted that there had been an arrest without warrant, no reasons were given for the arrest, there as no opportunity to challenge the detention and that the detentions was incommunicado, and that there were violations of Article 9 and 10. (¶¶8.7, 8.8); Khirani v. Algeria, Communication No. 1905/2009, CCPR/C/104/D/1905/2009, (Mar. 26, 2012), where the applicant’s husband was arrested without a warrant and without being informed of the reasons for his arrest. He was at no point informed of the criminal charges against him, nor was he brought before a judge or other judicial authority to challenge the legality of his detention, which remained indefinite and incommunicado. The HRC found violations of Articles 9 and 10. (¶¶7.7, 7.8); Maamar Ouaghliissi v. Algeria, Communication No. 1905/2009, UN Doc. CCPR/C//104/D/1905/2009 (Mar. 26 2012) where the applicant brought a case in 2005 in respect of her husband who had been arrested in 1994. The HRC found a violation of Article 9 that he had been arrested without a warrant, not told why, and never brought before a judge to challenge his indefinite incommunicado detention. (¶7.7).
150 U.N. HUMAN RIGHTS COUNCIL, STUDY ON SECRET DETENTION, supra note 143, at ¶¶180-186.
152 Id., at ¶181.
29 July 2004 under the Terrorist and Disruptive Activities (Control and Punishment) Act of 2004. This Act was adopted in the context of the state of emergency declared by the State party, and permits the arrest and preventive detention of suspects for a period of up to one year.\textsuperscript{153} The Constitution states that no person shall be deprived of his/her personal liberty save in accordance with law,\textsuperscript{154} and the guarantees relating to access to justice do not apply to preventive detention.\textsuperscript{155} The HRC found violations of Article 7, in that keeping the suspect incommunicado amounted to cruel and inhuman treatment,\textsuperscript{156} and of Article 9 in that the applicant was held incommunicado without being informed of the reasons for his arrest.\textsuperscript{157}

The HRC has approached cases of incommunicado detention by finding violations of process, such as not informing detainees of the reasons for detention, not affording them a right to challenge detention, and by treating incommunicado detention as a violation of articles 7 and 10, which both deal with cruel and inhuman treatment. The deficiency in the ICCPR is that the problem of being held incommunicado can only be

\textsuperscript{153} Maharjan v. Nepal, \textit{supra} note 151, at ¶8.6.
\textsuperscript{154} Interim Constitution of Nepal 2063 (2007), §12(2).
\textsuperscript{155} \textit{Id.}, at §24 "(1) No person who is arrested shall be detained in custody without being informed of the ground for such arrest. (2) The person who is arrested shall have the right to consult a legal practitioner of his/her choice at the time of the arrest. The consultation made by such a person with the legal practitioner and the advice given thereon shall remain confidential, and such a person shall not be denied the right to be defended through his/her legal practitioner. Explanation: For the purpose of this clause, the words "legal practitioner" means any person who is authorized by law to represent any person in any court. (3) Every person who is arrested shall be produced before a judicial authority within a period of twenty-four hours after such arrest, excluding the time necessary for the journey from the place of arrest to such authority, and no such a person shall be detained in custody beyond the said period except on the order of such authority. Provided that nothing in clauses (2) and (3) shall apply to preventive detention or to a citizen of an enemy state."
\textsuperscript{156} Maharjan v. Nepal, \textit{supra} note 151, at ¶8.4.
\textsuperscript{157} \textit{Id.}, at ¶8.6. In the absence of any explanations for the periods of detention from Nov. 26, 2003 to Jul. 29, 2004 and another 5 day period in Oct.-Nov. 2004, the HRC found a violation of Art. 9. Another recent example of incommunicado detention for two periods of two months was held to be a violation of Article 9 in Idriss Aboufaied v. Libya, Communication No. 1782/2008, UN Doc CCPR/C/104/D/1782/2008, Mar. 21, 2012, ¶7.6.
addressed by guaranteeing humane treatment in articles 7 and 10, and by guaranteeing a right in article 9(4) to challenge detention, without stipulating a time limit for doing so. Nothing in the ICCPR requires that a detainee must be brought before a court without delay, or that someone, whether lawyer, family or friend, is informed about the detention.

8.7 Summary

Despite the comprehensive framework that has been developed by the HRC and other groups, significant flaws can be discerned in the due process provisions of the ICCPR that require addressing. Indeed, in its recent response to the Working Group on Arbitrary Detention, the Australian Human Rights Commission has sought the development of general principles and guidelines on Article 9(4) in particular. In commenting on the HRC’s Draft General Comment No. 35, the International Commission of Jurists has recommended that the HRC should address the issue of access to lawyers.

Even with the guarantees in place, many violations occur and the HRC has no real power to make States abide by international human rights standards. For example, even after delivering an excoriating opinion about Obaidullah’s indefinite detention by the United States in Guantánamo Bay, the condemnation fizzles away to nothing in the

158 AUSTRALIAN HUMAN RIGHTS COMMISSION, RESPONSE TO QUESTIONNAIRE FROM THE WORKING GROUP ON ARBITRARY DETENTION, JUDICIAL REVIEW OF LAWFULNESS OF DETENTION, supra note 116, at ¶85.
161 HRC Communication No. 10/2013 (United States of America), supra note 38, at ¶28-44.
mild request to “take the necessary steps to remedy the situation of Mr Obaidullah and bring it into conformity” with international human rights standards and principles. 162

From a review of the treaty provisions, guidance to interpretation and relevant case law, a number of core principles relating to preventive detention can be extracted. These will form the base line from which to compare the principles that emerge from analysis of the other treaties.

1. Detention can only be on grounds, and in accordance with procedures established by law. 163
2. Detention may not be arbitrary. 164
3. Detention must be appropriate. 165
4. Detention may not be unjust. 166
5. Detention must be predictable. 167
6. Detention must be reasonable. 168
7. Detention must be necessary. 169
8. Detention must be proportionate. 170
9. Detention should not continue longer than can be justified. 171
10. Detention must not be discriminatory. 172

162 Id., at ¶45.
163 ICCPR, supra note 1, at Art. 9(1).
164 Id.
165 Hugo van Alphen v. The Netherlands, supra note 58, at ¶5.8.
166 Id.
167 Id.
168 Id.
169 Id.
170 A v. Australia, supra note 59, at ¶9.2.
171 Id. at ¶9.4.
172 HRC Communication No. 10/2013 (United States of America), supra note 38, at ¶¶41, 42.
11. Detention may not be imposed if a less invasive method can be used to achieve the same ends. 173

12. Detention guarantees can be suspended in a state of emergency that threatens the life of the nation and is officially proclaimed. 174

13. Detention guarantees can be suspended in a state of emergency which must be an exceptional situation of actual or imminent danger. 175

14. Detention measures used in a state of emergency must be exceptional and temporary. 176

15. Detention can be used in a state of emergency provided it is strictly necessary and proportionate, and consistent with other obligations under international law. 177

16. In all cases, both in normal times and in periods of emergency, detainee must be able to challenge detention in a court, which has to adjudicate without delay. 178

17. There may be an implied right of access to legal representatives when challenging detention. 179

18. Detainees must be told the reason for arrest and detention. 180

19. Treatment in detention must be humane and respect the dignity of the person. 181

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173 C v. Australia, supra note 61, at ¶8.2.
174 ICCPR, supra note 1, at Art. 4(1); CCPR General Comment No. 29, supra note 88, at ¶2.
175 Siracusa Principles, supra note 86, at ¶39; Paris Minimum Standards, supra note 87, at ¶A(1)(b).
176 CCPR General Comment No. 29, supra note 88, at ¶2.
177 ICCPR, supra note 1, at Art. 4(1); CCPR General Comment No. 29, supra note 88, at ¶4.
178 ICCPR, supra note 1, at Art. 9(4); CCPR General Comment No. 29, supra note 88, at ¶16.
179 Berry v. Jamaica, supra note 112, at ¶11.1.
180 ICCPR, supra note 1, at Art. 9(2).
181 ICCPR, supra note 1, at Art. 10.
20. Victims of unlawful detention have a right to compensation.¹⁸²

¹⁸² ICCPR, supra note 1, at Art. 9(5).
CHAPTER 9 - EUROPEAN CONVENTION ON HUMAN RIGHTS

9.1 Introduction

The European Convention, through the judgments of the European Court of Human Rights (“ECHR”), has become a dynamic and powerful instrument in the response to new challenges and the ongoing promotion of the rule of law and democracy in Europe. The ECHR has developed an extensive body of case law, much of it concerned with detention. The Council of Europe describes the ECHR as the “conscience of Europe” and its landmark judgments in detention and other cases have prompted changes in national laws. Its interpretive jurisprudence yields much useful and important material to assist in the search for global core principles.

9.2 Jurisdiction

In this Convention too, the interpretation of extraterritorial jurisdiction, which is relevant to detention, has been controversial. Initially the jurisdiction clause was drafted to guarantee rights to all persons residing within the territories of the contracting parties, but this was thought to be too restrictive. Although the words in the final version, that the “High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention” appear clear, the phrase “within

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3 Id.
5 Id.
6 European Convention, supra note 1 at art. 1.
their jurisdiction” has generated a lot of discussion and debate.⁷ Although Article 1 does not mention territory, it should be read in tandem with Article 56, which provides that any State can notify the Secretary General of the Council of Europe that the European Convention extends to “all or any of the territories for whose international relations it is responsible,”⁸ but there is a proviso that “the Convention shall be applied in such territories, with due regard, however, to local requirements,”⁹ whatever that means.

The issue of the applicability of extraterritorial jurisdiction has been frequently disputed in places where States have been in some sort of military occupation. In *Loizidou v. Turkey*, the Court opined

> [b]earing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.¹⁰

However, effective control of an area has been hard to define.¹¹ Until 2011 the leading case was *Bankovic v. Belgium*,¹² which generated much academic comment.¹³ It involved

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⁸ European Convention, *supra* note 1, at Art. 56(1).

⁹ *Id.*, art. 56(3).


¹³ See e.g. FONS COOMANS & MENNO T. KAMMINGA, Comparative Introductory Comments, 5; DOMINIC McGOLDRICK, Extraterritorial Application of the International Covenant on Civil and Political Rights, 68; RICK LAWSON, Life After Bankovic: On the Extraterritorial Application of the European Convention on
a complaint by relatives of Yugoslav citizens killed in a NATO operated strike in
Belgrade, that various Convention rights had been violated. The Court did not find a
jurisdictional link between the applicants and the respondent state for an extraterritorial
act. It commented that the case law
demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a
Contracting State is exceptional: it has done so when the respondent State, through
the effective control of the relevant territory and its inhabitants abroad as a
consequence of military occupation or through the consent, invitation or
acquiescence of the Government of that territory, exercises all or some of the public
powers normally to be exercised by that Government.\(^\text{14}\)

However, in this case the exceptional exercise of extraterritorial jurisdiction was limited
to action on the territory of another contracting party except in some special
circumstances.\(^\text{15}\)

The scope of extraterritorial jurisdiction was broadened further in 2004 in
Ilascu v. Moldova and Russia.\(^\text{16}\) The case concerned the pre and post trial detention of
Moldovan nationals in Moldova. The applicants claimed first that Moldova had violated
the Convention. Moldova asserted that at the relevant time it did not have effective
control. The extra-territorial aspect related to the allegation that Moldova was under \textit{de facto}
Russian control on account of the presence of Russian troops and equipment as well
as support that Russia allegedly gave to the separatist regime.\(^\text{17}\) The Court gave a very

\(^\text{14}\) Bankovic v. Belgium, \textit{supra} note 12, at ¶71.
\(^\text{15}\) \textit{Id.}, at ¶80: “The Convention was not designed to be applied throughout the world, even in respect of the
conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights’
protection has so far been relied on by the Court in favour of establishing jurisdiction only when the
territory in question was one that, but for the specific circumstances, would normally be covered by the
Convention.”
\(^\text{17}\) \textit{Id.}, at ¶3.
wide interpretation of jurisdiction in respect of Moldova,\(^\text{18}\) and also concluded that there was a “continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate.”\(^\text{19}\) One view is that the Court’s principles of extraterritorial application of the ECHR are “valid not only in cases of military occupation \textit{sensu stricto}, but also in cases where a state party provides a separatist regime in another state (in that case another state party) with political, military, and economic support” which enables the separatist regime to survive.\(^\text{20}\)

In 2011 \textit{Al-Skeini v. United Kingdom}\(^\text{21}\) concerned a complaint of a violation of Article 2, relating to an investigation into the death of Iraqi civilians involving British soldiers in an area of southern Iraq under British control. The U.K. government argued that it did not have effective control over any part of Iraq and that in any event, Iraq fell outside the Convention space, and that none of the exceptions in \textit{Bankovic} applied. The Court commented that “the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra-territorially must be determined with reference to the particular facts.”\(^\text{22}\)

The Court gave the example of \textit{Al-Saadoon and Mufdhi v. the United Kingdom},

\(^{18}\) \textit{Id.}, at ¶333. In answer to Moldova’s assertion that at the relevant time it did not exercise effective control, the Court considered that “where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining \textit{de facto} situation, such as obtains when a separatist regime is set up, whether or not this is accompanied by military occupation by another State, it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State. Nevertheless, such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory. The State in question must endeavor, with all the legal and diplomatic means available to it \textit{vis-à-vis} foreign States and international organizations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention.”

\(^{19}\) \textit{Id.}, at ¶393.


\(^{22}\) \textit{Id.}, at ¶132.
where it was held that “two Iraqi nationals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the United Kingdom, since the United Kingdom exercised total and exclusive control over the prisons and the individuals detained in them.”

In considering whether extraterritorial jurisdiction could apply in a place that was non-Convention territory, the Al-Skeini Court commented that the importance of establishing jurisdiction of an occupying State does not imply that “jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States. The Court has not in its case-law applied any such restriction.” Thus in the exceptional circumstances of this case, the Court considered “that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.”

The ECHR thus extended the concept of extraterritorial jurisdiction, albeit limited to what it called exceptional circumstances, to acts committed anywhere. In Al-Jedda v. United Kingdom, decided on the same day as Al-Skeini, the Court held that an Iraqi detained in British custody in Iraq was within the authority and control of the United Kingdom throughout his detention, and therefore within the jurisdiction of the United Kingdom and thus the European Convention was applicable to his case.

24 Al-Skeini v. United Kingdom, supra note 21, at ¶142.
25 Id., at ¶149.
9.3 Detention

The European Convention is based on an earlier draft of the ICCPR, but there are some significant differences in the final version, particularly relating to detention, which is dealt with in Article 5. The words “freedom from arbitrary arrest or detention” do not appear in the European Convention, but the ECHR has implied such a term into the interpretation of Article 5. In Fox, Hartley and Campbell v. United Kingdom, the

internment without trial... “[U]nder international humanitarian law internment is to be viewed not as an obligation on the Occupying Power but as a measure of last resort.” Jelena Pejic, in The European Court of Human Rights’ Al Jedda judgment: the oversight of international humanitarian law, 883, 851 INT’L REV. RED CROSS 837 (Sep. 2011), criticizes the judgment and suggests that it implies that parties to the European Convention may not intern civilians unless there is a binding and explicit UN Security Council mandate, or a derogation to Article 5 of the European Convention has been entered. Pejic believes that “the Court has failed to grasp the logic of IHL” and that the case “casts a chilling shadow on the current and future lawfulness of detention operations carries out by ECHR states abroad.”


28 European Convention, supra note 1 at art. 5:
1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

29 CLAIRE MACKEN, COUNTER-TERRORISM AND THE DETENTION OF SUSPECTED TERRORISTS, 52 (Routledge, 2012), citing Lawless v. Ireland, (No.3) Eur. Ct. H.R. Series A no. 3, (Jul. 1, 1961) ¶ 14: the meaning of Article 5(1)(c) “is fully in harmony with the purpose of the Convention which is to protect the freedom and security of the individual against arbitrary detention or arrest...” Also see Ammur v France,
applicants challenged their detention on the basis that they had not been arrested or detained on “reasonable” suspicion of having committed an offense, as prescribed in Article 5(i)(c). Although the Court noted that the interpretation of reasonableness depended on all the circumstances, it made it clear that “[t]he reasonableness of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention.”

The ECHR applied the margin of appreciation in this case, by noting that there would be some deference to the state as it accepted that terrorist crime fell into a special category. The Court went on to show that police expertise alone in dealing with terrorism would not be determinative, and police would need to provide evidence to the ECHR that there was reasonable suspicion for holding applicants.33


31 Id. at ¶34. “Certainly Article 5(1)(c) of the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organized terrorism. It follows that the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity. Nevertheless the Court must be enabled to ascertain whether the essence of the safeguard afforded by Article 5(1)(c) has been secured. Consequently the respondent Government has to furnish at least some facts or information capable of satisfying the Court that the arrested person was
Article 5(1) makes it clear that detention will only be permitted in accordance with a procedure prescribed by law, and only on the six grounds specified in the Article. Compliance with the law by itself is not sufficient; any deprivation of liberty should “be in keeping with the purpose of protecting the individual from arbitrariness.” Macken comments that arrest and detention “must accord with the principles of justice. It must not be inappropriate, unjust or lack predictability.”

In 2008, in Saadi v. United Kingdom, which concerned an immigration detention for a period of seven days, the Court noted that it had not previously formulated a global definition of arbitrariness, but that key principles had been developed on a case-by-case basis. Further, the notion of arbitrariness varied “to a certain extent on the type of detention involved.”

A number of general principles apply to Article 5 as a whole: bad faith or deception on the part of the authorities is not permitted; the detention must genuinely

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34 The domestic law needs to be scrutinized to ensure it is not arbitrary. Amuur v. France, supra note 29 at ¶50: “In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls to the Court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. Quality in this sense implies that where a national law authorizes deprivation of liberty… it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness.”


36 CLAIRE MACKEN, COUNTER-TERRORISM AND THE DETENTION OF SUSPECTED TERRORISTS, supra note 29, at 52, citing Winterwerp v. The Netherlands, Series A no. 33, ¶45, Eur. Ct. H.R., (Oct. 24, 1979); and Adler and Bivas v. Federal republic of Germany, App Nos. 5573/72 and 5670/72, Commission decision, Yearbook 20 (1977) 102, at 146, but there does not seem to be wording in these judgments to support Macken’s assertion.


conform with the purpose of the restrictions in Article 5(1); and some relationship must exist between the ground of permitted detention and the place and conditions of detention. This means that, for example, someone detained on a mental health ground should be placed in a hospital, and someone detained for immigration purposes should be detained in an immigration center.

