

APPENDIX A

–DRAFT–

**THE COMPANY WE KEEP:
COMPARATIVE LAW AND PRACTICE REGARDING
THE DETENTION OF TERRORISM SUSPECTS**

A WHITE PAPER

OF THE

WORKING GROUP ON DETENTION WITHOUT TRIAL

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INTRODUCTION

“Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law.”

—Lord Nicholls of Birkenhead, *A v. Home Secretary*, [2004] U.K.H.L. 56.

Proponents of a new U.S. system of “preventive detention”¹ for terrorism suspects often rely upon assertions that other nations employ similar tactics.² But a survey of global practices reveals that no advanced democracy other than India and Israel employs a system of indefinite preventive detention without criminal charge.³ Our closest allies—including the U.K., France, Spain, Germany, Australia, and Canada—do not resort to detention outside of the criminal justice or immigration contexts.⁴ Instead, these nations have narrowly adapted existing criminal and immigration regimes to combat terrorism without sacrificing core principles.

In the United Kingdom, detention without charge is limited to 28 days as part of a criminal investigation. France restricts detention without charge of terrorism suspects to 6 days; Spain limits pre-charge detention to 13 days. Germany, Denmark, Italy, and Norway apply ordinary criminal procedures to suspected terrorists. Australia limits detention without charge to 14 days and bars interrogation in that period, while Canada narrowly restricts detention to the immigration deportation context.

¹ The term “preventive detention” is itself problematic. See Catherine Powell, Reporter, *Scholars’ Statement of Principles for the New President on U.S. Detention Policy: An Agenda for Change* at 1 (Dec. 1, 2008). With signatories from a number of prominent law professors, the Statement notes, “[t]he current detention policies also point to the inherent fallibility of ‘preventive’ determinations that are based on assessment of future dangerousness (as opposed to past criminal conduct). Empirical studies demonstrate that “preventive” detention determinations that rely on assessment of future dangerousness generate unacceptably high levels of false positives (i.e., detention of innocent people).”

² See, e.g., Stuart Taylor Jr., *The Case for a National Security Court*, NAT’L J., Mar. 26, 2007; Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT’L L. 369, 372-73 (2008) (“Thus, although all western democracies continue to rely heavily on the criminal process to prosecute and detain non-battlefield suspects, many have also acted outside that process.”).

³ Stella Burch Elias, *Rethinking ‘Preventive Detention’ from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects* at Appendix (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406814.

⁴ “Preventive detention” is a term used in various contexts. The lack of specificity has led to confusion and misleading comparisons in the recent debate about U.S. detention policy. For the purpose of this white paper, “preventive detention” shall refer to a regime whereby a terrorism suspect may be imprisoned solely on an assessment that they pose a future risk and not in connection with a criminal prosecution or immigration action. See Int’l Comm’n of Jurists, Memorandum on International Legal Framework on Administrative Detention and Counter-Terrorism, at 6 (Dec. 2005) (defining administrative detention), available at http://www.icj.org/IMG/pdf/Administrative_detent_78BDB.pdf. This memorandum specifically does not address the application of the laws of war, which apply only in very limited instances. Although beyond the scope of this white paper, the authors note their disagreement with the assertion set forth by some proponents of preventive detention that the laws of war may be extended outside the traditionally recognized contexts of international and non-international armed conflict. See, e.g., Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror”*, 87 INT’L REV. RED CROSS 39, 53 (2005).

International human rights law generally proscribes preventive detention except where absolutely necessary and proportionate.⁵ Administrative detention for security purposes may theoretically be permitted under international law, but only in the presence of a “public emergency that threatens the life of the nation,”⁶ and where criminal prosecution or less restrictive alternatives are impossible.⁷ In all events, indefinite detention without trial⁸ and detention for purely intelligence-gathering purposes are highly suspect.⁹

Moreover, the experiences with emergency detention in India and Israel demonstrate the great danger of sidestepping the criminal process: definitions remain impossibly elastic, the pressure for intelligence-gathering yields coercive treatment, and processes are frequently shrouded in secrecy. The use of long-term preventive detention without charge most often corresponds with wide-ranging human rights violations. Most important, there is no evidence that preventive detention works. Comparative studies of terrorism stretching back more than twenty years have concluded that draconian measures—such as prolonged detention without trial—are not proven to reduce violence, and can actually be counterproductive.¹⁰

⁵ Human Rights Comm., Communication No. 1324/2004: Australia, ¶ 7.2, U.N. Doc. CCPR/C/88/D/1324/2004 (Nov. 13, 2006) (detention could be arbitrary if “not necessary in all the circumstances of the case and proportionate to the ends sought”); Human Rights Comm., Communication No. 560/1993: Australia, ¶ 7.2, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997) (same if “not necessary in all the circumstances of the case”); Human Rights Comm., Communication No. 305/1988: Netherlands, ¶ 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (Aug. 15, 1990) (same if not “reasonable in all the circumstances”); *see also* Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503, 507 (2003).

⁶ General Comment No. 29, “Derogation during a state of emergency”, in “International human rights instruments: Compilation of general comments and general recommendations adopted by human rights treaty bodies”, UN Doc. HRI/GEN/1/Rev.7 (2004), pp. 184 ff.

⁷ Article 9(1) of the International Covenant on Civil and Political Rights (“ICCPR”) provides that “everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” UNTS, Vol. 999, p. 171, 16 December 1966, entered into force 23 March 1976. While Article 4 permits for the derogation of Article 9 in times of public emergency “which threaten[] the life of the nation and the existence of which is officially proclaimed,” derogations must still be “strictly required by the exigencies of the situation” and may not involve discrimination “solely on the grounds of race, color, sex, language, religion or sound origin.” *Id.* at Art. 4. *See* Alfred de Zayas, *Human Rights and Indefinite Detention*, 87 INT’L REV. RED CROSS 15, (2005); *see also* Human Rights Comm., Communication No. 66/1980: Uruguay, ¶ 18.1, U.N. Doc. CCPR/C/17/D/66/1980 (Oct. 12, 1982) (“[A]dministrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society *which cannot be contained in any other manner ...*”) (emphasis added).

⁸ *Bolaños v. Ecuador*, No. 238/1987, UN Doc. A/44/40, Annex X, Sec. I, para. 8.3 (finding violation of Article 9, paragraph 3 where criminal defendant was held in pre-trial detention for over five years).

⁹ Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT’L REV. RED CROSS 375, 377 (2005) (“[I]nternment or administrative detention for the sole purpose of intelligence gathering, without the person involved otherwise presenting a real threat to State security, cannot be justified.”). The Israeli Supreme Court rejected Israel’s use of detainees as “bargaining chips” on the ground that detention must be based on an individualized assessment of risk. *A v. Minister of Defence*. CrimFH 7048/97, [2000] IsrSC 44(1) 721. *See also* Human Rights Comm., Second Periodic Report Addendum: Israel, ¶¶ 125-28, U.N. Doc. CCPR/C/ISR/2001/2 (Dec. 4, 2001); Human Rights Comm., Concluding Observations: Israel 1998, *supra*, at 106, ¶ 21; Human Rights Comm., Concluding Observations: Israel, ¶ 13, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003).

¹⁰ *See* Arunabha Bhoomik, *Democratic Responses to Terrorism: A Comparative Study of the United States, Israel and India*, 33 DENV. J. INT’L L. & POL’Y 285, 292-95 (2005) (discussing various comparative empirical studies of counterterrorism); Yonah Alexander, *COMBATING TERRORISM: STRATEGIES OF TEN COUNTRIES 7* (2002) (study of the United States, Argentina, Peru, Colombia, Spain, the U.K., Israel, Turkey, India, and Japan); Christopher Hewitt,

Finally, the number of people who have been subjected to detention without charge for more than three years by any democratic state, including India and Israel, is extraordinarily small. Application of such policies abroad thus contrasts sharply with the United States' ongoing detention of over two hundred detainees at Guantanamo and elsewhere.

In sum, long-term preventive detention overwhelmingly has been rejected by democratic states abroad.¹¹ Our allies in Europe and North America have concluded that such detention is unwarranted, unproven and unwise, in marked contrast with the relative success of the criminal justice system in fighting terrorism. By contrast, indefinite detention without trial is a hallmark of repressive regimes such as Egypt, Libya, Syria, and apartheid-era South Africa, which held tens of thousands of government opponents in preventive detention as security threats during the last decades of white rule.¹²

Should the United States take the unprecedented step of implementing indefinite detention without trial for terrorism suspects, it would have profound consequences for the rule of law globally and for U.S. foreign policy. By acting outside accepted legal standards, we would embolden other nations with far worse human rights records to adopt sweeping regimes for long-term detention in response to internal or external threats, both real and perceived. Further erosion of the rule of law in nations such as Egypt and Pakistan could further destabilize these states, with dire consequences for global security. Moreover, taking an extreme position so far out of step with our European and North American allies would undermine our ability to gain their critical cooperation in international counterterrorism efforts.

