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# Rethinking 'Preventive Detention' from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects

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# RETHINKING “PREVENTIVE DETENTION” FROM A COMPARATIVE PERSPECTIVE: THREE FRAMEWORKS FOR DETAINING TERRORIST SUSPECTS

Stella Burch Elias\*

## ABSTRACT

*President Barack Obama has convened a multi-agency taskforce whose remit includes considering whether the United States should continue to hold terrorist suspects in extra-territorial “preventive detention,” should develop a new system of “preventive detention” to hold terrorist suspects on domestic soil, or should eschew any use of “preventive detention.” American scholars and advocates who favor the use of “preventive detention” in the United States frequently point to the examples of other countries in support of their argument. At the same time, advocates and scholars opposed to the introduction of such a system also turn to comparative law to bolster their arguments against “preventive detention.” Thus far, however, the scholarship produced by both sides of the debate has been limited in two key respects. Firstly, there have been definitional inconsistencies in the literature—the term “preventive detention” has been used overbroadly to describe a number of different kinds of detention with very little acknowledgment of the fundamental differences between these alternative regimes. Secondly, the debate has been narrow in scope—focusing almost exclusively on “preventive detention” in three or four other (overwhelmingly Anglophone) countries. This Article seeks to*

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\* Law Clerk to the Honorable Stephen Reinhardt. Yale Law School, J.D. 2009. I am very grateful to Harold Hongju Koh, Hope Metcalf, Judith Resnik, Reva Siegel, Muneer Ahmad, Sarah Cleveland, and John Ip for their generous advice and thoughtful comments on earlier versions of this article, to Allison Tait, Megan Barnett, and the Yale Law Teaching Series workshop participants for their helpful feedback, and to Meera Shah, Megan Crowley, and the *Columbia Human Rights Law Review* for their terrific editing. Above all, I owe a tremendous debt to Bram Elias for his countless contributions to this piece.

*advance the debate about “preventive detention” by moving beyond each of these limitations. First, the Article defines, analyzes, and differentiates between the different kinds of “preventive detention.” Second, the Article broadens the scope of the debate by comparing the systems of terrorism-related “preventive detention” in use in thirty-two different countries. The Article constructs a taxonomy of “preventive detention” based on core principles of international law to distill the key attributes of the “preventive detention” regimes in each of the countries surveyed. Using the taxonomy, the Article proposes that there are three overarching frameworks used to detain terrorist suspect detainees: (1) the pre-trial detention framework; (2) the immigration detention framework; and (3) the national security detention framework. This Article proposes that U.S. policymakers contemplating possible future approaches to the detention of suspected terrorists should move beyond the inapposite and misleading question of whether or not to engage in “preventive detention,” and should instead determine which of these three frameworks offers the most appropriate approach to the detention of terrorist suspects. The Article concludes with the argument that a version of the pre-trial detention framework approach would be most suited for use in the United States.*

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INTRODUCTION

*Our responses to terrorism, as well as our efforts to thwart it and prevent it, should uphold the human rights that terrorists aim to destroy. Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism—not privileges to be sacrificed at a time of tension.*<sup>1</sup>

On January 22, 2009 President Barack Obama signed executive orders mandating the closure of the detention camp at Guantánamo Bay, Cuba, within one year,<sup>2</sup> ending the Central Intelligence Agency’s secret detention facilities,<sup>3</sup> and holding all interrogations of suspected terrorists to the “noncoercive” standards set out in the Army Field Manual.<sup>4</sup> At the same time, President Obama signed Executive Order 13493, “Review of Detention Policy Options,” establishing an interagency taskforce whose mission is to:

conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent

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1. Kofi Annan, Sec’y Gen. U.N., Remarks at a special meeting of the Security Council’s Counter-Terrorism Committee with International, Regional, and Sub-Regional Organizations (Mar. 6, 2003).

2. Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009).

3. Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009).

4. *Id.* The Order’s language, however, leaves open the ability to employ “authorized, non-coercive” techniques in addition to those detailed in the Army Field Manual. *Id.* See also Scott Shane, Mark Mazzetti & Helene Cooper, *Obama Reverses Key Bush Security Policies*, N.Y. Times, Jan. 23, 2009, at A16.

with the national security and foreign policy interests of the United States and the interests of justice.<sup>5</sup>

In July 2009, the task force appointed by President Obama announced that it required a six-month extension to more fully consider the options available for the detention of terrorist suspect detainees.<sup>6</sup>

This Article explores one of the options currently being considered by the task force: the use of “preventive detention”—i.e. detention without trial or charge—to hold suspected terrorists.<sup>7</sup> The Guantánamo detainees are perhaps the most (in)famous prisoners held in “preventive detention” anywhere in the world today, and widespread criticism at home and abroad appears to have contributed to the Obama administration’s decision to close the detention camp by January 2010.<sup>8</sup> Despite this criticism, however, a

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5. Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009).

6. See David Johnston, *Panel Misses A Deadline in Reviewing Guantánamo*, N.Y. Times, July 21, 2009, at A14. The task force produced an interim report, leaving open the possibility of an indefinite detention regime, but their final decision has yet to issue. *Id.*

7. The first recorded use of the term “preventive detention” was by Lord Wrenbury in the World War I English case *R. v. Halliday*, [1917] AC 260, (H.L.) (appeal taken from K.B.). Today the term “preventive detention” is typically used to describe a situation where a person is detained for reasons that are either political or connected with national security, public order, or public safety. A number of synonyms for “preventive detention” are used in jurisdictions throughout the world, including “preventative detention,” “detention without charge or trial,” “administrative detention,” “administrative internment,” “internment,” “*retention administrative*,” “*mise aux arrets*,” “*detention administrative*,” “house arrest,” “attachment,” “ministerial detention,” and “*a disposicion del poder ejecutivo nacional*.” See Andrew Harding & John Hatchard, *Preventative Detention and Security Law: A Comparative Survey* 23 (1993); Int’l Comm’n of Jurists Memorandum on International Legal Framework on Administrative Detention and Counter-Terrorism 4 (December 2005), available at [http://www.icj.org/IMG/pdf/Administrative\\_detent\\_78BDB.pdf](http://www.icj.org/IMG/pdf/Administrative_detent_78BDB.pdf) [hereinafter ICJ Memorandum]. However, these synonyms refer overwhelmingly to pre-arrest or administrative immigration detention, rather than detention without charge or trial on purely national security grounds. See ICJ Memorandum. The discussion *infra* will demonstrate that virtually no democracy in the world has a form of national security detention that is untethered from immigration or criminal processes.

8. See Shane & Glaberson, *Obama Issues Directive to Shut Down Guantánamo*, N.Y. Times, Jan. 22, 2009, at A1 (“As for closing Guantánamo, [Obama] said that would take time but must be done because it has become ‘a damaging symbol to the world.’”). The United Nations, national governments, international human rights organizations, and American advocates, scholars, and jurists called for the detention facility to be closed and the detainees to be tried

number of commentators in the United States continue to argue that that some degree of divergence from the constitutionally and internationally mandated practice of "speedy and public trials" for all those detained on suspicion of committing or conspiring to commit a crime<sup>9</sup> might be justified in cases involving terrorism suspects.<sup>10</sup> Pointing to what they perceive to be the unprecedented danger of the terrorist threat and to the security concerns inherent in releasing classified information in open court, some scholars have argued that the United States should consider establishing a "National Security Court,"<sup>11</sup> with different evidentiary standards and different powers of

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within the U.S. federal legal system. *See, e.g.*, Harold Hongju Koh, *Restoring America's Human Rights Reputation*, 40 *Cornell Int'l L. J.* 635 (2007) (arguing that closure of Guantánamo is an essential step in the restoration of America's human rights reputation amongst the world community); Amnesty Int'l, *Framework: End Illegal US Detentions*, AI Index AMR 51/167/2007, Dec. 10, 2007. Even former Bush administration officials have stressed the need to close Guantánamo and either release the detainees or bring them to trial within the federal justice system. *See, e.g.*, Matthew Waxman, *The Smart Way to Shut Gitmo Down*, *Wash. Post*, Oct. 28, 2007, at B4.

9. The Sixth Amendment to the U.S. Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. International human rights law also upholds the right to fair trial, as discussed in more detail in Part I.B *infra*.

10. *See, e.g.*, Rosa Brooks, *Protecting Rights in the Age of Terrorism: Challenges and Opportunities*, 36 *Geo. J. Int'l L.* 669, 677–78 (2005) (criticizing the Bush administration's legal inventions as based on "fallacious reasoning" while noting the need to "acknowledge[e] that the Geneva Conventions were designed in a different era, and they do not fully reflect the unique challenges to both security and rights we face today"); Glenn M. Sulmasy, *The Law of Armed Conflict in the Global War on Terror: International Lawyers Fighting the Last War*, 19 *Notre Dame J.L. Ethics & Pub. Pol'y* 309, 314 (2005) ("The nature of warfare has changed. International lawyers must not cling to the definitions of the past if history has rendered them obsolete."). *But see* Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 *Chi. J. Int'l L.* 499, 499 (2005) ("[W]e should be skeptical of the view that the complementary frameworks of criminal law, human rights law, the web of multilateral and bilateral arrangements for interstate cooperation in police work and judicial assistance, and the law of armed conflict fail to provide tools necessary to combat terrorism.").

11. *See, e.g.*, Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, *N.Y. Times*, July 11, 2007, at A19; Stuart Taylor Jr., *The Case for a National Security Court*, *Nat'l J.*, Feb. 24, 2007, at 15; Ken Anderson & Elisa

detention, to oversee some form of American “preventive detention” regime. While this viewpoint has garnered criticism from human and civil rights organizations and prominent members of the criminal bar,<sup>12</sup> it seems to be gaining popularity among academics, politicians, and the mainstream media.<sup>13</sup> Indeed, on the very day that President Obama issued the executive order forming the interagency task force to consider how best to detain terror suspects, the *Wall Street Journal* published an article claiming that “the idea of a national security court . . . to supervise detentions”<sup>14</sup> was “gaining political traction.”<sup>15</sup>

American scholars who favor the establishment of a National Security Court and a “preventive detention” regime in the United States frequently point to comparative examples in support of their argument.<sup>16</sup> At the same time, advocates engaged in Guantánamo-related litigation often turn to international and comparative law to bolster their arguments that the regime of “preventive detention” employed by the Bush administration at Guantánamo afforded the detainees insufficient process.<sup>17</sup> Consideration of other nations’

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Massimino, *The Cost of Confusion: Resolving Ambiguities in Detainee Treatment*, Stanley Found., Bridging the Foreign Pol’y Divide Project, Mar. 2007, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=968177#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968177#) (arguing pros and cons as to whether a special counterterrorism court should assume responsibility for the work of the federal courts and military commissions and conduct limited review of the continued detention of terrorist suspects).

12. See Richard Zabel & James Benjamin, White Paper, *In Pursuit of Justice: Prosecuting Terrorism in the Federal Courts*, Human Rights First, May 2008, available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>; see also John C. Coughenour, Op-Ed., *How to Try a Terrorist*, N.Y. Times, Nov. 1, 2007, at A27; Kelly Anne Moore, Op-Ed., *Take Al-Qaeda to Court*, N.Y. Times, Aug. 21, 2007, at A19.

13. Glen Sulmasy, *Momentum for a National Security Court*, Jurist Forum, July 13, 2007, <http://jurist.law.pitt.edu/forumy/2007/07/momentum-for-national-security-court.php>.

14. Editorial, *Obama and Guantánamo: Fighting Terrorism is Simpler When You’re a Candidate*, Wall St. J., Jan. 22, 2009, at A16.

15. *Id.*

16. See, e.g., Amos Guiora, *Where Are Terrorists To Be Tried—A Comparative Analysis of Rights Granted to Suspected Terrorists*, 56 Cath. U. L. Rev. 805 (2007).

17. See, e.g., Brief for the Commonwealth Lawyers Association as Amicus Curiae in Support of Petitioners, Brief of Federal Courts and International Law Professors as Amici Curiae in Support of Petitioners (Geneva Enforceability), Brief for the Commonwealth Lawyers Association as Amicus Curiae in Support of the Petitioners, Brief of Amici Curiae Amnesty International, et al. in Support of Petitioners, Brief of International Humanitarian Law Experts as Amici Curiae in

terrorism-related detention legislation and jurisprudence is therefore pertinent as President Obama’s taskforce debates whether or not the United States should continue with the Bush Administration’s extra-territorial approach to “preventive detention,” develop a domestic system of “preventive detention,” or adopt a wholly different approach.

Thus far, however, American scholars’ analysis of other nations’ terrorism-related detention regimes has been limited in two key respects. Firstly, there have been definitional inconsistencies in the literature, as the term “preventive detention” has been used overbroadly to describe a number of different kinds of detention. “Preventive detention” has been applied to systems of pre-charge detention,<sup>18</sup> pre-trial detention,<sup>19</sup> administrative detention,<sup>20</sup> immigration detention<sup>21</sup> and national security detention,<sup>22</sup> with very little acknowledgment of the fundamental differences between these alternative detention regimes. This has led some scholars to conclude that U.S. allies overseas uniformly resort to detention of terrorist suspects by the executive for an unlimited period without charge or trial—a regime of detention defined in this Article as “national security detention”<sup>23</sup>—a conclusion that, as the discussion *infra* will show, is far from accurate.<sup>24</sup>

Secondly, the debate has been narrow in scope, focusing almost exclusively on “preventive detention” in three or four other countries—the United Kingdom, Canada, Israel, and, occasionally, Australia.<sup>25</sup> While there is obvious value in considering the use of

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Support of Petitioners, Amicus Curiae Brief of 383 United Kingdom and European Parliamentarians in Support of Petitioners, *Boumediene v. Bush and Al Odah v. United States*, 128 S.Ct. 2229 (2008) (Nos. 06-1195 and 06-1196) (arguing that detainees are entitled to the opportunity to challenge the legality and conditions of their detention under international humanitarian and human rights law). See discussion *infra* Part I-A for full definitions.

18. See discussion *infra* Part I-A for full definitions.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. See *id.* for an explanation of the differences between “pre-trial detention,” “immigration detention,” and “national security detention.”

24. “National security detention” is discussed in detail in Part IV *infra*.

25. See, e.g., 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) (explaining Canada’s approach to deportation to torture in “exceptional circumstances” as articulated by *Suresh v.*



terrorism-related detention regimes by these American allies, there is also much to be gained by undertaking a broader analysis and situating any future U.S. policy within a truly global context. This Article seeks to advance the debate about “preventive detention” by moving beyond each of these limitations. First, the Article defines, analyzes, and differentiates between the different kinds of “preventive detention.” Second, the Article seeks to broaden the ongoing debate about “preventive detention” by comparing the U.S. approach with the systems of terrorism-related “preventive detention” used in thirty-one other countries. In doing so, this Article aims to provide an illustrative (though by no means exhaustive) study of the underappreciated diversity of “preventive detention” systems in use throughout the world today.

The countries whose “preventive detention” regimes have been chosen for inclusion in this Article are all countries whose legal or political systems offer relevant and legitimate points of comparison with that of the United States, either because they share a common law heritage,<sup>26</sup> are established democracies,<sup>27</sup> have longstanding experience combating terrorism,<sup>28</sup> or have developed new approaches to the detention of terrorist suspects in the wake of the terrorist attacks of September 11, 2001.<sup>29</sup> There are, obviously,

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Canada, [2002] 1 S.C.R. 3, ¶ 78); Colin Warbrick, *The European Response to Terrorism in an Age of Human Rights*, 15 Eur. J. Int'l L. 989, 1007–1015 (2004) (discussing the United Kingdom's detention policies post-September 11); Mark R. Schulman, *National Security Courts: Star Chamber or Specialized Justice?*, 15 ILSA J. Int'l & Comp. Law 533, 548 (Spring 2009) (summarizing the use of emergency powers by the United Kingdom and its effect on civil liberties). There are logical explanations for the limited scope of most scholarship on this issue, including the linguistic challenges of using non-English materials, and scholars' desire to limit inquiries to nations that are considered to be close U.S. allies.

26. Including: Australia, Bangladesh, Canada, India, Ireland, Kenya, Malaysia, New Zealand, Nigeria, Pakistan, Singapore, South Africa, Sri Lanka, Swaziland, Tanzania, Trinidad & Tobago, and Zambia.

27. Including: Denmark, France, Germany, Greece, Ireland, Israel, Italy, and Norway.

28. Including: France, Greece, India, Israel, the Russian Federation, Spain, Turkey, and the United Kingdom.

29. The United States Congress was not alone in passing new legislation in 2001 that granted law enforcement officers new powers to arrest and detain potential terrorist suspects. See U.S.A. PATRIOT of 2001, Pub. L. No. 107–56, 115 Stat. 272 (codified in scattered sections of the U.S.C.). Following the passage of U.N. Security Council Resolution 1373, many countries around the world adopted new anti-terrorist laws, and a considerable number of these new laws include special provisions for the detention of suspected terrorists. U.N.S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (issued under Chapter VII of the

U.N. Charter (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression)). The resort to preventive detention on national security grounds is, therefore, not just the preserve of the United States and its key allies. Nor is it a recent phenomenon. Preventive detention has been used by national governments for hundreds of years during processes of colonization and decolonization, the Cold War, separatist conflicts, and states of emergency. *See, e.g.*, South Africa: Internal Security Act 44 of 1950; Terrorism Act 83 of 1967 s. 6; Police Amendment 82 of 1980; Burma: The Public Order (Preservation) Act, No. 16 of 1947, as amended by No. 28 of 1947, Burma Code (1953), v. 2. (providing that the president can order any person removed from the country or detained “with a view to preventing him from acting in any manner prejudicial to the public safety or to the maintenance of public order”); Chile: Decreto Ley 13, Clarification of the Sense and Scope of Article 73 of the Code of Military Justice (1973) (providing for continuance of military tribunals in peacetime); Colombia: Constitution of 1886, art. 28 (allowing for peacetime preventive detention when there are “serious reasons to fear a disturbance of public order”); Decreto Legislativo No. 2686 de 26 Oct. 1966, art. 7, [1966] Diario Oficial 32.074 (authorizing detention for up to 60 days in certain regions); Greece: The Greek Case, 1969 Y.B. Eur. Conv. on Human Rights 127–8 (Eur. Comm’n on H.R.) (describing Constitutional Act “Beta” of 1967, which declared martial law); India: Defence of India Act, 1939, No. 35, Acts of Parliament, 1939 (providing for “the apprehension and detention in custody of any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a manner prejudicial to the public safety or interest or to the defense of British India”); Prevention Detention Act, No. 4 of 1950, India Code (1955) v. 3(1)(a) (providing the government may detain any person “to prevent him from acting in any manner prejudicial to the defense of India, the relations of India with foreign powers, or the security of India”); Malaysia: International Security Act, 1960, available at [http://ejp.icj.org/img/internal\\_security\\_act\\_1960.pdf](http://ejp.icj.org/img/internal_security_act_1960.pdf); Paraguay: Constitution of the Republic of Paraguay of 1940, art. 52; Decree No. 8313 (Dec. 31, 1959) (extending the state of siege), translated at <http://www.cidh.org/countryrep/Paraguay78eng/chap.1.htm>; Philippines: Proclaiming a State of Martial Law in the Philippines, Proclamation No. 1081, (1972), V.L.Doc; In the New Society, Book 1, p. 7; Poland: Dekret o stanie wojennym [Decree on Martial Law], 154/1981, s. II, Dziennik Ustaw 29; Rozporządzenie Ministra Spraw Wewnętrznych o sprawie zasad i trybu zatrzymywania, kontroli osobistej, przeglądania zawartości bagazy oraz sprawdzania ładunku osob naruszających lub zagrażających porządkowi i bezpieczeństwu publicznemu [Regulation of the Ministry of Interior on Principles and Mode of Detention and Search of Persons who Contravene or Threaten Public Order and Security], 28/1984, arts. 1–18, Dziennik Ustaw 6; Singapore: Preservation of Public Security Ordinance, No. 25 (1955) (giving the Chief Secretary the power to order that a person be detained for up to two years if necessary to prevent acts that would be prejudicial to the Security of Malaya). In 1985, a survey by the International Commission of Jurists identified 85 countries around the world with laws permitting the executive to detain, without trial, individuals suspected of posing a threat to national security, public order, or public safety. *See* Niall MacDermott, Sec’y General, Int’l Comm’n of Jurists, *Draft*

limitations inherent in the selection of just thirty-two countries for this survey. Since the Article consciously focuses on common law, commonwealth countries, and European democracies, civil law countries—particularly those in Latin America and Africa—are underrepresented. Although including more civil law countries would bolster the strength of this Article’s conclusions, the thirty-two nations considered in this Article constitute a good starting point for this conversation about global approaches to preventive detention.

Starting with a discussion of internationally agreed-upon definitions of different kinds of preventive detention, Part I of this Article constructs a taxonomy based upon eight individual units of analysis drawn from clearly articulated principles of international law relating to detention.<sup>30</sup> The taxonomy is used to distill the key attributes of the preventive detention regimes in each of the thirty-two countries included in this study.<sup>31</sup> By doing so, it is possible—despite the many and significant differences between the nations surveyed—to identify three overarching frameworks that have been adopted for the detention of terrorist suspects in the different countries surveyed. For reasons that will be explored in detail in the Article, I have designated these frameworks (1) the pre-trial detention framework; (2) the immigration detention framework; and (3) the national security detention framework.<sup>32</sup> The borders between these three frameworks are often blurred in practice, and countries whose detention regimes predominantly fit into one framework may also, on occasion, detain terrorist suspects under conditions more

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*Intervention on Administrative Detention to U.N. Commission on Human Rights*, Int’l Comm’n of Jurists Newsletter, January/March 1985, at 52–56.

30. See discussion *infra* Part I-B. The taxonomy builds upon the work undertaken by Steven Greer in the early 1990s. See *infra* n. 47, 48.

31. Appended to this Article is a table populating the taxonomy, which provides an overview of the legal basis for, and characteristics of, the differing preventive detention regimes of each country surveyed.

32. Each of these three designations is derived from a different element of the power of the sovereign state—police power in the case of pre-trial detention, immigration power in the case of immigration detention, and national security power in the case of national security detention. In creating these designations, I am particularly indebted to the work of Monica Hakimi and John Ip. See John Ip, *Comparative Perspectives on the Detention of Terrorist Suspects*, 16 *Transnat’l L. & Contemp. Probs.* 773 (2007) (analyzing and comparing the detention regimes in the United States, United Kingdom, Canada, and New Zealand); Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed-Conflict Divide*, 33 *Yale J. Int’l L.* 369 (2008) (identifying three models for the detention of suspected terrorists).

akin to that those found in another framework.<sup>33</sup> This complexity leads some scholars to miss the conceptual distinction between the different “preventive detention” frameworks. As Part I will show, though, this clear conceptual distinction between the frameworks is an important tool both for understanding preventive detention regimes in practice around the world, and for applying lessons from those regimes to the American experience.

Parts II through IV of the Article undertake a detailed analysis of the pre-trial detention framework, immigration detention framework, and national security detention framework in turn, exploring the defining characteristics of the “preventive detention” regimes of the countries within these frameworks. Part II considers the pre-trial detention framework countries—Colombia, Brazil, Denmark, France, Germany, Italy, Norway, Greece, Ireland, Spain, Turkey and the United Kingdom (UK). Part III considers the countries that have adopted an immigration detention framework—Canada, New Zealand and South Africa—and one country that has rejected this framework—the UK. Part IV considers the countries whose “preventive detention” regimes can best be characterized as operating within a national security detention framework—Kenya, India, Mozambique, Malaysia, Nigeria, Pakistan, the Russian Federation, Singapore, Sri Lanka, Swaziland, Tanzania, Trinidad & Tobago, Zambia and, to a certain extent, Australia and Israel. In analyzing and placing the regimes of these countries within a particular framework, these sections explore the common threads between countries that have adopted similar approaches, and key differences between countries whose policies are divergent. Among the factors that have shaped these regimes are constitutional and statutory structures, legislative histories, experiences of the terrorist threat, and use of preventive detention in domestic criminal or civil law; moreover, common values and social mores have also, in many instances, played a vital role in the development of comparable standards for the treatment of individuals held in preventive detention.<sup>34</sup> Each Part concludes with a consideration of the

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33. For example, a country that would ordinarily be characterized as an immigration detention framework nation, because it uses immigration law as its principal tool for detaining terrorist suspects, may also hold terrorist suspects in pre-trial detention when criminal charges have been filed against that individual.

34. See *infra* Part II-B for a discussion of the similarities and differences between the pre-trial detention framework nations, *infra* Part III-B for a discussion of the similarities and differences between the immigration detention

advantages or disadvantages of the framework in question, and its potential utility for the United States. In its Conclusion, this Article turns to the lessons that American policymakers—particularly those in President Obama’s interagency taskforce—can draw from this comparative analysis of “preventive detention” regimes.

## I. TOWARD A TAXONOMY OF PREVENTIVE DETENTION

### A. Defining “Preventive Detention”

There is no standard, internationally agreed-upon definition of preventive detention.<sup>35</sup> Although there are exceptions, the term “administrative detention” is more frequently employed in civil law countries, and the term “preventive” or “preventative” detention is used more often in common law countries. This apparently innocuous distinction is nonetheless important, as the differing terms “administrative” and “preventive” are intrinsically value-laden, suggesting, in the case of the former, that detention is a tool of the administration or bureaucracy, and, in the case of the latter, that detention is necessary to “prevent” a potential threat or danger from occurring.<sup>36</sup>

In international instruments, the terms “preventive detention,” “internment,” and “administrative detention” appear to be used interchangeably. The most commonly used definition of “preventive detention” in international (particularly United Nations) documents is “persons arrested or imprisoned without charge.”<sup>37</sup> The

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framework nations, and *infra* Part IV-B for a discussion of the similarities and differences between the national security detention framework nations.

35. Although there is no formal international consensus on definitions that shape the law of detention, a number of transnational institutional actors (both public and private) are engaged in the process of developing an appropriate lexicon. The International Commission of Jurists (ICJ) has been particularly active in this respect, and this part of the Article extensively draws upon the findings summarized in a memorandum released by the ICJ in 2005. See ICJ Memorandum, *supra* note 7, at 4–6.

36. See generally Stanislaw Frankowski & Dinah Shelton eds., *Preventative Detention: a Comparative and International Law Perspective* (1992) (providing a comparative study of “preventive” and “administrative detention” practices while illustrating the problem with conflating the two).

37. Standard Minimum Rules for the Treatment of Prisoners, ECOSOC Res. 2076 (LXII), ¶ 95, U.N. Doc. E/RES/2076 (May 13, 1977) [hereinafter *Standard Minimum Rules*]. See also ICJ Memorandum, *supra* note 7 at 5 (stating that “Generally, international norms do not provide a definition of administrative

U.N. Centre for Human Rights and the U.N. Crime Prevention and Criminal Justice Unit has further clarified this definition, describing it as applying "to a broad range of situations outside the process of police arresting suspects and bringing them into the criminal justice system."<sup>38</sup> The International Committee of the Red Cross favors the term "internment," which it defines as "deprivation of liberty ordered by the executive authorities when no specific criminal charge is made against the individual concerned."<sup>39</sup> M. Louis Joinet, the special expert reporting to the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, uses the term "administrative detention." In the Sub-Commission's report on the practice of preventive detention he provides the following definition of administrative detention:

[D]etention is considered as "administrative detention" if, *de jure* and/or *de facto*,<sup>40</sup> it has been ordered by the executive and the power of decision rests solely with the administrative or ministerial authority, even if a remedy *a posteriori* does exist in the courts against such a decision. The courts are then responsible only for considering the lawfulness of this decision and/or its proper enforcement, but not for taking the decision itself.<sup>41</sup>

However, these three descriptions of preventive detention, internment, and administrative detention do not encompass other forms of deprivation of liberty that may also be described as

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detention, but refer to it with expressions such as 'persons arrested or imprisoned without charge').

38. U.N. Centre for Human Rights, Crime Prevention and Criminal Justice Branch, Human Rights and Pre-Trial Detention: A Handbook of International Standards Relating to Pre-Trial Detention, Professional Training Series No. 3, ¶ 177, U.N. Doc. HR/P/PT/3, U.N. Sales No. E.94.XIV.6 (1994), available at [http://www.ohchr.org/Documents/Publications/training3\\_en.pdf](http://www.ohchr.org/Documents/Publications/training3_en.pdf). ICJ Memorandum, *supra* note 7 at 5.

39. Claude Pilloud et al., Int'l Comm. of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 875 (Yves Sandoz et al. eds., 1987), available at <http://www.icrc.org/IHL.NSF/COM/470-750096?OpenDocument>; ICJ Memorandum, *supra* note 7 at 5.

40. De facto preventive detentions occur in a "legal vacuum," often when martial law has been imposed. This Article deals exclusively with de jure preventive detention—i.e. detentions that are (at least in principle) sanctioned by the constitutional and legislative framework of the country in which they occur.

41. ECOSOC, Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, Report on the Practice of Administrative Detention, ¶ 17, U.N. Doc. E/CN.4/Sub.2/1989/27 (July 6, 1989) (statement by M. Louis Joinet). ICJ Memorandum, *supra* note 7, 5–6.

preventive detention, including but not limited to: pre-trial charge detention; pre-trial detention; detention during immigration proceedings; and, with certain conditions, detention of an excessive length in custody pending trial. All of these forms of detention may also constitute “preventive detention” when they are employed in the context of state security.<sup>42</sup>

This multiplicity of overlapping definitions of “preventive detention” is partially responsible for misconceptions that American scholars have about the systems that other countries use for the detention of terrorist suspects.<sup>43</sup> In the interests of clarity, this essay therefore proposes a tripartite definition of preventive detention: deprivation of liberty ordered by executive authorities because of national security concerns<sup>44</sup> for (i) *pre-trial detention* when terrorism or terrorism-related criminal charges are pending or will ultimately be brought before a court of law; (ii) *immigration detention* when measures are being taken to control immigration, asylum, deportation, or extradition, through court, administrative, or other proceedings; or (iii) *national security detention* when no specific criminal charge is made against the individual concerned, and judicial review is limited to review of the detention, not the

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42. Parts II and III *infra* will explore the use of pre-charge, pre-trial, and immigration detention as an explicitly “preventive” measure in the terrorism context. See also Frankowski & Shelton, *supra* note 35 *passim* (considering a broader definition of “preventive detention”).

43. See, e.g., Gregory S. McNeal, *Beyond Guantánamo, Obstacles and Options*, 103 Nw. U. L. Rev. Colloquy 29 *passim* (2008) (conflating “national security detention” and other models of “preventive detention”); *Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System Before the S. Comm. on the Judiciary*, 110th Cong. 9–10 (2008) (statement of Amos Guiora, Professor of Law, S.J. Quinney College of Law, University of Utah) (describing the mixed Israeli approach to administrative national security detention as a prototypical approach to “preventive detention”).

44. This stipulation is extremely important in establishing the limits of the scope of this Article. There are a variety of circumstances, unrelated to national security or terrorism concerns, in which “preventive” detention is employed, including (but not limited to) drug rehabilitation programs, the treatment of mental illness, and the prevention of certain varieties of criminal activity (particularly any that are related to organized crime). Such instances are beyond the ambit of this Article. The term “national security” is also potentially nebulous and open to interpretation; for the purposes of this survey, preventive detention on terrorism-related or national security grounds is used to describe a situation where a person is detained for reasons connected with public order, safety, and security.

underlying suspected offense.<sup>45</sup> Although under some circumstances pre-trial and immigration detention may be employed on security grounds, it is only the third category of national security detention that may truly be considered as purely national-security specific preventive detention.

#### B. Interpreting International Standards to Construct a Taxonomy of “Preventive Detention”

Any meaningful comparison of a number of different nations’ legal frameworks and practices requires both clear definition of the terms involved, and a solid methodology underpinning the comparison. A handful of scholars have sought to differentiate between a small number of countries’ “preventive detention” regimes in the aftermath of 9/11.<sup>46</sup> To date, however, nobody has offered an

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45. I have included administrative detention on immigration grounds in this survey because of the crucial effect that a detainee’s citizenship status has upon the executive’s recourse to preventive detention in many of the jurisdictions surveyed in this Article. In many instances, detention in immigration proceedings is used either as a proxy for, or to enforce, preventive detention on national security grounds. *See, e.g.*, *El Badrawi vs. Dep’t of Homeland Sec.*, 579 F.Supp.2d 249, 253 (D. Conn. 2008) (noting that immigration violator was also a national security threat); *Turkmen v. Ashcroft*, Nos. 02 CV 2307, 04 CV 1809 (E.D.N.Y. Oct. 3, 2006) (finding that plaintiffs were investigated for terrorist connections before being deported or leaving the country); *Elmaghraby v. Ashcroft*, 2005 U.S. Dist. LEXIS 21434 (E.D.N.Y. 2005), *aff’d in part and rev’d in part*, 490 F.3d 143 (2d Cir. 2007), *rev’d*, 129 S.Ct. 1937 (2009) (plaintiffs held as persons “of high interest” to the government’s terrorism investigation); *Zaoui v. Attorney-General*, [2005] 1 N.Z.L.R. 577 (S.C.) (noting that immigration applicant was a national security risk); *A v. Sec’y of State for the Home Dep’t*, [2005] 2 A.C. 68 (appeal taken from Eng.) (U.K.) (finding that foreign national detainees were detained due to suspected terrorist ties); *Charkaoui (Re)*, [2005] 2 F.C. 299 (Can.) (considering permanent resident’s residency status alongside national security concerns).

46. *See, e.g.*, Ip, *supra* note 32, at 808–26 (comparing the United States’ detention regime to those in the United Kingdom, Canada, and New Zealand); Hakimi, *supra* note 32, at 375–89 (arguing that international law furnishes three models of detention). Government ministries and NGOs have also produced survey pieces. *See, e.g.*, United Kingdom Foreign & Commonwealth Office, Counter-Terrorism Legislation and Practice: A Survey of Selected Countries 1–2 (2005), available at <http://www.fco.gov.uk/resources/en/pdf/4175218/counterterrorism-Oct05> (comparing various countries’ responses to terrorism); Jago Russell, *Liberty, Terrorism Pre-Charge Detention Comparative Law Study* 2–5 (2007) [hereinafter *Liberty Study*] (comparing the time a suspect can be held without charge in various countries), <http://www.liberty-human-rights.org.uk/issues/pdfs/pre-charge-detention-comparative-law-study.pdf>.



objective taxonomy as a baseline for this differentiation.<sup>47</sup> In the pages that follow, I explain how I have constructed a taxonomy upon which to base this comparative analysis of preventive detention regimes.