The Court went on to discuss Article 5(1)(c), which is the relevant clause for preventive detention. It stated that arbitrariness includes “an assessment of whether detention was necessary to achieve the stated aim.” Furthermore, detention is justified “only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained.” The Court also noted that detention must be proportionate.

Interestingly, the word “proportionality” is nowhere to be found in the European Convention, but the idea it expresses appears as a central principle in the jurisprudence of the ECHR. Proportionality analysis may consist of

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41 Id., at ¶70.
43 Id., at ¶70: “The principle of proportionality further dictates that where detention is to secure the fulfillment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfillment of the obligation in question, and the importance of the right to liberty. The duration of detention is a relevant factor in striking such a balance.” The Court cited in support Vasileva v. Denmark, Eur. Ct. H.R. (2005) 40 E.H.R.R. 27 at 37.
(1) suitability (the limiting measure must be capable of achieving the (legitimate) aim pursued); (2) necessity (the limiting measure must be the least restrictive means to achieve the relevant purpose); and (3) proportionality in the narrow sense (there must be a reasonable balance between the limiting measure and the aim pursued).

However, a fair or reasonable balance must be struck between the rights of individuals and the general public interests of society. In the context of preventive detention of terror suspects, a proportionate balance is required between preventive detention and prevention of terrorism.

Article 5(1)(c) appears to contain three separate grounds in one sentence: “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offense or fleeing after having done so.” This looks clear enough, but in fact is riddled with ambiguity.

The ordinary reading of the words seems to suggest that it is permissible to detain a person when it is reasonably considered necessary to prevent his committing an offense. One view is that because the three grounds are “placed side by side in one paragraph rather than as a cumulative list,” there must be proof that the detainee is linked with the

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45 STEFAN SOTTIAUX, TERRORISM AND THE LIMITATION OF RIGHTS, supra note 44, at 45.


47 CLAIRE MACKEN, COUNTER-TERRORISM AND THE DETENTION OF SUSPECTED TERRORISTS, supra note 29, at 56.
commission of a criminal offense, and the Article “does not permit preventive detention solely based on a presumption of predicted criminal conduct.”\textsuperscript{48}

If there is ambiguity when interpreting the meaning of treaty provisions, reference may be made to the \textit{travaux préparatoires},\textsuperscript{49} and it appears that detention to prevent the commission of a crime was contemplated by the drafters.\textsuperscript{50} However, despite that, the jurisprudence of the ECHR indicates a restrictive approach.

In \textit{Guzzardi v. Italy}, which concerned the imposition of certain restrictions of liberty, the Court held that Article 5(1)(c) “is not adapted to a policy of general prevention directed against an individual or a category of individuals who, like mafiosi, present a danger on account of their continuing propensity to crime; it does no more than afford the Contracting States a means of preventing a concrete and specific offence.”\textsuperscript{51} The paragraph continues with a purported justification for this interpretation deriving from the use of the singular words “an offense” and “celle-ci” in the French text of the European Covenant, as well as reliance on the object of Article 5 to ensure that no-one is dispossessed of liberty in an arbitrary fashion.\textsuperscript{52}

This is baffling and seems to be something of a \textit{non sequitur}. The French text,\textsuperscript{53} if translated literally, reads as follows: [detention is permitted] if he is arrested and detained

\textsuperscript{50} \textit{COMMITTEE OF EXPERTS, COLLECTED EDITION OF THE ‘TRAVAUX PRÉPARATOIRES’, supra note 4, at Vol. IV, 260 (Jun. 8-17, 1950): “The Conference considered it useful to point out that where authorized arrest or detention is effected on reasonable suspicion of preventing the commission of a crime, it should not lead to the introduction of a Police State. It may, however, be necessary in certain circumstances to arrest an individual in order to prevent his committing a crime, even if the facts which show his intention to commit the crime do not of themselves constitute a penal offence.”}
\textsuperscript{51} \textit{Guzzardi v. Italy, App. No. 7367/76, Eur. Ct. H.R., ¶102, (Nov. 6, 1980).}
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} Article 5 (1)(c): “s’il a été arrêté et détenu en vue d’être conduit devant l’autorité judiciaire compétente, lorsqu’il y a des raisons plausibles de soupçonner qu’il a commis une infraction ou qu’il y a des motifs
in order to be brought before the competent judicial authority, when there are plausible reasons to suspect that he has committed an offense or that there are reasonable reasons to believe that it is necessary to prevent the commission of an offense or flight after having done this. Thus the French words do not appear to make the position any clearer.

In *M. v. Germany*, which involved the detention of a convicted person after the conclusion of his sentence to prevent the commission of future crimes, the Court repeated the *Guzzardi* formula, and added that the “potential further offenses are not however, sufficiently concrete and specific, as required by the Court’s case law as regards, in particular, the place and time of their commission and their victims, and do not, therefore, fall within the ambit of art. 5(1)(c).”

A more recent case involved complaints relating to arrest and detention before any offenses had been committed. In *Schwabe and MG v. Germany*, a G8 summit of Heads of State and Government was held in Rostock in June 2007. The police thought that Islamist terrorists posed a threat of terror attacks during the summit. The applicants drove to Rostock in order to participate in demonstrations. They parked their car in a car park in front of a prison. The police did a routine identity check, and when one of the applicants physically resisted the identity check, the police searched the car and found banners with the words “Freedom for all prisoners” and “Free all now.” The applicants were arrested and detained under a local statute. The local district court ruled that their detention had been lawful to prevent the imminent commission or continuation of a criminal offense. Because they had banners calling for the liberation of prisoners, and

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55 Id., at ¶102.
they were in a car park in front of a prison, the Court ruled that it had to be assumed that they had been about to commit or aid and abet a criminal offense.

Appeals to both the Court of Appeal and the Federal Constitutional Court were dismissed, but the European Court of Human Rights ruled that the applicants’ right to liberty pursuant to Article 5 (1)(c) had been violated. The Court held that although the detention of a person may be justified when it is considered reasonably necessary to prevent his committing an offense, that ground of detention does no more than afford the Contracting States a means of preventing “a concrete and specific offense….as regards, in particular, the place and time of its commission and its victim(s).”  

57 The Court also reiterated that “detention to prevent a person from committing an offense, must in addition, be ‘effected for the purpose of bringing him before the competent legal authority,’ a requirement which qualifies every category of detention referred to in Article 5(1)(c).”

Article 5(1) (c) thus envisages that detention is only permissible if it is connected with bringing the detainee before a competent legal authority. The words could simply imply that a detainee cannot be detained without some court process. In Lawless, the government argued that Article 5(1)(c) referred to two different types of case: the first where a person is detained on reasonable suspicion that an offense has been committed; and the second where a person is detained to prevent the commission of an offense. They argued that the obligation to bring a detainee before a court did not apply in the second narrower situation.  

59 The Court rejected the narrow approach and held that Article 5(1)(c)

57 Id., at ¶70.
58 Id., at ¶71.
had to be read together with Article 5(3) with the effect that if a person has been arrested to prevent an offense from taking place, he has to be brought promptly before a judge so that the judge can decide if the detention is justified.\footnote{Id., citing Lawless v. Ireland (No. 3), supra note 29, at ¶14: When Articles 5(1)(c) and 5(3) are read together they “plainly entail the obligation to bring everyone arrested or detained in any of the circumstances contemplated by the provisions of Article 5(1)(c) before a judge for the purpose of examining the question of deprivation of liberty or for the purpose of deciding on the merits.”}

However, as regards preventive detention, the position is not clear. \textit{Jecius v. Lithuania}\footnote{Jecius v. Lithuania, App. No. 34578/97, Eur. Ct. H.R. ¶50 (Jul. 31, 2000): ”The Court observes that a person may be deprived of his liberty only for the purpose specified in Article 5 § 1. A person may be detained within the meaning of Article 5 § 1 (c) only in the context of criminal proceedings, for the purpose of bringing him before the competent legal authority on suspicion of his having committed an offence (see, \textit{mutatis mutandis}, the Lawless v. Ireland judgment of 1 July 1961, Series A no. 3, pp. 51-52, § 14, and the Ciulla v. Italy judgment of 22 February 1989, Series A no. 148, pp. 16-18, §§ 38-41).”} and \textit{Ciulla v. Italy}”\footnote{CLAIRE MACKEN, \textit{COUNTER-TERRORISM AND THE DETENTION OF SUSPECTED TERRORISTS}, supra note 29 at 55, citing Ciulla v Italy., App. No. 11152/84, Eur. Ct. H.R., ¶40, (Feb. 22, 1989).} suggest that detention to prevent an offense from taking place is only permitted in the context of criminal proceedings. One view is that the words in \textit{Ciulla} mean that “detention is only permitted if it is related to proceedings that could lead to conviction for a specific criminal charge.”\footnote{Id. at 55. Macken suggests that this reasoning is supported by the holding in Jecius v. Lithuania, supra note 61, at ¶47. There were no grounds for preventive detention “as no criminal proceedings had been pending against him at that time. Moreover, there were no crimes which he should have been prevented from committing.”} This does appear to neuter the effect of the second limb of Article 5(1)(c) which ostensibly has been interpreted to permit detention to prevent a specific and concrete offense.

A broader approach is seen in the comments of the Court in \textit{Al-Jedda v. United Kingdom}, where British forces in Iraq detained an Iraqi national on the grounds of alleged imperative reasons of security. The Court noted that it has “long been established that the list of grounds of permissible detention in art. 5(1) does not include internment or preventive detention where there is no intention to bring criminal charges within a
reasonable time."\textsuperscript{64} This could be interpreted to give the authorities a window of time to detain for a short time within the parameters of Articles 5(1) (c) and 5(3) before it is clear that there is no intention to bring criminal charges, provided the detainee is brought promptly before the legal authority.

9.4 Derogation

If preventive detention does not fall into any of the categories in Article 5(1)(c), States can only lawfully use this tool if the detention takes place in an emergency. The jurisprudence of the ECHR illustrates that terrorism is such an emergency.\textsuperscript{65} States may derogate from Article 5 in emergency situations that meet the criteria set out in Article 15.\textsuperscript{66} The wording of Article 15 is broadly similar to that in Article 4 ICCPR, with the addition of the words “in time of war”, and the absence of the reference to non-discrimination in Article 15.

There are two tests. The first is that there must be a “public emergency.” In Lawless v. Ireland, the European Commission defined this as “a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular

\textsuperscript{64} Al-Jedda v. United Kingdom, \textit{supra} note 26, at ¶100.


\textsuperscript{66} Art. 15 “1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”
groups, and constituting a threat to the organized life of the community which composes the State in question."\(^{67}\)

In the *Greek* case,\(^{68}\) where it was not accepted that a public emergency existed, the European Commission identified four characteristics of a public emergency:

1. It must be actual or imminent;\(^{69}\)
2. Its effects must involve the whole nation;\(^{70}\)
3. The continuance of the organized life of the community must be threatened;
4. The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.\(^{71}\)

The second test is that derogating measures are only permitted to the extent strictly required by the exigencies of the situation. Any suspension measure must be “proportionate to strict necessity.”\(^{72}\)

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\(^{68}\) The Greek Case, European Commission’s Report of Nov. 5, 1969, 12 Ybk (the Greek Case).

\(^{69}\) CLAIRE MACKEN, COUNTER-TERRORISM AND THE DETENTION OF SUSPECTED TERRORISTS, supra note 29, at 82-3 points out that the Court gave very wide reading of actual and imminent threat in Lawless because although the facts did not appear to satisfy the criteria, the Court concluded that the Irish government was justified in declaring a state of emergency.

\(^{70}\) In cases where terrorist activity has taken place in a section of a territory, this has been open to both narrow and wide interpretation. See CLAIRE MACKEN, COUNTER-TERRORISM AND THE DETENTION OF SUSPECTED TERRORISTS, *supra* note 29, at 85-88. For example, the narrow approach is reflected in Aksoy v. Turkey, *supra* note 65 at ¶70, the Court accepted there was a public emergency in the region of South East Turkey, and considered a deprivation of liberty that took place in that region. In Sakik v. Turkey, 87/1996/67/897-902, Eur. Ct. H.R., (Nov.26, 1997), ¶39, in relation to an public emergency in South East Turkey, “the Court would be working against the object and purpose of that provision if, when assessing the territorial scope of the derogation concerned, it were to extend its effects to a part of Turkish territory not explicitly named in the notice of derogation.” In contrast the wide approach is seen where the influence of terrorist activity is deemed to have an effect on the entire nation. For example, although terrorist activity in Northern Ireland had comparatively little impact on daily life of the general public in the entire region of Northern Ireland and/or the UK, a wide interpretation was given by the Court, which accepted that there was a public emergency. See Lawless v. Ireland, *supra* note 29, at ¶30, and Ireland v. United Kingdom, *supra* note 65 at ¶205.

The ECHR has consistently recognized a margin of appreciation in assessing the necessity for derogating measures and the scope of the actual derogating measures.\footnote{73} A difference in approach can be discerned between various members of the European Commission and the ECHR in their exercise of the margin of appreciation in construing proportionality.\footnote{74} These range from the strict approach that a government had no other measure available to deal with the emergency,\footnote{75} to a less rigorous approach which affords each government a wide margin of appreciation, where “notions like good faith and reasonableness play an important role in assessing the proportionality of the measures.”\footnote{76} Discussion of both approaches can be seen in \textit{Lawless}, and \textit{Ireland}, but in each case the less rigorous approach prevailed.\footnote{77}

The jurisprudence thus indicates that the Court has “hesitated to interfere with the discretion of national governments in cases involving derogation from human rights for


\footnote{73} \textsc{Yutaka Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR}, supra note 44, at 178. \textit{See also} Lawless v. Ireland, Report of the European Commission, supra note 29, at §90: “…having regard to the high responsibility which a Government has to its people to protect them against any threat to the life of the nation, it is evident that a certain discretion - a certain margin of appreciation - must be left to :the Government in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention.”


\footnote{75} \textit{Id.}, at 145.

\footnote{76} \textit{Id.}

\footnote{77} \textit{Id.}, citing Lawless v. Ireland, supra note 29, and Ireland v. United Kingdom, supra note 65.
reasons of public emergency that may detrimentally affect the life of that nation.”  

This is particularly true in respect of detention in some cases involving terrorism.  

The most recent case is that of A v. United Kingdom. After 9/11, the United Kingdom enacted the Anti-Terrorism, Crime and Security Act 2001, in which section 23 permitted indefinite detention of suspected international terrorists. The British Home Secretary issued a derogation order on November 11, 2001. The Court recalled that it fell to states to determine whether the life of the nation was threatened by a public emergency, and that in that connection

- a wide margin of appreciation should be left to the national authorities. Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, inter alia, the States have gone beyond the “extent strictly required by the exigencies” of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation. 

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79 E.g. The Court has accepted the State’s assessments of a state of emergency in Lawless v. Ireland, supra note 29 at ¶37; in Brannigan v. McBride v. United Kingdom, supra note 65, at ¶¶59, 60; and Ireland v. United Kingdom, supra note 65, at 25, ¶214. In Aksoy v. Turkey, supra note 65, the Court accepted that there was a state of emergency, but the measures taken were not sufficiently required by the exigencies of the situation. In this case no judicial intervention took place for 14 days, see ¶84.
“(1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by—
(a) a point of law which wholly or partly relates to an international agreement, or
(b) a practical consideration.
(2) The provisions mentioned in subsection (1) are—
(a) paragraph 16 of Schedule 2 to the Immigration Act 1971 (c. 77) (detention of persons liable to examination or removal), and
(b) paragraph 2 of Schedule 3 to that Act (detention pending deportation).”
82 A. v. United Kingdom, supra note 80, at ¶173.
The Court agreed that there was a public emergency threatening the life of the nation, but that was not the end of the story, as it was for the Court to assess the proportionality of the measures used:

When the Court comes to consider a derogation under Article 15, it allows the national authorities a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency. Nonetheless, it is ultimately for the Court to rule whether the measures were “strictly required”. In particular, where a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse… the question of proportionality is ultimately a judicial decision.

The Court concluded that the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals. The detention measures were therefore found to be in violation of Article 5. The case triggered a change in UK law.

In the guidance to the ICCPR, there is reference to the fact that a state of emergency should be a temporary situation. However, in respect of the European Convention,

[the components required to meet the threshold of ‘public emergency threatening the life of the nation’ for the purposes of Article 15, as outlined by the Court in Lawless and the Commission in the Greek Case, do not allude to the temporal element attached to emergencies. The Court in its judgments relating to situations of entrenched emergencies has never referred to the phenomenon but rather has chosen to examine each application on a case-by-case basis, regardless of the prevailing country situation.]

83 Id., at ¶181.
84 Id., at ¶184.
85 Id., at ¶190.
The jurisprudence reflects several examples of implicit acceptance of long and entrenched states of emergency, in Northern Ireland\textsuperscript{88} and Turkey.\textsuperscript{89} However, although the margin of appreciation may be wide, as regards the Court’s analysis of whether a state of emergency exists, it may be narrower and less deferential when it comes to the evaluation of the proportionality of the derogating measures,\textsuperscript{90} and the length of detention measures will be a factor to be considered in the Court’s proportionality analysis.

\textbf{9.5 Process}

Certain safeguards exist for persons who have been preventively detained, and these are set out in Articles 5 (2), (3) and (4).\textsuperscript{91} Pursuant to Article 5(2), every person has the right to be told why he or she has been arrested and detained. In Fox, Hartley and Campbell v. United Kingdom, the applicants were all told merely that they had been arrested on suspicion of terrorism. The Court stated that “any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to

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\textsuperscript{88} See e.g. Oren Gross, “Once More Unto the Breach”: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies, supra note 78 at 472-3: “Emergency has not been the exception in Northern Ireland; it has been the norm…The situation in Northern Ireland contradicts the very foundations of the derogation regime as expressed in the concept of ‘normalcy-rule, emergency-exception.’”

\textsuperscript{89} See e.g. Edel Hughes, Entrenched Emergencies and the “War on Terror”: Time to Reform the Derogation Procedure in International Law? supra note 87, at 20-23.

\textsuperscript{90} \textit{Stefan Sottiaux}, \textit{Terrorism and the Limitation of Rights}, supra note 44, at 259. Examples of the Court refusing to accept that measures were proportionate can be found in Brannigan & McBride, supra note 65, Aksoy v. Turkey, supra note 65, and A. v. United Kingdom, supra note 80.

