

**EXTREME MEASURES: DOES THE UNITED STATES NEED PREVENTIVE
DETENTION TO COMBAT DOMESTIC TERRORISM?**

By Diane Webber*

Preventive detention: “an extreme measure which places the individual wholly under the control of the state, not as a punishment for a proven transgression of the law but rather as a precautionary measure based on a presumption of actual or future criminal conduct...”¹

ABSTRACT

This paper deals with preventive detention in the United States, i.e. the detaining of a suspect to prevent a future domestic terrorist offense. Two recent events are examined: the Fort Hood shootings; and a preventive arrest in France, to consider problems in combating terrorist crimes on U.S. soil. The paper demonstrates that U.S. law as it now stands, with some limited exceptions, does not permit detention to forestall an anticipated domestic terrorist crime. After reviewing and evaluating the way in which France, Israel and the United Kingdom use forms of preventive detention to thwart possible terrorist acts, the paper proposes three possible ways to fill this gap in U.S. law, and give the United States the same tools to fight terrorism as the other countries discussed in the paper, within the boundaries of the Constitution.

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¹HELENA COOK, *Introduction to PREVENTIVE DETENTION*, 1 (Stanislaw Frankowski & Dinah Shelton, eds., Kluwer Academic Publishers) (1992).

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Introduction

At 6 a.m. on Thursday October 8, 2009, eight officers of the French Centrale Directorate d’Intelligence Interieure (“CDII”), together with twenty armed riot officers, burst into an apartment in south east France and arrested two scientist brothers, Adlene and Halim Hircheur, allegedly in order to avert a terrorist atrocity.² They were detained in police

² Jason Lewis & Peter Allen, *Al Qaeda nuclear suspect worked at UK laboratory*, MAIL ON SUNDAY (Eng.), Oct. 11, 2009, at 22-23.

custody for four days, before Adlene was charged and Halim was released without charge.

The CDII had been monitoring the brothers for eighteen months, but the decision to arrest was made after the CDII intercepted email exchanges between the brothers and people linked to Algerian Al Qaeda terrorists. The French Interior Minister is quoted as saying that the brothers posed such a serious threat that he halted the surveillance operation and ordered their arrest: “the investigation will reveal what were the objectives in France or elsewhere of these men. Maybe the enquiry will reveal that thanks to these two arrests, the worst could have been avoided.”³ The facts resulting in the police preventive detention will be referred to in this paper as the “Hircheur scenario.”

There is much discussion⁴ as to whether the United States should have a regime for preventive detention of terrorists, whether one exists now, or whether new laws are needed. These questions are even more pertinent in the wake of the shootings perpetrated by Major Nidal Hasan at Fort Hood on November 5, 2009.⁵ This tragedy has been described in the course of Congressional hearings as a “homegrown terrorist attack,”⁶ and

³ *Id.* at 22.

⁴ See, e.g., David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693 (2009); Robert M. Chesney, *Symposium: Law, Ethics and the War on Terror: Terrorism, Criminal Prosecution and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669 (Summer 2009); Peter Baker, *Obama to Use Current Law to Support Detentions*, N.Y. TIMES, Sep. 23, 2009, available at www.nytimes.com/2009/09/24/us/politics/24detain.html?_r=2&hp; Benjamin Wittes, *Obama's Cheney Moment*, WASH. POST, Sep. 29, 2009, available at www.washingtonpost.com/wp-dyn/content/article/2009/09/28/AR2009092802492.html?hpid=opinionsbox1.

⁵ Robert D. McFadden, *Army Doctor Held in Fort Hood Rampage*, N.Y. TIMES, Nov. 5, 2009, available at <http://www.nytimes.com/2009/11/06/us/06forthood.html>.

⁶ David Johnston, *Lawmakers call Ft. Hood Shootings 'Terrorism'*, N.Y. TIMES, Nov. 19, 2009, available at <http://www.nytimes.com/2009/11/20/us/politics/20hood.html>.

has generated speculation as to whether the attack could have been prevented.⁷ Hasan has been charged with thirteen counts of murder and multiple counts of attempted murder. He faces a military trial in a court martial, because the offenses took place at an army base. Law enforcement officials are reported as believing that Hasan acted alone, as they have not currently found any evidence of conspiracy.⁸ Newspaper reports also suggest that U.S. intelligence knew for months before the shooting that Hasan had been trying to contact figures associated with Al Qaeda “by electronic means.”⁹ There are also reports pointing to other possible alarming signs,¹⁰ suggesting that preventive action could perhaps have forestalled this tragedy. Leaving aside the military aspect, because such an attack could have happened anywhere, this pattern of facts will be referred to in this paper as the “Hasan scenario.”

This paper will show that in current U.S. law, if factual situations occurred in the United States similar to those described above in the Hircheur and Hasan scenarios, a suspect could not be detained (except in one very limited situation) to prevent a terrorist atrocity. Thus, U.S. law as it now stands, with some limited exceptions, does not permit detention

⁷ Dana Priest, *Fort Hood suspect warned of threats within the ranks*, WASH. POST, Nov. 10, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/story/2009/11/09/ST2009110903704.html?sid=ST2009110903704>.

⁸ James C. McKinley Jr. *Major Held in Fort Hood Rampage is Charged with 13 Counts of Murder*, N.Y. TIMES, Nov. 12, 2009, available at <http://www.nytimes.com/2009/11/13/us/13inquire.html>.

⁹ James Dao, *Suspect was ‘Mortified’ About Deployment*, N.Y. TIMES, Nov. 6, 2009, available at <http://www.nytimes.com/2009/11/06/US/06suspect.html>, (FBI became aware of a man calling himself Nidal Hasan making internet postings in which suicide bombings were discussed favorably); Giles Whittell, *Fort Hood gunman Major Nidal Malik Hasan ‘tried to contact Al-Qaeda’*, TIMES (London), Nov. 10, 2009, http://www.timesonline.co.uk/tol/news/world/us_and_america/article6910273.ece; Pamela Hess & Anne Gearan, *Levin: More emails from Ft. Hood suspect possible*, WASH. POST, Nov. 21, 2009.

¹⁰ See Priest, *supra* note 7 (Instead of giving a medical presentation at Walter Reed hospital, Hasan delivered a 50 slide power point presentation on the “Koranic World View as it Relates to Muslims in the U.S. Military”); Scott Shane, *Born in the U.S., a Radical Cleric Inspires Terror*, N.Y. TIMES, Nov. 18, 2009, available at http://www.nytimes.com/2009/11/19/us/19awlaki.html?_r=1, (Hasan sought religious advice in emails intercepted by U.S. intelligence from radical cleric born in U.S., but now living in Yemen).

to forestall an anticipated terrorist crime. The paper will propose three possible ways to fill this gap in the law, within the boundaries of the Constitution.

This paper addresses only the legal aspects, not the larger and more philosophical question whether suspects *should* be arrested and detained because of something they might do in the future. Some might argue that this type of detention is inherently arbitrary and the essence of repression. Others might say that the importance and urgency of looking after the public safety has a greater priority. The answers to these questions and issues are neither simple nor clear. Innocent people would indeed balk at the thought of being locked up because law enforcement personnel think they might commit some terrorist offense at some point in the future. However, if the civil liberties of an individual who may or may not be innocent are balanced against the need to protect the public, the problem appears insoluble.¹¹

The starting place is to define the meaning of “preventive detention”. In the United States the term means different things to different commentators.¹² For the purposes of this paper, *preventive detention means detaining a suspect in the United States for the purposes of preventing a terrorist act*. Various commentators have discussed possible

¹¹ This subject will not be debated in this paper, but see e.g. Cole, *supra* note 4, at 694. Nor will this paper discuss the situation of the detainees remaining in Guantanamo Bay, (including the plight of the Uighurs, who are cleared for release but still detained in Guantanamo, despite neither being charged nor suspected of anything). See e.g. Ulysees S. Smith, “*More Ours Than Theirs*”: *The Uighurs, Indefinite Detention and the Constitution*, 40 CORNELL INT’L L. J. 265 (2007); Robert Barnes, *Supreme Court to hear Uighurs’ case*, WASH. POST, Oct. 21, 2009, at 1A, 6A. Nor does the paper address the position of detainees in Afghanistan and elsewhere outside the United States.

¹² See, e.g. PREVENTIVE DETENTION AND SECURITY LAW, A COMPARATIVE SURVEY, 4-5 (Andrew Harding & John Hatchard, eds., Kluwer Academic Publishers) (1993) (hereinafter *Security Law*), defines the terms as “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, (Cambria Press) (2009), uses the term “investigative detention”; COOK, *supra* note 1, at 1, uses the term “pre-trial detention”.

rationales for this type of detention, such as incapacitation or interrogation.¹³ These rationales are surely closely intertwined. A person arrested on suspicion that an offense may be committed might have information or lead investigators along a path to prevent both a possible atrocity that may occur imminently (which was the reason for the arrest), and also other future terrorist acts.

The discussion starts in Part I with a review of the framework of relevant international human rights law. Part II describes the French law of preventive detention, in order to understand what happened in the Hircheur case. As it may be useful to look to other jurisdictions¹⁴ to see if any valuable lessons can be learned from their experience in dealing with combating and prosecuting terrorists, Parts III and IV will in turn analyze certain aspects of Israeli and British law. Part V contains a survey of the current law of detention in the US, a discussion about whether the tools that exist in the current law to combat terrorism would be effective in the Hircheur and Hasan scenarios, and identification of possible problem areas. Finally, Part VI contains suggestions that might address some of the problem areas in the current U.S. system.

Part I

The International Framework

¹³ See e.g. STEPHANIE COOPER BLUM, *THE NECESSARY EVIL OF PREVENTIVE DETENTION IN THE WAR ON TERROR*, 53-73 (Cambria Press 2008); JANE MAYER, *THE DARK SIDE*, 81- 82 (Doubleday, 2008).

