

# The Price of Prevention: Anti-Terrorism Pre-Crime Measures and International Human Rights Law

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*How far can law go to prevent violent acts of terrorism from happening? This Article examines the response by a number of Western democratic States to that question. These States have enacted special legal mechanisms that can be called ‘anti-terrorist pre-crime measures.’ Anti-terrorist pre-crime measures, or ATPCMs for short, are conditions or restrictions imposed on a person by law enforcement authorities as the outcome of a legal process set up to identify and neutralize potential sources of terrorist activity before it occurs. The issue is whether the ATPCMs regimes in existence today comply with the corresponding States’ international obligations under human rights law because, by virtue of their preventative mission, these regimes operate outside, or on the fringes of, the ordinary criminal justice systems in the democratic societies that deploy them. Despite the operation of ATPCMs regimes in robust democracies like the United Kingdom, Canada, Australia and, potentially, the United States, they surprisingly have not been the subject of recent international scrutiny or systematic comparative study. This Article fills both gaps. On the one hand, it documents how the national legal frameworks in the aforementioned countries design and deploy anti-terrorist pre-crime measures, as well as how those measures function in practice. On the other, the Article canvasses the relevant international legal framework to identify not just which human rights are implicated by the operation of ATPCMs regimes, but also how those rights are impacted by it. The Article then applies this normative framework to the domestic counter-terrorism initiatives studied to ascertain how, and the extent to which, the respective ATPCMs regimes comply with human rights law. Significant insights can be derived from this exercise for other countries like the United States that authorize or contemplate implementing ATPCMs.*

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## I. INTRODUCTION

In the futuristic 2002 movie *Minority Report*, Tom Cruise plays the chief of a specialized police unit charged with arresting individuals believed to be on the verge of committing murder.<sup>1</sup> This “Pre-Crime” Unit acts on specific foreknowledge provided by a group of psychics that is based on foreboding visions of a crime yet to be carried out but, allegedly, certain to happen.<sup>2</sup> In the movie, a key challenge to the “Pre-Crime” program grows out of the doubts expressed by critics (well-founded, as it turns out) regarding the effectiveness of the safeguards in place to protect the due process rights of the unfortunate perpetrators-to-be who, once detained, are subject to severe punishment.<sup>3</sup> Without giving too much away, the film, though a work of science fiction, raises important questions about how far the long arm of the law should reach to combat violent crime.

In our time, nowhere is this more evident than in the sphere of counter-terrorism. In the long wake of the terrorist attacks of September 11, 2001, governments around the world have, collectively and unilaterally, spared no effort to combat the common enemy of global terrorism. The United Nations, to name just one multilateral example, has seen such a proliferation of counter-terrorism mechanisms and initiatives that human rights experts have begun to worry about the United Nation’s ability to harmonize and implement the ever-growing *corpus* of standards, rules and practices emanating from this transnational bureaucracy.<sup>4</sup> Similarly, since 2001, governments around the world have adopted or updated domestic anti-terrorist legislation in order to combat this scourge more effectively.<sup>5</sup> All these efforts reflect, to some extent, the same concern addressed by the fantasy of future-crime prevention in *Minority Report*: how far can and should the law go to combat the threat of lethal violent extremism?

More to the point for purposes of this Article, the central question is: How far can and should the law go to *prevent* violent acts of terrorism *from occurring in the first place*? There is no question that under international law States “have . . . a duty to protect individuals under their jurisdiction from terrorist attacks.”<sup>6</sup> Indeed, the United Nations has longed recognized that

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1. Roger Ebert, *Minority Report*, ROGEREBERT.COM (June 21, 2002), <https://www.rogerebert.com/reviews/minority-report-2002>.

2. *Id.*

3. *Id.*

4. Fionnuala Ní Aoláin (Special Rapporteur of the Human Rights Council), *Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶¶ 19-25, U.N. Doc. A/72/495 (Sept. 27, 2017).

5. See Office for Democratic Insts. & Human Rights, Org. for Sec. & Co-operation in Eur., *Counter-Terrorism*, LEGISLATIONLINE, <https://www.legislationline.org/topics/topic/5> (last visited July 7, 2019).

6. Office of the U.N. High Comm’r for Human Rights, *Human Rights, Terrorism and Counter-terrorism*, at 8, Fact Sheet No. 32 (July 2008) [hereinafter OHCHR Fact Sheet].

prevention is a key tenet in the struggle against violent extremism and the human rights abuses it propagates.<sup>7</sup> At the same time, however, “States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law.”<sup>8</sup> A country that fails to live up to its obligations in either respect is one which risks losing legitimacy in the eyes not just of other countries, but of its own people as well. In particular, the governments of democratic rule-of-law countries walk a tightrope when enacting counter-terrorism legislation that impacts the rights of individuals.

A handful of democratic Western countries have responded to the conundrum of how to *prevent* violent acts of terrorism while remaining in compliance with the rule of law by creating special legal regimes that deploy what I will call, for lack of a better term, *anti-terrorist pre-crime measures*. Anti-terrorist pre-crime measures (ATPCMs) are conditions or restrictions imposed on a person by law enforcement authorities as the outcome of a legal process set up to identify and neutralize potential sources of terrorist activity *before* it occurs. The measures themselves are intended to prevent, or at least reduce the likelihood of, the person affected from engaging in, or contributing to, violent acts of terrorism in the future. The distinguishing feature of the ATPCMs regimes examined in this Article is that, by virtue of their preventive mission, they operate outside or on the fringes of the ordinary criminal justice systems in the Western democratic countries that have them. This makes them controversial.

Despite the ongoing use of ATPCMs regimes in consolidated democracies like the United Kingdom, Canada, Australia and, potentially, the United States, they surprisingly have not yet been the subject of much international scrutiny or comparative study.<sup>9</sup> And, although domestic critics of said regimes have repeatedly raised human rights concerns, a comprehensive analysis of existing ATPCMs procedures under international human rights law has to date been lacking. This Article seeks to fill both gaps. On the one hand, its goal is to document how national legal frameworks engage anti-terrorist pre-crime measures, as well as how these measures operate in practice. This should help to raise awareness of these frameworks and facilitate their comparative analysis. On the other hand, the Article canvasses the relevant international legal framework and applies it to the domestic counter-terrorism regimes under study to initiate a broader

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7. U.N. Secretary-General, *Protecting Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶¶ 3-4, U.N. Doc. A/72/316 (Aug. 11, 2017).

8. G.A. Res. 70/148, ¶ 1 (Feb. 25, 2016).

9. *But see* DAVID ANDERSON, INDEP. REVIEWER OF TERRORISM LEGISLATION, CONTROL ORDERS IN 2011: FINAL REPORT OF THE INDEPENDENT REVIEWER ON THE PREVENTION OF TERRORISM ACT 2005 ¶¶ 2.14-2.20 (2012), <https://tinyurl.com/y7v2jhb9> (engaging in comparative review of other countries with counter-terrorism legislation similar to the United Kingdom’s control orders regime).

dialogue around when, and the extent to which, said regimes can be said to comply with human rights law.

This Article proceeds in two Parts aside from this Introduction. Part II gives a detailed account of three relatively robust ATPCMs regimes active today, namely, those in the United Kingdom, Canada and Australia. Each country is covered in its own section (A-C). These country case studies illustrate how the respective legal regimes seek to balance the deployment of ATPCMs with their constitutional and international human rights obligations. Part III then examines the relevant international law framework governing human rights in the countries studied; it illustrates how, regardless of the approach taken, ATPCMs regimes seriously threaten, if not undermine, the exercise of basic human rights. Part III then analyzes the extent to which the regimes studied in Part II can be considered human rights compliant, taking into account a series of best practices and key factors prescribed by international law. This comparative exercise leads to significant overarching insights. I conclude with brief observations on how those insights can inform the United States' (or any other country's) obligations under international law in light of its own ATPCMs-inspired legislation, including the Patriot Act.

## II. A PANORAMA OF ANTI-TERRORISM PRE-CRIME INITIATIVES

This Part describes three national legal regimes that feature ATPCMs and how these regimes operate. The objective is to paint a panorama of the domestic systems in place around the world that most actively deploy such measures: the United Kingdom, Canada, and Australia.<sup>10</sup> In the United Kingdom, the ATPCMs take the form of Terrorism Prevention and Investigation Measures (TPIMs). In Canada, they are called “Peace Bonds.” Australia employs “Control Orders,” which are modelled on the original U.K. system that TPIMs replaced.<sup>11</sup>

I present the country studies for the United Kingdom, Canada and Australia in that order. These case studies correspond respectively to Sections A, B and C below. Each examines the details of the corresponding ATPCMs regime according to a template organized around a set of common topics: (1) policy background and stated objectives; (2) legal framework and procedure; (3) judicial and other oversight; (4) implementation; (5)

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10. In his 2012 report on control orders, U.K. Independent Reviewer of Terrorism Legislation David Anderson took a comparative look at the relevant legal frameworks in “other developed Western jurisdictions.” *Id.* ¶ 2.14. He found close corollaries to the U.K. ATPCMs regime only in Australia (control orders), Canada (peace bonds), and, possibly, the United States (preventive detention by the Executive of terrorist suspects). *Id.* ¶¶ 2.15, 2.16, 2.18.

11. Jessie Blackburn & Tamara Tulich, *Control Orders for Kids Won't Make Us Any Safer*, CONVERSATION (Oct. 15, 2015), <https://tinyurl.com/ydh3kh6k>.

individual case studies; and (6) critiques of the regime. This uniform approach is intended to facilitate the international and comparative legal analyses of the different regimes in Part III.

#### A. *United Kingdom*

##### 1. *Policy & Stated Objectives*

TPIMs were introduced in the United Kingdom in 2011.<sup>12</sup> TPIMs are restrictive measures that the State may impose on an individual who is suspected of terrorism-related activity, absent evidence sufficient to charge (much less convict) them with committing a crime. TPIMs are propagated in the form of a notice.<sup>13</sup> According to the U.K. Home Office,<sup>14</sup> their purpose is to “protect the public from individuals who pose a real terrorist threat,” but who cannot be prosecuted “or, in the case of foreign nationals, deport[ed].”<sup>15</sup> These measures limit a suspect’s activity by preventing or restricting their mobility, communications, and interactions with other individuals, both within and outside the country.

Starting in 2012, the TPIMs regime superseded the previous system of control orders that was introduced in 2005 under the Prevention of Terrorism Act.<sup>16</sup> The government sought to replace the controversial control orders with the less-intrusive TPIMs created under the Terrorism Prevention and Investigation Measures Act (2011 TPIMs Act), which was in large part promulgated to be more respectful of individual liberty protections in the use of anti-terrorism pre-crime measures.<sup>17</sup> The 2011 TPIMs Act continued to authorize the imposition of restrictions on a suspect’s movement, but only for shorter periods of house arrest and often in conjunction with electronic tagging.<sup>18</sup> Unlike the control orders they replaced, TPIMs originally did not allow for forced relocation and were subject to a maximum time limit during which they could be in force.<sup>19</sup> The 2011 TPIMs Act further authorized limits on individuals’ ability to

12. Terrorism Prevention and Investigation Measures Act 2011, c. 23, § 2 (U.K.) (amended 2015).

13. *Id.* § 2(1).

14. The U.K. Home Office is responsible for the country’s security measures, including border protection, policing and prisons. *See Home Office*, GOV.UK, <https://www.gov.uk/government/organisations/home-office> (last visited July 7, 2019).

15. Home Office, *Terrorism Prevention and Investigation Measures Act*, GOV.UK: COUNTER-TERRORISM (Oct. 25, 2016), <https://www.gov.uk/government/collections/terrorism-prevention-and-investigation-measures-act> [hereinafter Home Office, *TPIMs Act*].

16. Terrorism Prevention and Investigation Measures Act 2011 § 1. Control orders were measures that allowed “the British government to impose a series of restrictions on individuals to prevent or limit their involvement in suspected terrorist activities.” ROBIN SIMCOX, CTR. FOR SOC. COHESION, CONTROL ORDERS: STRENGTHENING NATIONAL SECURITY 7 (2010).

17. Helen Fenwick, *What’s the Difference Between TPIMs and Control Orders?*, DURHAM UNIV.: THOUGHT LEADERSHIP (June 8, 2017), <https://tinyurl.com/y83hottz>.

18. *See* Terrorism Prevention and Investigation Measures Act 2011 §§ 2-12; *see also* Fenwick, *supra* note 17.

19. Terrorism Prevention and Investigation Measures Act 2011 §§ 2-12.

communicate with, and transfer property to, other persons.<sup>20</sup> These measures could similarly necessitate a suspect's disclosure of any property to which he or she has any connection.

Then, in 2015, the Counter-Terrorism and Security Act (2015 TPIMs Strengthening Act) bolstered the TPIMs regime, among other things, by reinstating forced relocation as a permissible restriction.<sup>21</sup> This meant individuals could once again be ordered "to reside in a property [provided by the government] up to 200 miles away from their own residence."<sup>22</sup> This reinforced framework for TPIMs, which is in effect today, also permits prohibiting a suspect from acquiring certain weapons and requiring them to attend appointments arranged by the Secretary of State "with specified persons."<sup>23</sup> At the same time, however, the government under the amended regime must meet a higher standard to issue a TPIM—"balance of probabilities" rather than "reasonable suspicion"—when claiming involvement by a suspect in terrorism-related activity.<sup>24</sup>

## 2. *Legal Framework and Procedure*

The 2011 TPIMs Act, as amended, grants the Home Department's Secretary of State (Home Secretary)<sup>25</sup> the power to impose conditions limiting the liberty, movement, and other fundamental rights of individuals suspected of terrorism-related activity.<sup>26</sup> These measures are authorized to restrict:

- Where and for how long the individual remains in a specified residence;
- Relocation to a different residence provided by the government;
- Domestic and international travel, including seizing or canceling passports;
- Visiting specified locations;

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20. *Id.*

21. *See id.* § 1(3)(b), sch. 1. The 2015 Act put in place provisions allowing for the temporary seizure of travel documents at the border pending investigation, enhanced law enforcement monitoring abilities, improved border security and sought to combat underlying ideology associated with terrorism. *See* Home Office, *Counter-Terrorism and Security Act*, GOV.UK: COUNTER-TERRORISM (Nov. 26, 2014), <https://www.gov.uk/government/collections/counter-terrorism-and-security-bill>.

22. Counter-Terrorism and Security Act 2015, c. 6, § 16(3) (U.K.).

23. *Id.* § 19.

24. *Id.* § 20(2); *see also infra* note 37 and accompanying text.

25. The Home Secretary, otherwise known as the Secretary of State for the U.K.'s Home Department, is a senior official responsible for "security and terrorism, legislative programme[s], and expenditure issues," of the entire the Home Office business. *See Secretary of State for the Home Department*, GOV.UK, <https://www.gov.uk/government/ministers/secretary-of-state-for-the-home-department> (last visited July 7, 2019).

26. Terrorism Prevention and Investigation Measures Act 2011 §§ 2-12.



- Individual movement;
- Use or access to financial services;
- Property transfers;
- Access to and use of weapons;
- Access to and use of electronic communication devices;
- The individual's communications, association, and meeting with others; and
- Work or studies.

The Home Secretary may also require the individual to communicate, provide updates, and attend meetings with the Office of the Home Secretary.<sup>27</sup>

The procedure for imposing a TPIMs notice requires coordination between the Home Secretary, the appropriate police forces, and the High Court of Justice (the Court). The Court is the United Kingdom's third highest court and hears both trial and appellate cases.<sup>28</sup> Before a TPIMs notice may issue, the Home Secretary must first confer with the chief officer of the appropriate police force about whether sufficient evidence "on the balance of probabilities" exists to charge and prosecute an individual for terrorist-related activity.<sup>29</sup> If the chief officer of the investigating police force *and* the Home Secretary find that no such evidence exists or is admissible, then the Home Secretary may proceed to prepare a TPIMs notice.<sup>30</sup> In so doing, the Home Secretary must certify that five conditions are met. S/he must:

- A. Believe that the subject is or was involved in terrorism-related activity;
- B. Confirm that at least some of the subject's activity is "new" in relation to previous TPIMs issued against them;
- C. Find it necessary to impose restrictions on the subject to protect the public's safety;
- D. Find it necessary to impose restrictions on the subject to prevent or restrict the subject's terrorism-related activity; and
- E. Either receive permission from the High Court to issue the TPIMs notice or assess the matter as so urgent that the Home

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27. *Id.*

28. *High Court of Justice*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/High-Court-of-Justice-British-law> (last visited July 7, 2019).

29. Terrorism Prevention and Investigation Measures Act 2011 § 10(1)-(2).

30. *Id.* § 10(2).

Secretary reasonably believes the measures can be imposed without first obtaining the court's permission.<sup>31</sup>

If the Home Secretary chooses to seek the Court's approval before proceeding to order TPIMs, then s/he must submit an application to the Court along with a draft of the proposed notice for review.<sup>32</sup> To meet condition E when acting *without* prior approval from the Court, the Home Secretary must prepare a statement explaining the urgency of the situation and the reasons for bypassing judicial review in the short term.<sup>33</sup> The Home Secretary, upon noticing the individual, then must immediately transmit to the Court the TPIMs order adopted along with the aforementioned statement for *ex post facto* review in the terms described below.<sup>34</sup>

In either case, the role of the High Court is to review whether the Home Secretary's assessment that the five conditions above have been met is justified or not, with special attention paid to whether to confirm or modify the measures adopted pursuant to condition D.<sup>35</sup> The High Court may decide not to approve the Home Secretary's prior or *ex post facto* TPIMs decision *only* if it finds that the Secretary's determination that conditions A, B and C have been met is "obviously flawed" with respect to any of them.<sup>36</sup> The standard the Home Secretary must meet when evaluating each of the 2011 TPIMs Act's threshold conditions was raised in 2015 when the Act was amended to the current civil standard, already noted, of "the balance of probabilities" (it used to be that the government had merely to show that it had a "reasonable suspicion" that the aforementioned conditions were met).<sup>37</sup>

The subject of the TPIMs notice has little or no access to these proceedings, which can proceed *ex parte*: that person need not be present when the Court hears the Home Secretary's application.<sup>38</sup> Nor does the affected individual need to be notified of the existence of the application or given an opportunity to be represented during the Court's review.<sup>39</sup> As noted, however, when the Home Secretary issues an urgent TPIMs notice without the prior judicial review, the notice and accompanying statement justifying it must be sent to the Court immediately after service.<sup>40</sup> Here, too,

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31. *Id.* § 3.

32. *Id.* § 6.

33. *Id.* § 2, sch. 2.

34. *Id.* § 3(1), sch. 2.

35. *Id.* § 6(3), (9).

36. *Id.* § 6(7).

37. Compare Terrorism Prevention and Investigation Measures Act 2011 § 26(2), with Counter-Terrorism and Security Act 2015 § 20(1).

38. Terrorism Prevention and Investigation Measures Act 2011 § 6(4)(a).

39. *Id.* § 6(4)(b), (c).

40. *Id.* § 3(1), sch. 2.

the Court is authorized to review the application without the suspect's presence, notification or opportunity to make representations,<sup>41</sup> though it is required to notify the individual of its ultimate decision.<sup>42</sup>

If upon prior or *ex post facto* application the Court authorizes the Home Secretary to impose the TPIMs notice, then it must schedule a Directions Hearing within seven days of this decision.<sup>43</sup> The purpose of the Directions Hearing is to allow the affected individual the opportunity to appear and hear the Court either grant permission to proceed or confirm the TPIMs notice already issued, respectively.<sup>44</sup> At the same time, the Court will provide instructions for setting a subsequent Review Hearing, at which it is obliged to revisit and review the standing decision to impose the TPIMs; this requires the Court to determine anew whether the Home Secretary's reasoning for finding the operative conditions to be met continues to be justified or not.<sup>45</sup>

In any case, the Home Secretary is the only party to the proceedings that may appeal the Court's decision regarding its application to notice a TPIM.<sup>46</sup> Individuals subject to a TPIM may only appeal a Court decision if it concerns a "question of law."<sup>47</sup> They are, however, permitted to contest the specific measures enacted pursuant to condition D as well as the manner in which they are being implemented.<sup>48</sup> In all cases, the TPIM notice (with prior Court approval or not) becomes effective and enforceable once it is served on the individual personally, or at the time specified in the notice, whichever is later. Under the current regime, TPIMs are valid for one year only.<sup>49</sup> The Home Secretary must give the individual notice of the "period for which the TPIM notice will be in force," as well as the day the TPIMs notice "comes, or came, into force," and when it will expire.<sup>50</sup>

Upon transmission to the individual, the Home Secretary is required to inform the chief officer of the appropriate police forces that the TPIMs notice was served so that they may proceed to monitor and enforce it as required by law.<sup>51</sup> The police force will keep track of the affected person's conduct while the TPIMs notice is in force and report regularly on compliance to the Home Secretary.<sup>52</sup> In turn, the Home Secretary is obligated to ratify that conditions C and D continue to be met while the

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41. *Id.* § 3(4), sch. 2.

42. *Id.* § 5(2), sch. 2.

43. *Id.* § 8(1).

44. *Id.* § 8(2)(b).

45. *Id.* § 9(1).

46. *Id.* § 18(2).

47. *Id.* § 18(1).

48. *Id.* § 16(7).

49. *Id.* § 5(1).

50. *Id.* § 28(1).

51. *Id.* § 10(4).

52. *Id.* § 10(5).

TPIM notice is in force.<sup>53</sup> The chief officer must also consult with prosecuting authorities should new incriminating evidence admissible in court become available.<sup>54</sup> Failure to comply with the terms of a TPIMs notice is an offense punishable by fine or imprisonment of six months to five years, depending on the location of the offense and whether the accused is indicted or not.<sup>55</sup>

Modifications to the TPIMs notice may be made after it is in force, but the amended notice must then be personally served on the individual to become enforceable.<sup>56</sup> For example, the Home Secretary may renew an existing TPIMs notice for one additional year if s/he can argue that conditions A, C and D continue to be met.<sup>57</sup> If the Home Secretary seeks to extend the TPIMs notice beyond two years, however, s/he must provide new evidence connecting the individual to more recent terrorist activity.<sup>58</sup> The Home Secretary may also revive TPIMs notices that have been revoked so long as there are no High Court instructions otherwise preventing such action.<sup>59</sup> Finally, the powers granted to the Home Secretary under the 2011 TPIMs Act were due to expire after five years, but could be extended with Parliaments approval, which they were.<sup>60</sup>

### 3. *Judicial Oversight*

Judicial oversight is built into the TPIMs notice procedure. As stated above, condition E requires that the Home Secretary seek the High Court's approval to issue a TPIM notice, unless s/he finds the matter urgent enough to bypass the Court's review in the short term.<sup>61</sup> As a rule, the Home Secretary requests the Court's approval once it finds that conditions A, B, C and D are met; it does so by submitting an application to the Court along with a draft of the proposed TPIMs notice.<sup>62</sup> The Court must then evaluate whether the Home Secretary's decision regarding each of those elements is "obviously flawed" or not.<sup>63</sup> If it finds the Home Secretary's decision to be flawed with respect to conditions A, B or C, the Court will not authorize issuance of the TPIMs notice.<sup>64</sup> If the Court finds the Home Secretary's decision on condition D regarding the measures to be adopted is flawed, it

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53. *Id.* § 11.

54. *Id.* § 10(5).

55. *Id.* § 23.

56. *Id.* § 13(6).

57. *Id.*

58. *Id.* § 5.

59. *Id.* § 13(9)(b)(ii).

60. *Id.* § 21; *see infra* note 117 and accompanying text.

61. Terrorism Prevention and Investigation Measures Act 2011 § 3(5).

62. *Id.* § 6(1)-(2).

63. *Id.* § 6(3).

64. *Id.* § 6(7).

may give corrective guidance as to the restrictions that may be appropriately imposed on the individual.<sup>65</sup> In all other cases, the Court is directed to give permission for the TPIMs to issue.<sup>66</sup>

If under urgent circumstances the Home Secretary proceeds to issue a TPIMs notice without the High Court's prior review, as noted already, it must immediately refer that action to the Court for review *ex post facto*.<sup>67</sup> The Court then has seven days after issuance of the notification to assess whether the Home Secretary's decision to impose the TPIMs notice was "obviously flawed" or not in the terms noted above.<sup>68</sup> Under these circumstances, the Court will follow the same steps to assess whether the five conditions required by the 2011 TPIMs Act are met as it would if it had been consulted prior to the issuance of the notice.<sup>69</sup> If on *ex post facto* review the Court finds that the Home Secretary's decision regarding conditions A, B and/or C is "obviously flawed," it may then "quash" the Home Secretary's TPIMs notice.<sup>70</sup> If the Court finds the Home Secretary's decision on condition D is flawed, then the Court must quash the flawed measures.<sup>71</sup> Otherwise, the TPIMs must be confirmed.<sup>72</sup>

An important feature of this judicial oversight process is the provision allowing for closed proceedings to consider information or evidence, the disclosure of which the government believes "would be contrary to the public interest."<sup>73</sup> During such proceedings, from which the affected party and his or her legal representative are excluded, only a "special advocate" appointed by the Court may be present "to represent the interests of [the affected] party."<sup>74</sup> Even so, the rules are clear that this person "is not responsible to the party to the proceedings whose interests the [special advocate] is appointed to represent."<sup>75</sup> This provision prevents the relevant individual and his or her legal representative from having access to all the evidence presented by the government in its case against him or her during the relevant proceedings, thereby denying them the opportunity to contest and counter that evidence. The same rules governing the proceedings affirm that they should not be read "in a manner inconsistent with Article 6 of the [European] Convention [on Human Rights]."<sup>76</sup>

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65. *Id.* § 6(9).