The starting point for this taxonomy is settled international consensus (enshrined in treaties and customary international law) upon the standards of detention by national executives. I have chosen international (rather than any particular national) legal standards and norms, in an attempt to create a non-hierarchical approach to the different countries surveyed. Discussion of different nations' legal regimes may be infused with normative attitudes towards those nations.<sup>48</sup> By starting from an international law perspective and classifying each country's preventive detention regime purely on the basis of how those regimes measure up against eight objective units of analysis, drawn from international legal standards, I seek to minimize the risk of normative bias infringing upon the outcome of the survey.

The eight units of analysis that I use to form the taxonomy of "preventive detention" regimes are as follows: (i) the legal basis for detention; (ii) notification of charges; (iii) initial appearance before a judicial, administrative or other authority; (iv) period of time in detention without charge or trial; (v) access to legal counsel; (vi) right to a fair and public hearing; (vii) judicial review; and (viii) rules regarding interrogation.<sup>49</sup> Each of these separate criteria has been

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47. Steven Greer prepared a taxonomy, similar in many respects to the one developed in this Article, to compare the attributes of Commonwealth countries' systems of public-security oriented administrative detention. Stephen Greer, *Preventive Detention and Public Security-Towards a General Model*, in Harding & Hatchard, *supra* note 7. This Article owes a significant debt to Greer's work, particularly with respect to his methodology for identifying and measuring the different attributes of differing detention regimes. Greer does not, however, use his taxonomy to identify and differentiate between different frameworks of "preventive detention." Greer's analysis is also outdated, as many of the nations he considered have amended their counterterrorism laws in the aftermath of 9/11.

48. See Anne Peters & Heine Schwenke, *Comparative Law Beyond Post-Modernism*, 49 Int'l & Comp. L.Q. 800, 801-02 (2000) (critiquing the post-modernist critique of comparative law, which holds that "legal comparison is trapped in cultural frameworks").

49. These eight units of analysis build upon the work of Stephen Greer in the early 1990s, adapting the categories that Greer first identified, in line with the changes in various nations' approaches to the detention of terrorist suspects post-9/11. See Greer, *supra* note 47.

addressed in international treaties, studies, and colloquia relating to detention, and has been seen as reflecting standards in the context of both administrative/preventive detention and detention within the regular criminal justice system, in line with the United Nations’ longstanding commitment to affording administrative detainees the same protections as prisoners within the criminal justice system.<sup>50</sup>

The legal basis for detention is the first criterion by which the different detention regimes analyzed in this Article are compared. The importance of a legally-grounded, non-arbitrary basis for detention is addressed in Article 9 of the Universal Declaration of Human Rights,<sup>51</sup> Article 9 of the International Covenant on Civil and Political Rights (hereinafter ICCPR),<sup>52</sup> Article 6 of the African

50. In 1977, the United Nations Economic and Social Council declared that identical standards should be used to measure the treatment of detainees, irrespective of whether they are subject to preventive detention or detention within the regular criminal justice system. Standard Minimum Rules, *supra* note 37 (“Without prejudice to the provisions of article 9 of the International Covenant on Civil and Political Rights, persons arrested or imprisoned without charge shall be accorded the same protection as that accorded under part I [Rules of General Application, rules 6-55 of the Standard Minimum Rules] and part II, section C [Prisoners Under Arrest or Awaiting Trial, rules 84-93]. Relevant provisions of part II, section A [Prisoners Under Sentence, rules 56-81], shall likewise be applicable where their application may be conducive to the benefit of this special group of persons in custody, provided that no measures shall be taken implying that re-education or rehabilitation is in any way appropriate to persons not convicted of any criminal offense.”). In 2003, the United Nations reiterated this commitment, specifically stating that the methods employed to combat terrorism, including the detention of terrorist suspects, should be commensurate with established international legal norms. S.C. Res 1456, ¶ 6, U.N. Doc. S/RES/1456 (January 20, 2003) (“States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”); *see also* ECOSOC Res. 2003/37, ¶ 60, U.N. Doc. E/CN.4/2003/37 (Mar. 4, 2003) (noting the importance of protecting human rights); ECOSOC Res. 2003/68, ¶ 13, E/CN.4.2003/68 (Dec. 17, 2002) (“no matter how wrongly, dangerously, or even criminally a person may act, every human being is legally and morally entitled to protection on the basis of internationally recognized human rights and fundamental freedoms.”).

51. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., art. 9, U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration] (“No one shall be subjected to arbitrary arrest, detention or exile.”).

52. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 9(1), S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171 [hereinafter ICCPR] (“Everyone has the right to liberty and security of person.

Charter of Human and Peoples' Rights,<sup>53</sup> Article 7 of the American Convention on Human Rights (hereinafter IACHR),<sup>54</sup> Article 5 of the European Convention on Human Rights (hereinafter ECHR),<sup>55</sup> and Principles 9 and 12 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (hereinafter Principles on Detention).<sup>56</sup> Since the early 1990s, comparative scholars have assessed the use of "preventive detention" against the legal basis upon which that detention rests.<sup>57</sup> In this context, a key point of differentiation between alternative preventive detention regimes is whether the power to detain without charge or trial derives from a country's penal code, immigration law, or constitutional and statutory provisions devolving extraordinary powers to the executive in crisis situations or in the interests of national security. Indeed, the remainder of this Article will show that this difference is the cornerstone of three different frameworks by which the "preventive detention" systems of the countries surveyed may be categorized. Whether or not a nation uses the existing provisions of its criminal code, immigration regulations, or national

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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.")

53. African Charter on Human and People's Rights, *adopted* June 27, 1981, art. 6, 21 I.L.M. 58, 60 (entered into force Oct. 21, 1986) [hereinafter African Charter] ("Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.")

54. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 7, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143, 145 (entered into force July 18, 1978) [hereinafter IACHR] ("1. Every person has the right to personal liberty and security. 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. 3. No one shall be subject to arbitrary arrest or imprisonment.")

55. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 5(1), Europ. T.S. No. 5, 23 U.N.T.S. 221, 226 (entered into force Sept. 3, 1953) [hereinafter ECHR] ("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 procedure prescribed by law . . .")

56. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, at 298, U.N. Doc. A/RES/43/173 (Dec. 9, 1988) [hereinafter Principles on Detention].

57. *See, e.g.*, Frankowski & Shelton, *supra* note 36, at 13 (discussing why providing the precise legal basis for detention is necessary for a detainee to exercise his rights and for proper review of detention).

security provisions to govern the executive's preventive detention of terrorist suspects influences the shape of the "preventive detention" regime in each country surveyed, particularly in terms of notification of charges, period of detention, access to counsel, and judicial review.<sup>58</sup>

The second criterion by which the different detention regimes are contrasted is the extent and timeliness of notification of the grounds on which an individual is detained. International standards governing the notification of a detainee of the grounds on which he is detained are articulated in Article 9 of the ICCPR,<sup>59</sup> Principles 10 and 13 of the Principles on Detention,<sup>60</sup> and Articles 5 and 6 of the ECHR.<sup>61</sup> Interpreting Article 9 of the ICCPR, the U.N. Human Rights Committee and the U.N. Centre for Human Rights have both stressed the fundamental importance of sufficiently detailed notice of the facts and the law governing an individual's detention.<sup>62</sup> There is broad consensus in the comparative literature pertaining to the detention of suspected terrorists that prompt notification of the

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58. To a certain extent, national security and state of emergency based detention regimes intersect with international humanitarian law. This will be discussed *infra*, particularly with respect to Israel. The detention of combatants is permitted under the Third Geneva Convention, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention III], and the detention of non-combatants for security reasons is permitted under the Fourth Geneva Convention, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention IV].

59. ICCPR, *supra* note 52, art. 9(2) ("Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.").

60. Principles on Detention, *supra* note 56, Principle 10 ("Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.").

61. Under article 5(2) of the ECHR an arrestee must be "informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him." Under article 6(3)(a) of the Convention an accused person is entitled to be informed of the nature and cause of the accusation against him.

62. See also General Comment 8, Human Rights Comm., Right to Liberty and Security of Persons (Article 9) (June 30, 1982), reprinted in Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 8, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994) [hereinafter General Comment 8] (asserting that Article 9 of the ICCPR requires states to inform administrative detainees, and not just criminal detainees, of the reasons for detention).

charges a detainee faces is a yardstick for fundamental fairness in proceedings.<sup>63</sup> The amount of time that elapses between an individual's arrest and his notification of the charges he faces is a strong indicator of a country's alignment with a particular framework of preventive detention—the pre-trial detention framework countries overwhelmingly mandate notification of charges within a twenty-four to forty-eight hour period,<sup>64</sup> and the national security detention framework countries frequently do not inform detainees of the grounds for their detention at all.<sup>65</sup>

The third criterion compared and contrasted in this study is the speed and process of a detainee's initial appearance before a judicial, administrative, or other authority. The importance of prompt appearance before a judicial or other authority is addressed in Article 9(3) of the ICCPR,<sup>66</sup> Principles 4, 11, and 37 of Principles on Detention,<sup>67</sup> and Article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance.<sup>68</sup> The U.N. Human Rights Committee, the Inter-American Commission on Human Rights (IACHR), and the European Court of Human Rights (ECtHR) have all published findings underscoring the importance of prompt appearance before a judicial, administrative, or other authority.<sup>69</sup>

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63. See Jago Russell, *Liberty, Terrorism Pre-Charge Detention Comparative Law Study* 17 (2007) [hereinafter *Liberty Study*], available at <http://www.liberty-human-rights.org.uk/issues/pdfs/pre-charge-detention-comparative-law-study.pdf>.

64. See discussion *infra* Part II.A and the medium gray-coded countries in *Table I* in the Appendix.

65. See discussion *infra* Part IV.A and the dark gray-coded countries in *Table I* in the Appendix.

66. ICCPR, *supra* note 52, art. 9(3) (“Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.”).

67. Principles on Detention, *supra* note 56.

68. Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, art. 10, U.N. Doc. A/RES/47/133 (Dec. 18, 1992) (“1. Any person deprived of liberty shall be held in an officially recognized place of detention, and, in conformity with the national law, be brought before a judicial authority promptly after detention.”).

69. See General Comment 8, *supra* note 62, at ¶ 2 (“Paragraph 3 of article 9 [of the International Covenant on Civil and Political Rights] requires that in criminal cases any person arrested or detained has to be brought “promptly” before a judge or other officer authorized by law to exercise judicial power.”); OAS, *Annual Report of the Inter-American Comm’n on Human Rights 1984-1985*, at 141, OEA/Ser.L/V.II.66, doc 10 rev.1 (1985) (criticizing El Salvador’s failure to promptly charge prisoners or bring them before judicial authorities); Brogan and

Scholars who advocate *for* national security detention nonetheless acknowledge that these international treaty commitments mandate meaningful judicial review of the detention of all terrorist suspect detainees.<sup>70</sup> The speed and type of judicial review of detention fundamentally affects whether a particular nation's regime falls within the pre-trial detention framework, the immigration detention framework, or the national security detention framework. In the pre-trial detention framework countries, for example, terrorist suspect detainees are brought before a judge or magistrate within a specified period of time (usually twenty-four to forty-eight hours).<sup>71</sup> In contrast, in the immigration detention framework countries, individuals are entitled to review of their cases during a similar timeframe, but such a review is either undertaken by a judge *in camera* acting in her individual capacity or by an administrative authority.<sup>72</sup>

The fourth criterion for comparison is the maximum length of time an individual may be detained. Length of detention in criminal proceedings is addressed in Article 9(3) of the ICCPR<sup>73</sup> and Principle 38 of the Principles on Detention.<sup>74</sup> Both the IACtHR and ECtHR have stressed that indefinite pre-trial detention, or detention without trial, is prohibited.<sup>75</sup> Prolonged administrative detention is also

Others, 145-B Eur. Ct. H.R. (ser. A) at 33–34 (1985) (holding that detaining a suspect for four days and six hours before he was brought before a judge did not fulfill the requirement of promptness and so violated article 5(3) of the European Convention on Human Rights).

70. See, e.g., Hakimi, *supra* note 32, at 409–10 (arguing that in a system of administrative detention, terrorist suspect detainees must have an opportunity for prompt and meaningful judicial review of their detention).

71. See discussion *infra* Part II-A and the medium gray-coded countries in Table I in the Appendix.

72. See discussion *infra* Part III-A and the light gray-coded countries in Table I in the Appendix.

73. ICCPR, *supra* note 52, art. 9(3) ("Anyone arrested or detained on a criminal charge . . . shall be entitled to trial within a reasonable time or to release.").

74. Principles on Detention, *supra* note 56, Principle 38 ("A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.").

75. The ECtHR has construed the right "to trial within a reasonable time or to release pending trial" under article 5 (3) as requiring an individual's provisional release once continued detention is no longer reasonable "reasonable," holding that "reasonableness" "must be assessed in relation to the very fact of his detention." Neumeister Case, 5 Eur. Ct. H.R. (ser. A) at 36–37 (1968). The "reasonableness" of the period of delay before trial and the "reasonableness" of the time period that an individual spends in detention must be assessed

prohibited under international law.<sup>76</sup> Comparativist scholars have consistently criticized the indefinite use of administrative detention in post-colonial nations in Africa and Asia,<sup>77</sup> condemning these nations' divergence from the norms established by the ICCPR and other international instruments. The period during which a terrorist suspect detainee may be held in detention without trial or charge certainly influences the framework to which a country belongs. Countries, for example, that permit indefinite detention of terrorist suspect detainees are exclusively national security detention framework nations. In fact, almost all countries within the national security detention framework allow indefinite detention of suspected terrorists.<sup>78</sup>

The fifth criterion used to contrast the different nations' detention regimes is the extent to which the detainees are afforded access to legal counsel. Article 14(3) of the ICCPR,<sup>79</sup> Rule 93 of the Standard Minimum Rules,<sup>80</sup> Principle 17 of the Principles on Detention,<sup>81</sup> and the U.N. Basic Principles on the Role of Lawyers<sup>82</sup>

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separately. Therefore, although the period of time that elapses before a trial may be "reasonable" under Article 6(1) of the Convention, continuous detention of an individual for that same time period might not be "reasonable." *Id.* at 37; *see also* Matznetter Case, 8 Eur. Ct. H.R. (ser. A) at 34 (1969).

76. Restatement (Third) of Foreign Relations § 702(e) (1990) ("A state violates [customary] international law if, as a matter of state policy, it practices, encourages or condones . . . prolonged arbitrary detention.").

77. *See, e.g.,* C.H. Powell, *Terrorism and Governance in South Africa and Eastern Africa*, in *Global Anti-Terrorism Law and Policy* 555 (Victor V. Ramraj, Michael Hor & Kent Roach eds., 2005); Andrew Harding, *Singapore*, in *Harding & Hatchard, supra* note 7, at 200 ("[T]he seed planted in *Liversidge* . . . [gave] . . . nurture, in South East Asia, to a whole equatorial jungle of cases which say that in national security matters the satisfaction of the executive cannot be challenged in the courts.").

78. *See* discussion *infra* Part IV and the dark gray-coded countries in *Table I* in the Appendix.

79. ICCPR, *supra* note 52, art. 14(3) ("[E]veryone shall be entitled to . . . communicate with counsel of his own choosing [and] . . . to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.").

80. Standard Minimum Rules, *supra* note 37, Rule 93 ("an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser.").

81. Principles on Detention, *supra* note 56, Principle 17 ("A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.").

all address the vital importance of access to counsel. The U.N. Human Rights Committee has specifically stressed the importance of immediate access to legal counsel for those suspected of committing terrorism-related offenses, whether they are held in pre-trial or national security detention.<sup>83</sup> The Inter-American Commission on Human Rights has also examined a law that prevented a detainee from having counsel during a period of pre-trial detention and investigation, noting that decisive evidence may be produced during the initial period of detention and holding that the lack of legal advice during the first few days of detention seriously impinged upon the right to a defense.<sup>84</sup> In comparing different detention regimes' provisions for access to counsel, this taxonomy also considers whether legal aid is available to fund representation for those unable to afford to pay for a lawyer. The right to free legal counsel for those who cannot afford their own representation is also guaranteed in international instruments.<sup>85</sup> The ECtHR and the European

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82. *See, e.g.*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27–September 7, 1990, Basic Principles on the Role of Lawyers [hereinafter Principles on Lawyers], Principle 7, available at <http://www.unhcr.org/refworld/pdfid/3ddb9f034.pdf> (“Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than 48 hours from the time of arrest or detention.”); *id.* Principle 8 (“All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality.”).

83. *See* Report of the Human Rights Committee Official Records of the General Assembly, 46th Sess., Supp. No. 40 (A/46/40) ¶ 166 (Spain) (disapproving of a state system whereby a suspected terrorist held in pre-trial detention was entitled only to a state-appointed defense attorney, as opposed to one of his own choosing, during the first five days of detention); Human Rights Committee, Concluding Observations of the Human Rights Committee: Israel, ¶ 13, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003) (stating that human rights law requires that any detainee held in administrative detention be provided with access to legal counsel).

84. *See* OAS, *Annual Report of the Inter-American Commission on Human Rights, 1985-1986*, OEA/Ser.L/V/II.66, doc 10 rev.1, at 154 (1985) (discussing El Salvador). Counsel must be permitted to be present when the accused gives a statement, is interrogated, or signs a statement. *See* Inter-Am. C.H.R., *Report on the Situation of Human Rights in the Republic of Guatemala*, OEA/Ser.L/V/II.61, doc. 47 rev.1, at 91 (1983) (finding deprivation of an “essential requirement of due process” where counsel was appointed only after an interrogation had resulted in a signed statement).

85. *See, e.g.*, ICCPR, *supra* note 52, art. 14(3) (“[E]veryone shall be entitled to . . . have legal assistance assigned to him . . . without payment by him in any



Commission go one step further and hold that it is not enough for a state to appoint defense counsel for indigent defendants, but that the state also has an obligation to provide effective counsel and see that counsel is performing her duties, and if necessary replace her or cause her to fulfill her duties adequately.<sup>86</sup> The ECtHR and European Commission have further defined the right to counsel as including the right to consultations with counsel which are unsupervised by the authorities of places of detention,<sup>87</sup> and have even in some cases found that the right to adequate facilities for preparing a defense implies a right of reasonable access to the prosecution's files.<sup>88</sup> The

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such case if he does not have sufficient means to pay for it . . . ."); Standard Minimum Rules, *supra* note 37, Rule 93 ("[A]n untried prisoner shall be allowed to apply for free legal aid where such aid is available . . . ."); Principles on Lawyers, *supra* note 82, Principle 3 ("Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.").

86. See Legal assistance; nature of assistance, 2 Digest of Strasbourg Case-Law Relating to the European Convention on Human Rights § 6.3.4.3.4, at 850–51 (citing Eur. Comm'n. H.R., App. No. 9127/80 (1981) (unpublished) (stating that right to effective assistance of counsel requires state to ensure that counsel performs or is replaced); Artico Case, 37 Eur. Ct. H.R. (ser. A) at 16 (1980) ("[M]ere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfill his obligations.").

87. This right applies both to personal visits and to correspondence between a detained person and counsel. See, e.g., Case of Schönenberger and Durmaz, 137 Eur. Ct. H.R. (ser. A) at 12–14 (1988) (finding that Swiss authorities' failure to forward to a detainee a letter from his lawyer constituted a breach of his right to respect for his correspondence under ECHR art. 8); S. v. Switzerland, 220 Eur. Ct. H.R. (ser. A) at 16 (1991) ("The Court considers that an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from [ECHR] Article 6 § 3(c).").

88. See X. v. Austria, 9 Eur. Comm'n H.R. Dec. & Rep. 50, 52 (1977) ("[T]he Commission notes that the right of access to the file is not as such guaranteed, although it may be implied by [Article 6] that under certain circumstances the person concerned or his lawyer must have reasonable access to the file."); Access to files, 2 Digest of Strasbourg Case-Law Relating to the European Convention on Human Rights § 6.3.3.3.3, at 805 (citing Eur. Comm'n H.R., App. No. 2435/65 (1966) (unpublished)) (stating that an accused person or counsel has a right of reasonable access to the relevant case file); see also Guy Jaspers v. Belgium, App. No. 8403/78, 27 Eur. Comm'n H.R. Dec. & Rep. 61, 87 (1981) (finding that, though

scholarly literature on the detention of terrorist suspects is replete with references to the vital importance of access to counsel—for detainees held both overseas and in the United States.<sup>89</sup> Interestingly, however, the right of access to counsel does not always determine the framework of "preventive detention" to which a country belongs. As might be expected, the pre-trial detention framework countries all provide for access to counsel, with many providing for access to free counsel for indigent detainees.<sup>90</sup> As might also be expected, many, though not all, of the national security detention framework countries have no provisions guaranteeing detainees a right to counsel.<sup>91</sup>

The sixth criterion used to compare and contrast the different countries' detention regimes is the right to a "fair and public hearing."<sup>92</sup> This right is enshrined in Article 10 of the Universal Declaration of Human Rights,<sup>93</sup> Article 14 of the ICCPR,<sup>94</sup> Article 7 of the African Charter,<sup>95</sup> and Article 6(1) of the ECHR.<sup>96</sup> In this context,

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the ECHR does not expressly provide for a right of access to the prosecution's file, one can be inferred from article 6(3)).

89. See, e.g., Louise Arbour, U.N. High Comm'r for Human Rights, In Our Name and on Our Behalf, Speech at Chatham House (Feb. 15, 2006), in 55 Int'l & Comp. L.Q. 511, 519 ("Even in states of emergency, minimum access to legal counsel . . . [remains] mandatory") (internal citations omitted).

90. See discussion *infra* Part II and the medium gray-coded countries in Table I in the Appendix.

91. See discussion *infra* Part IV and the dark gray-coded countries in Table I in the Appendix. National security detention framework countries that do recognize a right to counsel are Pakistan, the Russian Federation, and Zambia. The two "mixed" framework countries, Australia and Israel, also recognize a right to counsel.

92. This internationally recognized right is incorporated into the American constitutional guarantee of procedural Due Process. See U.S. Const. amend. V; U.S. Const. amend XIV.

93. Universal Declaration, *supra* note 51, art. 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.").

94. ICCPR, *supra* note 52, art. 14 (1) ("All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.").

95. African Charter, *supra* note 53, art. 7(1). The African Commission on Human and Peoples' Rights elaborates on article 7 (1) of the African Charter and guarantees further rights including; notification of charges; appearance before a judicial officer; right to release pending trial; presumption of innocence; adequate preparation of the defense; speedy trial; examination of witnesses; right to an

the U.N. Human Rights Committee has specifically criticized the trial of civilians before military or special courts on the grounds that such courts often “do not afford the strict guarantees of the proper administration of justice . . . which are essential for the effective protection of human rights.”<sup>97</sup> The notion of what constitutes a fair and public hearing varies considerably around the world. International legal scholars agree, however, on a basic core of rights to transparency of proceedings and adjudication before a neutral decision-maker.<sup>98</sup> The variations between civil code countries’ and common law countries’ approaches to adjudication make a precise comparative analysis of differing degrees of fair and public hearings rather challenging, and so this unit of analysis has a limited impact on the framework to which a particular country belongs. That said,

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interpreter. African Commission on Human and Peoples’ Rights, Resolution on the Right to Recourse and Fair Trial (9), ACHPR Res. 4(XI)92 (March 2-9, 1992) ¶ 2, available at [http://www.achpr.org/english/\\_doc\\_target/documentation.html?../resolutions/resolution09\\_en.html](http://www.achpr.org/english/_doc_target/documentation.html?../resolutions/resolution09_en.html).

96. ECHR, *supra* note 55, art. 6.1 (A trial must be before an “independent and impartial tribunal.”). The European Court and Commission on Human Rights have emphasized that in order to be “independent and impartial” a tribunal must be independent from the executive and the parties to the proceedings. *See* Leo Zand v. Austria, No. 7360/76, 15 Eur. Comm’n H.R. Dec. & Rep. 70, 81 (1979) (holding that the Salzburg Labour Court is an “independent tribunal” within the meaning of Article 6(1) of the Convention and thus able to hear a civil action).

97. General Comment 13, Human Rights Comm., Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14) (April 13, 1984), ¶ 4, reprinted in Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 8, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994). *See also* Miguel Angel Estrella v. Uruguay, 2 Selected Decisions of the Human Rights Committee Under the Optional Protocol 74/1980, at 93 (29 March 1983); Elena Beatriz Vasilskis v. Uruguay, 2 Selected Decisions of the Human Rights Committee Under the Optional Protocol 80/1980, at 105 (31 March 1983) U.N. International Covenant on Civil and Political Rights, Selected Decisions of the Human Rights Committee under the Optional Protocol, volume 2 (finding that a military court procedure violated article 14 of the Covenant).

98. *See, e.g.*, Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* 406–08 (2002); Arbour, *supra* note 89, at 524; Hakimi, *supra* note 32, at 372. For a thorough examination of judicial transparency and its continued importance in the United States, see Judith Resnik, *Courts: In and Out of Sight, Site and Cite*, 53 Villanova L. Rev. (forthcoming 2009).

one recurring theme in the national security framework nations is that review of a detainee's confinement is conducted *in camera*.<sup>99</sup>

The seventh criterion used to evaluate the different nations' approaches to detention is the availability of judicial review of a detainee's confinement. The importance of judicial review is addressed in Article 8 of the Universal Declaration of Human Rights,<sup>100</sup> Article 9(4) of the ICCPR,<sup>101</sup> Principle 32 of the Principles on Detention,<sup>102</sup> U.N. Commission on Human Rights Resolution 1992/35,<sup>103</sup> Article 7 of the African Charter,<sup>104</sup> and Article 43 of the Fourth Geneva Convention.<sup>105</sup> The U.N. Human Rights Committee has stressed that the right to judicial review is applicable in instances of national security detention as well as immigration

99. See discussion *infra* Part IV and the dark gray-coded countries in *Table I* in the Appendix.

100. Universal Declaration, *supra* note 51, art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.")

101. ICCPR, *supra* note 52, art. 9(4) ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.")

102. Principles on Detention, *supra* note 56, princ. 32 ("A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.")

103. U.N. Econ. & Soc. Council, Comm'n H.R., Res. 1992/35, ¶ 1, U.N. Doc. E/1992/22 (February 28, 1992) ("[A]nyone who is deprived of his or her liberty by arrest or detention shall be entitled to institute proceedings before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is found to be unlawful.")

104. African Charter, *supra* note 53, art 7(1) ("Every individual shall have the right to have his cause heard [including] . . . the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force . . .").

105. Geneva Convention IV, *supra* note 58, art. 43 ("Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case with a view to the favourable amendment of the initial decision, if circumstances permit."). Although this provision does not apply *de jure* in most cases of administrative detention by a national government, this is an example of one internationally agreed minimum standard of review, i.e., once every six months.

detention and pre-trial detention.<sup>106</sup> The taxonomy used in this Article considers whether judicial review is “strong” or “weak,” using the definitions of the terms provided by Stephen Greer:

‘Strong’ judicial review involves the thorough scrutiny of the executive decision and the determined assertion of detainees’ rights. ‘Weak’ judicial review . . . tends to lean in the other direction on the grounds that the courts have neither the expertise nor the right to query the judgment of an executive officer that detention in any given case is justified in the public interest.<sup>107</sup>

This Article also adapts Greer’s criteria for adjudging whether judicial review is “strong” or “weak,” namely whether courts employ an objective test to determine whether or not detention is necessary, or rely upon the subjective opinion of the executive that justified the detention in the first place.

The eighth and final criterion of comparison is the rules regarding interrogation. The U.N. Centre for Human Rights’ Handbook of International Standards Relating to Pre-trial Detention stresses that “absence of torture and ill-treatment is the guiding principle behind the standards on the treatment of detainees.”<sup>108</sup> International condemnation of the use of torture against detainees is articulated in Article 5 of the Universal Declaration,<sup>109</sup> Article 7 of the ICCPR,<sup>110</sup> the entire text of the Convention against Torture and

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106. See Antti Vuolanne v. Finland (265/1987) (7 April 1989), Official Records of the General Assembly, Forty-fourth Session, supp. No. 40 (A/44/40), annex X, sect. J (holding that article 9 of the Covenant applies to all cases of detention, including administrative or preventive detention, so that individuals in such detention have the right to have the decision to detain them reviewed in a court of law.).

107. Greer, *supra* note 47, at 31.

108. U.N. Centre for Human Rights, Crime Prevention and Criminal Justice Branch, Human Rights and Pre-Trial Detention: A Handbook of International Standards Relating to Pre-Trial Detention, Professional Training Series No. 3, ¶122, U.N. Doc. HR/P/PT/3, U.N. Sales No. E.94.XIV.6 (1994), available at [http://www.ohchr.org/Documents/Publications/training3\\_en.pdf](http://www.ohchr.org/Documents/Publications/training3_en.pdf).

109. Universal Declaration, *supra* note 51, art. 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

110. ICCPR, *supra* note 52, art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”).

Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>111</sup> Article 21 of the Principles on Detention,<sup>112</sup> the Preamble of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,<sup>113</sup> and many other international and supra-national treaties.<sup>114</sup> This Article therefore considers whether or not interrogation of detainees is permitted at all in each country, and if so, what protections are in place to safeguard individual detainees’ rights. There is a vast academic and popular literature on the rights of detainees to humane treatment at the hands of their captors, as mandated by international law, that has been used to critique different “preventive detention” regimes—including the regime currently in force at Guantánamo Bay.<sup>115</sup> This unit of analysis is closely correlated with a country’s overall framework: those countries with the most stringent limitations on inhumane treatment or interrogation of detainees fall within the pre-

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111. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

112. Principles on Detention, *supra* note 56, princ. 21 (“It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person . . . No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment.”).

113. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, pmbl, *opened for signature* Nov. 26, 1987, Europ. T.S. No. 126 (entered into force Feb. 1, 1989) [hereinafter European Torture Convention].

114. For a general discussion of the definition of torture and other treatment prohibited by international standards, see Nigel S. Rodley, *The Treatment of Prisoners Under International Law* (2d ed. 1999). Again, international humanitarian law intersects with treaties and legislation prohibiting mistreatment of detainees. All detainees are entitled to the base protections of Common Article 3, and prisoners of war may not be questioned beyond name, rank, and serial number.

115. See, e.g., Jayawickrama, *supra* note 98, at 296–352 (discussing the right to freedom from torture and interpretations of what the various prohibited forms of conduct may include); W. Michael Reisman, *Rasul v. Bush: A Failure to Apply International Law*, 2 *J. Int’l Crim. Just.* 973 (2004) (discussing the procedural rights of detainees); Warren Hoge, *Investigators for UN Urge U.S. to Close Guantánamo*, *N.Y. Times*, Feb. 17, 2006, at A6 (discussing a U.N. report that argued that many of the detention and interrogation practices used in Guantánamo Bay amounted to torture); Jane Mayer, *Outsourcing Torture: Annals of Justice*, *New Yorker Mag.*, Feb. 14, 2005 (detailing the United States’ extraordinary rendition program).

trial detention or immigration detention frameworks of preventive detention.<sup>116</sup>

### C. Three Alternative Frameworks of Preventive Detention

When the “preventive detention” regimes used to detain terrorist suspect are measured against the eight units of analysis described *supra*—i.e. legal basis for detention, notification, appearance before a judicial, administrative, or other authority, maximum period of time in detention, access to legal counsel, right to a fair and public hearing, judicial review, and rules regarding interrogation—a number of trends and patterns emerge. *Table I*, in the Appendix to this Article, populates the taxonomy with data for each of the thirty-two countries included in this study. Despite significant differences between the nations surveyed, it is possible to identify three distinct frameworks that have been adopted for the detention of terrorist suspects, designated as (1) the pre-trial detention framework; (2) the immigration detention framework; and (3) the national security detention framework.<sup>117</sup> These frameworks underpin the tripartite definition of preventive detention used in this Article.<sup>118</sup> Each of the countries surveyed in this Article employs a scheme for the detention of terrorism suspects that may be characterized as fitting into one of these three frameworks. *Map I*, in the Appendix, illustrates the geographical location of the countries within each framework.

There are, of course, methodological challenges implicit in locating any country within a particular framework. It would be inaccurate to suggest that there are unwavering bright line distinctions between the different frameworks and different countries

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116. See discussion *infra* Part II-A and III-A and the medium gray-coded and light gray-coded countries in *Table I* in the Appendix.

117. As mentioned *supra*, I am particularly indebted to the work of Monica Hakimi and John Ip in developing these frameworks. See, Ip, *supra* note 32; Hakimi, *supra* note 32.

118. The definition used is “deprivation of liberty ordered by the executive authorities because of national security concerns for (i) *pre-trial detention* when terrorism or terrorism-related charges are pending or will ultimately be brought before a court of law; (ii) *immigration detention* when measures are being taken to control immigration, asylum, deportation or extradition, through court, administrative or other proceedings; or (iii) *national security detention* when no specific criminal charge is made against the individual concerned, and judicial review is limited to review of the detention, not the underlying suspected offense.” See discussion *supra* Part I-A.

involved. As noted *supra*, the borders between the frameworks may be blurred in practice.<sup>119</sup> It is this very complexity that has led some American scholars to treat all detention of terrorist detainees, whether of the pre-trial, immigration, or national security variety, as essentially indistinguishable forms of preventive detention.<sup>120</sup> This conflation of the differing “preventive detention” frameworks has led to incorrect assumptions about the prevalence of national security detention in other nations, and inapposite arguments about its potential for future use in the United States.<sup>121</sup>

In order to minimize the potential pitfalls of mischaracterizing and thereby misclassifying the complex detention regimes of the countries surveyed, this Article allocates countries to a detention framework on the basis of the most extreme—i.e., most rights-stripping—form of detention used by that country to hold suspected terrorists. A country is allocated to the pre-trial detention framework if the jurisprudential and/or legislative basis for its detention of terrorist suspects is anchored in its criminal law and penal code; to the immigration detention framework if anchored in its immigration law system; or the national security detention framework if anchored in special powers delegated to the executive at

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119. There may be countries whose detention practices arguably fit into more than one framework, or countries that predominantly fit into one framework but who also, on occasion, detain terrorist suspects in circumstances more akin to that employed by the countries found within another framework. For example, a country that is characterized as an immigration detention framework nation, because it uses immigration law as a tool for detaining terrorist suspects, may also hold terrorist suspects in pre-trial detention when criminal charges have been filed against that individual. One example is South Africa, which ordinarily uses the criminal justice system to detain terrorists, but holds non-citizen terrorist suspects in immigration detention. *See* discussion *infra* Part III.A (detailing South African detention laws).