I. EUROPE: SHORT-TERM DETENTION IN THE CRIMINAL JUSTICE SYSTEM

European nations detain terrorism suspects only in connection with ongoing criminal proceedings.¹³ The European Convention on Human Rights flatly forbids security-based detention where it is not connected with criminal or immigration proceedings. ECHR art. 5(1)(c) (permitting detention only “for the purpose of bringing [a person] before the competent legal authority . . . when it is reasonably considered necessary to prevent his committing an offense.”). The European Court of Human Rights has held that detention is lawful only if done in

THE EFFECTIVENESS OF ANTI-TERRORIST POLICIES 66-67 (1984) (study of Northern Ireland, Uruguay, Spain, Italy and Cyprus).

¹¹ 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*, 4 HOMELAND SEC. AFF. 1, 1 (2008) (“America’s policy of preventive detention is not just different as a matter of degree – it is grossly different as a matter of kind.”).

¹² Jeremy Sarkin, *Preventive Detention in South Africa*, in PREVENTIVE DETENTION AND SECURITY LAW: A COMPARATIVE SURVEY 209 (Andrew Harding & John Hatchard eds., 1993).

¹³ See generally Elias, *supra*, at Appendix; Mar Jimeno-Bulnes, *After September 11th: The Fight Against Terrorism in National and European Law. Substantive and Procedural Rules: Some Examples*, 10 EUR. L.J. 235 (2004); Sionaidh Douglas-Scott, *The Rule of Law in the European Union—Putting the Security into the “Area of Freedom, Security and Justice,”* 29 EUR. L. REV. 219 (2004); Colin Warbrick, *The European Response to Terrorism in an Age of Human Rights*, 15 Eur. J. Int’l L. 989 (2004). Although the United Kingdom has adopted legislation contemplating the detention of terrorism suspects outside the criminal justice system, as addressed below, that legal regime neither has been applied in practice nor has been subjected to judicial scrutiny.

conjunction with the criminal or immigration process.¹⁴ As the examples below demonstrate, some nations have brief pre-charge detention periods for terrorism suspects, but even these short-term detentions must be made in consecutive extensions, pursuant to judicial oversight and with access to counsel.¹⁵

A. United Kingdom

The United Kingdom is oft-cited as employing “preventive detention.”¹⁶ That assertion, however, vastly exaggerates the limited scope of British detention powers. Moreover, it ignores the British experience with the Irish Republican Army that led it expressly to reject military approaches to counterterrorism. As a British government committee noted in April 2002: “Terrorists are criminals, and therefore ordinary criminal justice and security provisions should, so far as possible, continue to be the preferred way of countering terrorism.”¹⁷

1. The British Experience in Northern Ireland

The lessons from its experience in Northern Ireland have caused the United Kingdom to reject long-term preventive detention. Faced with escalating violence in 1971, the United Kingdom invoked emergency powers and British troops began a campaign of raids resulting in the arrest of 342 IRA suspects on the first day and 2,375 in the first six months.¹⁸ Ultimately, thousands of people—the vast majority from the Catholic community—would be interned before the abandonment of the internment program in 1975.¹⁹

By any measure, the internments and other heavy-handed tactics of the early 1970s were a terrible failure. Based on poor and outdated intelligence, the raids alienated thousands of people and resulted in relatively few solid arrests.²⁰ Meanwhile, the government’s tactics

¹⁴ *Lawless v. Ireland* (No. 3), 3 Eur. Ct. H.R. (ser. A), ¶¶ 13-15, 48 (1961); *Ciulla v. Italy*, 148 Eur. Ct. H.R. (ser. A) 1, ¶38 (1989); *Guzzardi v. Italy*, 3 Eur. Ct. H.R. (ser. A) 333, ¶102 (1980). See generally Oren Gross, Fionnuala Ní Aoláin, LAW IN TIMES OF CRISIS 269 (2006) (discussing *Lawless* and limits on detention under ECHR).

¹⁵ The United Kingdom has by far the lengthiest period of pre-charge detention. Parliament recently expanded the detention period to 42 days, from 28 days enacted in 2005 and 7 days, enacted in 2000. Pre-charge detention for regular suspects is limited to four days. Notably, in *Brogan v. United Kingdom*, the European Court of Human Rights held that a detention of four days and six hours without charge violated the United Kingdom’s obligations under the European Convention. *Brogan v. United Kingdom* (1988), 11 EHRR 117, para. 62.

¹⁶ See, e.g., Stuart Taylor Jr., *The Case for a National Security Court*, NAT’L J. (Mar. 26, 2007).

¹⁷ Privy Counselor Review Committee, Anti-Terrorism, Crime and Security Act of 2001 Review: Report, 8 quoted in L.K. Donohue, *Britain’s Counterterrorism Policy*, in HOW STATES FIGHT TERRORISM: POLICY DYNAMICS IN THE WEST 39 (Zimmerman & Wenger, eds., 2006).

¹⁸ Michael Freeman, FREEDOM OR SECURITY: THE CONSEQUENCES FOR DEMOCRACIES USING EMERGENCY POWERS TO FIGHT TERROR 58 (2003); Daniel Moeckli, *The Selective “War on Terror”: Executive Detention of Foreign Nationals and the Principle of Non-Discrimination*, 31 BROOK. J. INT’L L. 495, 503 (2006).

¹⁹ Michael P. O’Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1678 (2003); Laura Donohue, COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM 1922-2000 (2001).

²⁰ Freeman, *supra*, at 58. Indeed, IRA leadership claimed that only 56 of those been detained were actually IRA members. *Id.* Further, the British Army estimated that up to 70% of the long-term internees became re-involved in terrorist acts after their release. Tom Parker, Testimony before Senate Subcommittee on Homeland Security, available at 2006 WLNR 16329315 (Sept. 20, 2006).

alienated large sections of the Catholic community and broadened support for the IRA.²¹ In the words of former British Intelligence officer Frank Steele who served in Northern Ireland during this period: “Internment barely damaged the IRA’s command structure and led to a flood of recruits, money and weapons.”²²

Put simply, the strategy was ineffective because security forces were unable to accurately identify and detain terrorists faster than they could be replaced. The British government finally took the decision to discard the power of internment in January 1998. Announcing the decision, the Junior Northern Ireland Minister Lord Dubs told the House of Lords: “The Government have long held the view that internment does not represent an effective counter-terrorism measure . . . The power of internment has been shown to be counter-productive in terms of the tensions and divisions which it creates.”²³ Moreover, the British experience taught that delegitimizing terrorists as ordinary criminals rather than combatants was ultimately more effective.

2. *Current British Approaches to Counterterrorism*

a. Pre-Charge Detention

The United Kingdom currently only permits pre-charge detention for terrorism suspects for a maximum of 28 days, and then only upon judicial review and in connection with an ongoing criminal investigation.²⁴ A detainee has the right to judicial review and access to counsel within 48 hours of arrest.²⁵ Continued detention may be permitted in seven day increments, totaling no more than 28 days,²⁶ only upon a showing that “there are reasonable grounds for believing that the further detention . . . is necessary” to bolster the criminal investigation, *e.g.*, either “to obtain evidence through questioning or otherwise, preserve

²¹ Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes made Fighting Terrorism, in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1680 (2003) (“[T]he brutal internment of family members was frequently identified as critical to the decision to join outlawed paramilitary organizations.”); David R. Lowry, *Internment: Detention Without Trial in Northern Ireland*, 5 HUM. RIGHTS 261, 267 (1976) (“[T]he hostility engendered by counter-terror tactics made the Catholic ghettos a safe haven for the Provisional I.R.A.”); Philip A. Thomas, September 11th and Good Governance, 53 N. IR. LEGAL Q. 366, 385 (2002) (quoting British MP during Parliamentary debate on 1998 bill revoking internment power: “Frankly it has not worked . . . we believe that the use of internment would strengthen the terrorists.”).

²² Frank Steele, quoted in Tom Parker, Testimony before Senate Subcommittee on Homeland Security, 2006 WLNR 16329315 (Sept. 20, 2006).