66. *Id.* § 6(8).

67. *Id.* § 3(1), sch. 2.

68. *Id.* § 3(2)-(3), sch. 2.

69. *Id.* § 3(2), sch. 2.

70. *Id.* § 4(1), sch. 2.

71. *Id.* § 4(2), sch. 2.

72. *Id.* § 4(3), sch. 2.

73. *Id.* § 4(1)(c), sch. 4.

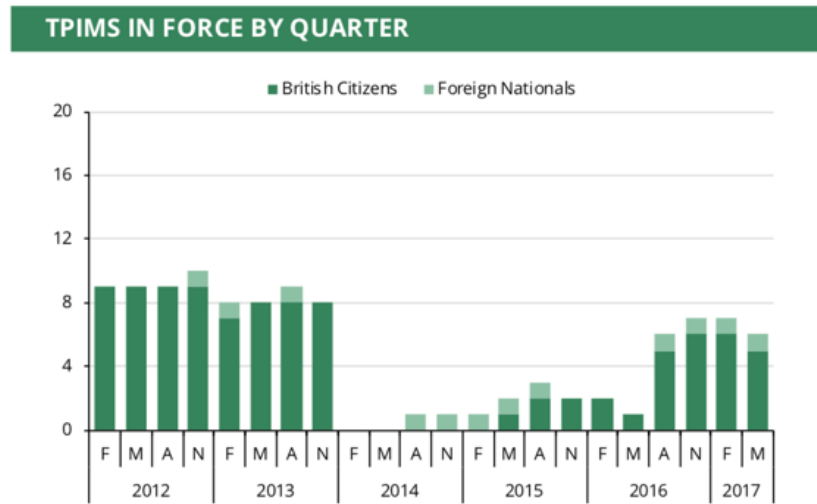
74. *Id.* § 4(1)(a), (10)(1), sch. 4.

75. *Id.* § 10(4), sch. 4.

76. *Id.* § 5(1), sch. 4.

#### 4. *Implementation of TPIMs*

As of January 2018, there were seven TPIMs orders in force. All seven individuals had been relocated under their respective notices.<sup>77</sup> There have never been more than ten TPIMs orders in force at any given time.<sup>78</sup> By contrast, under the control order regime between 2005 and 2011, 52 individuals were subject to control orders.<sup>79</sup> The following graph shows the number of TPIMs notices in force by quarter between 2012 and 2017:



Note: *Terrorism Prevention and Investigation Act 2011* in force from 15 December 2011; discontinuity in three month reporting period. Source: Figures collated from Hansard by the House of Commons Library.

Source: GRAHAME ALLEN & ESME KIRK-WADE, HOUSE OF COMMONS, *TERRORISM IN GREAT BRITAIN: THE STATISTICS 27* (2017), <http://researchbriefings.files.parliament.uk/documents/CBP-7613/CBP-7613.pdf>.

#### 5. *Individual Case Studies*

This section summarizes several of the most high-profile cases involving TPIMs since 2011.

<sup>77</sup> *Seven Anti-Terror Orders in Place as UK Confronts Unprecedented Threat*, BELFAST TELEGRAPH (Jan. 22, 2018), <https://tinyurl.com/y782sbx8>.

<sup>78</sup> GRAHAME ALLEN & ESME KIRK-WADE, HOUSE OF COMMONS, *TERRORISM IN GREAT BRITAIN: THE STATISTICS* (2017), <https://tinyurl.com/yazdbwdv>.

<sup>79</sup> *Id.*

*XH and AI*<sup>80</sup>

On April 29, 2014, the Home Secretary issued a notice canceling the passport of XH, a British national, because it assessed that XH planned to travel in connection with terrorist-related activity.<sup>81</sup> The Home Secretary's decision to cancel XH's passport was based on undisclosed evidence that tied XH to terrorist-related activity.<sup>82</sup> Similarly, the government arrested a seventeen-year-old British national of Iraqi-Kurdish background, AI, on November 4, 2014, for suspicion of wanting to travel to Syria to join Islamic terrorist forces.<sup>83</sup> The Home Secretary's notice revoked AI's passport and charged AI with failing to disclose information about others who were involved in terrorism-related activity.<sup>84</sup> The TPIMs imposed on both individuals restricted their travel outside of the United Kingdom and Europe. Both XH and AI appealed the government's revocation of their passports. The High Court dismissed both parties' appeals on February 2, 2017 and upheld the Home Secretary's decision to impose the TPIMs.<sup>85</sup>

*EB*<sup>86</sup>

On October 13, 2013, police arrested EB, a twenty-eight-year-old British citizen of Algerian descent, for possessing a document with information helpful to those interested in committing a terrorist-related crime.<sup>87</sup> He pled guilty at trial.<sup>88</sup> The court sentenced EB to three years' imprisonment but released him in 2015.<sup>89</sup> On April 21, 2015, the Home Secretary imposed a TPIMs order against EB that was renewed for an additional year on April 20, 2016.<sup>90</sup> The restrictive measures imposed on EB included forcing him to relocate; to notify authorities of his social interactions with people outside of his immediate family; to seek approval for usage of the Internet; and to limit the amount of cash he could carry to no more than £50.<sup>91</sup> Additionally, the measures prevented EB from visiting certain zones near his relocation area, required him to report daily to a police station and required him to adhere to a curfew from 9:00 pm until 7:00 am.<sup>92</sup>

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80. Information drawn from *XH & AI v. Secretary of State for the Home Dep't* [2016] EWHC 1898 (Admin) (UK).

81. *Id.* ¶ 6.

82. *Id.* ¶ 93.

83. *Id.* ¶ 17.

84. *Id.* ¶¶ 18, 22.

85. *Id.* ¶ 138.

86. Information drawn from *Secretary of State for the Home Dep't v. EB* [2016] EWHC 1970 (Admin) (UK).

87. *Id.* ¶ 1.

88. *Id.*

89. *Id.*

90. *Id.* ¶ 2.

91. *Id.* ¶¶ 36-37.

92. *Id.*

On December 9, 2015, EB appealed the measures imposed upon him.<sup>93</sup> The Court denied his appeal, finding that the measures were reasonable and upholding the Home Secretary's TPIMs order.<sup>94</sup>

*DD*<sup>95</sup>

Between 2012 and 2015, the government imposed a TPIMs notice on DD, a thirty-nine-year-old Somali refugee, for providing material support to the al-Shabaab terrorist group.<sup>96</sup> The TPIM notice required, among other measures, that he wear an electronic monitoring device.<sup>97</sup> In 2015, a British judge found that DD's rights under Article 3 of the European Convention on Human Rights (ECHR) prohibiting inhumane and degrading treatment were breached by this measure.<sup>98</sup> The judge found that DD, who suffered from conditions of mental illness, truly believed the electronic device he wore "was a bomb and contained a camera," and as a result experienced undue suffering.<sup>99</sup> Accordingly, the judge granted DD permission to remove his electronic tag. However, the judge also sustained the TPIMs notice overall on the basis that the decision to impose it was "not legally flawed."<sup>100</sup>

*Mohammed Ahmed Mohamed*

In 2011, the government alleged that Mohammed Ahmed Mohamed, a twenty-seven-year-old British citizen of Somali origin, had ties with the al-Shabaab terrorist group.<sup>101</sup> The government placed Mohamed under a control order in 2011, which it subsequently converted into a TPIMs order.<sup>102</sup> Between 2011 and 2012, Mohamed faced twenty charges of violating his control and TPIMs orders.<sup>103</sup> The measures he violated included failing to report to multiple police stations, possessing a mobile phone without the state's permission, and gaining access to the internet without approval.<sup>104</sup> Other TPIMs included confinement to his home for ten hours overnight, wearing an electronic monitoring device, remaining in

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93. *Id.* ¶ 3.

94. *Id.* ¶ 40.

95. See Peter Dominiczak & Emily Gosden, *Terror Suspect's Tag 'Violates His Human Rights,'* TELEGRAPH (June 19, 2015), <https://tinyurl.com/ycks635m>; see also *Electronic Tag Removed from Terror Suspect Who 'Feared it Was a Bomb,'* BBC (June 19, 2015), <http://www.bbc.com/news/uk-33206372>.

96. See Clive Walker, *The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia*, 37 MELB. U. L. REV. 143, 160 (2013); see also Dominiczak & Gosden, *supra* note 95.

97. Dominiczak & Gosden, *supra* note 95.

98. See *supra* note 95 and accompanying text; see also European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

99. Dominiczak & Gosden, *supra* note 95.

100. *Id.*

101. See Vikram Dodd, *Burqa Fugitive Mohammed Ahmed Mohamed 'Faced 20 Charges,'* GUARDIAN (Nov. 8, 2013), <https://tinyurl.com/yc2vz2he>.

102. *Id.*

103. *Id.*

104. *Id.*



the United Kingdom, and having only one bank account, phone, computer and landline.<sup>105</sup> In 2013, Mohamed discarded his electronic tag and fled.<sup>106</sup> In 2014, the Court of Appeals ruled that his original control order should be quashed because it had been based on secret evidence that prevented the government from sufficiently informing Mohamed and his lawyers of the reasons for the original orders' imposition.<sup>107</sup> A judge subsequently withdrew the warrant for Mohamed's arrest after the Crown Prosecution Service refused to release this evidence.<sup>108</sup>

### *Ibrahim Magag and CC*

In 2009, the U.K. government alleged that Ibrahim Magag, a twenty-eight-year-old Somali-born British national, was a member of a British network that supports the al-Shabaab terrorist group.<sup>109</sup> It placed Magag under a control order that forced him to relocate from London to the West of England.<sup>110</sup> He moved back to London in 2011, however, because the original TPIMs Act enacted that year no longer permitted forced relocations.<sup>111</sup> The government alleged that Magag's former associate, CC, also had ties to terrorist groups in Somalia.<sup>112</sup> Both Magag and CC were accused of breaching their TPIMs orders.<sup>113</sup> The TPIMs imposed on Magag included an overnight residence condition, as well as wearing an electronic tag.<sup>114</sup> The TPIMs also restricted Magag's access to electronics and Internet, but he breached these measures over a dozen times.<sup>115</sup> In 2012, Magag removed his electronic tag and disappeared into a cab.<sup>116</sup> His whereabouts are unknown.

## 6. Critiques

Critics of the current TPIMs regime have questioned its substantial similarity to the discredited system of control orders that it replaced. After

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105. Anthony Bond, *Police Launch Manhunt For 'Terror Suspect' Who Went Missing On Boxing Day... While Under Close Surveillance*, DAILY MAIL (Dec. 31, 2012), <https://tinyurl.com/y722dlmt>.

106. Dodd, *supra* note 101; *see also* Alan Travis & Ben Quinn, *Missing Terror Suspect: Theresa May to Make Urgent Statement*, GUARDIAN (Nov. 4, 2013), <https://tinyurl.com/ydfxn4tc>.

107. James Slack, *Burka Fugitive Inflicts Damaging Court Victory on Home Office After They Restricted His Movements... Because Allegations Were Heard in Secret*, DAILY MAIL (May 2, 2014), <https://tinyurl.com/yc4zz5x7>.

108. Steve Bax, *Burqa Terror Suspect no Longer a Wanted Man After Fleeing Acton Mosque*, MYLONDON NEWS (Sept. 18, 2015), <https://tinyurl.com/y8xaxz8k>.

109. Bond, *supra* note 105.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Wesley Johnson, *Terrorism Suspect 'Escaped in a Black Cab'*, TELEGRAPH (Jan. 8, 2013), <https://tinyurl.com/y8pecmey>; *see also* Travis & Quinn, *supra* note 106.

115. Bond, *supra* note 105 and accompanying text.

116. Travis & Quinn, *supra* note 106.

2015 especially, when TPIMs were expanded to once again allow forced relocation, they have been “condemned for being little more than control orders rebranded because [b]oth schemes operate outside the criminal justice system and infringe fundamental civil liberties.”<sup>117</sup> There is little doubt that control orders were problematic from the point of view of civil liberties, having been successfully challenged in the courts as violative of due process, including the right to a fair hearing, liberty, as well as private and family life.<sup>118</sup> In 2011, the U.K. Home Office conducted a review of control orders and found them to inhibit evidence-gathering and thus in conflict with the ultimate goal of criminal investigation and prosecution of terrorist activity.<sup>119</sup> Forced relocation in particular was deemed incompatible with “traditional British norms” as well as “offensive [in] practice [and] abusive in principle.”<sup>120</sup>

Another shared feature of control orders and TPIMs is the use of secret evidence in closed hearings to which the affected individual has no access. In TPIMs proceedings, like those for control orders before them, the government can present evidence without the defense being present to contest or controvert it.<sup>121</sup> Scholars have noted the ways in which this undermines traditional protections afforded by the adversarial system, such as the presumption of innocence and the right to respond to accusations.<sup>122</sup> Others point with concern to how this can create the misimpression that “intelligence” is equal in legal value to “evidence,” a proposition which belies the procedural protections that regulate the admissibility of evidence.<sup>123</sup> Concerns like these have led TPIMs’ critics to complain that the regime lacks sufficient safeguards to adequately protect fundamental human rights.<sup>124</sup>

The United Kingdom’s Equality and Human Rights Commission, Great Britain’s independent national human rights institution, raised these issues before Parliament, affirming that “as a whole the [TPIMs] regime lacks sufficient safeguards to adequately protect the right to liberty and the right

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117. Max Rowlands, *Criticism of UK Terrorism Prevention and Investigation Measures Mounts as Government Retains Power to Forcibly Relocate Suspects*, 37 STATEWATCH ANALYSES 1 (2011), <http://www.statewatch.org/analyses/no-160-uk-TPIM.pdf>.

118. See Simcox, *supra* note 16, at 29-31; Adam Wagner, *Control Order Breached Human Rights Say Supreme Court*, UK HUM. RTS. BLOG (June 16, 2010), <https://tinyurl.com/y9b6w9ch>.

119. LORD MACDONALD OF RIVER GLAVEN, REVIEW OF COUNTER-TERRORISM AND SECURITY POWERS 9 (2011), <https://tinyurl.com/ybld5dr6>.

120. *Id.* at 12.

121. See *supra* notes 73-76 and accompanying text.

122. Tamara Tulich, *Adversarial Intelligence? Control Orders, TPIMs and Secret Evidence in Australia and the United Kingdom*, 12 OXFORD U. COMMONWEALTH L.J. 341 (2012).

123. Adrian Hunt, *From Control Orders to TPIMs: Variations on a Number of Themes in British Legal Responses to Terrorism*, 62 CRIME, L. & SOC. CHANGE 289 (2014) (noting that “intelligence” is inconsistent and rarely tells the full story or stands up to the scrutiny required of admissible evidence).

124. See, e.g., TPIMs, LIBERTY, <https://tinyurl.com/y86z8bve>.

to a fair trial as guaranteed by the European Convention on Human Rights (Convention).<sup>125</sup> Other rights it highlighted as similarly impacted by TPIMs are those to respect private and family life, freedom of expression, and the prohibition of discrimination.<sup>126</sup> While finding that TPIMs were potentially more “proportionate” in terms of the conditions and restrictions prescribed than control orders, the Commission expressed deep concern regarding their continued over-reliance on executive authority and secret evidence.<sup>127</sup>

In the Commission’s view, “the decision to impose a TPIM should be a matter for the judiciary, not the executive, with provision for the granting of emergency orders by the Home Secretary where absolutely necessary, such as to prevent a real and immediate act of terrorism.”<sup>128</sup> It found the current regime’s role for the judiciary to be “inadequate” because the authority to order TPIMs “still lies with the Home Secretary and is only subject to review by the courts on the basis of judicial review.”<sup>129</sup> Similarly, the Commission was no more sanguine about the continued use of secret evidence in TPIMs proceeding. It pointed out that depriving the implicated individuals of “sufficient information about the allegations against them . . . ‘gives rise to a serious inequality of arms’ and creates ‘the risk of serious miscarriages of justice.’”<sup>130</sup>

Proponents of TPIMs, on the other hand, tend to view them as exceptional but necessary measures that have proved effectual against an increasing threat of terrorism. Independent reviewer, David Anderson Q.C., a longtime monitor of terrorism legislation for the U.K. government, concluded in 2015 that as reformed, “TPIMs, properly used as a last resort, can be an effective method of disrupting the networks of dangerous terrorists and releasing resources for use in relation to other pressing national security targets.”<sup>131</sup> On this view, TPIMs offer a “more focused and less intrusive system” for combatting terrorism than the control orders they replaced, because they do a better job of balancing the “security powers” of the State with increased “safeguards for civil liberties.”<sup>132</sup> As noted already,

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125. EQUALITY & HUMAN RIGHTS COMM’N, PARLIAMENTARY BRIEFING: TERRORISM PREVENTION AND INVESTIGATION MEASURES BILL 1 (2011), <https://tinyurl.com/y9ugugrw>.

126. *Id.* at 2.

127. *Id.* at 4.

128. *Id.* at 3.

129. *Id.*

130. *Id.* (citing JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS (SIXTEENTH REPORT): ANNUAL RENEWAL OF CONTROL ORDER LEGISLATION 2010, 2009-10, HC 395, at 3 (UK)).

131. DAVID ANDERSON, INDEP. REVIEWER OF TERRORISM LEGISLATION, TERRORISM PREVENTION AND INVESTIGATION MEASURES IN 2014: THIRD REPORT OF THE INDEPENDENT REVIEWER ON THE OPERATION OF THE TERRORISM PREVENTION AND INVESTIGATION MEASURES ACT 2011 ¶ 3.1(a) (2015), <https://tinyurl.com/y84n7e35>.

132. Home Office, *TPIMs Act*, *supra* note 15.

these safeguards include a higher standard of proof for imposing TPIMs and greater opportunities for judicial review.<sup>133</sup>

For these reasons, defenders of TPIMs under the current regime believe their benefits outweigh and justify the harm they may cause. Regarding forced relocation, supporters of this TPIM, like David Anderson, credit the fact that this power is “[prized] by police and MI5 both as an effective way of disrupting networks that [are] concentrated in particular areas and as a way of making abscond more difficult.”<sup>134</sup> They believe such orders can be justified so long as relocation “is used only when the individual circumstances of the particular TPIM subject render it *necessary* and *proportionate* to do so[,]” which is now the standard under the revised TPIMs regime.<sup>135</sup> Similarly, while acknowledging “the difficulties of dealing with secret evidence” stemming from the need to protect the sources and methods of intelligence gathering, the architects of this regime, including David Anderson, nevertheless defend the process as providing “something resembling a fair litigation procedure.”<sup>136</sup>

## B. Canada

### 1. Policy/Stated Objectives

In Canada, “peace bonds”—more technically known as recognizance with conditions—are “essentially restraining orders” and, as such, are “relatively commonplace in a non-terrorism context.”<sup>137</sup> Generally speaking, a peace bond can be sought when a person has reasonable grounds to believe that another person is likely to commit certain offenses in breach of the peace and can persuade a local judge of that fact at a hearing. If the court agrees, it can impose conditions along with the peace bond/recognizance to help prevent the feared harmful conduct from occurring, such as not possessing weapons or staying away from certain places or people.<sup>138</sup> In this respect, one way a person can be made subject to a peace bond is through a kind of plea bargaining: the suspect “agrees to enter into a peace bond [in exchange for] the Crown . . . agree[ing] to withdraw [any criminal] charge(s)

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133. *Id.*

134. ANDERSON, *supra* note 131, ¶ 3.17.

135. *Id.* ¶ 3.8(c).

136. *Id.* ¶ 3.1(b).

137. *Peace Bonds and Preventive Detention*, INT’L CIVIL LIBERTIES MONITORING GRP., <http://iclmg.ca/issues/peace-bonds/> (last visited July 7, 2019) [hereinafter *Peace Bonds*]. According to Black’s Law Dictionary online, recognizance is “[a]n obligation of record, entered into before some court of record, or magistrate duly authorized, with condition to do some particular act; as to appear at the assizes, or criminal court, to keep the peace, to pay a debt, or the like. It resembles a bond, but differs from it in being an acknowledgment of a former debt upon record.” *Recognizance*, BLACK’S L. DICTIONARY, <https://thelawdictionary.org/recognizance/> (last visited May 30, 2020).

138. Legal Aid Ontario, *Peace Bonds*, LAWFACTS, <http://www.lawfacts.ca/criminal/peace-bonds> (last visited July 7, 2019).

if they do so.”<sup>139</sup> Women in Canada fearing domestic violence, for example, have long used peace bonds in this way to protect themselves.<sup>140</sup>

It was only after September 11, 2001 that peace bonds were extended to the terrorism context. In December of that year, Canada enacted the Anti-Terrorism Act (ATA), which added a chapter on “Terrorism” to the Criminal Code and defined two anti-terrorism pre-crime provisions: (1) peace bonds, under section 810.011 of the Criminal Code, in relation to an inchoate terrorist offenses, i.e. where there exists a demonstrable “fear” that a particular person might commit an act of terrorism; and (2) preventive detention with the option of seeking a peace bond, under section 83, intended to impede or defuse terrorist activity more generally.<sup>141</sup> In 2015, after a number of high-profile attacks by local extremists the previous year, Parliament relaxed the legal threshold to be met in terrorism peace bond cases under 810.011, making it easier for law enforcement to procure such measures.<sup>142</sup> However, the National Security Act of 2017, which went into effect in July 2019, raised the standard for securing preventive measures under section 83, in the terms described below.<sup>143</sup>

## 2. *Legal Framework & Procedure*

Section 810 of the Canadian Criminal Code deals with breaches of the peace generally. Section 810.011 in particular establishes the “Fear of terrorism offence,” which states that any person (in practice usually a police officer) who has reasonable grounds to fear that another “may commit a terrorism offence” can, with the Attorney General’s consent, present such information at a hearing before a provincial court judge.<sup>144</sup> In Canada, this is the criminal judge of first instance.<sup>145</sup> If the court is satisfied that there are reasonable grounds to substantiate said fear, it can “cause the parties to appear” before it.<sup>146</sup> Typically, the judge can negotiate with the suspect to persuade them to accept the peace bond voluntarily;<sup>147</sup> it helps that a refusal

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139. *Id.*

140. Michael MacDonald, *Peace Bonds Rarely Used in Canadian Terrorism Cases: Experts*, HUFFPOST (May 25, 2015), <https://tinyurl.com/y7ff7tj4>.

141. *About the Anti-Terrorism Act*, DEP’T OF JUSTICE OF CAN., <http://www.justice.gc.ca/eng/cj-jp/ns-sn/act-loi.html> (last modified July 26, 2017); *Peace Bonds*, *supra* note 137.

142. The amendment required the authorities only to possess a reasonable belief that a suspect “may”, rather than “will,” carry out the offence or activity in question to act. *See Peace Bonds*, *supra* note 137; Haydn Watters, *C-51, Controversial Anti-Terrorism Bill, Is Now Law. So, What Changes?*, CBC NEWS (June 18, 2015), <https://tinyurl.com/y9el8363>.

143. National Security Act of 2017, S.C. 2019, c 13, ¶ 146(1) (Can.).

144. Criminal Code, R.S.C. 1985, c C-46, § 810.011(1) (Can.).

145. *About the Court*, PROVINCIAL CT. B.C., <https://www.provincialcourt.bc.ca/about-the-court> (last visited Mar. 27, 2020).

146. Criminal Code § 810.011(2) (Can.).

147. *See Peace Bonds*, *supra* note 137 and accompanying text.

to do so may lead to jail time of up to twelve months.<sup>148</sup> In the end, if the judge “before whom the parties appear is satisfied by the evidence . . . that the informant has reasonable grounds for the fear, the judge may order that the defendant enter into a recognizance . . . to keep the peace and be of good behaviour for . . . not more than 12 months[,]” extendable up to five years if the person subject to the recognizance has previously been convicted of a terrorism act.<sup>149</sup>

By law, an anti-terrorism peace bond under section 810.011 can carry any number of “reasonable” conditions to help “secure the good conduct of the defendant.”<sup>150</sup> Such conditions include, but are not limited to, participating in a treatment program, wearing an electronic monitoring device, remaining within a specific part of the country, keeping a curfew, abstaining from consuming drugs or alcohol, and participating in periodic drug and alcohol tests.<sup>151</sup> Other permissible restrictions are a prohibition on the possession of certain weapons and relinquishing passports for a period of time.<sup>152</sup> Persons who refuse or fail to comply with the peace bond may face separate criminal charges and imprisonment for up to twelve months.<sup>153</sup> As described further below, section 810.011 has been used with some regularity since 2015.