¹⁴ See, e.g. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003), (where Justice Kennedy considered European law in his opinion that a statute prohibiting homosexual conduct violated the Constitution. He was however lambasted by Justice Scalia at 598, who dismissed the comments on European law as “meaningless” and “dangerous dicta” and cited Justice Thomas in *Foster v. Florida*, 537 U.S. 990, 991 (2002), who commented on Justice Breyer noting Canadian practice in a death penalty case. “While Congress, as a legislature, may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads or fashions on Americans.”).

*“Preventive detention involves the deprivation of one of the most fundamental of all human rights recognized in international law – the right to personal liberty.”*¹⁵

Article 3 of Universal Declaration of Human Rights (“UDHR”),¹⁶ states: “Everyone has the right to life, liberty and the security of person.” Also relevant for the purposes of this paper is Article 9: “No-one shall be subjected to arbitrary arrest, detention or exile.” This is the foundation for many international human rights treaties,¹⁷ two of which are discussed here.

1. The International Covenant on Civil and Political Rights (“ICCPR”)¹⁸

The United States, the United Kingdom, France and Israel are all parties to this treaty.¹⁹

The relevant provision is Article 9.1, which states: “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 procedures as are established by law.” The remainder of Article 9 sets out the procedural framework in the event of a detention. Article 14 is also relevant. It deals with various procedural and substantive rights in criminal trials.

Helena Cook points out that while the ICCPR does not by its terms describe the circumstances in which persons may be detained in the first place, the use of preventive

¹⁵ COOK, *supra* note 1, at 1.

¹⁶ Adopted by the General Assembly of the United Nations on December 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.

¹⁷ COOK, *supra* note 1, at 2.

¹⁸ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

¹⁹ The United States ratified on Sep. 8, 1992, the United Kingdom ratified on May 20, 1976, France ratified on Nov. 4, 1980 and Israel ratified on Oct. 3, 1991. *See* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_noIV-3&chapter=4&lang=en

detention without charge or trial based purely on a prediction of future criminal conduct is not prohibited per se. Such detention is permissible provided it is not done in an arbitrary manner and that it accords with the domestic law of each country that is party to the treaty.²⁰

2. European Convention for the Protection of Human Rights²¹

France and the United Kingdom are parties to the European Convention.²² The United States and Israel are not. Unlike the ICCPR, the European Convention does explicitly set out situations when preventive detention may be used. Article 5 (1) provides:

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:....(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.²³

Thus despite the fact that conceptually the very notion of detention in situations where no crime has been committed may give rise to many concerns, neither of these treaties prohibit preventive detention provided that it is carried out in accordance with proper procedures established by law.

²⁰ COOK, *supra* note 1, at 7, 10.

²¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sep. 3, 1953, as amended by Protocols Nos. 3, 5, 8, and 11 which entered into force on Sep. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and Nov. 1, 1998 respectively.

²²See Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.: 005, available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=09/11/2009&CL=ENG>; France signed on Nov. 4, 1950 and treaty both ratified and came into force on May 3, 1974; U.K. signed on Nov. 4, 1950, ratified on Mar. 8, 1951, and treaty came into force on Sep. 3, 1953.

²³ *Id.* at art. 5(1).

Unlike the ICCPR, where individuals may only complain to the UN Human Rights Committee about breaches of the treaty if their country has signed the Optional Protocol, (like France, but not the United States, United Kingdom or Israel) individuals may complain to the European Court of Human Rights (“ECHR”) about alleged violations of the treaty and seek clarification about the meaning of treaty terms.

The ECHR has considered the issue of whether detention is permissible to prevent terrorism in several cases, often in an immigration context.²⁴ Where authorities have sought to detain outside the specific situations set out in Article 5, this can only be done by using the mechanism of derogation pursuant to Article 15,²⁵ which sets out situations where member states may depart from or derogate from their Convention obligations.

Article 15(1) provides:

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.

²⁴ See *e.g.* *Chahal v. United Kingdom*, (1996) EHRR 413 (where a lengthy period of detention prior to deportation did not violate Article 5 (1) (f), but this detention is only permissible whilst deportation proceedings are pending).

²⁵ See *e.g.* *Lawless v. Ireland* (No. 3), (1961) 1 EHRR 15; *Ireland v. United Kingdom*, (1978) 2 EHRR 25, *Brannigan & McBride v. United Kingdom* (1993) 17 EHRR 539; *Aksoy v. Turkey*, (1996) 23 EHRR 553; *Marshall v. United Kingdom*, Jul. 10, 2001, Appl. 41571/98. (In all of these cases the court found that the circumstances amounted to a public emergency justifying derogation and preventive detention.) (In the *Greek Case* (1969) 2 YB 1, the court held that the particular circumstances did not amount to a public emergency warranting derogation or preventive detention.)

The holding in *A v. United Kingdom*²⁶ confirms that acts of terrorism may justify derogation, although in that particular case the detention was not permitted for other reasons, as discussed below in Part IV.

Another reference concerned the meaning of reasonable suspicion, a concept to which I will return below. Three residents of Northern Ireland, detained without charge on suspicion of being terrorists, challenged the British government on the grounds that it was not reasonable to detain them simply to find out information about the IRA and claimed a violation of Article 5(1)(c). The court said: “The ‘reasonableness’ of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5(1)(c).”²⁷ It held that the test for reasonable suspicion is an objective one, but what may be regarded as “reasonable” will however depend upon all the circumstances, i.e. upon the facts of each situation.

The ECHR has heard many complaints made against different countries about excessively long periods of detention. In many of these cases there are relatively short periods of detention before charge, followed by long periods of detention post-charge, but pre-trial. Such detention is imposed for many varieties of criminal offenses, including offenses relating to terrorism.²⁸ In all these cases the court has repeated variations on the following theme: “the reasonableness of the length of detention has to be assessed in each case according to its special features. Continued detention might be justified in a given

²⁶ *A. v. United Kingdom*, Appl. No. 3455/05, at ¶ 181, Eur. Ct. H. R. (Feb. 19, 2009). (It was held that a public emergency threatening the life of the nation existed, justifying the U.K. derogating from Article 15).

²⁷ *Fox, Campbell and Hartley v. United Kingdom*, Appl. No. 12244/86 at ¶ 32; 12245/86; 12383/86, Eur. Ct. H. R., Aug. 30, 1990.

²⁸ See e.g., *Jecius v. Lithuania*, [2000] ECHR 34578/97, (murder); *Wedler v. Poland*, [2007] ECHR 14382/04, (embezzlement); *Yavnuz v. Turkey*, [2007] ECHR 47043/99, (involvement in illegal organization).

case only if there were clear indications of a genuine public interest which, notwithstanding the presumption of innocence, outweighed the right to liberty.”²⁹

In deciding what is reasonable, the court has said

terrorist crime falls into a special category. ... In view of the difficulties inherent in the investigation and prosecution of terrorist-type offences in Northern Ireland, the "reasonableness" of the suspicion justifying such arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime. Nevertheless, the exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the essence of the safeguard secured by Article 5(1)(c) is impaired.³⁰

Article 6 contains a list of protections for detainees, including those preventively detained, such as 6(3) (a) “to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him” and the right to legal assistance.

Part II

Preventive detention in France

France has a long history of dealing with terrorism, mainly starting in the 1950s and 1960s with attacks related to its connections with Algeria. There have been constant problems with separatist groups seeking independence or autonomy, and from the 1980s onwards France has had to deal with attacks carried out by Middle Eastern Islamic fundamentalist groups.

²⁹ *Jecius v. Lithuania*, [2000] ECHR 34578/97 at ¶ 93.

³⁰ *Fox, Campbell and Hartley v. United Kingdom*, Appl. No. 12244/86 at ¶ 32; 12245/86; 12383/86, Eur. Ct. H. R., Aug. 30, 1990.

The French response to this is a body of terrorism legislation setting out a list of various criminal acts carried out by individuals acting alone or in conjunction with others, including for example, attacks on life, hijacking and offenses involving explosives. There are also offenses of conspiracy to commit terrorism, and of participation in a group formed with the intent to commit a terrorist act, provided that material facts indicate preparation for such an act.³¹ All terrorist cases in France are dealt with in the Trial Court of Paris, whose investigating magistrates have become real experts in terrorism. These magistrates work in partnership with the French domestic intelligence service (DST) and have created a formidable body to combat terrorism.³² The French system of preventive detention in terrorism cases is an enhanced version of the regime of preventive detention used in general criminal cases.³³ The relevant parts are summarized here, in order to understand what happened to Hircheur.

1. Garde à Vue

Under this regime a terror suspect³⁴ may be arrested under reasonable suspicion and detained and questioned at a police station for up to six days. A suspect is defined as a person who is suspected of having committed or attempting to commit an offense.³⁵ The criteria for suspicion is that there is “one or more plausible reasons to suspect a person of

³¹ Code Pénale [C. pén] art. 421-1(Fr.) lists the series of offenses which constitute acts of terrorism. Article 421-2-1 provides: “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” *available at* http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textan.htm

³² Jeremy Shapiro & Benedicte Suzan, *The French Experience of Counter-Terrorism*, SURVIVAL, VOL.45, NO.1, 67-98 (Int’l. Inst. For Strategic Studies) (Spring, 2003).

³³ See STIGALL, *supra* note 12, at 135-156 (for description of the French system).

³⁴ *Id.*, at 138, 147.