\textsuperscript{91} European Convention, supra note 1, at Art. 5 “(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”
challenge its lawfulness in accordance with paragraph (4).”

There is, however, no requirement that all the relevant information be given at the moment of arrest. Although the bare statement that they had been arrested on suspicion of terrorism was deemed inadequate, the Court considered that the applicants would have found out the reasons during their interrogations.

Article 5(3) deals with the obligation to bring detained persons promptly before judicial authorities. In Lawless the Court confirmed that this requirement applies to persons detained on preventive grounds. The meaning of “promptly” was analyzed in Brogan v. United Kingdom. Four applicants were each arrested on reasonable suspicion of involvement in the commission, preparation or instigation of acts of terrorism and detained for less than seven days without being brought before a judge. Under the relevant legislation, detention was permissible for an initial period of 48 hours, and then a further period of up to five days with the authorization of the Secretary of State.

The Court noted that the assessment of “promptness” had to be made in the light of the object and purpose of Article 5, and that in view of the differences in between the English word “promptly” and the French word “aussitôt” (meaning immediate) in Article 5(3), and the fact the French version was to be given precedence, the scope for flexibility in interpreting and applying the notion of "promptness" was very limited.

The Court concluded that the “undoubted fact that the arrest and detention of the

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92 Fox, Campbell and Hartley v. United Kingdom, supra note 30, at ¶40.
93 Id.
94 Id., at ¶41.
95 Lawless v. Ireland No. 3, supra note 29, at ¶14.
96 Brogan v. United Kingdom, App. no. 11209/84; 11234/84; 11266/84; 11386/85, Eur. Ct. H.R., (Nov. 29, 1988).
97 Id., at ¶58.
98 Id., at ¶59.
99 Id., at ¶62.
applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not, on its own, sufficient to ensure compliance with the specific requirements of Article 5 para. 3 (art. 5-3). Similarly, in Brannigan v. McBride v. United Kingdom, both applicants were detained for less than seven days without charge and without judicial control. In the light of all the circumstances the Court did not consider this unacceptable.

The right to challenge the legality of the detention pursuant to Article 5(4) gives the arrested or detained persons entitlement to a review “bearing upon the procedural and substantive conditions which are essential for the ‘lawfulness’, in the sense of the Convention, of their deprivation of liberty.” In essence, this is the right to habeas corpus proceedings.

Article 5(4) does not state that a person challenging detention has the right to be represented by legal counsel. Article 6 mandates legal representation for everyone charged with a criminal offense. Thus anyone detained after being charged has the

100 Id.
101 Brannigan v. McBride v. United Kingdom, supra note 65, at ¶60.
102 Id., at ¶65.
103 European Convention, supra note 1 at Art. 6: “1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
   a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   b to have adequate time and facilities for the preparation of his defense;
   c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”
right to a lawyer, but the position is not so clear for those held without charge. The laws of some countries allow representation from the moment of arrest, or soon after, and others may not. It seems from \textit{Salduz v. Turkey} that a right to counsel could be implied because of the obligation to ensure that any subsequent trial is fair. So if there is a right to counsel during pre-charge interrogation, as recommended in \textit{Salduz}\textsuperscript{104} and/or from the moment a person is taken into custody, as held in \textit{Dayanan v Turkey},\textsuperscript{105} unless there are compelling reasons not to permit this, then the detainee is more likely to be represented during \textit{habeas} proceedings if detention continues without charge. The fact that this issue is unclear may have been one of the triggers for the Proposal for a Directive of the

\textsuperscript{104} \textit{Salduz v. Turkey}, Appl. No. 36391/02 Eur. Ct. H.R. (Nov. 27, 2008) ¶50 The Court reiterates that, even if the primary purpose of Article 6, as far as criminal proceedings are concerned, is to ensure a fair trial by a “tribunal” competent to determine “any criminal charge”, it does not follow that the Article has no application to pre-trial proceedings…” ¶51: “The Court further reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial (\textit{Poitrimol v. France}, 23 November 1993, § 34, Series A no. 277 A, and \textit{Demebukov v. Bulgaria}, no. 68020/01, § 50, 28 February 2008). Nevertheless, Article 6 § 3 (c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial. In this respect, it must be remembered that the Convention is designed to “guarantee not rights that are theoretical or illusory but rights that are practical and effective” and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (\textit{Imbrioscia}, cited above, § 38),” ¶52: “National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defense in any subsequent criminal proceedings. In such circumstances, Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation,” ¶55: “the Court finds that in order for the right to a fair trial to remain sufficiently “practical and effective” (see paragraph 51 above) Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.”

\textsuperscript{105} \textit{Dayanan v. Turkey}, App. No. 7377/03 Eur. Ct. H.R. (Oct 13, 2009), ¶¶31: “The Court considers that the fairness of criminal proceedings against accused persons requires as a general rule, for the purposes of Article 6 of the Convention, that they be able to obtain legal assistance as soon as he they are placed in custody or pre-trial detention.

32. In accordance with the generally recognized international norms, which the Court accepts and which form the framework for its case-law, an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned (for the relevant international legal materials see \textit{Salduz}, cited above, §§ 37-44). Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person’s defense: discussion of the case, organization of the defense, collection of evidence favorable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention.”
European Parliament and Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest. In this document, access to a lawyer is recommended from the time any deprivation of liberty begins and the scope of the lawyer’s duties would include representation at any *habeeas* hearing.\(^{106}\)

### 9.6 Some other examples of problematic preventive detention measures

A former President of the ECHR, has commented that “the Court established the principle that the Convention is to be interpreted as a living instrument, to be construed in the light of present day conditions.”\(^{107}\) On the issue of precedent, or *stare decisis*, the European Court “recognizes that the same European minimal standards should be observed in all member States.”\(^{108}\) In Europe the law in most States is based on the civil law tradition. The main exception to this is the law relating to the U.K, which is based on the common law tradition.

In Section A the discussion on the law enforcement model for detention focused on several countries whose legal systems are based on common law. Thus it is interesting to compare the laws governing preventive detention in two civil law countries, against the background of the rights guaranteed in the European Convention. This Chapter continues

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\(^{108}\) *Id.*
with a brief analysis of the laws of Spain and Turkey that deal with preventive detention of terror suspects. These countries have been selected because of the availability of material in the English language, and to demonstrate how procedural defects in the European Convention permit Spain to detain persons in flagrant disregard of human rights considerations, and how the ECHR is powerless to stop human rights violations in Turkey.

9.6.1 Spain

Significant terrorist activity in Spain has emanated from two sources. The first is homegrown, and the main group is the Euskadi Ta Askatasuna, or ETA, which was created in its current form in 1959 and has its roots in Basque nationalism.109 As at 2010, more than 800 deaths were attributed to ETA.110 Although from time to time cease-fires have been announced,111 the most recent in October 2011,112 reports suggest that ETA has neither disarmed nor disbanded.113 An August 2013 report states that “ETA still has arms and explosives, probably buried in waterproof containers in French forests. A heated debate continues between ETA’s leadership, its 700-odd jailed members and its political allies over whether to give up the weapons.”114 The second source is Islamist terrorists, whose bombing attack on the Madrid train system in 2004 claimed more than

109 ANNA OEHMICHEN, TERRORISM AND ANTI-TERROR LEGISLATION: THE TERRORISED LEGISLATOR? 104 (Intersentia, 2009). There were also attacks carries out by other anarchist and fascist groups in the late 1970s, the 1980s and early 1990s but were relatively small in number compared to attacks by ETA. See Ari D. MacKinnon, Counterterrorism and Checks and Balances: the Spanish and American Examples, 82 N.Y.U. L. REV. 602, 610 (2007).
110 Id.
111 Id., at 107-8.
113 Id.
190 lives and wounded more than 1000.\footnote{Ari D. MacKinnon, \textit{Counterterrorism and Checks and Balances: the Spanish and American Examples}, supra note 109 at 611.} In April 2013 two North Africans thought to be linked to Al Qaeda in the Islamic Mahgreb were arrested in Northern Spain.\footnote{Spain holds two \textquoteleft al—Qaeda suspects\textquoteright, \textit{BBC NEWS}, (Apr. 23, 2013), available at http://www.bbc.co.uk/news/world-europe-22261873.} Europol statistics show 38 terrorist arrests in 2012, of which eight were religiously inspired, five were of left wing suspects and twenty-five from separatist groups.\footnote{EU \textsc{TERORISM AND SITUATION TREND REPORT}, Annex 2, \textsc{EUROPOL TE-SAT} 2013, \textit{Id.}, at Annex 3.} Spain boasts the largest number of concluded terrorist related cases in Europe in 2012, 229 cases with 141 convictions and 88 acquittals.\footnote{Ari D. MacKinnon, \textit{Counterterrorism and Checks and Balances: the Spanish and American Examples}, supra note 109, at 614.}

The counter-terrorism strategy may still be designed to combat the homegrown threat despite the growing threat from Islamists from outside the country.\footnote{\textsc{Transnational Terrorism, Security And The Rule Of Law, Case Study: Spain, The Ethical Justness Of Counter-Terrorism Measures}, 7, (2008), available at www.transnationalterrorism.eu/publications.eu.} After the Madrid bombing, Spanish counter-terrorism policy acquired two priorities. The first was focused on reorganizing the security and intelligence agencies to increase their performance in dealing with the threat of international terrorism. The second priority was concerned with reforming and updating Spanish laws on terrorism.\footnote{BLANCA RODRIGUEZ-RIUD, \textit{Squaring the Circle? Fighting Terror while Consolidating Democracy in Spain}, 181-2 \textit{in Courts And Terrorism. Nine Nations Balance Rights And Security}, (Mary L. Volcansek & John F. Stack Jr., eds.) (Cambridge University Press, 2011).}

At the end of General Francisco Franco’s period of dictatorship in 1975, when Spanish legislators started to draft the Constitution of the new democratic state, the threat of terrorism from the Basque separatist group ETA was constant and increasing.\footnote{BLANCA RODRIGUEZ-RIUD, \textit{Squaring the Circle? Fighting Terror while Consolidating Democracy in Spain}, 181-2 \textit{in Courts And Terrorism. Nine Nations Balance Rights And Security}, (Mary L. Volcansek & John F. Stack Jr., eds.) (Cambridge University Press, 2011).} During the Franco era terrorism had been dealt with under military law but, from February 1976, terrorism was treated as part of the criminal law, and was put into the
ordinary Criminal Code. In 1977 a new central tribunal, the National Audience, was created to deal with serious organized crime and terrorist offenses, and a special prosecutor was appointed to deal with these crimes. Common to civil law systems, an examining magistrate is in charge of the investigation, with police officers assigned to him or her for this purpose, while the state prosecutor has the dual role of ensuring that the rights of both defendants and victims are respected.

In the international human rights arena, Spain ratified the ICCPR on April 27, 1977, its Optional Protocol on January 25, 1985, and the ECHR on October 4, 1979. The ECHR is directly applicable under the Spanish monist system, as is the ICCPR. Spain ratified its own Constitution on December 6, 1978.

The Constitution, uniquely for western constitutions, contains a provision permitting, by the enactment of an organic law, the suspension of a law limiting the duration of preventive detention in order that terrorist activities could be investigated.

122 Anna Oehmichen, Terrorism and Anti-Terror Legislation: The Terrorised Legislator? supra note 109, at 195, citing Decree 2/1976 of Feb. 18, 1976. Oehmichen describes how terrorist offenses became treated as common crimes and instead of being labelled as terrorist offenses, they are described in accordance with the conduct, such as crimes of assassination, serious bodily harm etc.
127 Ari D. MacKinnon, Counterterrorism and Checks and Balances: the Spanish and American Examples, supra note 109. MacKinnon explains that there are four types of law in Spain in order of importance: organic laws which are reserved for special subject matters, particularly the regulation of fundamental rights and public liberties; ordinary laws; decree laws; and legislative decrees.
128 Blanca Rodriguez-Ruiz, Squaring the Circle? Fighting Terror while Consolidating Democracy in Spain, supra note 121 at 183, citing §55.2 Constitution of Spain, : “An organic law may determine the manner and circumstances in which on an individual basis and with the necessary participation of the Courts, and adequate parliamentary control, the rights recognized in section 17, subsection 2 [dealing with preventive detention] and 28, subsections 2 and 3, may be suspended for specific persons in connection with investigations of the activities of armed bands or terrorist groups. Unjustified or abusive use of the powers recognized in the foregoing organic law shall give rise to criminal liability inasmuch as it is a violation of the rights and liberties recognized by law.” See also Victor Moreno Catena & Mariangeles Catalina Benavente, Limiting Fundamental Rights in the Fight Against Terrorism in
This means that the relevant constitutional rights can be “restricted beyond their usual limits, that the limits to their restrictions can be trespassed. Yet the rights in question do not disappear, and the suspension of rights is also subject to limits. Suspension is therefore a particularly stringent case of limitation.”

The section cannot apply to individuals acting without links to a terror organization – individual terrorism is dealt with in the Criminal Code.

The measures relating to preventive detention exist in tandem with the fundamental right to freedom in the Spanish Constitution, which also includes a provision that a person may not be detained for the purposes of investigation, for more than seventy-two hours without an appearance before a judicial authority. The period of detention can be extended by judicial authority for an additional period of forty-eight hours, making a total of five days.

129 BLANCA RODRIGUEZ-RUIZ, Squaring the Circle? Fighting Terror while Consolidating Democracy in Spain, supra note 121, at 184.
130 Id.
131 Constitution of Spain §17:
“(1) Every person has the right to liberty and security. No one may be deprived of his liberty without observance of the provisions of this article and only in the cases and in the form prescribed by law.
(2) Preventive arrest may not last more than the time strictly necessary for the investigations which tend to clarify events, and in every case, within a maximum period of 72 hours, the person detained must be freed or placed at the disposal of the judicial authority.
(3) Every person arrested must be informed immediately, and in a way that is understandable to him, about his rights and the reasons for his arrest, and he may not be forced to make a statement. The assistance of an attorney to the arrested is guaranteed during police and judicial proceedings under the terms established by law.
(4) The law will regulate a process of habeas corpus so that any person who is illegally arrested may be immediately placed at the disposal of the judiciary. The maximum period of provisional imprisonment shall also be determined by law.”
132 VICTOR MORENO CATENA & MARIANGELES CATALINA BENAVENTE, Limiting Fundamental Rights in the Fight Against Terrorism in Spain, supra note 128, at 448, citing §520bis 1 LECrim, which was modified to reflect a decision of the Constitutional Court (decision STC199/1987) which ruled that legislation permitting preventive detention to be extended for a further seven days, to give a total of ten days detention, was unconstitutional. BLANCA RODRIGUEZ-RUIZ, Squaring the Circle? Fighting Terror while Consolidating Democracy in Spain, supra note 121 at 188 notes that in this case the Court “ruled both the length of the detention and the rule permitting extension without judicial warrant unconstitutional, as neither was ‘strictly necessary’ for the investigation of crimes related to terrorism.”
The most controversial measure is that of incommunicado detention,\textsuperscript{133} whereby a judge can order that persons detained under suspicion of terrorism be held in isolation. The purpose of this measure is to serve three objectives: to prevent suspects under investigation from escaping; to prevent suspects interfering with witnesses, evidence or victims; or to prevent the commission of further criminal acts.\textsuperscript{134} The Spanish Constitutional Court is not always willing to enforce the principle of proportionality in the context of terrorism, as demonstrated by the practice of judges ordering isolation “rather automatically.”\textsuperscript{135}

Isolated suspects are not permitted to have any contact with the outside world, including their own lawyers, although they are entitled to assistance from a court appointed lawyer.\textsuperscript{136} The suspect has no right to challenge the making of an incommunicado detention order.\textsuperscript{137} The period of isolation commences as soon as the police request a judicial order.\textsuperscript{138} The period of incommunicado detention can be up to thirteen days,\textsuperscript{139} despite the Constitutional Court having stated that incommunicado detention is an exceptional short-term measure.\textsuperscript{140} There do not appear to be statistics

\textsuperscript{133} VICTOR MORENO CATENA & MARIANGELES CATALINA BENAVENTE, Limiting Fundamental Rights in the Fight Against Terrorism in Spain, supra note 128, at 449, citing §520bis 2 LECrim, in reference to §384 bis LECrim.
\textsuperscript{134} Id., at 451-2, citing §509.1LE Crim.
\textsuperscript{135} BLANCA RODRIGUEZ-RUIZ, Squaring the Circle? Fighting Terror while Consolidating Democracy in Spain, supra note 128, at 188.
\textsuperscript{136} Id. See also HUMAN RIGHTS WATCH, SETTING AN EXAMPLE? COUNTER-TERRORISM MEASURES IN SPAIN, supra note 124 at 31. A suspect may have to wait up between three and five days before seeing the court appointed lawyer, and there is no right to a private meeting.
\textsuperscript{137} BLANCA RODRIGUEZ-RUIZ, Squaring the Circle? Fighting Terror while Consolidating Democracy in Spain, supra note 121, at 189. See also HUMAN RIGHTS WATCH, SETTING AN EXAMPLE? COUNTER-TERRORISM MEASURES IN SPAIN, supra note 124, at 19.
\textsuperscript{138} VICTOR MORENO CATENA & MARIANGELES CATALINA BENAVENTE, Limiting Fundamental Rights in the Fight Against Terrorism in Spain, supra note 128, at 450-51.
\textsuperscript{139} Id., at 451, fn17.
\textsuperscript{140} Id., at 452.
available showing how many people have been placed in incommunicado detention, and for what period.

Spain’s use of incommunicado detention has been condemned by the European Committee for the Prevention of Torture,\textsuperscript{141} the U.N. Committee Against Torture,\textsuperscript{142} and the Human Rights Committee,\textsuperscript{143} as well as human rights bodies.\textsuperscript{144} Spain continues to insist that incommunicado detention is imposed only when it is strictly necessary.\textsuperscript{145} Whilst incommunicado detention most likely contravenes Articles 5(3) and 6(3) of the European Convention, there do not appear to be any claims in respect of this made against Spain in the ECHR. It is also noteworthy that Spain has never derogated from its human rights obligations as it has never declared a state of emergency.\textsuperscript{146}

\textsuperscript{141} HUMAN RIGHTS WATCH, SETTING AN EXAMPLE? COUNTER-TERRORISM MEASURES IN SPAIN, supra note 124, at 30, citing Report to the Spanish government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 to 26 July 2001, CPT/inf (2003) 22, ¶ 24.