The other procedure for imposing anti-terrorism peace bonds is in section 83, the Criminal Code’s chapter on terrorism, which sets out parameters for specialized preventive measures against persons likely to participate in or otherwise facilitate “terrorist activity.” Section 83.3 of the Code authorizes a police officer, with prior consent from the Attorney General, to seek a peace bond from a provincial court judge if the officer can demonstrate that there are “reasonable grounds [to believe] that a terrorist activity may be carried out” and that “the imposition of a recognizance with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist activity.”<sup>154</sup> To this end, section 83.3 permits warrantless arrests under “exigent circumstances” such as an imminent terrorist attack where it would be “impracticable” to seek a peace bond first, or where the police officer “suspects on reasonable grounds that the detention of the person in custody is necessary to prevent

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148. Criminal Code § 810.011(5) (Can.).

149. *Id.* § 810.011(3)-(4); *Peace Bonds*, *supra* note 137.

150. Criminal Code § 810.011(6) (Can.).

151. *Id.* § 810.011(6)(a)-(f).

152. *Id.* § 810.011(7), (9).

153. *Id.* § 810.011(5).

154. *Id.* § 83.3(2) (as amended by National Security Act of 2017 ¶ 146(1) (Can.)).

[such] a terrorist activity.”<sup>155</sup> A person arrested under this provision can be held in custody without charge for up to seven days.<sup>156</sup>

If and when a peace bond is sought under section 83.3, the judge may order the suspect to accept a recognizance period of up to twelve months, extendable to a maximum of two years if the person has been previously convicted of an act of terrorism.<sup>157</sup> Section 83.3 further authorizes the judge to impose “any reasonable conditions,” but expressly references only some of the restrictions that characterize other peace bond provisions, namely, the prohibition on the possession of firearms and other weapons; the temporary relinquishment of the person’s passport; and containment to a specific geographic area.<sup>158</sup> Failure or refusal to comply with the peace bond can be punished by imprisonment of up to twelve months.<sup>159</sup> As of 2017, however, it appears the Canadian police have not invoked this provision.<sup>160</sup>

The difference between the two anti-terrorism peace bond sections in the Criminal Code and their interplay can be confusing. According to one court:

While section 810.011 focuses on an individual who may commit the terrorism offence; section 83.3 focuses on a person who may be instrumental in facilitating terrorism to occur. The [latter] section allows a court to impose a recognizance on an individual where there are reasonable grounds to suspect that terrorist activity [such as planning an attack] may be carried out and that a recognizance being imposed is [necessary] to prevent such terrorist activity from occurring.<sup>161</sup>

So section 810.011 focuses on the *individual*, while 83.3 focuses on a broader *activity*, such as a terrorist plot. It is likewise important to keep in mind that when the government seeks a section 810.011 order, the preventive arrest (and bail) provisions that apply are not those set out in section 83.3, but rather those that apply generally to all summary convictions in Part 27 of the Criminal Code, of which section 810.011 is a part.<sup>162</sup> The significance of this clarification will become clearer once we look at the individual case

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155. *Id.* § 83.3(4) (as amended by National Security Act of 2017 ¶ 146(1) (Can.)).

156. Azeezah Kanji, *The Danger of Preventive Counter-Terrorism Powers*, TORONTO STAR (Apr. 6, 2016), <https://tinyurl.com/y6vhv4gn>.

157. Criminal Code § 83.3(8), (8.1) (Can.).

158. *Id.* § 83.3(8)(a), (10), (11.1), (11.2).

159. *Id.* § 83.3(9).

160. Brian Pratt, *Liberals’ National Security Bill Keeps Tories’ Lowered Threshold for Terrorism Peace Bonds*, NAT’L POST (June 22, 2017), <https://tinyurl.com/y8fz26uh>; see also *infra* note 200 and accompanying text.

161. *Canada (Attorney General) v. Driver*, 2016 MBPC 3, ¶ 8 (Can. Man.) (as amended by National Security Act of 2017 ¶ 146(1) (Can.)).

162. *Id.* ¶¶ 42-42, 58.

studies of how the respective peace bond sections have been applied, or not, in practice.

There are other distinguishing features of sections 810.011 and 83.3 that should be highlighted, along with one that they share. As sections of the Criminal Code, both are governed by the Canada Evidence Act, which contemplates restrictions on the disclosure of information before a court “on the grounds of a specified public interest,” of which national security is one.<sup>163</sup> This, of course, has profound implications in the counter-terrorism context.<sup>164</sup> On the other hand, section 83.3 belongs to that Part of the Criminal Code that explicitly regulates terrorism offenses and procedures, and as such is joined to other related provisions worth noting here. For example, section 83.28 authorizes judges, upon request by police acting with the Attorney General’s consent, to apply *ex parte* for a judicial order to gather information about past or potential terrorist acts.<sup>165</sup> A judge’s order to this effect can require suspects to appear before the court to produce evidence and/or “answer questions put to them by the Attorney General” or their agent.<sup>166</sup> Failure either to appear at the hearing, or to follow the judge’s instructions, can result in the person’s detention.<sup>167</sup>

Likewise, it is worth noting that section 83.3 as created by the Anti-Terrorism Act in 2001 is subject to a five-year sunset clause, recently re-upped with the entry into force of the National Security Act in 2019, as well as periodic review and evaluation by Parliament.<sup>168</sup> Significantly, the recent National Security Act amendments for the first time charged the Attorney General with producing an annual review of the peace bonds ordered under section 810.011 during the previous year.<sup>169</sup>

### 3. *Judicial Oversight*

Until 2016, “[t]he constitutionality of anti-terrorism peace bonds [had] never been tested.”<sup>170</sup> Even so, these peace bonds are similar to other restraining orders issued under section 810.1 (used *inter alia* for sexual

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163. Canada Evidence Act, R.S.C. 1985, c C-5, §§ 37(1), 38 (defining sensitive information to include that relating to national security).

164. *See, e.g., supra* text accompanying notes 121-123.

165. Criminal Code, S.C. 2017, c C-46, § 83.28 (Can.) (§ 83.28 repealed by Criminal Code, S.C. 2019, c C-13, § 145 (Can.)).

166. *Id.* § 83.28(5), (8).

167. *Id.* § 83.29 (§ 83.29 repealed by Criminal Code, S.C. 2019, c C-13, § 145 (Can.)).

168. National Security Act of 2017 ¶ 148(1) (refreshing the prior sunset clause for another five years and updating the review and reporting functions of Parliament); *see also* Criminal Code, S.C. 2017, c C-46, § 83.32(1) (Can.) (prior sunset provision), § 83.32(1.1, 1.2) (prior parliamentary review provisions). The NSA amendments did away with the prior requirement that the Attorney General also review section 83.3. National Security Act of 2017 ¶ 149.

169. National Security Act of 2017 ¶ 153 (amending Criminal Code § 810.011 (Can.)).

170. Craig Forcese, *Antiterror Peace Bonds in a Nutshell*, NAT’L SECURITY L. BLOG (Apr. 1, 2016), <https://tinyurl.com/ya566p39>.



offences) that have been challenged at higher levels of the judicial system, most notably in *R. v. Budreo* (2000). In that Court of Appeal case, the defendant Budreo argued that the section 810.1 peace bond at issue was based on his “status” as a convicted sex offender rather than on any wrongful conduct *per se*.<sup>171</sup> Because “status offences” are inherently unfair, — they punish people for who they are, not what they have done — this violated section 7 of the Canadian Charter of Rights and Freedoms, which guarantees life, liberty and security “and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>172</sup> The defendant also claimed the geographic restrictions imposed with the peace bond order, which prohibited him from going near certain public locales such as parks, were “overbroad” and thus unreasonable in violation of Charter section 7.<sup>173</sup>

The Ontario Court of Appeal “undertook an in-depth analysis of the extent of preventative powers of the [S]tate to impose restrictions on individuals.”<sup>174</sup> Regarding the status offence point, the court agreed that section 810.1 impinged on the defendant’s liberty under section 7 of the Charter, but nonetheless found it to be constitutional because its purpose as enacted was clearly “preventive,” not “punitive.”<sup>175</sup> In other words, “[i]ts purpose is not to punish crime but to prevent crime from happening. Its sanctions are not punitive, . . . they are activity and geographic restrictions on a person’s liberty intended to protect . . . society from future harm.”<sup>176</sup> The court then found that the geographic restrictions in that case were also constitutional because they were reasonable, “narrowly targeted” to advance section 810.1’s legislative goals, and “proportional” to the substantial social interest protected.<sup>177</sup> The court stressed that the measures imposed still allowed the defendant to live a “reasonably normal life,”<sup>178</sup> a finding that, it should be said, may distinguish this type of peace bond from the more onerous ones found in the counter-terrorism context.

A more recent case at the provincial court level addressed many of the same issues in a terrorism context. Aaron Driver was a young man who in 2015 challenged the constitutionality of section 810.011 under the Charter of Rights and Freedoms before the provincial court in Winnipeg, Manitoba; his case is described in more detail below.<sup>179</sup> In *Canada (Attorney General) v. Driver* (2016), the defendant argued, as in *Budreo* before him, that section

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171. *R. v. Budreo*, [2000] 46 O.R. 3d 481, ¶ 24 (Can. Ont. C.A.).

172. *Id.* ¶¶ 21-24.

173. *Id.* ¶ 35.

174. *Canada (Attorney General) v. Driver*, 2016 MBPC 3, ¶ 26 (Can. Man.).

175. *Budreo*, 46 O.R. 3d ¶¶ 30-34; *see also supra* text accompanying note 172.

176. *Budreo*, 46 O.R. 3d ¶ 30.

177. *Id.* ¶¶ 40-41.

178. *Id.* ¶ 39.

179. *See infra* text accompanying notes 205-210.

810.011 was not compatible with Charter section 7 because, among other things, it was punitive in its operation and effect. His “contention [was] that either by virtue of the arrest and bail process or by the operation of the conditions imposed upon determination of the ultimate [peace bond], the result [of 810.011’s application] [was] punitive in nature.”<sup>180</sup> The judge disagreed, finding that in all but one key respect, section 810.011 was compatible with the Charter.<sup>181</sup>

The court acknowledged that Driver’s rights were impacted by section 810.011 of the Criminal Code, but observed that the “real issue in this case [was] whether any deprivation of his liberty interest [as a result either of the conditions for bail or those imposed subsequently under a peace bond] is in accordance with the principles of fundamental justice” as per section 7.<sup>182</sup> In this regard, the judge ruled, first, that the implementation of section 810.011 in all its phases—arrest, bail with conditions and peace bond with conditions—was duly authorized by law and preventive, not punitive, in nature.<sup>183</sup> Quoting the court in *Budreo*, the judge concluded “that arrest and bail are a ‘legitimate first step’ towards [any] recognizance hearing.”<sup>184</sup> He explained further:

The process pursuant to section 810.011 peace bond needs to be initiated. As in any preventative court order application, the court must have a mechanism to invoke the process and ensure that any potential breach of the peace is addressed in a reasonable way. The bail provisions of the *Criminal Code* allow for a preliminary assessment of the extent to which conditions are necessary to ensure the subject of the application is not a danger to offend. The flexible nature of the bail hearing judge[’s] discretion meets constitutional muster.<sup>185</sup>

The second question was whether the peace bond conditions outlined in 810.011(6)(a)-(c) as applied to Driver were “reasonable” or not.<sup>186</sup> These authorize the court to order, respectively, that the suspect participate in a “treatment program,” wear an electronic monitoring device, and remain at their place of residence during specified times (curfew).<sup>187</sup> The judge recognized that the latter two conditions “effectively amount to imposing house arrest upon the subject” without them having been convicted of any

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180. *Canada (Attorney General) v. Driver*, 2016 MBPC 3, ¶ 41 (Can. Man.).

181. *See id.* ¶ 52.

182. *Id.* ¶ 15.

183. *Id.* ¶¶ 43-44.

184. *Id.* ¶ 43.

185. *Id.* ¶ 44.

186. *Id.* ¶ 51.

187. *Criminal Code*, R.S.C. 1985, c C-46, § 810.011(6)(a)-(c) (Can.).

offence.<sup>188</sup> Even so, he pointed to the “far reaching and devastating potential results of terrorist activity,” as well as the “extreme circumstances” under which such peace bonds are typically sought, to decide that the monitoring and curfew measures were reasonable and thus justified in Driver’s case.<sup>189</sup> An important procedural safeguard in the court’s opinion that helped reinforce this decision was the discretion given to judges by the legislature to decide whether to impose any of the listed conditions in particular circumstances and, if so, to decide which ones to apply and on what terms.<sup>190</sup>

The same, however, could not be said about 810.011(6)(a). The compelling circumstances cited by the court with respect to 810.011(6)(b) and (c) were not sufficient to save the court ordered requirement that Driver participate in a “treatment program,” which in his case took the form of “religious counseling.”<sup>191</sup> The judge expressed concern that in the terrorism context specifically, such “treatment” could only mean “deprogramming” the ideology that results in the subject holding the belief system causing concern that the subject may engage in terrorism.<sup>192</sup> This was determined to constitute undue interference with a person’s belief system in violation of their freedom of thought and expression as protected by section 2 of the Charter.<sup>193</sup> Nor was the aforementioned procedural safeguard of judicial discretion sufficient in this respect to help overcome the intrusiveness of the measure and render it reasonable. Accordingly, the religious counseling condition imposed as part of Driver’s release on bail in the context of a section 810.011 peace bond proceeding was struck down as contrary to “fundamental justice” as per section 7 of the Charter.<sup>194</sup>

#### 4. *Implementation of Peace Bonds*

Most commentators agree that at least sixteen anti-terrorism peace bonds have been issued since the criminal laws were first amended to authorize them in 2001, all of them, apparently, under section 810.011.<sup>195</sup> The first terrorism-related peace bonds were imposed in 2006 on six alleged members of the Toronto 18, an Al Qaeda-inspired group, after their foiled plot to carry out attacks in Ontario.<sup>196</sup> Peace bonds were not used again in

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188. Driver, 2016 MBPC ¶ 53.

189. *Id.* ¶ 54.

190. *Id.*

191. See *infra* note 208 and accompanying text.

192. Driver, 2016 MBPC ¶ 52.

193. *Id.*

194. *Id.*

195. See Stewart Bell, *Peace Bonds Increasingly a Weapon in Fight Against Terror as Officials ‘Punish’ Canadians Who ‘May’ Commit Crimes*, NAT’L POST (Dec. 21, 2015), <https://tinyurl.com/ybmmjqe>; Forcese, *supra* note 170; Pratt, *supra* note 160.

196. Bell, *supra* note 195.

this context until after the domestic terrorist attacks in Quebec and Ontario in October 2014.<sup>197</sup> In 2016, the Public Prosecution Service of Canada reported that there had been eighteen preventive arrests resulting in section 810.011 peace bonds since 2015.<sup>198</sup> Others estimate that up to twenty-one or more such orders may have been imposed, arguing that because there is no reporting requirement, the public may not have a full accounting of the practice.<sup>199</sup>

##### 5. *Individual Case Studies*

This section provides a sample of cases illustrating the use of peace bonds in the terrorism context. In most cases, the suspects were arrested prior to the imposition of a peace bond pursuant to section 810.011. It seems section 83.3, the more invasive peace bond provision that allows preemptively detaining someone suspected of facilitating a “terrorist activity,” i.e. plotting an attack, has not yet been invoked by government authorities; this may be due to the potentially far-reaching nature of its more controversial provisions, especially those regarding warrantless detention.<sup>200</sup>

###### *Martin Couture-Rouleau*

Martin Couture-Rouleau, a twenty-five-year-old Muslim convert living in Quebec, became known to Canadian authorities when he started posting increasingly extremist posts on social media, leading the police to determine that he had been “radicalized.”<sup>201</sup> In July 2014, the Royal Canadian Mounted Police (RCMP) arrested Couture-Rouleau when he tried to board a plane to Turkey but, because they lacked sufficient evidence to charge him with a crime or secure a peace bond, they had to release him.<sup>202</sup> Two months later, in an incident deemed a terrorist attack, Couture-Rouleau rammed his car into two Canadian Armed Forces members in Saint-Jean-sur-Richelieu, Quebec, killing one and injuring the other. Officers pursued him in a high-speed chase that ended when he was fatally shot by the officers after

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197. *Id.*

198. Stewart Bell, *Crown Withdraws Terrorism Peace Bond Against Toronto Man Once Accused of Communicating with ISIL*, NAT'L POST (Nov. 16, 2016), <https://tinyurl.com/ycdlzpdq>; see also Pratt, *supra* note 160.

199. Robin Simcox, Kent Roach & Arturo Carrillo, *Panel on the Challenges of Pre-Crime Prevention Measures*, GW LAW'S GLOBAL INTERNET FREEDOM PROJECT & GW'S PROGRAM ON EXTREMISM (Nov. 13, 2017), <https://www.law.gwu.edu/challenges-preventing-extremism-online-and-offline>.

200. See *Peace Bonds*, *supra* note 137 (“As best we can tell, [section 83.3] has not been used yet showing it is not needed to prevent terrorism offences. It is subject to a sunset clause every five years because it is understood even by legislators to be a serious restriction on people’s Charter right to liberty.”); see also *supra* note 160 and accompanying text.

201. *Martin Rouleau, Quebec Driver Shot by Police, ‘Radicalized’: RCMP*, CBC NEWS (Oct. 20, 2014), <https://tinyurl.com/oqkpcon> [hereinafter *Martin Rouleau* article].

202. Chris Hall, *Martin Couture-Rouleau Peace Bond Denied Weeks Before Fatal Attack*, CBC NEWS (Jan. 15, 2015), <https://tinyurl.com/ybfdpg79>.

crashing his car.<sup>203</sup> Couture-Rouleau's case became a rallying point in the Canadian government's successful campaign to amend the Anti-Terrorist Act in 2015 to make it easier for authorities to detain suspected terrorists and issue peace bonds in such cases.<sup>204</sup>

*Aaron Driver*

In October 2014, Aaron Driver, the twenty-two-year-old son of a Canadian Forces corporal from Winnipeg, caught the attention of Canada's intelligence agency, CSIS, after he began posting tweets in support of ISIL under an alias.<sup>205</sup> In June 2015, after an investigation that led to an application for a peace bond under section 810.011 of the Criminal Code, the Canadian authorities detained Driver "because of his online activities," which had included praising the Parliament Hill terrorist attack in Ontario, Canada the year before.<sup>206</sup> He was released on bail a week later pending a court decision on whether to issue the peace bond or not.<sup>207</sup> Among the two dozen conditions for his release, Driver was required to remain off social media, wear an electronic tracking device around the clock, comply with overnight curfew (from 9:00 p.m. to 6:00 a.m. daily) and participate in religious counseling.<sup>208</sup> Driver challenged the constitutionality of section 810.011 and the bail conditions imposed on him pursuant to that provision; his lawyer argued that these were "criminal [in nature because] they amount[ed] to punishment, even though Driver [had] never been charged."<sup>209</sup> The federal prosecutor insisted "the restrictions were 'not punitive' but reasonable for public safety."<sup>210</sup> As discussed above, the Manitoba provincial judge eventually ruled that section 810.011 was consonant with the Charter on Rights and Freedoms, save for section 810.011(6)(a) authorizing the court to order religious counseling as a "treatment program."<sup>211</sup>

In February 2016, Aaron Driver consented to a ten-month peace bond.<sup>212</sup> As noted, the provincial court had ruled just the month before on

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203. *Martin Rouleau* article, *supra* note 201.

204. Hall, *supra* note 202.

205. *Aaron Driver: Troubled Childhood, ISIS Supporter, Terror Threat Suspect*, CBC NEWS (Aug. 11, 2016), <https://tinyurl.com/yd3g2xhd>; *ISIS Supporter Aaron Driver Fights Attempt to Limit His Freedom*, CBC NEWS (Nov. 2, 2015), <https://tinyurl.com/y79jgv2c> [hereinafter *Aaron Driver* article I].

206. Alex Migdal, Kat Eschner & Andrea Woo, *Who Was Aaron Driver? The Latest Updates About the Man Killed after Standoff in Strathroy*, GLOBE & MAIL (Aug. 11, 2016), <https://tinyurl.com/y7h79e28>.

207. *Id.*

208. *Winnipeg ISIS Supporter Aaron Driver Released on Bail, But With 25 Conditions*, CBC NEWS (June 15, 2015), <https://tinyurl.com/yc7mb642>.

209. *Aaron Driver* article I, *supra* note 205.

210. *Id.*

211. *See supra* notes 192-94 and accompanying text.

212. *Peace Bond Will Limit Activity of Aaron Driver, ISIS Supporter*, CBC NEWS (Feb. 2, 2016), <http://www.cbc.ca/news/canada/manitoba/aaron-driver-peace-bond-terrorist-isis-1.3430287> [hereinafter *Aaron Driver* article II].

the constitutionality of section 810.011 and struck down 810.011(6)(a).<sup>213</sup> Accordingly, the peace bond agreement did *not* include the requirements that he attend religious counseling; nor did it require him to continue to wear a GPS tracking device.<sup>214</sup> The peace bond *did* require him to stay off all social media, live in Ontario with a relative, report twice a month to the RCMP and seek permission before possessing a cellphone, computer or other electronic communication devices. The court also restricted him from possessing firearms, applying for a passport from any country, wearing the symbol of ISIL or contacting members or affiliates of that terrorist organization. Aaron Driver's actual peace bond looked like this:<sup>215</sup>

- TEN (10) MONTH PEACE BOND APPENDIX- O/R 1000.00 ✓  
 DRIVER, Aaron Daniel ✓  
 555-83115 ✓  
 DOB: August 18, 1991 ✓
- 
- ✓1- Appear before the court when required to do so
  - ✓2- Carry a copy of the Peace Bond on your person at all times when outside your residence and produce it on demand of a Peace Officer
  - ✓3- Reside at [REDACTED] Strathroy, Ontario, and to notify Sgt. Nolan Keogh of the RCMP or his designate of any change of address
  - ✓4- Report bi-weekly (middle and end of month) to Sgt. Nolan Keogh at [REDACTED] London, Ontario or a person designated by him on a day and time designated by the RCMP
  - ✓5- Not to possess or acquire any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance
  - ✓6- Not to apply for any passport from Canada or any other country
  - ✓7- Not to possess or access any cellular telephone, computer, laptop, tablet, or similar electronic device, unless permitted in advance in writing, by Sgt. Nolan Keogh of the RCMP or his designate. This condition expires on August 31, 2016.
  - ✓8- Not to access any social media website or application or post any comment or communicate on any such site including, but not limited to; Facebook, Twitter, Kik, Surespot, Telegram encrypted chat or any related sites.
  - ✓9- Not to possess any object with the logo or symbol of ISIS, ISIL, or bearing the word(S): Islamic State of Iraq and Syria; Al Qaida in Iraq
  - ✓10- Not to contact or knowingly communicate in any way, directly or indirectly, with any member of ISIS, ISIL, Islamic State of Iraq and Syria and Al Qaida in Iraq or any affiliated groups
  - ✓11- Not to contact or communicate in any way, directly or indirectly, with any terrorist group or organization as designated by the Government of Canada pursuant to section 83.05 of the Criminal Code of Canada.

In August 2016, Driver breached his peace bond by releasing a “martyrdom video” warning that he was going to detonate a homemade explosive in an unidentified urban center sometime during rush hour traffic.<sup>216</sup> Canadian authorities intercepted Driver on while he was leaving a residence in a taxi cab, prompting him to detonate an improvised explosive device he was carrying. This apparently caused the police to then shoot and fatally wound him.<sup>217</sup> Many have since questioned the effectiveness of

213. The decision was handed down on January 14, 2016. *See* Canada (Attorney General) v. Driver, 2016 MBPC 3 (Can. Man.).

214. *Aaron Driver* article II, *supra* note 212.