³⁵ Law No. 2002-1138 of September 9, 2002, Journal Officiel de la République Française [J.O.][Official Gazette of France].

having committed or attempting to commit an offense.”³⁶ As with the U.S. material support laws which are discussed in Part V, if there is evidence of a person’s involvement with a terrorist group, he or she can be arrested to prevent a terrorist act and he or she may be held preventively for an extended period if a magistrate’s preliminary investigation reveals a serious risk of an imminent act of terrorism. The initial period of detention in terrorist cases is four days (as opposed to forty eight hours in normal criminal cases), and this can be extended twice by a judge for further periods of twenty four hours.³⁷ Hircheur was held for four days, presumably because of his alleged links with the Algerian Al Qaeda group. During the detention, a terror suspect may not consult an attorney until the seventy second hour. Although there is a right to silence under French law, if it is exercised, adverse inferences may be drawn at a trial. Since 2003 the authorities are no longer obliged to inform the detainee about this right,³⁸ thus devaluing its importance and effect.

2. Detention Provisoire

This is detention of a suspect under investigation for serious crimes including terrorism. This is a tool that can be used both *after* a crime has been committed pending trial, as well as *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 *before* terrorist acts take place, thereby creating a capacity... for preventing them in the

³⁶ JACQUELINE HODGSON, FRENCH CRIMINAL JUSTICE, 147 (Hart Publishing 2005) (hereinafter “HODGSON, FRENCH CRIMINAL JUSTICE”).

³⁷ Code de Procedure Penale art. 706-88, (Fr.).

³⁸ Loi n°2003-239 (Fr. 18 Mar. 2003).

first place.”³⁹ 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 detention provisoire, provided a judge is satisfied that lesser measures would not prevent a number of matters, including the prevention of a violation. 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 is 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.) During the detention when investigation and interrogation may continue, suspects must be told about their right to silence and they are not held incommunicado.

Hircheur has been held under detention provisoire since October 12, 2009 because the French security service found evidence suggesting that he had told an Algerian terrorist group that he was interested in committing an attack, although he had not begun any material preparation. This prompted an investigating judge to open an investigation concerning the commission of a possible terrorism offence by Hircheur of “association with criminals in relation to a terrorist enterprise”⁴⁰ and he was placed in detention for further investigation pending a trial.⁴¹ His detention is therefore serving a dual purpose of

³⁹ Shapiro & Suzan, *supra* note 31, at 85.

⁴⁰ Law No. 2003-239 of March 18, 2003, Journal Officiel de la République Française [J.O.][Official Gazette of France].

⁴¹ Charles Bremner & Adam Sage, *Nuclear physicist is charged over ‘terror plot’ with al-Qaeda*, TIMES (London), Oct. 13, 2009, at 37; *Mise en examen de l’ingénieur nucléaire*, available at lefigaro.fr/flash-actu/2009/10/12/01011-20091012FILWWW0534-mis-en-examen-de-l-ingenieur-nucleaire.php.

gathering intelligence about the possible attack for which he was arrested and any other future attacks, in order to prevent them, as well as building a case against him for trial.

3. Human Rights Issues

Unsurprisingly, the length of detention possible in 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.⁴² 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.

Several commentators have offered explanations as to why, despite ECHR condemnation as described above, France retains such draconian laws. The French intend to stop terrorist attacks before they happen.⁴³ There is a tension in France between the right to freedom from arbitrary arrest and detention, enshrined in the French Bill of Rights of 1789, as well as in 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 right⁴⁴ and one of the conditions for the exercise of individual and collective freedom. To the French, it is the most important freedom.⁴⁵

⁴² Jacqueline Hodgson, *Suspects, Defendants and Victims in the French Criminal Process*, 51 (4) I.C.L.Q. 781, 783 (2002).

⁴³ Jeremy Shapiro, *Detention of Terrorism Suspects in Britain and France*, Testimony to Commission on Security and Co-operation in Europe, July 15, 2008, available at www.brookings.edu/testimony/2008/0715_terrorism_shapiro.aspx.

⁴⁴ Code Pénale [C. pén] art. 421-1(Fr.).

⁴⁵ HODGSON, FRENCH CRIMINAL JUSTICE, *supra* note 35, at 45.

Thus, French citizens are more willing to give up greater degrees of fundamental liberties, in exchange for the services, safety and stability that their government provides.⁴⁶ Collective safety is more important than individual rights.⁴⁷ 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.”⁴⁸

Part III

Preventive detention in Israel

Israel has had to deal with terrorism continuously since it became a state in 1948. Israel’s preventive detention regime is called “administrative detention”, and a summary of its main features as described by several commentators follows below.⁴⁹ It does not form part of the general criminal law system, which has its own rules for detention. The goals of administrative detention are not arrest, trial, conviction and punishment. It is purely and simply a tool to prevent terrorist attacks. It is therefore the purest model of preventive

⁴⁶ Calliope Makedon Sudborough, *The War Against Fundamental Rights: French Counterterrorism Policy and the Need to Integrate International Security and Human Rights Agreements*, 30 SUFFOLK TRANSNAT’L L. REV. 459, (Summer 2007).

⁴⁷ *Legislating Against Terrorism – the French Approach*, Chatham House Meeting of International Law Discussion Group, (Dec. 8, 2005).

⁴⁸ Shapiro & Suzan, *supra* note 31, at 67-98.

⁴⁹ See e.g., BLUM, *supra* note 13, at 117-133; Stephanie Cooper Blum, *Preventive Detention in the War on Terror: A Comparison of How the United States, Britain and Israel Detain and Incapacitate Terrorist Suspects*, HOMELAND SECURITY AFFAIRS, VOL. IV, NO. 3 (Oct. 2008); Amos Guiora, *An Israeli case for Administrative Detention*, Opinio Juris, Jun. 15, 2009, available at <http://opiniojuris.org/2009/06/15/an-israeli-case-for-administrative-detention/>; Amos Guiora, *More on the Israeli Model*, Opinio Juris, Jun. 16, 2009, available at <http://opiniojuris.org/2009/06/16/more-on-the-israeli-model/>; Amos Guiora, *Dilemmas in the Administrative Detention Paradigm*, Opinio Juris, Jun. 17, 2009, available at <http://opiniojuris.org/2009/06/17/dilemmas-in-the-administrative-detention-paradigm/> (hereinafter “Dilemmas”); Amos Guiora, *Judicial Review and Administrative Detention*, Opinio Juris, Jun. 19, 2009, available at <http://opiniojuris.org/2009/06/19/judicial-review-and-administrative-detention/>; Daphne Barak-Erez & Matthew C. Waxman, *Secret Evidence – The Due Process of Terrorist Detentions*, (Aug. 2, 2009), (unpublished manuscript).

detention discussed in this paper as it is not bound up with charging and prosecuting. Essentially, it involves detention without charges or trial, for the sole purpose of preventing terrorist acts. 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 framework for such detention, which is authorized by administrative order, is set out in various statutes as described below.

The rationale 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.”⁵⁰ It is important to understand that Israel considers itself as having been in a state of emergency since the State was founded in 1948, and this is why their main focus is on prevention and protection of their citizens.

1. Detention Policies

There are two separate administrative detention policies, one for Israel and the other for the Palestinian territories. In Israel, the Emergency Powers (Detention) Law of 1979 (EPDL)⁵¹ applies once a state of emergency has been proclaimed. 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. The judge will see all the evidence,

⁵⁰ BLUM, *supra* note 13, at 120 (quoting Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does Democracy Have the Right to Hold Terrorists as Bargaining Chips?* 18 ARIZ. J. INT'L. & COMP. L. 721 (Fall 2001)).

⁵¹ Emergency Powers (Detention) Law, 5739-1979, S.H. 76, 33 L.S.I. 89-92 (Isr. 1979).

including that which is classified, and will decide what is to be disclosed to the detainee and his lawyer. 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 for irrelevant reasons. Appeal may be made to the Supreme Court, who will only order continued detention if satisfied that the danger to the state is so grave as to leave no choice but to keep the suspect in administrative detention, or that the detainee would almost certainly pose a danger to public or state security. Detention orders are limited to six months and subject to review every three months by the President of the District Court, but they can be renewed unlimited times.

In the Palestinian territories administrative detention is enforced pursuant to military order. The main difference is that detainees have to be brought before a court for judicial review within eight days of arrest, and that access to a lawyer can be denied for up to thirty four days. After forty eight hours detainees can receive visits from the Red Cross and their families can be informed as to their whereabouts. Detention can be for six months, and renewed unlimited times, provided the military commander has reasonable grounds to presume that the security of the area or public security require the detention. Appeals may be made to the Supreme Court sitting as the High Court of Justice.

In response to a Supreme Court decision that held that the EPDL did not permit the detention of individuals who were not themselves terrorists as “bargaining chips,”⁵² the Incarceration of Unlawful Combatants Law was passed in 2002.⁵³ This permits the

⁵² Anonymous Persons v. Minister of Defense, 54(1) P.D. 721 (Isr. 2000).

⁵³ Incarceration of Unlawful Combatants Law, 5762-2002 (Isr. 2002).

detention of members of a force perpetrating hostile acts against Israel, even without a showing of immediate threat or individual involvement in terrorist acts. 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 not threaten state security. This law, permitting indefinite detention based on mere association, has only been used a few times, perhaps because even in Israel it may be seen as a very broad law.

2. Human Rights Issues

Israel's detention policy has attracted much criticism from Human Rights organizations, both within and outside Israel. Some commentators dispute Israel's assertion of continuing emergency and opine that Israel is acting in violation of the ICCPR.⁵⁴

However, not only has Israel been involved in numerous wars, but the State continuously and regularly faces the threats (and actuality) of suicide bomb and other terrorist attacks. Between 2000 and 2007, of Israel's population of 7.1 million, 5,676 civilians and 2,665 members of the security forces were injured in terror attacks, and 140 suicide bomb attacks killed 542 people.⁵⁵ Between the beginning of January through the end of October 2009 alone, the Israeli Security Forces had to deal with 757 terror attacks, in addition to

⁵⁴ See e.g., John Quigley, *Israel's Forty Five Year Emergency: Are there Time Limits To Derogations From Human Rights Obligations?* 15 MICH. J. INT'L. L. 491 (Winter 1994).