\textsuperscript{143} HRC Concluding Observations of the Human Rights Committee: Spain, 94\textsuperscript{th} Session, Oct. 13-31, 2008 CCPR/C/ESP/CO/5 (Jan. 5, 2009), ¶14: “While taking note of Organization Act No. 13/2003, which introduces the detainee’s right to a second medical examination, as well as the possibility of obtaining a judicial order for the video-recording of certain interrogations, the Committee remains concerned at the persistence of the practice of incommunicado detention in cases of terrorism and organized crime, which can last up to 13 days, and at the fact that the individuals concerned are not entitled to choose their own lawyer. The Committee does not share the State party’s view that maintaining the practice of incommunicado detention is necessary and justified by “the interests of justice”. It considers that the practice can be conducive to ill-treatment, and regrets that it persists despite recommendations by several international bodies and experts that it should be abolished (arts. 7, 9 and 14). The Committee recommends once again that the necessary measures, including legislative ones, should be taken to definitively put an end to the practice of incommunicado detention, and that the right to freely choose a lawyer who can be consulted in complete confidentiality by detainees and who can be present at interrogations should be guaranteed to all detainees. The State party should also systematize the audio-visual recording of interrogations in all police stations and places of detention.”

\textsuperscript{144} HUMAN RIGHTS WATCH, SETTING AN EXAMPLE? COUNTER-TERRORISM MEASURES IN SPAIN, supra note 124; AMNESTY INTERNATIONAL, SPAIN: OUT OF THE SHADOWS – TIME TO END INCOMMUNICADO DETENTION, supra note 142; HUMAN RIGHTS WATCH, IN THE NAME OF SECURITY. COUNTERTERRORISM LAWS WORLDWIDE SINCE SEPTEMBER 11, 74-76, (2012).

\textsuperscript{145} HRC Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Fifth Periodic Report: Spain, CCPR/C/ESP/5, ¶93, (Dec. 11, 2007).

\textsuperscript{146} Id., at ¶20.
The European Convention does not address the problem of being held incommunicado. The issue is only tackled indirectly by guaranteeing humane treatment in Article 3, and by guaranteeing a right in Article 5(4) to challenge detention. There is nothing in the European Convention about ensuring that the detainee must be brought before a court to challenge detention without delay, and that someone, whether lawyer, family or friend, is informed about the detention.

### 9.6.2 Turkey

Since 1984, the political scene in Turkey has been continually dominated by the problem of Kurdish separatist insurgents. In order to combat the rising threat of terrorism, the Grand National Assembly passed the Law to Fight Terrorism in 1991. The extremely broad and vague definitions of terrorism, terrorist offenses and offenders impact on the numbers of people detained. Indeed, there are some accounts

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148 Id., at Article 1 – “Any criminal action conducted by one or more persons belonging to an organization with the aim of changing the attributes of the Republic as specified in the Constitution, the political, legal, social, secular or economic system, damaging the indivisible unity of the State with its territory and nation, jeopardizing the existence of the Turkish State and the Republic, enfeebling, destroying or seizing the State authority, eliminating basic rights and freedoms, damaging the internal and external security of the State, the public order or general health, is defined as terrorism.” (2010 version).

149 Id., “Terrorist offences

Article 3 – Offences defined under articles 302, 307, 309, 311, 312, 313, 314, 315, 320, and paragraph 1 of art. 310 of the Turkish Penal Code dated 26 September 2004, Act Nr. 5237, are terrorist offences.

Offences committed with terrorist aims

Article 4 – Offences specified below are considered as terrorist offences if they are committed within the framework of activities of a terrorist organization…” (2010 version).

151 Article 2 – “Any person, who, being a member of organizations formed to achieve the aims specified under Article 1, in concert with others or individually, commits a crime in furtherance of these aims, or who, even though does not commit the targeted crime, is a member of the organizations, is defined as a
that thousands are detained without charge.\textsuperscript{152} Many of the detentions relate to two types of offense: those that relate to an association with a terrorist organization, and those relating to freedom of expression. As regards the former, the scope is enormously wide, as it covers “any group,” without any reference to any specific ideological component.\textsuperscript{153} As far as the latter is concerned, Amnesty International notes the “increasingly arbitrary use of anti-terrorism laws to prosecute legitimate activities including political speeches, critical writing, attendance of demonstrations and association with recognized political groups and organizations - in violation of the rights to freedom of expression, association and assembly.”\textsuperscript{154}

The United States 2012 Country Reports on Human Rights Practices comments that “[w]hile legal reforms led to the release of thousands from jail, the judicial system was politicized and overburdened and authorities continued to engage in arbitrary arrests, hold detainees for lengthy and indefinite periods in pretrial detention, and conduct

\textsuperscript{152} UN rights committee criticizes Turkish counterterrorism laws, JURIST, Nov. 2, 2012, “UN rights experts allege that Turkey has been prosecuting activists, lawyers and journalists, holding them without cause and blocking access to a lawyer for pre-trial proceedings. There are currently nearly 100 journalists in Turkish prison, in addition to thousands of lawyers, activists, politicians and military officials.” available at http://jurist.org/paperchase/2012/11/un-rights-committee-criticizes-turkish-counterterrorism-laws.php

\textsuperscript{153} TURKEY: TERRORISM, CIVIL RIGHTS AND THE EUROPEAN UNION, supra note 147, at 128.

\textsuperscript{154} AMNESTY INTERNATIONAL, TURKEY: DECriminalize Dissent, 5 (Amnesty international Publications, 2013).
extended trials.”155 The Commissioner for Human Rights of the Council of Europe noted that detention on remand “can currently go up to ten years.”156

In April 2013 the Law Against Terrorism was amended. In terms of amending the substantive law, the scope of “making terrorist propaganda” has been limited and there will no longer be a statute of limitations in respect of prosecuting crimes of torture.157 Many commentators have complained that the reforms do not go far enough. Some have remarked that the law reforms are nothing more than an attempt to “placate” or even “silence” the European Court of Human Rights.158 There is very little source material available in English that can confirm whether any reforms have been made to the detention provisions.

Turkey has a lamentable human rights record, which has been one of the many stumbling blocks for the country in its attempts to join the European Union.159 As at January 31, 2013, the European Court of Human Rights had received 16,700 petitions claiming rights violations.160 Moreover, the European Court of Human Rights has

155 U. S. DEPARTMENT OF STATE, 2012 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – TURKEY, April 19, 2013, available at: http://www.refworld.org/docid/517e6de114.html, “The Peace and Democracy Party (BDP) and human rights organizations claimed that, over a three-year period, authorities detained approximately 20,000 persons, of whom they arrested 8,000, and approximately 4,000 remained detained awaiting trial, including 32 elected mayors, hundreds of political party officials, and numerous journalists and human rights activists.”
159 TURKEY: TERRORISM, CIVIL RIGHTS AND THE EUROPEAN UNION, supra note 147, at xv-xix
delivered “more than 2,200 judgments against Turkey in the period 1995-2010. Almost 700 of these judgments concerned violations of the right to a fair trial, and more than 500 related to the right to personal liberty and security.” However, the judgments have had little or no impact in encouraging Turkey to change its laws and practices.

9.7 Summary

Despite a comprehensive framework, and the extensive jurisprudence of the ECHR, treaty violations continue in some States without much impediment, particularly in the form of lengthy detention, incommunicado detention and poor process.

From a review of the treaty provisions and relevant case law, a number of core principles relating to preventive detention can be extracted. These will be compared against the core principles found in the other treaties at the end of this Section in B3 – Conclusions to Section B, for the purpose of extracting common core principles.

1. Detention can only be on six stated grounds, and in accordance with procedures prescribed by law.\(^{162}\)

2. Detention may only be to prevent a concrete and specific offense.\(^{163}\)


\(^{162}\) European Convention, supra note 1, at Art. 5(1).
3. Detention may not be arbitrary (this includes sufficiently accessible and precise).\footnote{Guzzardi v. Italy, supra note 51, at ¶102; M v. Germany, supra note 54, at ¶89.}

4. Detention must be compatible with the rule of law.\footnote{Lawless v. Ireland (no. 3), supra note 29, at ¶14; Ammur v. France, supra note 29, at ¶50.}

5. Detention order must be made in good faith.\footnote{Ammur v. France, supra note 29, at ¶50.}

6. Detention must conform with the purpose of the restrictions in the relevant section of Article 5(1).\footnote{Saadi v. United Kingdom, supra note 37, at ¶69.}

7. There must be some relationship between the ground of detention and the place and conditions of detention.\footnote{Id.}

8. There may have to be a relationship between detention and the bringing of future charges.\footnote{Id.}

9. Detention must be necessary.\footnote{Id.}

10. Detention must be proportionate.\footnote{Id.}

11. Detention must be a measure of last resort.\footnote{Id.}

12. Detainees must be told promptly the reason for arrest.\footnote{Ciulla v Italy, supra note 61, at ¶40; Al Jedda v United Kingdom, supra note 26, at ¶100.}

13. There may be an implied right of access to legal representatives when challenging detention.\footnote{Saadi v. United Kingdom, supra note 37, at ¶70.}

14. Anyone arrested or detained must be brought promptly before a court.\footnote{European Convention, supra note 1, at Art. 5(2); Fox, Campbell & Hartley v. United Kingdom, supra note 30, at ¶40.}

\footnote{Salduz v. Turkey, supra note 104, at ¶50; Dayanan v. Turkey, supra note 105, at ¶¶31, 32.}
15. Detainees must be able to challenge detention in a court, which has to adjudicate without delay.\textsuperscript{176}

16. Detention guarantees of Article 5 can be suspended\textsuperscript{177} in an actual or imminent\textsuperscript{178} public emergency\textsuperscript{179} which affects the whole nation,\textsuperscript{180} threatens the organized life of the community,\textsuperscript{181} and in a situation of exceptional crisis or danger, when normal measures are plainly inadequate.\textsuperscript{182}

17. Derogating measures are only permitted to the extent strictly required by the exigencies of the situation,\textsuperscript{183} i.e. proportionate to strict necessity, be a genuine response to the special circumstances of the emergency,\textsuperscript{184} there must be adequate safeguards against abuse,\textsuperscript{185} and must be consistent with other obligations under international law.\textsuperscript{186}

18. No one may be subjected to torture or inhuman or degrading treatment or punishment.\textsuperscript{187}

19. Victims of unlawful detention have a right to compensation.\textsuperscript{188}

\textsuperscript{175} European Convention, \textit{supra} note 1, at Art. 5(3); Lawless v. Ireland, \textit{supra} note 29, at ¶14; Brogan v. United Kingdom, \textit{supra} note 96, at ¶¶58. 59, 62.

\textsuperscript{176} European Convention, \textit{supra} note 29, at Art. 5(4); Brannigan & McBride v. United Kingdom, \textit{supra} note 65, at ¶ 65.

\textsuperscript{177} European Convention, \textit{supra} note 1, at Art. 15.

\textsuperscript{178} The Greek Case, \textit{supra} note 68, at ¶153.

\textsuperscript{179} Lawless v. Ireland, Report of the European Commission, \textit{supra} note 29, at §90.

\textsuperscript{180} The Greek Case, \textit{supra} note 68, at ¶153.

\textsuperscript{181} Id.

\textsuperscript{182} Id.

\textsuperscript{183} European Convention, \textit{supra} note 1, at art. 15(1); Brannigan & McBride v. United Kingdom, \textit{supra} note 65, at ¶43; Handyside v. United Kingdom, \textit{supra} note 72, at ¶48.

\textsuperscript{184} A. v. United Kingdom, \textit{supra} note 80. at ¶184.

\textsuperscript{185} Id.

\textsuperscript{186} European Convention, \textit{supra} note 1, at art. 15(1).

\textsuperscript{187} European Convention, \textit{supra} note 1, at art. 3.

\textsuperscript{188} European Convention, \textit{supra} note 1, at art. 5(5).
CHAPTER 10 - AMERICAN CONVENTION ON HUMAN RIGHTS

10.1 Introduction

The American Convention on Human Rights entered into force on July 18, 1978.\(^1\) It was modeled on both the ICCPR and the European Convention.\(^2\) The rights and freedoms it guarantees are those set forth in the American Declaration on the Rights and Duties of Man.\(^3\) Although the American Declaration was adopted as a non-binding declaration, it is generally recognized that it provides an authoritative definition and interpretation of the human rights obligations by which Organization of American States (OAS) member states are bound under their Charter.\(^4\)

The Inter-American Court of Human Rights (IACHR) has “confirmed that the ‘[American] Declaration is the text that defines the human rights referred to in the Charter’ [of the OAS] and is therefore ‘a source of international obligations related to the Charter of the Organization’ for those states.”\(^5\)

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\(^3\) American Declaration on the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948, hereinafter referred to as the “American Declaration.”


\(^5\) \textit{Id.} fn. 28 citing Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention of Human Rights, No. 10 (ser. A) 1989 IACHR P.45 (Jul 14, 1989).
10.2 Jurisdiction

The scope of jurisdiction in the American Convention is expressed as requiring States Parties to respect the rights and freedoms in the document and to ensure “to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms…”\(^6\) The extraterritorial scope of the American Convention is a relevant issue in the context of preventive detention measures used by many State parties, not least the United States at Guantánamo Bay. The United States, which has not ratified the Convention,\(^7\) is considered subject to the American Declaration,\(^8\) which has no jurisdictional scope.\(^9\)

The first case on extraterritoriality under the American Convention was *Saldano v. Argentina*\(^10\) where an Argentinian national applicant incarcerated on death row in the United States claimed that Argentina had failed to protect him. The Commission noted that a State Party “may be responsible under certain circumstances for the acts and omissions of its agents which produces effects or are undertaken outside that State’s own territory.”\(^11\) No evidence could be found to establish that Argentina had “in any way exercised its authority or control over Mr. Saldano either prior or subsequent to his arrest

\(^6\) American Convention, *supra* note 1, at Art. 1(1). Notably, the drafters’ first approach to crafting this clause was to model it on the ICCPR, using the words “within their territory and subject to their jurisdiction,” but after objections from Panama, the reference to territory was deleted. Panama’s objected was rooted in their desire to protect the human rights of persons residing in the Panama Canal Zone which was subject to U.S. jurisdiction, but not U.S. territory. Gondek notes that fact that the US did not object to this was inconsistent with the U.S. position on jurisdiction in the ICCPR. See Michal Gondek, *The Reach Of Human Rights In A Globalising World: Extraterritorial Application Of Human Rights Treaties*, *supra* note 2, at 111.

\(^7\) Nor have Canada and Cuba. See Michal Gondek, *The Reach Of Human Rights In A Globalising World: Extraterritorial Application Of Human Rights Treaties*, *supra* note 2 at 79.


\(^9\) *Id.*, at 141.


\(^11\) *Id.*, at ¶17.
in the United States, or over the local officials in the United States involved in the
criminal proceedings against him. Thus he was not within Argentinian jurisdiction.

One early case under the American Declaration concerning detention is *Coard v. United States*. Seventeen Grenadians complained about their detention for a period of between nine and twelve days, during the U.S. occupation of Grenada in 1983. The United States maintained that they were civilian detainees, held briefly for reasons of military necessity in accordance with the Geneva Conventions, and that the matter was governed exclusively by the LOAC, which the Commission had no mandate to apply. The Commission declared that it was competent to hear the complaint, and although it was not in issue, went on to consider the subject of extraterritoriality. On the facts, the Commission held that the claimants had been subjected to the extraterritorial authority and control of the U.S. authorities and had not been afforded access to a review of the

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14 *Id.*, at ¶32.
15 *Id.*, at ¶35.
16 *Id.*, at ¶36.
17 *Id.*, at ¶37: “While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination -- "without distinction as to race, nationality, creed or sex." Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state -- usually through the acts of the latter’s agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.”
legality of their detention with the least possible delay. Thus the United States had violated the American Declaration.

Pursuant to Article 25 of the Rules of Procedure of the IACHR, in serious and urgent cases, on its own initiative or at the request of a party, the Commission can request that States adopt precautionary measures to prevent irreparable harm to persons. In March 2002, after the arrival of the first detainees at Guantánamo, several human rights organizations applied for precautionary measures to protect the human rights of the detainees. Rather like the approach of the ECHR, the Commission decided that the detainees were within the authority and control of the United States, noting in March 2002 that

where persons find themselves within the authority and control of a state and where a circumstance of armed conflict may be involved, their fundamental rights may be determined in part by reference to international humanitarian law as well as international human rights law. Where it may be considered that the protections of international humanitarian law do not apply, however, such persons remain the beneficiaries at least of the non-derogable protections under international human rights law. In short, no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights.

During February and March 2003, the petitioner submitted further information to the Commission about the Guantánamo detainees, and again requested that the

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20 MICHAL GONDEK, THE REACH OF HUMAN RIGHTS IN A GLOBALISING WORLD: EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES, supra note 2, at 217.
21 Guantánamo Bay Precautionary Measures Communication of March 16, 2002 from Inter-Am. Comm’n H. R. President Juan E. Mendez to U.S. Secretary of State Colin Powell.
Commission adopt precautionary measures.\textsuperscript{22} The Commission made a formal request in this connection to the U.S. Government, which responded that the Commission lacked competence, both to apply international humanitarian law, and to request precautionary measures.\textsuperscript{23} The measures were reiterated and amplified in 2004, 2005, and 2006 in respect of Omar Khadr,\textsuperscript{24} but had no impact on the detention policy and practice at Guantánamo.

The first Guantánamo case to come before the IACHR was \textit{Ameziane v. United States,} in March 2012, where an Algerian national who was captured in Pakistan in 2002, was held briefly at a U.S. airbase in Kandahar, Afghanistan, and then transferred to Guantánamo. He alleged arbitrary detention,\textsuperscript{26} and complained about his treatment whilst detained, both in Kandahar and at Guantánamo.\textsuperscript{27} The United States did not file a response to the complaint, but the Court noted its longstanding position that “the Inter-American Commission lacks jurisdiction with respect to detention operations at Guantánamo.”\textsuperscript{28} The IACHR’s decision on admissibility concluded that at every stage of the arrest and detention, the United States brought the petitioner under U.S. jurisdiction.\textsuperscript{29}

\textsuperscript{23} \textit{Id.} at 164. \textit{See also} MICHAL GONDEK, \textit{THE REACH OF HUMAN RIGHTS IN A GLOBALISING WORLD: EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES,} \textit{supra} note 2, at 218, \textit{citing} Inter-Am. Comm’n H.R., Extension of the Guantánamo Bay Precautionary Measures (No. 259) (Mar. 18, 2003).
\textsuperscript{26} \textit{Id.}, at \textit{¶19}, 21, where the petitioner argues that the position of the U.S. is that it “should be able to detain the Guantánamo prisoners as ‘enemy combatants’ without charge or effective access to the courts, for the duration of its ‘war on terror,’ which be the government’s own admission is a war without end.”
\textsuperscript{27} \textit{Id.}, at \textit{¶10-18}.
\textsuperscript{28} \textit{Id.}, at \textit{¶25}.
\textsuperscript{29} \textit{Id.}, at \textit{¶31-35}.
In Kandahar the United States exercised “total and exclusive de facto control over the prison and the individuals detained there,” and in Guantánamo, “the United States has been exercising its jurisdiction there (de jure and de facto) for more than a century.”