215. Migdal et al., *supra* note 206.

216. *Id.*

217. *Id.*

terrorism-related peace bonds in light of the fact that Driver was able to manufacture and deploy an explosive device despite being subject to one.<sup>218</sup>

*Abdul Aldabous*

In April 2015, Canadian police discovered that eighteen-year-old Abdul Aldabous was using social media to communicate with ISIL and other suspected terrorists, including Aaron Driver.<sup>219</sup> On September 17th of that year, after an investigation, the RCMP arrested him on the basis of this online activity pursuant section 810.011, just as they had with Driver the year before.<sup>220</sup> A search of Aldabous' computer revealed possession of ISIL's handbook and other terrorism-related materials leading authorities to believe he was planning to carry out a terrorist act.<sup>221</sup> He was released on bail and subsequently accepted a peace bond with a dozen conditions.<sup>222</sup> Among these were turning over his electronic devices to the police and not leaving Ontario or contacting any member or associate of ISIL (including Aaron Driver).<sup>223</sup> In November 2016, after receiving religious counseling and taking other positive steps on his own initiative, the authorities terminated Aldabous' peace bond because they determined he was no longer a threat.<sup>224</sup> "For nineteen-year-old Aldabous . . . the process appears to have worked out. The conditions imposed on him following his arrest cut him off from ISIL propaganda and recruitment efforts, and helped contain the threat to Canadians while he got help."<sup>225</sup>

*Seyed Amir Hossein Raisolsadat*

In March 2015, police arrested Seyed Amir Hossein Raisolsadat after applying "for a peace bond under Section 810.01 of the Criminal Code, saying [they] had 'fears on reasonable grounds' that he 'will commit a terrorism offence.'"<sup>226</sup> The police, who had been surveilling him since 2013, claimed they had evidence to suggest that Raisolsadat, a twenty-year-old chemistry student at the University of Prince Edward Island (PEI), might

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218. See Elizabeth Thompson, *Foiled Attack Raises Questions About Value of Peace Bonds*, CBC NEWS (Aug. 11, 2016), <https://tinyurl.com/y75yhjjs>.

219. Bell, *supra* note 198.

220. Stewart Bell, *Teen Arrested by Counter-Terrorism Police in Toronto Released; Can't Communicate with ISIL Supporter*, NAT'L POST (Sept. 21, 2015), <https://tinyurl.com/yapt4nbq>.

221. *Id.*

222. Bell, *supra* note 198.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Man Signs Peace Bond Over Ricin Allegations*, NIAGARA THIS WEEK (May 22, 2015), <https://tinyurl.com/yanmscv2>. Prior to June 18, 2015 and the amendments to the ATA, a court would impose an order pursuant to section 810.01 in circumstances limited to preventing specific acts of intimidation, criminal organization and terrorism. See *supra* note 142 and accompanying text (describing how the legal standard was subsequently relaxed—from "will" to "may"—to accommodate more generalized fears).

use a “small rocket with a warhead carrying a chemical or biological agent” to commit a terrorist act.<sup>227</sup> Evidence to support this claim included the discovery in Raisolsadat’s home of a quantity of castor beans sufficient to produce a substantial amount of ricin, a deadly biotoxin, as well as the diagram of a small rocket.<sup>228</sup> The provincial court judge issued a peace bond imposing a number of conditions on Raisolsadat that included maintaining good behavior, living at home, getting permission before leaving Prince Edward Island, refraining from possessing castor beans or ricin, not possessing weapons, explosives or ammunition and checking in once a week with the RCMP.<sup>229</sup> In May 2015, Raisolsadat agreed to extend those conditions for another twelve months.<sup>230</sup> At that time, he assured authorities in a public statement that he would “never harm anyone.”<sup>231</sup> Raisolsadat was never charged with an offense and the peace bond expired in May 2016 without an application by the government to renew it.<sup>232</sup>

*Mohamed El Shaer*

On June 10, 2016, the RCMP arrested Mohamed El Shaer, a twenty-eight-year-old from Windsor, Ontario, who had a history of traveling to Syria and posting pictures on social media of himself at ISIL-controlled locations.<sup>233</sup> El Shaer had just completed a prison sentence for passport fraud and, because he was a so-called “high-risk traveler,” the police believed that upon release “he would leave the country to join a terrorist group.”<sup>234</sup> They claimed that “[a]s a result of his previous travel from Canada, the arrest was a preventative measure;”<sup>235</sup> he was released the same day and required to wear an electronic tracking device on his ankle.<sup>236</sup> Subsequently, on December 15th, the provincial court entered a peace bond that confirmed or imposed a total of seventeen conditions on El Shaer, including that he continue to wear a GPS tracking device and not travel outside of Windsor; surrender his passport and stay away from airports; refrain from possessing devices to access the Internet and communicating

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227. *Id.*

228. *Id.*

229. *Id.*; Sally Pitt, *Syed Amir Hossein Raisolsadat Sees Terrorism-Related Peace Bond End*, CBC NEWS (May 19, 2016), <https://tinyurl.com/y8kndhpm>.

230. *Terrorism-Related Peace Bond for Syed Amir Hossein Raisolsadat Extended*, CBC NEWS (May 22, 2015), <https://tinyurl.com/yc2czuuo>.

231. Pitt, *supra* note 229.

232. *Id.*

233. Stewart Bell, *Windsor Man Given Terrorism Peace Bond with 17 Conditions for Traveling to ISIL Territory*, NAT’L POST (Dec. 16, 2016), <https://tinyurl.com/yb4qz5lb>.

234. *Windsor’s Mohamed El Shaer Arrested on Terrorism Peace Bond*, CBC NEWS (June 17, 2016), <https://www.cbc.ca/news/canada/windsor/mohamed-el-shaer-terrorism-1.3640678>.

235. *Id.*

236. Stewart Bell, *Windsor Man Who Made Repeated Mysterious Journeys to Middle East Arrested on Terrorism Peace Bond*, OTTAWA SUN (June 16, 2016), <https://tinyurl.com/y8vc4wbu>.



with ISIL supporters; and keep a nighttime curfew.<sup>237</sup> El Shaer's case was one of several in recent years where the authorities have deployed "terrorism peace bonds to prevent suspected extremists from leaving Canada to join ISIL and other terror groups."<sup>238</sup>

#### 6. Critiques

The anti-terrorism peace bonds regime in Canada, which to date has been invoked in fewer than two dozen known cases, is criticized as much for what it does as for what it does not do. Most observers would agree that the challenge is striking the proper balance between respect for civil liberties and effective counter-terrorism measures.<sup>239</sup> How to best meet that challenge, however, is where the controversy lies.

On the one hand, critics say, the intrusive conditions that tend to follow a preventive arrest pursuant to a section 810.011 investigation, whether required for bail or a subsequent peace bond, can have an undue impact on the affected person's life, liberty and well-being. Such measures restricting movement (GPS monitoring, curfews), communication (restrictions on Internet and phone use) and conduct (forced treatment), among others, can feel profoundly "punitive" in their effects, if not their intent, especially when taken cumulatively.<sup>240</sup> As a result, these commentators argue that when imposed on a person who has not been charged with a crime, much less convicted of one, such measures may not be proportional or reasonable and may, therefore, amount to a violation of the subject's fundamental rights.<sup>241</sup> This is precisely what happened in the Driver case, where the judge struck down the application in the terrorism context of section 810.011(6)(a) because it was an unduly burdensome intrusion on the defendant's rights under the Charter of Rights and Freedoms.<sup>242</sup>

Critics also worry that the current peace bond regime is too permissive, which can lead to overreach by the government when it comes to the types of people it pursues as potential terrorist threats. Since the 2015 amendments to the ATA, all that is required to invoke 810.011 (or 83.3, for that matter) is the reasonable belief that a person "may" commit a terrorist act, not the probability that they "will," as was previously the case.<sup>243</sup> The concern here is that this more permissive wording empowers police

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237. Bell, *supra* note 233.

238. *Id.*; see also Josh Elliott, *Man Arrested on Fear of Terrorism in Ontario*, CTV NEWS (March 26, 2016), <https://tinyurl.com/y9k38ruv> (describing the case of another suspect detained preventively for fear that he might commit a terrorist offense).

239. See, e.g., Thompson, *supra* note 218.

240. See, e.g., *Aaron Driver* article I, *supra* note 205.

241. *Peace Bonds*, *supra* note 137.

242. See *supra* notes 192-94 and accompanying text.

243. See *supra* note 142 and accompanying text.

“to widen the net of who [they] can arrest on suspicion [of terrorism-related acts],”<sup>244</sup> which in turn can increase the possibility, if not the probability, that the “wrong people”—those who are not really a risk or likely to engage in violent conduct—will be caught up in that net.<sup>245</sup> Even so, the relatively modest number of known cases since 2015 involving preventative arrests and peace bonds, all of which have been under section 810.011, suggests that the regime is being used cautiously, at least for now.

Paradoxically, other commentators criticize the anti-terrorism peace bond regime as insufficient in strength and thus largely ineffective. They question the extent to which the above-referenced measures, which the critics cited above consider draconian, can actually serve to prevent a committed terrorist “who is determined to launch an attack.”<sup>246</sup> “Peace bonds ‘won’t necessarily stop a . . . dangerous person’ who is truly intent on doing harm.”<sup>247</sup> The Driver case in particular has highlighted this weakness in the regime: Despite being subject to almost a dozen restrictions after a lengthy judicial process, he was still able to build an explosive device, film a “martyr video” and, apparently, prepare for a suicide attack.<sup>248</sup> It is important to recall as well that said restrictions had been reduced in number and severity from those that Driver had received (and challenged) under the terms of his bail as too onerous.<sup>249</sup> In these situations, there is a valid question as to whether peace bonds are, in fact, effective and a “justified substitution for a terrorism prosecution.”<sup>250</sup>

On the other hand, the proponents of this counter-terrorism regime believe the use of peace bonds is justified in a number of grey-area cases where there is no legal alternative to acting on a founded fear of future terrorism-related conduct. Because these peace bond cases tend to be characterized by little or no evidence that a crime has (yet) been committed, only some evidence that a proclivity or inclination towards doing so exists, the preventive function of the peace bonds process is viewed as an especially necessary, if imperfect, recourse.<sup>251</sup> The cases of Abdul Aldabous and Seyed Amir Hossein Raisolsadat described in the previous section arguably support the claim that peace bonds can be an effective tool to counter radicalization and perhaps even disrupt terrorist acts.<sup>252</sup>

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244. *Id.*

245. *Peace Bonds*, *supra* note 137.

246. Thompson, *supra* note 218.

247. *Peace Bonds*, *supra* note 137.

248. Thompson, *supra* note 218.

249. *See supra* note 213 and accompanying text.

250. Pratt, *supra* note 160.

251. Haydn Watters, *Bill C-51: ‘No Prosperity Without Security,’ Steven Blaney Says*, CBC NEWS (May 25, 2015), <https://tinyurl.com/yauvxks9>.

252. *See supra* notes 219-26 and accompanying text.

More to the point, because persons prosecuted under 810.011 have not “actually broken the law . . . [,] the peace bond [is] really the only measure available [to police, whose] hands are [otherwise] tied [u]ntil someone does something [criminal].”<sup>253</sup> Defenders of the post-2015 peace bond procedure recall the conundrum the police faced after arresting Martin Couture-Rouleau in 2014, before the threshold for obtaining a peace bond was lowered (they were forced to release him for lack of evidence and he went on to commit a fatal terrorist attack).<sup>254</sup> In addition, there is some evidence that the section 810.011 peace bond procedure has been utilized effectively to prevent so-called “high-risk travelers” from leaving the country to go join up with militant Islamic forces in Syria and elsewhere.<sup>255</sup> Finally, the anti-terrorism peace bond procedure may serve as a stepping stone towards building a successful criminal case against a suspect but authorizing that person’s preventive detention while evidence is gathered.<sup>256</sup>

This notwithstanding, even supporters of anti-terrorism peace bonds have caveats regarding other potential abuses. They worry that the judge has wide discretion to craft conditions, and can even go beyond those suggested by law if s/he chooses; this suggests the possibility of peace bonds “potentially constraining liberty in *every* dimension of life, including issues of freedom of expression, freedom of association, and mobility rights, among others.”<sup>257</sup> A related caveat is the fear that peace bonds might be pursued as an easier route to incarcerating suspects than criminal prosecutions; they can “become a hair-trigger allowing the government to pursue easily proved and potentially banal peace bond violations as a means to incarcerate a person, without troubling itself with a prosecution for terrorism.”<sup>258</sup>

### C. *Australia*

#### 1. *Policy & Stated Objectives*

Since its creation in 2005, the Australian ATPCMs regime has evolved into one of the most robust on the planet. Australian control orders are issued by a federal court at the request of the police to protect the public

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253. Thompson, *supra* note 218.

254. *See supra* note 202 and accompanying text.

255. *See supra* note 238 and accompanying text; *see also* Watters, *supra* note 251 (“Dr. Bal Gupta, the chair of the Air India 182 Victims Families Association, said measures implemented in bill C-51 could have easily prevented the June 1985 bombing, which killed all 329 people aboard the plane.”).

256. Elliott, *supra* note 238. In 2014, Kevin Omar Mohamed was arrested pursuant to section 810.011, but instead of seeking a peace bond, the Canadian authorities were able to bring terrorism-related charges that eventually led to Mohamed’s conviction, imprisonment and eventual probation. Andrew Russell & Stewart Bell, *Canadian Who Tried to Join Terror Group in Syria Sentenced to 4.5 Years*, GLOBAL NEWS (Oct 31, 2017), <https://tinyurl.com/yall357t>.

257. Forcese, *supra* note 170.

258. *Id.*

from potential terrorist acts.<sup>259</sup> They do so by imposing restrictions and other conditions that “fall short of detention” on persons who authorities suspect might commit such an act.<sup>260</sup> Division 104 of the Australian Criminal Code Act of 1995 (Criminal Code) governing control orders affirms that the procedure’s objectives are “(a) protecting the public from a terrorist act, (b) preventing the provision of support for or the facilitation of a terrorist act, and (c) preventing the provision of support for or the facilitation of a hostile act in a foreign country.”<sup>261</sup> Though controversial, Division 104 has been repeatedly reauthorized, and its amended form remains an essential tool available to law enforcement authorities charged with combatting terrorism.<sup>262</sup>

Australia enacted control orders into its criminal law in 2005 in response to the September 11, 2001 terrorist attacks and the subsequent suicide bombings in London.<sup>263</sup> These orders are similar to those that once prevailed in the United Kingdom, but that have since been replaced by the less onerous TPIMs.<sup>264</sup> The United Kingdom’s Independent Reviewer of Terrorism Legislation, David Anderson, noted in 2011 that upon comparison with the legal systems of “other developed western jurisdictions[,] [t]he closest parallel to the UK’s control order regime [was] in Australia.”<sup>265</sup> In addition to control orders, the Australian Criminal Code prescribes procedures for “preventative detention orders” under exceptional circumstances to prevent imminent terrorist attacks and other threats.<sup>266</sup> While control orders have been used on rare occasions by the Australian authorities, preventative detentions at the federal level have apparently been used not at all.<sup>267</sup> The bulk of this country study will focus therefore on the former.

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259. JAMES RENWICK, INDEP. NAT’L SEC. LEGISLATION MONITOR, REVIEW OF DIVISIONS 104 AND 105 OF THE CRIMINAL CODE (INCLUDING THE INTEROPERABILITY OF DIVISIONS 104 AND 105A): CONTROL ORDERS AND PREVENTATIVE DETENTION ORDERS x (2017), <http://www.inslm.gov.au/sites/default/files/control-preventative-detention-orders.pdf>.

260. *Id.*

261. *Criminal Code Act 1995* (Cth) s 104.1 (Austl.).

262. RENWICK, *supra* note 259, at x-xi; *see also Criminal Code Act 1995* (Cth) div 104 (Austl.) and accompanying text.

263. George Williams, *A Decade of Australian Anti-Terror Laws*, 35 MELB. U. L. REV. 38, 141 (2011); Blackbourn & Tulich, *supra* note 11.

264. *See supra* notes 11-12 and accompanying text.

265. *See supra* note 8, ¶¶ 2.14, 2.15.

266. *Criminal Code Act 1995* (Cth) ss 105.1-105.4 div 105 (Austl.).

267. *Id.*; *see also* RENWICK, *supra* note 259, at xi (noting that similar provisions for preventative detention also exist at the local level among Australia’s states and territories, where it appears they have been used).

## 2. *Legal Framework & Procedure*

Under the Australian Criminal Code, the first step in the control order process is to seek and obtain an “interim control order” through *ex parte* proceedings carried out in the absence of the controlee.<sup>268</sup> Subsequent confirmation of that order, however, depends on the affected persons’ engagement, if not their actual participation.<sup>269</sup> To request an interim control order, a senior member of the Australian Federal Police (AFP) must first obtain the written consent of the Minister for Home Affairs,<sup>270</sup> referred to in the statute as the “AFP Minister.”<sup>271</sup> Prior to 2017, the Code designated the Attorney General as the authority whose written consent was required.<sup>272</sup> To obtain the AFP Minister’s consent, the requesting AFP member must be able to show, among other things, that they have reasonable grounds to believe that any of the following are true:

- The order would substantially assist in preventing a terrorist act;
- The suspect has provided training to, or received training from, a terrorist organization;
- The person has engaged in hostile activity in a foreign country, or has been convicted of an offence relating to terrorism in Australia or elsewhere;<sup>273</sup>
- The order would help to prevent “the provision of support for or the facilitation of a terrorist act [or] the engagement in a hostile activity in a foreign country.”<sup>274</sup>

Once the AFP Minister consents to the request for any of these reasons, the senior AFP member can proceed to ask for an interim control order from the court through the *ex parte* proceeding established for this purpose.<sup>275</sup> The court may only issue the order if it is satisfied “on the balance of probabilities” that any of the permissible grounds proffered by

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268. See *Criminal Code Act 1995* (Cth) ss 104.2-104.4 (Austl.); see also RENWICK, *supra* note 259, at 12, ¶ 3.3 (describing the *ex parte* procedure).

269. See *Criminal Code Act 1995* (Cth) s 104.12-12A (Austl.).

270. *Control Orders*, AUSTRALIAN GOV’T ATT’Y-GEN.’S DEP’t, <https://tinyurl.com/y88b9hzp> (last visited July 19, 2019) [hereinafter Australian AG, *Control Orders*]; see also *Criminal Code 1995* (Cth) s 104.2(1) [PPP] (Austl.).

271. *Criminal Code Act 1995* (Cth) s 104.2(1) (Austl.). This is because it is the Home Minister that administers the Australian Federal Police Act of 1979. See *Criminal Code Act 1995* (Cth) s 100.1 (Austl.).

272. See Australian AG, *Control Orders*, *supra* note 270.

273. *Criminal Code Act 1995* (Cth) s 104.2(2)(a)-(b) (Austl.).

274. *Id.* s 104.2(2)(c)-(d). Several of these conditions were not in the original text of Division 104, which was “significantly expanded in 2014 as part of amendments to Australia’s anti-terror laws to meet the threat posed by foreign fighters.” Blackbourn & Tulich, *supra* note 11; see also RENWICK, *supra* note 259, at 12, ¶ 3.1 (defining the modern control orders).

275. *Criminal Code Act 1995* (Cth) s 104.3 (Austl.); see also RENWICK, *supra* note 259, at 12, ¶ 3.3 (describing the *ex parte* proceeding).

the AFP as valid to justify the order are met; these are the same as those just listed.<sup>276</sup> At the same time, the court must be satisfied that each of the conditions to be imposed by the order would be reasonable, necessary, appropriate and “adapted, for the purpose of: protecting the public from a terrorist act [or] preventing the provision of support for or the facilitation of a terrorist act [or] the engagement in a hostile activity in a foreign country.”<sup>277</sup> In so doing, the court must also take into account a number of other factors, including the person’s age as well as the impact the conditions to be imposed would have on their personal and financial circumstances.<sup>278</sup> Interim control orders may remain in force for up to twelve months without confirmation.<sup>279</sup>

The court issuing the interim control order must further ensure that its contents are specific with respect to identifying the person affected, the conditions imposed and the grounds on which the order is made, subject to certain limitations.<sup>280</sup> In the original version of the legal framework, intelligence information deemed sensitive for purposes of protecting national security did not have to be disclosed, which meant that a “person[] made subject to [the] order [would] only be entitled to a summary of the grounds upon which the order was made.”<sup>281</sup> The governing law was amended in 2016 to affirm “the withholding of sensitive information from the controlee (and their legal representative) and their exclusion from the proceeding when the court considers that information should be withheld.”<sup>282</sup> To compensate, and based on recommendations from the legislative review process, Parliament authorized the appointment of special advocates, who “would have the powers necessary to represent the interests of the controlee effectively, in closed hearings.”<sup>283</sup>

To go into effect, said interim order must be “served personally on the person.”<sup>284</sup> It must further provide a court date for the confirmation hearing “as soon as practicable, but at least [seven] days, after the order is made.”<sup>285</sup> At the hearing, the person (and/or their lawyer) can appear to contest the order, after which it will be either confirmed (with or without variations) or

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276. *Criminal Code Act 1995* (Cth) s 104.4(1)(c) (Austl.).

277. *Id.* s 104.4(1)(d).

278. *Id.* s 104.4(2)(b)-(c).

279. *Id.* ss 104.5(f), 104.16(d).

280. *Id.* s 104.5(1)(b), (c), (h).

281. Martin Scheinin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Australia: Study on Human Rights Compliance While Countering Terrorism*, ¶ 39, U.N. Doc. A/HRC/4/26/Add.3 (Dec. 14, 2006) [hereinafter Scheinin Report]; see also *Criminal Code Act 1995* (Cth) s 104.2(3)(c) (Austl.).

282. RENWICK, *supra* note 259, ¶ 4.13(a).

283. *Id.* ¶ 4.14.

284. *Criminal Code Act 1995* (Cth) s 104.5(1)(d) (Austl.).

285. *Id.* s 104.5(1)(a).

voided.<sup>286</sup> A confirmed control order cannot extend for more than twelve months from the day the interim control order is made.<sup>287</sup> In practice, however, interim control orders can remain in place for months without confirmation, up to the full twelve months allowed by law.<sup>288</sup>

It is worth noting that, under extreme circumstances, the Australian Criminal Code will permit a senior AFP member to seek “urgent interim control orders” directly from a court, without obtaining prior written consent from the AFP Minister.<sup>289</sup> The AFP member may request such an interim control order only if they deem it “necessary” in light of the “urgent circumstances,” such as preventing a terrorist attack.<sup>290</sup> Even in such exceptional cases, however, the AFP Minister’s consent must be obtained within eight hours of the request or the interim order ceases to be in effect.<sup>291</sup> No interim control order can ever be sought against a minor under fourteen years old; special restrictions apply to control orders sought for minors under the age of seventeen.<sup>292</sup>

With respect to any control order, interim or otherwise, the AFP member may only request, and a court may only impose, those obligations, prohibitions and restrictions specified in the law.<sup>293</sup> As noted, the court must take into account the impact of each of the conditions to be imposed on the person’s financial and personal circumstances.<sup>294</sup> These permissible conditions include:

- A prohibition or restriction on being in specified areas or places;
- A prohibition or restriction on leaving the country;
- A requirement that a person remain on certain premises between specific times each day, i.e. a curfew up to a maximum of twelve hours a day within any twenty-four-hour period;
- A requirement to wear a tracking device;
- A prohibition or restriction on communicating or associating with certain people;
- A prohibition or restriction on accessing or using specified forms of telecommunication or other technology, including the internet;

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286. *Id.* s 104.5(1)(e).

287. *Id.* s 104.5.16(d).

288. This is what happened in the case of Jack Thomas and Harun Causevic. *See infra* notes 328, 381 and accompanying text.

289. *Criminal Code Act 1995* (Cth) div 104, sub-div C (Austl.).

290. *Id.* ss 104.2(1)(Note), 104.6(1)-(2), 104.8(1).

291. *Id.* s 104.10.

292. *Id.* s 104.28.

293. *Criminal Code Act 1995* (Cth) s 104.5(3) (Austl.).

294. *Id.* s 104.4(2).

- A ban on possessing certain articles or substances;
- A ban on carrying out certain activities, including those relating to the persons work or occupation;
- A requirement to report to specific authorities at set times and places;
- A requirement to provide fingerprints and photographs to authorities; and
- A requirement to participate in counseling or education.<sup>295</sup>

If the AFP decides to pursue confirmation of an interim control order, the court holds a hearing on the scheduled date to receive evidence from all the parties, including by calling witnesses.<sup>296</sup> A judge must evaluate any evidence presented as well as other submissions from the AFP and the person affected and their legal representatives, if they attend, before deciding to confirm, amend or void the order.<sup>297</sup> The admissibility of evidence is governed by the Evidence Act of 1995.<sup>298</sup> Even if the order is confirmed, as mentioned already, it cannot last longer than twelve months from the date the interim control order was issued.<sup>299</sup> However, the AFP and the court may subject the same person to successive control orders if the circumstances warrant it.<sup>300</sup> Once a control order is confirmed, the person bound may apply at any time to the court to revoke or vary it.<sup>301</sup> Finally, it is a criminal offence for a person subject to a control order to contravene its terms and conditions. The maximum penalty is imprisonment for up to a period of five years.<sup>302</sup>

Division 104 of the Criminal Code includes a sunset provision, which states that any control order in force on September 7, 2021, will cease to apply on this date.<sup>303</sup> This provision follows a prior three-year extension of the control order that expired on September 7, 2018. The current sunset clause further provides that no control orders can be “requested, made or confirmed after September 7, 2021.”<sup>304</sup> The preventative detention orders established by Division 105 have a similar sunset clause,<sup>305</sup> though they are an entirely different beast altogether. Under Division 105’s provisions,

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295. *Id.* s 104.5(3)(a)-(l); *see also* Australian AG, *Control Orders*, *supra* note 270 (referencing the same requirement).