120. This is an approach taken by Amos Guiora, among others. *Cf.* Guiora, *supra* note 16, at 806 (describing various schemes for detaining and trying terrorists, but analyzing the different regimes similarly, noting that “while civil, democratic states are not engaged in war as defined by international law, neither are they confronting the common criminal as defined by the traditional criminal law paradigm.”).

121. *Id.* at 834 (recommending an amendment to the Foreign Intelligence Surveillance Act (FISA) to permit terrorist suspects to be tried before FISA courts, and noting that the “[i]mplementation of methods extending beyond the criminal law paradigm suggests recognition that the traditional approach is ineffective”); *see also* Phillip Bobbit, *Terror And Consent: The Wars For The Twenty-First Century* 241–288 (2008) (describing how the the United States has shunned international and constitutional law precepts in dealing with modern-day terrorists).



times of war, national emergency, or crisis. Of these three bases for detention, pre-trial detention is generally regarded as the least extreme/most rights-respecting system of detention, and national security detention is generally regarded as the most extreme/most rights-stripping system of detention.<sup>122</sup> Therefore, a country that sometimes uses pre-trial detention or immigration detention to hold terrorist suspects, but also uses national security detention, is classified as a national security detention framework country in this Article.<sup>123</sup>

Adopting this methodological approach, the countries surveyed divide as follows: (1) the pre-trial detention framework countries, in which the detention of terrorist suspects is wholly, or largely, governed by the existing provisions of the penal code, are Brazil, Colombia, Denmark, France, Germany, Italy, Norway, Greece, Ireland, Spain, Turkey, and the United Kingdom;<sup>124</sup> (2) the immigration detention framework countries, in which the specialized judicial review mechanisms of immigration law have been adapted to provide oversight of preventive detention of terrorist suspects are

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122. See Hakimi, *supra* note 32, at 395 (finding that the “armed conflict” model’s “liberty costs are prohibitive,” whereas the “criminal model is substantially more protective of individual liberties”).

123. This is the situation of the United States today. The U.S. uses pre-trial detention within the regular criminal justice system, as well as immigration detention to hold individuals suspected of terrorism-related activities in the territorial United States, and employs national security detention at Guantánamo Bay, Bagram Airbase, and undisclosed black sites overseas. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Wash. Post, Nov. 2, 2005, at A1.

124. Strictly speaking, the nations within this framework fall into two subgroups; (i) countries in which the detention of terrorist suspects is governed entirely by the existing provisions of the criminal code (Denmark, France, Germany, Italy, Norway) and (ii) countries in which the preventive detention of terrorist suspects is governed by the provisions of the criminal code, augmented by specialized legislation (Greece, Ireland, Spain). The United Kingdom is a particularly interesting example; as discussed in detail *infra*, the UK would previously have been categorized as an immigration detention framework nation, but it explicitly rejected the immigration framework, in favor of the criminal law framework. Turkey is a similarly interesting case, because it previously employed what would be regarded as a national security framework regime, but, in 2004, Turkey reformed its Penal Code (a prerequisite for negotiating EU accession) 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, <http://jurist.law.pitt.edu/paperchase/2005/06/revised-turkish-penal-code-comes-into.php>.

Canada, New Zealand, and South Africa;<sup>125</sup> and (3) the national security detention framework countries, in which the constitution or relevant statutes have delegated discretion to the executive to hold individuals in detention are Pakistan, India, Kenya, Tanzania, Sri Lanka, Zambia, Mozambique, Malaysia, Nigeria, Russia, Singapore, Swaziland, and Trinidad & Tobago.<sup>126</sup> Australia and Israel are special cases, as both countries employ a version of national security detention that is extremely rights stripping and yet incorporates many of the procedural protections available in the pre-trial detention countries.<sup>127</sup> For this reason I have designated Australia and Israel “mixed” countries, a subset within the national security framework.

## II. THE PRE-TRIAL DETENTION FRAMEWORK

Brazil, Colombia, Denmark, France, Germany, Greece, Ireland, Italy, Norway, Spain, Turkey, and the United Kingdom are the twelve countries surveyed in this Article whose preventive detention regimes can most aptly be described as emerging from a pre-trial detention framework. Because the United Kingdom recently shifted from an immigration framework approach to a pre-trial detention framework approach, it will be discussed in both this Part and Part III.<sup>128</sup> In all of these countries, terrorist suspects are only detained without charge in advance of criminal charges being brought, and are only detained without trial before a trial occurs, in accordance with the statutory provisions governing the nation’s criminal law.<sup>129</sup> This does not, however, mean that terrorist suspects

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125. This category includes countries in which suspects may be detained for a limited period under the auspices of immigration law.

126. The countries within this group fall into two distinct subgroups; (i) countries in which the executive’s constitutionally or statutorily-confirmed powers to hold individuals in preventive detention are automatically reviewed by the courts (Israel, Mozambique) or by an administrative body (Pakistan, India, Kenya, Tanzania); and (ii) countries in which the executive’s constitutionally or statutorily-confirmed powers to hold individuals in preventive detention are only reviewed by an administrative body upon application by the detainee (Sri Lanka, Zambia, Malaysia, Nigeria, Singapore, Swaziland, Trinidad & Tobago).

127. See discussion *infra* Part IV.C.

128. The UK initially adopted an immigration framework approach to the detention of terrorist suspects, but the House of Lords ruled that such an approach was unlawful and the UK subsequently adopted a criminal law framework approach to ‘preventive’ detention. See discussion *infra* Part III.C.

129. See, e.g., Retsplejeloven [Administration of Justice Act], ch. 70 (Den.), translated in *The Principal Danish Criminal Acts: the Danish Criminal Code*, the

are treated in exactly the same way as other criminal suspects by the criminal justice systems of these nations. In many instances, special statutory provisions permit deviation from established criminal justice practices or regulations in cases involving terrorist suspects. For example, in some countries, terrorist suspects may be held in pre-charge detention for longer periods of time than other suspects.<sup>130</sup> In some countries, all terrorist cases are heard by central courts, rather than by the local magistrates who hear all other criminal cases.<sup>131</sup> The criminal justice systems of many of these states have evolved over time, innovating and adapting in response to national security concerns, particularly in the aftermath of the September 11, 2001 attacks.<sup>132</sup> Yet, despite these (and other) departures from

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Danish Corrections Act, the Administration of Justice Acts (excerpts) (Malene Frese Jensen et al. eds., 2006); Code pénal [C. Pén.] art. 421-1 (Fr.); Code de procédure pénale [C. Pr. Pén.] art. 706-23 (Fr.); Strafprozeßordnung [StPO] [Code of Criminal Procedure], Apr. 7, 1987, BGBl I, at 1074, § 120–130 (F.R.G.); Codice penale [C.p.] art. 270 (Italy); Criminal Procedure Act (Strafeprocessloven), Act 25 of May 22, 1981, as amended by Act 53 of June 30, 2006, ch. 14, available at <http://www.ub.uio.no/ujur/ulovdata/lov-19810522-025-eng.pdf> (Nor.); Criminal Justice Act, 1984 (Act No. 22/1984) (Ir.) available at <http://www.irishstatutebook.ie/1984/en/act/pub/0022/print.html> (last visited September 19, 2009); Criminal Justice (Miscellaneous Provisions) Act, 1997 (Act No. 4/1997) (Ir.) available at <http://www.irishstatutebook.ie/1997/en/act/pub/0004/print.html> (last visited September 19, 2009).

130. In the Republic of Ireland, the maximum limit on pre-charge detention is ordinarily 24 hours, but for terrorist suspects it is three days. Offences Against the State Act, 1939 (Act No. 13/1939) (Ir.) available at <http://www.irishstatutebook.ie/1939/en/act/pub/0013/print.html> (last visited Oct. 17, 2009), amended by Offences Against the State (Amendment) Act, 1998 (Act No. 39/1998) (Ir.) available at <http://www.irishstatutebook.ie/1998/en/act/pub/0039/sec0010.html#zza39y1998s10> (last visited Oct. 19, 2009).

131. In France, all terrorist cases are reviewed by the Paris Trial Court (Le tribunal de grande instance de Paris) and in Spain all terrorist cases appear before the National High Court (Audiencia Nacional). See discussion *infra* at II.A (vi).

132. See generally Jan Wouters & Frederik Naert, *Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures Against Terrorism After "11 September,"* 41 Common Mkt. L. Rev. 909, 910 n.128 (2004) (discussing the European arrest warrant, the framework decision to combat terrorism, and EU-U.S. extradition agreements post September 11, 2001); 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, 235 (2004) (examining the risks of specific procedural and substantive legal changes in European law following September 11, 2001); Sionaidh Douglas-Scott, *The Rule of Law in the European Union—Putting the Security into the "Area of Freedom, Security and Justice,"* 29

standard criminal procedures, in all of the countries within the pre-trial detention framework the methodology underpinning the detention without trial or charge of terrorist suspects is firmly rooted in the provisions of the nation's criminal law.

The discussion that follows begins with an exploration of the attributes of the different preventive detention regimes employed by the pre-trial detention framework countries, measured against each of the individual units of analysis in the taxonomy of preventive detention. It then continues with a consideration of the similarities and differences between the pre-trial detention framework countries that may have led to their adoption of similar regimes of preventive detention, before concluding with a discussion of the advantages and disadvantages of the pre-trial detention framework.

#### A. Key Characteristics of Pre-trial Detention Framework Countries

In each of the pre-trial detention framework countries surveyed in this Article,<sup>133</sup> "preventive detention" is considered to be a tool of the criminal justice system that may only be employed during a period of pre-trial detention.<sup>134</sup> This section examines the "preventive detention" regimes of pre-trial detention framework countries as measured against the eight characteristics described in Part I.

(i) Legal basis for detention: In the pre-trial detention framework countries, in common with almost all of the other nations surveyed, there are provisions in the penal codes and in other laws governing the administration of criminal justice that stipulate when and how individuals may be held pending criminal charges and trial for terrorist acts. In contrast, however, with the other nations

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Eur. L. Rev. 219, 219 (2004) (examining the European arrest warrant, the EU definition for terrorism, EU measures concerning the financing of terrorism, and the heightened activities of Europol and Eurojust in response to September 11, 2001). For information concerning the relationship between the legislation of individual member states and the European Council and Common Positions and Framework Decisions, *see generally* Chris Vincenzi & John Fairhurst, *Law of the European Community* (3d ed. 2002).

133. Denmark, France, Germany, Greece, Ireland, Italy, and Spain.

134. Preventive detention is also used in the criminal law framework countries as a tool to detain individuals with mental illnesses who are deemed to be a danger to themselves or others. *See, e.g.*, The General Civil Penal Code (Straffeloven), Act of 22 May 1902 No. 10, § 39(a) (Nor.). An analysis of this form of preventive detention is, as mentioned *supra*, beyond the scope of this Article.

surveyed in this Article, it is these penal code provisions alone that also, in practice, govern the detention of suspected terrorists. Some of the pre-trial detention framework countries, such as Ireland, Norway, Germany, and Brazil apply exactly the same pre-trial detention rules to all criminal suspects, including those charged with terrorist acts.<sup>135</sup> Other nations, such as France, Spain, Italy, Greece, and Turkey, have enacted special provisions and exceptions within their penal codes governing the treatment—including detention—of terrorist suspects, what might be called a “penal code plus” approach.<sup>136</sup> In all instances, though, the legal basis for pre-trial “preventive” detention is found in the regular criminal laws.

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135. Criminal Justice Act, 1984 (Act No. 22/1984) (Ir.) *available at* <http://www.irishstatutebook.ie/1984/en/act/pub/0022/print.html> (last visited September 19, 2009); Criminal Justice (Miscellaneous Provisions) Act, 1997 (Act No. 4/1997) (Ir.) *available at* <http://www.irishstatutebook.ie/1997/en/act/pub/0004/print.html> (last visited September 19, 2009); Criminal Justice (Terrorist Offenses) Act, 2005 (Act No. 2/2005) (Ir.) *available at* <http://www.irishstatutebook.ie/2005/en/act/pub/0002/print.html>; The General Civil Penal Code (Straffeloven), Act 10 of May 22, 1902, § 21–23 (Nor.), *available at* <http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf>; Criminal Procedure Act (Strafeprosessloven), Act 25 of May 22, 1981, as amended by Act 53 of June 30, 2006, § 183–185, *available at* <http://www.ub.uio.no/ujur/ulovdata/lov-19810522-025-eng.pdf>; Strafprozeßordnung [StPO] [Code of Criminal Procedure] Apr. 7, 1987, *Bundesgesetzblatt* (Federal Law Gazette) I, 1074, § 112–130 (F.R.G.). In Brazil, terrorism is listed in the constitution as a “heinous crime,” and the detention of individuals suspected or accused of committing “heinous crimes” is governed by the same rules as for all other criminal suspects, but individuals who commit “heinous crimes” are “non-bailable and not subject to grace or amnesty.” Constituição Federal art. 5, s. XLIII (Brazil); *see also* Heinous Crimes Act of 1990 (Braz.); Código de Processo Penal [C.P.P.] art. 288 (Braz.) (association of more than three persons to engage in criminal activities).

136. France’s legal regime for countering terrorism developed through the terrorism laws of September 9, 1986, July 10, 1991, July 22, 1996, November 15, 2001, and March 18, 2003, and its procedures are codified in the articles of the Penal and Criminal Procedure Codes relating to terrorism. *See* Law No. 86-1020 of Sept. 9, 1986, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Sept. 10, 1986, p. 10956; Law No. 91-646 of July 10, 1991, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 13, 1991, p. 9167; Law No. 96-647 of July 22, 1996, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 23, 1996, p. 11104; Law No. 2001-1062 of Nov. 15, 2001, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Nov. 16, 2001, p. 18215; Law No. 2003-239 of Mar. 18, 2003, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Mar. 19, 2003, p. 4761; C. Pén. art. 421-1–422-7 (Fr.); C. Pr. Pén. art. 706-16–706-25-1 (Fr.). *See also* Stephanie Dagron, *Country Report on France, in*

(ii) Notification of charges: Under these criminal laws, the pre-trial detention countries have substantially similar standards for the notification of charges against terrorist suspects. In all but one of the pre-trial detention framework countries, terrorist suspects held in pre-trial detention are afforded the same notification of the charges that they face as all other criminal suspects are afforded in regular criminal proceedings.<sup>137</sup> In Denmark, individuals must be notified "as soon as possible"<sup>138</sup> of the charges they face, and in Ireland, individuals must be notified "as soon as practicable" of any charges.<sup>139</sup> In Brazil, Italy, Turkey, and the United Kingdom a terrorist suspect is entitled to notification of the charges he faces promptly, and "as soon as is reasonably practicable" in the case of England.<sup>140</sup> In Colombia, a detained suspect must appear before a

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Terrorism as a Challenge for National and International Law: Security versus Liberty? 267–93 (Christian Walter et al. eds., 2004). Spain's legal regime for countering terrorism is articulated in the penal code. Código Penal [C.P.], art. 571–580 (Spain). Greece's provisions for detaining terrorist suspects are outlined in Law 3251/2004, amending Law 2928/2001. See Andreas G. Banoutsos, *Anti-Terror Legislation in Greece*, Research Institute for European and American Studies, Nov. 20, 2007, available at [http://www.rieas.gr/index.php?option=com\\_content&view=article&id=485&catid=21&Itemid=63](http://www.rieas.gr/index.php?option=com_content&view=article&id=485&catid=21&Itemid=63) (discussing the Greek laws). Italy's provisions for detaining terrorist suspects are found in the Penal Code. Codice Penal [C.p.] art. 270 *bis*, as amended by Law 438 of 2001, art. 1, Urgent Measures Against International Terrorism and Law 155 of 2005. Turkey's legal regime for countering terrorism is articulated in Law on the Fight Against Terror, Act No. 3713 of 1991, as amended by Law No. 5532 of 2006; Ceza Muhakemeleri Usulü Kanunu [CMUK] [Criminal Procedure Code] of 2005, art. 91, 251 (Turk.). See Liberty Study, *supra* note 46, at 55–56; U.N. General Assembly, Human Rights Working Group, Report of the Working Group on Arbitrary Detention, Mission to Turkey, Addendum, UN Doc. A/HRC/4/40/Add.5, Feb. 7, 2007, at ¶¶ 23, 27.

137. Spain is the exception and is discussed *infra*.

138. Retsplejeloven [Administration of Justice Act], art. 758 (2) (Den.).

139. Criminal Justice Act, 1984 (Act. No. 22/1984) (Ir.) available at <http://www.irishstatutebook.ie/1984/en/act/pub/0022/index.html> (last visited September 20, 2009).

140. Terrorism Act, 2006, c. 11, § 23 (Eng.); Terrorism Act, 2000, c. 11, sched. 8 (Eng.). See Türkiye Cumhuriyeti Anayasası Madde 19 (Constitution of the Republic of Turkey, art. 3), available at <http://www.byegm.gov.tr/sayfa.aspx?Id=78> ("Individuals arrested or detained shall be promptly notified, and in all cases in writing, or orally, when the former is not possible, of the grounds for their arrest or detention and the charges against them; in cases of offenses committed collectively this notification shall be made, at the latest, before the individual is brought before a judge."); Código de Processo Penal [C.P.P.] art. 306(2) (Braz.) (stating that within 24 hours of arrest a prisoner must be given a copy of the complaint, signed by an authority and

judge within thirty-six hours of arrest, which is the latest point at which he may be informed of the charges that he faces.<sup>141</sup> Similarly, in France, Germany, Greece, and Norway the latest point at which a detained individual may be informed of the totality of the charges against him is at his first hearing before a judicial authority—which in all instances occurs within a maximum of three days after the individual’s initial arrest.<sup>142</sup> In Spain, however, the doctrine of “secrecy of the investigation” (*secreto de sumario*) may limit notification of the charges against a terrorist defendant held in preventive detention to a “succinct description of the alleged act” and which of the goals of pre-trial detention the prosecutor seeks to achieve.<sup>143</sup> Needless to say, this restriction on notification may significantly hamper the defense lawyers’ ability to contest the legitimacy of their clients’ continued detention.

(iii) Initial appearance/review: In each of the pre-trial detention framework countries, similar standards of initial judicial review of the detainee’s confinement are enforced. In each of these nations, terrorist suspects held in pre-trial detention are entitled to prompt initial review of that detention by an officer of the regular criminal court, rather than by an agent of the executive or by an administrative appointee. In Denmark, for example, a Lower City Court judge must review all instances of detention of terrorist

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containing not only the details of the charge or charges but also the names of accusers and witnesses); see Liberty Study, *supra* note 46, at 45 (describing how in Italy a suspect is formally informed of the charges he faces at a hearing before a judge for the preliminary investigations (*guidice per le indagini preliminari*), which must take place “as soon as possible” and within 96 hours at the latest), 51 (stating that in Norway “arrested persons must appear before the district court no later than the third day after their detention . . . at which point the police must present the charge(s) and the reason(s) for keeping the person in custody.”)

141. Constitution of Colombia, art. 28 (“A person in preventive detention will be placed at the disposition of a competent judge within the subsequent 36 hours.”)

142. Code de procedure pénale [C. Pr. Pén.] art. 63, art. 63-1, art. 116 (Fr.); Grundgesetz für die Bundesrepublik Deutschland (federal constitution) (Ger.) art. 104(3) (“Any person provisionally detained on suspicion of having committed a criminal offense shall be brought before a judge no later than the day following his arrest; the judge shall inform him of the reasons for the arrest.”); 1975 Syntagma [SYN] [Constitution] 6.1–6.2 (Greece).

143. Ley Orgánica 13 de reforma de la Ley de Enjuiciamiento Criminal [L.E.C.] en materia de prisión provisional (B.O.E. 2003, 257), art. 1 modifying L.E.C. art. 506(2). Human Rights Watch, *Setting An Example? Counter-Terrorism Measures in Spain* 46, Jan. 26, 2005, available at <http://hrw.org/reports/2005/spain0105/>.

suspects within twenty-four hours of the arrest.<sup>144</sup> In Greece, all arrested persons, including terrorist suspects, must be brought before the public prosecutor within twenty-four hours of arrest and referred to an examining magistrate who deals with all types of crimes.<sup>145</sup> In Norway a detainee must appear before the district court within three days of his initial arrest.<sup>146</sup> In Italy, the public prosecutor (*Pubblico Ministero*) may detain and interview a suspected terrorist for up to forty-eight hours, at the end of that forty-eight hour period the prosecutor must schedule a hearing “for the validation of the arrest” before a judge for the preliminary investigations (*guidice per le indagini preliminary*), which must occur within forty-eight hours—in other words, a suspect must appear before a judge within ninety-six hours.<sup>147</sup>

In France, a judge of the special terrorist section of the Trial Court of Paris (*Cour d'assises*) must authorize any detention of terrorist suspects for more than forty-eight hours.<sup>148</sup> French law permits the authorities to detain a person suspected of carrying out an “act of terrorism” for up to forty-eight hours before bringing charges against him. Within the initial forty-eight hour period, law enforcement officers may bring a detainee before a sitting judge (*magistrat du siege*) to seek permission to hold him for a period lasting longer than forty-eight hours.<sup>149</sup> This additional period in custody, without charge, is thus a judicially authorized departure from ordinary criminal procedure. In Germany, any individuals (including terrorist suspects) who are being held without charge must appear before a local district court (*Amtsgericht*) judge “without delay, not later than on the day after his apprehension,”<sup>150</sup> which, in

144. Retsplejeloven [Administration of Justice Act], art. 760 (2) (Den.).

145. See United Kingdom Foreign and Commonwealth Office, *Counter-Terrorism Legislation and Practice: An Overview of Selected Countries* 16, Oct. 2005, para 54, available at [www.fco.gov.uk/resources/en/pdf/4175218/counter-terrorism-Oct05](http://www.fco.gov.uk/resources/en/pdf/4175218/counter-terrorism-Oct05).

146. See Liberty Study, *supra* note 46, at 51.

147. See Liberty Study, *supra* note 46, at 45.

148. Terrorism-related cases in France are generally heard before a special section of the Trial Court of Paris created for this purpose in 1986. In the case of asylum seekers suspected of having terrorist connections, the Tribunal must undertake a review within 4 days of their initial detention. See Code de procédure pénale [C. Pr. Pén.] art. 706-23 (Fr.) (authorizing the court to extend a suspect’s initial detention, which can last up to 48 hours under articles 63, 77, and 154, by an additional 48 hours).

149. Code de procédure pénale [C. Pr. Pén.] art. 706-23 (Fr.).

150. Strafprozeßordnung [StPO] [Code of Criminal Procedure], Apr. 7,



practice, means that individuals are ordinarily detained for twenty-four hours, but may be held for up to forty-eight hours.<sup>151</sup> In Ireland, a District Court Judge must review all criminal pre-trial detention “as soon as practicable,” and terrorist suspects may be held for a maximum of three days without charge.<sup>152</sup> In the United Kingdom, a terrorist suspect’s arrest must be reviewed by a review officer “as soon as is reasonably practicable after the time of the person’s arrest.”<sup>153</sup> In Colombia, one of the criminal judges of the Specialized Circuit (*los jueces penales de circuito especializados*) must review the detention within thirty-six hours of the arrest.<sup>154</sup> In Turkey, the detainee must be brought before a judge of the “serious crime courts”

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1987, Bundesgesetzblatt [BGBl. I]1074, as amended by the Act of 7 September 1998, Sept. 7, 1998, BGBl. I at 2646, § 115 (a) (F.R.G.) (“Kann der Beschuldigte nicht spätestens am Tage nach der Ergreifung vor den zuständigen Richter gestellt werden, so ist er unverzüglich, spätestens am Tage nach der Ergreifung, dem Richter des nächsten Amtsgerichts vorzuführen.”) (“If the accused cannot be brought before the competent judge at the latest on the day after his apprehension, he shall be brought before the judge of the nearest Local Court without delay, not later than on the day after his apprehension.”).

151. A German statute promulgated in 1977 in the wake of terrorist incidents involving the Baader-Meinhof Gang provides for the incommunicado detention for up to 30 days of terrorist suspects. The so-called *Kontaktsperregesetz* (lit. “contact blocking law”) was supposed to sunset, but in April 2006, when the German Introductory Act to the Judicature Act (*Einführungsgesetz zum Gerichtsverfassungsgesetz*) was recodified, the provision remained. However, this law has never been used in practice to detain terrorist suspects, such detainees have consistently been held in regular pre-trial detention for up to forty-eight hours. See Anna Oehmichen, *Incommunicado Detention in Germany: An Example of Reactive Anti-Terror Legislation and Long Term Consequences*, 9 German L. J. 855, 886 (2008) (discussing the *Kontaktsperregesetz* in 1977 and its 2006 recodification and noting that German executive authorities have been reluctant to enforce the *Kontaktsperre* regime at all).

152. Offences Against the State Act, 1939 (Act No. 13/1939) (Ir.) available at <http://www.irishstatutebook.ie/1939/en/act/pub/0013/print.html> (last visited Oct. 17, 2009), amended by Offences Against the State (Amendment) Act, 1998 (Act No. 39/1998) (Ir.) available at <http://www.irishstatutebook.ie/1998/en/act/pub/0039/sec0010.html#zza39y1998s10> (last visited Oct. 19, 2009). In contrast, the limit is seven days for “gangland-type” offenses. See Criminal Justice Act, 2007 (Act 29/2007), s. 50(8), available at <http://www.irishstatutebook.ie/2007/en/act/pub/0029/sec0050.html#sec50> (last visited Oct. 18, 2009).

153. Terrorism Act, 2006, c. 11, § 23 (Eng.) (amending Terrorism Act, 2000, c. 11, sched. 8, s. 41 (Eng.)).

154. Decreto 2001, Sept. 9, 2002, [2002] Diario Oficial 44.930 (Colom.); Constitution of Colombia, art. 28.

(*ağır ceza mahkemeleri*) within forty-eight hours of arrest.<sup>155</sup> However, in cases involving three or more suspects, the suspects may be detained for up to three days, and in cases initiated in regions of the country designated “emergency regions” judicial review must be provided within seven days.<sup>156</sup> In Spain, an investigating magistrate of the National High Court (*Audiencia Nacional*) must review the grounds of detention within seventy-two hours of a terrorist suspect’s arrest, and upon that magistrate’s approval, the suspect may be held for an additional forty-eight hours before being charged.<sup>157</sup> In Brazil, the police require judicial authorization to hold a terrorist suspect for more than five days; save in instances where they have indications that the suspect may leave the area, in which case the detention period may be extended for up to fifteen days.<sup>158</sup>

(iv) Period of detention without charge or trial: The early use of judicial review, as opposed to administrative review, in each of these countries is an important reason for why these countries are classified as within the pre-trial detention framework of preventive detention. There is wide variation among the pre-trial framework countries’ time limits for pre-trial detention. In Denmark, for example, pre-charge detention shall not exceed three days,<sup>159</sup> and pre-trial detention “shall be as short as possible and must not exceed four weeks,” but this time limit may be extended with a judge’s approval by four-week blocks.<sup>160</sup> In France, once formal charges have been brought, in accordance with regular criminal procedure,

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155. Türkiye Cumhuriyeti Anayasası Madde 19 (Constitution of the Republic of Turkey art. 19), available at <http://www.byegm.gov.tr/sayfa.aspx?Id=78> (mandating an initial appearance within 48 hours of arrest); U.N. General Assembly, Human Rights Working Group, Report of the Working Group on Arbitrary Detention, Mission to Turkey, Addendum, UN Doc. A/HRC/4/40/Add.5, Feb. 7, 2007, at ¶¶ 7 (noting that terrorist offenses are tried before special chambers of the Serious Crime Courts), 20 (finding that this period of detention can be extended during a state of emergency or declaration of martial law), and 48 (finding that “cases involving terror offences are tried before the special chambers of the Serious Crimes Court, including where the defendant is a minor”). See also Liberty Study, *supra* note 46, at 55–56.

156. See Liberty Study, *supra* note 46, at 55–56.

157. Human Rights Watch, *Setting An Example? Counter-Terrorism Measures in Spain* 18–19, Jan. 26, 2005, available at <http://hrw.org/reports/2005/spain0105/>.

158. U.S. Dep’t. of State, Bureau of Democracy, Human Rights & Labor, *2008 Human Rights Report: Brazil* (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119150.htm>.

159. Liberty Study, *supra* note 46, at 49–50.

160. Retsplejeloven [Administration of Justice Act], art. 767 (1) (Den.).

terrorist suspects may be held for up to four years in pre-trial detention.<sup>161</sup> In Germany an individual may be held in pre-trial detention for six to eighteen months, depending upon the offense charged.<sup>162</sup> In Italy a detainee may be held pending trial for up to 24 months.<sup>163</sup> Spain permits the detention of terrorist suspects for a long period of time before trial—a maximum of two two-year blocks of pre-trial detention (i.e. four years), if the punishment for the alleged offense would be imprisonment for more than three years.<sup>164</sup> In Turkey, the maximum period of pre-trial detention is two years, but may be extended up to three years under “exceptional circumstances.”<sup>165</sup> In Colombia, the Constitution prohibits indefinite detention, but provides no explicit limit for pre-trial detention—and prolonged pretrial detention is common.<sup>166</sup> Similarly, in Brazil, the law does not provide for a maximum period for pre-trial detention, the length of which is determined instead on a case-by-case basis.<sup>167</sup>

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161. Code de procédure pénale [C. Pr. Pén.] art. 145-2 (Fr.).

162. Strafprozeßordnung [StPO] [Code of Criminal Procedure], April 7, 1987, Bundesgesetzblatt [BGBL] I 1074 as amended, §§ 121, 122a.

163. See U.S. Dep’t. of State, Bureau of Democracy, Human Rights & Labor, *2004 Human Rights Report: Italy* (Feb. 28, 2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41688.htm>.

164. Human Rights Watch, *Setting An Example? Counter-Terrorism Measures in Spain* 51–52, Jan. 26, 2005, available at <http://hrw.org/reports/2005/spain0105/> (reporting, however, that the two-year extension is “practically automatic” in terrorism cases).

165. Ceza Muhakemeleri Usulü Kanunu [CMUK] [Criminal Procedure Code] of 2005, art. 102(2) (Turk.). See U.N. General Assembly, Human Rights Working Group, Report of the Working Group on Arbitrary Detention, Mission to Turkey, Addendum, UN Doc. A/HRC/4/40/Add.5, Feb. 7, 2007, ¶ 75. The Working Group on Arbitrary Detention notes that the language of this provision is confusing and could be read to authorize an *additional* three years of detention on top of the original two, despite the government’s statements in support of a total period of no more than three years. *Id.* Moreover, due to the double procedures permitted under art. 252(2) of the Criminal Procedure Code, this detention period could extend up to either six or ten years, depending on the interpretation. *Id.*

166. See Constitution of Colombia, art. 28 (“In no case may there be detention . . . not subject to limitations of time”); U.S. Dep’t. of State, Bureau of Democracy, Human Rights & Labor, *2001 Human Rights Report: Colombia* (Mar. 4, 2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2001/waha/8326.htm> (describing “prolonged pretrial detention”); U.N. General Assembly, Human Rights Working Group, Report of the Working Group on Arbitrary Detention, Mission to Colombia, Addendum, UN Doc. A/HRC/10/21/Add.3, Feb. 16, 2009, ¶¶ 50-55.

167. See, e.g., U.S. Dep’t. of State, Bureau of Democracy, Human Rights & Labor, *2008 Human Rights Report: Brazil* (Feb. 25, 2009), available at

(v) Access to legal counsel: In all of the pre-trial detention framework countries, there is a right to counsel for individuals held pending trial for terrorism-related activity, and, in most (but not all) countries, there is a right to state-funded counsel. In Brazil, Colombia, Denmark, Norway, and Ireland there is a right to counsel and a right to legal aid for those who cannot afford to pay for their own lawyers.<sup>168</sup> In the United Kingdom, the same is true, and if a detainee cannot afford counsel, the court will appoint one to represent the detainee.<sup>169</sup> In Germany, there is also a right to counsel and government-funded legal aid, but pre-trial detainees do not receive legal aid until they have been detained for three months, so there is less opportunity in Germany than in Norway, Ireland, or the United Kingdom for government funded counsel to be appointed to

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<http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119150.htm>. In Brazil, time in detention before trial is subtracted from the sentence. *Id.*

168. See, e.g., Retsplejeloven [Administration of Justice Act], art. 784 (Den.); Criminal Procedure Act (Strafeprosessloven), Act 25 of May 22, 1981, as amended by Act 53 of June 30, 2006, ch. 9 § 107 (Nor.) (“Official defense counsel shall be remunerated by the State”); Criminal Justice Act, 1984 (Act No. 22/1984) (Ir.) available at <http://www.irishstatutebook.ie/1984/en/act/pub/0022/index.html>, amended by Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) (Amendment) Regulations 2006 (Act No. 641/2006) (Ir.) available at <http://www.irishstatutebook.ie/2006/en/si/0641.html> (last visited October 20, 2009); Criminal Justice (Legal Aid) Act, 1962 (Act No. 12/1962) (Ir.) available at <http://www.irishstatutebook.ie/1962/en/act/pub/0012/index.html>, amended by Criminal Justice (Legal Aid) (Amendment) Regulations 2007 (Act No. 41/2007) (Ir.), available at <http://www.irishstatutebook.ie/2007/en/si/0041.html> (last visited October 20, 2009) (providing free legal assistance for defendants indicted on serious crimes when “the means of the person are insufficient to enable him to obtain legal aid”); Constitution of Colombia, art. 29 (“Everyone criminally charged is entitled to a defense and the assistance of counsel chosen by the accused or assigned during the investigation and trial.”); Constituição Federal art. 5, ss. LXIII, LXXIV (Brazil) (ensuring the arrested person assistance by his family and a lawyer, ensuring state-funded counsel for indigent defendants); U.S. Dep’t. of State, Bureau of Democracy, Human Rights & Labor, 2004 *Human Rights Report: Italy* (Feb. 28, 2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41688.htm>.