²³ *Id.*

²⁴ Terrorism Act 2000, amended by Terrorism Act 2006 Anti-Terrorism Crime and Security Act 2001, Part 4, § 21. The United Kingdom first differentiated the length of pre-charge detention for terrorist suspects from the length of pre-charge detention for ‘ordinary’ criminal suspects through the Terrorism Act of 2000. The maximum length of pre-charge detention for ‘ordinary criminal’ or ‘non-terrorist’ suspects is 4 days. The Act provided for an initial window of 48 hours (from the time of the suspect’s arrest) during which the suspect could be detained without warrant or charge. Upon judicial authorization this pre-charge detention could then be extended, via the provision of a warrant, such that it can last a maximum of 7 days from the initial arrest. The Criminal Justice Act 2003 extended the 7-day maximum to 14 days and the Terrorism Act of 2006 further the maximum to 28 days from the initial arrest though the judicial authority can only extend the warrant by 7 days at a time.

²⁵ Terrorism Act, 2000, c. 11, § 41 (U.K.).

²⁶ Terrorism Act, 2006, c. 11, §§ 19-20 (U.K.). The original maximum was seven days, and was incrementally increased to the current maximum of 28 days.

evidence, or pending the result of examinations and analyses of already obtained evidence.”²⁷ Additionally, authorities must certify that “the investigation in connection with which the person is detained is being conducted diligently and expeditiously.”²⁸ For the first fourteen days, a designated magistrate judge reviews the detention application; between days fourteen and twenty-eight, a High Court judge conducts the review.²⁹ The detainee and defense counsel may be denied access to evidence and barred from proceedings, but only during this 28-day period.³⁰ Instead, the detainee is represented by special counsel who has been cleared to handle classified information.

The statistics on pre-charge detention suggest that extended detention is subjected to fairly rigorous judicial review and is rarely used. According to a report by the Home Office, magistrates have rejected or reduced some detention orders. Between July 26, 2006, when pre-charge detention was increased to 28 days, and October 2007, there were 204 arrests under the Terrorism Act, but only 11 suspects were detained for more than 14 days. (Eight of them were then criminally charged and three were released without charge.)³¹

It is notable that Parliament has rejected recent pressures to increase the detention period beyond 28 days. For example, in 2005, following the London bombings, the government pushed for a 90-day detention period. Parliament undertook a comprehensive study of the issue and concluded that the unprecedented increase was not warranted.³² Efforts in 2007 and 2008 to increase the detention period to 56 days and 42 days, respectively, were similarly defeated.³³ Ongoing and mounting controversy also continues to shroud the British detention regime.³⁴

But despite the swirl of controversy, it is essential to note that the debate in the United Kingdom has been over a matter of days prior to criminal charge, not years outside the criminal justice system. The notion of indefinite detention without trial has never been suggested by British authorities. As Prime Minister Gordon Brown stated during the debates regarding the 2008 extension proposal, “our first principle is that there should always be a maximum limit on

²⁷ Terrorism Act of 2000, Schedule 8, at 32(1).

²⁸ *Id.*, at ¶ 23.

²⁹ *Id.*, at ¶ 23, ¶29(3).

³⁰ *Id.*, at ¶ 34.

³¹ Home Office, *Options for Pre-Charge Detention in Terrorist Cases*, at 6 (Jul. 25, 2007), available at <http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/pre-charge-detention.pdf?view=Binary>; Jago Russell, *Terrorism Pre-Charge Detention Comparative Law Study*, at 17 (2007), available at <http://www.liberty-human-rights.org.uk/issues/pdfs/pre-charge-detention-comparative-law-study.pdf>, (citing Oral Evidence to Home Affairs Select Committee, October 19, 2007, Q 7 (Mr. Peter Clarke CVO OBE QPM)).

³² House of Commons Home Affairs Committee, *Terrorism Detention Powers*, Fourth Report of Session 2005-06, July 3, 2006, 1.

³³ Cooper Blum, *supra*, at 20.

³⁴ The U.K.-based NGO Liberty reports that the British system of pre-charge detention far exceeds the detention allowed by any other European nation. Jago Russell, Liberty, *Terrorism Pre-Charge Detention Comparative Law Study* at 17 (2007), available at <http://www.liberty-human-rights.org.uk/issues/pdfs/pre-charge-detention-comparative-law-study.pdf>. Others contend that the British system is contrary to basic human rights principles and counterproductive by sacrificing British moral authority and alienating key communities. Human Rights Watch, *UK: Extended Pre-Charge Detention Violates Rights*, (Jul. 26, 2007), available at <http://hrw.org/english/docs/2007/07/26/uk16491.htm>.

pre-charge detention. It is fundamental to our civil liberties that no one should be held arbitrarily for an unspecified period.”³⁵

b. Failed Immigration Detention

The United Kingdom tried—and abandoned—a “three-walled” system of preventive detention through immigration law. Under the Anti-Terrorism, Crime and Security Act of 2001, foreign terrorist suspects who could not be deported due to the risk of ill-treatment in violation of Article 3 of the ECHR could be detained, potentially indefinitely.³⁶ The Act sharply circumscribed judicial review and detainees’ access to evidence. In particular, the Act introduced the “Special Advocates” regime, whereby detainees were denied access to secret evidence. Instead, the system relied on “special advocates,” appointed by the Solicitor General to act on behalf of the detainee.³⁷ In so providing, the United Kingdom derogated from the guarantee under Article 5 of the ECHR of liberty from immigration detention except where there exists a realistic prospect of removal.³⁸ In 2004, the House of Lords held that immigration detention where deportation was impossible was not justified by security concerns alone.³⁹ The Law Lords concluded that prolonged security detention of non-citizens only was arbitrary and discriminatory, and therefore incompatible with the ECHR. In particular, the majority pointed to the fact that terrorism suspects may be citizens, and whatever mechanisms exist to curtail the threat against citizen terrorism suspects presumably must be available with respect to non-citizens.⁴⁰ The United Kingdom declined to adopt an equivalent detention regime for citizens, and the detention law was allowed to lapse in 2005. The short-lived ATCSA resulted in the detention of only 17 individuals.⁴¹

In February 2009, the European Court of Human Rights concurred with the Law Lords and found that the ATCSA violated the ECHR substantively and procedurally.⁴² The court

³⁵ Gordon Brown, *42-Day Detention; A Fair Solution*, THE TIMES (Jun. 2, 2008).

³⁶ “A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by (a) a point of law which wholly or partly relates to an international agreement, or (b) a practical consideration.” Anti-Terrorism Crime and Security Act of 2001, at § 23, available at http://www.opsi.gov.uk/acts/acts2001/ukpga_20010024_en_4#pt4-pb1-11g21.

³⁷ *Id.* at § 30.

³⁸ Roach, *supra*, at 2186-87.

³⁹ *A v. Home Secretary*, [2004] U.K.H.L. 56, available at <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm>.

⁴⁰ As Lord Bingham explained: “the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda, may harbour no hostile intentions towards the United Kingdom. The conclusion that [Part 4 is], in Convention terms, disproportionate is in my opinion irresistible.” *Id.* at ¶ 43.

⁴¹ Donohue, “Britain’s Counterterrorism Policy,” *supra*, at 24. A total of 17 people were held under Part IV of the 2001 Anti-Terrorism, Crime and Security Act for varying periods of time between December 2001 (when the first arrests were made under the act) and March 2005 (when the last detainees were released under control orders). BBC News, *Who Are the Terrorism Detainees?*, (Mar. 11, 2005), available at http://news.bbc.co.uk/2/hi/uk_news/4101751.stm

⁴² *A and Others v. the United Kingdom*, Application no. 3455/05 (Feb. 12, 2009), http://www.icj.org/IMG/CASE_OF_A_AND_OTHERS_V_THE_UNITED_KINGDOM.pdf.

found that no lawful basis for indefinite detention of non-citizens existed.⁴³ Rather, detention was permissible only where the government was pursuing immigration proceedings in good faith. The inability to deport the petitioners due to the risk of torture upon repatriation was not sufficient in and of itself to justify prolonged immigration detention.⁴⁴ Finally, the court criticized the special advocate system, noting that “in view of the dramatic impact of the lengthy - and what appeared at that time to be indefinite - deprivation of liberty on the applicants’ fundamental rights, Article 5 § 4 must import substantially the same fair trial guarantees as Article 6 § 1 in its criminal aspect.”⁴⁵ The court held that where detainees were only provided general notice, they were deprived of their right to understand the nature of the evidence and charges against them.⁴⁶

c. Control Orders

Parliament replaced the ATCSA system not with detention, but with highly controversial “control orders” restricting personal movement. The Prevention of Terrorism Act 2005 permits the application of control orders to individuals “for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity.”⁴⁷ In reaching that conclusion regarding an individual, the Home Secretary must consult with the chief of police to determine that criminal prosecution is not possible. There are two forms of control orders: non-derogating control orders and derogating control orders. While both derogating and non-derogating control orders mandate ongoing home searches and surveillance and seriously restrict personal movements and communications, “derogating” control orders restrict individual liberty sufficiently to be incompatible with Article 5 of the ECHR. The procedural checks on derogating control orders are significantly more stringent than are those on non-derogating control orders.⁴⁸ Consequently, the government has attempted to treat even the most stringent of orders as non-derogating in order to avoid heightened oversight. This has sparked litigation that has ultimately led to judicial rulings from the House of Lords in two important 2007 cases involving the boundary between derogating and non-derogating control orders.⁴⁹ As of March 2009, thirty-

⁴³ *Id.* at 69-70.