296. *Id.* s 104.14(1).

297. *Id.* s 104.14, especially (3A)(b).

298. *Id.* s 104.14(3A)(Note).

299. *Id.* s 104.5(2).

300. *Id.*

301. *Id.* s 104.18.

302. *Id.* s 104.27.

303. *Id.* s 104.32.

304. *Criminal Code Act 1995* (Cth), § 104.32 (Austl.).

305. *Id.* § 105.53.



which have yet to be invoked, the AFP may apply to a special authority designated by the Attorney General for an order to detain a person “effectively incommunicado” for up to forty-eight hours to prevent an imminent terrorist attack or to preserve evidence relating to such an act.<sup>306</sup> In the case of state and territorial preventative detention laws, persons can be held up to fourteen days on this authority.<sup>307</sup>

### 3. *Judicial Oversight*

In *Thomas v. Mowbray* in 2007, the High Court of Australia (High Court) found the interim control order regime to be constitutional, and strongly suggested that control orders generally would pass muster on similar grounds.<sup>308</sup> Specifically, the High Court found that the subdivision of Division 104 of the Criminal Code that regulated interim control orders was lawfully applied in the case of a man who was cleared of charges under anti-terror laws “but judged to still pose a potential terrorist threat.”<sup>309</sup> The judgment was based in part on the High Court’s decision that Division 104 was compatible with separation of powers under the Constitution of Australia.<sup>310</sup> It also defended as valid the law’s “reasonably necessary [and] appropriate” standard for imposing prohibitions, restrictions and obligations on persons, finding that it was not overly vague.<sup>311</sup>

### 4. *International Oversight*

For years Australia’s ATPCMs regime has been the subject of review by various United Nations human rights mechanisms. Most notably, in 2006, the then U.N. Special Rapporteur on countering terrorism, Martin Scheinin, published a report on the regime that is by and large the same as the one currently in place.<sup>312</sup> The Special Rapporteur recognized that “the adoption by Australia of measures capable of protecting the public which fall short of actual detention” was a positive development.<sup>313</sup> At the same time, however, he urged the Australian authorities to ensure that any conditions imposed

306. *Criminal Code Act 1995* (Cth) §§ 105.1-105.4 (Austl.).

307. See *Preventative Detention Orders*, AUSTRALIAN GOVERNMENT ATTORNEY-GENERAL’S DEPARTMENT, <https://tinyurl.com/yb7mvoej> (last visited Aug. 5, 2019); see also *supra* note 267 and accompanying text.

308. *Thomas v Mowbray* [2007] HCA 33, 1-2 (Austl.). Due to special circumstances, the case involved facts that focused only on an interim control order; nonetheless, it was treated by the High Court as “a general challenge to the validity of Div. 104.” *Id.* ¶ 31. See also *Jack Thomas Still Under Control Order*, NEWS.COM (Mar. 17, 2009), <https://tinyurl.com/y9tkq2ax> (reporting that the High Court had found “control order legislation” to be valid) [hereinafter *Jack Thomas*].

309. *Jack Thomas*, *supra* note 308.

310. BRET WALKER, INDEP. NAT’L SEC. LEGISLATION MONITOR, DECLASSIFIED ANNUAL REPORT 20 (2012).

311. See *Mowbray* [2007] HCA ¶¶ 27, 154.

312. See Scheinin Report, *supra* note 281; see also RENWICK, *supra* note 259, ¶ 5.16 (making note of the U.N. monitoring of the control order regime).

313. Scheinin Report, *supra* note 281, ¶ 37.

by a control order be in line with the country's human rights obligations, "particularly having regard to the fact that control orders are issued based upon the non-criminal standard of proof on the balance of probabilities . . . ." <sup>314</sup> In this regard, the Special Rapporteur was adamant that "[t]he imposition of controls upon any person must not cumulate [sic] so as to be tantamount to detention."<sup>315</sup> In addition, he highlighted the risks that the control order procedure posed to the due process rights of the person affected because it "prevents disclosure of certain [sensitive] information upon which control orders are sought and made" in a manner that may not be "compatible with the right to a fair hearing."<sup>316</sup>

In 2016, the U.N. Human Rights Committee considered a challenge to the legality of control orders under the ICCPR in the complex case of *Hicks v. Australia* (the subject of an individual case study below) but declined to address the issue.<sup>317</sup> Hicks had alleged, among many other abuses, that "the control order imposed on [him] upon release from [prison in Australia] was unfair and the limitations imposed unnecessary, in violation of articles 12, 14, 17, 19 and 22 of the Covenant."<sup>318</sup> However, the Committee found that, with respect to both counts, the petitioner did not show that the "conduct of the domestic court amounted to arbitrariness or a denial of justice [and thus] failed to substantiate his claims sufficiently for purposes of admissibility."<sup>319</sup>

##### 5. Implementation of Control & Preventative Detention Orders

Only six control orders have been issued by Australian federal courts under Division 104 since 2005.<sup>320</sup> The first was in August 2006,<sup>321</sup> and the second in December 2007.<sup>322</sup> Based on the annual reports submitted by the Attorney General, no new interim control orders were made until December 2014, when two were adopted at the same time.<sup>323</sup> Little is known about

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314. *Id.*

315. *Id.*

316. *Id.* ¶ 39.

317. Human Rights Comm., *Views adopted by the Committee at its 115th session (19 October-6 November 2015)*, U.N. Doc. CCPR/C/115/D/2005/2010 (Feb. 19, 2016) [hereinafter *Views of the Human Rights Committee*]; Sarah Joseph, *Australia Found to Have Breached the Human Rights of David Hicks*, CONVERSATION (Feb. 21, 2016), <https://tinyurl.com/ybeespc0>. See generally International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

318. See *Views of the Human Rights Committee*, *supra* note 317, ¶ 2.4.

319. *Id.* ¶¶ 2.12-2.13.

320. See RENWICK, *supra* note 259, at xi.

321. See *infra* note 328 and accompanying text.

322. See *infra* note 340 and accompanying text.

323. See COMMONWEALTH OF AUSTRALIA, CONTROL ORDERS AND PREVENTATIVE DETENTION ORDERS: ANNUAL REPORT 2014-2015 (2016), <https://tinyurl.com/y7v12wpa> [hereinafter CONTROL ORDERS & PREVENTATIVE DETENTION ORDERS 2016 REPORT]. For a complete list of published AG reports, see Australian AG, *Control Orders*, *supra* note 270.

these orders because they were made subject to non-publication restrictions by the issuing court.<sup>324</sup> Two additional interim control orders were enacted in March and September 2015, for a total of six.<sup>325</sup> Of the six interim control orders issued to date, three were confirmed.<sup>326</sup> Federal preventative detention under Division 105 of the Criminal Code, on the other hand, was not used prior to 2017 and, as far as is known, remains uninvoked.<sup>327</sup>

#### 6. *Individual Case Studies*

This section details the four interim control order cases issued in Australia since 2005 against Jack Thomas, David Hicks, Ahmad Naizmand and Harun Causevic that were reported publicly. Each raises its own set of particular challenges and issues for the country's ATCPMs regime.

##### *Jack Thomas*

Australia's first control order was issued against Jack Thomas in August 2006.<sup>328</sup> Thomas was a Melbourne taxi driver nicknamed "Jihad Jack" by the media; the authorities arrested him in 2003 after he visited an Al Qaeda military camp in Pakistan and returned to Australia.<sup>329</sup> He was originally tried and convicted under the country's 2005 anti-terrorism laws on the basis of evidence showing that he had received funds and training from Al Qaeda and used a fake passport.<sup>330</sup> In August 2006, however, the state court of appeals for Victoria quashed Thomas' criminal conviction for terrorism-related acts, prompting the government to seek a control order against him.<sup>331</sup> On August 27, 2006, a federal court adopted an interim control order subjecting Thomas to a number of conditions, including a curfew, an obligation to report to police three times a week and a prohibition on contacting dozens of named individuals as well as on using unauthorized

324. See Blackburn & Tulich, *supra* note 274.

325. See Blackburn & Tulich, *supra* note 274 and accompanying text; Rachel Olding, *Sydney Courier Ahmad Saiyer Naizmand Charged with Accessing Terrorist Material Online*, SYDNEY MORNING HERALD (Mar. 1, 2016), <https://tinyurl.com/y9mmdrpa>.

326. See CONTROL ORDERS & PREVENTATIVE DETENTION ORDERS 2016 REPORT, *supra* note 323. The Attorney General Reports show that control orders were confirmed in November 2015, and July 2016. *Id.*; see also COMMONWEALTH OF AUSTRALIA, CONTROL ORDERS AND PREVENTATIVE DETENTION ORDERS: ANNUAL REPORT 2016-2017 (2017), <https://tinyurl.com/y9e5swkk> (listing control orders issued and confirmed). The David Hicks control order was similarly confirmed in 2007 for a total of three. See Joseph, *infra* note 338 and accompanying text.

327. See RENWICK, *supra* note 259, at xi.

328. Bronwen Jagers, *Anti-Terrorism Control Orders in Australia and the United Kingdom: A Comparison* (Parliamentary Library, Parliament of Australia, Research Paper No. 28 2007-08, 2008), <https://tinyurl.com/ydyj8hy5>.

329. Jack Thomas, *supra* note 308; Daniel Fogarty & Michelle Draper, *Jack Thomas Cleared of Terrorism Charge*, SYDNEY MORNING HERALD (Oct. 23, 2008), <https://tinyurl.com/y9w2r6nt>.

330. Jack Thomas, *supra* note 308.

331. Alison Caldwell, *Jack Thomas Under Control Order After Terrorism Charges Overturned*, ABC NEWS (Aug. 29, 2006), <http://www.abc.net.au/am/content/2006/s1726756.htm>.

phone and internet service providers.<sup>332</sup> This order remained in place for nearly twelve months without confirmation, apparently due to his pending retrial, and then allowed to expire.<sup>333</sup> At the 2008 retrial, Thomas was once again absolved of the terrorism charges against him but found guilty of passport fraud (he was given time served).<sup>334</sup>

Thomas unsuccessfully challenged the constitutionality of the control order regime in the Australian High Court case of *Thomas v. Mowbray*, as discussed above.<sup>335</sup> However, the U.N. Special Rapporteur, Martin Scheinin, raised questions about the regime after his visit to Australia in 2006. In relation to Thomas's case specifically, the Special Rapporteur expressed concern "that the order imposed . . . came just days after a state [court] quashed a terrorist financing conviction against him" and that it appeared to be based on "limited evidence."<sup>336</sup> Even so, the Rapporteur acknowledged that the conditions imposed by the interim control order did "not appear to unduly restrict Mr. Thomas's freedom of movement if the allegation that he is likely to commit a terrorist act [was] correct."<sup>337</sup>

*David Hicks*

In 2001, David Hicks, an Australian national, was captured in Afghanistan and subsequently imprisoned in Guantanamo Bay by the United States, where he remained until he pled guilty of providing material support to terrorism in March 2007.<sup>338</sup> As a result, the United States transferred Hicks to Australia to serve out the remaining nine months of his seven-year sentence.<sup>339</sup> In December 2007, an Australian court imposed an interim control order on Hicks mere days before his release from prison.<sup>340</sup> The terms of this twelve-month order included a curfew, reporting to the police three times a week, a prohibition on leaving the country, and a ban on communicating with known members of terrorist organizations, as well

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332. Jagers, *supra* note 328; *see also* Walker, *supra* note 310, at 19 (full roster of conditions imposed).

333. Jagers, *supra* note 328 ("The 12-month time limit for control orders was due to expire shortly after the High Court case was resolved. However, there appeared some confusion as to whether the interim control order would expire (without confirmation) after 12 months, or could continue. Mr. Thomas and the AFP came to a written agreement, in effect until the conclusion of his . . . re-trial, with similar conditions to those imposed by the interim control order. The AFP agreed not to seek a further control order on Mr. Thomas.")

334. Fogarty & Draper, *supra* note 329.

335. *See supra* notes 308-312 and accompanying text.

336. Scheinin Report, *supra* note 281, ¶ 38.

337. *Id.*

338. Joseph, *supra* note 317.

339. Jagers, *supra* note 328.

340. Walker, *supra* note 310, at 21.

as on the use of unapproved telecommunications services, including mobile telephones and internet access not sanctioned by the AFP.<sup>341</sup>

The order was confirmed in February 2008, though Hicks chose not to appear before the court at the confirmation hearing or to submit any evidence in his favor.<sup>342</sup> He did not challenge the basis for the control order, but his lawyer successfully argued for a reduction in the reporting requirement, which he described as “too onerous to lead a normal life” and an impediment to “his [client’s] assimilation back into the community.”<sup>343</sup> In all other respects, the court affirmed its earlier finding that the terms of the court order were “reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.”<sup>344</sup> The judge’s decision was based on the evidence that Hicks had trained with the terrorist organizations, including letters he wrote from Pakistan and Afghanistan where he spoke “of being a practicing Muslim who has military experience and needs to protect Islam from non-believers.”<sup>345</sup> The AFP did not seek to renew the confirmed control order and it expired in December 2008.<sup>346</sup>

In 2010, two years after his control order expired, Hicks took his case to the U.N. Human Rights Committee, eventually prevailing in 2016 on the claim that Australia violated his human rights by failing to protect him against arbitrary detention in violation of Article 9(1) of the ICCPR.<sup>347</sup> Although the Committee declined to examine the validity of Hicks’s control orders under the ICCPR directly,<sup>348</sup> it did take note of the fact that the procedure on its face did not appear to be “unfair” or “arbitrary” because Hicks was given multiple opportunities to appear and present evidence on his own behalf during the proceedings, which he chose not to do.<sup>349</sup> In addition, the Committee further recognized that:

the Magistrate subjected the evidence of the Australian Federal Police to scrutiny, expressed some concerns, reduced the requirement to report to the authorities and then provided a reasoned explanation for his decision based on the evidence at his

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341. Jagers, *supra* note 328; *see also* Walker, *supra* note 310, at 22-23 (full roster of the conditions imposed).

342. Jagers, *supra* note 328.

343. *Id.* The reporting requirement was reduced to twice a week from three times because the judge found that the AFP had other means to monitor Hicks’ location. *See* Walker, *supra* note 310, at 25.

344. Walker, *supra* note 310, at 23, 24-25.

345. *Id.* at 22 n.66.

346. *Id.* at 25.

347. *See Views of the Human Rights Committee, supra* note 317, ¶ 4.10.

348. *See supra* note 319 and accompanying text.

349. *See Views of the Human Rights Committee, supra* note 317, ¶ 2.11.

disposal; and that the author did not appeal the judgement confirming the control order.<sup>350</sup>

*Ahmad Naizmand*

After an *ex parte* proceeding, the AFP secured an interim control order in March 2015 against Ahmad Naizmand in the wake of a police investigation of a terrorist cell in Sydney in 2014, during which he was arrested and released without charge.<sup>351</sup> Police could also point to the fact that Naizmand was convicted in 2014 of using his brother's passport to travel to Syria to fight for Islamic State after his own passport was cancelled in 2013 due to terrorism-related concerns.<sup>352</sup> Furthermore, authorities had reason to believe that Naizmand, then nineteen-years-old, was connected to the 2015 Parramatta fatal shooting by a fifteen-year-old extremist of a civilian police employee,<sup>353</sup> as well as other potential acts of terror.<sup>354</sup> The interim order was confirmed on November 30, 2015, after Naizmand was linked to a terrorist plot to kill civilians randomly in the name of Islamic State, the first confirmed control order in over eight years (since Hicks').<sup>355</sup>

The interim control order, which was not made public until six months after its adoption, imposed severe—and controversial—conditions on Naizmand.<sup>356</sup> These included a full ban on using “mobile phones, computers, email, any telephone service, any internet account or any web applications such as FaceTime, WhatsApp, Telegram or Skype, unless otherwise approved.”<sup>357</sup> Nor was he allowed to communicate or associate with over a dozen other extremists labeled part of the “Naizmand Group” and deemed by police to be “willing and able to commit a terrorist act.”<sup>358</sup> He was required to report to the police every two to three days and expressly prohibited from electronically accessing or viewing extremist material or

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350. *Id.*

351. Blackburn & Tulich, *supra* note 11; Olding, *supra* note 325; Gina Rushton, *Sydney Man Under Terror Control Order Will Stay Behind Bars*, AUSTRALIAN (Mar. 14, 2016), <https://tinyurl.com/yddkrccg>.

352. Rushton, *supra* note 351; see Rachel Olding, *Sydney Teenager Ahmad Saiyer Naizmand Caught En Route to Joining Islamic State*, SYDNEY MORNING HERALD (Dec. 9, 2014), <https://tinyurl.com/y6w9778r>.

353. Blackburn & Tulich, *supra* note 11.

354. Rachel Olding, *Parramatta Shooting: Two Men Charged with Terrorism Offences Over Curtis Cheng Death*, SYDNEY MORNING HERALD (Oct. 15, 2015), <https://tinyurl.com/y96oefn5>; Melanie Kembrey, *Terror Suspect Ahmad Saiyer Naizmand Raises IS Salute After Jail Sentence*, SYDNEY MORNING HERALD (Feb. 2, 2017), <https://tinyurl.com/y7gumb9y>.

355. Stephanie Gardiner, *Ahmad Saiyer Naizmand Breach of Terrorism Control Order Was ‘Serious,’* SYDNEY MORNING HERALD (Dec. 23, 2016), <https://tinyurl.com/y9rqwgd5>; Olding, *supra* note 325; see also Paul Farrell, *Judge Confirms First Control Order in More Than Eight Years on Man, 20*, GUARDIAN (Dec. 1, 2015), <https://tinyurl.com/ybctmmze>.

356. Paul Farrell & Michael Safi, *Control Order Restricting What Mosques Man Can Attend Challenged*, GUARDIAN (Sept. 11, 2015), <https://tinyurl.com/yc8ftggx>.

357. *Id.*

358. Olding, *supra* note 325; Olding, *supra* note 354.

propaganda.<sup>359</sup> Significantly, the interim order limited him to visiting only one, pre-approved mosque in Parramatta by expressly prohibiting him from going “‘inside, or in the grounds of, any masjid/mosque, or any other place of observance’.”<sup>360</sup> Finally, the interim order “‘required [him] to consider in good faith participating in counselling or education relating to [his] spiritual, emotional and physical wellbeing, with a suitably qualified professional counsellor or publicly recognised religious leader, for at least [sixty] minutes every week.’”<sup>361</sup> The latter two constraints led to Naizmand threatening through his lawyers to bring a legal challenge for violations of his rights relating to freedom of religion.<sup>362</sup>

A potential challenge to the onerous terms of the interim control order became unnecessary after the court confirming the order varied its terms with the AFP’s consent to do away with in November 2015.<sup>363</sup> On the one hand, it lifted the restriction on what mosques Naizmand could attend; on the other, it adopted a more flexible approach to the constraints on communication to allow him to use a phone and have internet access on a device approved by the AFP. The condition requiring Naizmand to consider counseling, however, remained untouched. The judge confirmed the amended order by affirming that the “court [was] satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on [Naizmand] by the control order [were] reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.”<sup>364</sup>

A week before Naizmand’s control order was due to expire in early March 2016, he was arrested for violating the terms of that order.<sup>365</sup> Specifically, he was charged with, and pled guilty to, breaching the terms of his control order by using his phone to access three extremist videos on YouTube five times in January and February of that year.<sup>366</sup> The prohibited online material he accessed contained content that breached the prohibition on viewing “propaganda [and] promotional material for Islamic State and electronic media depicting beheadings, explosives, suicide attacks or bombings.”<sup>367</sup> At Naizmand’s sentencing hearing in December of 2016, the prosecutor showed the videos and argued that viewing them had been “a

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359. Olding, *supra* note 325. (“As part of the control order placed on him, Naizmand was prevented from accessing electronic material depicting or describing executions, beheadings, suicide attacks, bombings, terrorist attacks, promotional material from terrorist groups or any activities by Islamic State.”)

360. Farrell & Safi, *supra* note 356.

361. Farrell, *supra* note 355; Farrell & Safi, *supra* note 356; Rushton, *supra* note 351.

362. Farrell & Safi, *supra* note 356.

363. Farrell, *supra* note 355.

364. *Id.*

365. Farrell, *supra* note 355.

366. Gardiner, *supra* note 355.

367. Farrell, *supra* note 355.

serious breach” of the order because the videos advocated violence against non-believers.<sup>368</sup> In February 2017, Naizmand was sentenced to four years in prison for these violations of his control order;<sup>369</sup> as the authorities escorted him back to his cell, Naizmand lifted his index finger in the ISIL salute.<sup>370</sup> According to information presented to the court, he was only the second person to be sentenced for breaching a control order in Australia.<sup>371</sup> The first had made a call “on a public telephone and mobile which had not been approved for the use. The conversations were innocuous and the offender was given a maximum sentence of two years with a non-parole period of eighteen months.”<sup>372</sup>

*Harun Causevic*

Eighteen-year-old Harun Causevic was arrested during a high-profile police sweep in April 2015 for belonging to a small group of persons believed to be planning a terrorist attack on a public holiday.<sup>373</sup> He spent four months in maximum security prison before charges were dropped due to a lack of evidence on which to prosecute him.<sup>374</sup> In September 2015, after an *ex parte* proceeding, a federal court issued an interim control order against Causevic based on his alleged involvement in the foiled terrorist plot earlier in the year as well as other evidence that he was indeed a radicalized militant.<sup>375</sup> Of particular weight was his being a “close associate” of the plot’s ringleader, who pled guilty to organizing the terrorist attack.<sup>376</sup> The court determined based on these grounds that it was satisfied “on the balance of probabilities that making the order would substantially assist in preventing a terrorist act”.<sup>377</sup>

In terms similar to those used by the court in the case of Ahmad Naizmand, the court making the interim order against Causevic imposed on him a number of “severe restrictions,”<sup>378</sup> including: abiding by a curfew; wearing a GPS tracking device; keeping a distance from airports, military

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368. Gardiner, *supra* note 355.

369. Kembrey, *supra* note 354.

370. *Id.*

371. *Id.*

372. *Id.*

373. Blackburn & Tulich, *supra* note 11; Melissa Davey, *Dropping of Harun Causevic Terrorism Charge Will Erode Confidence in Police*, GUARDIAN (Aug. 25, 2015), <https://tinyurl.com/ycftn6qh>.

374. Blackburn & Tulich, *supra* note 11; Davey, *supra* note 373.

375. *See* Interim Control Order, *Gaughan v. Causevic*, sch 2 (Sept. 10, 2015) (Austl.); *see also* Calla Wahlquist, *Police Ask Court to Ensure Harun Causevic Remains Under Control Order*, GUARDIAN (July 1, 2016), <https://tinyurl.com/yd97dp3q> (reporting issuance of control order).

376. Interim Control Order, *Gaughan v. Causevic*, sch 2, ¶ 4 (Sept. 10, 2015) (Austl.); *see also* Wahlquist, *supra* note 375 (reporting issuance of control order).

377. Interim Control Order, *Gaughan v. Causevic*, order, ¶ 3 (Sept. 10, 2015) (Austl.)

378. Michael Bachelard & Chris Vedelago, *Place of Worship Ban Among Tough Restrictions on Former Terror Suspect Teen Harun Causevic*, SYDNEY MORNING HERALD (Sept. 17, 2015), <https://tinyurl.com/y9axavfl>.



establishments, prisons and the residences of certain identified persons; not contacting those same persons; a ban on leaving Australia; restricted access to mobile phones and other telecommunication devices subject to prior AFP approval; restricted access to internet service subject to prior AFP approval; a prohibition on “accessing, acquiring, possessing, accumulating, storing or distributing electronic media” relating to extremist materials, activities or propaganda; and a requirement that he “participate in counselling or education relating to [his] spiritual, emotional and physical wellbeing for a period of at least sixty minutes every week.”<sup>379</sup> In addition, he interim order specifically restricted Causevic from going “inside, or in the grounds of, any masjid/mosque, or any other place of observance, other than” the one specified in the order.<sup>380</sup>

The interim control order was made on September 15, 2015, but was not confirmed until July 8, 2016, with about two months remaining on its being in force.<sup>381</sup> As part of the confirmation process, Causevic complained about the onerous nature of the restrictions, his lawyers arguing “that he was [effectively] being punished without charge.”<sup>382</sup> In particular, they argued that the GPS monitoring taking place through the tracking device he was required to wear for the preceding nine months was impeding Causevic’s ability to gain employment and therefore was “negative . . . for his development and the broader community.”<sup>383</sup> The reviewing magistrate agreed, ordering that the device be removed in the interest of promoting his “ability to get a job and general rehabilitation.”<sup>384</sup> Aside from a few other small variances, the remainder of the control order was substantially confirmed and stayed into effect until September 2016.<sup>385</sup>

## 7. Critiques

Domestic and international critiques of Australia’s control order regime focus on questions of whether the orders are truly effective at protecting the public, as well as whether they are necessary, appropriate and otherwise compatible with human rights protections. There are also concerns about the *ex parte* nature of interim control order proceedings and the suspect’s ability to access and contest the evidence against them.<sup>386</sup> Even so, the

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379. Interim Control Order, *Gaughan v. Causevic*, sch 1 (Sept. 10, 2015) (Austl.).