169. Legal Aid Act, 1988 ch. 34, § 21 (U.K.) (providing free legal assistance to a criminal defendant when “it appears to the competent authority that his financial resources are such as, under regulations, make him eligible for representation.”); Terrorism Act, 2000, c. 11, § 68 (U.K.) (stating with regard to legal aid for bail-related hearings that, if “on a question of granting a person free legal aid under this section there is a doubt . . . the doubt shall be resolved in favour of granting him free legal aid.”).

represent detainees.<sup>170</sup> In all respects, there is no difference in any of these countries between the access to counsel afforded terrorist suspects held in preventive detention and the access to counsel provided for all other criminal suspects. In France and Spain, a detainee's alleged status may, however, affect his access to counsel. In Spain, if an incommunicado order is issued, a duty solicitor is appointed to represent the detainee in proceedings, rather than a lawyer of the detainee's choice, and the lawyer appointed is not permitted to meet with the detainee in private, thereby severely limiting the lawyer's ability to construct an effective defense of their client.<sup>171</sup> However, once the incommunicado period has expired, the detainee is free to contact the lawyer of his choice.<sup>172</sup> In France, terrorist suspects are treated slightly differently from criminals in that individuals detained by the police on the suspicion of committing terrorist offenses are only entitled to consult lawyers after seventy-two hours of detention, rather than twenty hours, which is the case for detainees suspected of committing all other crimes.<sup>173</sup> In Turkey, terrorist suspect detainees are permitted immediate access to one (and only one) attorney, and have the right to meet with that attorney at any time, but, at prosecutorial discretion, the detaining authority may impose a twenty-four hour incommunicado period.<sup>174</sup> Moreover, if a lawyer is suspected of acting as a "liaison" between the detainee and a terrorist organization, a judge may order an officer to be present during meetings.<sup>175</sup>

(vi) Right to a fair and public hearing: The right to a fair hearing is enshrined in most of the legislation and jurisprudence

170. Strafprozeßordnung [StPO] [Code of Criminal Procedure], April 7, 1987, Bundesgesetzblatt [BGBL] I 1074 as amended, § 117 (4) (providing that an attorney shall be appointed if remand detention has lasted for longer than three months), § 140 (1)(2) and (1)(7) (providing representation at trial if the defendant is "charged with a serious offense" or if "proceedings for preventive detention are conducted").

171. See Human Rights Watch, *Setting An Example? Counter-Terrorism Measures in Spain*, Jan. 26, 2005, available at <http://hrw.org/reports/2005/spain0105/> (claiming that this practice "seriously undermines the detainee's right to counsel and significantly heightens his or her susceptibility to unlawful pressure").

172. See *id.*

173. Code de procédure pénale [C. Pr. Pén.] art. 63-64 (Fr.).

174. Law No. 5532 of 2006, arts. 10(b) and (c), amending Law on the Fight Against Terror, Act No. 3713 of 1991 (Turk.) (stating, however, that the suspect may not be questioned during the incommunicado period).

175. Law No. 5532 of 2006, art. 10(e), amending Law on the Fight Against Terror, Act No. 3713 of 1991 (Turk.).

relating to terrorist suspects being held in "preventive detention" in the pre-trial detention framework countries. In Norway, Denmark, and Germany, terrorist suspects held in pre-trial detention are also guaranteed a "public" hearing in the regular criminal courts.<sup>176</sup> In Greece, terrorism suspects are brought to trial in the regular Court of Appeal, before a three-member panel composed of senior jurists.<sup>177</sup> In terrorism cases, as in other felony cases in Greece, no jury is impaneled.<sup>178</sup> In Turkey, court hearings are ordinarily open to the public, however in terrorism trials proceedings may be closed for "reasons of public morality or public security."<sup>179</sup> In the United Kingdom, special provisions exist that are only applied in terrorism-related cases, allowing for *in camera* hearings, security-cleared judges, and special, security-cleared prosecution and defense counsel.<sup>180</sup> In Colombia, terrorism cases are heard exclusively by the criminal judges of the Specialized Circuit (*los jueces penales de circuito especializados*), but all defendants, including terrorist suspects, enjoy the constitutional right to a "fair and public hearing."<sup>181</sup> Similarly, both France and Spain impose limits upon which courts are competent to review terrorism-related cases, and Spanish law also permits evidence gathered during ongoing proceedings to be "sealed" from public scrutiny.<sup>182</sup>

In France, the major difference between terrorism cases and other criminal cases is that all terrorism cases are heard in Paris

176. Strafprozeßordnung [StPO] [Code of Criminal Procedure], April 7, 1987, BGBL. I, 1074, as amended, § 117 (Ger.); Constitution of Denmark, s. 65; The Criminal Procedure Act (Strafeprosessloven), Act 25 of May 22, 1981, as amended by Act 53 of June 30, 2006, ch. 14 § 183 (Nor.).

177. See United Kingdom Foreign and Commonwealth Office, *Counter-Terrorism Legislation and Practice: An Overview of Selected Countries* 16, Oct. 2005, available at [www.fco.gov.uk/resources/en/pdf/4175218/counter-terrorism-Oct05](http://www.fco.gov.uk/resources/en/pdf/4175218/counter-terrorism-Oct05).

178. See *id.*

179. See Türkiye Cumhuriyeti Anayasası Madde 19 (Constitution of the Republic of Turkey) art. 141, available at <http://www.byegm.gov.tr/sayfa.aspx?Id=78>.

180. Terrorism Act, 2000, c. 11, sched. 8 (Eng.).

181. Constitution of Colombia, art. 29 ("Everyone criminally charged is entitled to . . . a fair and public hearing without undue delay; to present evidence and to examine witnesses for the prosecution; to challenge the conviction; and not to be subject to double jeopardy for the same act.")

182. Code de procédure pénale [C. Pr. Pén.] art. 706-23 (Fr.); Human Rights Watch, *Setting An Example? Counter-Terrorism Measures in Spain* 35, 46, Jan. 26, 2005, available at <http://hrw.org/reports/2005/spain0105/> (describing several Spanish cases where records were sealed).

rather than in local courts. The French Code of Criminal Procedure stipulates that the *procureur de la République*, the *juge d'instruction*, the *Tribunal correctionnel*, and the Parisian *Cour d'assises* may hear cases involving terrorist acts, thus tending to preclude local prosecutors, magistrates, and courts from doing so.<sup>183</sup> As opposed to ordinary trials, the *jury criminel* in the *Cour d'assises* is comprised entirely of professional judges when alleged perpetrators of acts of terrorism are tried.<sup>184</sup> The justification for this alteration to the regular lay *jury* system is that the complexity of terrorist charges makes it difficult for ordinary citizens to judge.<sup>185</sup> Scholars disagree as to whether this departure from regular procedure impacts upon a detainee's right to a fair hearing.<sup>186</sup>

In Spain, as in France, all terrorist cases are heard centrally, by professional jurists at the National High Court (*Audiencia Nacional*).<sup>187</sup> As in France, there is an ongoing scholarly debate about the extent to which this centralization compromises detainees' rights to fair and public hearings.<sup>188</sup> The doctrine of "secrecy of the investigation" (*secreto de sumario*), which permits the sealing of the examining magistrate's files until the conclusion of a terrorist investigation, may prevent defense counsel from undertaking a

183. Code de procédure pénale [C. Pr. Pén.] art. 706-17 (Fr.) (conferring concurrent jurisdiction on these bodies); see Dagron, *supra* note 136, at 292–93 ("The necessity for specialisation of the magistrates in charge is based on the need to have access in one place to all relevant information on the matter and to permit the magistrates to exercise competence over the whole territory of France.").

184. Law No. 86-1020 of Sept. 9, 1986, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Sept. 10, 1986, p. 10956. The website of the French Ministry of Justice also discusses the *cour d'assises speciale*, at <http://www.justice.gouv.fr/index.php?rubrique=10030&article=13837>.

185. See Dagron, *supra* note 136, at 295–96 (noting the fact that individuals can be excused from jury service compounds this difficulty).

186. See Julien Cantegreil, *A French Perspective on Preventive Detention* 18 (2008) (discussing differing attitudes towards the centralization of power and influence among an elite cadre of advocates and jurists) (on file with author).

187. Ley de Enjuiciamiento Criminal [L.E. Crim.] (B.O.E. 1982 app. 19); Real Decreto, Sobre Competencia Jurisdiccional en Materia de Terrorismo [Royal Decree, Law 3/1977, January 4 Regarding Jurisdictional Competency in Matter of Terrorism] (B.O.E. 1977, 4) (corrected in (B.O.E. 1977, 26)).

188. See, e.g., Human Rights Watch, *Setting An Example? Counter-Terrorism Measures in Spain*, Jan. 26, 2005, available at <http://hrw.org/reports/2005/spain0105/> (expressing concern that Spain's anti-terrorism laws run contrary to the decisions and guidance of United Nations human rights bodies).

vigorous challenge to the detainee's continued detention and may warrant an assault upon the notion of a fair and public hearing.<sup>189</sup>

(vii) Judicial review: The availability of periodic, ongoing judicial review is another hallmark of the pre-trial detention framework. In each pre-trial detention framework country, pre-trial detainees have the right to appeal their detention through the regular criminal justice system, up to the highest court in the land. In Denmark, after the Lower City Court has ruled that an individual should be detained, it must review the detention order every four weeks by law, and detainees have the right of appeal to the High Court.<sup>190</sup> In Germany, as discussed *supra*, all arrested defendants must be brought before a magistrate who will decide on the issue of bail, or some alternative treatment of a defendant pending trial, by the "end of the day following the arrest."<sup>191</sup> If a prosecutor wishes to prolong detention beyond this forty-eight hour period, he must make a compelling case to a local court magistrate's court (*Amtsgericht*).<sup>192</sup> A detainee has the right to appeal this decision to the local district court (*Landgericht*) and then to the area's highest regional court (*Oberlandesgericht*). At each stage of review or appeal, the presiding judge undertakes a substantive review of the merits of the case and allows the detainee to present new evidence, thus offering the detainee the opportunity for a fair and public hearing that mirrors procedure in other criminal cases.<sup>193</sup> In Greece, detainees may appeal their detention to the Council of the Court of Misdemeanors; pre-trial detention of longer than a year must be approved by the Council of the Court of Appeals.<sup>194</sup> In Ireland, detained terrorist suspects have the right of appeal to the High Court, including a right to *habeas corpus*.<sup>195</sup> In Brazil, terrorist suspect detainees, like all criminal detainees, are "ensured of the adversary system and of full

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189. *Id.*

190. Retsplejeloven [Administration of Justice Act], art. 767 (1), (2) (Den.).

191. See Richard S. Frase & Thomas Wiegend, *German Criminal Justice As A Guide to American Law Reform: Similar Problems, Better Solutions*, 18 B.C. Int'l & Comp. L. Rev. 317, 327 (1995) (citing Strafprozeßordnung [StPO] [Code of Criminal Procedure], Apr. 7, 1987, § 128).

192. *Id.*

193. Strafprozeßordnung [StPO] [Code of Criminal Procedure], Apr. 7, 1987, §§ 112-128.

194. See United Kingdom Foreign and Commonwealth Office, *Counter-Terrorism Legislation and Practice: An Overview of Selected Countries* 16, Oct. 2005, available at [www.fco.gov.uk/resources/en/pdf/4175218/counter-terrorism-Oct05](http://www.fco.gov.uk/resources/en/pdf/4175218/counter-terrorism-Oct05).

195. Ir. Const., 1937, art. 40.4.



defense<sup>196</sup> including the resort to *habeas corpus*.<sup>197</sup> This is also the case in Spain where, even in instances in which an *incomunicado* order has been issued, the right to *habeas corpus* still exists.<sup>198</sup> In Colombia, terrorism cases are heard exclusively by the criminal judges of the Specialized Circuit (*los jueces penales de circuito especializados*), and accused individuals have the right of appeal and the right to *habeas corpus*.<sup>199</sup> In the United Kingdom, individuals detained on terrorism charges have a right to challenge extensions of their pre-trial detention in the Court of Appeals and, ultimately, the Supreme Court of the United Kingdom.<sup>200</sup>

(viii) Rules regarding interrogation: The pre-trial detention framework countries have adopted a similar approach to interrogation and detentive questioning. Denmark, France, Germany, Greece, the Republic of Ireland, Norway, Spain, Italy, and the United Kingdom are all signatories to the European Convention on Human Rights<sup>201</sup> and the European Convention for the Prevention of Torture.<sup>202</sup> Article 3 of the European Convention on Human Rights states that “[n]o one shall be subjected to torture or to inhumane or degrading treatment or punishment,”<sup>203</sup> and the European

196. Constituição Federal art. 5, ss. LV (Brazil).

197. Constituição Federal art. 5, ss. LXXIV (Brazil).

198. Ley de Enjuiciamiento Criminal [L.E. Crim.], art. 520 bis (2), art. 509. For an overview of *incomunicado* detention in Spain, see Human Rights Watch, *Setting An Example? Counter-Terrorism Measures in Spain* 24–26 (Jan. 2005), available at <http://www.hrw.org/reports/2005/spain0105/spain0105.pdf>. Ley Orgánica 6, Reguladora del Procedimiento de Habeas Corpus [Regulation of the Procedure for Habeas Corpus] (B.O.E. 1984, 126). Human Rights Watch, however, has expressed concern that the *habeas* provision is “effectively meaningless.” Human Rights Watch, *Setting An Example?*, *supra* at 38.

199. Decreto 2001, Sept. 9, 2002, [2002] Diario Oficial 44.930 (Colom.); Constitution of Colombia, art. 28, 30, 31.

200. Terrorism Act, 2006, c. 11, § 23 (Eng.); Terrorism Act, 2000, c. 11, sched. 8 (Eng.). The newly inaugurated Supreme Court of the United Kingdom recently assumed jurisdiction over “all civil law cases in the UK and all criminal cases in England and Wales and Northern Ireland.” Parliament UK, From House of Lords to the Supreme Court, 23 July 2009, <http://news.parliament.uk/2009/07/from-house-of-lords-to-supreme-court/>. See also note 206 *infra*.

201. ECHR, *supra* note 55. The list of signatories can be found at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=7&DF=06/10/2009&CL=ENG>.

202. European Torture Convention, *supra* note 113. The list of signatories can be found at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=126&CM=7&DF=06/10/2009&CL=ENG>.

203. ECHR, *supra* note 55, art. 3.

Convention for the Prevention of Torture establishes that a European Committee will have unfettered access to all party signatories’ places of detention to ensure that no inhumane or degrading treatment or torture is being carried out.<sup>204</sup> No distinction is made, under the terms of either Convention, between the protections afforded detainees held in preventive detention and detainees held in post-conviction detention. Moreover, no distinction is made under the terms of either Convention between individuals accused of committing terrorist offenses and individuals accused of committing other criminal offenses. The three non-European pre-trial detention nations—Brazil, Colombia, and Turkey—share the European nations’ de jure commitments to humane treatment of detainees, although some commentators have criticized the reported de facto use of torture and other forms of detentive questioning.<sup>205</sup>

In the United Kingdom, the highest judicial authority has also considered whether or not information obtained overseas during the course of inhumane detentive questioning should be admissible in domestic courts.<sup>206</sup> A seven-member panel of the House of Lords was convened in 2005<sup>207</sup> to consider the admissibility of evidence obtained through “torture” during interrogations conducted at

204. European Torture Convention, *supra* note 113, art. 8.

205. See, e.g., U.S. Dep’t. of State, Bureau of Democracy, Human Rights & Labor, *2008 Human Rights Report: Brazil* (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119150.htm> (noting that “excessive force, beatings, abuse, and torture of detainees and inmates by police and prison security forces” were reported); U.S. Dep’t. of State, Bureau of Democracy, Human Rights & Labor, *2008 Human Rights Report: Colombia* (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119153.htm> (noting “allegations that some prison guards routinely used excessive force and treated inmates brutally”); U.S. Dep’t. of State, Bureau of Democracy, Human Rights & Labor, *2007 Human Rights Report: Turkey* (Mar. 11, 2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100589.htm> (observing that “prosecutors in some instances failed to pursue torture allegations” and “[i]n practice a trial based on a confession allegedly coerced under torture could proceed, and even conclude, before the court had examined the merits of the torture allegations.”).

206. The highest judicial authority in the United Kingdom was previously the House of Lords. The final judgment of the House of Lords took place from July 27 to July 30, 2009. On October 1, 2009 the Supreme Court of the United Kingdom assumed jurisdiction “all civil law cases in the UK and all criminal cases in England and Wales and Northern Ireland.” Parliament UK, *From House of Lords to the Supreme Court*, 23 July 2009, <http://news.parliament.uk/2009/07/from-house-of-lords-to-supreme-court/>.

207. At that point, the detention of the Belmarsh detainees was under review by the Special Immigration Appeals Commission. See discussion *infra* Part III.C.

Guantánamo Bay to establish criminal liability or eligibility for deportation of individuals who were held in “preventive detention.” The panel declared that “irrespective of where, or by whom, or on whose authority the torture was inflicted,” any evidence gathered via torture would be inadmissible in courts in the United Kingdom and abhorrent to the British system of justice.<sup>208</sup> There are therefore strict and binding prohibitions in all of the pre-trial detention framework countries against torturing or inhumanely treating detainees in their charge, or using any information collected by overseas allies who use such techniques.

#### B. Similarities and Differences between Pre-trial Detention Framework Countries

The above discussion of the detention regimes of Colombia, Brazil, Denmark, France, Germany, Greece, Ireland, Italy, Norway, Spain, Turkey, and the United Kingdom demonstrates the similar ways in which these nations have adopted a pre-trial detention framework approach to preventive detention. Underlying this shared approach to preventive detention are many identifiable similarities between these eight countries. The first and most obvious point of commonality between many of the pre-trial detention framework countries is geo-political. Denmark, France, Germany, Greece, Ireland, Italy, Norway, Spain, and the United Kingdom are all stable European democracies with well-developed multi-party political systems.<sup>209</sup> Denmark, France, Germany, Greece, Ireland, Italy, Spain, and the United Kingdom are members of the European Union (EU). Norway is not an EU member, but is a member of the European Economic Area (EEA).<sup>210</sup> Turkey, while not a full member

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208. *A v. Sec’y of State for the Home Dep’t* (No. 2), [2006] 2 A.C. 221, 246, 275 (appeal taken from Eng.). Lord Bingham’s lead opinion declared: “[T]he English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention.” *Id.* at 269.

209. For a critical examination of Europe’s democracies, see Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* 27–28 (1999) (questioning the effectiveness and legitimacy of multi-party European democracies in the context of the expanding capitalist economy and moves toward regional integration).

210. The European Union is an economic and political partnership between 27 European nations. The three major organs of the EU are: the European Parliament, composed of 785 elected MEPs (Members of the European Parliament) representing the citizens of Europe; the Council of the European Union (formerly the Council of Ministers of the European Union), composed of

of the EU, is seeking accession and has been an associate member of the Union (and its predecessors) for decades.<sup>211</sup> All of these countries are, without exception, members of the Council of Europe and signatories to the European Convention on Human Rights.<sup>212</sup> The European Union and the Council of Europe have implemented procedures designed to monitor member states' treatment of terrorist suspect detainees to ensure that they are proportionate and congruent with the institutions' commitments to human rights and the rule of law.<sup>213</sup> The two remaining pre-trial detention framework nations, Colombia and Brazil, are both constitutional democracies with multi-party political systems (albeit with less stable political

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ministers of EU nation states whose principal responsibilities are foreign policy, security policy and justice and freedom issues; and the European Commission, composed of 27 independent Commissioners (one from each member state) and approximately 24,000 civil servants charged with drafting proposals for new European laws, which it presents to the European Parliament and the Council, and managing the day-to-day business of implementing EU policies and spending EU funds. See generally Europa, The EU at a Glance, [http://europa.eu/abc/index\\_en.htm](http://europa.eu/abc/index_en.htm) (last visited Sept. 30, 2009).

211. See Euractiv, European Information on Enlargement & Neighbours, EU-Turkey relations (Sept. 23, 2004), <http://www.euractiv.com/en/enlargement/eu-turkey-relations/article-129678>.

212. The Council of Europe, which was founded in 1949, seeks to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals. The Council has 47 member states, one applicant state (Belarus) and five observers, the Holy See, Canada, the United States, Japan, and Mexico. The main component parts of the Council of Europe are: the Committee of Ministers, the Organisation's decision-making body, composed of the 47 Foreign Ministers of the member states or their Strasbourg-based deputies (ambassadors/permanent representatives); the Parliamentary Assembly, comprised of 636 members (318 representatives and 318 substitutes) from the 47 national parliaments: the Congress of Local and Regional Authorities composed of a Chamber of Local Authorities and a Chamber of Regions; and the Secretariat, headed by a Secretary General, elected by the Parliamentary Assembly. The Council of Europe should not be confused with the European Union (EU), although all of the member states of the EU are also members of the Council of Europe. See The Council of Europe, Who We Are, <http://www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en>.

213. See, e.g., Commission of the European Communities, *Synthesis of the Replies from the Member States to the Questionnaire on Criminal Law, Administrative Law/Procedural Law and Fundamental Rights in the Fight Against Terrorism* 27-34, Working Document No. 225 (final) (Feb. 19, 2009), available at [http://ec.europa.eu/justice\\_home/doc\\_centre/terrorism/docs/sec\\_2009\\_225\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/terrorism/docs/sec_2009_225_en.pdf) (assessing member states' treatment of terrorist suspect detainees and the protection of fundamental rights of such detainees).

histories and less developed human rights records than the European Union full member states).<sup>214</sup>

A second point of commonality between the countries is that many of them have longstanding experience combating terrorism. In each instance—particularly in those countries in which traditional criminal procedures and substantive law have been adapted somewhat for cases involving terrorist suspects—the country’s treatment of terrorist suspect detainees reflects particular experiences of domestic or international terrorism. The rejection by the UK and Ireland, for example, of the national security framework of “preventive” detention of terrorist suspects was heavily informed by the failure of British policies during the Troubles in Northern Ireland.<sup>215</sup> France, similarly, rejected the national security model of preventive detention following its experiences during the Algerian War of Independence during the 1950s and early 1960s.<sup>216</sup> In these countries, as in the other pre-trial detention framework nations, laws designed to govern the detention of terrorist suspects were not promulgated overnight, but rather evolved over decades. Then, in the aftermath of September 11, 2001, each nation broadened the definition of terrorism that they employed to encompass international as well as domestically active groups, but did not fundamentally alter their procedural frameworks for pre-trial detention.

In Italy, for example, the approach to the investigation of terrorist offenses and detention of terrorist suspects evolved in reaction to extreme leftist terrorist organizations, such as the Red

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214. See generally U.S. Dep’t. of State, Bureau of Democracy, Human Rights & Labor, *2008 Human Rights Report: Brazil* (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119150.htm> (describing Brazil’s human rights record); U.S. Department of State, Bureau of Democracy, Human Rights & Labor, *2008 Human Rights Report: Colombia* (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119153.htm> (noting that, though the government’s respect for human rights was improving, there were still numerous human rights violations in Colombia in 2008).

215. See generally Eric Metcalfe, *The Future of Counter-Terrorism and Human Rights*, JUSTICE Future Series (Sept. 2007) (providing an account of the continued impact of the Northern Irish experience on British policy).

216. See Antoine Garapon, *The Oak and the Reed: Counter-terrorism mechanisms in France and the United States of America*, 27 *Cardozo L. Rev.* 2041, 2049 (2006) (describing the reorientation of French policies following the war of independence). For background on the war of independence, see generally Martin Windrow, *The Algerian War 1954-62* (1997).

Brigades (*Brigate Rosse*) that were active during the 1970s.<sup>217</sup> As a result, Italian legislators developed a responsive approach to terrorist incidents. In 2001, reflecting Italian reactions to 9/11 and the "global war on terror," sections 270 *bis* of the *codice penale* were expanded and revised to include crimes relating to "international terrorism."<sup>218</sup> In 2005, in the aftermath of the London bombings, the so-called "Pisanu Decree" introduced further amendments to the criminal procedure code, prolonging the permissible period of pretrial detention of terrorist suspects and the period of time they could be denied access to counsel.<sup>219</sup> The same process occurred in Greece, a country with considerable experience combating left-wing terrorist groups such as the Marxist group November 17 (*Επανάστατική Οργάνωση 17 Νοέμβρη*).<sup>220</sup> In 2002, in reaction to 9/11, portions of the Greek Penal Code and the Code of Criminal Procedure were amended by Law 2928/01.<sup>221</sup> Penal Code Article 187 now states that the establishment of, or participation in, criminal organizations, including international terrorist organizations, will be punished as a felony.<sup>222</sup>

France's development of a criminal justice system-centered approach to the investigation of alleged terrorist offenses and

217. For a general history of the Red Brigades, see Robert C. Meade, Jr., *Red Brigades: The Story of Italian Terrorism* (1990); *Brigate Rosse, Fatti, Documenti i Personaggi*, [www.brigaterosse.org](http://www.brigaterosse.org). (an online archive of Italian language press materials relating to the Red Brigade attacks).

218. *Codice penale* [C.p.] art. 270, as amended by Law 438 of 2001 (Italy).

219. Decree-Law No. 144 of July 27, 2005, *Gazz. Uff. No. 173*, July 27, 2005, converted into law by *Legge di Conversione No. 155*, of July 31, 2005, *Gazz. Uff. 177*, Aug. 1, 2005. For a description of the impact of the Pisanu Decree, see Committee Against Torture, *Follow up to Concluding Observations of the U.N. Committee Against Torture: Italy*, Inter-Ministerial Committee for Human Rights, at 2, CAT/C/ITA/CO/4/Add.1 (May 7, 2008); Angela Napoli, *Speech, Combatting International Terrorism*, Istanbul, Jan. 30, 2009, at 3–4, available at <http://www.apm.org.mt/documents/pdfs/Napoli%20terrorism%20EN.pdf>.

220. For background information on N17, see George Kassimeris, *Fighting for revolution? The life and death of Greece's revolutionary organization 17 November, 1975-2002*, 6 *J. of Southern Eur. and the Balkans* 259 (2004) (discussing the development, ideology, and eventual collapse of Greece's Marxist revolutionary group, 17N, as well as the Greek government's attempts to combat the group's activities).

221. See Interpol Report, *National Laws and Measures: Counter-Terrorism Regulation of Biology: Greece* 88–89, 2003, available at <http://www.interpol.int/Public/BioTerrorism/NationalLaws/Greece.pdf> (discussing the 2002 amendment to the Greek Penal Code and Code of Criminal Procedure).

222. *Id.*

preventive detention of terrorist subjects is also undoubtedly a product of France's long experience combating terrorism.<sup>223</sup> Laws were passed in 1986, 1991, and 1996, principally in reaction to the activities of terrorist groups, including: the *Groupe islamique armé*<sup>224</sup> and other international terrorist groups relating to France's past and present relationships with North Africa; separatist terrorist movements, such as the Basque group *Iparretarak* or the *Front de Liberation Nationale de la Corse*; and radical left-wing groups such as *Action Directe*.<sup>225</sup> At each juncture, the public's reaction to both the terrorist attacks and the government's response to those attacks influenced the laws that were promulgated.<sup>226</sup> In France, in common with the other pre-trial detention framework countries discussed in this Part (and in contrast to other countries studied in Parts III and IV of this survey), the response of the government and the legislature was to make consistent efforts to develop new legislation to accommodate the investigation of terrorist acts within the criminal justice system. This has been achieved through regular introduction to the criminal code of new terrorism-related crimes, such as the introduction in 1986 of the new offense of "criminal conspiracy in relation to a terrorist undertaking" (*association de malfaiteurs en relation avec une entreprise terroriste*),<sup>227</sup> or the enactment in 2001 and 2003 of new laws in response to U.N. Security Council Resolution 1373<sup>228</sup> that focus more heavily on improving terrorism

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223. See Cantegreil, *supra* note 186.

224. For background and history of the GIA, see generally Habib Souaidia, *Le procès de "La sale guerre" (2002)* (providing transcripts of trials of several GIA members).

225. See W. Jason Fisher, *Militant Islamicist Terrorism in Europe: Are France and the UK Legally Prepared for the Challenge?*, 6 Wash. U. Global Stud. L. Rev. 255, 275–76 (2007) (discussing the evolution of French laws in response to encounters with these groups). For background and history of Action Directe, see generally Michael Y. Dartnell, *Action Directe: Ultra-Left Terrorism in France, 1979-1987*, at 165–80 (1995) (describing conditions and procedures for detaining and trying Action Directe members).

226. The Groupe islamique arme ("GIA") metro bombing campaign of 1995-1996, for example, prompted a public outcry for reform of the anti-terrorism laws, especially the laws relating to extradition. See Daniel McGrory, *Terror Suspect Extradited After 10 Years*, TimesOnline, Dec. 2, 2005, <http://www.timesonline.co.uk/article/0,13509-1900234,00.html>.

227. Law No. 86-1020 of Sept. 9, 1986, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Sept. 10, 1986, p. 10956, art. 1; Law No. 96-647 of July 22, 1996, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 23, 1996, p. 11105, arts. 3, 8.

228. S.C. Res. 1373, ¶ 2(e), UN Doc. S/RES/1373 (Sept. 28, 2001) (calling on states to "[e]nsure that any person who participates in the financing, planning,

prevention measures as well as the detention of terrorist suspects.<sup>229</sup> As a result, although there are specialized provisions governing the detention of terrorist suspects,<sup>230</sup> the French approach to preventive detention of terrorist suspects remains firmly rooted in the regular criminal law.

In Spain, as in France, the Penal Code and Law of Criminal Procedure govern the pre-trial detention of terrorist suspects.<sup>231</sup> In Spain, as in France, anti-terrorist legislation developed as a response to longstanding experience combating terrorism—particularly terrorist acts perpetrated by the Basque separatist movement ETA (*Euskadi Ta Askatasuna*, “Basque Homeland and Freedom”) and its right-wing Spanish nationalist opponents.<sup>232</sup> More recently, the effectiveness of Spanish anti-terrorist legislation and practices were challenged by the Madrid train bombings of March 11, 2004, which lead to repeated calls by different parliamentary factions and media outlets for increased scrutiny of the system.<sup>233</sup> The law governing the apprehension and detention of terrorist suspects is outlined in both the Penal Code and the Spanish Constitution. Section II of the Spanish Penal Code describes terrorism as an offense against the “public order.”<sup>234</sup> Article 571 identifies what Professor Fernández Sánchez of the University of Salamanca describes as “the objective elements of the crimes of terrorism, including arson and destruction,”

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preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that . . . such terrorist acts are established as serious criminal offences in domestic laws and regulations . . .”).

229. See Kevin A. O'Brien, *France, in Europe Confronts Terrorism* 19, 20–25 (Karin von Hippel ed., 2005) (discussing the development of French anti-terrorism legislation and its focus on prevention).

230. Discussed in more detail *infra*.

231. Cándido Conde-Pumpido Tourón, Justice of the Supreme Court of Spain, *Judicial Response to Terrorism: National Venues-The Spanish Model*, Remarks at the 10th Int'l Jud. Conf. (May 23, 2002) (transcript available at [http://www.coe.int/T/E/Com/Files/Ministerial-Conferences/2002-judicial/Panel1\\_CándidoCondePumpidoTourón.asp#TopOfPage](http://www.coe.int/T/E/Com/Files/Ministerial-Conferences/2002-judicial/Panel1_CándidoCondePumpidoTourón.asp#TopOfPage)) (explaining that Spain views terrorism as a criminal matter whereby terrorists are to be tried in courts of law established in accordance with the Spanish Penal Code).

232. See generally Enric Martínez-Herrera, *National Extremism and the Outcomes of State Policies in the Basque Country, 1979-2001*, 4 *Int'l J. on Multicultural Stud.* 1, 20–21 (2002) (arguing that Basque insurgent nationalist extremism can be mitigated through a combination of “public order and responsive policies,” instead of an exclusive choice of only one of them).

233. Economist, *Popular Peevishness: Spain's Bickering Opposition*, December 7, 2006, at 42.

234. Código Penal [C.P.] ch. 5, tit. 22, art. 571-574 (Spain).



which are considered crimes of terrorism when the perpetrator of the criminal act “belong[s] to, act[s] in the name of, or collaborate[s] with armed bands, organizations or groups whose goal is to disturb the constitutional order or the public peace.”<sup>235</sup> This definition is broadened by Article 572, which expressly penalizes any individual who acts against the life, health, or freedom of any person when the author of the crime is linked with an armed or terrorist organization, and Article 574, which penalizes any crime that is not described expressly in the Penal Code but which has the same conditions and the same goals as the rest of the crimes of terrorism.<sup>236</sup> In addition to the Penal Code provisions, Article 55(2) of the Spanish Constitution provides that certain rights, including the length of preventive detention, can be “suspended for specific persons in connection with investigations of the activities of armed bands or terrorist groups.”<sup>237</sup> However, in practice the rights available to terrorist suspects are not suspended entirely, but rather curtailed—allowing, as discussed *supra*, for longer periods in pre-trial detention, or for a longer period of incommunicado detention following arrest—and the procedure which is used is grounded in the regular criminal law.