⁴⁴ *Id.*

⁴⁵ *Id.* at 83 ¶ 217.

⁴⁶ *Id.* at 84-85.

⁴⁷ Prevention of Terrorism Act 2005, available at http://www.opsi.gov.uk/acts/acts2005/ukpga_20050002_en_1.

⁴⁸ For example, non-derogating orders may be imposed upon a showing that the Home Secretary has “reasonable grounds” for concluding that the subject “is or has been involved in terrorism-related activity” and “considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.” Prevention of Terrorism Act 2005 at § 2. Judicial review of such determinations is limited to whether the Home Secretary’s determination was “obviously flawed.” *Id.* at § 3. By contrast, derogating orders require a declaration of public emergency from both Houses of Parliament and an individualized showing that “on the balance of probabilities” the controlled person has been involved in terrorist activity and “it is necessary to impose the order to protect the public from the risk of terrorism.” *Id.* at § 4.

⁴⁹ The precise line between derogating and non-derogating orders is not well-defined, but two recent decisions shed some light. In *Secretary of State for the Home Department v. JJ*, the Law Lords quashed a non-derogating control order, holding that an “18-hour curfew, coupled with the effective exclusion of social visitors, meant that the controlled persons were in practice in solitary confinement for this lengthy period every day for an indefinite duration, with very little opportunity for contact with the outside world, with means insufficient to permit provision of significant facilities for self-entertainment and with knowledge that their flats were liable to be entered and searched at any time.” This was supplemented by the fact that most of the controlled persons were “located in an unfamiliar area where they had no family, friends or contacts, and which was no doubt chosen for that reason.”

eight people have been subjected to non-derogating control orders, and 15 are presently under such orders.⁵⁰

The Secretary of State may make a non-derogating control order if he or she has “reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity” and “considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.”⁵¹ In order to make the control order, the Secretary must apply to a regular court for permission, which will determine at a preliminary hearing whether the order is “obviously flawed” in process or substance.⁵² In the preliminary hearing, the court may consider the matter in the absence of the individual to whom the order applies, without that individual being notified of the hearing and without the individual being allowed to make representations before the court.⁵³ However the individual must be notified of the preliminary decision, and must be given the opportunity to make representations within seven days of the court’s decision to direct the case to a full hearing.⁵⁴ At the full hearing, the court reviews the order to determine whether the Secretary of State’s decision was “flawed.”⁵⁵ Non-derogating orders may be issued for up to twelve months, and may be renewed indefinitely, subject to ongoing judicial review.

The standards of proof and evidence for the imposition of control orders are lower than in criminal proceedings. The right of the accused to be present and to counsel is greatly truncated due to the use of classified evidence.⁵⁶ Instead, the 2005 law permits the use of a “special advocate” to “represent the interests of a relevant party to relevant proceedings,” but also specifies that the advocate “is not to be responsible to the person whose interests he is appointed to represent.”⁵⁷

Moreover, “[t]he requirement to obtain prior Home Office clearance of any social meeting outside the flat in practice isolated the controlled persons during the non-curfew hours also. Their lives were wholly regulated by the Home Office, as a prisoner’s would be, although breaches were much more severely punishable.” The Lords held that this combination of factors amounted to a violation of Article 5. *Secretary of State for the Home Department v. JJ and others (FC)*, [2007] UKHL 45, ¶24, available at <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071031/homejj-1.htm>. In a second case, *Secretary of State for the Home Department v. MB*, the Lords allowed a non-derogating control order that imposed a 14 hour curfew; required the controlled person to wear an electronic tag at all times; restricted him during non-curfew hours to an area of 9-square miles; required that he report to a monitoring company upon leaving his flat after a curfew period had ended and on his last return before the next curfew commenced; rendered his flat open to police search at any time; banned all visitors during curfew hours except the controlled person’s father, official or professional visitors, children aged 10 or under or persons agreed by the Home Office in advance on supplying the visitor’s name, address, date of birth and photographic identification; banned his communication with several specified individuals; permitted him to attend only one specified mosque; and confiscated all communications equipment and his passport. This combination of factors, the Lords held, did not violate Article 5. *Secretary of State for the Home Department v. MB (FC)*, [2007] UKHL 46, ¶ 11, available at <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071031/home-1.htm>.

⁵⁰ Human Rights Watch, Letter to the UK Parliament on Control Orders (Mar. 2, 2009), available at <http://www.hrw.org/node/81153>.

⁵¹ Prevention of Terrorism Act, at § 2(1).

⁵² *Id.* at § 3(2)-(3).

⁵³ *Id.* at §3(5).

⁵⁴ *Id.*

⁵⁵ *Id.* at §3(10)

⁵⁶ Prevention of Terrorism Act 2005 § 11.

⁵⁷ Prevention of Terrorism Act 2005 § 11(7).

The control order regime has provoked a wave of litigation and ongoing controversy. Human rights advocates have charged that the cumulative restrictions amount to a deprivation of liberty and a “flawed system that violates rights.”⁵⁸ The House of Lords held that an 18-hour curfew combined with other restrictions on movement and communications was tantamount to solitary confinement, and therefore an unlawful derogation.⁵⁹ Another case, involving a 16-hour curfew, is presently on appeal to the European Court of Human Rights.⁶⁰

The “special advocate” system is also under serious doubt. The Law Lords determined that the use of secret evidence and a “special advocate” deprived two petitioners of a fair hearing, and ordered their cases to be reconsidered by a high court judge.⁶¹ The Court of Appeal nonetheless interpreted the Law Lords’ decision to permit fully *ex parte* hearings, and the case is presently back before the Law Lords.⁶² Should the House of Lords uphold the special advocate regime, it is likely that the European Court of Human Rights would reject the system as violating the Article 5(4) right to a fair hearing. As noted above, the European Court rejected a very similar system of special advocates under the now-abandoned ATCSA.

The 2005 law also facially contains a provision for preventive detention, but only if the security threat cannot be met by the criminal process or by less restrictive measures such as control orders. Because the government must consider filing criminal charges against anyone subject to pure security-based detention, extended detention is permitted in the United Kingdom only when the criminal process is deemed unavailable. It does not appear that the United Kingdom has ever detained anyone under the 2005 legislation.⁶³ Moreover, it is doubtful that such security detention would pass judicial muster under the European Convention on Human Rights.

B. Continental Europe

1. France

Despite decades of experience with terrorism domestically and abroad, France permits the detention of terrorism suspects only in conjunction with criminal charge and pending trial.⁶⁴

⁵⁸Human Rights Watch, *UK: ‘Control Orders’ for Terrorism Suspects Violate Rights*, Mar. 2, 2009, available at hrw.org/en/news/2009/03/01/uk-control-orders-terrorism-suspects-violate-rights.

⁵⁹ See *Secretary of State for the Home Department v. JJ and others (FC)*, [2007] UKHL 45, ¶24, available at <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071031/homejj-1.htm>.

⁶⁰ Human Rights Watch, *Letter to the UK Parliament on Control Orders* (Mar. 2, 2009), <http://www.hrw.org/node/81153>.

⁶¹ *Secretary of State for the Home Department v. MB and AF*, [2007] UKHL 46, available at <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071031/home-1.htm>.

⁶² *Secretary of State for the Home Department v. AF; Same v AM; Same v AN; Same v AE*, [2008] EWCA Civ 1148; [2008] WLR (D) 320, Judgment of 17 October 2008.

⁶³ Lord Alex Carlile, *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, at 6-8 (2006), available at <http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/laws-against-terror.pdf?view=Binary> (reviewing implementation of control orders after amendments).

⁶⁴ Jeremy Shapiro, Brookings Institution, *French Lessons: The Importance of the Judicial System in Fighting Terrorism* 2-3 (Mar. 2003), available at http://www.brookings.edu/~media/Files/rc/articles/2003/03france_shapiro/shapiro20030325.pdf.