380. *Id.*, Control 4, ¶ 4.

381. Interim Control Order, *Gaughan v Causevic* (No 2) [2016] FCCA 1693; *see also* RENWICK, *supra* note 260, at 15, ¶ 3.17.

382. Calla Wahlquist, *Tracking Device Removed from Teenager Formerly Linked to Anzac Day Terrorist Plot*, GUARDIAN (July 8, 2016), <https://tinyurl.com/ybq7tp9l>.

383. Wahlquist, *supra* note 375.

384. Wahlquist, *supra* note 382.

385. *Id.*

386. Jagers, *supra* note 328; RENWICK, *supra* note 259, at 49, ¶ 8.4; *see also supra* notes 336-337 and accompanying text (highlighting related concerns expressed by the U.N. Rapporteur).

prevailing view among law and policy makers in the country is that the control order regime is necessary and appropriate given the real threat of more acts of terrorism in the country.<sup>387</sup>

Domestically, Bret Walker, who served as Australia's first Independent National Security Legislation Monitor (INSLM) from 2010 to 2014, doubted the effectiveness of Australia's control order regime, especially in relation to the first two control orders adopted.<sup>388</sup> Other legal commentators agreed.<sup>389</sup> One eminent law professor remarked that "[i]t [was] not clear that [Jack Thomas' and David Hicks'] order[s] were necessary, or did anything to protect the community."<sup>390</sup> A top policeman echoed the concern that control orders are "only useful where the police have sufficient intelligence about a person's [prior] activity,"<sup>391</sup> which is not always the case when terror attacks take place.<sup>392</sup> Nor are they effective at stopping committed extremists. In his 2012 report, Walker observed that "[t]he deterrent effect of a [control order] largely depends on the person's willingness to respect a court order. It is unlikely that a terrorist who is willing to commit suicide in his terrorist act will be deterred by a" control order.<sup>393</sup>

In 2012, INSLM Walker recommended repealing Division 104 on control orders, finding that they were not justified.<sup>394</sup> In addition to the questions about the ATPCMs effectiveness, he was concerned that the control order regime could be utilized as "an alternative means to restrict a person's liberty where a prosecution fails but the authorities continue to believe the acquitted (or not convicted) defendant poses a threat to national security."<sup>395</sup> For these reasons, Walker believed that the ruling in *Thomas v. Mowbray* did "not foreclose the possibility of an adverse opinion . . . concerning any of the 'effectiveness, appropriateness . . . and necessity' of the control order regime."<sup>396</sup> He proposed replacing it instead with a narrower one "authorizing [control orders] against terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness."<sup>397</sup> Only in such cases would control orders be justified, but never where such orders were "sought in relation to persons

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387. See *infra* notes 410-414 and accompanying text.

388. Walker, *supra* note 310, at 4, 29.

389. George Williams, *Some of Our Anti-Terrorism Laws are Well Past Their Use-By Date*, SYDNEY MORNING HERALD (Aug. 14, 2012), <https://tinyurl.com/y839haa7>.

390. *Id.*

391. Blackburn & Tulich, *supra* note 11.

392. *Id.*

393. Walker, *supra* note 310, at 38.

394. *Id.* at 44.

395. *Id.* at 17.

396. *Id.* at 38.

397. *Id.* at 44.

‘before charge and trial, after trial and acquittal or who will never be tried’<sup>398</sup>

International experts agreed with INSLM Walker on key points of his critique. U.N. Special Rapporteur Martin Scheinin in his 2006 report to the Human Rights Council raised red flags about the impact on personal liberty of control orders in Australia because he, like Walker, believed that “[such orders] should never substitute for criminal proceedings.”<sup>399</sup> In this regard, he questioned the control order in the Jack Thomas case.<sup>400</sup> With respect to the control order regime generally, he expressed concern

that house arrest [was] a possible imposition under a control order . . . [but] that house arrest (like any form of detention) is only permissible during the course of a *criminal* investigation; while awaiting trial or during a trial; or as an alternative to a custodial sentence (while on parole, for example).<sup>401</sup>

With respect to appropriateness and proportionality, Human Rights Watch (HRW) has criticized the control order regime for the potentially punitive effects of the restrictions that can be imposed on a person without the protections of criminal due process.<sup>402</sup> For instance, an accumulation of onerous constraints on a suspect’s personal freedom can amount to an “unlawful deprivation of liberty, without ever charging [that person] with an offense.”<sup>403</sup> For HRW and other observers, it is troubling that control orders mandate “restrictions on freedom that are imposed on people on the basis of no conviction and on a civil rather than criminal standard of proof.”<sup>404</sup> On a related front, HRW expressed concern that Australia may also be violating the United Nations Convention on the Rights of the Child because it allows control orders to be imposed on fourteen-year-olds, in violation of the Convention’s rule “that no child shall be deprived of his or her liberty arbitrarily.”<sup>405</sup> In that organization’s view, the fact that the laws allows control orders to be imposed on children for periods of up to three months, which can be renewed indefinitely, and can result in imprisonment of up to five years, is highly problematic.<sup>406</sup>

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398. RENWICK, *supra* note 259, at 47, ¶ 7.2 (quoting Walker, *supra* note 310, at 43).

399. Scheinin Report, *supra* note 312, at 37.

400. *See supra* notes 336-337 and accompanying text.

401. Scheinin Report, *supra* note 312, at 37 (emphasis added).

402. Georgie Bright, *Australia Expands ‘Control Orders’ on Children*, HUM. RTS. WATCH (Nov. 22, 2016), <https://www.hrw.org/news/2016/11/22/australia-expands-control-orders-children>.

403. *Id.*

404. Joseph, *supra* note 317.

405. Bright, *supra* note 402; *see also* Convention on the Rights of the Child art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3.

406. *Id.*

Other international NGOs share similar concerns. Amnesty International (AI) and Lawyers for Human Rights, for example, are strong critics of the *ex parte* proceedings that govern the issuance of interim control orders.<sup>407</sup> AI argues that due to the *ex parte* nature of these proceedings, and because a lawyer is only entitled to request a copy of the order, not the evidence on which it is based, “[a] person may never know the reason he or she is the subject of an [interim] order and might never find out.”<sup>408</sup> Lawyers for Human Rights believes there is no reason why the interim control order process must be *ex parte*, noting that it is a “fundamental departure” from essentially all other civil and criminal procedures in Australia.<sup>409</sup>

In September 2017, Australia’s current INSLM, James Renwick, published the latest report available on the effectiveness and legitimacy of control orders and preventive detention orders.<sup>410</sup> The INSLM’s role is to ensure “that national security and counter-terrorism legislation is applied in accordance with the rule of law and in a manner consistent with [Australia’s] human rights obligations.”<sup>411</sup> Notwithstanding his predecessor’s views to the contrary, as summarized above, INSLM Renwick concluded in 2017 that the Division 104 control orders *are* consistent with “Australia’s human rights, counter-terrorism, and international security obligations[,] proportionate to the current threats of terrorism and to national security[, and] necessary.”<sup>412</sup> Renwick further affirmed that, even though control orders pursuant to Division 104 are “rarely” made, “the [pertinent] laws have the capacity to be effective.”<sup>413</sup> For this reason, he recommended the program be continued for another five years, and Parliament agreed.<sup>414</sup>

### III. ATPCMS REGIMES UNDER INTERNATIONAL LAW

All legislative regimes are subject to international as well as domestic legal restraints. In the Introduction, I highlighted that States have “a responsibility . . . to take effective counter-terrorism measures and to investigate and prosecute those responsible for carrying out such acts, [while] emphasizing [at the same time] the importance of ensuring that [those] counter-terrorism laws, measures and practices are human rights-

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407. Jagers, *supra* note 338.

408. *Id.* (quoting AMNESTY INT’L AUSTL., SUBMISSION TO THE EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS (2006)).

409. *Id.*

410. *See generally* RENWICK, *supra* note 259.

411. *Id.* at 1.

412. *Id.* at xii.

413. *Id.*

414. *Id.* at 55; *see also* JOINT COMM. ON INTELLIGENCE AND SEC., PARLIAMENT OF AUSTL., REVIEW OF CERTAIN POLICE POWERS, CONTROL ORDERS AND PREVENTATIVE DETENTION ORDERS 13, ¶¶ 54-55 (2017).

compliant.”<sup>415</sup> The U.N. General Assembly has further underlined the importance of ensuring that any national legislation criminalizing acts of terrorism be accessible, formulated with precision, non-discriminatory, non-retroactive and in accordance with international law.<sup>416</sup> This also means complying with international human rights norms in the implementation of such legislation. Under international law, then, human rights norms establish parameters within which ATPCMs regimes must fit and operate or risk breaching the respective State’s international obligations.

By now it is evident that ATPCMs impact an extensive roster of fundamental human rights: due process and non-discrimination; personal liberty and security; freedom of movement, expression and association; freedom of religion; as well as privacy and family rights, among others. In this Part, I will reference primarily the International Covenant on Political and Social Rights (ICCPR), the U.N. human rights treaty to which each of the three States reviewed—the United Kingdom, Canada and Australia—is a party.<sup>417</sup> The ICCPR provides a normative baseline for comparative study. In addition to being a primary source for the roster of rights to be addressed, the ICCPR treaty regime provides a universal framework for their realization and restriction.<sup>418</sup> In this regard, international law recognizes that there is a narrow “flexibility” to the human rights framework that allows for “some restrictions on the enjoyment of certain human rights . . . [i]n a limited set of exceptional national circumstances.”<sup>419</sup>

This Part is broken down into two sections. The first presents an overview of the human rights from the ICCPR that are implicated by ATPCMs. The second section answers the question, “When are ATPCMs Regimes Human Rights Compliant?” The first objective of this Part is to view the country studies from Part II in light of the ICCPR’s normative framework. This will help determine the extent to which the United Kingdom, Canadian and Australian legal systems succeed in balancing the use of ATPCMs with their constitutional and international human rights obligations. The second goal is to develop a more general framework for determining when and how domestic ATPCMs regimes can be said to be compliant with States’ legal obligations under the ICCPR. The third and

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415. Fionnuala Ní Aoláin (Special Rapporteur of the Human Rights Council), *Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 2, U.N. Doc. A/72/495 (Sept. 27, 2017); see also *supra* note 6 and accompanying text.

416. G.A. Res. 70/148, ¶ 1 (Feb. 25, 2016).

417. See ICCPR, *supra* note 317. The United Kingdom ratified the ICCPR on May 20, 1976, with no relevant reservations; Canada ratified the ICCPR on May 19, 1976, with no reservations; Australia ratified the ICCPR on August 13, 1980, with no relevant reservations. *Id.*

418. See U.N. COUNTER-TERRORISM IMPLEMENTATION TASK FORCE, BASIC HUMAN RIGHTS REFERENCE GUIDE: CONFORMITY OF NATIONAL COUNTER-TERRORISM LEGISLATION WITH INTERNATIONAL HUMAN RIGHTS LAW, at 4, ¶ 5 (2014), <https://www.ohchr.org/EN/newyork/Documents/CounterTerrorismLegislation.pdf> [hereinafter CITTIF HRs].

419. See OHCHR Fact Sheet, *supra* note 6, at 22.

final objective is to draw upon the lessons learned to offer initial thoughts on the potential use of ATPCMs in the United States, itself a party to the ICCPR.<sup>420</sup>

As we move through the sections below, it will become evident that, regardless of the approach taken, ATPCMs by their very nature are a threat to the enjoyment of basic human rights and, in some cases, can undermine them. Although not prohibited *per se* by international law, it is a challenge for any State to design and deploy ATPCMs in ways that minimize the likelihood that their impact will unduly impinge on basic human rights guarantees.

#### *A. Human Rights Impacted by ATPCMs*

This section canvasses the human rights most relevant to evaluating when ATPCMs regimes are compliant with international law and applies them to the country studies from Part II. This exercise draws on the ICCPR for the operative norms primarily because all three States comprising the country studies are parties to it. But there is an additional advantage: the ICCPR has been ratified by 170 countries comprising over 85% of the world's governments and nearly 80% of the global population.<sup>421</sup> It is "one of the core international human rights instruments . . . representing in many respects a codification of the content of customary international law and of the Universal Declaration of Human Rights."<sup>422</sup> This means that the treaty's prescriptions have far-reaching implications for States beyond those at the heart of this study. This includes the United States, which I will touch upon in the conclusion.<sup>423</sup>

This section is organized around two sets of human rights norms. The first are those relating to due process and equal protection of the laws, as well as the right to liberty of persons. This grouping revolves around a core of rights rooted in the serious due process concerns raised by ATPCMs. The second set is comprised of other fundamental human rights generally impacted by such measures. These are the rights relating to the physical and mental security of persons, as well as their freedom of movement, expression, association, assembly and religion. The norms concerning non-interference with family life and privacy are also included in this grouping.

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420. See *infra* note 423 and accompanying text.

421. *Status of Ratification Interactive Dashboard*, U.N. OFF. OF HIGH COMMISSIONER ON HUM. RTS., <http://indicators.ohchr.org> (last visited July 29, 2019) (calculated by adding the populations of states that are either not signatories, or have not ratified the ICCPR, and subtracting that sum from the total population of the world, roughly 7 billion as of October 21, 2016).

422. CITTFF HRs, *supra* note 418, at 4, ¶ 5.

423. The United States ratified the ICCPR on June 8, 1992, with no relevant reservations. *International Covenant on Civil and Political Rights Signatories*, U.N. TREATY COLLECTION, <https://tinyurl.com/y4r7kxzd> (last updated June 23, 2020).

For each, I will summarize the pertinent rules and explain how international law prescribes their application in light of the examples presented in the country studies.

1. *Due Process, Equal Protection and Personal Liberty*

a) Due Process and Equal Protection of the Laws

Due process, broadly speaking, is the fair treatment of a person in the determination of his or her legal rights and duties by the authorities of a given country.<sup>424</sup> While due process features most notably in the criminal law context, it applies in some form or another to any situation where a person's rights or obligations are determined "in a suit at law."<sup>425</sup> The definition of a 'suit at law' encompasses various non-criminal proceedings, including those of an administrative nature before a judicial body.<sup>426</sup> Article 14 of the ICCPR codifies the bright line rule in international law that criminal charges, *or a person's rights and obligations in a suit at law*, must be determined by a competent, independent and impartial tribunal established by law.<sup>427</sup> Furthermore, Article 26 of the ICCPR dictates that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law."<sup>428</sup> The conjugation of Articles 14 and 26 thus establishes a "general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings before such bodies."<sup>429</sup>

Equal protection is the essential safeguard against discrimination in legal proceedings. The ICCPR Article 26 codifies this safeguard which is reinforced by a general prohibition in Article 2(1) against discrimination in the implementation of *any* of the rights enshrined in the treaty.<sup>430</sup> Together, Articles 26 and 2 constitute nothing less than "a basic and general principle relating to the protection of [all] human rights."<sup>431</sup> Equal protection in particular must be afforded "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social

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424. *See* U.N. COUNTER-TERRORISM IMPLEMENTATION TASK FORCE, BASIC HUMAN RIGHTS REFERENCE GUIDE: RIGHT TO A FAIR TRIAL AND DUE PROCESS IN THE CONTEXT OF COUNTERING TERRORISM, 4, ¶ 5 (2014), <https://tinyurl.com/ydd3t8n7> [hereinafter CTITF DPs].

425. *See* ICCPR, *supra* note 317, art. 14(a).

426. *See* CTITF DPs, *supra* note 424, at 1, ¶ 4.

427. *See* ICCPR, *supra* note 317, art. 14(a); CTITF DP, *supra* note 424, at 1, ¶ 2 (emphasis added).

428. *See* ICCPR, *supra* note 317, art. 26.

429. Human Rights Comm., General Comment No. 32, ¶ 3, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

430. "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *See* ICCPR, *supra* note 317, art. 2(1).

431. Human Rights Comm., General Comment No. 18, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 1) (Nov. 10, 1989) [hereinafter GC 18].

origin, property, birth or other status.”<sup>432</sup> Moreover, this guarantee “is not limited to citizens of State parties, but must also be available to all individuals, regardless of nationality [or] their status [who] find themselves in the territory or subject to the jurisdiction of the State party.”<sup>433</sup> In practice, it is up to States “to determine [the] appropriate measures” necessary to implement the treaty’s non-discrimination and equal protection provisions.<sup>434</sup>

Finally, because ATPCMs regimes by definition are presented as less stringent alternatives to formal criminal proceedings, the full range of due process guarantees that operate in the ordinary justice system do not attach, at least not initially; for that to happen, police or prosecutors usually must charge the suspect with criminal offenses in a timely fashion.<sup>435</sup> Critics of ATPCMs regimes are concerned that these measures circumvent the justice system. They see these regimes as nullifying fair trial guarantees by subjecting persons suspected of advancing terrorism to punitive measures without the corresponding protection provided by criminal procedure.<sup>436</sup> Fair trial protections are the subject of ICCPR Article 14 and include being brought without undue delay before a competent, independent and impartial judicial body; the presumption of innocence; equality of arms in mounting a defense; the right to a fair and public hearing, among others.<sup>437</sup> These are especially critical in the counter-terrorism context:

In establishing a list of principles applicable to the detention of persons in the framework of counter-terrorism measures, the UN Working Group on Arbitrary Detention has stated that: ‘In the development of judgments against them, the persons accused of having engaged in terrorist activities shall have a right to enjoy the necessary guarantees of a fair trial, access to legal counsel and representation, as well as the ability to present exculpatory evidence and arguments under the same conditions as the prosecution . . . .’<sup>438</sup>

#### b) The Liberty of Persons

A cornerstone of international human rights law is the right to liberty and security of person, without distinctions of any kind.<sup>439</sup> Liberty of person

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432. *Id.*

433. *Id.* ¶ 9.

434. *Id.* ¶ 4.

435. *See* ICCPR, *supra* note 317, art. 14.

436. *See, e.g.*, Scheinin Report, *supra* note 281.

437. *See* ICCPR, *supra* note 317, art. 14.

438. *See* CITT DP, *supra* note 424, at 5, ¶ 8 (quoting Report of the Working Group on Arbitrary Detention, ¶ 54(g), U.N. Doc. A/HRC/10/21 (Feb. 16, 2009)).

439. Human Rights Comm., General Comment No. 35, ¶¶ 2, 17, U.N. Doc. CCPR/G/GC/35 (Dec. 16, 2014) [hereinafter GC 35].



includes the express right to be free from arbitrary arrest and detention.<sup>440</sup> Naturally, there is an overlap between ICCPR Articles 2(1) and 26's mandates to ensure equal protection of the laws, on the one hand, and the due process and fair trial guarantees of Articles 9 and 14, respectively, on the other.<sup>441</sup> The significance of the interplay between these mandates will be a recurring theme of this sub-section. At the same time, ICCPR Article 9 protects the security as well as the liberty of persons. Security of person means "freedom from injury to the body and the mind, or bodily and mental integrity."<sup>442</sup> As such, it is part and parcel of Article 7's prohibition on torture and cruel, inhumane and degrading treatment,<sup>443</sup> and its significance will be addressed in conjunction with the discussion of Article 7 in the next sub-section.

Liberty of person under Article 9 of the ICCPR means "freedom from confinement" except on such grounds and in accordance with such procedures as are established by law.<sup>444</sup> It applies to "everyone [including] persons who have engaged in terrorist activity."<sup>445</sup> Whenever an arrest, detention or other deprivation of liberty occurs, the specific safeguards in Article 9 are triggered, most notably "the right to review by a court of the legality of detention, [which] applies to all persons deprived of liberty."<sup>446</sup> This critical right enshrines the bright-line principle of *habeas corpus* that extends to all forms of detention, including those carried out in the name of national security and counter-terrorism.<sup>447</sup> Another important safeguard is the right of any person being arrested to be informed of the reasons for his or her detention at the time he or she is taken into custody.<sup>448</sup> This process matters because it is meant to "enable [the person] to seek release if they believe that the reasons given are invalid or unfounded."<sup>449</sup>

Though similar in some respects, it is helpful to clarify the difference between Article 9's right to personal liberty, and Article 12's right to freedom of movement which will be discussed in the next sub-section. An arrest, detention or deprivation of personal liberty for purposes of Article 9 must involve "more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12."<sup>450</sup>

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440. See ICCPR, *supra* note 317, art. 9(1)-(4).

441. See GC 18, *supra* note 431, ¶ 3.

442. GC 35, *supra* note 439, ¶ 3.

443. *Id.* ¶ 56.

444. *Id.* ¶ 3; see also ICCPR, *supra* note 317, art. 9(1).

445. *Id.* ¶ 3.

446. *Id.* ¶ 4.

447. *Id.* ¶¶ 39-40.

448. See ICCPR, *supra* note 317, art. 9(2).

449. GC 35, *supra* note 439, ¶ 25 (citing *Campbell v. Jamaica*, Communication 248/1987, UN Doc. CCPR/C/44/D/248/1987, Decision on the Merits, United Nations Human Rights Committee [UNHRC], ¶ 6.3 (Mar. 30 1992)).

450. *Id.* ¶ 5.

Recognized examples of deprivations of liberty for purposes of Article 9 that are relevant to our discussion of ATPCMs are:

- being held in police custody or remand detention,
- house arrest,
- administrative detention,
- involuntary hospitalization,
- confinement to a restricted area of an airport, and
- being involuntarily transported.<sup>451</sup>

Whether or not any of these deprivations of liberty amount to a *violation* of Article 9, however, depends on the circumstances of a given case. For example, a State cannot arrest, detain or otherwise deprive a person of liberty as punishment for the legitimate exercise of the rights guaranteed by the ICCPR.<sup>452</sup> To do so would be *per se* arbitrary. These guaranteed rights include freedom of opinion and expression (Art. 19), freedom of assembly (Art. 21), freedom of association (Art. 22), freedom of religion (Arts. 18 and 27) and the right to privacy (Art. 17).<sup>453</sup> Furthermore, keeping in mind the aforementioned interplay between equal protection and personal liberty, any “[a]rrest or detention on discriminatory grounds in violation of [ICCPR] article 2, paragraph 1 . . . or article 26 is also in principle arbitrary.”<sup>454</sup> This means that no deprivation of liberty can be based on distinctions like the status of persons as “aliens, refugees and asylum seekers, stateless persons, migrant workers, persons convicted of crime, [or] persons who have engaged in terrorist activity.”<sup>455</sup>

The right to personal liberty is, of course, not absolute. It is perfectly legitimate to arrest persons suspected of breaking criminal laws,<sup>456</sup> so long as the arrest and subsequent detention are not arbitrary and are carried out “with respect for the rule of law.”<sup>457</sup> An arbitrary arrest or other deprivation of liberty is one that fails to guarantee due process or other basic elements of “[j]ustice], reasonableness, necessity and proportionality.”<sup>458</sup> Thus, for example, “the decision to keep a person in any form of detention [that is not the result of a judicially imposed sentence] is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.”<sup>459</sup>

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451. *Id.*

452. *Id.* ¶ 17.

453. *Id.*

454. *Id.*

455. *Id.* ¶ 3.

456. *Id.* ¶ 10.

457. *Id.* ¶¶ 10, 65; *see also* ICCPR, *supra* note 317, art. 9(1).

458. GC 35, *supra* note 439, ¶ 12.

459. *Id.*

Finally, it is possible for an arrest, detention or other deprivation of liberty to be considered legal pursuant to *domestic* law, but deemed arbitrary under *international law* if Article 9 safeguards are not met.<sup>460</sup>

As illustrated in Part II, the ATPCMs affecting the liberty of suspects in many cases fall short of crossing Article 9's threshold. They do not necessarily involve an arrest, detention or deprivation of liberty in the terms just described. Nonetheless, some ATPCMs can come close to — and even cross — that threshold. These measures are tantamount to administrative or other forms of detention carried out in the name of national security or counter-terrorism and function where criminal charges cannot be, or are not being, brought.<sup>461</sup> Such 'security detentions' pose severe risks of arbitrary deprivation of liberty because, ordinarily, "other effective measures addressing the threat, including the criminal justice system, would be available."<sup>462</sup> Under the ICCPR framework this type of detention is considered compatible with human rights *only* "if under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat."<sup>463</sup> This language reflects a high standard of proof that the State has the burden to meet.

### c) Analysis

Application of the foregoing human rights framework for due process and personal liberty to the country studies in Part II requires, first and foremost, a systemic analysis, which I conduct in Part III.B(ii) below. The analysis in this regard must be systemic because the most salient issues are *de jure*. In other words, they are legal issues that arise when certain provisions of the legislative framework that governs a particular ATPCMs regime do not conform to human rights (ICCPR) standards as codified.<sup>464</sup> This analysis will show that there are indeed structural features of each of the three ATPCMs regimes studied that fail to fully conform to such standards. Examples of these features include a reliance on excessive Executive authority (United Kingdom), regular *ex parte* hearings (United Kingdom, Australia), low standards of proof (Canada) and high standards of review (United Kingdom), as well as the use of secret evidence (all three).<sup>465</sup>

Additionally, each of the countries studied has prescribed available measures—restrictions or conditions that can be imposed on suspects—

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460. *Id.*

461. *See id.*, ¶ 40.