Furthermore, the Court ruled that domestic remedies had been adequately pursued to the extent available, noting that the petitioner’s habeas petition still had not been heard by a U.S. court. Thus the IACHR has now paved the way to continue with an analysis of the merits of the case.

10.3 Detention

Detention is dealt with in Article 7, the terms of which have many similarities to Article 9 ICCPR and Article 5 European Convention. Article 7 has been a central focus of Inter-American case law. In 1994, in Gangaram Panday the Court stated that

no person may be deprived of his or her personal freedom except for reasons, cases or circumstances expressly defined by law (material aspect) and, furthermore, subject to strict adherence to the procedures objectively set forth in that law (formal aspect). The second provision addresses the issue that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other things, they are unreasonable, unforeseeable or lacking in proportionality.

30 Id., at ¶32.
31 Id., at ¶33.
32 Id., at ¶43.
33 Id., at ¶39. Although the habeas petition still has not been heard, Ameziane was cleared for transfer on May 8, 2009 by the Guantanamo Review Task Force. However there is an ongoing dispute about the mechanics of implementing this. The most recent decision was Ameziane v. Obama, No. 09-52-36, (Oct. 5, 2012 D.D.C.).
34 American Convention on Human Rights, supra note 1 at Art.7:
“1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.”
35 SERGIO GARCIA RAMIREZ, The Inter-American Court of Human Rights’ Perspective on Terrorism, 805 in COUNTER-TERRORISM, INTERNATIONAL LAW AND PRACTICE, (Ana Maria Salinade Frias, Katja LH Samuel, Nigel D White, eds.) (Oxford University Press, 2012)
The Court has repeated this formula in a number of cases involving alleged violations of Article 7 in several states. The Commission has also restated this in its 2009 report on Citizen Security and Human Rights.

The Court specifically mentioned preventive detention in *Lopez Alvarez*, which involved preventive detention in Honduras (although unconnected with terrorism):

The preventive detention is limited by the principles of legality, the presumption of innocence, need, and proportionality, all of which are strictly necessary in a democratic society. It is the most severe measure that can be applied to the person accused of a crime, reason for which its application must have an exceptional nature. The rule must be the defendant’s liberty while a decision is made regarding his criminal responsibility.

The legitimacy of the preventive detention does not arise only from the fact that the law allows its application under certain general hypotheses. The adoption of this precautionary measure requires a judgment of proportionality between said measure, the evidence to issue it, and the facts under investigation. If the proportionality does not exist, the measure will be arbitrary.

The Court has also specifically mentioned preventive detention, again not in a terrorism situation, and in a pre-trial context in *Barreto Leiva v. Venezuela*. The applicant had been requested to give evidence in criminal proceedings, and did so. He was arrested on a warrant, but not told of the charges against him, and was placed in preventive detention for over a year. He was denied representation by a lawyer of his choice, and was denied access to the evidence in the case. He was eventually sentenced to

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38 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON CITIZEN SECURITY AND HUMAN RIGHTS, OEA/Ser.L/V/II, Doc. 57 (Dec. 31, 2009) at ¶¶144-5.


a period of one year and two months, but denied a right of appeal. The Court declared that the imposition of preventive detention violated Article 7(3), and noted that

[i]he Court has established that, in order to restrict the right to personal liberty using measures such as remand in custody, there must be sufficient evidence to allow reasonable supposition that the person committed to trial has taken part in the criminal offense under investigation. Nevertheless, “even in these circumstances, the deprivation of liberty of the accused cannot be based on general preventive or special preventive purposes, which could be attributed to the punishment, but […] based on a legitimate purpose….”

The Court also stated that preventive detention is “limited by the principle of proportionality.”

*Valencia and Llanos*, is a recent case involving detentions in Colombia. For the purpose of determining whether detention is compatible with the provisions of Article 7 (2) and (3), the Court considered that there are three steps to follow:

in the first place, the legality of the detention must be determined, in the material and formal sense of the term, for which purpose it must be found to be consistent with the domestic legislation of the state in question; 2) in the second place, said domestic laws must be examined in light of the guarantees established in the American Convention, to determine if they are arbitrary; and 3) finally, if the detention meets the requirements established in domestic laws that are compatible with the American Convention, it must be determined whether application of that provision to the specific case was arbitrary.

Article 5 guarantees the right to of persons deprived of liberty to be treated with due respect for human dignity. Yet there have been frequent concerns about the appalling

41 *Id.*, at ¶111.
42 *Id.*, at ¶122.
44 *Id.*, at ¶128.
conditions of detention.\textsuperscript{45} The Court has frequently stated that detainees have the right to enjoy conditions of detention that are compatible with their personal dignity.\textsuperscript{46}

\textbf{10.4 Derogation}

No derogation clause is found in the American Declaration, merely a general limitation clause.\textsuperscript{47} States may derogate from Article 7 of the American Convention in emergency situations provided that the criteria in Article 27 are satisfied.\textsuperscript{48} Two differences from the wording in Article 4 ICCPR, and Article 15 European Convention are immediately apparent. The first difference is in the definition of ‘emergency.’ In the American Convention, derogation is permitted “in time of war, public danger, or other emergency that threatens the independence or security of a State Party,” whereas derogation pursuant to the other two instruments is permitted in a “public emergency threatening the life of the nation.” Some scholars have commented that the distinctive

\textsuperscript{45} \textsc{Sergio Garcia Ramirez}, The Inter-American Court of Human Rights’ Perspective on Terrorism, \textit{supra} note 35 at 806-7, \textit{citing} e.g. Case of Castillo Petruzzi, Inter-Am. Ct. H.R., Series C No.20, May 30, 1999 (Peru).

\textsuperscript{46} \textit{Id.}, \textit{citing} e.g. the Case of Tibi, \textit{supra} note 37, and the Case of Durand and Ugarte, \textit{supra} note 37.

\textsuperscript{47} American Declaration, \textit{supra} note 3 at Art. XXVIII: “The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.”

\textsuperscript{48} American Convention on Human Rights, \textit{supra} note 1, at Art.27:

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.”
terminology in the American Convention “was most likely chosen to better reflect the emergency terms used in the various constitutions of the American states.”

The second difference in the wording is the addition of the words “for the period of time” in the limitation section of sub-paragraph 1. The time limitation has been mentioned in the HRC guidance to the ICCPR, but not in the European Convention.

On the issue of interpretation, some commentators note the lack of a thorough analysis by the IACHR, mainly because many cases have required factual determination. In its Doctrine on States of Emergency, some guidance on the interpretation of Article 27 can be extracted from the comments of the Inter-American Commission. It notes that state of emergency is “an institution which is essentially transitory in nature,” and which “may only be justified in the face of real threats to the public order or the security of the state.”

In the 1987 Advisory Opinion in Emergency Situations, the Court stated that derogation is a provision for exceptional situations only. It applies solely "in time of war, public danger, or other emergency that threatens the independence or security of a State Party."

And even then, it permits the suspension of certain rights and freedoms only "to the extent and for the period of time strictly required by the exigencies of the situation."
situation." Such measures must also not violate the State Party's other international legal obligations, nor may they involve "discrimination on the ground of race, color, sex, language, religion or social origin."54

In the Commission’s 1983 report concerning Nicaragua, it noted that the emergency had to be “of a serious nature, created by an exceptional situation that truly represents a threat to the organized life of the state.”55 In the 1987 Advisory Opinion on Judicial Guarantees in States of Emergency, the Court noted that “[f]rom Article 27(1), moreover, comes the general requirement that in any state of emergency, there be appropriate means to control the measures taken, so that they are proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it.”56

The Commission referred to the European Convention and the ICCPR in its analysis, and noted that those instruments, as well as the American Convention, “require the existence of a serious national emergency, that the measures adopted be ‘strictly required by the exigencies of the situation’ (these terms are the same in all three instruments) and that those measures be compatible with the state’s other international obligations.”57 This means that “the measures adopted should be proportionate to the danger, both with respect to degree and duration; thus, once the danger that threatens the

security of the State has been overcome, the special provisions should also be 
terminated.”

A number of states have not observed the temporal limitation in Article 27. The 
Commission has frequently found violations of Article 27 because of lengthy entrenched 
emergencies. For example, the government of Nicaragua invoked a state of emergency 
in early 1982, because of attacks by armed insurgents. Several hundred Miskitos were 
detained on grounds of alleged involvement in counter-revolutionary activities for 
various periods of up to ten months, and many cases of disappearances were reported. 
Similarly the Commission has criticized Colombia in respect of an emergency involving 
a state of siege for more than thirty years.

Permanent states of emergency have been described as those that are “perpetuated, 
with or without proclamation, either as a result of de facto systematic extension or 
because the Constitution has not provided any time limit a priori” and “especially under 
the Inter-American system, permanent states of emergency have been declared 
unlawful.” More recently the Commission complained that in Honduras, “the de facto 
government has continued to use curfews and to extend the state of emergency arbitrarily, 
without any basis in law or legitimate grounds.”

58 Id., at ¶14.
59 Edel Hughes, Entrenched Emergencies and the “War on Terror”: Time to Reform the Derogation 
Procedure in International Law? supra note 51, at 43.
60 Id., citing INTER-AM. COMM’N H.R., REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC 
OF COLOMBIA, CONCLUSIONS AND RECOMMENDATIONS, subdiv. A, ¶2, OEA/Ser.L/V/II.53 doc.22 (Jun. 30, 
1981). Oraa notes that the Commission failed to give a clear opinion as to the actual existence of a state of 
emergency. See JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW, supra 
note 52, at 25.
61 JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW, supra note 52, at 30, 
citing as an example IACHR REPORT ON THE SITUATION OF HUMAN RIGHTS IN PARAGUAY, (1978) OAS 
62 INTER-AM. COMM’N H.R REPORT ON HONDURAS AND THE COUP D’ETAT. §§ HUMAN RIGHTS 
The IACHR has applied the principles governing assessment of the existence of a public emergency to States non-parties to the American Convention, that were members of the OAS. On the issue of assessment of whether the measures taken are lawful, the Court has said:

Since Article 27(1) envisages different situations and since, moreover, the measures that may be taken in any of these emergencies must be tailored to "the exigencies of the situation," it is clear that what might be permissible in one type of emergency would not be lawful in another. The lawfulness of the measures taken to deal with each of the special situations referred to in Article 27(1) will depend, moreover, upon the character, intensity, pervasiveness, and particular context of the emergency and upon the corresponding proportionality and reasonableness of the measures.

The Court has not produced a clear analysis of proportionality; a mixture of examples can be found where the principle has been applied, and where it has not been mentioned.
However, it is never lawful to suspend habeas corpus in a situation of emergency. Scant mention of the margin of appreciation is found in IACHR cases; the doctrine does not seem to have been accepted to any great extent by the Court. One example where the margin of appreciation seems to have been exercised, but not labeled as such, is in Zambrano Velez, a case dealing with the use of lethal force during an alleged situation of emergency in Ecuador.

10.5 Process

The process relating to detention is clearly set out in Article 7, and broadly corresponds to the equivalent provisions in the ICCPR and European Convention.

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40. If this is so, it follows that in a system governed by the rule of law it is entirely in order for an autonomous and independent judicial order to exercise control over the lawfulness of such measures by verifying, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorized by the state of emergency. In this context, habeas corpus acquires a new dimension of fundamental importance.”

See also Case of Neira Alegria, Inter-Am. Ct. H.R. Series C No. 21, (Jan. 19, 1995) ¶84 where “the control and jurisdiction of the armed forces over the San Juan Bautista Prison translated into an implicit suspension of the habeas corpus action, by virtue of the application of the Supreme Decrees that imposed the state of emergency and the Restricted Military Zone status.”


68 Case of Zambrano Velez, Inter-Am. Ct. H.R. Series C No. 166 (Jul. 4, 2007), ¶47: “It is the obligation of the State to determine the reasons and motives that lead the domestic authorities to declare a state of emergency and it is up to these authorities to exercise appropriate and effective control over this situation and to ensure that the suspension decreed is limited “to the extent and for the period of time strictly required by the exigencies of the situation”, in accordance with the Convention. States do not enjoy an unlimited discretion; it is up to the Inter-American system’s organs to exercise this control in a subsidiary and complementary manner, within the framework of their respective competences. In this case, the Court analyses the conformity of the State actions within the framework of the obligations enshrined in Article 27 of the Convention, in conjunction with other provisions of the Convention under dispute.”

69 American Convention, supra note 1, at Art. 7:

“4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may
Frequent concerns center on the denial of access to *habeas corpus* proceedings,\(^70\) and the conduct of those proceedings.\(^71\) In *Ferrer-Mazorra*, a case under the American Declaration, the Commission clarified that the procedure in *habeas* proceedings should comply with the fundamental rules of procedural fairness, requiring an opportunity to present evidence, and know and meet the claims of the opposing party. Additionally, the detainee must have an opportunity to be represented by legal counsel or some other representative.\(^72\)

Another subject of criticism concerns the duration of detention without access to a judicial authority. For example, in *Castillo Peruzzi*, the Court held that the period of up to thirty days preventive detention for persons suspected of treason as permitted by Peruvian law, contravened the American Convention.\(^73\) The victim’s period of thirty-six days detention was excessive.\(^74\) Indeed, the Commission has stated that a “delay of more than two or three days in bringing a detainee before a judicial authority will generally not be considered reasonable.”\(^75\)


\(^{72}\) Id.

\(^{73}\) Case of Castillo Petruzzi, *supra* note 45, at ¶110.

\(^{74}\) Id., at ¶111.

A delay in ruling on a *habeas* petition can also contravene the American Convention, such as in *Acosta Calderon*, where the court considering the victim’s *habeas* petition took forty-four days to rule.\(^{76}\)

In 2006, the Commission made some recommendations about how deprivation of liberty should be dealt with in the context of terrorism.\(^{77}\) In 2009, the Commission’s Report on Citizen Security and Human Rights laid out some principles about process,\(^{78}\) and in *Valencia and Llanos* in 2011 the Court stated its position regarding process:

Both the Inter-American Court and the European Court of Human Rights have attached special importance to prompt judicial control of detentions, to prevent arbitrary detentions. A person who has been deprived of his liberty without any type of judicial control should be released or immediately placed at the disposal of a judge, since the main duty established in Article 7 of the Convention is protection of personal liberty against the interference of the State. The Court has emphasized that failure to recognize the detention of an individual is a complete denial of the guarantees that should be granted and an even more serious violation of the article in question.\(^{79}\)

### 10.6 Some other examples of problematic preventive detention measures

The examples that follow have been chosen because they demonstrate how the IACHR is powerless to prevent human rights violations, signaling the need for a more

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\(^{76}\) Case of Acosta Calderon, *supra* note 37, at ¶97.

\(^{77}\) **INTER-AM. COMM’N H. R., RECOMMENDATIONS FOR THE PROTECTION OF HUMAN RIGHTS BY OAS MEMBER STATES IN THE FIGHT AGAINST TERRORISM,** OEA/Ser.G, CP/doc.4117/06, (May 9, 2006) §B ¶1: “Where member states arrest, imprison or otherwise detain individuals as part of their anti-terrorism initiatives in situations outside of armed conflict, they must comply with minimum standards governing the right to personal liberty and security, from which derogation may never be justified. These include the following requirements:

(a) the grounds and procedures for the detention must be prescribed by law;

(b) the detainee must be informed of the reasons for the detention and afforded prompt access to legal counsel, family and, where necessary or applicable, medical and consular assistance;

(c) prescribed limits must be placed upon the length of detention;

(d) a central registry of detainees must be maintained;

(e) appropriate and effective civilian judicial review mechanisms must be in place to supervise detentions and to protect the non-derogable rights of detainees, promptly upon arrest or detention and at reasonable intervals when detention is extended.”

\(^{78}\) **INTER-AM. COMM’N H.R., REPORT ON CITIZEN SECURITY AND HUMAN RIGHTS,** *supra* note 38, at ¶¶146-7.

robust enforcement mechanism to protect the human rights of detainees, together with more specific and comprehensive guidance on detention.

In 2011, the Inter-American Commission on Human Rights reported that the most serious and widespread problems in the absolute majority of countries in the region include the excessive use of preventive detention, and deplorable conditions in detention centers and prisons, frequently exacerbated by prisoner violence.

In its 2011 Country Reports on Human Rights Practices, the U.S. Department of State has reviewed inter alia, global detention practices. One of the most noteworthy examples is that of Cuba, where the law permits detention for up to four years of persons before they commit a crime, on a subjective determination of dangerousness. The criminal code permits detention for up to 168 hours, after which time a prosecutor has to recommend a criminal investigation or release. A survey conducted in 2009-10 revealed that 64% of pre-trial detainees were held for weeks and in some cases, months without seeing a lawyer, or being informed of any charges against them.

Another recent example concerns the case of Peruvian Jose Cantoral who was arrested in Bolivia in August 2011 on “terrorism charges” and held for twenty-two days without due process or access to lawyers. He was also allegedly beaten whilst in

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80 INTER-AM. COMM’N H.R., REPORT ON THE HUMAN RIGHTS OF PERSONS DEPRIVED OF LIBERTY IN THE AMERICAS, supra note 75, at 1, and fn. 2. However preventive detention includes detention of persons awaiting trial and those detained after serving a sentence of imprisonment, as well as those detained to prevent the commission of a crime.
81 Id. ¶¶98-117.
custody. The Inter-American Commission granted precautionary measures on his behalf.\(^{84}\)

**10.7 Summary**

As in the case of the other treaties, despite the framework of the Convention and the jurisprudence of the IACHR, violations continue, particularly with respect to poor process. From a review of the treaty provisions and relevant case law, a number of core principles relating to preventive detention can be extracted.