Although special investigating magistrates handle all terrorism investigations, independent judges oversee ongoing pretrial detention, and a panel of regular judges presides over trials at which normal criminal procedural protections apply.⁶⁵ The investigating judge may authorize pre-charge detentions longer than 48 hours, but no longer than 144 hours (6 days). After this point, the detainee must be criminally charged. Detainees have a right to counsel after 72 hours.⁶⁶

Under French law, an independent judge oversees pretrial detention.⁶⁷ Pretrial detention is permitted only “if deprivation of liberty is considered the only way to preserve material evidence, to prevent either witnesses or victims being pressured or to prevent those under judicial investigation and their accomplices from agreeing on false testimony; to protect the person under judicial examination; to prevent the person from absconding; or to put an end to the offense or to prevent its recurrence.”⁶⁸ The initial detention period for serious terrorism-related charges is one year, renewable in 6-month increments up to four years.⁶⁹

Despite its commitment to the criminal system, France has come under mounting criticism for its handling of terrorism prosecutions, particularly with respect to the combination of an extremely broad definition of “association of wrongdoers”⁷⁰ and the prolonged pretrial detention of suspects.⁷¹ The role of the independent judge in reviewing pretrial detention is greatly hampered by the fact that the judge is wholly dependent upon the investigating magistrate and prosecutor’s case file.⁷² Indeed, some commentators have referred to the system as “a trompe-l’oeil guarantee.”⁷³

2. Germany

Germany detains terrorism suspects exclusively under regular criminal procedures, an approach employed by numerous other European nations, including Denmark, Italy, Norway, Turkey, as well as Brazil and Colombia.⁷⁴ Pre-charge detention may extend only up to 48 hours,

⁶⁵ Articles 421-1 et seq. of the Penal Code (as amended in Law 96-647 of 22 July 1996); see also Jeremy Shapiro & Benedicte Suzan, *The French Experience of Counterterrorism*, 45 *Survival* 67, 76 (2003), available at http://www.brookings.edu/~media/Files/rc/articles/2003/spring_france_shapiro/shapiro20030301.pdf.

⁶⁶ Articles 421-1 et seq. of the French Penal Code (as amended in Law of 22 July 1996).

⁶⁷ CCP, art. 144.

⁶⁸ Human Rights Watch, *Preempting Justice: Counterterrorism Laws and Procedures in France*, at IV (July 1, 2008), available at http://www.hrw.org/en/node/62151/section/5#_ftnref66.

⁶⁹ CCP, art. 145-2.

⁷⁰ Crim. Code art. 421-2-1 (defining “association des malfaiteurs” as “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.”).

⁷¹ Laurent Bonelli, *An 'Anonymous and Faceless' Enemy: Intelligence, Exception and Suspicion After September 11, 2001*, 58 *CULTURES AND CONFLICTS* 109-29 (2005) (noting authorities’ conviction that “it matters little if a good number of the accused are found to be innocent after spending one or two years in pre-trial detention.”).

⁷² Human Rights Watch, *supra*, at IV.

⁷³ Human Rights Watch, *supra*, at IV (quoting Emmanuelle Perreux, president of a judges’ union called the Magistrates Syndicate).

⁷⁴ See Elias, *supra*, at 122. Turkey reformed its Penal Code in 2004 in order to accede to the European Union, and in the process overhauled its approach to terrorist suspect detainees. See Krista-Ann Staley, *Revised Turkish Penal Code Comes Into Force as Part of EU Deal*, *JURIST*, 3 June 2005, available at <http://jurist.law.pitt.edu/paperchase/2005/06/revised-turkish-penalcode-comes-into.php>.

at which point the civil section of the lower court reviews the detention⁷⁵ and a criminal charge must be entered. Judicial review of ongoing pretrial detention occurs every six months. The lower court's decision can be appealed to the district civil court and then to the regional civil court. Review upon appeal is a substantive review of the merits of the case, and new evidence may be presented.⁷⁶ Access to counsel is provided at all stages of detention.

3. Spain

Under Spain's criminal code, detainees suspected of terrorist activity may be held in pre-charge incommunicado detention for up to 13 days. An investigating magistrate of the National High Court must review the grounds for pre-charge detention within 72 hours.⁷⁷ The magistrate may order an additional 48 hours of incommunicado detention in police custody. A 2003 amendment provides that a court may impose up to an additional eight days of incommunicado pre-trial detention for persons suspected of membership in an armed group or conspiracy with two or more persons.⁷⁸ The magistrate may extend the initial period of incommunicado detention, up to a total 13 days. If an incommunicado order is issued, a duty solicitor is appointed, not a lawyer of the detainee's choice. After the end of incommunicado period, the detainee may retain a lawyer of his choosing. After charge, as in France, the maximum pre-trial preventive detention period is four years for serious offenses.⁷⁹ Habeas corpus is available throughout the entire detention period.⁸⁰

Spain has come under increasing criticism for its method of terrorism prosecutions. Human rights advocates point out that detainees often spend up to five days in detention without seeing a judge, and up to 13 days without access to counsel.⁸¹ Moreover, during the lengthy period of pre-trial detention, "defense attorneys do not have access to critical information regarding the charges against their clients or the evidence against them, including the full grounds for remand to pre-trial detention."⁸²

II. OTHER COMMON LAW COUNTRIES: AUSTRALIA AND CANADA

A. Australia: Short-Term Security Detention

Australia is unique in its use of short-term detention, limited to a maximum of 14 days, for the exclusive purpose of intercepting imminent terrorist plots.⁸³ In accordance with High

⁷⁵ Art. 112-130 Law of Criminal Procedure (StPO).

⁷⁶ Elias, *supra*, at Appendix.

⁷⁷ Crim. Code, of Procedure art. 520 bis (1) (Spain).

⁷⁸ Organic Law 15/2003 of 25 November 2003, reforming the Code of Criminal Procedure.

⁷⁹ Crim. Code art. 504(2) (persons accused of crimes punishable by more than 3 years imprisonment may be held in pre-trial detention for up to four years, provided that the case cannot be brought to trial within the default time period of two years).

⁸⁰ Elias, *supra*, at Appendix.

⁸¹ Human Rights Watch, *Setting an Example? Counter-Terrorism Measures in Spain* (Jan. 2005), available at <http://www.hrw.org/en/reports/2005/01/26/setting-example>.

⁸² *Id.*

⁸³ Aus. Crim. Code § 105 *et seq.* Under this same law, control orders may be imposed, but only for up to one year total, which may include curfew, restrictions on movement and communications, and electronic monitoring. Counsel is only entitled to see or request a copy of the order and (where confirmation of a control order is sought) a

Court precedent,⁸⁴ security detention is strictly limited in both duration and purpose. Detentions may last only up to 14 days⁸⁵ and only where (a) there are “reasonable grounds to suspect” the individual will be involved in an *imminent* terrorist attack (defined as “expected to occur at some time in the next 14 days”); or (b) detention is “reasonably necessary” to gather evidence relating to a recent terrorist attack (defined as having occurred within the last 28 days).⁸⁶ Initial 24-hour detention orders are issued by an administrative body, but a renewal for a 48-hour detention order requires approval by an ordinary judicial officer.⁸⁷ During the detention, detainees have access to counsel but quite limited opportunity to challenge their detention. Habeas review is limited to questions of law and does not permit an examination of underlying evidence.⁸⁸ Attorney communications are permitted but can be monitored. Nonetheless, the purpose of the detention is strictly limited: interrogations are flatly barred.⁸⁹

B. Canada: Detention Pending Deportation

Canada does not employ any specialized security-based detention regime in its criminal justice system. The country previously has employed immigration security detention sparingly for persons pending deportation, but no individuals are currently subject to such detention.

In 2001, Canada enacted the highly controversial Immigration and Refugee Protection Act (IRPA), which permitted non-citizens to be detained pending deportation as national security threats.⁹⁰ In 2007, the Supreme Court of Canada invalidated that security certificate system as violating fundamental fairness due to the use of secret evidence unavailable even to the

statement of the underlying facts, though it is possible to deny counsel access to these facts if it would, amongst other things, prejudice national security and/or be protected by public interest immunity. There is no right to appeal. Only two control orders have been issued in Australia to date, for Jack Thomas and David Hicks.

⁸⁴ *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1.

⁸⁵ The federal statute permits initial detention for up to 48 hours without charge, but detainees may be transferred to state authorities where they may be held an additional 12 days. Terrorism (Police Powers) Act 2002 (NSW) Part 2A; Terrorism (Preventive Detention) Act 2005 (Qld); Terrorism (Preventive Detention) Act 2005 (SA); Terrorism (Preventive Detention) Act 2005 (Tas); Terrorism (Community Protection) Act 2003 (Vic) Part 2A, s 4; Terrorism (Preventive Detention) Act 2006 (WA); Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT); Terrorism (Emergency Powers) Act 2003 (NT) Part 2B. See generally, Katherine Nesbitt, *Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis*, 17 B.U. PUB. INT. L.J. 39 (2007).