462. *Id.* ¶ 15; *see also* Human Rights Comm., Concluding Observations: Colombia, ¶ 20, U.N. Doc. CCPR/C/COL/CO/6 (Aug. 4, 2010); Human Rights Comm., Concluding Observations: Jordan, ¶ 11, U.N. Doc. CCPR/C/JOR/CO/4 (Nov. 18, 2010).

463. *See supra* GC 35, note 439, at 4 and accompanying text.

464. *See infra* Part III.B(ii).

465. *See infra* Part III.B(ii).

that, *prima facie*, run counter to the aforementioned human rights protections. Among such conditions are forced relocation and similarly onerous constraints on personal liberty, such as house arrest. that are tantamount to detention.<sup>466</sup> EB in the United Kingdom and Jack Thomas from Australia are examples of cases implicating this practice.<sup>467</sup> Along with the aforementioned structural deficiencies, these burdensome restrictions on liberty will undermine suspects' rights to due process and personal liberty across the board, especially when taken in combination with those deficiencies.<sup>468</sup> In the end, a case-by-case analysis is required to determine if a person's human rights have been violated and if that violation is justified or not by exceptional circumstances, with special attention paid to the necessity and proportionality of the measures to be imposed in a given situation.<sup>469</sup>

## 2. *Other Fundamental Human Rights Impacted by ATPCMs*

The roster of potentially affected rights does not end with due process, equal protection and personal liberty. The deployment of ATPCMs implicates a series of additional guarantees in the ICCPR and other human rights treaties. These include the right not to be tortured or subjected to cruel, inhumane or degrading treatment (CIDT); freedom of movement; the rights to privacy and family life; the rights to freedom of expression; association and assembly; and freedom of religion. Each of these is examined in turn below.

### a) Freedom from Torture and CIDT

The ICCPR guards against unlawful bodily and mental harm to persons specifically in two articles, Articles 9 and 7. Article 9 was introduced in the prior sub-section. As explained earlier, Article 9 guarantees “[t]he right to security of person [which] protects individuals against intentional infliction [by State agents] of bodily or mental injury, regardless of whether the victim is detained or non-detained.”<sup>470</sup> At the same time, Article 7 of the ICCPR *explicitly* prohibits torture, as well as cruel, inhuman and degrading treatment or punishment.<sup>471</sup> This provision also affords protection from both physical

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466. *See infra* Part III.B(ii); *see also supra* note 315.

467. *See supra* notes 91, 336 and accompanying text. It is certainly likely that if the pertinent constraints applied to EB and Jack Thomas through their respective ATPCMs orders impinged unduly on their due process rights, the same terms applied to other individual cases imposing forced relocation or similar burdens on liberty would too. *See supra* Part II.A(v).

468. *See infra* Part III.B.(iii).

469. *See infra* Part III.B.(iii).

470. GC 35, *supra* note 439, ¶ 9.

471. *See* ICCPR, *supra* note 317, art. 7. CIDT is best understood as “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 16, *opened for signature* Dec. 10,

pain and mental suffering.<sup>472</sup> The guarantee of physical and mental integrity in the ICCPR is of such critical importance that it cannot be restricted or its violation justified by States under any circumstances.<sup>473</sup>

The ambit of protection enshrined in Article 7 is fairly broad. There is no bright-line distinction between torture and CIDT; instead, suspect acts by State officials must be examined on a case-by-case basis, taking into account the “nature, purpose and severity of the treatment applied.”<sup>474</sup> It is worth noting that “the prohibition extend[s] to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.”<sup>475</sup> It is not hard to see how, under this standard, certain ATPCMs can cross the line into cruel, inhumane or degrading treatment. The case of DD in the United Kingdom is a good example: the judge allowed DD to modify the conditions of his TPIMs notice and remove the electronic tracking device on him, after finding that, due to DD’s mental illness, the device caused him undue psychological anguish.<sup>476</sup> Even in cases less extreme than DD’s, there is always a question of how the measures imposed on a suspect, individually and taken together, may impact their well-being.

#### b) Freedom of Movement

According to ICCPR Article 12, persons lawfully inside the territory of a State are entitled to “liberty of movement and freedom to choose [their] residence.” This provision further dictates everyone’s freedom to leave any country, as well as the right of any national of a given country to enter at will.<sup>477</sup> The freedom to leave a State’s territory covers the right to obtain the necessary travel documents, such as a passport.<sup>478</sup> Generally, it is prohibited to have any “form of forced internal displacement” and prevent people from entering or remaining in a specific place within the territory.<sup>479</sup> This,

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1984, 85 U.N.T.S. (entered into force June 26, 1987). 1465. Among other things, this refers to the degree of pain or suffering required; for CIDT, it would not need to be as “severe” as for torture. *Id.* The definition of “torture” in the Convention Against Torture is: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” *Id.* art. 1.

472. Human Rights Comm., General Comment No. 20, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 1) (May 27, 2008) [hereinafter GC 20].

473. *Id.* ¶ 3.

474. *Id.* ¶ 4.

475. *Id.* ¶ 5.

476. *See supra* notes 96-100 and accompanying text.

477. *See* ICCPR, *supra* note 317, art. 12(1), (4).

478. Human Rights Comm., General Comment No. 27, ¶ 9, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 1) (Nov. 2, 1999) [hereinafter GC 27].

479. *Id.* ¶ 7.

however, is precisely the aim of the most common type of ATPCMs. In nearly all the individual cases surveyed, ATPCMs restricted a person's movement to a defined area, including burdensome curfews.<sup>480</sup> Some prohibited visiting or entering certain public spaces, like the cases of Mohamed El Shaer in Canada, and Harun Causevic in Australia.<sup>481</sup> Finally, some ATPCMs included forced relocation like that challenged by EB in the United Kingdom, which is considered so onerous as to rise to the level of a *per se* transgression of personal liberty requiring "the most exceptional circumstances," and a showing of "a present, direct and imperative threat . . . to justify the [security] detention of persons considered to present such a threat."<sup>482</sup>

Generally speaking, imposing limits on a suspects' movements through travel bans, curfews, geographic restrictions, and prohibitions on visiting or entering specified areas or places is one of the most readily justified measures available under each ATPCMs regime. Unlike the right to be free from torture and CIDT, which can never be circumscribed, a person's freedom of movement may be curtailed under certain exceptional circumstances. These circumstances, which tend to be present in counter-terrorism cases, must be "provided by law . . . necessary to protect national security, public ord[er], public health or morals or the rights and freedoms of others, and [must be] consistent with the other rights recognized in the [ICCPR]."<sup>483</sup> Any condition imposed must also be proportional.<sup>484</sup> This means that it must be an appropriate means of achieving the State's purpose, the least restrictive and intrusive means possible, and it "must be proportionate to the interest to be protected."<sup>485</sup> The foregoing discussion illustrates how difficult it is for States to meet these requirements, and why sometimes they fail to do so.

### c) Rights to Privacy and Family Life

Article 17 of the ICCPR protects persons from "arbitrary or unlawful interference with his [or her] privacy, family, home, or correspondence," and further establishes that everyone shall have "the right to the protection of the law against such interference or attacks."<sup>486</sup> The meaning of "home" in the article is defined as "the place where a person resides or carries out

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480. *See supra* Part II.A-C.

481. *See supra* notes 237, 379 and accompanying text.

482. *See infra* note 439, at 15 and accompanying text. EB's case was discussed in Part II.A(v); *see also* note 91 and accompanying text.

483. *See* ICCPR, *supra* note 317, art. 12(3).

484. GC 27, *supra* note 478, ¶ 14.

485. *Id.*

486. *See* ICCPR, *supra* note 317, art. 17.

his usual occupation.”<sup>487</sup> The phrase “unlawful interference” means the only interference permitted under this Article is that prescribed by the law.<sup>488</sup> This means that any laws implementing Article 17’s provisions must “specify in detail the precise circumstances in which such interferences may be permitted.”<sup>489</sup> Even interference carried out pursuant to law can be arbitrary if it is not carried out “in accordance with the provisions, aims and objectives of the [ICCPR, and is] reasonable in the particular circumstances.”<sup>490</sup> In practice, only the severest ATPCMs, such as forced relocation, may be deemed unreasonable interferences with a terror suspect’s family and private life, as was the case under the control order regime in the United Kingdom before it was replaced by TPIMs.<sup>491</sup> Like freedom of movement, privacy rights are the crux of what ATPCMs are intended to control. Therefore, most measures will be considered justified so long as they are not patently overbroad or arbitrary.<sup>492</sup>

d) Rights to Freedom of Expression, Association and Assembly

A group of inter-related rights frequently impacted by ATPCMs are those relating to freedom of expression, association and assembly.<sup>493</sup> Article 19 of the ICCPR ensures a person’s rights to hold opinions without interference as well as to freedom of expression.<sup>494</sup> “The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.”<sup>495</sup> Freedom of expression consists of the right “to seek, receive and impart information and ideas of all kinds . . . through any media of . . . choice.”<sup>496</sup> It is meant to protect both religious and political discourse, both of which are essential to “every free and democratic society.”<sup>497</sup> In this respect, it is important to highlight that Article 19(2) “embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.”<sup>498</sup>

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487. Human Rights Comm., General Comment No. 16, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. 1) (May 27, 2008) [hereinafter GC 16].

488. *Id.* ¶ 3.

489. *Id.* ¶ 8.

490. *Id.* ¶ 4.

491. *See supra* notes 117-118 and accompanying text.

492. *See infra* Part III.D, especially notes 602-603 and accompanying text.

493. Human Rights Comm., General Comment No. 34, ¶ 4, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) [hereinafter GC 34]. Freedom of expression “is integral to the enjoyment of the rights to freedom of assembly and association . . .” *Id.*

494. *See ICCPR, supra* note 317, art. 19.

495. GC 34, *supra* note 493, ¶ 2.

496. *Id.*

497. *Id.* ¶ 2.

498. *Id.* ¶ 11.

ICCPR Articles 19(3) and 20 establish the framework that States must follow when adopting measures that would curtail peoples' freedom of expression rights. Paragraph 3 of Article 19 requires that any restrictions be provided by law and necessary to advance a legitimate State aim. Namely, a State may restrict these rights to some extent to protect national security, public order, or public health or morals, on the one hand, or to respect the rights of fellow persons, on the other.<sup>499</sup> It is in this vein of balancing expression with the rights of others that Article 20 mandates a bright-line prohibition of "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence," and that such extreme forms of expression must "be prohibited by law."<sup>500</sup>

The freedom to associate with others enshrined in ICCPR Article 22, and the right to peaceful assembly in Article 21, are closely linked to Article 19 as well as to each other. Their defining role in enabling a vibrant, functioning democracy is manifest. "Citizens . . . take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association."<sup>501</sup> Like Article 19, Articles 21 and 22 expressly set out a framework for States seeking to adopt limitations on the rights of assembly and association, in almost identical terms:

No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.<sup>502</sup>

Not surprisingly, all three freedoms—expression, association and assembly—are heavily implicated in the ATPCMs regimes studied and individual cases surveyed. Indeed, every regime expressly establishes a number of measures aimed directly at limiting a person's ability to communicate and associate with other persons convicted of or implicated in terrorist activity; these measures include bans or limits on electronic means of communication, as well as prohibitions on meeting with or speaking to designated individuals.<sup>503</sup> Said measures generally will meet the exceptions regime standard, save in cases where the particular measures

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499. See ICCPR, *supra* note 317, art. 19(3); see also GC 16, *supra* note 487, ¶¶ 2-3 (describing unlawful interference in the context of the right to privacy).

500. See ICCPR, *supra* note 317, art. 20.

501. Human Rights Comm., General Comment No. 25, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996).

502. See ICCPR, *supra* note 317, art. 22(2); see also ICCPR, *supra* note 317, art. 21 (providing a similar qualification to the right of peaceful assembly).

503. See *supra* notes 27, 151, 158, 295 and accompanying text.



adopted are overbroad. Thus, for example, in the Australian case of Ahmad Naizmand, the *full* ban imposed in the interim control order on using “mobile phones, computers, email, any telephone service, any internet account or any web applications” was considered excessive and subsequently narrowed by the judge who confirmed the control order.<sup>504</sup>

e) Freedom of Religion

Article 18 of the ICCPR provides that everyone is entitled to freedom of religion.<sup>505</sup> This right includes the freedom “to have or to adopt a religious belief of [one’s] choice . . . and to “manifest [one’s] religion or belief in worship, observance, practice and teaching,” individually or with others.<sup>506</sup> No one can be coerced in such a way that would impair their ability to have or adopt such a belief.<sup>507</sup> This includes using penal sanctions to force someone to disavow their religion or beliefs, or force them to adhere to different beliefs.<sup>508</sup> At the same time, these principles are reinforced by ICCPR’s Article 27, which affirms that persons belonging to “ethnic, religious or linguistic minorities . . . shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion.”<sup>509</sup> As noted in the prior discussion of the ICCPR’s equal protection and non-discrimination rules, a person’s freedom of religion is further protected by operation of Articles 26 and 2(1) which together ensure that the implementation of the rights contained in the Covenant cannot discriminate on any grounds, including religion, and must guarantee full equality of all people before the law.<sup>510</sup>

Freedom of religion, however, can be regulated or curtailed under certain circumstances. For example, religious advocacy that promotes “national, racial, or religious hatred” and incites discriminatory or violent behavior will not be protected by Articles 18 or 27.<sup>511</sup> More generally, the right to hold and practice one’s religion or beliefs can be limited by “necessary” measures prescribed by law “to protect public safety, order,

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504. *See supra* notes 357, 363-364 and accompanying text.

505. *See* ICCPR, *supra* note 317, art. 18(1)-(3).

506. *Id.*

507. *Id.*

508. Human Rights Comm., General Comment No. 22, ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993) [hereinafter GC 22] (explaining that ICCPR article 4(2) reflects the non-derogable nature of article 18(1); article 18 guarantees the right to freedom of thought, conscience and religion “even in time of public emergency”).

509. *See* ICCPR, *supra* note 317, art. 27.

510. *See* ICCPR, *supra* note 317, art. 2(1), art. 26 and accompanying text; *see also* GC 18, *supra* note 431, ¶ 12 (explaining that article 26 protections extend beyond the rights enumerated in article 2 of the Covenant, requiring State parties to further prohibit discrimination “in law and in fact in any field regulated and protected by public authorities”).

511. GC 22, *supra* note 509, ¶ 7; *see also* ICCPR, art. 20 (prohibiting advocacy of religious hatred).

health, or morals or the fundamental rights and freedoms of others.”<sup>512</sup> Such restrictions, however, “are not allowed on grounds not specified, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security.”<sup>513</sup> Clearly, States must proceed with great care when intervening in a person’s right to practice their religion.

The strictest conditions on a person’s right to freedom of thought, belief and religion are in Australia, where the Criminal Code authorizes judges to impose “a *requirement* that the person participate in [religious] counselling or education,”<sup>514</sup> In addition, Australian courts have interpreted their authority to restrict a person from “being at specified areas or places” to mean that they can prohibit suspects from going “inside, or in the grounds of, *any* masjid/mosque, or any other place of observance,” except for one – literally, just one -- designated by the court.<sup>515</sup> This draconian measure was imposed by Australian courts on both Ahmed Naizmand and Hasun Causevic. However, the judge, when confirming the interim control order in the former case, was persuaded to relax the scope of the condition to allow Naizmand broader access to other places of worship.<sup>516</sup> Both of these extreme conditions — forced participation in religious “counseling or education” and a prohibition on visiting more than a single officially designated mosque — were imposed *simultaneously* on Hasun Causevic,<sup>517</sup> which almost certainly violated his rights to hold beliefs as well as to practice their religion.<sup>518</sup>

Australia is not the only country to struggle to impose ATPCMs in a manner consistent with freedom of religion. In a case from Canada similar to that of Hasun Causevic, the one concerning Adam Driver, a judge found that the government could not force the defendant into a “treatment” program consisting of “religious counseling” because it would constitute undue interference with his personal belief system in violation of that country’s Charter of Fundamental Rights.<sup>519</sup> In short, measures that impinge on freedom of religion must be carefully tailored so as not to unduly undermine a suspects right to worship or otherwise hold their religious beliefs.

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512. See ICCPR, *supra* note 317, art. 18(3).

513. GC 22, *supra* note 508, ¶ 8.

514. See *Criminal Code Act 1995* (Cth) s 104.5(3)(a)-(l) (Austl.) (emphasis added); see also *supra* notes 361, 379 and accompanying text.

515. Farrell & Safi, *supra* note 356 (emphasis added).

516. See *supra* notes 360, 380 and accompanying text.

517. See *supra* notes 360-362, 378-380 and accompanying text.

518. See *supra* notes 505-508 and accompanying text; see also *Criminal Code Act 1995* (Cth) s 104.5(3)(a)-(l) (Austl.).

519. See *supra* notes 191-194 and accompanying text.

## B. *When Are ATPCMs Regimes Human Rights Compliant?*

### 1. *Introduction*

It is important to be clear about the central concern running through the analysis of ATPCMs in this final section of Part III. By default, anti-terrorism pre-crime measure regimes operate in a ‘grey area’ of law and are driven by compelling counter-terrorism forces. This raises the specter of States seeking to do *indirectly* what they are prohibited from doing *directly*; that is, circumventing the criminal justice system’s due process requirements in terrorism cases by imposing punitive sanctions on suspects without providing pre-trial or fair trial protections.<sup>520</sup> International law anticipates this contingency and addresses it in no uncertain terms: any special procedures directed at terrorist activity must be prescribed by law and cannot “amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections.”<sup>521</sup>

For any country, the answer to when ATPCMs regimes are human rights compliant will depend on the responses to three sub-queries. First, to what extent is the legal regime *as a whole* in conformity with the dictates of international human rights law? The idea here is to understand whether the pertinent legislation was properly enacted and whether the rules and procedures as established harmonize with the State’s obligations under the ICCPR. The second interrogatory addresses the implementation of the regime in particular cases, and asks, “to what extent do the measures imposed on a subject impinge on that person’s human rights?” This inquiry has both an objective and subjective component: it looks at the types of measures imposed in specific cases as well as how onerous they are in effect. I have already begun to address this question by summarizing in Part II several emblematic cases in all three ATPCMs regimes, which then served to illustrate how the human rights identified in Section A *supra* are impacted.

The third and final query, which is closely linked to the prior one, is this: “In a particular case, when a subject’s human rights are impacted, to what extent can the measures at issue be deemed a lawful exercise of the enacting State’s limited power to restrict basic human rights under exceptional circumstances?” Understanding the interplay between these last two queries is one focus of this section; answering the first interrogatory formulated above is another. The goal is to identify key factors in the calculus for evaluating State compliance with human rights law when adopting ATPCMs regimes and implementing them. I conclude by briefly extrapolating some of the lessons learned from the aforementioned analyses, and their

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520. *See* GC 35, *supra* note 439, ¶ 14.

521. *Id.*

application to the country case studies in Part II, to the United States, which has an inchoate ATPCMs regime in waiting.

### C. *ATPCMs Regimes and International Human Rights Law*

We have seen that “States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, including international human rights law.”<sup>522</sup> Deciphering the question of whether legislation establishing an ATPCMs regime has been properly enacted in this way, and its provisions crafted in line with a State’s human rights obligations, requires a systemic analysis focusing on compliance *de jure*.<sup>523</sup> It obliges us to evaluate first the *process* through which legislation (or amendments to existing legislation) is enacted, as well as the rules and procedures it authorizes, *as codified*. Put simply, to pass muster under international law as a threshold matter, an ATPCMs regime must on its face respect the rule of law and conform to the human rights standards outlined in Part III.A above.<sup>524</sup> For starters, this usually means seeking “the broadest possible political and popular support for counter-terrorism laws through an open and transparent process.”<sup>525</sup> It also means ensuring that any legislation produced by this process is treated as “extraordinary” in a number of specific ways.<sup>526</sup>

In democratic societies, there are a number of ‘best practices’ intended to ensure consistency between counter-terrorism laws, including those governing ATPCMs regimes, and a State’s international legal obligations.<sup>527</sup> At a structural level, it is recommended that any “specific powers” conferred under such laws “be contained in stand-alone legislation capable of being recognized as a unique exception to customary legal constraint.”<sup>528</sup> At the same time, there is a broad international consensus around the recommendation that the legal “provisions under which such powers are established should be subject to sunset clauses and regular review.”<sup>529</sup> Indeed, the heart of this safeguard is ensuring regular review of, and reporting on, counter-terrorism laws and practice, including through the use

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522. CITTFF HRs, *supra* note 418, at 1; *see supra* notes 6-8 and accompanying text.

523. *See, e.g.*, RENWICK, *supra* note 259, at xii, ¶¶ 5.37-5.38 (evaluating the Australian control order framework in light of the country’s human rights law framework).

524. CITTFF HRs, *supra* note 418, at 1, 15 (Principle 2).

525. *Id.* ¶ 55.

526. Martin Scheinin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Ten Areas of Best Practices in Countering Terrorism*, ¶ 20, U.N. Doc. A/HRC/16/51 (Dec. 22, 2010), <https://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/a-hrc-16-51.pdf> [hereinafter *Terrorism Report*].

527. *Id.* ¶¶ 10-11.

528. CITTFF HRs, *supra* note 418, ¶ 60(b).

529. *Id.*

of independent mechanisms.<sup>530</sup> Best practice in this regard requires ensuring “periodic parliamentary review” of legislation, as well as “annual governmental [and] independent review[s],” including by the Judiciary, of such laws and the exercise of power under them.<sup>531</sup>

Whenever possible, all “review mechanisms should enable public consultation and should be accompanied by publicly available reports.”<sup>532</sup> As concerns parliamentary review, the idea is to have mechanisms within the legislative process that guarantee input on *proposed* counter-terrorism laws or amendments. This input should be directed in particular to “any provision that appears to be inconsistent with the purpose and provisions of international human rights . . . law . . . binding on the State.”<sup>533</sup> Subsequently, the legislature itself should “through a specialized body or [other legislative procedure], review and ensure that any law approved by it conforms to the norms of international human rights . . . law . . . binding upon the State.”<sup>534</sup> In other words, regular legislative review of the legal framework governing ATPCMs, before and after it is enacted, is a hallmark of a compliant regime. But it is not the only one.

In a functioning democracy, the Executive also fulfills a critical role in ensuring that counter-terrorism legislation, including for ATPCMs, is consistent with the State’s obligations under international law. A best practice in this regard is for any such legislation to be subject to independent review by an expert or other delegate of the Executive branch.<sup>535</sup> The person appointed should “at least every 12 months, carry out a review of the operation of the law relating to terrorism and report the findings of such review to the Executive and the Legislature.”<sup>536</sup> Their study should expressly address whether the law and any proposed or recent amendments continue to be “compatible with international human rights . . . law.”<sup>537</sup> As a practical matter, then, the function of the independent government reviewer encompasses an analysis of the legislation’s sunset clause(s) and “whether the overall operation of [the law] calls for [its] modification or discontinuance.”<sup>538</sup>

Another best practice closely interrelated to that of carrying out regular reviews of counter-terrorism laws is the use of sunset clauses. Sunset clauses are legislative devices that establish a fixed period of operation for legal provisions after which those provisions will automatically lapse “unless the

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530. *Id.* ¶ 61.

531. *Id.* at 24, ¶¶ 57, 61.

532. Terrorism Report, *supra* note 526, ¶ 19.

533. CITTf HRs, *supra* note 418, ¶ 55.

534. Terrorism Report, *supra* note 526, ¶ 14(2).

535. CITTf HRs, *supra* note 418, ¶ 62.

536. *Id.*

537. *Id.*

538. *Id.*

Legislature reviews and renews them before [the given] date.”<sup>539</sup> In the counter-terrorism context, the use of sunset clauses as well as the regular review of those clauses by the Legislature, the Executive and independent experts, are essential safeguards to ensuring that “special powers relating to the countering of terrorism are effective and continue to be required.”<sup>540</sup> The goal is “to help avoid the ‘normalization’ or de facto permanent existence of extraordinary measures.”<sup>541</sup> Sunset clauses also enable legislatures to consider whether the exercise of those powers have been “proportionate and thus whether, if they continue, further constraints . . . should be introduced.”<sup>542</sup>

At the end of the day, it is the Judiciary that often has the final say on whether counter-terrorism laws, including those governing ATPCMs, are consistent with applicable human rights norms.<sup>543</sup> Taken together, the best practices described above regarding the Legislature and Executive are intended to ensure consistency *de jure* between national legislation and the State’s international obligations. But it is up to the Judiciary to decide, typically on the basis of a constitutional challenge, whether the other branches of government have succeeded in doing so or not. In broad terms, at least insofar as international law is concerned, this means deciding if “States [have] take[n] steps to ensure that national counter-terrorism legislation is specific, necessary, effective and proportionate.”<sup>544</sup>

The judicial review of cases pertaining to ATPCMs can encompass several issues in addition to whether they were prescribed by law or are necessary and proportional.<sup>545</sup> For example, courts may review whether counter-terrorism norms violate *prima facie* the principle of legality when defining offenses, conduct or circumstances upon which the rights and obligations of individuals will be determined.<sup>546</sup> A court may also have to evaluate whether a given legal provisions transgresses a bright-line prohibition under international law, such as infringing upon a conventional human right not susceptible to derogation or exception, or otherwise protected as a norm of *jus cogens*. A good example is the prohibition of torture, which is both *jus cogens* and captured in Art. 7 of the ICCPR.<sup>547</sup> The related, but distinct, question of when the imposition of ATPCMs *de facto*

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539. *Id.*

540. Terrorism Report, *supra* note 526, ¶ 20.

541. *Id.*

542. CITTf HRs, *supra* note 418, ¶ 62.

543. *Id.* ¶ 57.