⁵⁵ Data from Intelligence and Terrorism Information Center at Israel Intelligence, Heritage and Commemoration Center, Jun. 2008, available at <http://www.mfa.gov.il/terrorism/>, last accessed Nov. 16, 2009.

518 terror attacks during Operation Cast Lead.⁵⁶ As Israel is faced with such a volume of continual and relentless attacks, it is hardly surprising that the Knesset regularly renews the declaration of the state of emergency.

Israel denies that it has violated article 9 of the ICCPR. When it ratified the treaty, Israel attached a declaration that it was not subject to article 9 because it was in a persistent state of emergency. In order for this declaration to be valid Israel had to state that it had complied with article 4.⁵⁷ Emmanuel Gross states that even though article 4 refers to an extreme situation, where there is a threat to the life of the nation as a whole, 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.⁵⁸

Human rights groups in Israel such as B'tselem have criticized Israel's process of judicial review. This is 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."⁵⁹

⁵⁶ Data from Israel Security Agency Monthly Reports, *available at* <http://www.shabak.gov.il/English/EnTerrorData?Reports/pages/default.aspx>, last accessed Nov. 16, 2009.

⁵⁷ Article 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 required by the exigencies of the situation, provided that such measures do not involve discrimination solely on the grounds of race, color, sex, language, religion or social origin."

⁵⁸ Gross, *supra* note 49, at 767.

⁵⁹ BLUM, *supra* note 13 (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)).

Although a subsidiary issue as far as this paper is concerned, a major complaint of human rights groups relates to the use of “secret evidence”, i.e. classified information in the judicial review process. Even though the Israeli courts have developed an activist approach, neither the accused nor his lawyer may have access to classified information. This is because protecting the source of the intelligence information is “of the fundamental essence.”⁶⁰ Barak-Erez and Waxman highlight the special role played by the court in trying to compensate for not giving the evidence by applying a heightened scrutiny to the evidence.⁶¹ The court examines 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.⁶² 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.⁶³ Despite this, Barak-Erez and Waxman are concerned whether this gives the accused sufficient ammunition to make an effective appeal.

On the law as it stands, if Hircheur or Hasan scenarios presented in Israel, the suspects could have been preventively or administratively detained without the need to connect the detention to a specific crime.

⁶⁰ *Dilemmas*, *supra* note 48.

⁶¹ Barak-Erez & Waxman, *supra* note 48.

⁶² *Id.* (quoting *A v. State of Israel*, para. 43, Crim.A. 6659/06 (Isr. 2008)).

⁶³ *Id.* (quoting *Sofi v State of Israel*, Administrative Petition Appeal 2595/09 (Isr. unpublished, Apr. 1, 2009)).

Part IV

Preventive detention in the United Kingdom

Historically and currently, the United Kingdom has treated and continues to treat terrorism as a crime⁶⁴, to be prosecuted in the regular criminal courts. Offenses criminalizing various acts of terrorism are enshrined in numerous statutes, together with details of the two main methods of preventive detention: detention without charge and control orders.⁶⁵

The United Kingdom has had to deal with terrorists for more than a century, mainly related to Ireland⁶⁶, but the emphasis has now moved to terrorism from Islamic fundamentalists, including those born British. Since 2001 twelve terrorist plots have been disrupted, and up to mid 2008, nearly two hundred people have been convicted of terrorist-related offenses.⁶⁷ From 2006 the British security services have assessed the level of terrorist threats as wavering between “critical” (an attack is expected imminently), and “severe” (an attack is extremely likely). In July 2009 the level was reset at “substantial” (an attack is a strong possibility).⁶⁸

1. Detention without charge

Persons reasonably suspected to be terrorists, (i.e. persons who are or have been

⁶⁴ Terrorism Act, 2000, §1 c.11 (Eng.).

⁶⁵ See e.g., Terrorism Act, 2000, c.11 (Eng.); Anti-Terrorism, Crime and Security Act, 2001 c.24 (Eng.); Prevention of Terrorism Act, 2005, c.2 (Eng.); Terrorism Act, 2006, c.11 (Eng.); Counter-Terrorism Act, 2008, c.28 (Eng.).

⁶⁶ PURSUE, PREVENT, PROTECT, PREPARE: THE UNITED KINGDOM'S STRATEGY FOR COUNTERING INTERNATIONAL TERRORISM, HOME OFFICE, CM 7547, at ¶ 1.02 (Mar. 2009 Eng.); (3,500 people died in the United Kingdom as a result of Irish terror attacks between 1969 and 1998).

⁶⁷ *Id.* 28, and ¶2.13.

⁶⁸ Data from British Security Services, available at <https://www.mi5.gov.uk/output/threat-levels.html>.

concerned in the commission, preparation or instigation of acts of terrorism),⁶⁹ may be arrested without a warrant.⁷⁰ As the definition of terrorism covers the use or *threat* of action, this means that people can be arrested without actually being in the act of committing or having committed an offense. The law therefore permits detention both to prevent an attack and investigate and collect sufficient evidence to charge and prosecute.

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. 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. After seven days an extension of the warrant can be sought from a judicial authority for up to a further fourteen days, and thereafter extensions may be sought for further periods not exceeding an additional seven days. Thus a suspect may be detained for up to twenty eight days in total,⁷¹ but the suspect or his attorney are entitled to contest each application to extend the detention in court.

⁶⁹ Terrorism Act, 2000, c.11, §40 (Eng.), (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 113 (1)(c) c.24 (Eng.); Terrorism Act, 2006, §34 c.11 (Eng.); and Counter-Terrorism Act, 2008, §27 c.28 (Eng.).

⁶⁹ See e.g., Terrorism Act, 2000, c.11 (Eng.); Anti-Terrorism, Crime and Security Act, 2001 c.24 (Eng.); Prevention of Terrorism Act, 2005, c.2 (Eng.); Terrorism Act, 2006, c.11 (Eng.); Counter-Terrorism Act, 2008, c.28 (Eng.).

⁷⁰ *Id.* at §41.

⁷¹ 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 (Eng.).

The British government's attempt to increase the twenty eight day period to forty two days was defeated by the House of Lords in October 2008. However, there is an emergency Bill providing for a longer period lodged in the Library of Parliament, in the event that it is needed.⁷² To date the current length of detention without or before charge has not been challenged in the ECHR.

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 ECHR.⁷³ 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 measures."⁷⁴ At the time these aliens were originally detained in 2001, British citizens could be held for up to seven days without charge.⁷⁵ Thus, all persons on British soil, suspected of terrorist involvement, irrespective of immigration status, are now treated in the same way.

Whilst detained, a suspect has the right to have a person informed of the detention. There is access to counsel but in certain circumstances access may be delayed for up to forty eight hours as well as restricted to having to take place within the sight and hearing of a

⁷² PURSUE, PREVENT, PROTECT, PREPARE: THE UNITED KINGDOM'S STRATEGY FOR COUNTERING INTERNATIONAL TERRORISM, HOME OFFICE, CM 7547 at ¶8.42 (Mar. 2009 Eng.).

⁷³ *A (F.C.) and Others (F.C.) v. Secretary of State for the Home Department*, [2004] UKHL 56 (Eng.).

⁷⁴ STEVE HEWITT, *THE BRITISH WAR ON TERROR*, 45, (Continuum 2008) (quoting Charles Clarke *Parliamentary Introduction of the Prevention of Terrorism Bill 2005*, Home Office Feb. 22, 2005, available at <http://press.homeoffice.gov.uk/Speeches/0205-st-prevention-terrorism>).

⁷⁵ Terrorism Act, 2000, Sch. 8 ¶29, c.11 (Eng.).

police officer.⁷⁶ Once suspects have seen counsel, such counsel are entitled to be present at police interviews.

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 suspect's refusal to answer questions, both in pre-charge questioning, and during trial.⁷⁷ 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.⁷⁸

2. Control Orders

*"It is not always possible to prosecute people who intelligence indicates are engaged in terrorist related activity: for this reason the Government has developed a range of non-prosecution actions to protect the public...including control orders... These powers directly affect only a very small number of individuals."*⁷⁹

This is a useful weapon that may be used before a crime is committed if there is reasonable suspicion that a person may be involved in some terrorist activity, even at the earliest stage, including at the point of making threats. A control order is an order that may be made against an individual imposing obligations, (such as curfews⁸⁰) connected with preventing or restricting involvement by that individual in terrorism-related activity,

⁷⁶ Terrorism Act, 2000, c.11, Sch.8 (Eng.).

⁷⁷ Criminal Justice and Public Order Act 1994, c.33, §§34, 35 (Eng.).

⁷⁸ Counter-Terrorism Act 2008, c.28, §22 (Eng.).

⁷⁹ PURSUE, PREVENT, PROTECT, PREPARE: THE UNITED KINGDOM'S STRATEGY FOR COUNTERING INTERNATIONAL TERRORISM, HOME OFFICE, CM 7547, at ¶0.26 (Mar. 2009 Eng.).