Turkey, however, provides an interesting counterpoint to the argument that 9/11 marks a universally crucial turning point. Turkey has longstanding experience combating diverse domestic terrorist groups, ranging from the Kurdistan Workers’ Party (PKK), to the Revolutionary People’s Liberation Party/Front, to Turkish Hizbullah.<sup>238</sup> Turkey previously adopted a rights-violative national security detention scheme to hold terrorist suspects, but reformed its detention system, not because of 9/11, but rather in its bid for EU accession.<sup>239</sup> The 1991 counterterrorism law called for offenses under the law to be tried in state security courts, presided over by military judges.<sup>240</sup> These courts, however, were abolished in 2004 through a

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235. María Teresa Fernández Sánchez, World Law: Spain, JURIST (Feb. 15, 2001), <http://jurist.law.pitt.edu/world/spaincor3.htm>.

236. *Id.*

237. Constitución [C.E.] art. 55(2) (Spain).

238. See U.S. State Dep’t, Office of the Coordinator for Counterterrorism, Country Reports on Terrorism 2007: Turkey, April 30, 2007, available at <http://www.state.gov/s/ct/rls/crt/2006/82732.htm>.

239. See Staley, *supra* note 124 (“Turkey has implemented a revised penal code in satisfaction of one of two pre-conditions for its eventual accession to the European Union.”).

240. See U.N. General Assembly, Human Rights Working Group, Report of the Working Group on Arbitrary Detention, Mission to Turkey, Addendum, UN

series of constitutional and legislative revisions following heavy criticism by international human rights bodies and the European Court of Human Rights.<sup>241</sup> Even in Turkey’s case, it is thus possible to conclude that the length of experience of combating terrorism, combined with the public reactions (at home and abroad) to the methods used, led to the adoption of a more rights-respecting, pre-trial detention model.

The third (and perhaps less salient) point of similarity between seven of these nine countries relates to their legal systems. Colombia, Brazil, Denmark, France, Germany, Greece, Italy, Spain, and Turkey are all civil law nations. As Maria Angel noted in 1989, the European civil law systems that developed during the nineteenth century were often deeply interconnected: “The Italian and Greek [legal] systems find their origins in the French *Code d’Instruction Criminelle* of 1808—Greece by way of Germany.”<sup>242</sup> It is undoubtedly true that many of the European civil law countries’ legal systems have much in common, but it would be a mistake to overestimate the influence this has on which countries fall within the pre-trial detention framework, and which fall within other frameworks of preventive detention. To the contrary, the strong pre-trial detention system in the United Kingdom and Ireland demonstrates that such a system is wholly commensurate with adversarial common-law notions of justice.

### C. Advantages and Disadvantages of the Pre-Trial Detention Framework

At first glance, there seem to be many advantages to the pre-trial detention framework of preventive detention. Terrorist acts almost invariably involve violations of the criminal law, so treating terrorists in a manner similar to the way others who violate the law are treated is not obviously illogical. Using the criminal justice

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Doc. A/HRC/4/40/Add.5, Feb. 7, 2007, at ¶ 62 (describing the earlier provisions and subsequent changes to procedure for trying terrorist offenses).

241. See, e.g., Amnesty International, *Turkey - Amnesty International Report 2007*, available at <http://www.amnesty.org/en/region/turkey/report-2007> (discussing the problems associated with the courts and the 2004 changes); Council of Europe Committee of Experts on Terrorism, *Profiles on Counter-Terrorist Capacity - Turkey* 4, June 2006, available at <http://www.legislationline.org/upload/legislations/37/a7/9e17fc18ff122bf6c899a882d366.pdf> (describing the evolution of Turkey’s counter-terrorism laws).

242. Marina Angel, *Foreword, Modern Criminal Procedure: A Comparative Law Symposium*, 62 Temp. L. Rev. 1087, 1089 (1989) (italics not in original).

system to try suspected terrorists enables experienced and qualified individuals to investigate, prosecute, and (if appropriate) convict suspected terrorists of their crimes. Conducting terrorist trials within the regular court system, and granting members of the judiciary oversight of pre-trial “preventive detention” also confers considerable legitimacy on the process. In all of the pre-trial detention framework countries, as in the United States, the judiciary is independent of the executive. The independence and impartiality of the judge ordering the initial period of preventive detention, combined with a detainees’ right of appeal to a higher tribunal of independent jurists, guarantees a certain degree of fairness in proceedings. The fact that this apparent fairness in proceedings exists and, also importantly, is *perceived* to exist, is crucial, and compares favorably to the criticisms of illegitimacy that have been leveled against the opaque, executive-controlled U.S. national security detention regime in operation on Guantánamo.<sup>243</sup> The final (and in many ways most compelling) argument in favor of the pre-trial detention framework is that it appears to work. It appears to have worked in France, where the 1995 Paris metro bombers were brought to trial in 1999.<sup>244</sup> It also appears to have worked in Spain, where the authorities have arrested, interrogated, and brought to trial a number of individuals involved in the Madrid train bombings.<sup>245</sup>

Critics of the pre-trial detention framework of “preventive detention” argue, however, that there are difficulties in using the criminal law as an anti-terrorism tool, and the criminal law system to determine who should be preventively detained. Such critics suggest that effective counter-terrorism measures prevent a terrorist act from taking place at all, and this prospective orientation is fundamentally “at odds with the criminal law’s primarily retrospective focus on punishing individuals’ past acts.”<sup>246</sup> This may

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243. See, e.g., Ari D. MacKinnon, Note, *Counterterrorism and Checks and Balances: The Spanish and American Examples*, 82 N.Y.U. L. Rev. 602, 636 (2007) (arguing that the U.S. counterterrorism model does not reflect the principle of checks and balances).

244. See, e.g., *Bomb Suspects on Trial in France*, BBC News, June 1, 1999, <http://news.bbc.co.uk/2/hi/357808.stm>.

245. See John Ward Anderson & Pamela Rolfe, *Spain Bitterly Divided as Terror Trial Begins in '04 Train Bombings*, Wash. Post, Feb. 16, 2007, at A12; *Train Bomb Trial Starts in Madrid*, BBC News, Feb. 15, 2007, <http://news.bbc.co.uk/2/hi/europe/6363149.stm> (discussing the 2004 Madrid train bombings and the subsequent trials of the suspects).

246. Ip, *supra* note 32, at 808–09.

be an accurate description of the primary focus of the criminal justice system generally, but it is far from the whole story in the terrorism context. The criminal justice system can, in fact, play a prospective and preventive role—including, for example, the criminalization of inchoate acts such as conspiracy to commit terrorism and material support of terrorism, crimes which carry heavy sentences in many pre-trial detention framework countries.<sup>247</sup> The French system, in particular, provides an extremely broad definition of “conspiracy to commit terrorism,” and has a particularly prospective approach to counter-terrorism within a criminal justice framework.<sup>248</sup>

Some critics of the pre-trial detention framework also argue that it would be foolhardy to rely entirely upon a pre-trial detention scheme because of the evidentiary and procedural challenges to building and presenting a case against terrorist suspects. In answer to such concerns, advocates of the pre-trial detention framework point to the successful use of the criminal justice system to try and convict terrorists.<sup>249</sup> Other critics of the pre-trial detention framework express concerns about the need to meet the high standard of proof applicable in ordinary criminal proceedings. These commentators argue, for example, that statements made by certain high-level al Qaeda detainees during interrogations would almost certainly be inadmissible under standard rules of evidence; as such statements may have been procured through torture or coercion.<sup>250</sup> Many proponents of the criminal law system of preventive detention would, of course, argue that these last points—the inadmissibility of statements extracted through inhumane treatment and the necessity of proving guilt beyond a reasonable doubt—are precisely their arguments *in favor* of the pre-trial detention framework of detention.

A more fundamental criticism of the pre-trial detention framework is one that has been advanced by some civil rights advocates—namely, that by relying on the criminal justice system alone to prevent terrorist attacks, the pre-trial detention framework

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247. See notes accompanying discussion *supra* Part II.B.

248. See notes accompanying discussion *supra* Part II.A and II.B.

249. See, e.g., Zabel & Benjamin, *supra* note 12, at 17–20, 26 (highlighting several cases in the United States where prosecutors successfully convicted terrorism suspects under existing law and indicating that over 90% of 160 defendants whose charges have been resolved between September 12, 2001 and December 31, 2007 in the United States received criminal convictions).

250. *Id.* at 107–111 (arguing that while critics have expressed concern about the negative impact of the rules of evidence in terrorism trials, this concern is unfounded).

countries risk distorting the criminal justice system's purpose. One frequently cited example of this proposition is that by creating overly broad definitions of "criminal" acts to control speech, "free" speech that would ordinarily be protected becomes subject to sanction. This is a criticism that has been leveled against anti-hate speech legislation in both the United Kingdom and France.<sup>251</sup> A parallel argument says that adapting the criminal justice system to make it suitable for use in terrorism cases might involve lowering evidentiary standards, which would "infect and change the standards in ordinary [criminal] cases."<sup>252</sup> The most straightforward response to this argument is that terrorism trials already take place within the criminal justice system, without perverting the course of justice or diluting the protections for defendants in "regular" criminal cases.<sup>253</sup>

A further argument against the pre-trial detention framework is specific to its current implementation by the pre-trial detention framework nations surveyed: the long period of time that many terrorist suspects actually spend in detention awaiting trial. Suspects held in preventive detention pending trial in France, for example, are detained according to (almost) the standards applied in regular criminal cases, and are eventually brought up on charges in (almost) the same way as all other criminal defendants, but this is no guarantee that their period of preventive detention will be short—under the French penal system, an investigating magistrate can detain a suspect for two consecutive four-month periods on quite general charges, and a major human rights association has observed that the length of pre-trial detention in terrorism cases is frequently longer than the norm.<sup>254</sup>

The pre-trial detention framework is clearly not perfect—particularly when viewed from the perspectives of governments

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251. See *New Efforts to Ban Religious Hate*, BBC News, June 11, 2005, [http://news.bbc.co.uk/1/hi/uk\\_politics/4075442.stm](http://news.bbc.co.uk/1/hi/uk_politics/4075442.stm) (describing the proposed Racial and Religious Hatred Bill); Mark Rice-Oxley, *Free Speech in Europe: Mixed Rules*, Christian Sci. Monitor, Feb. 8, 2006, at 1 (describing the debate over free speech and tolerance in France).

252. Michael Mukasey, *Jose Padilla Makes Bad Law*, Wall St. J., Aug. 22, 2007, at A15.

253. See Zabel & Benjamin, *supra* note 12, at 129 (concluding that the criminal justice system can handle terrorism cases "without sacrificing national security interests or rigorous standards of fairness and due process").

254. *France: Paving the Way for Arbitrary Justice*, Int'l Fed'n of Hum. Rts. Leagues (FIDH), No. 271-2, at 24–30, Mar. 1999 (describing several cases of extensive detention of suspects in France).

engaged in prospective efforts to thwart potential terrorist attacks. The response of three countries—Canada, New Zealand, and South Africa—has been to adopt a more “flexible” approach to preventive detention, by applying pre-existing immigration law practices and procedures to the detention of terrorist suspects.

### III. THE IMMIGRATION DETENTION FRAMEWORK

Canada, New Zealand, and South Africa are all countries whose preventive detention regimes, in their most rights-stripping iteration, fall within the immigration detention framework. Each of these nations, as discussed in more detail *infra*, have provisions within their criminal justice systems for the investigation of terrorist acts and the incarceration of terrorist suspects. Yet, each of these nations has made frequent (and, importantly, more rights-stripping) use of immigration law provisions to hold non-national suspects in preventive detention. (In common with these nations, the United Kingdom initially employed an immigration detention framework, but subsequently rejected that framework when the House of Lords ruled that using immigration-based detention impermissibly violated individual detainees’ rights.) Part III begins by exploring in more detail the attributes of the different preventive detention regimes employed by Canada, New Zealand, and South Africa, measured against each of the individual units of analysis in the taxonomy of preventive detention. This Part continues by considering the Commonwealth and common law traditions that all of these countries share—and how those shared traditions have deeply influenced the preventive detention regimes that exist in each of these countries today. Part III then turns to discuss how and why the United Kingdom rejected the immigration detention framework, before concluding with a discussion of the advantages and disadvantages of the immigration detention framework.

#### A. Key Characteristics of Immigration Detention Framework Countries

Unlike the pre-trial detention framework of preventive detention, the immigration detention framework is not grounded in the criminal law and penal codes, but rather in administrative immigration law. In immigration detention framework countries, “preventive detention” is not, therefore, predicated upon a detainee’s past conduct, but rather upon his status as a non-citizen or naturalized immigrant. Immigration detention framework countries

use the strictures laid down in immigration legislation to legitimize the detention of terrorist suspects without affording the detainees the full panoply of procedural protections characteristic of criminal law.<sup>255</sup> In these two respects, the immigration detention framework is somewhat akin to the executive-dominated national security detention framework of preventive detention. Yet, the approach of the immigration detention framework countries also shares some practices and procedures (although not all) with the pre-trial detention framework nations—most notably with respect to judicial review of the grounds for ongoing detention.<sup>256</sup> The immigration detention framework thus sits uneasily between the most rights-stripping national security detention regimes and the more rights-inhering pre-trial detention regimes. This section of the Article will examine the eight key characteristics of the immigration detention framework countries' "preventive detention" regimes. Through this exploration, the limitations on the rights of terrorist suspect detainees will quickly become apparent, hinting at why the United Kingdom ultimately rejected the immigration detention regime in favor of the more rights-inhering pre-trial detention model.

(i) Legal basis for detention: In each of the immigration detention framework countries, the legal basis for detention is found in a combination of immigration and terrorism-specific statutes. In each country, high profile cases have been brought seeking to challenge the use of immigration detention to hold suspected terrorists. In the United Kingdom, the outcome of such a legal challenge was the wholesale rejection of the immigration detention framework of preventive detention. In other countries, the outcome has been more mixed.

The intersection of counter-terrorism measures and immigration law is readily apparent in New Zealand's terrorism-related statutes and case law. In New Zealand, as in the other countries discussed in this Article, the government enacted comprehensive legislation in the wake of 9/11, laying out a clear statutory scheme for crimes of terrorism and appropriate measures

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255. See Ip, *supra* note 32, at 823–24 (describing the use of immigration detention in the United States).

256. As in the pre-trial detention framework countries, in the immigration detention framework countries, a judge is responsible for deciding whether or not an individual will continue to be held in preventive detention, and all decisions that judge makes about detention may be appealed through the judicial system, to the highest court in the land.

to pursue, detain, and bring to trial terrorist suspects within the regular criminal justice system.<sup>257</sup> Yet, only one terrorist suspect has ever been held in preventive detention in New Zealand—Ahmed Zaoui<sup>258</sup>—and Mr. Zaoui, who has since been released,<sup>259</sup> was held for two years under a pre-existing amendment to the Immigration Act of 1987.<sup>260</sup> This Act grants the Director of the New Zealand Security Intelligence Service (NZSIS) the power to issue a “security risk certificate” in the name of individuals suspected of involvement with terrorist activities. The “security risk certificate” states that there are “reasonable grounds” to suppose that a foreign national poses “a threat to national security.”<sup>261</sup> The Director of NZSIS, under the terms of the Act, is then required to forward this certificate to the New Zealand Minister of Immigration.<sup>262</sup> The Minister must then make a preliminary decision about the certificate’s reliability.<sup>263</sup> If the Minister is satisfied that the intelligence underlying the certificate is inherently reliable, the individual in whose name the certificate has been issued may be detained or removed from the country.<sup>264</sup> The Immigration Act of 1987 grants the subject of the certificate the right to appeal the Minister of Immigration’s decision.<sup>265</sup> Review of this decision is not, however, undertaken by a court of law, but rather by the appointed Inspector General of Intelligence and Security.<sup>266</sup> The Inspector General is a retired High Court Judge, and his task is to confirm whether or not the security

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257. The Terrorism Suppression Act of 2002 (N.Z.).

258. John Ip explains that Ahmed Zaoui was formerly a political leader in Algeria, who fled the country following a military coup d’état, and lived in France, Belgium, Switzerland and Malaysia before relocating to New Zealand in 2002. Ip, *supra* note 32, at 805. For a detailed account of Mr. Zaoui’s movements and encounters with immigration and law enforcement in each of these countries, see *id.* at 805-08. I am very indebted to Professor Ip for his comments and assistance with this section of the Article.

259. See Ip, *supra* note 32, at 805–08. See also Zaoui: *I Never Lost my Faith in New Zealand Justice*, N.Z. Herald (Auckland), Sep. 13, 2007, available at [http://www.nzherald.co.nz/section/1/story.cfm?c\\_id=1&objectid=10463340&pnum=0](http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10463340&pnum=0).

260. Immigration Act of 1987 (N.Z.) (as amended in 1999 and 2002).

261. Immigration Act of 1987, § 114C(2)(b). (N.Z.).

See Ip, *supra* note 32 at 805.

263. *Id.*

264. Ip *supra* note 32 at 805; Immigration Act of 1987, § 114A(f) (N.Z.) (noting that individuals posing a security risk . . . can “be effectively and quickly detained and removed or deported from New Zealand”).

265. Ip *supra* note 32 at 805, 807; Immigration Act of 1987, § 114I(2) (N.Z.).

266. Immigration Act of 1987, § 114I(3) No. 74 (N.Z.).



risk certificate has been issued properly and appropriately and to advise the Minister of Immigration accordingly before a final decision is made.<sup>267</sup>

Mr. Zaoui's lawyers brought several challenges to the provisions of the Immigration Act that constituted the legal basis of Mr. Zaoui's detention: Mr. Zaoui first sought and won a ruling from the New Zealand Supreme Court that the courts had inherent jurisdiction, despite the outstanding security risk certificate, to grant Mr. Zaoui's release on bail.<sup>268</sup> Mr. Zaoui then sought review of the Inspector General's risk assessment.<sup>269</sup> In this instance, the Court favored the government by holding that the Inspector-General need only determine whether the statutory security criteria were satisfied, rather than consider all of the risks Mr. Zaoui might face if New Zealand were to deport him.<sup>270</sup> Nonetheless, it curtailed the government's ability to deport Mr. Zaoui, implying that the government had an obligation to abide by human rights provisions enshrined in New Zealand and international law that prohibit the deportation of individuals to countries where they are at risk of persecution, torture or cruel, inhuman or degrading treatment.<sup>271</sup>

In South Africa, while the Constitution expressly prohibits the use of "preventive detention" for citizens,<sup>272</sup> non-citizens may be held in "preventive detention" outside of the regular criminal justice system.<sup>273</sup> Concern for human rights and human dignity plays an enormous role in determining the legal parameters of domestic legislation governing the detention of suspected terrorists in South Africa in part because of the legacy of oppressive legislation enacted

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267. *Ip, supra* note 32 at 805, 807; Immigration Act of 1987, § 114I(4)(a-c) (N.Z.); *see also* Inspector-General of Intelligence and Security Act of 1996, § 5(3) (N.Z.) ("No person shall be appointed as the Inspector-General unless that person has previously held office as a Judge of the High Court of New Zealand.")

268. *Zaoui v. Attorney-General*, [2005] 1 N.Z.L.R. 577, 643-653 (S.C.). The Supreme Court of New Zealand granted Zaoui's bail application, which is a highly unusual step for the highest court to take. *Zaoui v. Attorney-General*, [2005] 1 N.Z.L.R. 577, 662-665 (S.C.) (Judgment of the Court (No. 2)).

269. *Zaoui v. Attorney-General* (No. 2), [2006] 1 N.Z.L.R. 289 (S.C.).

270. *Id.* at 317-318.

271. *Id.* at 322.

272. S. Afr. Const. 1996 § 12 (b).

273. *See, e.g.*, The Refugees Act of 1998, art. 29 (permitting detention of refugees and asylum seekers for up to 30 days without judicial review, and in 30-day increments thereafter, subject to judicial review at the expiration of each 30-day period).

under Apartheid.<sup>274</sup> The Preamble to South Africa's Protection of Constitutional Democracy Against Terrorist and Related Activities Act of 2004<sup>275</sup> distinguishes the legislation from its Apartheid era predecessors, such as the Terrorism Act of 1967<sup>276</sup> and the Internal Security Act of 1982.<sup>277</sup> A first draft of the Protection of Constitutional Democracy bill, containing a provision for detention without trial, was rejected as reminiscent of the Apartheid era and incompatible with Section 12 of the South African Constitution.<sup>278</sup> These decisions by the legislature were commensurate with the South African Constitutional Court's jurisprudence, which stressed that the words "detention without trial" should never be "viewed apart from [South Africa's] ugly history of political repression."<sup>279</sup> In December 2007, the South African Human Rights Commission

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274. The Apartheid era government introduced a range of problematic legislation in the 1950s and 1960s, providing for detention without trial. See SA Law Commission Project 105 Review of Security Legislation (August 2002) 16–17, available at [http://www.doj.gov.za/salrc/reports/r\\_prj105\\_2002aug.pdf](http://www.doj.gov.za/salrc/reports/r_prj105_2002aug.pdf) (critiquing draft proposals for a bill to prosecute and noting parallels to laws under Apartheid, including: General Laws Amendment Act 37 of 1963 s. 21 (providing for detention during interrogation); Criminal Procedures Act 56 of 1965 (providing for detention of state witnesses); General Law Amendment Act 62 of 1966 s. 22 (providing for short-term detention); Terrorism Act 83 of 1967 s. 6(5) (prohibiting any court of law from pronouncing on the validity of the detention or ordering the release of an individual detained under the act); Internal Security Act 74 of 1982 s. 28–29, 31, 50 (providing for detention for interrogation and preventive detention)).

275. Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004, pmbl.

276. Terrorism Act 83 of 1967 s. 6 (authorizing detention for interrogation and preventive detention).

277. Internal Security Act 74 of 1982 s. 29, 54 (providing for indefinite detention).

278. See Annette Hubschle, *South Africa's Anti-Terror Law: Among the Least Restrictive?*, 14 Afr. Sec. R. 105, 106 (Summer 2005). Section 16 of the draft bill provided that a judge of the high court could issue a warrant for the detention of any person who, on the grounds of information submitted under oath by a Director of Public Prosecutions, appeared to be withholding information regarding any offense under the Act. See SA Law Commission Project 105 Review of Security Legislation (August 2002) 16–17, 1035, available at [http://www.doj.gov.za/salrc/reports/r\\_prj105\\_2002aug.pdf](http://www.doj.gov.za/salrc/reports/r_prj105_2002aug.pdf) (criticizing the draft bill for this provision). Section 12 of the South African Constitution provides that everyone has the right to freedom and security of their person, which includes the right not to be deprived of freedom arbitrarily or without just cause, not to be detained without trial, and not to be tortured in any way. S. Afr. Const. 1996 § 12(1)(a), (b), and (d).

279. *De Lange v. Smuts* 1998 (3) SA 785 (CC) at 99 (S. Afr.).

commended the government's "decision to handle for the most part terrorism cases within the same criminal procedure framework as all other criminal cases."<sup>280</sup> However, at the same time, the Commission highlighted the plight of one class of suspects who are held outside the criminal justice system: non-nationals held in immigration detention.<sup>281</sup> Under the auspices of the Refugees Act, therefore, non-national terrorist suspects could be held in immigration detention, in potentially abusive circumstances, even if there was insufficient proof to make out a criminal case against them.<sup>282</sup> Under the auspices of the Refugees Act, this "loophole" in the immigration law has led to non-national terrorist suspects being detained in the absence of concrete proof sufficient to make a criminal case.<sup>283</sup>

In Canada, as in South Africa, legislators formulating anti-terror legislation in the wake of 9/11 were deeply concerned with human rights and individual liberties,<sup>284</sup> and in Canada, as in South Africa, and New Zealand, a line was drawn between the rights of citizens and non-nationals. The Canadian Anti-Terrorism Act of 2001<sup>285</sup> (hereinafter ATA) established a new set of "terrorist offences" over which the state has specially-created prosecutorial and

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280. Nat'l Human Rights Inst. (NHRI), Statement to the Human Rights Council by The South African Human Rights Commission, Dec. 12, 2007, available at [http://www.nhri.net/2008/Statement\\_NHRI\\_South\\_Africa\\_on\\_Mission\\_to\\_South\\_Africa.pdf](http://www.nhri.net/2008/Statement_NHRI_South_Africa_on_Mission_to_South_Africa.pdf).

281. *Id.*

282. Refugees Act 130 of 1998, s. 29(1).

283. Nat'l Human Rights Inst. (NHRI), Statement to the Human Rights Council by The South African Human Rights Commission, Dec. 12, 2007, available at [http://www.nhri.net/2008/Statement\\_NHRI\\_South\\_Africa\\_on\\_Mission\\_to\\_South\\_Africa.pdf](http://www.nhri.net/2008/Statement_NHRI_South_Africa_on_Mission_to_South_Africa.pdf) ("The Commission believes that the potential for abuse of non-nationals in detention is particularly high due to systemic issues relating to the delays in processing of immigration applications and asylum claims."). See M. Cowling, *The Return of Detention without Trial?* 13 S. Afr. J. Crim. Just. 344, 348 (2000) for a scholarly account anticipating this development.

284. For an analysis of the similarities between South Africa and Canada, see Kent Roach, *A Comparison of South African and Canadian Anti-Terrorism Legislation*, 2 S. Afr. J. of Crim. Just. 127, 129 (2005) ("While the South African law is significantly narrower in scope than the Canadian law, it has a broader definition of terrorist activities and employs objective or culpa forms of fault that were deliberately not included in the Canadian anti-terrorism law. In addition, the South African law has a broader duty to report offense and provides for some investigative powers without the restraints of prior judicial authorization and a presumption of public hearings.").

285. Anti-Terrorism Act, 2001 R.S.C., ch. 41 (Can.) [hereinafter ATA]. The full text is available at [http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-36/C-36\\_1/C-36\\_cover-E.html](http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-36/C-36_1/C-36_cover-E.html).

investigative powers, including preventive detention.<sup>286</sup> Under Canada's Criminal Code, as amended by the ATA, police officers are empowered to arrest and detain a suspect without an arrest warrant if the officer suspects on "reasonable grounds" that it is "necessary to do so in order to prevent a terrorist activity."<sup>287</sup> When it was originally introduced, the ATA provided that the individual could be preventively detained for up to seventy-two hours, but this particular provision was allowed to sunset in March 2007, following an outcry from human rights activists.<sup>288</sup> In common with New Zealand, Canada also has a certification procedure that permits preventive detention of non-citizens under the Immigration and Refugee Protection Act (hereinafter IRPA) for extended periods of time.<sup>289</sup> Once again, the key determinant for the treatment of terrorist suspect detainees is not the crime of which they stand accused (although that is obviously significant), but rather the identity of the suspect—with two different standards being applied for those who are considered "insiders" and those who are considered "outsiders." In 2007, the Canadian Supreme Court upheld Canada's practice of holding terrorist suspects for several years "pending deportation."<sup>290</sup> The court held that such detention was permissible, provided detainees were given prompt and full notice of grounds for their detention and were permitted meaningful judicial review.<sup>291</sup>

(ii) Notification of charges: The immigration detention framework countries adopt a very similar approach to notifying terrorist suspects of the charges that they face. In Canada, a terrorist suspect who is arrested and detained, or an individual whose immigration status is revoked leading to his detention is entitled to be informed of the allegations against him within forty-eight hours.<sup>292</sup>

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286. These offenses included those found in §§ 83.01–83.04, 83.18–83.23 of the Criminal Code, as amended by the ATA. 2001 R.S.C., ch. 41 (Can.).

287. Canada Criminal Code, R.S.C., ch C-46, § 83.3(7)(b)(ii).

288. See The Council of Canadians, Vote Against "Preventive Arrests" and "Investigative Hearings," <http://www.canadians.org/action/2007/12-Feb-07.html> (last visited Sept. 30, 2009) ("On Tuesday February 27, the House of Commons voted 159 to 124 against extending the preventive arrests and investigative hearings provisions of C-36, Canada's Anti-Terrorism Act. As of Thursday March 1, these two provisions expired and are no longer the law in Canada.").

289. Immigration and Refugee Protection Act § 77-85.

290. See *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (allowing prolonged detention on the condition of periodic judicial review).

291. *Id.* at 387–90.

292. *Id.*

In New Zealand, detained individuals are entitled to “be informed at the time of the arrest or detention of the reason for it.”<sup>293</sup> In South Africa, individuals are entitled to be informed of “the reason for the detention” at the “first court appearance after being arrested” which must either occur forty-eight hours after arrest or “at the end of the first court day after the expiry of the [forty-eight] hours, if the [forty-eight] hours expire outside ordinary court hours or on a day which is not an ordinary court day.”<sup>294</sup>

(iii) Initial appearance/review: The immigration detention framework countries’ provisions for initial review before a specified authority mirror the provisions in their laws for the timeframe for notification of charges. In each instance, initial review must be undertaken within a twenty-four to forty-eight-hour window. In Canada, where a separate system of immigration detention exists, the timeframe for initial review is also forty-eight hours. Under the Canadian IRPA, a federal court must review the reasonableness of the certificate permitting the detention of the immigrant within forty-eight hours of that individual’s initial arrest.<sup>295</sup> In New Zealand, the Immigration Act imposes a forty-eight-hour limit for initial review of detention of criminal offenders.<sup>296</sup> In South Africa, detained individuals must be “brought before a court as soon as reasonably possible” and “not later than” forty-eight hours after arrest or “at the end of the first court day after the expiry of the [forty-eight] hours, if the [forty-eight] hours expire outside ordinary court hours or on a day which is not an ordinary court day.”<sup>297</sup> Individuals held in immigration detention on suspicion of having committed or conspiring to commit terrorist offenses have their cases reviewed by a judge in chambers at this time, rather than in open court.<sup>298</sup>

(iv) Period of detention without charge or trial: The area in which there is the most divergence between the otherwise relatively homogenous immigration detention framework countries is the maximum period during which an individual may be held in

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293. See Bill of Rights Act 1990, § 23(1)(a) (N.Z.).

294. S. Afr. Const. 1996 §35(1)(d)-(e).

295. Immigration and Refugee Protection Act § 77-85.

296. Immigration Act 1987, § 99 (N.Z.).

297. S. Afr. Const. 1996 §35(1)(d).

298. This *in camera* review was criticized by the South African Human Rights Commission. Nat’l Human Rights Inst. (NHRI), Statement to the Human Rights Council by The South African Human Rights Commission, Dec. 12, 2007, available at [http://www.nhri.net/2008/Statement\\_NHRI\\_South\\_Africa\\_on\\_Mission\\_to\\_South\\_Africa.pdf](http://www.nhri.net/2008/Statement_NHRI_South_Africa_on_Mission_to_South_Africa.pdf).

immigration detention. In New Zealand, criminal offenders held under the Immigration Act of 1987 may be detained for up to twenty-eight days without review, and thereafter their detention must be reviewed by a district judge every seven days, but in theory (if not in practice) individuals could be detained indefinitely.<sup>299</sup> In contrast, in Canada there is no provision for indefinite administrative detention, and an individual held in immigration detention who is not deported within one hundred and twenty days may apply for release from detention.<sup>300</sup> In South Africa, individuals held in immigration detention may not be detained for a longer period than is "reasonable and justifiable," and any detention over thirty days is automatically reviewed by the High Court.<sup>301</sup> In common with the initial review of detention in South Africa, these periodic automatic reviews take place *in camera*, rather than in open court.<sup>302</sup>

(v) Access to counsel: Each of the immigration detention framework countries has a robust provision for access to counsel, although in certain circumstances the anti-terrorism legislation limits that counsel's freedom to discuss the details of the case, and in other cases legal aid is not available for the detainees. In Canada, there is a right to counsel in both criminal and immigration-related proceedings.<sup>303</sup> In South Africa, this is also the case, but government-funded legal aid is limited, and does not extend to immigration proceedings.<sup>304</sup> In New Zealand there is a right to counsel in immigration-related cases, but government-funded legal aid is not available.<sup>305</sup>

(vi) Right to fair and public hearing: In each of the immigration detention framework countries, individuals held in

299. Immigration Act of 1987, § 100(2)–(3).

300. Canada, Immigration and Refugee Protection Act, 2001 S.C., ch. 27, § 77-85 (Can.).

301. Refugees Act 130 of 1998 s. 29(1) (S. Afr.).

302. See Nat'l Human Rights Inst. (NHRI), Statement to the Human Rights Council by The South African Human Rights Commission, Dec. 12, 2007, available at [http://www.nhri.net/2008/Statement\\_NHRI\\_South\\_Africa\\_on\\_Mission\\_to\\_South\\_Africa.pdf](http://www.nhri.net/2008/Statement_NHRI_South_Africa_on_Mission_to_South_Africa.pdf) (criticizing this practice as rights-violative).

303. Canada Criminal Code, R.S.C., ch C-46, § 83.28 (right to counsel) ("(11) A person has the right to retain and instruct counsel at any stage of the proceedings."); Immigration and Refugee Protection Act, 2001 S.C., ch. 27, § 167(1) (Can.).

304. See Legal Aid South Africa, Legal Aid Guide 2009, available at <http://www.legal-aid.co.za/images/legal-services/Guide/laguide.pdf>.