⁸⁶ Aus. Crim. Code § 105.8(5).

⁸⁷ Aus. Criminal Code § 105.14.

⁸⁸ Aus. Crim. Code §105.51(1). The administrative order must state forth the most basic facts, but need not include any information that is likely to jeopardize national security—even if it is the sole basis for the detention. Aus. Crim Code § 105.19, 105.8(6A). The detainee has no right to review the initial application or the underlying evidence. Attorney communications are permitted but can be monitored. Aus. Crim. Code §§ 105.39. Otherwise, disclosure of the detention—even after release—is strictly barred.

⁸⁹ Aus. Crim. Code § 105.42(1).

⁹⁰ Immigration and Refugee Protection Act, 2001 S.C. ch. 27, §§ 77-88 (Can.). See generally Kent Roach, *Canada's Response to Terrorism, in Global Anti-Terrorism Law and Policy* in GLOBAL ANTI-TERRORISM LAW AND POLICY 511 (Victor V. Ramraj et al. eds., 2005); Kent Roach, *Must We Trade Rights For Security?: The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 CARDOZO L. REV. 2151, 2194 (2006); John Ip, *Comparative Perspectives on the Detention of Terrorist Suspects*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 773, 802-03 (2007).

detainee's counsel.⁹¹ In response, Parliament revised the law to treat permanent residents and foreign nationals equally and to provide additional procedural and substantive protections.⁹²

Detention for aliens subject to removal is permitted only if the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness issue a warrant for the person's arrest and detention upon "reasonable grounds to believe that the person is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal."⁹³ A judge must now review the detention within 48 hours of arrest where the reasonableness may be challenged, and a respondent may challenge his detention at the Federal Court for further review at six-month intervals.⁹⁴ Detention cannot continue if the person can be deported. Moreover, although IRPA previously made detention mandatory pending deportation upon a judicial finding that the petitioner continued to be a threat to national security, the new law forbids continued detention where less restrictive alternatives are available.⁹⁵ There is a right of appeal to the Federal Court of Appeal, provided that the judge first "certifies that a serious question of general importance is involved and states the question."⁹⁶

Most controversial among the amendments was the passage of a "special advocate" system whereby a court may appoint a special security-cleared representative to review classified information and represent the petitioner.⁹⁷ Although the detainee is formally represented, the special advocate may not share classified information with the detainee or his regular counsel. For that reason, among others, the measure drew sharp criticism from human rights advocates, and promises continued litigation.⁹⁸ As of 2007, only 27 security certificates had been issued,

⁹¹ *Charkaoui v. Canada* (Citizenship and Immigration), [2007] 1 S.C.R. 350, 2007 SCC 9, ¶ 3 (Can.); see generally Maureen T. Duffy & René Provost, *Constitutional Canaries and the Elusive Quest to Legitimize Security Detentions in Canada*, 40 CASE W. RES. J. INT'L L. 531 (2009) (discussing decision at length); Craig Forcese & Lorne Waldman, *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of "Special Advocates" in National Security Proceedings*, at 5, 10 (Aug. 2007), available at <http://aix1.uottawa.ca/~cforcese/other/sastudy.pdf> (advocating against the adoption of a special advocate system like the United Kingdom).

⁹² C-3, An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act, 2d Sess., 39th Parl., 2007, available at http://www2.parl.gc.ca/content/hoc/Bills/392/Government/C-3/C-3_2/C-3_2.PDF [hereinafter Bill C-3]; see also Parliamentary Information and Research Service, "Legislative Summary — Bill C-3: An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act," No. LS-576E (Nov. 2, 2007, rev. Dec. 31, 2007), available at <http://www.parl.gc.ca/39/2/parlbus/chambus/house/bills/summaries/c3-e.pdf>.

⁹³ Bill C-3 at cls. 18.

⁹⁴ *Id.* at cls. 82(1)-82(3).

⁹⁵ *Id.* at cl. 82(5)(a).

⁹⁶ *Id.* at cl. 79.

⁹⁷ *Id.* at cl. 78, 83.

⁹⁸ Louis Millan, *Charkaoui Challenges Special Advocate Regime*, LAWYERS WEEKLY (May 16, 2008), <http://www.lawyersweekly.ca/index.php?section=article&articleid=681>; Craig Forcese & Lorne Waldman, *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of "Special Advocates" in National Security Proceedings*, Aug. 2007, at 5-10, available at <http://aix1.uottawa.ca/~cforcese/other/sastudy.pdf> (arguing against the adoption of a special advocate system); Human Rights Watch, *Canada: Parliament Should Amend Bill on Special Advocates* (Nov. 17, 2008), available at <http://www.hrw.org/en/news/2007/11/18/canada-parliament-should-amend-bill-special-advocates>.

all of which were issued prior to 2003. No new certificates have been issued since that date, and currently no detainees are being held.⁹⁹

III. EMERGENCY DETENTION REGIMES: ISRAEL AND INDIA

The only two longstanding democracies to permit long-term security-based preventive detention—Israel and India—have done so based on security concerns that differ fundamentally from those confronting the United States, based on emergency security regimes inherited from British colonial rule (a regime that the United Kingdom itself has abandoned), and in a context of fundamentally different protections for basic rights. The experiences of both countries also suggest that detention without trial is unwarranted, unproven, and legally highly problematic.

A. Israel

The Israeli system has been pointed to in public debates as an appropriate model for U.S. reforms. Yet Israel differs fundamentally from the United States, both in its legal regime and in the security threat it faces. Terrorism in Israel has been so severe and prolonged that many have argued that the existence of the state itself has been under threat throughout its existence.¹⁰⁰ Moreover, security detention in Israel was inherited from the British Mandate, and has been available since the nation's inception.¹⁰¹ Finally, due to the intensity and frequency of terrorist attacks, many argue that the situation in Israel more closely resembles armed conflict or insurrections, and the West Bank is under military administration. "These factors, and the geography of the Middle East itself, yield an Israeli terrorist experience which is drastically different from that of the United States."¹⁰²

Three distinct detention regimes prevail in Israel. Detention without charge is available within Israel proper through domestic legislation for citizens and for non-citizens¹⁰³ and in the Occupied Territories through special military ordinances.¹⁰⁴ Military detention for persons captured outside of Israel has been in practice since 1945 and is the most widely-used detention authority.¹⁰⁵ Under the military occupation regime, military commanders in the West Bank can detain an individual for up to six months if they have "reasonable basis to assume" that public

⁹⁹ Roach, *supra*, at 2194.

¹⁰⁰ Bhoumik, *supra*, at 322.

¹⁰¹ *Id.* at 322.

¹⁰² *Id.* at 321.

¹⁰³ The Emergency Powers (Detention) Law 1979 (Israeli citizens); Internment of Unlawful Combatants Law 2005 (non-Israelis in Israel).

¹⁰⁴ The current source for detentions in the West Bank is Military Ordinance no. 1226(1988). Until the enactment of the Emergency Powers (Detentions) Law in 1979, the past on Art. 111 of the Defense Emergency Regulations Act (1945). Subsequently, the detention authority has been defined by various military ordinances.

¹⁰⁵ See B'Tselem, *Statistics on Administrative Detention*, available at www.btselem.org/english/Administrative_Detention/Statistics.asp; Amnesty International, *Israel/Occupied Territories: Administrative Detention Cannot Replace Proper Administration of Justice*, (Aug. 2005), <http://asiapacific.amnesty.org/library/Index/ENGMDE150forty-five2005?openandof=ENG-ISR> (describing how thousands of Palestinians were held in administrative detention between 2000 and 2005, some of them for more than three years, while during that same time period only four Israelis were placed in administrative detention for periods ranging from six weeks to six months).

security requires his or her detention.¹⁰⁶ The terms “security of the area” and “public security” are undefined, leaving military commanders great discretion. Detainees are granted review before a military judge within eight days,¹⁰⁷ but hearings are closed and typically based on secret evidence that is not shared with the detainee or his lawyer.¹⁰⁸ Moreover, detainees may be denied access to counsel for up to 34 days, but “advancing the investigation [e.g., facilitating interrogation] is not a sufficient reason to prevent the meeting [T]here must be an element of necessity.”¹⁰⁹ Commanders can extend detentions for additional six-month periods,¹¹⁰ theoretically indefinitely, though in practice detentions lasting more than two or three years are extremely rare.¹¹¹ Judicial review is available through appeal, potentially to the Supreme Court.