⁸⁰ LORD CARLILE OF BERRIEW Q.C., FOURTH REPORT OF THE INDEPENDENT REVIEWER PURSUANT TO SECTION 14(3) OF THE PREVENTION OF TERRORISM ACT 2005, at ¶15, Feb. 3, 2009; (in 2008 twenty two people were subjected to curfews, on average of thirteen hours duration per day).

which is viewed as criminal in British law.⁸¹ There are two distinct species of control order – derogating and non-derogating. The former contains obligations incompatible with the right to liberty under Article 5 of the European Convention on Human Rights⁸². The latter can impose conditions that fall short of actual deprivation of liberty under Article 5. To date there has not been any derogation from Article 5 (as far as control orders are concerned) and only non-derogating control orders have been made.⁸³ Between March 2005 and December 31, 2008 there have only ever been thirty eight people under control orders.⁸⁴

Non-derogating control orders may only be made against a person reasonably suspected of involvement in terrorist-related activity,⁸⁵ whether a British national or not, and whether the terrorist activity is domestic or international. The control order must be considered necessary for purposes connected with protecting the public from a risk of terrorism.⁸⁶ In respect of a derogating control order a court must be satisfied that there is evidence “capable of being relied on by the court as establishing that the individual is or

⁸¹ Prevention of Terrorism Act, 2005, c.2 (Eng.), sets out control order regime. See §1(4) for examples of obligations that may be imposed.

⁸² 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.

⁸³ *Id.* ¶12. Not to 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. In *A (F.C.) and Others (F.C.) v. Secretary of State for the Home Department*, [2004] UKHL 56 (Eng.), although the determination of a state of emergency, justifying derogation, was upheld, the court concluded that the detention regime of indefinite duration did not rationally address the threat to security and was a disproportionate response to that threat. Discussed in ¶20 and upheld in ¶190, *Case of A and Others v. The United Kingdom*, Application no. 3455/05, Eur. Ct. H.R. (Feb. 19, 2009).

⁸⁴ *Id.* ¶14.

⁸⁵ Prevention of Terrorism Act 2005, c.2, §2 (Eng.).

⁸⁶ BERRIEW, *supra* note 79, at ¶7 Feb. 3, 2009.

has been involved in terrorism-related activity.”⁸⁷ Thus a higher standard is required when liberty is to be deprived.

Nevertheless, there has been much judicial criticism about control orders, not least relating to how they are imposed. Control orders may be made with court permission, or in certain urgent cases without prior permission, provided such order is promptly referred to a court to justify its validity.⁸⁸

When the matter comes before a court, either for prior permission or review after the event, the Special Advocate system established by the Special Immigration Appeals Commission (SIAC) in 1997, is used. Special advocates are appointed by the court and 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.”⁸⁹ Although the use of special advocates may at first sight seem a significant impediment to protecting of civil liberties, in practice, special advocates strive to gain an acceptable open summary of

⁸⁷ Prevention of Terrorism Act 2005, c.2, §4 (Eng.).

⁸⁸ Prevention of Terrorism Act 2005, c.2, §3 (Eng.).

⁸⁹ SPECIAL ADVOCATES: A GUIDE TO THE ROLE OF SPECIAL ADVOCATES AND THE SPECIAL ADVOCATES SUPPORT OFFICE, (Special Advocates Support Office, Nov. 2006).

the closed materials. Once the closed materials have been revealed to them, special advocates dedicate a great amount of time in fighting for disclosure.⁹⁰

In 2007 the House of Lords reviewed the case of a controlee who claimed that 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.⁹¹ 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: “[b]oth 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.”⁹² She is therefore talking about creating open material.

The issue of how much information should be given to a controlee was considered by the ECHR in February 2009.⁹³ 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 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

⁹⁰ Barak-Erez & Waxman, *supra* note 48.

⁹¹ Secretary of State for the Home Department v. MB (FC), [2007] UKHL, 46 (Eng.).

⁹² *Id.*, at ¶66.

⁹³ Case of A and Others v. The United Kingdom, Application no. 3455/05, Eur. Ct. H.R. (Feb. 19, 2009).

enable him to give effective instructions to the special advocate, although the amount would have to be decided on a case by case basis.⁹⁴ Barak-Erez and Waxman point out that “while special advocates are a useful procedural protection, they are not a substitute for the disclosure of the core of the evidence against an individual.”⁹⁵

In June, 2009 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: “[p]rovided 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 materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.”⁹⁶ He continued, “[t]he 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...”⁹⁷ and he also confirmed that it may be acceptable not to disclose the source of evidence.⁹⁸

The effect of these decisions is that provided the above requirements are met, control orders will not be invalid or in violation of the European Convention. Since the House of Lords’ decision in June 2009, of the fifteen control orders that were in place in December

⁹⁴ *Id.* ¶¶218 - 220.

⁹⁵ Barak-Erez & Waxman, *supra* note 48.

⁹⁶ Secretary of State for the Home Department v. AF (FC) [2009] UKHL 28, ¶59 (Eng.).

⁹⁷ *Id.* at ¶65.

⁹⁸ *Id.* at ¶66.

2008,⁹⁹ two control orders have been revoked because the courts decided that the controlees did not know the essence of the case against them.¹⁰⁰ In addition, the High Court has recently 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”.¹⁰¹

Returning once more to the Hicheur and Hasan scenarios, such suspects in the United Kingdom could have been arrested and detained in police custody for up to twenty eight days, and in appropriate circumstances might have been the subject of control orders.

Part V

Preventive detention in the United States today

In France Hircheur was arrested and held for four days before being charged and he is currently preventively detained. Let us suppose that facts similar to the Hircheur case presented in the U.S., i.e. where U.S. authorities have some evidence that a U.S. citizen had told an Algerian terrorist group that he was interested in committing an attack but had not begun any material preparation.

Let us also consider a type of Hasan scenario, where there are indications from a lone civilian actor that some future violent or terrorist act might be perpetrated. The

⁹⁹ BERRIEW, *supra* note 79, at ¶14 Feb. 3, 2009.

¹⁰⁰ *Control Order Suspect is Released*. BBC News, Sep. 24, 2009, available at <http://news.bbc.co.uk/2/hi/8272621.stm>.

¹⁰¹ Frances Gibb, *Terror suspects cannot be held on ‘secret evidence’, High Court rules*, TIMES (London) Dec. 2, 2009, available at <http://business.timesonline.co.uk/tol/business/law/article6940104.ece>.

indications come from that person's email correspondence with a cleric connected to international terrorist groups as well as from the lone actor's public statements demonstrating his sympathy with jihadists. Assuming that the authorities fear that a terrorist act is imminent, do they need to act? Can they act?

From a review of the available and admittedly limited facts, it seems that neither a Hircheur nor a Hasan type of actor could be arrested under current law, because the activities that caused suspicion are at a very early stage, even pre-preparatory, of any crimes being committed. With very limited exceptions as detailed below, U.S. law does not permit the detention of persons simply to prevent a crime being committed.

Human Rights First conducted an analysis of over one hundred cases relating to international terrorism that have been successfully prosecuted in the U.S. federal criminal system, and their survey highlights a wide range of relevant laws, (including those dealing with immigration violations, money laundering and fraud), used successfully against suspected terrorists.¹⁰² 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 planning or preparation, or even making threats.¹⁰³ Arrests can be made for attempting to commit a terrorist act, provided there has been sufficient activity.

¹⁰² RICHARD B. ZABEL, JAMES J. BENJAMIN JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS, (Human Rights First, May, 2008).

¹⁰³ See e.g. N.Y. CLS. Penal §490.20 (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.").

The separate stand-alone crime of conspiracy can sometimes be a useful tool. As has been observed by commentators, a defendant can be convicted for the substantive crime of conspiracy even if the crime that was the object of the conspiracy was never committed, or even attempted, so long as one overt act in furtherance of the conspiracy was performed.¹⁰⁴ From the facts available in the news reports, there appears little or no evidence of any overt act of conspiracy in either of the Hircheur or Hasan scenarios.

Specific statutes where preventive detention is contemplated

1. Material Witness Statute¹⁰⁵

This statute is used to preventively detain people who have not committed a crime and who are not even suspected of committing a crime. Material witness warrants can be used to arrest and detain persons believed to be material witnesses to a crime, and there is evidence 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. Commentators suggest that this is a lower standard than that required to arrest suspected criminals generally.¹⁰⁶

¹⁰⁴ JULIE O’SULLIVAN, DAVID LUBAN, DAVID STEWART, MATERIALS FOR A COURSE ON INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW, Chapter. 17, (Aspen 2009, forthcoming); Kenneth Roth, *After Guantanamo: The Case Against Preventive Detention*, FOREIGN AFFAIRS VOL. 87 NO. 3, (May/June 2008).

¹⁰⁵ 18 U.S.C. §3144 (2006).

¹⁰⁶ STIGALL, *supra* note 12 at 51 (citing Ronald L. Carlson, *Distorting Due Process for Noble Purposes: The Emasculation of America’s Material Witness Laws*, 42 GA. L. REV. 941, 973-74 (2008)).

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.”¹⁰⁷

The misuse of this statute as a detention tool has been criticized by many commentators,¹⁰⁸ because, for example, the Bush Administration failed to call its material witnesses to trial in many cases. Some of the fiercest criticism was generated because of the handling of the cases of Jose Padilla,¹⁰⁹ a U.S. citizen, and of Ali Saleh Kahlah al-Marri¹¹⁰, a citizen of Qatar, but a U.S. resident. The attempt of the Bush Administration to use an armed conflict model¹¹¹ to incapacitate suspect terrorists on U.S. soil without any definitive Supreme Court ruling as to the constitutionality of that approach, suggests that Administration itself believed U.S. criminal law was inadequate to prevent terrorist attacks.

¹⁰⁷ *Id.*

¹⁰⁸ See e.g., Cole, *supra* note 4, at 704; BLUM, *supra* note 13 at 3.

¹⁰⁹ 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, *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).

¹¹⁰ 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).