305. Immigration Act of 1987, § 140(4) (N.Z.) (noting right to counsel, but no provision for government-funded legal aid).

immigration detention have the right to a hearing in front of a member of the regular judiciary, but the shape and attributes of that hearing differ from country to country. Canadian law provides for a “hearing by an independent and impartial tribunal.”<sup>306</sup> In New Zealand, criminal offenders held subject to an order of commitment under the Immigration Act of 1987 for a period of more than twenty-eight days have a right to review of their detention by a district judge every seven days.<sup>307</sup>

(vii) Judicial review: The availability of judicial review is a keynote of the immigration detention framework countries’ systems of preventive detention. As noted above, the shape and attributes of the initial judicial review differ by country, but in each instance the review is carried out by a member of the judiciary. In each of the immigration detention framework countries, the initial review by a judge or magistrate is then subject to review by the regular court system. In Canada, proceedings may be brought in federal court, where the government has to meet the usual burden of proof—i.e., “beyond a reasonable doubt”—to demonstrate that the detainee has engaged in or may engage in activities that justify that detainee’s continued incarceration.<sup>308</sup> In New Zealand, as the Zaoui case demonstrates, detainees have the right to appeal their cases all the way to the Supreme Court.<sup>309</sup>

(viii) Rules of interrogation: Each of the immigration detention framework countries has a strong statutory and/or constitutional and jurisprudential commitment to protecting detainees from torture or ill treatment. South Africa, in particular, because of the history of the nation’s struggle against Apartheid, has integrated stringent international human rights standards into its post-Apartheid constitution.<sup>310</sup> The South African Constitution forbids torture, and South African courts have underscored that any evidence obtained as a fruit of torture or inhumane treatment will be inadmissible in court—as was most recently demonstrated in 2008 in

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306. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

307. Immigration Act of 1987, § 100(2)–(3) (N.Z.).

308. Canada Criminal Code, R.S.C., ch C-46.

309. See discussion *supra* Part A.

310. S. Afr. Const. 1996 § 39 (“When interpreting the Bill of Rights, a court . . . must consider international law; and may consider foreign law.”).

the Bongani Mthembu case.<sup>311</sup> New Zealand and Canada have both also condemned torture and inhuman treatment of detainees.<sup>312</sup> Furthermore, in each of the immigration detention framework countries, the laws governing the treatment of terrorist suspects also specifically prohibit the deportation of individuals to countries where they may be subjected to torture or inhumane treatment.<sup>313</sup>

#### B. Similarities and Differences between Immigration Detention Framework Countries

The above discussion of the immigration detention regimes of South Africa, New Zealand, and Canada demonstrates the great extent to which these countries have adopted similar approaches to preventive detention. Underlying this shared approach to preventive detention are many other easily identifiable similarities. The first (and most obvious) similarity is political: as is the case in the pre-trial detention nations, the immigration detention countries are parliamentary democracies. Each country has a well-established and independent judiciary, and each country has a longstanding commitment to human rights, and a longstanding engagement with international instruments designed to protect those rights and uphold the rule of law.

Moreover, each of the immigration detention framework countries is a member of the Commonwealth. They are former British colonies, and, as a result, they have similar legal systems, shared histories, a shared language—English—and overlapping (although far from identical) cultures and traditions. South Africa is, perhaps, an outlier within this group because of its mixture of many different languages, cultures, and traditions that were subjugated during the colonial and Apartheid eras.<sup>314</sup> Despite its distinct

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311. See Ernest Mabuza, *South Africa: Landmark Court Ruling On Torture*, Business Day, 11 April 2008, available at <http://allafrica.com/stories/200804110027.html>.

312. Both Canada and New Zealand are, for example, signatories to the ICCPR.

313. See, e.g., Criminal Code Act, 1995, § 105.33 (Austl.); Canadian Charter of Rights and Freedoms, Part I of Constitution Act, 1982, being Schedule B to Canada Act 1982, ch. 11 (U.K.), at § 7.

314. See Sally Frankental & Owen Sichone, *South Africa's Diverse Peoples: A Reference Sourcebook (Ethnic Diversity Within Nations)* 29–59, 123–162 (2005) (detailing the process by which South Africa became culturally diverse as it was colonized by Britain and the subsequent effect on this diversity as a result of Apartheid policies).



national identity, however, it shares many legal traditions with New Zealand and Canada. Shared legal traditions may play a crucial role in the development of an immigration detention framework approach to the detention of terrorist suspects. Various incarnations of “preventive detention” have, for good or for ill, a long history within the English common law.<sup>315</sup> While it would be extremely simplistic to

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315. The origins of preventive detention under the common law stretch back over 400 years to the use of prerogative detention by the Tudor and Stuart monarchs of England. One of the most well known (and well documented) early instances of royal prerogative detention is *Darnel's Case* (also known as The Five Knights' Case) of 1627. 3 How. St. Tr. 1, 59 (K.B. 1627). In March 1627, Sir Thomas Darnel, Sir John Corbet, Sir Walter Earl, Sir Edmund Hampden, and Sir John Hevingham were imprisoned by Charles I for refusing to pay the Ships' Tax (used to raise troops and arms for the war in support of Frederick, Elector of Palatine). They were imprisoned solely at the royal prerogative—“*per speciale mandatum domini regis*.” The earliest common law jurisdiction statute permitting preventive detention appeared 162 years later when the House of Lords passed Pitt's India Act of 1784, which contained provisions intended to preserve order and restrict political subversion in Bengal. See Faqir Hussain, Personal Liberty and Preventive Detention 3–90 (1989) (discussing the use of preventive detention over the course of British history as a means of ensuring security for communities). However, it was a World War II case that provided the most infamous justification of administrative detention within the common law and commonwealth tradition. See *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.) (appeal taken from K.B.). In *Liversidge*, a plaintiff detained under wartime Regulation 18B of the Defence (General) Regulations of 1939 brought a false imprisonment action against the Secretary of State. *Id.* See also Harding & Hatchard, *supra* note 7, at 32. The relevant regulations stated “If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and by that reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.” See *id.*; A.W. Brian Simpson, In the Highest Degree Odious: Detention Without Trial in Wartime Britain 424 (1992). The House of Lords interpreted Regulation 18B as insulating detention decisions made by the Secretary of State from judicial review, provided that the Secretary was acting in good faith and had “reasonable cause” to believe that the detention was justified. *Liversidge*, [1942] AC at 222–223; see also Harding & Hatchard, *supra* note 7, at 32 (describing how the House of Lords construed the statute as meaning that courts could not enquire into the grounds of detention underlying a detention order “unless the plaintiff could demonstrate that the Secretary of State had acted in bad faith.”). Lord Atkin, in dissent famously argued that the words “reasonable cause” indicated that, even during war time a decision made by the executive to detain individuals should be subject to judicial scrutiny, as courts could, and should, be able to review independently whether or not the detention was justifiable. See Simpson, at 363 (noting that Lord Atkin's impassioned dissent appeared to stem from a desire for greater deference by the Home Office to the judiciary); Harding & Hatchard,

argue that the immigration detention framework countries’ approach to preventive detention of terrorist suspects is a natural consequence of this common law tradition—indeed, given the fact that the United Kingdom and Ireland, also common law countries, have eschewed this approach, it would be foolish to make such an argument—there is some merit in the claim that the shared legal tradition of immigration detention framework countries informs the statutory and jurisprudential approaches taken in each nation in response to terrorism.

A related reason for the convergence of the immigration detention framework countries’ respective approaches to preventive detention of terror suspects is the extent to which the legislators and jurists in these three nations are engaged in dialogue with one another.<sup>316</sup> It is surely no accident that countries that share the same parliamentary and legal traditions, whose jurists and legislators refer to the decisions and policies of one another, each developed methods for detaining terrorist suspects involving their immigration systems.

However, despite these similarities between the immigration detention framework countries, it would be a mistake to assume that these similarities are preconditions that ultimately lead to an immigration framework approach to preventive detention. Australia is a nation that has much in common with its antipodean neighbor New Zealand, and yet it has not adopted an immigration detention framework. Ireland and the United Kingdom are both Commonwealth countries with parliamentary democracies and independent judiciaries, and they have adopted a pre-trial detention approach to preventive detention. Common law traditions do not, therefore, inevitably lead to the immigration detention framework—just as civil law systems do not inevitably lead to the pre-trial detention framework of “preventive detention.” The most vivid illustration of this point is the United Kingdom’s experience of

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*supra* note 7, at 32. The *Liversidge* decision created an “impenetrable wall of secrecy” around executive decisions to detain. *Id.* at 362.

316. See Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, “A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication,” Speech at the Constitutional Court of South Africa (February 7, 2006) (transcript available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_02-07b-06.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html)) (underscoring why the United States can, and should, learn from foreign jurisdictions).

shifting from an immigration detention to a pre-trial detention regime.

### C. The United Kingdom's Rejection of the Immigration Detention Framework

The United Kingdom is unique among the countries surveyed in this Article in its shift between “preventive detention” frameworks in the post-9/11 period. In the aftermath of 9/11, the United Kingdom developed a scheme for the detention of terrorist suspects that, when measured against the criteria in this Article’s taxonomy, firmly placed it within the immigration detention framework; it subsequently rejected this regime as too violative of detainees’ rights. The current regime for the preventive detention of terrorist suspects in the United Kingdom is intended to be more rights respecting and locates the United Kingdom within the pre-trial detention framework. The circumstances and legislative history of the United Kingdom’s move away from immigration detention to pre-trial detention illustrate the fundamental problems inherent in using the immigration detention framework to detain terrorist suspects.<sup>317</sup> The Terrorism Act of 2006<sup>318</sup> was enacted to amend the Anti-Terrorism, Crime and Security Act of 2001<sup>319</sup> (hereinafter ATCSA), the legislation that previously governed the “preventive detention” of suspected terrorists in the United Kingdom. The ATCSA extended police powers to combat terrorism, previously enumerated in the Terrorism Act of 2000<sup>320</sup> and the International Convention for the Suppression of the Financing of Terrorism of 1999,<sup>321</sup> and, alongside a host of other measures,<sup>322</sup> granted the Home Secretary the power to

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317. For a detailed analysis of the history of the bill, see generally Sangeeta Shah, *The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish*, 5 Hum. Rts. L. Rev. 403 (2005) (discussing constitutional arguments raised in a challenge to the bill adjudicated by the House of Lords).

318. Terrorism Act, 2006, c. 11 (Eng.).

319. Anti-Terrorism, Crime, and Security Act, 2001, c. 24 (Eng.).

320. Terrorism Act, 2000, c. 11 (Eng.).

321. Adopted by G.A. Res. 54/109, U.N. Doc. A/RES/54/109 (Dec. 9, 1999).

322. See Shah, *supra* note 317 at 404 (explaining that the measures created include “the crime of inciting religious hatred; extending controls over ‘weapons of mass destruction’; safeguarding the control of pathogens and toxins and security in the nuclear industry; mandating improvements in aviation security” and implementing so-called “criminal co-operation measures” under the Third Pillar of the EU). *Id.* at n.7, citing Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?*, 65 Mod. L. Rev. 724, 725–27 (2002) (arguing that the Act amounts to a disproportional

"certify" foreign nationals who were terrorist suspects.<sup>323</sup> Once an individual had been certified, that individual could be repatriated. If, however, the individual's home country conditions were such that upon repatriation the individual might face torture or other forms of ill treatment, that individual could be detained until such conditions changed—i.e. potentially indefinitely—or until another country indicated that it was willing to receive the suspected individual.<sup>324</sup> This provision of the ATCSA allowing for indefinite detention of foreign nationals was intended to address the United Kingdom's responsibilities under Article 3 of the European Convention on Human Rights, which has been interpreted by the European Court of Human Rights to prohibit the extradition of individuals to countries in which they would face a real risk of torture, the death penalty, or any other "inhuman or degrading treatment or punishment."<sup>325</sup> However, in its attempt to conform with its responsibilities under Article 3, the United Kingdom risked violating Article 5(1) of the European Convention, as well as Article 9 of the ICCPR, both of which prohibit arbitrary detention. As a result, the United Kingdom entered derogations from both instruments.<sup>326</sup>

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response to terrorism); Adam Tomkins, *Legislating Against the Terror: the Anti-Terrorism, Crime and Security Act 2001*, 2002 Pub. L. 205 *passim* (presenting an outline of the entire Act and its history and discussing in more detail its most controversial provisions).

323. Anti-Terrorism, Crime, and Security Act, 2001, c. 24, § 21 (Eng.). The text of § 21(1) reads: "The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably—(a) believes that the person's presence in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist."

324. *Id.* § 23 (Eng.). The text of § 23(1) reads: "A suspected international terrorist may be detained under a provision specified in subsection (2) [relevant provisions of the Immigration Act 1971] 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." Lord Nicholls argued preventive detention under the ATCSA was thus less absolute, describing it as "a prison . . . [with] only three walls," but also acknowledged that "this freedom is more theoretical than real . . . most of those detained . . . prefer to stay in prison rather than face the prospect of ill treatment in any country willing to admit them." *A v. Sec'y of State for the Home Dep't*, [2005] 2 A.C. 68, 128.

325. See *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413, ¶ 80 (1997); *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439 (1989); see also Shah, *supra* note 317 at 405.

326. Shah, *supra* note 317 at 405. As Shah points out, the text of both derogations, communicated to the relevant authorities on December 18, 2001, is almost identical. *Id.* at n. 14. See UK Derogation from the ECHR at:

The British government made use of the certification procedures permitted under the ATCSA to detain foreign nationals suspected of terrorist connections. In the three years following the passage of the ATCSA, a total of seventeen individuals were certified, sixteen of whom were detained.<sup>327</sup> The detainees vigorously challenged the lawfulness of their detention, arguing that it was illegal under Article 5 of the European Convention for foreign national terrorist suspects to be treated differently than UK nationals, and a 8-1 majority of the House of Lords agreed, holding that section 23 of the ATCSA was incompatible with Article 5 of the European Convention on this ground.<sup>328</sup> The government's response

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<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CV=0&NA=&PO=999&CN=999&VL=1&CM=9&CL=ENG>; "Notifications under Article 4 (3) of the Covenant (Derogations)" at: [http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=1&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en). Both derogations were withdrawn on March 15, 2005. For further background on the United Kingdom's derogation from these two instruments, see Stuart McDonald, Essay, *The Unbalanced Imagery of Antiterrorism Policy*, 18 Cornell J.L. & Pub. Pol'y 519, 525 and n. 35, citing Tom Hickman, *Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism*, 68 Mod. L. Rev. 655 (2005) (discussing the merits of derogation as a way to legally accommodate emergency actions as compared to assuming that extra-legal actions will be taken in emergencies); Stephen Tierney, *Determining the State of Exception: What Role for Parliament and the Courts?*, 68 Mod. L. Rev. 668 (2005) (discussing the proper roles of legislature, executive, and courts in determining the existence of an emergency); David Dyzenhaus, *An Unfortunate Outburst of Anglo-Saxon Parochialism*, 68 Mod. L. Rev. 673 (2005) (objecting to the emphasis placed by the House of Lords on traditional common law as opposed to international human rights law in evaluating derogation). The substantive provisions of the European Convention have also been incorporated into UK domestic law as part of the Human Rights Act 1998; as such, the Home Secretary also made a Designated Derogation Order with regard to Article 5(1). Human Rights Act 1998 (Designated Derogation) Order, 2001, S.I. 2001/3644 (U.K.).

327. Media accounts of the detainees, the allegations they faced, and the proceedings against them can be found online, including Who are the Terror Detainees, BBC News, Mar. 11, 2005, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk/4101751.stm>; Vikram Dodd, The 11 Belmarsh Detainees Likely to be Freed, Guardian, Mar. 11, 2005, <http://www.guardian.co.uk/uk/2005/mar/11/terrorism.september111>; Philippe Naughton, Judge Grants Bail to Belmarsh Terror Detainees, Times Online, Mar. 10, 2005, <http://www.timesonline.co.uk/tol/news/uk/article423891.ece>.

328. *A v. Sec'y of State for the Home Dep't*, [2005] 2 A.C. 68, 127. See Shah, *supra* note 317 at 413, describing how, in finding the detention of the Belmarsh suspects violated the ECHR, Lord Bingham, the author of the majority opinion, relied upon the test set forth in *R (S) v. Chief Constable of the South Yorkshire Police*, [2004] UKHL 39, ¶ 42, [2004] 1 W.L.R. 2196,

to the Lords’ ruling was to repeal Part 4 of the ATCSA and introduce the Prevention of Terrorism Act (PTA) of 2005, providing for “control orders” to be used to proscribe the movements of “undeportable” terror suspects.<sup>329</sup> Against this legislative backdrop, and in the aftermath of the July 7, 2005 bombings, the Terrorism Act of 2006 was enacted. The Terrorism Act of 2006 provides that UK authorities may detain, without charge, persons suspected of involvement in terrorist or terrorism-related activities for an initial period of forty-eight hours, and, with judicial authorization, may detain those persons for an additional period of up to, but not exceeding, twenty-eight days.<sup>330</sup> The basis for detaining an individual may not, however,

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2212 (“(1) Do the facts fall within the ambit of one or more of the [ECHR] rights? (2) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison? (3) If so, was the difference in treatment on one or more of the proscribed grounds under article 14 [including nationality or immigration status]? (4) Were those others in an analogous situation? (5) Was the difference in treatment objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim?”). For a detailed discussion of the Belmarsh case, see John Ip, *The Rise and Spread of the Special Advocate*, 2008 Pub. L. 717, 723–24 (discussing the Belmarsh case as an example of the use of a security-cleared special advocate to challenge in a closed session evidence that the state refuses on security grounds to show to a defendant or defense counsel).

329. Paragraph 13 of the Explanatory Notes to the Prevention of Terrorism Act, 2005, c. 2 (Eng.), states that control orders may be imposed on individuals of any national origin who are suspected of being involved with terrorism and are considered to be a threat to public safety. As Shah explains, two types of control order were envisaged by the Act: (1) derogating control orders—i.e. control orders requiring a derogation from Article 5 of the ECHR, which were to be used only for those individuals who are considered to pose a high risk to public safety and security, in instances where such risk is associated with a public emergency; and (2) non-derogating control orders—i.e. control orders that the Home Secretary could request, requiring a preliminary hearing (potentially *ex parte*) in the High Court, at which a judge of that court would ascertain whether there “is a prima facie case for the order to be made” by the Home Secretary. If so, the High Court would authorize the order and order a full *inter parties* hearing, at which the court would either revoke the order or confirm its continuance for a period of up to six months. Thereafter, the Home Secretary would be required to renew the application for the control order, otherwise it would lapse. Shah, *supra* note 317 at 418.

330. Terrorism Act, 2006, c. 11, § 23 (Eng.); Terrorism Act, 2000, c. 11, sched. 8 (Eng.). In 2008 Prime Minister Gordon Brown attempted to raise the period of pre-charge detention from 28 to 42 days. The bill passed in the House of Commons by a slight margin, but was defeated in the House of Lords. See Nicholas Watt, *Brown Abandons 42-Day Detention After Lords Defeat*, *Guardian*, Oct. 14, 2008, at 1. The 28 day period of detention is supposed to be investigative, rather than punitive—in practice, many individuals who are detained under this

take into account an individual's immigration status. During the initial reading of the bill, the government proposed an amendment to the bill allowing for the detention, without charge, of a terrorist suspect for a period of up to ninety days—with judicial review of the detention every seven days by a High Court judge, sitting *in camera*—an increase of seventy-six days to the existing term of fourteen days permitted by the Terrorism Act of 2000.<sup>331</sup> The House of Commons rejected this amendment, eventually passing an amendment permitting the period of pre-charge detention to be extended up to twenty-eight days, subject to stringent judicial review.<sup>332</sup>

The House of Lords rejected the immigration detention framework of preventive detention because it was incompatible with the United Kingdom's pre-existing human rights commitments under the Article 5(1) of the European Convention, as well as Article 9 of the ICCPR.<sup>333</sup> The provisions expressly prohibit arbitrary detention, and the Lords interpreted immigration detention without charge, trial, or opportunity for repatriation as "arbitrary" within the terms of both treaties.<sup>334</sup> This interpretation of the United Kingdom's treaty commitments seems equally applicable to other state parties to both the Convention and the ICCPR, demonstrating just one (of many) of the potential pitfalls of the immigration detention framework of preventive detention.

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provision are released without charge. See Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill, 2007-8*, H.L. 172, H.C. 1077, at 11–13 (noting that detention for more than 14 days had not been used within the last year, had "only ever been used in a handful of cases," and resulted in release without charge in three cases). See also Brice Dickson, *The Detention of Suspected Terrorists in Northern Ireland and Great Britain*, 43 U. Rich. L. Rev. 927, 952 (2009)

331. See Ben Russell & Nigel Morris, *Blair Renews Battle for 90-Day Detention of Terror Suspects*, Independent, Nov. 17, 2006, at 22.

332. The 28-day limit, proposed by David Winnick, MP, went into force on July 25, 2006. See Matthew Tempest, *Blair Defeated on Terror Bill*, Guardian, Nov. 9, 2005, <http://www.guardian.co.uk/politics/2005/nov/09/uksecurity.terrorism> (reporting the defeat of the 90-day proposed limit and the renewal of Winnick's proposal); The Terrorism Act 2006 (Commencement No. 2) Order, 2006, S.I. 2006/1936 c. 64 (U.K.) (setting July 25, 2006 as the date for entry into force of the new detention limit).

333. See *A v. Sec'y of State for the Home Dep't*, [2005] 2 A.C. 68, 124–28.

334. *Id.*

D.     Advantages and Disadvantages of the Immigration Detention Framework

It would be tempting to see the the approach of countries found within the immigration detention framework as occupying the middle ground between the pre-trial detention framework countries’ “business as usual” approach to detaining terrorist suspects, and the extreme deference to the executive’s power to detain suspected terrorists found within the national security detention framework countries. After all, the immigration detention framework approach, incorporates some fundamental protections of detainees’ rights—such as prompt notification of charges,<sup>335</sup> meaningful judicial review,<sup>336</sup> and unfettered access to counsel<sup>337</sup>—and as such may satisfy many concerns about granting terrorist suspects due process of law, while simultaneously acknowledging that terrorist suspects are “different” and as such require different practices and procedures. Thus, the “middle ground” occupied by the Canadian, South African, and New Zealand systems of immigration detention for terrorist suspects, might be seen as a “realistic” or “flexible” approach detaining terrorist suspects without charge or trial. However, such an argument ignores the fundamental point that the immigration detention framework is not simply a middle ground between the pre-trial detention framework and the national security detention framework—it is not in the middle, but rather is orthogonal, based in an entirely separate source of law.<sup>338</sup> The immigration detention framework does not represent an attempt by the nations who have adopted it to moderate between two extremes of detainee treatment, but rather represents their choice to locate their authority to detain

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335.     See discussion *supra* Part II.A.

336.     *Id.*

337.     See discussion *supra* Part II.A.

338.     In each of the countries surveyed in this Article, immigration law is a specialized field of administrative law, distinct from the criminal justice system, as well as from the systems of martial law or the state of emergency powers that may be deployed in the interests of national security. In most nations surveyed, the immigration system is governed by distinct statutory provisions, which are separate and apart from the penal code. The immigration system thus operates parallel to the regular criminal justice system, with a cadre of specialized immigration judges or adjudicators whose powers are different from those of the judiciary who preside in regular courts, and in whose courtrooms or tribunals different procedures are employed and different rights of confrontation and appeal are available. For a comprehensive overview of the key differences between the sources of immigration law and criminal law in the United States, see Ira J. Kurzban, Kurzban’s Immigration Law Sourcebook 1–20 (11th ed. 2005).



terrorist suspects in a wholly different source of legal authority: immigration law.<sup>339</sup> To advocate for the United States to adopt an immigration detention framework approach would be to disregard the views taken by scholars, advocates, and jurists within existing immigration detention framework countries, as well as the overriding lesson from the United Kingdom's experience.

Some American scholars approvingly point to the fact that the cornerstone of the immigration framework countries' systems is the role played by the judiciary.<sup>340</sup> As discussed *supra*, in each of the immigration framework countries, professional jurists are the ultimate arbiters of the fate of individuals held in detention.<sup>341</sup> Judges and magistrates, either sitting *in camera* or in open court, make the first determination about the validity of an individual's detention, conducting regular subsequent review, and the decisions that they make may be appealed up to the highest court in the land.<sup>342</sup> The involvement of the judiciary in the process of preventive detention within the immigration detention framework nations is thoroughgoing, and some U.S. scholars perceive that involvement as conferring a considerable degree of legitimacy on the proceedings.<sup>343</sup> However, while the central role played by the independent judiciaries of the immigration detention framework countries has led external commentators to praise their systems of preventive detention, the jurists within the systems have often been their own harshest critics. The position taken by the New Zealand Supreme Court in the Zaoui case demonstrates the degree to which the very jurists charged with perpetuating the immigration detention framework system question

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339. It is nonetheless worth noting that, in many of the countries surveyed in this Article, in the wake of 9/11, the boundaries between these three theoretically distinct areas of law are beginning to blur, with the criminalization of certain immigration offenses or the use of immigration law itself to attain national-security related goals. For a discussion of this phenomenon in the Canadian context, see Anna Pratt, *Securing Borders: Detention and Deportation in Canada 196–199* (2005).

340. See Guiora, *supra* note 16, at 833 (cataloging the ways in which courts interact with detained terrorists in the United States, Israel, Russia, India, and Spain, and describing the United States' enemy combatant paradigm as, initially at least, a "clear policy failure" for failing to bring accused terrorists before an independent court).

341. See discussion *supra* Part III.A.

342. *Id.*

343. *Cf., e.g.,* Ip, *supra* note 32, at 869 (criticizing detention regimes based on immigration status, but noting with approval the availability of judicial review).

the wisdom of using immigration detention as a "tool" in the war on terror.<sup>344</sup> The House of Lords spoke even more clearly in the *Belmarsh* cases, when it ruled in an 8-1 decision that treatment of terrorist suspects should be predicated neither on their immigration status nor their identity as citizens or non-nationals.<sup>345</sup>

The current statutory regime in the United Kingdom suggests that, in the future, "preventive detention" in the current immigration detention framework countries may trend towards convergences with the "penal code plus" models of France and Spain. Highlighting the many points of departure between their nations' treatment of regular criminal suspects and terrorist suspects, domestic critics of the immigration detention framework of preventive detention argue that this convergence should occur immediately.

#### IV. THE NATIONAL SECURITY DETENTION FRAMEWORK

The remaining approach to the detention of terrorist suspects adopted by the countries surveyed in this Article is the "national security detention framework," so called because terrorist suspects are held pursuant to constitutional provisions, executive decrees, or statutes passed in the name of national security in response to the existence of a state of national emergency. This framework contains the largest and most divergent group of countries, encompassing nations with a wide variety of legal, cultural, linguistic, and social traditions. Yet, for all their differences, when each of these countries is measured against the taxonomy developed here, common threads emerge in their approach to the detention of terrorist suspects, securing them a place in this category. Kenya, India,<sup>346</sup> Mozambique, Malaysia, Nigeria, Pakistan, the Russian Federation, Singapore, Sri Lanka, Swaziland, Tanzania, Trinidad & Tobago, and Zambia are all

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344. See discussion *supra* Part III.A.

345. *A v. Sec'y of State for the Home Dep't*, [2005] 2 A.C. 68, 69.

346. The inclusion of India within this framework is based upon the attributes of the Indian preventive detention regime when measured against the taxonomy. This is, however, by no means an uncontroversial interpretation of the shape of the Indian preventive detention regime. Derek Jinks, for example, expressly rejects the thesis that India's preventive detention laws are emergency-based. See Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventative Detention and Personal Liberty in India*, 22 Mich. J. Int'l L. 311, 340-50 (2001).

countries whose detention of terrorist suspects fit unequivocally into the national security detention framework.

Two countries—Australia and Israel—prove more difficult to classify within a single detention framework. This is perhaps inevitable, as the three categories of pre-trial detention framework, immigration detention framework, and national security detention framework are, as discussed *supra*, somewhat artificially bounded; countries in one group may share many characteristics with countries in another, and no single criterion should be regarded as a definitive category determinant. Australia and Israel demonstrate this point clearly: both countries mandate a number of the procedural protections for terrorist suspect detainees that are available in the pre-trial detention countries, but both countries also employ a version of national security detention that is extremely rights-violative. In Israel's case this is further complicated by the fact that the state runs two separate schemes of detention for terrorist suspects—one in Israel proper, and the other in the Occupied Territories—and applies two different standards for detainees—one for Israeli citizens and the other for non-citizens.<sup>347</sup> Much of the Israeli system is therefore identity-based, and thus also shares some characteristics of the detention scheme in operation in the immigration detention framework nations; yet, the system used by Israel in the Occupied Territories is predicated upon an occupation under the laws of war, a legal basis that warrants Israel's inclusion in the national security detention framework.<sup>348</sup> In line with the methodology outlined in Part I of this Article, Australia and Israel have been classified according to the most rights-violative approach that each country adopts to the detention of terrorist suspects, and have therefore been classified as falling within a special “mixed” subset of the national security detention framework.<sup>349</sup> As such,

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347. Israel applies a two-track approach to Palestinians suspected of having committed acts of terrorism. Following the June 1967 Six-Day War, the Israel Defense Forces (IDF) established military courts in the West Bank and the Gaza Strip for the purpose of trying Palestinians residing in either area suspected of having committed acts of terrorism.

348. See Guiora, *supra* note 16 at 817–18 (“Israel applies a two-track approach to Palestinians suspected of having committed acts of terrorism. Following the June 1967 Six-Day War, the Israel Defense Forces (IDF) established military courts in the West Bank and the Gaza Strip for the purpose of trying Palestinians residing in either area.”)

349. I use the term national security detention framework (“mixed”). This designation is reflected in the grayscale-coding in both *Table I* and *Map I* found within the Appendix.

Australia and Israel will be discussed in Part IV alongside the other, more rights violative national security detention framework countries.

#### A. Key Characteristics of the National Security Detention Framework Countries

This section of the Article will examine the eight key characteristics of the national security detention framework countries’ “preventive detention” regimes.

(i) Legal basis for detention: In many, but not all, national security detention framework nations, the original authorization for the detention of terrorist suspects without charge or trial can be traced to the nation’s founding documents. India, Pakistan, Singapore, Malaysia, Mozambique, Kenya, and Trinidad & Tobago all have constitutions containing some kind of express provision for preventive detention.<sup>350</sup> In some countries, such as Trinidad & Tobago, the constitution grants wide latitude to the executive to “make provision for the detention of persons” at times of national emergency.<sup>351</sup> In other countries, the legislature is required to make this determination—for example, article 64 of the Constitution of Mozambique states that preventative detention (*prisão preventiva*) “shall be permitted only in cases provided for by the law, which shall determine the duration of such imprisonment.”<sup>352</sup> This language confers a broad degree of latitude on the legislature to define “the law” including “determin[ing] the duration of such imprisonment.”<sup>353</sup> In other nations, constitutions authorize the legislature to enact “preventive detention” legislation in more tightly defined circumstances, albeit while retaining exceptions for detention by the executive, if the executive declares a state of emergency. Article 149 of the Singapore constitution, for example, states that any such statute must contain an explanation of the ways in which the

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350. See, e.g., India Const. art. 246; Constitution of the Republic of Mozambique art. 64; Constitution of Kenya § 83; Constitution of Malaysia art. 151; and Constitution of the Republic of Trinidad & Tobago § 7.

351. Constitution of the Republic of Trinidad & Tobago § 7 (2) (“Without prejudice to the generality of subsection (1) regulations made under that subsection may, subject to section 11, make provision for the detention of persons”).

352. Constitution of the Republic of Mozambique art. 64; Open Society Initiative for Southern Africa, *Mozambique: Justice Sector and the Rule of Law* 29, 104–105 (2006).

353. Constitution of the Republic of Mozambique art. 64.

security of Singapore has been prejudiced or that violence, the excitement of disaffection towards the President or the government, the promotion of racial or class tensions, or an alteration to the law by unlawful means has occurred or been threatened.<sup>354</sup>

In other national security detention framework countries, there is no constitutional grant allowing the executive to detain suspects in preventive detention, but legislation conferring powers of administrative detention was passed during the 1960s, 1970s, and early 1980s—in many instances during periods of post-colonial era political unrest—and neither the courts nor the executive have disavowed these statutes. Thus, in Zambia, Sri Lanka, Bangladesh, Nigeria, Tanzania, and Swaziland, a body of laws has developed permitting detention without charge or trial.<sup>355</sup> A typical example of this trend is Sri Lanka, where section 9 of the Prevention of Terrorism (Temporary Provisions) Act of 1979 stipulates that the Minister in charge of the Act may order detention where he has “reason to believe or suspect that any person is connected with or concerned in any unlawful activity.”<sup>356</sup>

In some instances the statutes conferring the power to hold individuals in “preventive detention” were drafted with a particular, narrow range of offenses in mind, in other cases “preventive detention” statutes have been construed broadly. Hence, in Tanzania, “preventive detention,” which was initially authorized in 1962 in the interests of the preservation of national security,<sup>357</sup> has reportedly been used to detain suspects alleged to have been involved in “illegal

354. Constitution of the Republic of Singapore art. 149–151. The constitution of Malaysia uses almost identical phraseology. Constitution of Malaysia art. 151

355. See, e.g., Preservation of Public Security Act of 1960, sec. 3(3), 2 L. Rep. of Zambia Ch. 106 (Zambia); Prevention of Terrorism Act, No. 48 (1979) ch. 30, s. 9(1) (Sri Lanka); Special Powers Act 1974, sec. 3 (Bangl.), reprinted in A.N.M. Khaled Chowdhury, Law on Women With Special Powers Act 111 (1987); State Security (Detention of Persons) Act, (1983) Cap. 414, s. 1 (Nig.); Preventative Detention Act, 1962, No. 60, s. 2–4, available at <http://www.parliament.go.tz/Polis/PAMS/Docs/60-1962.pdf> (Tanzania); Detention Order, No. 1 of 1978, § 2(1) (Swaziland).

356. Prevention of Terrorism Act, No. 48 (1979) ch. 30, s. 9 (Sri Lanka).

357. The Preventive Detention Act, 1961, No. 60, available at <http://www.parliament.go.tz/Polis/PAMS/Docs/60-1962.pdf> (Tanzania). Preventive detention is also permissible in Tanzania for individuals held pending deportation or removal. Deportation Ordinance, (1921) Cap. 38, s. 5; Expulsion of Undesirables Ordinance, (1930) Cap. 39, s. 7.

brewing" or "cattle rustling,"<sup>358</sup> and in Nigeria, "preventive detention," which, under the State Security Act of 1984, may be used to detain individuals who have "contributed to the economic adversity of the nation," has apparently been deemed to cover those suspected of involvement in "currency-trafficking, armed robbery, forgery, stealing, conspiracy, obtaining money under pretence, and receiving stolen goods."<sup>359</sup> Detention without charge or trial is also frequently permitted for those suspected of smuggling goods or currency, perhaps reflecting yet another overlap between immigration status or suspected violations of border crossing and immigration law and administrative detention.<sup>360</sup> In other national security detention framework countries, the legislative grant is more generalized, as in Kenya, where the Preservation of Public Security Act authorizes the use of "preventive detention" when the government deems it may be needed for the "preservation of public security."<sup>361</sup> In Russia, the constitution contains specific provisions for permitting suspension of individual rights during the imposition of a state of emergency,<sup>362</sup> which have been built upon and broadened in successive anti-terrorism legislation passed in 1998 and 2006.<sup>363</sup>

The judiciary in some national security detention framework countries also plays a role in the creation or validation of provisions permitting detention without charge or trial. In Zambia, the nation's Supreme Court expanded the definition of "threats to national security" that justify "preventive detention" to economic crimes, such as illegal trafficking in and smuggling of semi-precious stones, elephant tusks, rhino horns, and mandrax, as well as the illegal export of foreign exchange and thefts of copper cathodes, cobalt, and spare parts from mining companies.<sup>364</sup> In Sri Lanka, the Supreme

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358. Harding & Hatchard, *supra* note 7, at 28.