The substantive and procedural protections for detentions within Israel are somewhat more stringent. For example, in contrast to the wide-ranging “public security” rationale underlying the military occupation regime, the Unlawful Combatants Law (UCL) applies only to an individual “who took part in hostilities against the State of Israel, whether directly or indirectly, or who is a member of a force carrying out hostilities against the State of Israel. . . .”¹¹² Initial administrative review by a military officer must occur within 96 hours;¹¹³ a detention order for up to six months may be issued. Judicial review must occur within 14 days thereafter, and periodically every six months thereafter.¹¹⁴ The detainee has a right of appeal to the Supreme Court within 30 days.¹¹⁵ At this point, “it appears that Israel has used this law only a few times, against high-profile terrorists from abroad.”¹¹⁶ Most recently, Israel used it to detain Hezbollah fighters during the summer of 2006.

The law nonetheless falls short of common notions of due process.¹¹⁷ For example, the UCL provides a probative presumption that a member of a group engaged in hostilities against Israel is *a fortiori* dangerous, a concept recently narrowed by the Israeli Supreme Court.¹¹⁸ The

¹⁰⁶ Military Ordinance no. 1226 at art. 1(a).

¹⁰⁷ *Id.* at art. 4.

¹⁰⁸ *Id.* See also *Administrative Detention: For the Good of Many?*, THE JERUSALEM POST (Oct. 16, 2008) (“It’s based on secret evidence, no witnesses, no questioning of witnesses or the detainee on the allegations or challenges from the detainee to the state. In such circumstances even judges with the best abilities can’t function as an effective check on the system.”) (quoting Lila Margalit, Association for Civil Rights in Israel).

¹⁰⁹ Blum, *supra*, at 7; see also *Marab v. IDF Commander in the West Bank*, 57 (2) P.D. 349, ¶¶ 39, 45 (Isr. H.C.J. 2003) (upholding the denial of counsel).

¹¹⁰ *Id.* at art. 1(b).

¹¹¹ Interview, Lila Margalit, Association for Civil Rights in Israel (June 28, 2008); see also B’Tselem, *Administrative Detention in the Occupied Territories*, available at http://www.btselem.org/english/Administrative_Detention/Occupied_Territories.asp.

¹¹² UCL, at art. 2.

¹¹³ *Id.* at art. 4.

¹¹⁴ *Id.* at art. 5.

¹¹⁵ *Id.* at art. 5(d).

¹¹⁶ Cooper Blum, *supra*, at 11.

¹¹⁷ Joanne Mariner, *Indefinite Detention of Terrorist Suspects*, FindLaw (Jun. 10, 2002), <http://writ.news.findlaw.com/mariner/20020610.html>; B’Tselem, *Administrative Detention in Occupied Territories*, http://www.btselem.org/english/Administrative_Detention/Occupied_Territories.asp (listing procedural shortcomings including lack of notice and the use of secret evidence); Lila Margalit, ACRI, *Administrative Detention in Israel and the Occupied Territories* (April 2008), available at <http://www.acri.org.il/pdf/admindetention.pdf>.

¹¹⁸ *Id.* at art. 7. The Supreme Court of Israel recently limited this provision to require a showing beyond mere membership; rather, the government must show some “connection or contribution to the organization [that] will be

reviewing court also may amend the evidentiary rules if it decides doing so would be beneficial to the disclosure of the truth and in the interests of justice, resulting in the use of “hearsay upon hearsay,” in the words of one practitioner.¹¹⁹ The courts also routinely rely upon secret, *ex parte* evidence upon a finding that disclosure to the attorney or the detainee would prejudice public security.¹²⁰ Although the Israeli Supreme Court has expressly ruled that preventive detention may not be used as an alternative to criminal proceedings,¹²¹ human rights organizations have charged that detainees are frequently held in preventive detention prior to criminal charges.¹²²

B. India

India shares Israel’s inheritance of emergency detention from British colonial rule. The country also has experienced intensive terrorism attacks by separatist groups since its inception,¹²³ such that “the threat of terrorism is ... seen as a threat to the very core of the Indian identity.”¹²⁴ India’s periodic reliance on preventive detention likewise has resulted in widespread human rights violations.¹²⁵

India has had a long and complex history of administrative detention, and there are three detention regimes currently in place in India.¹²⁶ First, under the Armed Forces (Special Powers) Act (“AFSPA”), the military may make warrantless arrests leading to preventive detention up to two years in officially declared “disturbed areas.”¹²⁷ Those arrests—which occur essentially

expressed in other ways that are sufficient to include him in the ‘cycle of hostilities’ in a broad sense.” *A.B. et al. v. State of Israel*, Crim. App. 6659/06 (June 11, 2008), available at http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.htm.

¹¹⁹ One reviewing court has previously held, with respect to the ADL, and held that “[n]ot every piece of hearsay evidence will carry weight with the administrative authority, such as evidence which does not contain more than unfounded rumors ... the evidence must be - bearing in mind the subject-matter, the content and the person producing it - such evidence that every reasonable man would regard it as having evidentiary value and would rely on it to some extent or another.” *H.C. 442/71 Lanski v. Minister of the Interior*, 26(2) P.D. 337, at 357.

¹²⁰ *Id.* at art. 5(e), (f).

¹²¹ See Cr.A. 3514/97, A.D.A. 6/97 Anonymous v. State of Israel.

¹²² B’Tselem, *Administrative Detention in Occupied Territories*, available at http://www.btselem.org/english/Administrative_Detention/Occupied_Territories.asp (“The authorities use administrative detention as a quick and efficient alternative to criminal trial, primarily when they do not have sufficient evidence to charge the individual, or when they do not want to reveal their evidence.”).

¹²³ India grounds its preventive detention authority in a constitutional provision passed in the immediate aftermath of the assassination of Mahatma Gandhi. Chris Gagne, Note, *POTA: Lessons Learned from India’s Anti-Terror Act*, 25 B.C. THIRD WORLD L.J. 261, 266 (2005); Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventative Detention and Personal Liberty in India*, 22 MICH. J. INT’L L. 311, 324-25 (2001).

¹²⁴ *Id.* at 330; see also Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93, 99-100 (2006).

¹²⁵ India signed the ICCPR, but only upon reservation as to security detentions. The Committee expressed regret as to widespread preventive detention but Human Rights Comm., Concluding Observations: India, ¶ 24, U.N. Doc. CCPR/C/79/Add.81 (Aug. 4, 1997).

¹²⁶ See Kalhan, *supra*, at 265-66. The Indian Constitution grants the federal and state governments the power to enact detention laws in the interest of national or state security. See India Const., Sched. 7, List I, Entry 9 (Central Government Powers); *id.* List III, Entry 3 (Concurrent Powers). The constitution permits the denial of core procedural rights for such detentions, but requires administrative or judicial review and a fixed maximum period of detention. *Id.* art. 22(7)(a) (requiring Parliament to specify the maximum period of detention).

¹²⁷ Since 1958, the Armed Forces (Special Powers) Act has endowed the military with extraordinary powers—including administrative detention—in “disturbed areas.” The law was initially enacted as a one-year measure to bring security to a limited region, but its use has extended for five decades and to widespread areas of the Northeast

outside judicial review—have led to widespread reports of torture and extrajudicial killings.¹²⁸ Second, the National Security Act (“NSA”) permits state and federal officers to detain any individual up to twelve months “with a view to preventing him from acting in any manner prejudicial to” various state interests, including national security and public order.¹²⁹ Those arrests include administrative review and offer modest procedural protections, but have been employed in practice to suppress dissent and to target minority groups.¹³⁰ The use of prolonged detention without trial under these regimes has fostered human rights violations and enormous social unrest. The continued violations associated with the expanded military powers have prompted widespread demonstrations and calls from numerous actors—from the U.N. High Commissioner for Human Rights to local and international NGOs—for the AFSPA’s repeal.¹³¹

Third, India has recently experimented with a specific detention regime for terrorism suspects. The Prevention of Terrorism Act (POTA) effectively instituted a modified regime of detention without trial.¹³² The statute was often used to justify the incarceration without charge

Territories, Punjab, Jammu and Kashmir. Kalhan, *supra*, at 114. AFSPA applies to a region following a declaration that the area subject to the Act has been declared “disturbed” by the central or state government. This declaration is not subject to judicial review. Human Rights Watch, *Getting Away With Murder: 50 Years of the Armed Forces (Special Powers) Act (2008)*, <http://www.hrw.org/legacy/background/2008/india0808/>. Section 4(c) of the AFSPA permits soldiers to arrest solely on suspicion that a “cognizable offence” has already taken place or is likely to take place in the future. The AFSPA provides no specific time limit for handing arrested persons to the nearest police station, but merely advises that those arrested be transferred to police custody “with the least possible delay.” AFSPA, §5. Detention may last up to one year in most affected provinces and up to two years in Jammu and Kashmir. Assam Preventive Detention Act, 1980 (six months); Bihar Control of Crimes Act, 1981 (twelve months); Gujarat Prevention of Anti-Social Activities Act, 1985 (twelve months); Jammu and Kashmir Public Safety Act, 1978 (two years).