¹¹¹ Geneva Convention Relative to the Treatment of Prisoners of War, art.118, Aug. 12, 1949, 75 U.N.T.S. 135, (detention possible until the cessation of hostilities), in the Padilla and Al-Marri cases basing authority on President Bush’s Authorization for the Use of Military Force Joint Resolution, P.L. 107-40 (2001).

The material witness tool is therefore rather limited in scope, and in any event it fails at the first post if the terror suspect does not happen to be a material witness to a crime. This statute would not be of any use to law enforcement officials in a Hircheur or Hasan situation.

2. Material Support Statutes¹¹²

These laws make it a crime to support the acts of others without establishing any sort of involvement by suspect in a terrorist act other than a suspect's provision of material support to a foreign terrorist organization. According to David Cole, there is no requirement to prove that a suspect actually engaged or conspired to engage in terrorism, or aid and abet terrorism, or even intend to further terrorism. He continues: "...because the laws are drafted so broadly, they can be employed to incarcerate individuals preventively, without proving that they have undertaken any actual harmful conduct."¹¹³

Although David Cole refers to preventive incarceration here, he may be talking about post-charge, pre-trial detention, and/or post-conviction imprisonment, as opposed to detention before charges are preferred in order to prevent an act of terrorism taking place.

The wording of 18 U.S.C. §2339B does not suggest that a person could be detained pursuant to this law in order to stop an offense being committed absent a showing of conspiracy or actions sufficiently advanced to amount to attempt.¹¹⁴ In any event it seems

¹¹² 18 U.S.C. §2339B; 50 U.S.C. §1701.

¹¹³ Cole, *supra* note 4, at 723-24. Furthermore, the Supreme Court has agreed to hear argument on whether the material support for terrorism provisions are unconstitutionally vague: Holder v. Humanitarian Law Project, No. 09-89, (*cert. granted*, Sept. 30, 2009).

¹¹⁴ 18 U.S.C. §2339B, ("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

unlikely that law enforcement officials could assess either the Hircheur or Hasan facts as falling within the ambit of the material support statutes.

3. Laws relating to aliens

If the suspects in the Hircheur or Hasan scenarios were aliens, the following detention tools might be relevant, but of limited use.

3.1 Immigration laws

“ In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”¹¹⁵

If our suspects in the Hircheur and Hasan scenarios had, for example, been aliens working in the U.S. without proper visas, they could be detained. 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.¹¹⁶ Dan Stigall and David Cole have separately highlighted the invidious position of immigration detainees as regards, for example, not being informed of rights (the deportation proceedings are civil and thus criminal law protections of due process are inapplicable) and their inequitable position as to bail.¹¹⁷

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 [8 USCS § 1182(a)(3)(B)]), 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 [22 USCS § 2656f(d)(2)]”).

¹¹⁵ DAN E. STIGALL, *COUNTERTERRORISM AND THE COMPARATIVE LAW OF INVESTIGATIVE DETENTION*, 55 (Cambria Press 2009), citing *Matthews v. Diaz*, 426 U.S. 67, 79-80 (1976).

¹¹⁶ 8 U.S.C. §1226 (2008).

¹¹⁷ STIGALL, *supra* note 12, at 55; Cole, *supra* note 4, at 719-722.

Aliens can be detained for a ninety day removal period and 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. If there are connections with terrorism, the period can be even longer.¹¹⁸

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.”¹¹⁹ Such continued detention would then be arbitrary, contrary to Article 9 ICCPR.

3.2 Section 412 USA PATRIOT Act¹²⁰

This section 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 the purest form of preventive detention in the current law 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 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.

¹¹⁸ STIGALL, *supra* note 12, at 55, 56 (*citing* 8 U.S.C. §1231 (a)(2) & (6) (2009); §§ 1158(b)(2)(A)(v), 1182(a)(3)(B)(i)(I)).

¹¹⁹ 533 U.S. 678, 701 (2001).

¹²⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) §412, P.L. 107-56 (2001).

Daniel Prieto notes that section 412 has never been used (so the indefinite detention point has not been tested against *Zadvydas*). He highlights two of the most significant deficiencies of the section in that it allows indefinite detention on what he calls a technicality (the automatic re-certification as described above) and that it fails to provide adequate oversight from an authority outside the executive branch.¹²¹ The current Senate discussions about reform of the USA PATRIOT Act do not include any proposed amendment to section 412.

Process

Fourth Amendment

*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.*¹²²

In order to obtain a warrant to seize, or arrest our Hircheur and Hasan scenario suspects, law enforcement officers would have to show probable cause that a crime has been or is being committed (although there are some exceptions to the requirement to show probable cause, discussed below).¹²³ Warrants could not be obtained in either the Hircheur or Hasan scenarios. Although the meaning of probable cause has been refined over time, the Supreme Court has not used the words that a suspect was “about to” or

¹²¹ DANIEL B. PRIETO, “WAR ABOUT TERROR”, CIVIL LIBERTIES AND NATIONAL SECURITY AFTER 9/11, 18, 34 (Council on Foreign Relations, Inc., Feb. 2009).

¹²² U.S. CONST. Amend. IV.

¹²³ *Gerstein v. Pugh*, 420 U.S. 103 (1975), (“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”).

“likely to” commit an offense, except in the short investigative stop context,¹²⁴ nor does the Court appear to have addressed the issue of probable cause for arrests to *prevent* offenses.

When Hircheur was arrested in France, the police had up to six days in which to interrogate and investigate him, with limited access to counsel, before charging him. This could not happen under current U.S. law,¹²⁵ where suspects arrested without warrant must be brought before a magistrate within forty eight hours of arrest to ensure that there is probable cause for the arrest.¹²⁶ Persons arrested pursuant to a warrant are entitled to a prompt appearance before a magistrate.

In current U.S. law there is a period of forty eight hours which theoretically can be used as a period of detention without charge to prevent an imminent crime. If there is no probable cause to detain then the suspect will have to be released at the end of the period.

Thus, the most that law enforcement personnel could do in the Hircheur/Hasan scenarios is arrest the suspects and keep them off the streets for forty eight hours, and hope that sufficient evidence can be found in that short period to show probable cause that a crime is being committed, and that they picked the right period of forty eight hours.

¹²⁴ *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”).

¹²⁵ STIGALL, *supra* note 12, at 40-49 (describing the U.S. procedure).

¹²⁶ *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991).

Problem areas

1. The Constitution only permits arrest on a showing of probable cause that an offense has been or is being committed. Without the tool of a sufficiently broadly drafted law that covers the steps from the making of threats, through the stages of preparatory acts leading up to the actual commission of a terrorist act, sometimes all the police can do is grasp at straws, such as arrest a suspect for making false statements (as in Al-Marri¹²⁷, and more recently, Najibullah Zazi¹²⁸). If there are no such straws available, (as in the Hircheur and Hasan scenarios) in the absence of probable cause that an offense has been or is being committed, there is no mechanism to arrest to incapacitate and prevent an attack, save for the limited ability to arrest without a warrant and hold a suspect for forty eight hours before bringing him before a court. It may also be problematic to decide exactly when to make the arrest. The police may find that the detention actually takes place during the wrong forty eight hour period, i.e. the arrest is premature. There is likely to be only one opportunity to hold a suspect without charge for forty eight hours, as repeated arrests of the same suspect for periods of forty eight hours would surely be unreasonable.

2. Some commentators have claimed that probable cause is too high a standard to meet,¹²⁹ with the result that some dangerous people cannot be arrested. What does probable cause mean? Craig Lerner has analyzed this question thoroughly.¹³⁰ His article

¹²⁷ See discussion *supra* note 109.

¹²⁸ William K. Rasbaum & Liz Robbins, *Terror Suspect Is Transferred to New York for Trial*, N.Y. TIMES, Sep. 25, 2009, available at www.nytimes.com/2009/09/26/us/26terror.html.

¹²⁹ See e.g., Andrew C. McCarthy, *We Need an Administrative Detention Law*, Sep. 21, 2009, available at www.uslaw.com/library/Federal_Judiciary/AdministrativeDetention_Law_Andrew_C_McCarthy.php?itm=588509.

¹³⁰ Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951 (Mar. 2003).

reviews the difficulties encountered by counsel for the FBI in showing probable cause to obtain a Foreign Intelligence Surveillance Act¹³¹ warrant to search the computer of Zacarias Moussaoui, whose determination to learn to steer a jumbo jet despite displaying little aptitude for flying had caused alarm in several quarters. Counsel had placed the likelihood that Moussaoui was “an agent of a foreign power”¹³² as greater than fifty per cent, yet found that her local US Attorney’s office were regularly requiring “seventy five to eighty per cent probability, and sometimes even higher.”¹³³

Lerner traces the evolution of the reasonable suspicion standard into Fourth Amendment jurisprudence. Probable cause was depicted as a fixed point in *Dunaway v. New York*: A single familiar standard is essential to guide police officers.¹³⁴ Seizures (arrests) are reasonable “only if supported by probable cause.”¹³⁵ Lerner states, however, that the standard fluctuated over time. In 2001 Chief Justice Rehnquist said “[a]lthough the Fourth Amendment ordinarily requires the degree of probability embodied in the term ‘probable cause’, a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable.”¹³⁶ According to Chief Justice Rehnquist, the reasonable suspicion analysis is applied rather than that of

¹³¹ 50 U.S.C. §§1800-1829 (2002).

¹³² The standard required to obtain a FISA warrant pursuant to 50 U.S.C. §1805(a)(3)(A).

¹³³ *Id.*, (citing Memorandum from Coleen M. Rowley, FBI Special Agent and Minneapolis Chief Division Counsel, to Robert Mueller, FBI Director, ¶ 7 (May 21, 2002)). Moussaoui was a French citizen who had been arrested on a visa violation. The evidence that Rowley thought amounted to probable cause was essentially a tip from the flying instructor and information from the French Intelligence Service that Moussaoui had affiliations to fundamentalist Islamic groups and activities connected to Osama Bin Laden. Counsel’s application for a warrant under FISA was refused in late August 2001. After 9/11 the FBI did obtain a criminal warrant to search the computer and held Moussaoui as a material witness until he was charged with six conspiracy offenses, to which he eventually pleaded guilty.