359. See Harding & Hatchard, *supra* note 7, at 28; State Security (Detention of Persons) Act, (1983) Cap. 414, s. 1 (Nig.).

360. See, e.g., Indian Conservation of Foreign Exchange and Prevention of Smuggling Act, No. 52 of 1974; India A.I.R. Manual (1974), v. 7, (enabling central and state governments to detain a person for the purpose of preventing smuggling or conduct prejudicial to conservation of foreign exchange).

361. Preservation of Public Security Act, (1960), Cap. 57, s. 4 (Kenya).

362. Constitution of Russia, art. 56 ("individual restrictions of rights and liberties with identification of the extent and of their duration may be instituted in conformity with the federal constitutional law under conditions of the state of emergency").

363. Federal Law on Counteracting Terrorism 2006; Federal Law on Combating Terrorism 1998.

364. See Harding & Hatchard, *supra* note 7, at 282–83 (discussing the

Court also has a longstanding practice of authorizing the broad use of “preventive detention” as a tool of law enforcement and terrorism prevention. In the early 1990s, the Court held that, during periods of crisis preventive detention is not a per se violation of basic constitutional liberties, provided that the government is able to demonstrate that it is not employing preventive detention in an arbitrary or oppressive manner.<sup>365</sup>

The legal basis for “preventive detention” in each of the national security detention framework countries is therefore slightly different, varying according to the branch of government involved and the specificity of the constitutional, statutory, or common law grant. The powers granted the executive, and the checks and balances upon the executive’s exercise of such powers range widely. Under the “straight” national security detention country of Swaziland, with the King’s approval, the Prime Minister has the power to detain any person without further review if “he deems it necessary in the public interest.”<sup>366</sup> Additionally, in 2008, a new law was passed in Swaziland authorizing members of the judiciary to issue preventive detention orders for suspected terrorists.<sup>367</sup> Under the “mixed” national security detention country of Israel,<sup>368</sup> the legal basis for administrative detention of terror suspects is found in the Defense (Emergency) Regulations of 1945<sup>369</sup> and the Emergency Powers (Detention) Law of 1979.<sup>370</sup> Detention orders are initially

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Zambian case *Rao v. Attorney General*, S.C. Judgment No. 30 (1987) (unreported)).

365. See *Harding & Hatchard*, *supra* note 7, at 27 (discussing *Saman Wicremabandu v. Herath and Others*, [1990] 2 SRI L.R. 348, 349 (Sri Lanka)).

366. Detention Order of 1978 s. 2(1) (Swaziland).

367. Suppression of Terrorism Act (Bill No. 5 of 2008) (April 11, 2008) art. 23 (Swaziland).

368. See, e.g., *Guiora*, *supra* note 16, at 819–824 (describing Israel’s two-track detention system that allows a suspected terrorist either to be tried before a military court if the act is “evidence-based” or be “administratively detained” based on “intelligence information”).

369. Defense (Emergency) Regulations, 1945, *Palestine Gazette No. 1442* (Sept. 27, 1945). Because international law does not permit an occupying power to eliminate existing laws, Israel inherited the laws introduced under the British Mandate (1917-1948) when it occupied the West Bank in 1967. See *Guiora*, *supra* note 16, at 819 n.76.

370. Emergency Powers (Detention) Law, 5738-1979, 33 LSI 89 (1978-79) (Isr.).

reviewed by military judges, whose decisions can be appealed up to the High Court of Justice.<sup>371</sup>

In Australia, the Anti-Terrorism Act (No. 2) of 2005 introduced two new divisions into the Criminal Code allowing Control Orders and Preventive Detention Orders (hereinafter PDOs) to be issued against individuals for the purpose of preventing terrorist activity.<sup>372</sup> These orders are not predicated on immigration status, nor are they issued pursuant to an ongoing investigation leading to trial; they are solely determined by national security concerns. Senior members of the Australian Federal Police (hereinafter AFP) are permitted to issue an initial PDO ordering the detention of a suspect for up to twenty-four hours,<sup>373</sup> and to issue continued PDOs, which may last for a further period of up to forty-eight hours from the time when the suspect was first detained.<sup>374</sup> Australian state and territorial governments have also enacted similar provisions to permit “preventive detention” and control orders.<sup>375</sup> These so-called “preventive procedures,” and the limited

371. Guiora, *supra* note 16, at 821 (noting, however, that neither the detainee nor his attorney have the right to examine the information on which the detention order is based). *See also* HCJ 3239/02 Marab v. IDF Commander in the West Bank [2002-2003] IsrLR 173, 206, *available at* [http://elyon1.court.gov.il/files\\_eng/02/390/032/A04/02032390.a04.pdf](http://elyon1.court.gov.il/files_eng/02/390/032/A04/02032390.a04.pdf) (holding that initial judicial review should occur as quickly as possible after a decision to detain is made); HCJ 5784/03 Salama v. IDF Commander in Judea & Samaria [2002-2003] IsrLR 289, 295, *available at* [http://elyon1.court.gov.il/files\\_eng/03/840/057/a05/03057840.a05.pdf](http://elyon1.court.gov.il/files_eng/03/840/057/a05/03057840.a05.pdf) (holding that decisions to order administrative detention or to extend an administrative detention require judicial review); *see also* Harding & Hatchard, *supra* note 7 at 28.

372. Criminal Code Act, 1995, c. 5, div. 104, 105, as amended by Act No. 144, 2005. The control order regime is found in Division 104 of the Code, and the regime for PDOs is in Division 105.

373. *Id.* § 105.8.

374. *Id.* § 105.14.

375. *See, e.g.*, Terrorism (Police Powers) Act, 2002, pt. 2A, div. 2, sec. 26D (1)(a–c) (N.S.W.); Terrorism (Preventative Detention) Act, 2005, pt. 2, div. 1 sec. 8(3)(a–c), (Queensl.) (using the same language as the New South Wales statute); Terrorism (Preventative Detention) Act, 2005, pt. 2 sec. 6 (1)(3)(a–c) (S. Austr.); Terrorism (Preventative Detention) Act, 2005, pt. 2, sec. 5 (1)(a–b) (Tas.); Terrorism (Community Protection Act), 2003, pt. 2A, div. 1, sec. 13E(1)(a–b) (Vict.); Terrorism (Preventative Detention) Act, 2006, pt. 2, sec. 13(1)(a–b) (W. Austr.); Terrorism (Extraordinary Temporary Powers) Act, 2006, pt. 2, div. 2.3 sec. 18 (1)(a–d) (Austl. Cap. Terr.); Terrorism (Emergency Powers) Act, 2003, pt. 2B, div. 2, sec. 21G(1)(a–b) (N. Terr.) (all of which allow preventive detention for up to 14 days if a court finds reasonable grounds that a subject is planning to



rights available to individuals detained pursuant to PDOs, ensure that Australia's regime fits within the national security detention framework, although the limited period of time during which an individual may be detained separates Australia from almost every other national security detention nation.

(ii) Notification of charges: Within the national security detention framework countries, there is, as their vastly divergent legal bases for "preventive detention" suggest, considerable variance in the methods used to inform detainees of the reasons they are being held, and the time period that elapses before that notification is given. In both Malaysia and Singapore, there is no specified timeframe within which a detainee held in "preventive detention" must be informed of the factual allegations relating to his detention—the guidelines simply state "as soon as possible."<sup>376</sup> In Russia, under the 2004 amendments to the criminal code, a terrorist suspect may be held in a pre-trial detention center (SIZO) for up to thirty days without charges being brought.<sup>377</sup> In Swaziland, there is no official time limit by which a detainee must be told of the grounds for his detention under either the 1978 or 2008 laws, although under the 1978 law the grounds for detention were required to be published in the Government Gazette.<sup>378</sup> In Nigeria, a detainee is entitled to be

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commit a terrorist act within 14 days, or if detention will substantially assist in preventing a terrorist act). For a comprehensive overview of the Anti-Terrorism Act (No. 2) of 2005, Control Orders, and Preventive Detention Orders, see Paul Fairell & Wendy Lacey, *Preventative Detention and Control Orders Under Federal Law: The Case for a Bill of Rights*, 31 Melb. U. L. Rev. 1072 (2007).

376. Internal Security Act of 1960, ch. II s. 8(16) (Malay.), available at [http://ejp.icj.org/IMG/INTERNAL\\_SECURITY\\_ACT\\_1960.pdf](http://ejp.icj.org/IMG/INTERNAL_SECURITY_ACT_1960.pdf). See also Drew R. Atkins, *Customary International Humanitarian Law and Multinational Military Operations in Malaysia*, 16 Pac. Rim. L. & Pol'y J. 79, 97 (2007) (noting that the provisions allow the government to withhold the facts underlying the alleged necessity of detention). Internal Security Act, cap. 143, s. 9, available at [http://statutes.agc.gov.sg/non\\_version/cgi-bin/cgi\\_retrieve.pl?&actno=Reved-143&date=latest&method=part](http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?&actno=Reved-143&date=latest&method=part) (Sing.). See also Michael Hor, *Terrorism and the Criminal Law: Singapore's Solution*, 2002 Sing. J. Legal Stud. 30, 43 (2002).

377. See Lev Levinson, *Governance as a Counter-Terrorist Operation: Notes on the Russian Legislation Against Terrorism* 7-8, available at <http://ejp.icj.org/IMG/Levinson.pdf> (last visited Nov. 13, 2009). See also U.S. Dep't. of State, Bureau of Democracy, Human Rights & Labor, *2008 Human Rights Report: Russia* (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119101.htm> (describing how "defendants are provided a copy of their indictment, which describes the charges in detail" before trial).

378. See Fairell & Lacey, *supra* note 375 at 1075 n.15, citing Detention Order of 1978 s. 2(1) (Swaziland).

informed within twenty-four hours of the "facts and grounds" for his detention.<sup>379</sup> In Kenya, an individual may be held for five days without notification of the charges that he faces;<sup>380</sup> in Zambia, this period extends to fourteen days, and, in Tanzania, India, Bangladesh, and Pakistan, the maximum period is fifteen days.<sup>381</sup>

In Mozambique, an individual held in preventive detention is entitled to be informed "promptly" of the reason for his detention, but an exact time period is not specified.<sup>382</sup> In Australia, a detainee held under an initial or continued detention order is entitled to be informed of the reasons for his detention "as soon as [is] practicable."<sup>383</sup> In Israel proper, a detainee is entitled to be told the general reasons for his detention during the first forty-eight hours he is in custody, although the specific basis of an accusation may only be given to a presiding judge who reviews his detention order; inside the Occupied Palestinian Territories, the initial review period before an individual may be told of the accusations he faces extends up to eight days.<sup>384</sup>

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379. Constitution, art. 35(3) (Nigeria).

380. Constitution, art. 83(2)(a) (Kenya).

381. Zambia Const. (Constitution Act 1991) art. 26(1)(a); Preventive Detention Act, 1962, No. 60, s. 6, as amended by Act No. 2 of 1985, s. 7 (Tanzania); Constitution of the People's Republic of Bangladesh, art. 33(5); Special Powers Act, 1974, § 8 (Bangl.); Constitution of Pakistan, (1973) art. 10; National Security Act, 1980, No. 65 of 1980, India Code, art. 3(4) (1980). In India, although the maximum period for notification of the grounds of detention is fifteen days, the Constitution stipulates that: "When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order." India Const. art. 22(5). India provides an interesting case study within the state of emergency framework. In 2004 the Indian parliament repealed the Prevention of Terrorism Act (POTA), which was often used to justify the incarceration without charge or trial of terrorist suspects for up to 180 days. In the aftermath of the repeal, the President of India promulgated an ordinance to amend the Unlawful Activities (Prevention) Act of 1967, and this more moderate instrument is still in force. *See* Unlawful Activities (Prevention) Act Amendment Ordinance, 2004. Human rights abuses under POTA were well documented and attracted near-universal condemnation. Yet, in the years since POTA's repeal, individuals are still administratively detained under the terms of pre-existing legislation. *See generally* Human Rights Watch, World Report 2005, at 280 (Jan. 2005) available at <http://www.hrw.org/legacy/wr2k5/wr2005.pdf>.

382. Constitution of the Republic of Mozambique art. 64.

383. Anti-Terrorism Bill 2005 (Cth), pt. 5.3 div. 105, subdiv. B, sec. 105.28.

384. *See* Stephanie Cooper Blum, *Preventive Detention in the War on*

(iii) Initial appearance / (iv) Period of detention without charge: A key characteristic of the national security detention framework nations is the period during which individuals may be held in preventive detention. In almost every country surveyed, it is theoretically possible to hold terrorist suspects indefinitely, and in many it is possible to do so without independent judicial review. Different criteria have to be fulfilled so that detention can continue in different countries, but in all cases, once these conditions are met, the detention may continue. In India, an individual may be held in preventive detention for three months without any charges being brought before any review is undertaken by an administrative Advisory Board.<sup>385</sup> In Malaysia a detainee “shall be given the opportunity of making representations” against a detention order “as soon as possible” and those representations must be considered by an advisory board “within three months” of receipt “or within such longer period as the [head of state] may allow.”<sup>386</sup> In Swaziland, under the 1978 order, an individual was entitled to administrative review of detention within sixty days, renewable every sixty days.<sup>387</sup> Under the 2008 Act, an individual may be held for up to seven days.<sup>388</sup> In Nigeria, review is undertaken within six weeks, and every six weeks thereafter by a “Detention of Persons Review Panel” headed by the Attorney General.<sup>389</sup> In Kenya, an administrative tribunal presided over by a person “qualified to be appointed as a judge of the high court” reviews the grounds for a detainee’s detention “not more than one month after the commencement of . . . detention,” with such review continuing “at intervals of not

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*Terror: A Comparison of How the United States, Britain, and Israel Detain and Incapacitate Terrorist Suspects*, IV Homeland Security Affairs (Oct. 2008), at 6 (citing Emergency Powers (Detention) Law, 5738-1979, 33 LSI 89, §§ 4(a), 6(c), 8(a) (1978-79) (Isr.); B’Tselem, *Administrative Detention in Occupied Territories*, The Israeli Center for Human Rights in the Occupied Territories, ¶2 (May 2007), available at [www.btselem.org/english/Administrative\\_Detention/Index.asp](http://www.btselem.org/english/Administrative_Detention/Index.asp) (noting that, although detainees may appeal the detention, neither they nor their attorneys are allowed to see the evidence); Matti Friedman, *Not an Alternative to Criminal Justice*, Jerusalem Post, November 14, 2005, at 96 (describing the practice and procedures of administrative detention).

385. India Const. art. 22(4).

386. Malaysia Const. art. 151 (1).

387. Detention Order of 1978 s. 2(1) (Swaziland).

388. Suppression of Terrorism Act (Bill No. 5 of 2008) (April 11, 2008) art. 23 (4) (Swaziland).

389. See State Security (Detention of Persons) Act, (1983) Cap. 414, s. 1 (Nig.); State Security (Detention of Persons) Amended Decree no. 14 (1994).

more than six months.<sup>390</sup> In Kenya, as in Bangladesh, indefinite detention is permissible with ministerial authorization.<sup>391</sup> In Sri Lanka, the same is true, although a minister must renew the detention order on a monthly basis.<sup>392</sup> In Trinidad & Tobago, the minister of national security may authorize indefinite preventive detention in the interests of national security; during that period the detainee may request review by "an independent and impartial tribunal" composed of "persons entitled to practice in Trinidad & Tobago as barristers and solicitors" but the detaining authority "shall not be obliged to act in accordance" with any recommendations made by the tribunal concerning "the necessity or expediency" of the detainee's continued detention.<sup>393</sup> In Singapore, a detainee may be held for up to two years when his detention is authorized by the President, and the authorization may be renewed every two years thereafter.<sup>394</sup> The same is true in Malaysia, where detention is indefinitely extendable in two-year increments, even when the only justification is that contained in the initial order.<sup>395</sup> Similarly, in the Occupied Territories, the initial detention order is valid for six months and is renewable every six months thereafter; as in Malaysia, there is no statutory time limit on the number of times the order may be renewed, and renewal may be predicated on the information contained in the original complaint.<sup>396</sup> In Mozambique, detainees must be brought before a criminal investigative judge (*juiz*

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390. Constitution, art. 83(2)(c) (Kenya).

391. Special Powers Act (1974), s. 3(2), in Law on Women With Special Powers Act, 113 (1987) (Bangl.); Preservation of Public Security Ordinance, No. 2 (1960) s. 4 (Kenya).

392. See GL Peiris, *Chapter 13: Sri Lanka*, in Harding & Hatchard, *supra* note 7, at 232.

393. Constitution of the Republic of Trinidad and Tobago § 11. See also U.S. Dep't of State, Country Reports on Human Rights Practices: Trinidad & Tobago (2008).

394. U.S. Department of State, Bureau of Democracy, Human Rights & Labor, *2008 Human Rights Report: Singapore* (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119056.htm>. In contrast, there is a 30-day limit on police-authorized detentions, and a Minister must receive a report after 14 days. *Id.*

395. Internal Security Act of 1960, ch. II s. 8(7) (Malay.), available at [http://ejp.icj.org/IMG/INTERNAL\\_SECURITY\\_ACT\\_1960.pdf](http://ejp.icj.org/IMG/INTERNAL_SECURITY_ACT_1960.pdf); see also Atkins, *supra* note 376, at 97 n.124.

396. See Guiora, *supra* note 16, at 819–20 ("Renewability requires a showing that the detainee continues to present a viable security threat. In the overwhelming majority of cases, the basis for extension of the initial detention order is the *same* intelligence information that had served as the basis for the military commander's initial decision.").

*da instrução criminal*) within a time period fixed by law to establish the legality of their imprisonment.<sup>397</sup> Individuals may be held for forty-eight hours before their detention is reviewed by a criminal investigative judge, and for a further ninety days after that review.<sup>398</sup> In Russia, a detainee must be brought before a judge within forty-eight hours, may be held for three further days thereafter during the initial investigation, and a terrorist suspect detainee may remain in a detention center (SIZO) for up to thirty days before formal charges are brought.<sup>399</sup> In Australia, judges and Federal Magistrates acting in their personal capacity, members of the Administrative Appeals Tribunal, or retired judges must review whether or not a PDO can be extended after forty-eight hours up to a maximum of fourteen days.<sup>400</sup> In Israel proper, a detainee will be brought before a presiding magistrate within forty-eight hours of being taken into custody, in the Occupied Territories, the initial review period extends to eight days.<sup>401</sup>

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397. Constitution of the Republic of Mozambique art. 64; Open Society Initiative for Southern Africa, *Mozambique: Justice Sector and the Rule of Law* 104–105 (2006).

398. See Malawi Law Commission, *Human Rights Under the Constitution of the Republic of Malawi* 26 (2006) (stating that in Mozambique “the maximum preventive imprisonment period is 48 hours and during this time the detainee has the right to have his case reviewed by judicial authorities . . . Where the penalty for the offense is 8 years or more they may be held for up to 84 days without formal charge and may, with judicial approval, further be held for two consecutive custody periods.”); U.S. Dep’t of State, *Country Reports on Human Rights Practices: Mozambique* (2007) (reporting that “more than 500 detainees in the Maputo Central Prison (Machava) had been held beyond the 90-day preventive detention period.”).

399. See Liberty Study, *supra* note 46, at 54, citing articles 91 and 94 of the Russian Criminal Procedure Code; Lev Levinson, *Governance as a Counter-Terrorist Operation: Notes on the Russian Legislation Against Terrorism* 7-8, available at <http://ejp.icj.org/IMG/Levinson.pdf> (last visited Nov. 13, 2009).

400. See Fairell & Lacey, *supra* note 369 at 1076, and n. 26; Criminal Code Act, 1995, c. 5, §§ 105.12, 105.18(2) (Austl.).

401. See 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*, IV Homeland Security Affairs (Oct. 2008), at 6 (citing Emergency Powers (Detention) Law, 5738-1979, 33 LSI 89, §§ 4(a), 6(c), 8(a) (1978-79) (Isr.); B’Tselem, *Administrative Detention in Occupied Territories*, The Israeli Center for Human Rights in the Occupied Territories, ¶2 (May 2007), available at [www.btselem.org/english/Administrative\\_Detention/Index.asp](http://www.btselem.org/english/Administrative_Detention/Index.asp) (noting that, although detainees may appeal the detention, neither they nor their attorneys are allowed to see the evidence); Matti Friedman, *Not an Alternative to Criminal Justice*, Jerusalem Post, November 14, 2005, at 96 (describing the practice and procedures of administrative detention).

(v) Access to counsel: The national security detention countries do not all adopt a similar approach to access to counsel or, rather, lack of access to counsel for detainees held in preventive detention. In India, Pakistan, Russia, and Zambia, there is an affirmative right to counsel.<sup>402</sup> In Kenya a detainee must be “afforded reasonable facilities to consult a legal representative of his own choice” who will be permitted to review the detainee’s case and make representations on his behalf to the administrative tribunal.<sup>403</sup> In Swaziland, there is no right to counsel under the 1978 order, but a right to counsel during detentive questioning under the 2008 Act.<sup>404</sup> There is, however, no right to legal aid or government-funded counsel for detainees.<sup>405</sup> In other national security detention framework countries, such as Malaysia, Mozambique, Nigeria, Singapore, Sri Lanka, Tanzania, and Trinidad & Tobago, while there is a right to counsel for those accused of serious crimes within the regular criminal justice system, it is less clear whether that right extends to individuals held in preventive detention.<sup>406</sup> There is also a right to

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402. The Indian Constitution, for example, provides for access to a lawyer. India Const. art. 22(4). Those held in preventive detention, however, are frequently denied this right. See U.S. Dep’t. of State, Bureau of Democracy, Human Rights & Labor, *2008 Human Rights Report: India* (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119134.htm> (“the law provides arrested persons the right to released on bail and prompt access to a lawyer; however, those arrested under special security legislation often received neither.”) See also U.S. Dep’t. of State, Bureau of Democracy, Human Rights & Labor, *2008 Human Rights Report: Russia* (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119101.htm> (describing how “Prior to the interrogation, the detainee has the right to meet with an attorney for two hours” and how “the law provides for the appointment of a lawyer free of charge if a suspect cannot afford one; however, this provision was often ignored in practice.”)

403. Constitution, art. 83(2)(d) (Kenya).

404. Suppression of Terrorism Act (Bill No. 5 of 2008) (April 11, 2008) art. 24 (10) (Swaziland).

405. Constitution, art. 83(4) (Kenya) (“nothing . . . shall be construed as entitling a person to legal representation at public expense”).

406. See Malaysia Const. art. 5 (3) (guaranteeing right to counsel in regular criminal cases); Mozambique Const. art 100 (guaranteeing “the right to a defense and the right to legal assistance and aid”); Singapore Const. art. 9 (3) (“Where a person is arrested he . . . shall be allowed to consult and be defended by a legal practitioner of his choice.”); U.S. Dep’t of State, Country Reports on Human Rights Practices: Nigeria (2008) (describing the right of suspects to “the opportunity to engage counsel”); U.S. Dep’t of State, Country Reports on Human Rights Practices: Sri Lanka (2008) (“in all cases suspects ha[ve] the right to legal representation”); U.S. Dep’t of State, Country Reports on Human Rights Practices: Tanzania (2008) (describing how “the law gives accused persons the

counsel in the two “mixed” framework countries, Australia and Israel; however, in Israel, there are severe limits on the access to that counsel.<sup>407</sup> In Australia, individuals detained subject to PDOs are entitled to access to counsel,<sup>408</sup> but the procedure for the issuance and continuance of PDOs is made *ex parte* by the detaining police officer.<sup>409</sup> Neither the suspect nor his legal representative is entitled to challenge the initial issuance of the PDO, though there is an opportunity to be heard later in the application process.<sup>410</sup>

(vi) Right to fair and public hearing: In the national security detention framework nations, there is no right to what Americans would recognize as a “fair and public hearing.” All administrative detention hearings in the national security detention framework countries are held *in camera* and often hearings or reviews are done purely on the paper record with neither the detainee nor his counsel present. Israel has the most transparent process of all of the national security detention nations. In Israel, a judge of the High Court conducts the hearing, the detainee has a right to be present, the detainee’s lawyer is entitled to argue, and the detainee himself is entitled to speak about the conditions of his confinement.<sup>411</sup> This system has, nonetheless, been consistently criticized by Israeli human rights activists because of the restrictions on the detainee’s ability to confront his accuser and the attendant burden this places on defense counsel to use the hearing, which should be dedicated to presenting a case, to instead conduct a “fishing expedition” to

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right to contact a lawyer” although in practice the authorities denied this right at times); U.S. Dep’t of State, Country Reports on Human Rights Practices: Trinidad & Tobago (2008) (describing right to counsel in regular criminal cases).

407. Yesh Din, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (Dec. 2007), <http://www.yesh-din.org/site/images/BackyardProceedingsENG.pdf>.

408. Criminal Code Act, 1995, c. 5, § 105.37 (Austl.). See also Fairell & Lacey, *supra* note 375 at 1078.

409. Criminal Code Act, 1995, c. 5, §§ 105.7, 105.11 (Austl.). See also Fairell & Lacey, *supra* note 375 at 1078.

410. Criminal Code Act, 1995, c. 5, § 105.28 (Austl.) (excluding the right to challenge the initial issuance of a PDO from the list of rights of which a detained person must be informed). See also Fairell & Lacey, *supra* note 375 at 1078.

411. See B’Tselem, *Absolute Prohibition: The Torture and Ill-Treatment of Palestinian Detainees*, The Israeli Center for Human Rights in the Occupied Territories 80 (May 2007) available at [http://www.btselem.org/english/Publications/Summaries/200705\\_Utterly\\_Forbidden.asp](http://www.btselem.org/english/Publications/Summaries/200705_Utterly_Forbidden.asp); Yesh Din, *supra* note 407 *passim*.

establish the facts of the case against her client.<sup>412</sup> In each of the other national security nations, however, terrorist suspect detainees enjoy even fewer procedural protections. In Russia, for example, although terrorist detainees held under the criminal code are granted a court hearing, the detainee may be tried and convicted in *abstentia*.<sup>413</sup>

In each of the national security detention nations, save Israel and Russia, terrorist suspect detainees are not entitled to a court hearing. In most national security detention framework nations, administrative review boards are responsible for reviewing the basis and circumstances of terrorist suspects' detention. In some countries, the boards are composed of lawyers and jurists, and in others the boards are composed of politicians, police officers, or other dignitaries.<sup>414</sup> These boards meet in private and follow their own procedures; no rules of procedure are printed, and there is no consistent record of the extent to which due process is observed.<sup>415</sup> Some countries, such as Tanzania, permit board members to meet and interview detainees at their place of detention.<sup>416</sup> Other nations, such as India, allow detainees to appear in person and call witnesses,<sup>417</sup> but detainees who seek to do so may be cross-examined by the board, and may not be entitled to cross-examine the government's witnesses.<sup>418</sup> The greatest flaw of the board system, however, is not the lack of transparency, lack of due process, or the risk of self-incrimination without redress. Rather, the greatest flaw is the powerlessness of the boards. With the exception of Bangladesh and Pakistan, in each of the national security detention framework

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412. Guiora, *supra* note 16, at 820.

413. See Federal Law on Counteracting Terrorism 2006, amending Criminal Procedure Code art. 247 (permitting in *abstentia* prosecutions); see also Lev Levinson, *Governance as a Counter-Terrorist Operation: Notes on the Russian Legislation Against Terrorism*, available at <http://ejp.icj.org/IMG/Levinson.pdf> (last visited Nov. 13, 2009). The same act that provided for in *abstentia* trial and conviction also removed terrorism proceedings from the jurisdiction of jury trials. See U.S. Dep't. of State, Bureau of Democracy, Human Rights & Labor, *2008 Human Rights Report: Russia* (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119101.htm> (describing how "supporters of the legislation justified it as an allegedly necessary measure in the war on terror.") Individuals held under the administrative code (for example in immigration detention) are not entitled to a court hearing. *Id.*

414. Greer, *supra* note 47, at 29.

415. *Id.* at 29–30.

416. *Id.* at 30.

417. *Id.*

418. *Id.*



countries in which administrative review boards operate the detaining authorities are under no obligation to comply with the board's decisions.<sup>419</sup> Even if a board recommends that a detainee be released, after finding that the evidence against him is contrived, or insufficient to warrant his continued detention, the detaining powers are free to ignore the board's recommendations.

(vii) Judicial review: Judicial review or oversight of "preventive detention" varies considerably amongst the countries of the national security detention framework. In Australia, judges and federal magistrates acting in their personal capacity, members of the Administrative Appeals Tribunal, or retired judges conduct individual reviews of the continued utility and legality of PDOs.<sup>420</sup> In Israel, in contrast, there is a more formal and public system of judicial review. Once a military commander within the Occupied Territories has determined that an individual should be held in administrative detention, the commander's decision is subject to review by a military appeals court judge.<sup>421</sup> In India, Pakistan, and Bangladesh, senior judges also review the records of individuals held in preventive detention in their capacity as members of administrative review boards, and the judiciary has established its jurisdiction to review constitutionality of "preventive detention" provisions.<sup>422</sup> In Trinidad & Tobago and Zambia, courts have

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419. *Id.*

420. Criminal Code Act, 1995, c. 5 (Austl.) §§ 105.12, 105.18(2) (specifying that Australian judges are deemed to be acting in their "personal capacity" when they issue authorities for continued PDOs because Australian PDOs are categorized as administrative orders). *See also* Fairell & Lacey, *supra* note 375 at 1086 (suggesting that the involvement of federal judicial officers, albeit in a personal capacity, in the making of PDOs implicates important constitutional questions).

421. *See* B'Tselem, *The Legal Basis for Administrative Detention*, The Israeli Center for Human Rights in the Occupied Territories, [http://www.btselem.org/english/Administrative\\_Detention/Israeli\\_Law.asp](http://www.btselem.org/english/Administrative_Detention/Israeli_Law.asp). As B'Tselem notes, "Several safeguards which exist in the Israeli law are absent from the system of administrative detention in the Occupied Territories. For example, the Israeli law requires that the detainee be brought before a judge within 48 hours and for periodic review every three months by the president of a District Court." *Id.* *See also* Guiora, *supra* note 16 at 821.

422. *See* Greer, *supra* note 47, at 29 (describing procedures in Pakistan); Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 *Colum. J. Asian L.* 93, 134–35 (2006) (describing non-emergency procedures in India); Constitution of the People's Republic of Bangladesh art. 33(4) ("No law providing for preventive detention shall authorise the detention of a person for a period exceeding six months unless an Advisory

similarly instituted judicial review of the administrative board's decisions,<sup>423</sup> and in Bangladesh the administrative review board's decision is ultimately subject to judicial review that assesses the board's ruling using a "reasonable person" standard.<sup>424</sup> In Malaysia, in contrast, judicial review of preventive detention orders is highly circumscribed, and in 2003 the Federal Court ruled that "Malaysian courts should not intervene in matters of national security and public order."<sup>425</sup> In Nigeria, the State Security (Detention of Persons) Act authorizing preventive detention precludes judicial review, leaving detainees with recourse only to the Detention of Persons Review Panel, a body whose recommendations are not binding on the executive.<sup>426</sup> In Mozambique, judicial review is undertaken by a criminal investigative judge (*juiz da instrução criminal*), who may authorize preventive detention for up to ninety days.<sup>427</sup> In other national security detention framework countries, while there are provisions for judicial review and several levels of appeal within the regular criminal justice system, it is less clear whether that right extends to terrorist detainees held in preventive detention whose only recourse is to administrative review boards whose members may or may not have judicial experience. In Kenya, an administrative tribunal is convened, composed not of professional jurists, but rather of senior police officers and members of the State Counsel, presided over by an individual "qualified to be appointed as a judge of the

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Board consisting of three persons, of whom two shall be persons who are, or have been, or are qualified to be appointed as, Judges of the Supreme Court and the other shall be a person who is a senior officer in the service of the Republic.").

423. See Greer, *supra* note 47, at 32 (describing how, Bangladesh, India, Pakistan, Trinidad & Tobago, and Zambia have "successfully instituted strong judicial review of preventive detention.").

424. See Greer, *supra* note 47, at 33, citing *Aruna Sen v. Gov't of Bangladesh*, 27 DLR (1975) HCD 122, 137; S. Malik, *Bangladesh in Harding & Hatchard*, *supra* note 7 at 50-51.

425. U.S. Dep't of State, Country Reports on Human Rights Practices: Malaysia (2008) (also describing how the 1988 amendments to the Internal Security Act limited judicial review of detentions under the act).

426. See State Security (Detention of Persons) Act, (1983) Cap. 414, s. 1 (Nig.); State Security (Detention of Persons) Amended Decree no. 14, s.2(4) (1994); see also M. A. Owoade, *Some Aspects of Human Rights and the Administration of Criminal Justice in Nigeria*, in *The Protection of Human Rights in African Criminal Proceedings*, 187, n. 30. (M. Cherif Bassiouni & Ziyad Motala eds., 1995).

427. Constitution of the Republic of Mozambique art. 64; Open Society Initiative for Southern Africa, *Mozambique: Justice Sector and the Rule of Law* 104-05 (2006); U.S. Dep't of State, Country Reports on Human Rights Practices: Mozambique (2007).