¹²⁸ See U.S. Dep’t of State, *Country Reports on Human Rights Practices: India*, at § 1(d) (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61707.htm>; see also *infra* at n.136.

¹²⁹ National Security Act, Act. No. 65 of 1980 (India) (“NSA”) at §§3, 13. Courts have exercised judicial review over executive determinations, but the permissible bases for detention remain ill-defined and extremely broad in application. Jinks, *supra*, at 328-29 (detailing jurisprudence); C. Raj Kumar, *Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties*, 33 DENV. J. INT’L L. & POL’Y 195, 213 (2005). Procedural rights under the NSA are extremely limited. Review is conducted before an Advisory Board, an executive body whose members must be qualified to serve as a High Judge, and the Chief of the Board must presently serve as a High Judge. The Board does not conduct a hearing in a traditional sense; evidentiary rules do not apply, the procedure and final report are not public, and the Board does not make formal factual findings. Detainees do not have the right to counsel, compulsory process, or confrontation. Jinks, *supra*, at 335-38 (describing procedural protections). Thus, while India “guarantee[s] a limited regime of procedural rights”. . . [t]hese guarantees . . . arguably fall well short of established international human rights standards.” Jinks, *supra*, at 338.

¹³⁰ See Asian Centre for Human Rights, *Human Rights Report 2005: Manipur*, <http://www.achrweb.org/reports/india/AR05/manipur.htm> (describing how NSA detentions were used to detain protestors of AFSPA).

¹³¹ See UN Human Rights Panel Chief Wants India to Abolish AFSPA, TIMES OF INDIA (Mar. 23, 2009), available at <http://timesofindia.indiatimes.com/India/UN-human-rights-panel-chief-wants-India-to-abolishAFSPA/articleshow/4306996.cms>; Human Rights Watch, *Getting Away with Murder*, *supra*; Amnesty Int’l, *Briefing on the Armed Forces (Special Powers) Act, 1958*, ASA 20/025/2005, at 6-7 (2005), available at [http://web.amnesty.org/library/pdf/ASA200252005ENGLISH/\\$File/ASA2002505.pdf](http://web.amnesty.org/library/pdf/ASA200252005ENGLISH/$File/ASA2002505.pdf); Asian Centre for Human Rights, *Review of the AFSPA: Need for Upholding Primacy of the Rule of Law* (Apr. 2005), available at <http://www.achrweb.org/Review/2005/54-05.htm>.

¹³² A similar pattern can be seen in the Terrorist and Disruptive Activities (Prevention) Act, No. 31 of 1985 (TADA), enacted in 1985 in response to the assassination of Indira Gandhi. See Kalhan et al., *supra*, at 145. Originally expected to expire after two years, the legislature re-enacted TADA in 1987 for another six years. See

or trial of terrorist suspects for up to 180 days.¹³³ Moreover, the statute reversed the burden for bail so that a detainee had to show that there were reasonable grounds to believe that the accused was not guilty and unlikely to commit any other offense while on bail.¹³⁴ Judicial review was guaranteed, but *ex parte* evidence could be considered on a finding that disclosure could jeopardize public safety.¹³⁵ Facing increased criticism and evidence of widespread abuses,¹³⁶ legislators repealed POTA in 2004.¹³⁷ Following the November 2008 terrorist attacks in Mumbai, the Indian Parliament hastily enacted a modified version of POTA that, among other things, again empowers police to detain suspects for up to 180 days without charge.¹³⁸ This regime has not yet been subjected to judicial scrutiny.

Despite their decades-long experimentation with preventive detention, there is no evidence that India and Israel have succeeded in reducing violence. Rather, their history suggests that long-term detention without trial contributes to a cycle of violence and crackdowns resulting in widespread abuse which, in turn, flames unrest and provides recruitment tools for terrorist organizations.¹³⁹ And so on for decades, all without abating violence. It is a familiar

Terrorist and Disruptive Activities (Prevention) Act, No. 28 of 1987; Manas Mohapatra, Comment, *Learning Lessons from India: The Recent History of Antiterrorist Legislation on the Subcontinent*, 95 J. CRIM. L. & CRIMINOLOGY 315, 329 (2004). TADA criminalized a number of terrorism-related offenses, but it was “predominantly used not to prosecute and punish actual terrorists,” but “as a tool that enabled pervasive use of preventive detention and a variety of abuses by the police, including extortion and torture.” *Id.* at 146-47; Mohapatra, *supra*, at 331 (“[T]he actual result of [TADA] was widespread abuse as its broad definition of terrorism was used to crack down on political dissidents ... and was used in some regions exclusively against religious and ethnic minorities.”). Between 1987 and 1995, TADA was used to “put 77,000 people in prison,” of which only 8,000 eventually were tried for terrorist activities and only two percent ultimately were convicted. See Amnesty Int’l, India: Report of the Malimath Committee on Reforms of the Criminal Justice System: Some Observations 22 (Sept. 19, 2003).

¹³³ POTA § 49(2)(a)-(b).

¹³⁴ POTA § 49(6)-(7). The Supreme Court upheld these provisions. *People’s Union for Civil Liberties v. Union of India*, [2004] S.C. 456; *State of Tamil Nadu v. R.R. Gopal*, [2003] SC 800.

¹³⁵ Kalhan et al., *supra*, at 148-52. The Supreme Court has implied the right to judicial review in preventive detention. *Shalini Soni v. Union of India* (1980) 4 SC 544.

¹³⁶ For example, the law was often invoked to justify large-scale sweeps and detentions targeted at religious or political minorities. See, e.g., Amnesty Int’l, Abuse of the Law in Gujarat: Muslims Detained Illegally in Ahmedabad, at 1-2 (Nov. 6, 2003), available at [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/ASA200292003ENGLISH/\\$File/ASA2002903.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/ASA200292003ENGLISH/$File/ASA2002903.pdf) (discussing illegal detention of Muslim minority groups and disregard for POTA safeguards); Human Rights Watch, In the Name of Counter-Terrorism: Human Rights Abuses Worldwide, Briefing Paper for the 59th Session of the United Nations Commission on Human Rights 15 (Mar. 25, 2003), available at <http://www.hrw.org/un/chr59/counter-terrorism/bck.pdf> (discussing detention of political figures and vulnerable groups such as children and the elderly).

¹³⁷ Mohapatra, *supra*, at 335. Nonetheless, administrative (and often abusive) detentions continue under pre-existing security laws National Security Act (applying to Punjab) and the Armed Forces Special Powers Act or the Armed Forces (Jammu and Kashmir) Special Powers Act.

¹³⁸ Rama Lakshmi, *Anti-Terror Bills Advance in India*, WASH. POST at A21 (Dec. 18, 2008); South Asia Human Rights Documentation Centre, *The Unlawful Activities (Prevention) Amendment Act, 2008: Repeating the Mistakes of the Past* (22 Jan. 2009), available at <http://www.hrdc.net/sahrdc/hrfeatures/HRF191.htm> (“The Unlawful Activities (Prevention) Amendment Act, 2008, intended to deal with terrorism, and adopted in haste following the November 2008 terrorist attacks in Mumbai, borrow provisions from the previous, unsuccessful anti-terror laws, rather than offering a new approach.”).

¹³⁹ See Kalhan et al., *supra*, at 105-106 (describing the pattern); see also Hiren Gohain, *Chronicles of Violence and Terror*, 42(12) ECONOMIC AND POLITICAL WEEKLY 1012 (Mar. 30, 2007); Sanjay Barbora, *Rethinking India’s Counter-Insurgency Campaign in the North-East*, 41(35) ECONOMIC AND POLITICAL WEEKLY 3805 (Sept. 8, 2006).

scenario, evoking the failed British experiments in Northern Ireland and the repressive regime of South Africa.

IV. CONCLUSION

A system of long-term detention without charge not only would conflict with centuries of U.S. constitutional law and practice; it would place the United States on the far margins of an emerging global consensus among rule of law states that terrorism is best combated within the recognized confines of the criminal justice system. The experience of our allies demonstrates that detention without charge is not only the wrong choice as a matter of law; it is the wrong choice as a matter of policy. Should the United States take the unprecedented step of implementing indefinite detention without trial for terrorism suspects, it would have profound consequences for the rule of law globally and for U.S. foreign policy, ultimately making us less safe and less free.