¹³⁴ *See* 442 U.S. 200 (1997).

¹³⁵ *Id.* at 213-14.

¹³⁶ *U.S. v. Knights*, 534 U.S. 112, 121 (2001).

probable cause, “when it is reasonable.”¹³⁷ Regrettably Chief Justice Rehnquist did not go on to describe or suggest any circumstances in which it might be reasonable to apply the reasonable suspicion analysis.

Both Lerner and Stigall cite cases showing that this lower standard is frequently applied in ‘special needs’ situations, “beyond the normal need for law enforcement”¹³⁸ (such as stops at checkpoints¹³⁹ and airports¹⁴⁰) other than full custodial arrest and house searches, with the rationale that such searches and seizures are minimally intrusive. However, they are far less intrusive and invasive than detention.

Does the reasonable suspicion standard apply to stopping potential terrorist acts? David Cole does not think so. “Where the government cannot invoke a special need distinct from law enforcement, but is merely engaged in counterterrorism, the criminal standard would apply, requiring probable cause for any arrest.”¹⁴¹ The Supreme Court has not addressed this question.

3. Since 9/11, the nature of terrorist threats and the challenges to investigation have changed and it is often necessary to disrupt suspected terrorist activities earlier in the planning and preparation cycle.¹⁴² Forty eight hours may not be enough time to find out more about a possible attack in order to stop it and/or to charge offenders. However,

¹³⁷ Lerner, *supra* note 129, at 1003.

¹³⁸ *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985).

¹³⁹ *Mich. Dep’t. of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

¹⁴⁰ *U.S. v. Moreno*, 475 F.2d. 44 (5th Cir. 1973).

¹⁴¹ Cole, *supra* note 4, at 713.

¹⁴² John P. McLoughlin, Gregory P. Noone & Diana C. Noone, *Security Detention in Practice: Security Detention, Terrorism and the Preventive Imperative*, 40 CASE W. RES. J INT’L. L. 463, 468 (2009).

indefinite detention, as seen in the cases of Padilla and Al-Marri¹⁴³ before they were transferred back to the federal system, is also unacceptable.

Some commentators say that none of the above presents a problem sufficient to justify preventive detention.¹⁴⁴ Others might view the public safety element as paramount.

Part VI

The Future

There is no shortage of suggestions in scholarly literature on the subject of preventive detention. Some query whether the U.S. needs preventive detention at all,¹⁴⁵ in armed conflict situations only,¹⁴⁶ or within the domestic criminal framework,¹⁴⁷ and just in response to terrorist attacks.¹⁴⁸ Some suggest a model code,¹⁴⁹ some suggest

¹⁴³ See notes 108 and 109, *supra*.

¹⁴⁴ See e.g., Kenneth Roth, *After Guantanamo: The Case Against Preventive Detention*, in FOREIGN AFFAIRS VOL. 87 NO. 3, (May/June 2008) (“Not all suspects can be prosecuted...In these cases the government will have to let the suspects go...But a policy of preventive detention poses greater dangers.”); 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 criminal justice system can adequately deal with those who the U.S. should be seeking to detain”);

¹⁴⁵ Deborah Pearlstein, *We’re All Experts Now: A Security Case Against Security Detention*, 40 CASE W. RES. J. INT’L L. 577 (2009), (Preventive detention might promote terrorist acts, but in favor of perhaps extending pre-trial detention); Jules Lobel, *9/11 Five Years On: A Look at the Global Response to Terrorism: The Preventive Paradigm and the Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407 (May 2007), (preventive detention might increase the risk of a terrorist attack).

¹⁴⁶ See generally Cole, *supra* note 4 (Preventive detention should exist only in armed conflict situation. If government cannot show probable cause they should not be using it outside the prescribed military setting).

¹⁴⁷ McCarthy, *supra* note 128 (which states that the standard of reasonable suspicion should be used).

¹⁴⁸ BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERROR*, (Yale Univ. Press 2006). (Advocates emergency Constitution after a terrorist attack with detention based on reasonable suspicion for up to 45 days, to prevent further attack); Doug Cassel, *Security Detention: The International Legal Framework: International Human Rights Law and Security Detention*, 40 CASE W. RES. J. INT’L. L. 383 (2009), (preventive detention should be kept to a minimum if allowed at all and should follow the European model, during national emergency).

¹⁴⁹ See COOK, *supra* note 1; BENJAMIN WITTES & COLLEEN A. PEPPARD, *DESIGNING DETENTION: A MODEL LAW FOR TERRORIST INCAPACITATION*, (Brookings, Jun. 2009).

modifications be made to existing laws,¹⁵⁰ others suggest enacting new laws¹⁵¹ and some suggest that the status quo is adequate¹⁵². A full review of this literature is beyond the scope of this paper.¹⁵³ I turn instead to make some proposals.

A Way Forward for Preventive Detention in the United States?

From the review of the prevention detention regimes in France, Israel and the United Kingdom some common threads emerge:

- i) the system of preventive detention of suspect terrorists is enshrined in the legislation of each of those countries;
- ii) in each of these jurisdictions, the basis for arrest and detention is reasonable suspicion that a crime may be, is being, or has been committed, as the case may be, in the different jurisdictions. It is easier to find reasonable suspicion because it is a lower standard than probable cause;
- iii) in each country there are procedural safeguards involving adversarial hearings relating to review of detention that address concerns of civil liberties to some extent.

¹⁵⁰ STIGALL, *supra* note 12, at 171-183 (using civil detention model as suggested by Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Non Criminal Detention Model for Holding and releasing Guantanamo Bay Detainees*, 29 HARV. J. L. & PUB. POL'Y. 149 (2005)); BLUM, *supra* note 13, at 208 – 19 (amending FISA law to use FISC to monitor thirty or sixty day periods of detention, standard could be probable cause or reasonable suspicion); BENJAMIN WITTES, *LAW AND THE LONG WAR*, (The Penguin Press 2008), (model based on civil commitment); Chesney, *supra* note 4 (suggests amending various statutes including CIPA).

¹⁵¹ Robert Chesney and Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (Feb. 2008) (none of current models work; proper reform and new legislation needed); McLoughlin, Noone & Noone, *supra* note 141, (new legislation needed); Benjamin Priester, *Terrorist Detention: Directions for Reform*, 43 U. RICH. L. REV. 1021 (2009), (New legislation for a separate model of terrorist detention); DANIEL B. PRIETO, *DETENTION AND INTERROGATION*, (Council for Foreign Relations, Feb. 2009) (need to reform §412 PATRIOT Act).

¹⁵² Daskal, *supra* note 143; Roth, *supra* note 143; Catherine Powell (as reporter), *Scholars Statement of Principles for the New President on U.S. Detention Policy: An Agenda for Change*, 47 COLUM. J. TRANSNAT'L. L. 339 (2009), (use existing detention regimes).

¹⁵³ See BLUM, *supra* note 13, at 165 - 219 (for review of some literature).

Do any of these threads help in proposing possible solutions to address the problem areas in U.S. law identified in Part V of this paper? At the outset, it is conceded that there are no perfect solutions, but some suggestions follow. I believe that all of these suggestions would go some way to filling the gaps in the law that have been exposed in this paper.

The Proposals

1. The First Proposal – a new terrorist offense

1.1 Legislation could be passed to create a terrorist offense or offenses that include preparatory conduct, planning or threatening to commit an act of terrorism. For example, perhaps something along the following lines, based on a combination of 18

U.S.C.S. §2331(5), §412 P.L 107-56 and NY CLS Penal 490.20, might be a starting point:

- (1) It shall be a criminal offense for any person acting alone, or in conjunction with others, to:
 - (a) commit; or
 - (b) plan; or
 - (c) make preparations for committing an act of domestic terrorism; or
 - (d) do any act that is likely to cause a reasonable expectation or fear of the imminent commission of such offense; or
 - (e) do any act that is likely to cause reasonable suspicion that he or she poses a threat to the national security of the United States.
- (2) 'Domestic terrorism' means activities that--
 - (a) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
 - (b) appear to be intended--
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
 - (c) occur primarily within the territorial jurisdiction of the

United States.¹⁵⁴

If an offense along these sorts of lines existed (provided it does not violate the Constitution for vagueness or overbreadth), it would enable arrests to be made much earlier in the planning and preparation phase of the commission of a crime, and thus prevent it. It would also obviate the need to use devices like the material witness laws. It cannot be said without sight of the evidence whether or not the electronic communications of Hircheur and Hasan and their other activities would fall within paragraph (1) (d) but their actions might be caught by paragraph 1 (e) above.

1.2 Together with 1.1 above, I propose that there be legislation to impose the standard of reasonable suspicion to justify the arrest (and detention) of terror suspects. This, coupled with the above new terrorist offense will enable a wider range of terror suspects to be taken off the streets. The reasonable suspicion standard has found favor with a number of commentators referred to above.¹⁵⁵ My suggestion has two rationales. First, it is submitted that terrorist acts should fall within the meaning of “special needs.” The existing situations could be extended, and set out in legislation as within the scope of cases “beyond the normal need for law enforcement,”¹⁵⁶ or perhaps by making a separate category, for terrorist cases.

Second, it is submitted that arresting a suspect to prevent a terrorist act is in the category of circumstances envisaged by Chief Justice Rehnquist where “a lesser degree of probability satisfies the Constitution when the balance of governmental and private

¹⁵⁴ U.S.C.S. §v2331(5); § 412 P.L 107-56; NY CLS Penal 490.20.