1. Detention can only be for the reasons and under the conditions established beforehand by a State’s Constitution, or by law established pursuant thereto.\(^{85}\)

2. Detention may not be arbitrary.\(^{86}\)

3. Detention must be reasonable.\(^{87}\)

4. Detention must be proportionate.\(^{88}\)

5. Detention must be foreseeable.\(^{89}\)

6. Detention must be limited by the principle of legality, i.e. based on a legitimate purpose.\(^{90}\)

7. Detention must be necessary.\(^{91}\)

8. Detainees must be told the reason for detention.\(^{92}\)

9. Detainees must be brought promptly before a judge and be entitled to a trial within a reasonable time.\(^{93}\)

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\(^{84}\) \textit{INTER-AM. COMM’N H.R., ANNUAL REPORT 2011, 77, PM 291/11 – José Antonio Cantoral Benavides y otros, Bolivia.}

\(^{85}\) American Convention, \textit{supra} note 1, at Art. 7(2); Case of Gangaram Pandaray, \textit{supra} note 36, at ¶47.

\(^{86}\) American Convention, \textit{supra} note 1, at Art. 7(3).

\(^{87}\) Case of Gangaram Pandaray, \textit{supra} note 36, at ¶47.

\(^{88}\) \textit{Id.}

\(^{89}\) \textit{Id.}

\(^{90}\) Case of Lopez-Alvarez, \textit{supra} note 39, at ¶¶67, 68.

\(^{91}\) \textit{Id.}

\(^{92}\) American Convention, \textit{supra} note 1, at Art. 7(4).
10. Detainees have the right of access to legal representatives when challenging detention.\textsuperscript{94}

11. At all times, including in an emergency, detainees must be able to challenge detention in a court, which has to adjudicate without delay.\textsuperscript{95}

12. Habeas proceedings must comply with fundamental rules of procedural fairness, regarding knowing the opposing case and having the opportunity to present evidence.\textsuperscript{96}

13. Detention guarantees of Article 7 can be suspended in time of war, public danger or other emergency that threatens the independence of security of a State party.

14. Derogating measures are limited to the extent and period of time strictly required by the exigencies of the situation.\textsuperscript{97}

15. Derogating measures must be proportionate to the danger.\textsuperscript{98}

16. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.\textsuperscript{99}

\textsuperscript{93} American Convention, \textit{supra} note 1, at Art. 7(6).
\textsuperscript{94} Case of Ferrer-Mazorra, \textit{supra} note 71.
\textsuperscript{95} American Convention, \textit{supra} note 1, at Art. 7(6); Case of Castillo Peruzzi, \textit{supra} note 45, at ¶110; Case of Acosta Calderon, \textit{supra} note 37, at ¶97.
\textsuperscript{96} Case of Ferrer-Mazorra, \textit{supra} note 71.
\textsuperscript{97} American Convention, \textit{supra} note 1, at Art. 27(1); \textit{INTER-AM. COMM’N H.R. REPORT ON THE SITUATION OF HUMAN RIGHTS OF A SEGMENT OF MISKITO ORIGIN, supra} note 55, at E ¶¶6-8.
\textsuperscript{98} Habeas Corpus in Emergency Situations, \textit{supra} note 54, at ¶19; Judicial Guarantees in States of Emergency, \textit{supra} note [ ] at ¶21; \textit{INTER-AM. COMM’N H.R. REPORT ON THE SITUATION OF HUMAN RIGHTS OF A SEGMENT OF MISKITO ORIGIN, supra} note 55, at E ¶¶6-8.
\textsuperscript{99} American Convention, \textit{supra} note 1, at Art. 5.
CHAPTER 11 – OTHER GENERAL HUMAN RIGHTS TREATIES

11.1 AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS

11.1.1 Introduction

This instrument was adopted in 1981, and entered into force in 1986.\(^1\) 53 states have ratified it. All of those states bar Sahrawi Democratic Arab Republic and Tanzania have also ratified the International Covenant on Civil and Political Rights (ICCPR).\(^2\) Yet neither instrument has a robust enforcement mechanism, and little can be done to police or sanction violations effectively. In 1998 the Organization of African States adopted a Protocol to the African Charter to establish an African Court on Human and Peoples’ Rights.\(^3\) The African Commission and States may submit cases to the Court,\(^4\) but NGOs and individuals may only do so if their State has made a declaration “accepting the competence of the Court” to receive such cases.\(^5\)

The Court has jurisdiction to hear cases relating to the interpretation and application of the African Charter, the protocol and “any other relevant Human Rights instrument ratified by the States concerned.”\(^6\) This last provision concerning extending the jurisdiction to permit the Court to make findings about other treaties, will be discussed under the subject of forum shopping in the section B3.

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4. Id., at art. 5.
5. Id., at arts. 5(3), 34(6).
6. Id., at art. 3(1).
The Court can issue advisory opinions, and has the power to make findings as to whether there has been a violation of the African Charter and issue “appropriate orders to remedy the violation, including the payment of fair compensation or reparation.” Judges for the Court were sworn in during 2006. It appears that the Court has not dealt with any cases alleging a violation of Article 6 of the African Charter.

A person who considers that his fundamental rights have been violated, must first seek redress in his national courts. If that does not yield a satisfactory result, he can make a complaint to the African Commission, which was established inter alia to “formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations” and “ensure the protection of human and peoples' rights under conditions laid down by the present Charter.” The aggrieved individual would have to persuade a State Party or permitted organization to take up his cause and petition the African Commission. The best outcome that can be expected is that the African Commission will make a recommendation in a report and send it to the offending State party.

If individuals wish to seek redress when all domestic remedies have been exhausted, they may have the opportunity to do so if they can claim a breach of another human rights treaty to which their country is party. For example, in Zoumana Sorifing Traore v. Cote d’Ivoire, the applicant was successful in his complaints pursuant to the

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7 Id., at art. 4.
8 Id., at art. 27.
9 A search on the African Court of Human Rights’ web site has not revealed any cases dealing with arbitrary detention.
10 African (Banjul) Charter of Human and Peoples’ Rights, supra note 1 at Art. 56.
11 Id., at art. 45 (1)(b).
12 Id., at art. 45 (2).
13 Id., at arts. 47, 48, 49, 50.
ICCPR *inter alia* that he had been detained secretly and was not brought before a judge until after three weeks of detention.\(^{14}\) However, all the HRC could do was remind the State Party that it had to afford the applicant with an effective remedy, which in this case involved conducting an investigation into the matters complained of, as well as paying adequate compensation.\(^{15}\)

11.1.2 Jurisdiction

Article 2 states that every individual shall be entitled to the rights and freedoms recognized and guaranteed under the Charter. There does not appear to be any case law relating to jurisdiction in the context of detention.

11.1.3 Detention

Article 6 proscribes arbitrary detention, and states that freedom may only be deprived for reasons and conditions previously laid down by law.

11.1.4 Derogation

The Charter contains no provision for derogation in times of emergency, thus all articles apply at all times.

11.1.5 Process

No specific rights relate to challenging detention. However, the general wording in Article 7, concerning the right to have one’s cause heard, including the right to appeal against acts violating fundamental rights (such as the right to liberty) may cover this. Nothing in the Charter mandates a right to a prompt hearing to challenge detention. The general language gives a right to counsel for the purposes of criminal defense – this may or may not cover appeals to challenge detention.


\(^{15}\) *Id.*, at ¶7.9.
The African Commission on Human and Peoples’ Rights has issued some general principles, some of which apply to arrest and detention. These include the right for a detained person to be kept in an officially recognized place of detention with a register of persons detained, the right of access to necessary facilities to communicate with lawyers, family and friends, and the right of habeas corpus.\(^\text{16}\) The extent to which these principles have been adopted is as yet unknown.

### 11.1.6 Some examples of problematic preventive detention measures

The examples in this section have been selected because of their availability in the English language, and demonstrate how human rights violations in connection with detention occur on a continual basis. As in the case of the other treaties, this signals the need for a more robust enforcement mechanism to protect the human rights of detainees, together with more specific and comprehensive guidance on detention.

Human Rights Watch discusses the practices of a number of countries that detain persons to prevent acts of terrorism. They highlight some countries that detain persons for seven days or more.\(^\text{17}\) For example, in Swaziland\(^\text{18}\) a police officer may obtain a detention order from a judge specifically to prevent the commission of a terrorist offense, provided there are reasonable grounds to believe that a person is about to commit such an offense.\(^\text{19}\) Detention can be up to seven days, and the Act does not contain any


\(^\text{17}\) HUMAN RIGHTS WATCH, IN THE NAME OF SECURITY. COUNTERTERRORISM LAWS WORLDWIDE SINCE SEPTEMBER 11, 62-80 (2012).

\(^\text{18}\) Id., at 68, citing Suppression of Terrorism Act 2008, (Bill No. 5 of 2008) §23 (Swaziland).

\(^\text{19}\) Suppression of Terrorism Act §23: “(1) Subject to subsection (2) a police officer may for the purpose of preventing the commission of an offence under this Act or preventing interference in investigation of an offence under this Act, apply ex parte, to a Judge of the High Court for a detention order.
mechanism whereby the detained person can challenge detention. The Constitution of Swaziland, permits liberty to be deprived if someone has been detained on reasonable suspicion of being about to commit a criminal offense.\textsuperscript{20} It does, however, provide certain guarantees, including the right to be told as soon as is reasonably practicable of the reason for detention in a language the person understands, and be given access to a legal representative of his choice.\textsuperscript{21} Furthermore the detainee has the right to be brought before a court “without undue delay” which appears to be within 48 hours.\textsuperscript{22}

In Zambia, detention can be ordered, with the consent of the Attorney General, when there are reasonable grounds to believe or suspect that a person is preparing to commit a terrorist offense.\textsuperscript{23} The period of detention may initially be for 14 days, but a judge may extend it to a total of 30 days.\textsuperscript{24} This Act does not provide a mechanism to challenge detention. The Constitution of Zambia permits a deprivation of liberty if

\begin{itemize}
  \item[(2)] A police officer may make an application under subsection (1) only with the prior written consent of the Attorney-General.
  \item[(3)] A judge to whom an application is made under subsection (1) shall make an order for the detention of the person named in the application where the judge is satisfied that there are reasonable grounds to believe that -
    \begin{itemize}
      \item[(a)] the person is about to commit an offence under this Act; or
      \item[(b)] is interfering or likely to interfere with an investigation into an offence under this Act.
    \end{itemize}
  \item[(4)] An order under subsection (3) shall be for a period not exceeding forty-eight (48) hours in the first instance and may, on application made by a police officer, be extended for a further period, provided that the maximum period of detention under that order shall not exceed seven (7) days.
  \item[(5)] An order under subsection (3) shall specify the place at which the person named in the order is to be detained and the conditions subject to which that person shall be detained (including conditions relating to access to a Government medical officer and the video recording of the person in detention so as to constitute an accurate, continuous and uninterrupted record of the detention of that person for the whole period of the detention).” (Swaziland), available at http://m.idasa.org/media/uploads/outputs/files/Suppression%20of%20Terrorism%20Act%202008.pdf.
  \item[(20)] The Constitution of the Kingdom of Swaziland Act 2005 (Act No. 001 of 2005), Art. 16(1)(e).
  \item[(21)] Id., at art. 16(2).
  \item[(22)] Id., at art. 16(3), 16(4).
  \item[(24)] Anti-Terrorism Act 2007, supra note 23, at §31(4).
\end{itemize}
reasonable suspicion exists that someone is about to commit a criminal offense, but does afford some rights. The detainee must be told as soon as is reasonably practicable of the reason for detention in a language he understands, and he must be brought before a court “without undue delay.” No guidance can be found on the meaning of “undue delay” nor does any provision ensure access to legal counsel.

In Ethiopia, terror suspects can be held for four months without charge. Anyone reasonably suspected of having committed or committing a terrorist act, which is broadly drafted to include acts of preparation and planning and making threats to commit a terrorist act, may be arrested without a warrant. The detainee must be brought before a court within 48 hours and an order may be made to detain the suspect for further investigation or trial. Detention may be ordered in tranches of 28 days, up to a maximum of four months. This seems somewhat in conflict with article 17(2) of the Constitution of Ethiopia, which states that “[n]o person may be subjected to arbitrary arrest, and no person may be detained without a charge or conviction against him.” The Constitution provides that detainees must be told the reason for their arrest promptly in a

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26 Id., at art. 13(2).
27 Id., at art. 13(3).
28 HUMAN RIGHTS WATCH, IN THE NAME OF SECURITY, supra note 17, at 69, citing Ethiopia’s Proclamation on Anti-Terrorism, 2009, art. 20.
30 Id. at art. 4.
31 Id., at art 3(2).
32 Id., at art. 19.
33 Id.
34 Id., at art 20.
language they understand, and be made aware that they have a right to silence. The Constitution and the anti-terrorist law are silent about access to legal counsel.

Forty-three cases have been submitted to the African Commission relating to arbitrary detention but not many relate to detention for the prevention of, or in connection with, terrorist acts. One relevant example is *International Pen v. Nigeria.* A number of victims were arrested and kept in detention for a lengthy period under the State Security (Detention of Persons) Act of 1984 and State Security (Detention of Persons) Amended Decree No. 14 (1994). This legislation stipulated that the government can detain people without charge for as long as three months in the first instance. The Decree also stated that the courts cannot question any such detention, or in any other way intervene on behalf of the detainees. The Decree allowed the government arbitrarily to hold people critical of the government for up to three months, without having to explain themselves and without any opportunity for the complainant to challenge the arrest and detention before a court of law. The Commission held that Article 6 had been violated and recommended that Nigeria annul the decrees.

Possibly in response to that decision, in June 2011, Nigeria’s Terrorism (Prevention) Act came into force. It may address security concerns, but it is still very lacking from the human rights perspective. The definition of terrorism is extremely broad,
encompassing the actions of a person who knowingly “does, attempts or threatens to do an act preparatory to or in furtherance of an act of terrorism, …commits to do anything reasonably necessary to promote an act of terrorism,…or assists or facilitates the activities of a person engaged in an act of terrorism.” 43 The definition also includes arranging or attending meetings connected with terrorism, 44 or knowingly supporting an act of terrorism. 45 In the case of a “verifiable emergency” which would cause a delay that “may be prejudicial to the maintenance of public safety and order,” the National Security Advisor or Inspector General of Police can authorize the detention of any person that he “reasonably suspects of having committed or is likely to commit” a terrorist offense. 46 A Judge in Chambers, may on an ex parte application, order detention for up to thirty days. 47 During the first twenty-four hours of detention the detainee may in certain circumstances be held incommunicado, save for access to a doctor, and the legal counsel of the detaining authority. 48 If an “expert” application, whatever that means, is made to a Judge in Chambers, the suspect can be detained for a period of two months. 49

Nothing in this Act deals with any process whereby the detainee can challenge the detention. The Act does not grant access to the detainee’s own legal counsel or the right to silence, although police interviews are required to be video-taped. 50 As in the cases of the other countries discussed in this section, it appears that certain due process rights are

43 Id., at §1(1)(a). Terrorism is defined in §2.
44 Id., at §3.
45 Id., at §4.
46 Id. at §25(1)(e).
47 Id., at §25(4).
48 Id., at §28.
49 Id., at §25(3).
50 Id. at §29.
guaranteed by Nigeria’s Constitution. However, despite the fact that the Constitution is stated to be supreme and applicable in place of any inconsistent law, little is currently known about whether the Terrorism Act provisions are working in tandem with the fundamental guarantees set out in the Constitution.

11.1.7 Summary

The very brief overview of detention in several African States demonstrates that despite the noble aspirations in the Constitutions of various States to guarantee fundamental rights relating to detention, human rights violations continue, often in tandem with provisions designed to protect the general population from terrorist attacks.

As there is very little case law relating to detention, and what there is provides no further interpretation of the African Charter, the only core principles are those that may be found in the Charter itself.

1. Detention is only permitted for reasons and conditions laid down by law.

2. Detention may not be arbitrary at any time.

3. Every detainee may have his cause heard, including that relating to a violation of fundamental rights. (The remaining rights appear to relate specifically to a trial).

4. Detainees must be treated with due respect for human dignity at all times.

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51 Constitution of the Federal Republic of Nigeria 1999. Art. 35(2) provides for the right to silence and for access to legal counsel, Art. 35 (3) provides that detainee must be told the reasons for arrest and detention within 24 hours in a language he understands, and Art. 35(4) and (5) deal with the right to appear within a reasonable time before a court to challenge the detention, available at https://www.unodc.org/tldb/pdf/Nigeria_const_1999.pdf

52 Id., at Art 1.

53 One ICJ case which mentions detention under the African Charter, as well as under the ICCPR, is Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment I.C.J. Reports 2010 639.

54 African Charter, supra note 1, at art. 6.

55 Id.

56 Id., at art. 7(1).
5. There are no situations where any guarantees are suspended.

11.2 ARAB CHARTER ON HUMAN RIGHTS

11.2.1 Introduction

The most recent regional human rights instrument, the Arab Charter,\(^{58}\) came into force on March 15, 2008, when seven states had ratified it.\(^{59}\) Although it is an improvement on an earlier 1994 version,\(^{60}\) critics of the Charter point out that it is still inconsistent with international human rights law.\(^{61}\) For example, Rishawi notes: “What is clear is that the 2004 Charter reflects largely the degree of acceptance of international human rights law and standards by certain Arab States, as demonstrated, for example, by their reservations to UN human rights treaties.”

The author has found two English translations of the Charter, which are subtly different. The first appears in an article in the Boston University International Law Journal, and the second is published in the International Human Rights Report, as held in the University of Minnesota Human Rights Library.\(^{62}\) Some of the provisions in the Boston version are more human rights friendly than in the Minnesota version. For example, in the Boston article, Article 8(1) proclaims “No one shall be subjected to

\(^{57}\) Id., at art. 5.


\(^{59}\) Algeria, Bahrain, Jordan, Palestine, Syria, Libya and the United Arab Emirates. By 2009 three more states had ratified it – Qatar, Saudi Arabia and Yemen.


\(^{62}\) Arab Charter on Human Rights, supra note 58.
physical or mental torture or to cruel, inhuman or degrading treatment or punishment.\textsuperscript{63}

The Minnesota version, does not cover punishment in Article 8(1). In his analysis of the Charter, Rishmawi appears to be reading the Minnesota version. Other discrepancies include the addition of the word “exceptional” to qualify public emergency in the derogation clause in the Minnesota version, but not in the Boston version.

In the event of violations, no effective enforcement mechanisms, nor recourse for either aggrieved States or individuals are provided. Article 48 of the Charter merely provides for national reports to be considered by a Committee of seven experts.

11.2.2 Jurisdiction

Under Article 3 each State party undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set out in the Charter.