High Court.”<sup>428</sup> Judicial review of the tribunal’s recommendations is very limited—there is no right to appeal the tribunal’s conclusions regarding the grounds for an individual’s detention, and it is only possible to appeal to High Court if a detainee’s constitutionally guaranteed conditions of confinement or due process have been contravened.<sup>429</sup> In Swaziland, under the 1978 Detention Order, detainees and their families were permitted to petition the monarch, seeking his personal review of the detention order, although the process for doing so is opaque.<sup>430</sup>

(viii) Rules of interrogation: Rules governing the interrogation or detentive questioning of suspects held in national security detention also vary widely among the countries surveyed. Australia and Israel are the national security detention framework countries with the most robust protection against the torture of terrorist suspect detainees.<sup>431</sup> Under President Aharon Barak, the Israeli Supreme Court ruled that it was never lawful to use violence or torture while interrogating a terrorist—even in a “ticking bomb” situation.

[It] is the fate of a democracy [that] not all means are acceptable to it . . . not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of [a democracy’s] understanding of security. At the end of the day, [those values support] its spirit and strength [and its capacity to] overcome [the] difficulties.<sup>432</sup>

Yet, despite the unequivocal language of the Israeli Supreme Court’s ruling, there have been continued allegations that the Israeli security services have committed human rights violations, including the use

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428. Constitution, art. 83(2)(c) (Kenya). *See also* J.B. Ojwang, *Kenya*, in Harding & Hatchard, *supra* note 7, at 115 (describing the composition of review tribunals in *Ooko v. Republic of Kenya*, High Court, Nairobi, Civil Case No. 1159 of 1966 (unreported)).

429. Constitution, art. 84 (Kenya).

430. *See* Harding & Hatchard, *supra* note 7 at 29.

431. On May 23, 2009 Australia became a signatory to the United Nations Optional Protocol to the Convention Against Torture. *See* Cynthia Banham, *Australia Says No To Torture*, *Sydney Morning Herald* (May 23, 2009), <http://www.smh.com.au/national/australia-says-no-to-torture-20090522-bial.html>.

432. HCJ 5100/94, *Judgment Concerning the Legality of the General Security Service’s Interrogation Methods* [1999] IsrSC 53(4) 817.

of cruel, inhuman, or degrading treatment and torture, in the Occupied Territories.<sup>433</sup>

Of the remaining national security detention framework countries, Bangladesh, Indonesia, Kenya, Mozambique, and the Russian Federation are full signatories of the Torture Convention (UNCAT),<sup>434</sup> and India and Pakistan have signed, but not ratified, the Convention.<sup>435</sup> However, the extent to which each of these nations abides by the principles of the Convention remains unclear, according to the records of the United Nations and human rights organizations.<sup>436</sup> In Russia, for example, the country’s UNCAT commitments and constitutional provisions prohibit torture, but there are widespread accusations of custodial abuse.<sup>437</sup> In Bangladesh, there is no domestic prohibition on torture or custodial abuse,<sup>438</sup> although in September 2009 a bill was pending before Parliament to outlaw torture and custodial abuse entitled “the Torture and Custodial Death (Prohibition) Bill, 2009.”<sup>439</sup> In Pakistan, although the law prohibits torture, coerced confessions are admissible in “antiterrorism courts” and there are reports of

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433. See, e.g., B’Tselem, *Absolute Prohibition*, *supra* note 411, at 33–34, 59–60, 69–70 (reporting the findings of a study on Israel’s treatment of detainees and finding that Israel’s actions amounted to ill-treatment and, in some cases, torture, under international law).

434. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. Treaty Doc. 100-20, 1465 U.N.T.S. 85 (entered into force, June 26, 1987) [hereinafter Torture Convention].

435. A full list of signatories to the Convention is available on the website of the Office of the United Nations High Commissioner for Human Rights, at [http://treaties.un.org/Pages/Viewdetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/Viewdetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en).

436. See, e.g., Jay Goodliffe and Darren G. Hawkins, *Explaining Commitment: States and the Convention against Torture*, 68 J. of Pol. 358 (2006) (providing a statistical analysis of the factors affecting the extent of a country’s commitment to the Torture Convention).

437. See U.S. Dep’t of State, Country Reports on Human Rights Practices: Russia (2008) (noting that “there were credible reports that law enforcement personnel engaged in torture, abuse and violence to coerce confessions from suspects and allegations that the government did not hold officials accountable for such actions.”)

438. See Amnesty International, *Bangladesh: Death in custody and reports of torture*, AI Index: ASA 13/005/2007, 10 May 2007, available at <http://www.amnesty.org/en/library/info/ASA13/005/2007/en>.

439. See Asian Human Rights Commission, Bangladesh: Torture and Custodial Death (Prohibition) Bill, 2009 is placed before Parliament, available at <http://www.ahrchk.net/statements/mainfile.php/2009statements/2221/>.

custodial abuse by the security forces.<sup>440</sup> In some national security detention framework countries, such as Singapore, where the law prohibits mistreatment of detainees, allegations of custodial abuse are rare.<sup>441</sup> In other national security detention framework countries, such as India, Kenya, Malaysia, Mozambique, Sri Lanka, Swaziland, Tanzania, Trinidad & Tobago, and Zambia, despite legal prohibitions on torture or grievous harm to detainees there are numerous allegations of torture and abuse by prison authorities.<sup>442</sup>

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440. See U.S. Dep't. of State, Bureau of Democracy, Human Rights & Labor, *2008 Human Rights Report: Pakistan* (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119139.htm>.

441. See U.S. Dep't. of State, Bureau of Democracy, Human Rights & Labor, *2008 Human Rights Report: Singapore* (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119056.htm>.

442. See U.S. Dep't. of State, Bureau of Democracy, Human Rights & Labor, *2008 Human Rights Report: India* (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119134.htm> (describing "beating; electric shock; denial of food and water; rape; stripping; pins under nails; chili pepper inserted in body cavities; denial of medical treatment; and threats to harm children"); See U.S. Dep't. of State, Bureau of Democracy, Human Rights & Labor, *2008 Human Rights Report: Kenya* (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119007.htm> (noting that "The constitution and law prohibit such practices; however, police frequently used violence and torture during interrogations and as punishment of pretrial detainees and convicted prisoners."); U.S. Dep't of State, Bureau of Democracy, Human Rights & Labor *2008 Country Report on Human Rights Practices: Trinidad & Tobago* (2008) (Feb. 25, 2009) (describing "credible reports that police officers and prison guards mistreated individuals under arrest or in detention."); U.S. Dep't of State, Country Reports on Human Rights Practices: Malaysia (2008) (describing claims of "physical and mental abuse" by police); U.S. Dep't of State, Country Reports on Human Rights Practices: Mozambique (2008) (describing "reports of death resulting from police torture"); U.S. Dep't of State, Country Reports on Human Rights Practices: Sri Lanka (2008) (describing how the law makes torture a punishable offense with a mandatory sentence of not less than seven years imprisonment, but nonetheless "torture is widely practiced"); U.S. Dep't of State, Country Reports on Human Rights Practices: Swaziland (2008) (noting that the provision prohibiting torture "is located in the 'policy' section of the constitution and is not enforceable in any court or tribunal" and "reports that government officials sometimes used torture during interrogation" ); U.S. Dep't of State, Country Reports on Human Rights Practices: Tanzania (2008) (describing beatings "as the method most commonly used."); U.S. Dep't of State, Country Reports on Human Rights Practices: Zambia (2008) (describing Human Right Commission's finding that "police officers continue to rely on torture as an interrogation technique.").

B.     Similarities and Differences between National Security Detention Framework Countries

The countries within the national security detention framework appear at first glance to be widely divergent by any number of measures—they are geographically, culturally and linguistically distinct, they have different political systems, they belong to different transnational alliances, and they enjoy differing levels of economic development. Yet, there is one feature that almost all<sup>443</sup> of the national security detention framework nations share: The territory that they occupy was once colonized by the British Empire. Australia, Israel, Kenya, India, Mozambique, Malaysia, Nigeria, Pakistan, Singapore, Sri Lanka, Swaziland, Tanzania, Trinidad & Tobago, and Zambia have all inherited, to differing degrees, the same common law traditions and common law precedents that have influenced the jurisprudence of the immigration detention framework nations and two of the criminal framework countries, the United Kingdom and Ireland. Yet, Australia, Israel, Kenya, India, Mozambique, Nigeria, Pakistan, Singapore, Sri Lanka, Swaziland, Tanzania, Trinidad & Tobago, and Zambia have all developed an approach to “preventive detention” grounded, to differing degrees, in emergency powers and executive deference. An exploration of the similarities and differences of the national security detention framework nations must therefore begin with an attempt to ascertain what common set of circumstances led these countries to develop this particular approach to preventive detention.

Some commentators argue that the English wartime case, *Liversidge v. Anderson*,<sup>444</sup> played a crucial role in the national security detention framework nations’ conception of “preventive detention.”<sup>445</sup> In that case, a plaintiff’s false imprisonment claim was not entertained by the House of Lords on the grounds that, if the relevant cabinet minister claimed to have reasonable cause to believe detention was justified, the courts could not enquire further into the adequacy of the plaintiff’s detention.<sup>446</sup> Considered in light of the great deference accorded ministerial decisions within the numerous

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443.     The two exceptions are the Russian Federation and Mozambique (which was colonized by Portugal).

444.     *Liversidge v. Anderson*, [1942] AC 206.

445.     See Harding, *supra* note 77, at 200 (discussing the influence of the *Liversidge* case on South East Asian courts in finding unreviewable by courts the executive’s decision to detain in national security situations).

446.     *Liversidge v. Anderson*, [1942] AC 206, 282.

statutory provisions of national security detention framework countries,<sup>447</sup> this argument is persuasive to some extent. However, *Liversidge* cannot be the whole story, for, since the 1960s, courts in some national security detention framework nations have been gradually overturning the legacy of *Liversidge* and distinguishing modern iterations of “preventive detention” from that undertaken by the House of Lords in the 1940s.<sup>448</sup>

The legacy of colonialism itself, rather than one particular case, appears to provide a more compelling explanation of the persistence of the state of emergency model of “preventive detention” in many countries, with the obvious exceptions of Russia, which is *sui generis*,<sup>449</sup> and Australia, which enjoyed a remarkably peaceful transition from colonial possession to Commonwealth status and independence. The economic disadvantages and the political instability in the immediate aftermath of withdrawal of colonial rule undoubtedly influenced the insertion of “preventive detention”

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447. See discussion *supra* Part IV.

448. See, e.g., Steven Greer, *Preventive Detention and Public Security: Law and Practice in Comparative Perspective*, 23 Int'l J. Sociology of Law 45, 51 (1995) citing Harding, *supra* note 76 at 200 and Ghulam Jilani v. Gov't of West Pakistan, PLD 1967 SC 373, 390 (holding that “reasonable grounds” not satisfied by executive insistence that such grounds existed); Abdul Baqi Baluch v. Gov't of West Pakistan, PLD 1968 SC 313, 314 (observing that Pakistan's Constitution requires the High Court to examine the basis for detention and distinguishing this requirement from English law); Gov't of West Pakistan v. Bux Jatui, PLD 1969 SC 210, 219 (noting that, when a detention is challenged, the Provincial Government and Board must make its decision based on information regarding the basis for that detention); Mohammed Yunus v. Gov't of Sindh, PLD 173 Karachi 694, 709–10 (reviewing Indian Supreme Court jurisprudence and finding that the Court has the power to examine the Government's basis for the detention and determine the reasonableness of the Government's actions); Aruna Sen v. Gov't of the People's Republic of Bangladesh, 27 DLR (1975) HCD 122, 137 (finding that “the dictum of subjective satisfaction as laid down in the majority decision in *Liversidge v. Anderson* has been whittled down to a large extent by confining its application to exceptional condition [sic] prevailing during wartime”). The Bangladesh High Court Division followed up with Ranabir Das v. Ministry of Home Affairs, 28 DLR (1976) HCD 48, 53 (holding that, when a detention is challenged as without basis or illegally *mala fide*, the detaining authority bears the burden of proving the need for continued detention).

449. Russia was, of course, never subject to rule by a colonial European power, but rather asserted considerable imperial sway in Europe, the Middle East, and the Far East in the nineteenth and twentieth centuries. See Dietrich Geyer, *Russian Imperialism: The Interaction of Foreign and Domestic Policy* 65–66, 99–100, 186 (Bruce Little trans., 1987) (1977) (describing Russia's involvement in the Balkans and its commercial and imperial expansion into Central Asia and East Asia).

clauses into some new nations' constitutions,<sup>450</sup> and the genuine states of national emergency prompted statutes to be passed to deal with crisis situations.<sup>451</sup> In periods of political and economic uncertainty, tensions between different branches of government may become manifest, and the statutes promulgated by legislatures in some national security detention framework nations that expressly limit the extent of judicial review over preventive detention, may reflect the extent to which that tension was thoroughgoing.<sup>452</sup>

A further legacy of the colonial era in the national security detention framework nations may be the political culture of the judiciary itself. In many of the national security detention framework countries, the role of the judiciary is heavily proscribed, and the judiciary is regarded as the weakest branch of government.<sup>453</sup> In some national security detention framework countries, the courts emphatically avoid confrontation with the executive on detention issues.<sup>454</sup> In others, judges attempt to craft a more activist role in the review of detention cases, but are immediately rebuffed by either the executive or the legislature.<sup>455</sup> Australia and Israel are obvious

450. See generally Harding & Hatchard, *supra* note 7, at 2, 41, 63 (describing post-colonial unrest that sometimes accompanied the passage of detention laws, but noting that most of these regimes had originally been "introduced by British colonial governments").

451. The Defense Emergency Powers regulations in Israel are just one example of this phenomenon. Defense (Emergency) Regulations, 1945, *Palestine Gazette No. 1442* (Sept. 27, 1945) (passed in the context of Mandate-era unrest).

452. For example, see the Emergency Powers legislation passed in Malaysia, Singapore, and India in the 1960s. Internal Security Act of 1960, (Malay.), available at [http://ejp.icj.org/IMG/INTERNAL\\_SECURITY\\_ACT\\_1960.pdf](http://ejp.icj.org/IMG/INTERNAL_SECURITY_ACT_1960.pdf); Internal Security Act (Sing.) available at [453. See, e.g., Ali Khan, \*Pakistan Elections and the Lawyers' Movement\*, JURIST, Nov. 21, 2007, <http://jurist.law.pitt.edu/forumy/2007/11/pakistan-elections-and-lawyers-movement.php> \(discussing resistance by Pakistani lawyers to General Pervez Musharraf's suspension of the Constitution and attempts to intimidate the judiciary\).](http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?&actno=Reved-143&date=latest&method=part; Defence of India Act, No. 51 (1962).</a></p>
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454. For example, in Tanzania, courts have "shied away from investigating cases . . . [of preventive detention] . . . preferring to avoid a direct confrontation with the executive." Y. Ghai, *The Rule of Law, Legitimacy and Governance*, 14 Int'l J. of the Soc. of Law 179, 194 (1986) (also discussing Kenya and Uganda).

455. See Greer, *supra* note 448 at 51, describing how, in Malaysia in the 1980s, courts attempted to develop an "objective" test to determine whether or not individuals should be held for extended periods of time without trial or charge, but "were immediately reversed by legislation." See also Karpal Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia, [1988] 1 M.L.J. 468, 472



exceptions to this argument. With the exception, however, of these two “mixed” countries, the courts in the state of emergency countries appear to be heavily circumscribed in terms of the measures they are permitted to take to investigate and adjudicate the claims of individuals held in preventive detention. An interrelated point is the extent to which the national security detention framework nations have developed common approaches to the procedures governing preventive detention. Restrained from addressing the substance of the detention cases passed to them for review, jurists in Bangladesh, for example, have argued that the slightest technical flaw is sufficient to invalidate an individual’s incarceration under an administrative detention statute.<sup>456</sup> In India, the Supreme Court has consistently interpreted article 22(5) of the Constitution to incorporate procedural guarantees, and, as a result, has developed a “collateral” process of judicial review, albeit via Court members sitting on administrative review boards.<sup>457</sup> However, in each of these instances, the judiciary is hamstrung, demonstrating the vast differences between the legal circumstances in the majority of the

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(establishing three circumstances when individuals cannot legally be detained— (1) if the grounds for detention are based on *mala fides*, (2) if the stated grounds of detention are outside the scope of the enabling legislation, and (3) if doing so would fail to comply with condition precedent); *Yit Hon Kit v. Minister of Home Affairs*, [1988] 2 M.L.J. 638, 647–648 (expressing the court’s preference for an objective approach); *Chng Suan Tze v. Minister of Home Affairs*, [1989] 1 M.L.J. 69, 82 (Ct. of App.) (calling for the application of an objective standard, stating that “all power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power”). Nicole Fritz & Martin Flaherty, *Unjust Order: Malaysia’s Internal Security Act*, 26 *Fordham Int’l L.J.* 1345, 1410–1413 (2003) (addressing the reversal of rulings where courts acted to protect a detainee’s individual liberties).

456. See *Harding & Hatchard*, *supra* note 7, at 35 (describing how jurists throw out cases on pretenses such as failure to use an official seal, omissions of relevant dates, mistakes in the detainee’s name, or failure to publish notice of detention in official government gazette). See also Press Release, Amnesty International, One Year On: Human Rights in Bangladesh Under the State of Emergency, AI Index PRE01/009/2008 (Jan. 10, 2008) (noting the weakness of the judiciary and the need to separate the judiciary from the executive branch).

457. See *Harding & Hatchard*, *supra* note 7, at 36; see, e.g., *Kamla v. State of Maharashtra*, A.I.R. 1981 S.C. 814, 816–17 (holding that the law of preventive detention requires that the protections afforded under Art. 22(5) of the Constitution are complied with and that the procedure is just and reasonable); *Shalini Soni v. Union of India*, (1980) 4 S.C.C. 544, 549–551 (stating that, because Article 22(5) of the Constitution imposes obligations on the detaining authority that establish the sole procedural safeguards for detainees, it must be strictly observed).

national security detention framework countries and nations like the United States that have a strong, independent judiciary.

C. The Advantages and Disadvantages of the National Security Detention Framework

The purported “advantages” of the national security detention framework approach to the detention of terrorist suspects have been discussed at length by politicians, military strategists, academics, and popular commentators.<sup>458</sup> One argument advanced by those in favor of national security detention is that it is crucial to protect society from suspected terrorists, a uniquely threatening group of “bad men,” even if the proof that they have committed or intended to commit a crime is insufficient for a court to charge or convict them.<sup>459</sup> Others argue that the sensitivity of intelligence sources and techniques would be compromised if terrorists were brought to trial within the regular criminal justice system, necessitating specialized procedures in closed court rooms with lower standards of proof and prophylactic detention.<sup>460</sup> This Article has attempted to show, by pointing to comparative examples, that such suggestions are ultimately unavailing. Yet, such arguments have received a considerable amount of traction in the mainstream media. Meanwhile, the disadvantages of national security detention remain under-explored. This section therefore provides a brief overview of the profound and thoroughgoing disadvantages of the national security detention framework.

For individuals steeped in the Anglo-American notion of the “rule of law” and its attendant legal traditions, perhaps the most glaring feature of the national security detention framework is the extent to which it deviates wildly from established norms of due process and fair treatment. Under the national security detention

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458. See *supra* notes 10–15 and accompanying text.

459. Clive Stafford Smith critiques this description of terrorist suspects in the title (and contents) of his account of his representation of Guantánamo detainees. Clive Stafford Smith, *Bad Men* 164–5 (2007) (published in the United States under the title *The Eight O’Clock Ferry to the Windward Side: Fighting the Lawless World of Guantánamo Bay*).

460. This argument has been convincingly undermined by two former federal prosecutors. See Zabel & Benjamin, *supra* note 12, at 77–129 (emphasizing the capacity of federal courts to handle terrorism cases); see also Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 *Vill. L. Rev.* 771, 803 (2008) (discussing how public proceedings contribute to the functioning of democracies and equality before the law).

framework, individuals may never know the precise details of the offense of which they stand accused; they may languish in prison for extended periods of time, without notification of the charges against them and without access to counsel; they may not be granted the “due process” to which criminal prisoners in the same country are entitled; they may not appear before a judge, but rather before a review board; they may not have a right of confrontation with their accusers; they may not have the right to question witnesses or present evidence; they may not be entitled to meaningful judicial review of the grounds on which they are detained; they may be held indefinitely, without reprieve, on the same grounds that they were initially captured and imprisoned; and, perhaps most shockingly, they may be tortured. However, despite the dissonance between the national security framework and the Anglo-American legal tradition, this approach to the detention of terrorist suspects is not only employed by the governments of Swaziland, Pakistan, and Zambia—to name but three of the national security detention framework countries—but was also employed at Guantánamo Bay by the United States government during the Bush administration.

The regime at Guantánamo provides further illustration of many of the ways in which the national security detention framework fundamentally deviates from settled Anglo-American legal norms. “Unlawful enemy combatants”<sup>461</sup> have been held in Guantánamo for seven years without meaningful judicial review of their detention.<sup>462</sup> The United States Supreme Court’s jurisprudence on detainees indicates a growing belief that individuals held in Guantánamo should be entitled to adequate judicial review,<sup>463</sup> but

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461. Defined in part, somewhat ambiguously, by the Military Commissions Act of 2006 as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).” Military Commissions Act of 2006 § 3, 10 U.S.C. § 948a (2006).

462. See Andy Worthington, *Seven Years of Guantánamo, Seven Years of Torture and Lies*, Huff. Post, Jan. 11, 2009, [http://www.huffingtonpost.com/andy-worthington/seven-years-of-guantanamo\\_b\\_156903.html](http://www.huffingtonpost.com/andy-worthington/seven-years-of-guantanamo_b_156903.html).

463. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (holding that an American citizen classified as an enemy combatant is entitled to “notice of the factual basis for his classification, and a fair opportunity to rebut the government’s factual assertions before a neutral decision maker”); *Rasul v. Bush*, 542 U.S. 466, 483–84 (2004) (finding that aliens classified as enemy combatants on Guantánamo have the right to file a habeas petition challenging that status);

the Court has hesitated to articulate a vision for that view, beyond describing the inadequacies of the Detainee Treatment Act of 2005<sup>464</sup> and the Military Commissions Act of 2006.<sup>465</sup>

Some commentators have argued that the fact that Guantánamo detainees are not apprised of the charges against them has led to farcical situations in which individuals who could clearly demonstrate their innocence languished in jail for years, and were only freed after prosecutors broke the rules and inadvertently mentioned the reasons some detainees were being held.<sup>466</sup> Others have pointed out that the lack of habeas corpus set out in the Detainee Treatment Act for the Combatant Status Review Tribunal (CSRT) process<sup>467</sup> irreparably damages detainees’ future opportunity of ever mounting a reasonable defense, irrespective of the detainees’ guilt or innocence.<sup>468</sup> Perhaps the most shocking element of the national security detention framework style system of “preventive detention” employed by the U.S. government in Guantánamo is the “inhumane treatment” employed by investigators in an attempt to elicit confessions from the detainees.<sup>469</sup> Former Assistant Attorney

*Boumediene v. Bush*, 128 S.Ct. 2229, 2274 (2008) (holding that prisoners held in Guantánamo have a constitutionally guaranteed right to habeas).

464. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2780 (2005) [hereinafter DTA].

465. Military Commissions Act of 2006 § 3, Pub. L. No. 109-366, 10 U.S.C. § 948a (2006). The Act was passed by Congress in response to the Supreme Court’s decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (invalidating certain sections of the DTA).

466. For some examples of problems detainees faced as a result of the CSRT constraints, see Transcript of Oral Argument, *Boumediene v. Bush*, 128 S.Ct. 2229 (2008) (No. 06-1195), available at [www.oyez.org/cases/2000-2009/2007/2007\\_06\\_1195/argument/](http://www.oyez.org/cases/2000-2009/2007/2007_06_1195/argument/) (noting that one detainee without counsel was not provided the name of the so-called terrorist with whom he was accused of associating, while the lawyer for another detainee was able to examine the CSRT record filed by the government to learn the name of the alleged terrorist association, and thus able to prove his client’s innocence).

467. DTA § 1005(a)(1)(A) (authorizing the Secretary of Defense to establish procedures for combatant status review).

468. See Jonathan Hafetz, *Torture, Judicial Review, and the Regulation of Custodial Interrogations*, 62 N.Y.U. Ann. Surv. Am. L. 433, 461–62 (2007).

469. See *id.* at 1413 (identifying “inhumane treatment” of prisoners as one of the “constellation of tactics that form a core of the [Bush] administration’s new preventive paradigm”). See also Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 18, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) (expressing concern about the lack of adequate due process under the Bush administration); Paul Reynolds, *Chorus Mounts Against Guantánamo*, BBC News, May 19, 2006,

General (now Judge) Jay Bybee's infamous "torture memo" suggested that waterboarding, mock executions, physical beatings, and painful stress positions might not be illegal *per se*.<sup>470</sup> The stories of detainees being forced to bark like dogs, urinate in their clothes, climb into backpacks, and sit in close proximity to naked or semi-naked women<sup>471</sup> seem to be the very epitome of "inhumane treatment" in violation of the Torture Convention to which the United States is a signatory.<sup>472</sup>

The international community, human rights advocates, and legal scholars have roundly condemned the laws and practices of countries that operate within the national security detention framework—including the regime employed by the United States.<sup>473</sup>

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<http://news.bbc.co.uk/2/hi/americas/4997458.stm> (describing the U.N. Committee Against Torture's call for the closure of Guantánamo after abuses came to light).

470. Memorandum from Jay S. Bybee, U.S. Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, (Aug. 1, 2002), *reprinted in* The Torture Papers 172, 214 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (arguing that "there is a significant range of acts that though they might constitute cruel, inhuman or degrading treatment or punishment fail to rise to the level of torture"). Timothy Flanigan, President Bush's nominee to be Deputy Attorney General, suggested before the Senate Judiciary Committee that these acts might not be illegal "depend[ing] on all of the relevant facts and circumstances" of each particular case. *Confirmation Hearing on the Nomination of Timothy Elliott Flanigan to be Deputy Attorney General Before the S. Comm. on the Judiciary*, 109th Cong. 108, 111–12, 137–38 (2005) (written responses of Timothy Flanigan).

471. *Id.*

472. *See* Torture Convention, *supra* note 434, art. 16.

473. *See, e.g.*, Sarah Joseph, Jenny Schultz & Melissa Castan, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary 312–19 (2d ed. 2005) (recounting several cases of inappropriate detention by Australia and the Netherlands); Human Rights Comm., Concluding Observations: Israel, ¶21, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998) (expressing concern over the detention of Palestinians by Israeli military forces); Human Rights Comm., Concluding Observations: Israel, ¶ 13, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003) (indicating concern that "Palestinians in the occupied territories who remain under the control of Israeli security forces do not enjoy the same rights and freedoms as Jewish settlers in those territories"); Human Rights Comm., Communication No. 1324/2004: Australia, ¶ 7(2), U.N. Doc. CCPR/C/88/D/1324/2004 (Nov. 13, 2006) (discussing claim against the Australian government for arbitrary and indefinite detention); Human Rights Comm., Concluding Observations of the Human Rights Committee: United States of America, ¶ 18, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) (expressing concern that the Bush Administration "may not offer adequate safeguards of due process" to detainees). *See also* Joan Fitzpatrick, *Sovereignty, Territoriality and the Rule of Law*, 25 *Hastings Int'l & Comp. L. Rev.* 303, 303–04 (2002) (asserting

One of the Law Lords in the United Kingdom has even declared Guantánamo a "legal black hole" because of this rights-violative regime.<sup>474</sup> As President Obama's multi-agency task force ponders the future direction of U.S. policy with respect to terrorist suspect detainees, the members of the task force would be well advised to remember these criticisms and to recall the human rights violations and statutory and jurisprudential limitations of the vast majority of the countries who have taken a national security based approach to the "preventive detention" of suspected terrorists.

#### CONCLUSION

President Obama's multi-agency task force is currently considering policy proposals from scholars and advocates who argue that the U.S. government should look to the precedent of other nations to help answer the question of whether the United States should formalize a system of "preventive detention" for suspected terrorists in the United States.<sup>475</sup> This is the wrong question. *All* of the thirty-two countries surveyed in this Article (including the

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that the United States has pursued "a highly problematic armed conflict alternative to the criminal law paradigm, which is readily available to combat terrorist acts and threats"); Avril McDonald, *Terrorism, Counter-Terrorism, and the Jus in Bello*, in *Terrorism and International Law: Challenges and Responses* 57, 62 (Michael N. Schmitt & Gian Luca Beruto eds., 2002) ("Al Qaeda and other terrorist organizations must be defeated for the most part by detection (good intelligence) and by prosecution . . . under domestic criminal legislation."); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 Harv. Hum. Rts. J. 123, 136 (2006) (arguing that the detention of non-battlefield terrorism suspects not formally convicted of a crime violates human rights law); Michael Ratner, Letter to the Editor, N.Y. Times, July 15, 2007, at A12 ("No domestic or international law permits preventative detention [in the fight against terrorism].").

474. Lord Johan Steyn, *Guantánamo Bay: The Legal Black Hole*, 53 Int'l & Comp. L. 1, 6–15 (2004) (arguing that the regime in Guantánamo is rights-violative because it infringes on human rights to a degree disproportionate to the crisis).

475. See, e.g., Roach, *supra* note 25, at 2188–2203 (comparing the policies of Canada and the United Kingdom to argue that conflicts between rights and security should be resolved through rigorous, rational, and logical application of proportionality principles); Warbrick, *supra* note 25, at 1007–15 (offering examples from the United Kingdom to argue for the application of the core standards of international humanitarian and human rights law to the "war on terrorism"); Schulman, *supra* note 25, at 547–48 (discussing the protection of fundamental rights in the context of a new national security court system by pointing to examples from the United Kingdom, Malaysia, and South Africa).

United States) employ *some* kind of system for detaining terrorist suspects, but when and how such detention occurs varies so significantly that it is both meaningless and misleading to assert that the Obama administration should employ “preventive detention” in the United States. Instead, the question facing American policymakers, including President Obama’s task force, who seek to learn from comparative international precedent is: “Which framework should we use to detain terrorist suspects—a pre-trial detention framework, an immigration detention framework, or a national security detention framework?”

Reframing the question in these terms underscores the flaws in the arguments of those advocating for a “National Security Court” or a U.S. version of “preventive detention.” Scholars advocating for “preventive detention” in the United States often do so pointing to the precedent of America’s closest allies. These scholars argue that “preventive detention” should be an acceptable solution because the United Kingdom and France hold suspected terrorists in preventive detention.<sup>476</sup> However, in making their arguments, these commentators erroneously conflate the different detention frameworks. Citing the experiences of the United Kingdom and France as favorable precedent suggesting that the United States should formalize “preventive detention” policies, these advocates then propose specific policies more consistent with a national security detention framework<sup>477</sup>—despite the fact that the United Kingdom and France are firmly ensconced within the pre-trial detention framework.<sup>478</sup> If these scholars are wedded to their policy prescriptions, they should invoke more accurate comparative precedents for their position—the detention policies of Russia, Nigeria, or other countries that rely on the national security

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476. See, e.g., Hakimi, *supra* note 32, at 401–08 (citing dissatisfaction with the *ad hoc* reactions of France and the United Kingdom to criminal and armed-conflict models of detention to argue that a modified version of “administrative detention” is necessary).

477. See, e.g., Roach, *supra* note 25, at 2154–55, 2188–2203 (finding the actions of the United Kingdom and Canada instructive with respect to issues of national security confidentiality, non-citizen terrorists who cannot be deported due to safety concerns, and the preventive detention of suspected terrorists); Marc Perelman, *How the French Fight Terror*, *Foreign Policy*, Jan. 2006, [http://www.foreignpolicy.com/story/cms.php?story\\_id=3353&print=1](http://www.foreignpolicy.com/story/cms.php?story_id=3353&print=1) (proposing an overhaul of U.S. counterterrorism policy based on the French judicial approach of “aggressive prosecution, specialized investigators, and intrusive law enforcement”).

478. See discussion *supra* Part II.

framework.<sup>479</sup> If, on the other hand, these scholars are wedded to the notion that the United States should follow the example set by the United Kingdom and France, they should reverse their policy prescriptions—eschewing national security detention in favor of a criminal justice-based pre-trial detention regime.

This Article illustrates the importance of fully understanding the systems of detention in use in other nations before citing them as precedent. The first step to take when attempting any comparative analysis of different countries’ detention schemes is to identify whether or not the countries in question use pre-trial detention, immigration detention, or national security detention to hold terrorist suspects. As this Article has argued, the framework to which a country belongs often implicates that nation’s constitutional, historical, political, and social values and mores. As observed in the Introduction, the United States is a nation that happens to share many civic values, human rights standards, constitutional provisions, political traditions, national security concerns, and legal system tenets with the pre-trial detention framework countries. The governments of these countries have faced similar challenges and weighed similar human rights concerns, and so it is to these countries that the United States should now turn for the firmest precedent as it considers what system of detention it should use to hold terrorist suspects in future.

The United States cannot and should not import wholesale another nation’s system—pre-trial detention or otherwise—for the detention of terrorist suspects. The United States, like all countries, has its own legal traditions and its own approach to legislation and jurisprudence. Unsurprisingly, then, not all of the pre-trial detention countries’ approaches to the detention of terrorist suspects are applicable in a U.S. context.<sup>480</sup> The United States can, however, learn from the broad principles running through the pre-trial detention nations’ approaches to the detention of terrorist suspects, and use these systems as a point of departure for future discussion. This Article has endeavored to provide a roadmap for that process. By isolating the attributes of three alternative systems, and pointing to the nations and groups of nations that have adopted these three different frameworks, this Article hopes to demonstrate what might be possible and achievable in the United States. For, as Justice

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479.     *See* discussion *supra* Part IV.

480.     For example, the Spanish system of *in communicado* detention, or the French centralization of proceedings. *See* discussion *supra* Part II.



Stevens observed in his dissent in *Rumsfeld v. Padilla*, “[a]t stake . . . is nothing less than the essence of a free society.”<sup>481</sup> As the Obama administration’s multi-agency task force begins its work, it would do well to remember Justice Stevens’s rejoinder in the same case that “[e]ven more important than the method of selecting the people’s rulers and their successors is the character of the constraints imposed . . . by the rule of law.”<sup>482</sup>

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481.      542 U.S. 426, 465 (2004) (Stevens, J., dissenting).

482.      *Id.*





















