¹⁵⁵ See e.g. McCarthy, *supra* note 128.

¹⁵⁶ *T.L.O.*, 469 U.S. at 351.

interests make such a standard reasonable.”¹⁵⁷ In addition to the argument set out in Part V above concerning the evolution of the reasonable suspicion standard into Fourth Amendment jurisprudence, some commentators believe that in any event there is scope for modifying the definition of probable cause in terrorist cases to mean reasonable suspicion. “The term probable cause in the Fourth Amendment did not have any fixed meaning at the time of ratification¹⁵⁸ and there is no evidence that the language chosen by the framers was meant to ‘codify for all time a particular concept of probable cause.’”¹⁵⁹

From the experience of terror cases dealt with in France, Israel and the United Kingdom, the reasonable suspicion standard appears to be adequate and effective from the perspective of incapacitating potential terrorists, and it is the standard used in Article 5(1)(c) of the European Convention on Human Rights. It is also submitted that the facts of the Hircheur and Hasan scenarios would be sufficient to generate reasonable suspicion.

2. The Second Proposal – a longer period of detention without charge

The sophistication of terror attacks often involving many layers of international electronic communications means that investigators frequently need plenty of time to collect information and evidence before law enforcement officials can act. As Andrew McCarthy puts it, “if we wait too long for law enforcement to build a solid case, we increase the risk of a catastrophic attack.”¹⁶⁰

¹⁵⁷ *Knights*, 534 U.S. at 121.

¹⁵⁸ Kit Kinports, *Commentary: Diminishing Probable Cause and Minimalist Searches*, 6 OHIO ST. J. CRIM. L. 649 (Spring 2009), (quoting Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 253-54 (1984)).

¹⁵⁹ *Id.* (quoting Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J. L. REFORM 465, 479-95 (1984)).

¹⁶⁰ McCarthy, *supra* note 128.

This proposal requires a fresh approach by Congress if they are willing to have the tool of preventive detention to stop terrorist attacks. A regime of detention without charge, for a period longer than the forty eight hours currently theoretically permissible, similar to the French and British models could be enacted for a period acceptable to Congress. Any formalized system involving detention to prevent a terrorist attack may seem a huge leap from what is perhaps not actually recognized as a tool that can now provide a forty eight hour period of preventive detention. It is suggested that detention be extended incrementally, starting with detention for a period of forty eight hours, after which time a law enforcement officer will have to apply to a court for extensions for further limited periods, up to a total of say, six days (as in France), or longer if desired. Judicial review of the detention is essential so safeguards such as regular reviews of status, the right to counsel and the right to contest detention in adversarial court hearings could be built in.

Three possible arguments might be advanced as to why this might not violate the right to liberty in the Constitution. First, there is already precedent for what is in all but name preventive detention for forty eight hours, i.e. the current period between arrest and being brought to court to test probable cause. Thus the concept of being held for a short period after arrest and before the first court appearance does not violate the Constitution. It may be regarded as reasonable to increase the period in exigent circumstances, which it is submitted, should include the threat of terrorist attack.

Second, there is precedent for detention in circumstances described as regulatory or administrative, as opposed to punitive.¹⁶¹ So preventive detention in pre-charge situations could be viewed as an administrative measure, as it is in Israel. From a review of the relevant regulatory cases, McLoughlin and others find that preventive detention in the United States generally requires “not just a finding of dangerousness, but a finding of dangerousness combined with (1) adequate procedural safeguards; and (2) some “special justification.” In their view, based on comments from Justice Breyer in *Zadvydas*¹⁶² terrorism could qualify as a “special justification” to warrant preventive detention,¹⁶³ although David Cole, who has also reviewed these cases, warns that “proof of past harmful conduct might be required.”¹⁶⁴ That is quite alarming, as successful suicide bombers only strike once!

Third, assuming that one or both of the previous arguments are tenable, it is suggested that heed be given to the fact that neither the French power to detain suspect terrorists at a police station for six days, nor the British power to detain for twenty eight days has been found to violate Article 5 of the European Convention on Human Rights or Article 9 of the ICCPR. Why should the right to liberty in the U.S. Constitution mean something different from the right to liberty in the European Convention and the ICCPR? It is submitted that it does not.

¹⁶¹ See e.g. *Zadvydas*, 533 U.S. 678 (in immigration cases); *United States v. Salerno*, 481 U.S. 739 (1987), in cases refusing bail pre-trial; *Addington v. Texas*, 441 U.S. 418 (1979), (in cases involving mental illness); *Kansas v. Hendricks*, 521 U.S. 346 (1997), (in cases involving sex offenders).

¹⁶² *Zadvydas*, 533 U.S. at 696 (“neither do we consider terrorism or other special circumstances where special argument might be made for use of preventive detention...”).

¹⁶³ McLoughlin, Noone & Noone, *supra* note 141, at 490.

¹⁶⁴ Cole, *supra* note 4, at 711.

3. The third proposal – the introduction of control orders

This involves the imposition through legislation of a system of preventive detention analogous to the British regime of non-derogating control orders, i.e. orders that do not involve actual deprivation of liberty. If the experience of the United Kingdom is anything to go by, this tool may only be needed occasionally; nevertheless, it is a useful addition to the armory.

McLoughlin and others also advocate some form of control order¹⁶⁵. They believe that this, or any form of preventive detention should only be available “for those who represent the central threat of modern terrorism and who cannot be handled without straining the ordinary criminal justice processes or law of armed conflict doctrines.”¹⁶⁶ David Cole echoes this sentiment, despite only entertaining the prospect of preventive detention in an armed conflict model permitting departure from the model of criminal prosecution and punishment “only where the criminal process cannot adequately address a particular serious threat.”¹⁶⁷

If the concept of a control order is acceptable in the first place, Congress could decide the appropriate threshold, as well as the duration of a control order, and the periods at which an order may be reviewed. It is suggested that six months might be reasonable, renewable for further periods of six months. As in the United Kingdom, there could be the power to impose an order without prior permission within carefully defined emergency circumstances.

¹⁶⁵ McLoughlin, Noone & Noone, *supra* note 141, at 492 -503.

¹⁶⁶ *Id.* 494.

¹⁶⁷ Cole, *supra* note 4, at 697.

As to the process of judicial review, this should take place, as in the United Kingdom, either to seek prior permission for an order, or within a short period, say two days of an emergency order being made. The key feature is that that suspect should be told the essence of the case against him to enable him and his attorney (who should be specially security cleared) to dispute it in an adversarial hearing in a regular federal court. If the government has classified evidence, perhaps sufficient information could be disclosed using the procedures of redaction and providing summaries as set out in the Classified Information Protection Act¹⁶⁸ as it is currently drafted, or amended to deal with any gaps.¹⁶⁹

Additionally, by reference again to European law, the regime of non-derogating control orders per se does not violate the fundamental right to liberty in the European Convention, provided the suspect knows the essence of the case against him. Using the same analogy, it is submitted that control orders should not violate the right to liberty in the Constitution.

David Cole suggests that the Constitution does not forbid preventive detention and proposes four basic requirements of any preventive scheme.

(1) it must have a legitimate, non-punitive purpose that cannot be served through the presumptive approach of criminal prosecution;

¹⁶⁸ Classified Information Procedures Act, P.L. 96-456 (1980).

¹⁶⁹ See, e.g. Chesney, *supra* note 4, at 702 - 703 (identifying a problem where an accused represents himself).

- (2) it must be accompanied by fair procedures to establish that the individual in fact poses a threat sufficient to warrant preventive detention;
- (3) it must provide for prompt and meaningful judicial review, absent suspension of the writ [of habeas corpus]; and
- (4) it must be subject to a definable (if not necessarily definite) endpoint.¹⁷⁰

It is submitted that if legislation for preventive detention establishes procedures and protections as suggested in my proposals, these new tools will not violate the Constitution.

Conclusion

It is clear that the United States is not now equipped with the same tools as France, Israel and the United Kingdom to prevent terrorist attacks from happening on home soil.

Preventive detention may not be a perfect solution but it has gone some way to avert catastrophe in those countries. The Bush Administration felt that there were some shortcomings in the criminal law,¹⁷¹ which may be one of the reasons they decided to detain terrorist suspects in Guantanamo Bay using an enemy combatant model. There is no reason why the United States should leave itself and its citizens vulnerable, by having these gaps in the law, particularly as there is a way to solve the problem.

It is submitted that the issues identified in this paper should and can be resolved, by adopting the above proposals which use preventive detention. If some or all of the above raft of suggestions were adopted, law enforcement authorities would have additional tools to deal with persons suspected of involvement in a Hircheur or Hasan scenario, or in any

¹⁷⁰ *Id.* at 714.

¹⁷¹ *See* MAYER, note 13.

other situation, when a crime has not yet been committed, or where the evidence is short of probable cause, or where, for some reason, the authorities do not want to start the criminal law process but need to incapacitate a possible future terrorist.

In my view it is fundamental to make the above changes to the law by way of legislation.

It is submitted that the neatest way forward is to have one piece of legislation dealing specifically with terrorism related matters, rather than separate statutes and piecemeal amendment.

It is however, essential that this is a matter addressed by Congress. There has been some reference to President Obama issuing an Executive Order to deal with the continuing detention of those still held in Guantanamo Bay.¹⁷² It has not been suggested that if it was decided to introduce new preventive detention laws to take effect in the United States, that this would not be done by way of legislation. Nevertheless, the value of giving such extreme measures anywhere the force of Congress-made law cannot be underestimated.

¹⁷² Dafna Linzer & Peter Finn, *White House Weighs Order on Detention*, WASH. POST, Jun. 27, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/26/AR2009062603361.html>; Wittes, *supra* note 4.