11.2.3 Detention

Article 14 proscribes detention without a legal warrant, and states that detention may only be on grounds and in accordance with procedures established by law.

11.2.4 Derogation

In time of [exceptional] public emergency it is permitted to derogate from the provisions relating to detention, but not the right to challenge detention at that time.\textsuperscript{64}

11.2.5 Process

Detainees are entitled to be told at the time of arrest why they are being held, and must be brought before a judge promptly for a determination as to whether the detention is lawful.


\textsuperscript{64} Arab Charter, \textit{supra} note 58, at art. 4(1), (2).
11.2.6 Some examples of problematic preventive detention measures

The examples in this section have been selected because of their availability in the English language, and demonstrate how human rights violations in connection with detention occur on a continual basis. As in the case of the other treaties, this signals the need for a more robust enforcement mechanism to protect the human rights of detainees, together with more specific and comprehensive guidance on detention.

In its 2012 report, Human Rights Watch highlighted the detention practices of various countries. Of the countries that have ratified the Charter, Bahrain permits pre-charge detention without judicial authority for up to fifteen days, but the Attorney General can order detention for the purposes of investigating an alleged terrorist act for up to sixty days. In the preamble to that statute, it states that the law was made “having reviewed the Constitution,” but the fundamental guarantees relating to liberty to do not give any rights regarding process other than the right for an accused person to have a lawyer defend him.

Algeria permits pre-charge detention of persons suspected of subversive or terrorist acts for up to twelve days, without access to legal counsel, and in Saudi Arabia a new draft counter-terrorism law would permit terror suspects to be held

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69 Id., citing Algeria’s Code of Criminal Procedure, art. 51bis 1, (Loi no. 01-08 du 26 juin 2001).
incommunicado for 120 days. A judge can extend the duration of detention indefinitely, but this draft law was so extensively criticized that it is in the course of being revised.

The United States Department of State published its 2011 report on Saudi Arabia in June 2012, and noted that as at the end of December 2010, 4,662 persons suspected of terrorism were being detained. In Lebanon, which has not ratified the Charter, there is no time limit on pre-charge detention.

11.2.7 Summary

Other than as set out above, very little information in the English language can be found to inform about how much impact, if any, this very new treaty has on human rights in the region. In the absence of case law and guidance, core principles have to be extracted from the words of the Arab Charter.

1. Detention is only permitted on grounds and in accordance with such procedures as are established by law.
2. Detention may not be arbitrary.
3. Anyone detained on a criminal charge must be brought before a court without delay.

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72 UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORTS 2011 – SAUDI ARABIA, available at http://www.unhcr.org/refworld/topic,4565c225e,46d6814f2,501fbca228,0,,SAU.html
74 Arab Charter, supra note 58 at art. 14.2.
75 Id., at art. 14(1).
76 Id., at art. 14(5).
4. Detainee can challenge detention in a court which must decide legality of the detention without delay.\(^{77}\)

5. Detainee entitled to be told reasons for arrest at time of arrest.\(^{78}\)

6. Detainee has a right to contact relatives.\(^{79}\)

7. Detainee has a right to a medical examination.\(^{80}\)

8. No one shall be subjected to physical or mental torture, or cruel, inhuman or degrading treatment.\(^{81}\)

9. There is no derogation from detention provisions in times of emergency.\(^{82}\)

\(^{77}\) Id., at art. 14(6).

\(^{78}\) Id., at art. 14(3).

\(^{79}\) Id.

\(^{80}\) Id., at art. 14(4).

\(^{81}\) Id., at art. 14(8).

\(^{82}\) Id., at art. 4(2).
B3 Conclusions to Section B

Both commonality, and subtle yet important differences emerge from the analysis of the treaty detention jurisprudence. Two basic points of commonality are that detention can only be in accordance with, and on grounds that are prescribed by, law, and arbitrary detention is prohibited.

Arbitrary detention is expressly proscribed in international human rights law. This is found in the texts of all the treaties except the European Convention, and in ECHR jurisprudence. However, the definition of arbitrary is not consistent in the guidance and jurisprudence of any of the HRC, ECHR and IACHR. The broadest definition can be found in HRC cases. Common core elements seem to be necessity and proportionality.

The most significant difference relating to detention is the scope of the detention power. In all the treaties other than the European Convention, the only restrictions on detention are that it must be in accordance with and on grounds prescribed by law, and

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3 Lawless v. Ireland, (No. 3) Series A no. 3(1961), ¶14.
4 For ease of reference, the similarities and difference are displayed in Table 2, in Appendix 1.
5 The line of cases from Hugo van Alphen v. The Netherlands, HRC Communication No. 305/1988, CCPR/C/39/D/305/1988 (1990), ¶5.8; A. v. Australia, HRC Communication No. 560/1993, CCPR/C/59/D/560/1993 (1997), ¶9.2’ C. v. Australia, HRC Communication No. 900/1999, CCPR/C/76/D/900/1999 (2002), ¶8.2 define arbitrary detention as reasonable, appropriate, predictable, necessary, proportionate, not unjust, not indefinite, not for a longer period than can be justified, not unjust and not to be imposed if a less invasive method can be used to achieve the same ends.
6 Hugo van Alphen v. The Netherlands, supra note 5, at ¶5.8; Saadi v. United Kingdom, App. No. 13229/03, ECHR (2008), ¶70; Case of Lopez-Alvarez, IACHR (Series C) No. 141, (2006), ¶¶67,68.
7 Id.
not arbitrary. The European Convention’s approach is different, in that it permits detention only in six specified cases. The relevant provision for this dissertation is Article 5(1)(c).\(^{8}\) This provision was discussed extensively in Chapter 9, but in sum, jurisprudence relating to this Article narrows the scope of the detention power to preventing “a concrete and specific offense….as regards, in particular, the place and time of its commission and its victim(s).”\(^{9}\) Thus, if authorities detain suspects without establishing that the potential offense is concrete and specific, a state could face ECHR censure for violating Article 5, unless the state had derogated from the European Convention at the relevant time during a state of emergency. In that situation, a state would not be obligated to provide any of the guarantees set out in Article 5.

Many procedural requirements are inadequate or absent. For example, although the ICCPR and the Arab Charter require that persons arrested shall be informed of the reasons for arrest at the time of arrest,\(^{10}\) and the European Convention requires that the reason for arrest should be given ‘promptly,’\(^{11}\) the American Convention does not specify a time limit for giving reasons, and the African Charter is silent on this issue. Detainees should be told why they are held as soon as possible after arrest, so comprehensive guidance on this issue is required.

With the exception of American Convention jurisprudence, which guarantees legal representation in habeas proceedings,\(^{12}\) neither specific treaty wording nor

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\(^{8}\) European Convention, \textit{supra} note 2, at art. 5(1)(c): “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.”


\(^{10}\) ICCPR, \textit{supra} note 1, at art 9(2); Arab Charter \textit{supra} note 1 at art 14(3).

\(^{11}\) European Convention, \textit{supra} note 1, at art. 5(2).

Jurisprudence gives a right to a detained person to have access to a lawyer. After a suspect has been charged, the right to have a lawyer is mandated by the ICCPR and the European Convention and the African Charter.\(^{13}\) All detainees should be entitled to have the assistance of counsel during detention. This significant deficiency requires remedy.

The ICCPR and American Convention and their jurisprudence envisage court proceedings to challenge detention, even during a state of emergency.\(^{14}\) In each case the court is required to adjudicate without delay, but the treaties and jurisprudence offer no guidance as to how promptly a detainee may make his challenge. The European Convention provides that detainees must be brought before a court promptly and be entitled to a trial without delay, but there is only a right to have the lawfulness of detention adjudicated speedily, with no mention of when this challenge may be made.\(^{15}\) Furthermore, the European Convention does not mandate that the right to challenge detention during a state of emergency is non-derogable.

The African Charter does not specify any rights of challenging detention. The Arab Charter contains similar general wording to that found in the ICCPR, European Convention and American Convention, but the right to liberty is non-derogable.\(^{16}\) None of the wording gives any real guidance on how to challenge detention, and these are all important matters that should be addressed in core principles.

\(^{13}\) ICCPR, supra note 1, at art. 14(b); European Convention, supra note 2 at art. 6(3)(c); African Charter, supra note 1, at art. 7.


\(^{15}\) European Convention, supra note 2, at art. 5(3).

\(^{16}\) Arab Charter supra note 1, at art 14(5).
No uniform right of redress exists for victims of violations. Very little real redress is given to the victims of the continuing treaty violations in the field of detention matters, and in any event, the treaties bodies lack the power to compel state parties to comply with treaty obligations.

One of the biggest problems with current international human rights law standards is that no effective mechanism exists to ensure compliance. Although many of the provisions in treaties purport to offer protection, they are only effective if State Parties choose to honor them. Many countries have incorporated international human rights law directly into their domestic law, or have implemented specific legislation.

However, the interpretation of human rights law is often stretched by the way governments deal with difficult security issues. Little heed is paid to the risk of an almost meaningless censure by an international body and international law does not have the mechanism of a “Super Court” to sanction treaty violations.

Could this problem be addressed by making each country more responsible for human rights violations through domestic sanctions? To whom would those sanctions be applied? Would the risk of sanctions deter law enforcement authorities from detaining an individual, in case their conduct fell short of the required standards, or if mistakes were made? No solution to this conundrum is immediately obvious.

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17 The ICCPR by art. 9(5) and the European Convention, by art. 5(5) guarantee an ‘enforceable right to compensation. The Arab Charter by art. 14(7) guarantees ‘a right’ to compensation, the American Convention by art. 10 ties the right of compensation to a sentence by a final judgment through a miscarriage of justice and the African Charter offers no individual right of redress.
18 E.g., HILARY CHARLESWORTH, HUMAN RIGHTS: AUSTRALIA VERSUS THE UN, Democratic Audit of Australia, Australian National University, 2, 3 (Aug. 2006): “In response to almost every finding against Australia, the Commonwealth Government has reiterated that the Human Rights Committee is not a court and its views are not binding.”
19 Examples of this are France and Spain.
20 An example of this is the Human Rights Act 1998 c. 42, (U.K.).
Two versions of an international human rights law framework for detention principles could be extrapolated from the analysis in Section B. A narrower approach comprises the very small set of abstract common principles mentioned above, that can be extracted from the combination of the five human rights treaties. The narrow framework is not useful because of its limited scope, as insufficient material is yielded to create a meaningful set of detention guidelines.

A broader approach would be to select one of the treaties as a general framework. If so, which one? Does one treaty stand out as an obvious best example for the detention guidelines? The answer is no, and this approach also does not work either because there are inconsistencies between the treaties, particularly in respect of the detention power provisions in the ECHR that differs from all the others, as mentioned above. Furthermore, as many states are party to more than one human rights instrument,21 problems can be caused by conflicts between treaty provisions.

In the event of conflicts between the treaties, or treaty case law, there is “no supreme arbiter of international human rights law as a whole.”22 Little authority exists outside of consulting general rules on treaties about how to resolve the type of conflict where the provisions relating to detention are inconsistent. The ICCPR came into force after the European Convention. Theoretically, in accordance with the relevant rules of the Vienna Convention on Treaties, where states parties belong to both treaties, “the earlier treaty applies only to the extent that its provisions are compatible with those of the later

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21 All parties to the European Convention, other than Moldova, are also parties to the ICCPR. All parties to the American Convention, other than Jamaica, are also parties to the ICCPR. All parties to the African Charter, other than Comoros, Sahrawi Arab Democratic Republic, Sao Tome, Swaziland and Tanzania are also parties to the ICCPR, and all parties to the Arab Charter, other than Palestine, Qatar, Saudi Arabia, and United Arab Emirates, are also parties to the ICCPR. Two countries, Algeria and Libya, are each party to the ICCPR and two regional instruments, the African Charter and the Arab Charter.

The detention provisions in the two treaties are different, so it might be concluded that the provisions of the ICCPR ought to prevail. Opinions differ on this. One approach is that the global instrument (i.e. the ICCPR) would contain the minimum normative standard and the regional document might do further by refining or adding rights. Applying this reasoning, although the regional instrument came first, one might argue that the earlier regional treaty refines the general prohibition on arbitrary detention. The problem with this argument is that the drafters of the ICCPR specifically considered, and rejected the formula of listing specified grounds as in Article 5 (1) of the European Convention.

Another approach to resolve treaty conflicts is to apply the *lex specialis* doctrine. This will focus on the scope of the treaties and give effect to the more narrowly gauged treaty. Perhaps the application of *lex specialis* is what explains why the ICCPR has not trumped the European Convention.

The rights and guarantees of detainees, and powers to detain differ depending on where the actors are, and which human rights treaty governs. From the perspective of a

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24 28th Report of the Commission to Study the Organization of Peace (1980) at 15, INTERNATIONAL HUMAN RIGHTS IN CONTEXT, 930, (Henry J. Steiner, Philip Alston & Ryan Goodman, eds.), (3rd ed.), (Oxford University Press, 2007): “It may be argued that the global approach and the regional approach to promotion and protection of human rights are not necessarily incompatible; on the contrary, they are both useful and complementary. The two approaches can be reconciled on a functional basis: the normative content of all international instruments, both global and regional, should be similar in principle, reflecting the Universal Declaration of Human Rights, which was proclaimed ‘as a common standard of achievement for all peoples and all nations.’ The global instrument would contain the minimum normative standard, whereas the regional instrument might go further, add further rights, refine some rights, and take into account special differences within the region and between one region and another.


26 CHRISTOPHER J. BORGAN, Treaty Conflicts and Normative Fragmentation, 466, in THE OXFORD GUIDE TO TREATIES, (Duncan B. Hollis ed.), (Oxford University Press, 2012), citing H. Grotius, De Jure Belli ac pacis Bk II, Ch XVI Sec XXIX; ILC Fragmentation Report pp 36, 37: “Grotius explained that ‘special provisions are ordinarily more effective than those that are general.’”
detained person, his rights seem better served if he is within the jurisdiction of the European Convention. From the perspective of law enforcement authorities, absent a state of emergency, the ability to preventively detain a terror suspect would appear more limited in countries within the jurisdiction of the European Convention than in countries that fall within the jurisdiction of the other treaties.

If guidance is sought from international human rights law, the current state of the jurisprudence relating to preventive detention as analyzed in Section B is insufficiently developed to address all the problems of preventive detention. The many flaws and deficiencies in the detention provisions in international human rights law demonstrate an urgent need for a clear and unambiguous set of core detention principles.

In Chapter 12, I tackle this problem, by proposing ten recommendations, which have been crafted with due consideration to balancing the human rights needs of individual detainees, against the requirements of law enforcement authorities to do an effective job of keeping the public safe from terror attacks.
## APPENDIX 1

### TABLE OF COUNTRIES USING PREVENTIVE DETENTION OF TERROR SUSPECTS BEFORE OR WITHOUT CHARGE

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>POPULATION</th>
<th>PERIOD OF DETENTION BEFORE OR WITHOUT CHARGE</th>
<th>SOURCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>22,507,617</td>
<td>48 hours federal detention and then up to a total of 14 days by states, or by Australian Investigation and Security Officers</td>
<td>SBE; Criminal Code Act (Cth.)1995, §105.4. See Chapter 3 infra.</td>
</tr>
<tr>
<td>Bahrain</td>
<td>1,314,089</td>
<td>Initially 60 days, which can be increased in 45 days tranches, indefinitely.</td>
<td>U.S. Department of State.³</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>166,280,062</td>
<td>At least 30 days, but law can permit indefinite detention</td>
<td>SBE; U.S. Department of State.⁴ Article 33 Constitution of Bangladesh (Advisory Board has to confirm preventive detentions exceeding 6 months). Section 12 Special Powers Act 1974 envisages indefinite detention</td>
</tr>
<tr>
<td>Burkina Faso</td>
<td>18,365,123</td>
<td>5 days</td>
<td>U.S. Department of State.³</td>
</tr>
<tr>
<td>Burma</td>
<td>55,746,253</td>
<td>4 weeks</td>
<td>U.S. Department of State.⁶</td>
</tr>
<tr>
<td>Canada</td>
<td>34,834,841</td>
<td>Indeterminate but not indefinite immigration detention pursuant to security certificates</td>
<td>SBE; Immigration and Refugee Protection Act, S.C. (2001), §81. See Chapter 3 infra.</td>
</tr>
</tbody>
</table>

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¹ This table reflects the domestic laws relating to detention before or without charge. It does not catalog the practices of countries that preventively detain outside their law. The source of much of this material is Stella Burch Elias, *Rethinking “Preventive Detention” From a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects*, 41 Colum. Hum. Rts. L. Rev. 99, 212 (2009). Materials derived from this source are marked “SBE” in the Source column, but she has combined pre-charge and pre-trial detention. The data has been re-checked and updated to reflect pre-charge or without charge detention and any changes in the law since publication of the source article.


⁴ Id., Bangladesh.

⁵ Id., Burkina Faso.

⁶ Id., Burma.
<table>
<thead>
<tr>
<th>Country</th>
<th>Population</th>
<th>Duration</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>1,355,692,576</td>
<td>82 days</td>
<td>U.S. Department of State.7</td>
</tr>
<tr>
<td>Cote d’Ivoire</td>
<td>22,848,945</td>
<td>96 hours</td>
<td>U.S. Department of State.8</td>
</tr>
<tr>
<td>Egypt</td>
<td>86,895,099</td>
<td>45 days</td>
<td>U.S. Department of State.9</td>
</tr>
<tr>
<td>France</td>
<td>66,259,012</td>
<td>96 hours garde à vue, 4 years détention provisoire for investigation</td>
<td>SBE; Code de Procédure Pénale art. 706-88. See Chapter 5 infra.</td>
</tr>
<tr>
<td>India</td>
<td>1,236,344,631</td>
<td>90 days</td>
<td>SBE; Code of Criminal Procedure 1973, §167. See Chapter 3 infra.</td>
</tr>
<tr>
<td>Indonesia</td>
<td>253,609,643</td>
<td>4 months</td>
<td>U.S. Department of State.10</td>
</tr>
<tr>
<td>Iraq</td>
<td>32,585,692</td>
<td></td>
<td>Arreets can take place without warrant under the anti-terrorism law and detentions may last for the duration of the investigation.</td>
</tr>
<tr>
<td>Ireland</td>
<td>4,832,765</td>
<td>3 days</td>
<td>SBE.</td>
</tr>
<tr>
<td>Israel</td>
<td>10,552,902</td>
<td>Indefinite administrative detention</td>
<td>SBE; Emergency Powers (Detention) Law, 5739-1979, S.H. 76, 33 L.S.I. 89-92, §§1,5. See Chapter 4 infra.</td>
</tr>
<tr>
<td>Italy</td>
<td>61,680,122</td>
<td>48 hours</td>
<td>U.S. Department of State.13</td>
</tr>
<tr>
<td>Japan</td>
<td>127,103,388</td>
<td>23 days</td>
<td>U.S. Department of State.14</td>
</tr>
<tr>
<td>Jordan</td>
<td>7,930,491</td>
<td>6 months</td>
<td>U.S. Department of State.15</td>
</tr>
<tr>
<td>Kenya</td>
<td>45,001,056</td>
<td>Indefinite</td>
<td>SBE; Constitution of Kenya, Section 72</td>
</tr>
<tr>
<td>Libya</td>
<td>6,244,174</td>
<td>8 days</td>
<td>U.S. Department of State.16</td>
</tr>
<tr>
<td>Malaysia</td>
<td>30,073,353</td>
<td>28 days on suspicion of security offenses, and indefinite detention of persons who have previously committed offenses, to prevent security offenses.</td>
<td>Security Offenses (Special Measures) Act 2012, §4; Prevention of Crime (Amendment and Extension) Act 2013, §§7C, 19A.</td>
</tr>
<tr>
<td>Mexico</td>
<td>120,286,655</td>
<td>40 days “precautionary measures” involving detention, known as</td>
<td>U.S. Department of State.17 Mexican Commission for the Defense and Promotion of Human Rights.18</td>
</tr>
</tbody>
</table>

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7 Id., CHINA.
8 Id., COTE D’IVOIRE.
9 Id., EGYPT.
10 Id., INDONESIA.
11 Id., IRAQ.
12 This figure is comprised of 7,821,850 in Israel and 2,731,052 in the West Bank.
13 U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2013, supra note 3, at ITALY.
14 Id., JAPAN.
15 Id., JORDAN.
16 Id., LIBYA.
17 Id., MEXICO.
<table>
<thead>
<tr>
<th>Country</th>
<th>Population</th>
<th>Detention Period</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Morocco</td>
<td>32,987,206</td>
<td>16 days</td>
<td>U.S. Department of State.</td>
</tr>
<tr>
<td>Mozambique</td>
<td>24,692,206</td>
<td>92 days plus another 84 days if judicially approved.</td>
<td>U.S. Department of State.</td>
</tr>
<tr>
<td>Pakistan</td>
<td>196,174,380</td>
<td>Initial period of 3 months with indefinite number of 3 month renewals</td>
<td>Constitution of Pakistan, (1973, as amended) art. 10(4).</td>
</tr>
<tr>
<td>Peru</td>
<td>30,147,935</td>
<td>15 days</td>
<td>U.S. Department of State.</td>
</tr>
<tr>
<td>Russia</td>
<td>142,470,272</td>
<td>48 hours, but can be detained for 2 months prior to arraignment, with possibility of further 12 month extension</td>
<td>U.S. Department of State.</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>27,345,986</td>
<td>6 months</td>
<td>U.S. Department of State.</td>
</tr>
<tr>
<td>Singapore</td>
<td>5,567,301</td>
<td>Indefinite, in tranches of 2 years</td>
<td>Internal Security Act 1960 (as amended), Chapter 143, §8.</td>
</tr>
<tr>
<td>South Africa</td>
<td>48,375,645</td>
<td>48 hours</td>
<td>U.S. Department of State.</td>
</tr>
<tr>
<td>Spain</td>
<td>47,737,941</td>
<td>5 days</td>
<td>Constitution of Spain, art. 17; §520bis 1 LECrim.</td>
</tr>
<tr>
<td>Sudan</td>
<td>35,482,233</td>
<td>4 months</td>
<td>National Security Act 2010, art. 50.</td>
</tr>
<tr>
<td>Syria</td>
<td>17,951,639</td>
<td>60 days</td>
<td>U.S. Department of State.</td>
</tr>
<tr>
<td>Turkey</td>
<td>81,619,392</td>
<td>4 days</td>
<td>U.S. Department of State.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>63,742,977</td>
<td>14 days</td>
<td>Terrorism Act 2000, §41 and Schedule 8. See Chapter 2 infra.</td>
</tr>
<tr>
<td>United States</td>
<td>318,892,103</td>
<td>7 days for aliens posing</td>
<td>USA PATRIOT Act, §412 P.L.107-56</td>
</tr>
</tbody>
</table>

19 U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2013, supra note 3, at MOROCCO.
20 Id., MOZAMBIQUE.
21 Id., PERU.
22 Id., RUSSIA.
23 Id., SAUDI ARABIA.
24 Id., SOUTH A
25 Id., SYRIA.
26 Id., TURKEY.
<table>
<thead>
<tr>
<th>Country</th>
<th>Population</th>
<th>Status</th>
<th>Legal Basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Zambia</td>
<td>14,638,505</td>
<td>Indefinite</td>
<td>Preservation of Public Security Regulations, §33.</td>
</tr>
</tbody>
</table>

*Indefinite detention at Guantánamo Bay*
### APPENDIX 2

#### TABLE 1 – DETENTION PROVISIONS IN HUMAN RIGHTS TREATIES

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>Date in force</td>
<td>23-Mar-76</td>
<td>3-Sep-53</td>
<td>18-Jul-78</td>
<td>21-Oct-86</td>
<td>15-Mar-08</td>
</tr>
</tbody>
</table>

#### Detention and procedure provisions

**ARTICLE 9**
1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, to appear at any other stage of the judicial proceedings, and should occasion arise, for the execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
6. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the arrest or detention is unlawful.

**ARTICLE 10**
1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

#### Treatment in detention

**ARTICLE 3**
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

**ARTICLE 5**
1. Everyone has the right to his physical, mental and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. No one shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment or punishment.
Table 1 Contd…

<table>
<thead>
<tr>
<th>TREATIES</th>
<th>INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS</th>
<th>EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS</th>
<th>AMERICAN CONVENTION ON HUMAN RIGHTS</th>
<th>AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS</th>
<th>ARAB CHARTER ON HUMAN RIGHTS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>DROGATION</strong></td>
<td><strong>ARTICLE 4</strong> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the Present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin. 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision. 3. Any State party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.</td>
<td><strong>ARTICLE 13</strong> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2. No derogation from Article 3, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision. 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General; of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.</td>
<td><strong>ARTICLE 27</strong> 1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided such measures are not inconsistent with its other obligations under international law. 3. Any State Party availing itself of the right of suspension shall immediately inform the other States parties, through the Secretary General of the Organization of American States, of the provision of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.</td>
<td><strong>None</strong></td>
<td><strong>ARTICLE 4</strong> 1. In time of [exceptional] public emergency which threatens the life of the nation and which shall be officially proclaimed as such, the State Parties may take measures derogating from their obligations under the present Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. [In exceptional situations of emergency] No derogation from articles 5, 8, 9, 10, 13, 14, 15, 18, 19, 20, 22, 27, 28 and 29 shall be made under this provision. The legal guarantees for the protection of these rights may not be suspended. 3. Any State Party to the present Charter availing itself of the right of derogation shall immediately inform the other States Parties, through the intermediary of the Secretary General of the League of Arab States, of the provisions from which it has derogated and of the reason for which the derogation was declared. A further communication shall be made, through the same intermediary, on the date on which it shall terminate such derogation.</td>
</tr>
<tr>
<td><strong>COMPENSATION</strong></td>
<td><strong>ARTICLE 9</strong> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.</td>
<td><strong>ARTICLE 5</strong> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.</td>
<td>No individual right to claim redress other than in the limited situation set out in <strong>ARTICLE 10</strong> Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.</td>
<td>No individual right to claim redress</td>
<td><strong>ARTICLE 14</strong> 7. Anyone who is the victim of unlawful arrest or detention shall be entitled to compensation.</td>
</tr>
<tr>
<td><strong>JURISDICTION</strong></td>
<td><strong>ARTICLE 2</strong> 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…</td>
<td><strong>ARTICLE 7</strong> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.</td>
<td><strong>ARTICLE 1</strong> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of these rights and freedoms… Cumberlege and lengthy process - individual can complain to Inter-American Commission on Human Rights (Article 44) and which deals with the violating State. If no satisfactory outcome in accordance with Articles 48 and 50, the Commission has to apply to the Inter-American Court of Human Rights (Article 46) on behalf of the aggrieved individual.</td>
<td>No effective enforcement mechanism - States can submit reports of violations to the Inter-American Commission on Human Rights and/or to African Commission on Human and Peoples’ Rights, (Articles 47, 48, 49). Individuals can also make a complaint (Article 50).</td>
<td><strong>ARTICLE 3</strong> 1. Each State party to the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein…</td>
</tr>
</tbody>
</table>

States that have ratified

| | 167 | 47 | 24 | 53 | 10 |

Appendix 2 – Treaties and Core Principles
April 30, 2014
<table>
<thead>
<tr>
<th>TREATIES</th>
<th>Date in force</th>
<th>States that have ratified</th>
<th>Key concepts relating to detention derived from wording of treaty</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS</td>
<td>23-Mar-76</td>
<td>167</td>
<td>No arbitrary arrest or detention. Detention on such grounds and in accordance with such procedures as are established by law. Reasons for arrest must be given at time of arrest. Detainee may challenge detention in court so that court may decide without delay if detention is lawful.</td>
</tr>
<tr>
<td>EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS</td>
<td>3-Sep-53</td>
<td>47</td>
<td>No detention except in the 6 specified cases and in accordance with a procedure prescribed by law. Reasons for arrest/detention must be given promptly. Detainee must be brought promptly before a court to test if detention is lawful.</td>
</tr>
<tr>
<td>AMERICAN CONVENTION ON HUMAN RIGHTS</td>
<td>18-Jul-78</td>
<td>24</td>
<td>Detention only for the reasons and under the conditions established beforehand by the Constitution or law of a State Party. No arbitrary arrest or imprisonment. Detainee must be told the reasons for detention and told promptly of charges. Detainee entitled to seek decision from court on lawfulness of detention &quot;without delay&quot;</td>
</tr>
<tr>
<td>AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS</td>
<td>21-Oct-86</td>
<td>53</td>
<td>Detention only for reasons and conditions laid down by law. No arbitrary arrest or detention. Not much detail about process. Process in Article 6 is not specific to detention, so unclear if (c) and (d) are applicable if challenging detention.</td>
</tr>
<tr>
<td>ARAB CHARTER ON HUMAN RIGHTS</td>
<td>15-Mar-08</td>
<td>10</td>
<td>No derogation in times of emergency</td>
</tr>
<tr>
<td>LIBRARY CONVENTION OF 53</td>
<td></td>
<td></td>
<td>Detention guarantees can be suspended in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed. Derogation may only be to the extent strictly required by the exigencies of the situation, may not be inconsistent with other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.</td>
</tr>
<tr>
<td>LIBRARY FLIGHT CONVENTION OF 47</td>
<td></td>
<td></td>
<td>No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.</td>
</tr>
<tr>
<td>LIBRARY TREATY OF 6</td>
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<td>Right to compensation</td>
</tr>
<tr>
<td>LIBRARY CONVENTION OF 47</td>
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<td>Right to compensation</td>
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</tbody>
</table>

### Key concepts relating to detention derived from case law and guidance

No arbitrary means appropriate, just, predictable, reasonable, proportionate, necessary, no other less intrusive measures available, should not continue for a longer period than a state can justify.

Detention should not be arbitrary, meaning must be compatible with rule of law, not ordered in bad faith, necessary, proportionate, conform to purpose of Article 5(1), and be a measure of last resort.

Detention must be linked to a concrete and specific offense. There may have to be an intention to bring criminal charges within a reasonable time.

There may be an implied right to have access to a lawyer.

Emergency will justify derogation if relevant circumstances are exceptional and relate to actual or imminent danger. Measures must be strictly necessary and proportionate, exceptional and temporary.

Right to challenge detention is not derogable.
APPENDIX 3

CORE PRINCIPLES FOR PREVENTIVE DETENTION OF TERROR SUSPECTS BEFORE OR WITHOUT CHARGE

Principle 1 – clarify the requirement that preventive detention must be on grounds authorized by law

Subject to compliance with procedural guarantees set out in these Principles, detention of suspects is only permitted to prevent the commission of a terrorist offense that is concrete and specific as to (i) the type of conduct it is designed to proscribe, and (ii) where, and when, the offense is expected to be committed, and against whom, or what, the act is targeted.

Principle 2 – clarify meaning of arbitrary detention

Detention may never be arbitrary. This means:

(i) Detention may only be imposed in accordance with procedures established by law;
(ii) Detention must not be unjust;
(iii) Detention must be proportionate;
(iv) Detention must be necessary;
(v) Detention may not continue for a longer period than can be justified in accordance with judicial assessment at regular specified intervals as to the continuing validity of the grounds that justified the initial detention, including the continuing threat posed by the terror suspect;
(vi) Detention must not be imposed if a less invasive method can be used to achieve the same ends.

**Principle 3 – Guidance for giving detainees the reason for detention**

(i) All detainees must be told the reasons for arrest and detention at the time of arrest, or as soon as practicable thereafter, in a language the detainee understands.

(ii) The detainee is entitled to know the essential factual and legal grounds for the arrest. He must be sufficiently informed during the detention, in accordance with procedures set out in Principle 7, to be able to challenge his detention.

**Principle 4 – eliminate incommunicado detention**

(i) Detainees must have the right to inform someone of their choice about their detention, either personally, or through the medium of police or some other acceptable third party.

(ii) This right must be exercised as soon as practicable after arrest and a record kept of the date when, and name of the person to whom, the information was given.

(iii) In exceptional circumstances this right may be delayed for up to forty-eight hours, provided that the detainee is told why this right is being delayed. To qualify as exceptional circumstances, investigating authorities must reasonably believe that the consequences of exercising the consequences of exercising the right under 4(i) will carry a significant risk of:

a) interfering with an on-going investigation;

b) tampering with evidence;
c) harming witnesses;

d) the alerting of a person, thereby making it more difficult to prevent an act of terrorism;

e) the alerting of a person and thereby making it more difficult to secure a person’s apprehension, prosecution or conviction in connection with the commission, preparation or instigation of an act of terrorism;

f) the alerting of persons who are suspected of having committed a serious offence but who have not been arrested for it.

(iv) Detainees must be kept in officially recognized facilities for detention.

(v) Each state must keep a central registry containing details of its detainees, including the detainee’s full name and date of birth, date of commencement of detention and place of detention.

Principle 5 - access to legal counsel

(i) Every detainee must have immediate access to legal counsel for advice and representation after arrest, and in any legal proceedings.

(ii) Indigent detainees must be provided with legal counsel at the government’s cost.

(iii) Lawyers must be given access to all facts of each case, and all evidence relevant to the detention, subject only to specified exceptions in cases of sensitive information and where there is a requirement for the authorities to protect sources, which is dealt with under Principle 7 below.

(iv) Confidentiality of communications between detainee and his lawyer must be respected, unless the investigating authorities have reasonable grounds to believe
that the detainee’s lawyer will, inadvertently or otherwise, pass on a message from the detainee or compromise the investigation in some other way. In these circumstances, either the communication will be monitored or the detainee must be permitted to choose another lawyer.

(vi) Lawyers must be present during all interviews and examinations of detainees.

(vii) In exceptional circumstances this right may be delayed for up to forty-eight hours. To qualify as exceptional circumstances, investigating authorities must reasonably believe that the consequences of exercising the right under 5(i), (iii) and (vi) will carry a significant risk of:

a) interference with an on-going investigation;

b) tampering with evidence;

c) harming witnesses;

d) the alerting of a person, thereby making it more difficult to prevent an act of terrorism;

e) the alerting of a person and thereby making it more difficult to secure a person’s apprehension, prosecution or conviction in connection with the commission, preparation or instigation of an act of terrorism;

f) the alerting of persons who are suspected of having committed a serious offence but who have not been arrested for it.

(viii) If the right of access to legal counsel is delayed, the detainee must be given an explanation.
Principle 6 – improve the procedures for indefinite detention

(i) After initial judicial confirmation, detention before, or without charge must be reviewed at least every six months.

(ii) Detainees, with the assistance of independent legal counsel, must have the right to challenge detention at each review before a judicial authority.

(iii) At each review hearing a number of specified criteria should be assessed, including the threat posed by the detainee at the time of the review, the continued necessity of detention, the length of time the suspect has been detained, and the availability of other appropriate methods to protect the community.

(iv) If the detainee is determined to pose a continuing threat, and detention is confirmed, he must be informed of the reasons for the decision.

Principle 7 – rights and process of challenging detention

(i) All detainees must have the right to challenge detention before a judicial authority after 48 hours or as soon as is reasonably practicable.

(ii) All detainees have the right to attend a court for the purpose of challenging detention.

(iii) In the case of classified or otherwise sensitive information, the detainee is entitled to consult with and be represented by a security-cleared lawyer who may see the confidential or classified evidence.

(iv) The detainee is entitled to know the essence of the case against him. The information must be sufficient to enable him to give effective instructions to his legal counsel.

(v) If detention is confirmed, every detainee must be given detailed reasons.
(vi) All detainees must have the right of appeal to a different or higher judicial authority within a specified time frame.

Principle 8 – ensure fair treatment of detainees

(i) There must be a guarantee of no torture, or cruel, inhuman or degrading treatment.

(ii) All detainees must have the right to medical examinations and treatment at any time.

(iii) Detainees may only be held in facilities officially acknowledged as places of detention.

(iv) All detainees must be confined in sanitary, properly heated and ventilated conditions, with a right to regular periods of exercise.

(v) All interviews between detainees and authorities must be recorded, visually as well as audio, as a check on proper interrogation techniques.

Principle 9 – right to seek compensation for violation of human rights

(i) Persons unlawfully detained shall be entitled to claim compensation or other redress from a court in the country where detention took place.

(ii) Persons who have been subjected to ill-treatment, or restriction of human rights during detention shall be entitled to claim compensation or other redress from a court in the country where detention took place.

(iii) States are required to enact legislation to enable persons to seek the redress referred to in Principles 9(i) and (ii).

Principle 10 – independent oversight of detention
Each country must designate an independent person or body to monitor and report annually on the exercise and operation of preventive detention measures prevailing in the country in question, and make appropriate recommendations relating to the abolition or improvement of those measures.

The report should be presented to the governing body of the country, which is required to respond within a designated time period, and introduce changes to the detention laws if appropriate.
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