544. U.N. Secretary-General, *Protecting Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 26, U.N. Doc. A/72/316 (Aug. 11, 2017); *see, e.g.*, RENWICK, *supra* note 259, ¶¶ 5.37-5.38.

545. *See supra* Part III.D.

546. Terrorism Report, *supra* note 526, ¶ 15; *see also* ICCPR, *supra* note 317, art. 14(1).

547. *See infra* note 599 and accompanying text.

on someone may violate that person's human rights is explored in the next sub-section.

1. *De Jure Analysis of the United Kingdom, Canadian and Australian ATPCMs Regimes*

It is now possible to begin to answer the first of the queries posed in the Introduction to Part II.B about the extent to which the United Kingdom, Canadian and Australian ATPCMs regimes conform *de jure* to international human rights law. As all three are exemplary democracies with strong rule-of-law traditions, I will focus less on how the respective laws were enacted, given their realization via robust political and legislative processes, and focus more on which rules and procedures harmonize with the provisions of human rights law outlined in Part II.A. This birds-eye comparison of the three regimes reveals a number of shared positive characteristics, including meaningful oversight by legislative, executive and judicial authorities. But it also uncovers several problematic issues: questions relating to the necessity of such regimes; the respective role of the judiciary in each; the presence of diluted due process guarantees; and the inclusion of some restrictive measures that seem *prima facie* to contravene human rights.<sup>548</sup>

Before examining the normative deficiencies of the ATPCMs regimes studied, it is worth highlighting some of their positive aspects, especially with respect to the best practices identified above. First, all three regimes are subject to regular review by parliament as well as the Executive branch; notably, the United Kingdom and Australia can further count on the services of high-profile independent reviewers of terrorist legislation.<sup>549</sup> At times, the regimes have evolved in positive directions by taking into account recommendations emanating from those reviews, as well as from other critiques regarding civil liberties and human rights. A prominent example is the replacement of control orders in the United Kingdom with less restrictive TPIMs in 2011.<sup>550</sup> Similarly, concerns about suspects' restricted access to evidence gave rise to the designation of special advocates in both

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548. For discussion of whether or not ATPCMs regimes are "necessary," see RENWICK, *supra* note 259, at xii, ¶ 5.38. *See also supra* notes 246-250 and accompanying text (regarding the effectiveness of ATPCMs in the Canadian context).

549. Both the United Kingdom and Australia are subject to robust review by mechanisms in the Executive and Legislative branches, as well as by and independent reviewers. *See, e.g., supra* notes 125, 130-136; *see also supra* notes 259, 272, 310 (independent reviewer reports summarizing oversight mechanisms). In Canada, there is no independent reviewer of terrorist legislation as in the other two countries. Instead, review of anti-terrorism legislation has been largely concentrated in Parliament, with a supporting role for the Attorney General. *See supra* notes 168-169 and accompanying text; *see also About the Anti-Terrorism Act*, GOV'T OF CAN. DEP'T OF JUSTICE, <http://www.justice.gc.ca/eng/cj-jp/ns-sn/act-loi.html> (last modified July 26, 2017).

550. *See supra* notes 118-120 and accompanying text.

the United Kingdom and Australia.<sup>551</sup> Other positives include public proceedings (with some exceptions) in each country, strong media coverage and public debate, the limited duration of orders to 12 months across the board with limits on renewal, and what appears to be the relatively judicious use of ATPCMs mechanisms to date by the national authorities of each country.<sup>552</sup>

Furthermore, for each jurisdiction, the law itself designates the specific obligations, restrictions and prohibitions that make up the menu of restrictive measures available to authorities; only Canada allows for judicial discretion in crafting additional measures.<sup>553</sup> And, where the statute stipulates them, several of the available constraints are configured to be narrow, minimally intrusive, and necessary under the special circumstances addressed by the law.<sup>554</sup> Examples of such non-problematic measures are those that prohibit access to weapons, explosives and related materials, as well as contact with known terrorism suspects.<sup>555</sup> Travel bans and some narrow limits on movement, in addition to reasonable restrictions on electronic forms of communication generally (as opposed to a blanket ban), also fit this bill.<sup>556</sup> Finally, parliament and other reviewers in the U.K, Australia, and, to some extent, Canada, monitor sunset provisions and ensure the continued, exceptional nature of ATPCMs regimes there.<sup>557</sup>

These and other positives notwithstanding, there remain a number of substantial concerns about the legal framework of these ATPCMs regimes when it comes to evaluating their consistency with human rights standards. As a structural matter, the first revolves around the role of the judiciary in each. The three regimes form a spectrum of possible judicial protection in this respect, with Canada's representing overall the least exceptional (and thus most protective) model, while the United Kingdom has the most exceptional regime (and the least protective). Australia falls somewhere between them, although its regime is based on, and hews fairly closely to, the United Kingdom's. As regards due process guarantees, each country strikes its own unique balance. The United Kingdom and Australia go further in key respects to restrict a suspect's process rights than Canada, most notably as they use *ex parte* proceedings and rely more heavily on secret evidence.<sup>558</sup> A third and final area of concern relates to specific anti-

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551. *See supra* notes 74, 283 and accompanying text.

552. *See generally supra* Part II.A-C (discussing the use and context of ATPCMs in the United Kingdom, Canada, and Australia).

553. *See supra* notes 27, 158, 295 and accompanying text; *see also supra* note 150 (regarding Canada's allowance of judicial discretion).

554. *Id.*

555. *See supra* notes 26-27, 151-152, 295 and accompanying text.

556. *See supra* notes 27, 150, 158, 295 and accompanying text.

557. *See supra* notes 60, 168-169, 303-305 and accompanying text.

558. *See supra* notes 38-39, 73, 268, 282, 127 and accompanying text.



terrorism pre-crime measures that may *prima facie* violate a person's human rights. The role of the judiciary and due process in each regime is especially important given the fact that criminal sanctions may be imposed for the breach of even the most minor condition imposed by an ATPCM order.<sup>559</sup>

Peace bonds in Canada are essentially an adaptation of civil restraining orders with a long history of use in other contexts, such as domestic violence.<sup>560</sup> As such, they are organically judicial and thus integrate more due process safeguards than their counterparts in the Commonwealth, where ATPCMs have developed as measures of exception outside the country's ordinary legal framework and/or tradition.<sup>561</sup> Consequently, for example, peace bonds do not rely on *ex parte* hearings as a matter of course as much as TPIMs and control orders do in the U.K and Australia, respectively.<sup>562</sup> Furthermore, the ordinary rules of evidence apply to peace bond hearings, thereby limiting the use of secret evidence, although Australia takes a similar approach.<sup>563</sup> On the other hand, in 2015 Canada lowered its standard of proof in terrorism peace bond cases to require only a reasonable suspicion on the part of law enforcement that a suspect "may" commit a terrorist act or offence to trigger the process.<sup>564</sup> In cases where a suspect has been convicted of a terrorist offense, the peace bond can remain in effect for up to five years; otherwise, it is capped at 12 months.<sup>565</sup> Also unique to Canada is the authority given to judges, when imposing restrictions in particular cases, to fashion "reasonable" conditions not prescribed by the law.<sup>566</sup> Depending on one's perspective, this judicial discretion can be taken either as a "procedural safeguard" or the unfettered authority to potentially nullify a subject's rights.<sup>567</sup> In Canada, violations of peace orders are only punishable up to 12 months in jail, as opposed to maximums of five years in the United Kingdom and Australia.<sup>568</sup>

The United Kingdom TPIMs regime stands in stark contrast to Canada's and Australia's in that it is largely an autonomous, non-judicial jurisdiction. The United Kingdom's Executive branch, through the Home Office, decides when and how to impose restrictions on persons suspected of terrorism-related activity in cases where there is insufficient evidence to prosecute.<sup>569</sup> The Judiciary through the High Court reviews the Home

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559. *See supra* notes 55, 153, 157, 302 and accompanying text.

560. *See supra* notes 137 and accompanying text.

561. *See supra* notes 120, 122, 409 and accompanying text.

562. *See supra* notes 146-149 and accompanying text; *see also supra* notes 38-39, 73, 268, 282, 127 and accompanying text.

563. *See supra* notes 163, 298 and accompanying text.

564. *See supra* notes 142, 144 and accompanying text.

565. *See supra* note 149 and accompanying text.

566. *See supra* notes 150, 158 and accompanying text.

567. *Compare supra* notes 190, 257 and accompanying text.

568. *Compare supra* notes 153, 157, *with* notes 55, 302.

569. *See supra* note 26 and accompanying text.

Secretary's certification, based on an executive determination of the "balance of probabilities," of whether the law's conditions for such action are met, but can only overturn it where the justification is "obviously flawed," a high standard indeed.<sup>570</sup> It is helpful that the Court must schedule a Directions (confirmation) hearing and subsequent Review hearings in which the suspect can participate to evaluate the ongoing status of an active TPIM order.<sup>571</sup> It is less helpful that, at the government's request, evidence can be presented to the Court in closed proceedings and on the basis of secret evidence.<sup>572</sup> Another due process challenge is that only the Home Secretary can appeal the Court's decision regarding the decision to notice a TPIM order; the suspect has no such right at any point.<sup>573</sup> The law does limit the length (12 months) and number of consecutive TPIMs (2) that can be ordered against a person without new evidence.<sup>574</sup> But violations, as noted, are punishable by up to five years of prison.<sup>575</sup> All in all, it is not surprising to see why credible critics of this regime decry the excessive Executive authority over the process as well as the secondary and "inadequate" role played by the Judiciary.<sup>576</sup>

Australian control orders are closer in construction to TPIMs than peace bonds, albeit with a stronger judicial bent than their United Kingdom cousins. Interim control orders are made and confirmed by judges based on the civil law standard of "a balance of probabilities," which is higher than the standard replaced in 2014 ("reasonable suspicion")<sup>577</sup> but still deficient if the measures imposed are so onerous as to amount to criminal sanctions in name or effect.<sup>578</sup> It matters hugely that the regime is integrated into the Criminal Code, as in Canada, because it means the proceedings are subject to greater procedural safeguards, such as rules of evidence and the right to challenge court orders.<sup>579</sup> Even so, like in the United Kingdom, interim control orders result from *ex parte* proceedings that can rely on secret evidence that the suspect does not have direct access to.<sup>580</sup> Moreover, sensitive cases are kept confidential and subject to non-publication orders, which also happens in the United Kingdom and Canada.<sup>581</sup> Unlike the United Kingdom, however, interim control orders can remain in effect for

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570. *See supra* notes 36-37 and accompanying text.

571. *See supra* notes 43-45 and accompanying text.

572. *See supra* notes 38-42, 73, 127 and accompanying text.

573. *See supra* note 47 and accompanying text.

574. *See supra* note 57-58 and accompanying text.

575. *See supra* note 55 and accompanying text.

576. *See supra* notes 125-130 and accompanying text.

577. *See supra* note 276 and accompanying text.

578. *See supra* notes 314-315 and accompanying text.

579. *See supra* notes 163, 298 and accompanying text.

580. *See supra* note 268 and accompanying text.

581. *See supra* note 324 and accompanying text.

months without a confirmation hearing taking place.<sup>582</sup> Though limited to a maximum duration of 12 months, there is no restriction on the number of successive orders that can be issued against a person if conditions warrant.<sup>583</sup> Violations of even the most minor terms of a control order can result in prison sentences of up to five years.<sup>584</sup>

The foregoing analysis focuses on problematic structural features of the ATPCMs regimes studied, such as excessive Executive authority (United Kingdom), reliance on *ex parte* hearings (United Kingdom, Australia), low standards of proof (Canada) and high standards of review (United Kingdom), and the use of secret evidence (all three). Viewed in this way, such measures tend to unduly impinge on any suspects' rights to due process and a fair hearing under the ICCPR, especially when taken in combination. At the same time, the regimes studied all possess on their books express restrictions or conditions that, on their face, run counter to the basic human rights protections reflected in the treaty. From a *de jure* perspective, two prominent examples come to mind: forced relocation and other onerous constraints on personal liberty such as house arrest, which are tantamount to detention; and unduly burdensome restrictions on a person's freedom of religion, conscience and thought. My objective here is only to identify those terms codified by the ATPCMs regimes that have been (or could be) determined to contravene human rights *per se*. A discussion of how to analyze these and other listed measures in context, that is, as applied to suspects in particular cases, is the topic of the next sub-section.

The first of the questionable measures from a *de jure* perspective comes from the United Kingdom: the use of forced relocation. This controversial constraint contributed to the demise of control orders and was absent from the TPIMs framework until its reintegration into the TPIMs regime in 2015.<sup>585</sup> This measure inherently entails a substantial restriction of personal liberty that goes well beyond curfews and location bans, and thus requires greater due process protection.<sup>586</sup> This notwithstanding, the authority to impose such curfews and bans, if these are not "necessary and [especially] proportionate," also seems to conjure up the specter in all three regimes of "house arrest, which constitutes a form of detention," and as such can only be imposed as part of criminal proceedings.<sup>587</sup> This specter can materialize in specific cases where the combined effect of these and other measures can

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582. *See supra* note 288 and accompanying text.

583. *See supra* note 300 and accompanying text.

584. *See supra* notes 302, 369-370 and accompanying text.

585. *See supra* notes 21, 27, 117, 120 and accompanying text.

586. *See supra* notes 118-120, and accompanying text.

587. Scheinin Report, *supra* note 281 and accompanying text.

break through the punitive threshold and trigger criminal due process guarantees.<sup>588</sup>

The second set of dubious measures relate to the rights to hold personal beliefs and practice one's religion. In this case, I am referring to terms in an ATPCMs order that would require a person to submit to religious counseling or similar "treatment,"<sup>589</sup> or otherwise curtail their right to hold personal beliefs and practice their religion.<sup>590</sup> Most notably, as explained in Part II.A(ii)(e), Australia's express authority to obligate persons to attend religious counseling (and refrain from visiting all but one place of worship) is almost certainly in violation of ICCPR Articles 18 and 27.<sup>591</sup> Canada's imposition of forced religious counseling as "treatment" was actually struck down by a court as violatory of the defendant's fundamental rights.<sup>592</sup> While some less onerous version of both types of measures would likely pass muster under the applicable human rights standards—making counseling voluntary, for example—the legislative approach taken to date has been a cause for concern.<sup>593</sup>

#### D. *ATPCMs and the Human Rights Exceptions Regime in Individual Cases*

Ensuring consistency between national counter-terrorism legislation and international law "includes the need to ensure that the *conduct* of State agencies involved in the countering of terrorism is [also] in compliance" with human rights law.<sup>594</sup> In other words, it is not enough for a State to strive for compliance *de jure* with its international obligations when enacting ATPCMs legislation. The State must also guarantee respect *de facto* for human rights norms in the implementation of that legislation and the practice of its agents. The key to this analysis is looking at how the legal provisions discussed above apply in context and the effect of that practice on the people targeted.

The tenor of the touchstone question—"when are ATPCMs compatible with human rights?"—is not about *whether* such compatibility can exist generally, but rather *how* it is to be realized. It accepts as a parting premise that the two can be reconciled, and that the challenges that may arise in the process are not "insurmountable."<sup>595</sup> The main reason for this is "the flexibility of human rights law,"<sup>596</sup> which ensures that "[t]here is no need in

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588. *See supra* notes 315-316 and accompanying text.

589. *See supra* notes 191-194 and accompanying text.

590. *See supra* note 295 and accompanying text.

591. *See supra* Part III.A(ii)(e).

592. *See supra* notes 191-194 and accompanying text.

593. *See supra* notes 240-242, 361-362 and accompanying text.

594. CITTIF HRs, *supra* note 418, at 21 (principle 4).

595. *Id.* at 10, ¶ 24.

596. *Id.*

this process for a balancing between human rights and security, as the proper balance can and must be found *within* human rights law itself. Law *is* the balance, not a weight to be measured.”<sup>597</sup> This means that, as we saw in Part III.A in the discussion of individual rights impacted by ATPCMs, existing international law is well-equipped to accommodate the process of designing a human rights-compliant ATPCMs due to its built-in flexibility, which I refer to as the ‘human rights exceptions regime.’

The ‘flexible’ approach to determining when State-imposed limits on human rights are lawful can be referred to as the ‘human rights exceptions regime’ because, by and large, it is the same for all rights, save for those few that do not allow such restrictions.<sup>598</sup> ICCPR Article 7’s prohibition on torture and CIDT falls into this latter category.<sup>599</sup> All other rights are expressly or presumptively subject to the ‘exceptions regime’ outlined below.<sup>600</sup> The ICCPR articles relevant to the analysis of ATPCMs that expressly set parameters for curtailing the rights protected are Articles 12(3) (freedom of movement), 19(3) (freedom of expression), 22 (association), 21 (assembly), as well as 18(3) and 27 (freedom of religion). As discussed in Part III.A, these Articles recognize a State party’s authority to restrict the exercise of the respective rights only “in a very limited set of exceptional circumstances.”<sup>601</sup>

The rights to privacy and family life in Article 17 are no exception. Although Article 17 does not explicitly reference the full exceptions regime, it is still subject to the same framework because it is not absolute: the Article by its own terms only prohibits “unlawful” or “arbitrary” interference or attacks, allowing for a limited set of exceptions that meet the aforementioned criteria.<sup>602</sup> At the same time, it is instructive to recognize that there is a direct parallel between Article 17’s proscription of arbitrary intrusions on privacy, and Article 9’s prohibition on arbitrary detentions: ‘arbitrary’ in both cases means the State action fails to guarantee due process and/or the other basic elements of “[justice], reasonableness, necessity and proportionality.”<sup>603</sup>

Accordingly, in all cases involving human rights that are capable of limitation under the ICCPR, any constraints ordered under an ATPCMs

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597. *Id.* (emphasis added).

598. *Id.* at 10, ¶ 25.

599. *Id.* at 11, diagram 1.5. The right to hold opinions is another example. *See also* ICCPR, *supra* note 317, art. 19(1).

600. *See* CITTIF HRs, *supra* note 418, at 10, ¶¶ 24-25; *see also* CITTIF HRs, *supra* note 418, at 11, diagram 1.5.

601. CITTIF HRs, *supra* note 418, at 10 ¶ 25.

602. *See* ICCPR, *supra* note 317, art. 17(1); *see also* CITTIF HRs, *supra* note 418, at 10, ¶ 24-25 & 11, diagram 1.5.

603. *See* GC 35, *supra* note 439, ¶ 12.

regime that restrict those guarantees must conform to the exception regime's parameters to be lawful. This means all such measure must be

- prescribed by law,
- for a legitimate State purpose in a democratic society, i.e. to protect national security, public order or safety, or public health or morals, or
- for the protection of the rights and freedoms of others;
- necessary to pursue a legitimate purpose in a free and democratic society;
- proportional, as enacted and implemented, to the risk or harm it seeks to avoid; and
- consistent with “the fundamental principles of equality [before the law] and non-discrimination.”<sup>604</sup>

To be considered legitimately ‘prescribed by law,’ any condition or limiting measure adopted to restrict the exercise of human rights as part of an ATPCMs regime must be grounded in the regime’s governing statute, law or legal provision as enacted pursuant to the best practices described in Part III.B(ii).<sup>605</sup> Typically, this means that the law must specify “with sufficient precision” which obligations, prohibitions and other restrictions can be imposed and under what circumstances.<sup>606</sup> Furthermore, all counter-terrorism measures including ATPCMs must be “adequately accessible” to the person affected so that they may have “adequate indication of how the law limits his or her rights” and understand how to regulate their conduct.<sup>607</sup>

Once an ATPCMs regime is operating, a case-by-case analysis is required to determine whether a particular person’s human rights have been violated. In practice, because combatting terrorism is a legitimate State aim, this usually entails a determination of whether the ATPCMs are in fact ‘necessary’ and ‘proportional’ in response to the harm sought to be avoided. In the counter-terrorism context, ATPCMs are deemed ‘necessary’ if they are “rationally connected” to the aim of combatting extremist violence; that is, they must “logically further the objective” of preventing a terrorist act.<sup>608</sup> A restriction is not indispensable, and thus “violates the test of necessity[,] if the protection could be achieved in other ways” or with lesser constraints on the right at issue.<sup>609</sup> Similarly, determining whether a specific condition

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604. See GC 27, *supra* note 478, ¶¶ 14, 18; see also CITTTF HRs, *supra* note 418, at 11, diagram 1.5.

605. See CITTTF HR, *supra* note 418, ¶ 26.

606. *Id.*

607. *Id.*

608. *Id.* ¶ 27.

609. See GC 34, *supra* note 493, ¶ 33.

or measure in an ATPCMs package is ‘proportionate’ requires balancing the degree to which it encumbers or negates the exercise of the subject’s human rights against the extent to which it can serve to counter “an actual or potential threat of terrorism.”<sup>610</sup> To be proportional, a State is required to use the least restrictive means to achieving its legitimate goal.<sup>611</sup>

#### *E. ATPCMs and the United States*

The United States does not yet possess an ATPCMs regime in the same capacity that the United Kingdom, Canada and Australia do. It does, however, possess legislation that, if invoked, could be used to pre-emptively detain foreign *and* U.S. nationals for terrorist-related activity. In this respect, it is similar to Canada and Australia, which both have laws authorizing such preventative detentions, though currently only Canada uses it.<sup>612</sup> The first of these laws is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, better known as “The Patriot Act.”<sup>613</sup> Foreign nationals who the Attorney General certifies as having engaged or likely to engage in terrorism-related activity are subject to administrative detention under the Patriot Act.<sup>614</sup> The second piece of legislation is the National Defense Authorization Act of 2012 (NDAA).<sup>615</sup> The NDAA is a military spending bill that contains several provisions addressing counter-terrorism.<sup>616</sup> These provisions authorize indefinite military detention without charge or trial of persons inside or outside the United States who the government suspects may be involved in terrorism.<sup>617</sup> It applies specifically to U.S. citizens and lawful resident aliens who are apprehended<sup>618</sup> on American soil.<sup>618</sup>

Both the Patriot Act and the NDAA’s counter-terrorism provisions are, by their own terms, intended to allow the U.S. government to detain persons

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610. CITTF HR, *supra* note 418, ¶ 28.

611. *Id.*

612. *See supra* note 198 and accompanying text.

613. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272 (2001).

614. The Patriot Act contains controversial provisions that expand the U.S. government’s powers to detain aliens who are not yet convicted of a crime. Section 412 of the Patriot Act permits the AG to take custody of any foreign national on U.S. soil who they “certify.” Certification is determined either by the AG’s belief that the foreign national is engaged in activity that threatens U.S. national security, or by the foreign national’s history of violating the law. That person’s charge or violation need not even be related to terrorist activity *per se*, but they must be engaged in an activity that “endangers the national security” of the U.S. Patriot Act. *Id.* § 412(a).

615. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §§ 1021-22, 125 Stat. 1298 (2011). The provisions of this bill are codified at 10 U.S.C. § 801.

616. *Id.*

617. *Id.*

618. Marty Lederman & Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War—Part II*, LAWFARE (Dec. 31, 2011), <https://www.lawfareblog.com/ndaa-good-bad-and-laws-war-part-ii>.

suspected of carrying out or supporting terrorist actions outside the ordinary legal system. It would seem that neither law has yet been used for this purpose.<sup>619</sup> It is difficult to be certain about the NDAA because “[t]he government does not need a warrant to detain” a person under this law, nor must it produce a record of the detention or arrest.<sup>620</sup> But it is not difficult to foresee scenarios where either or both laws could be invoked to that purpose, especially by the Trump Administration.<sup>621</sup>

The United States is a party to the ICCPR.<sup>622</sup> Accordingly, the foregoing analyses under international law of foreign ATPCMs regimes in this and the prior Part are directly relevant to American policies on national security. Whether it be ‘best practices’ sanctioned by international norms, or a nuanced consideration of key elements like necessity and proportionality under the human rights exception regime, the comparative study advanced by this Article offers important lessons for national authorities and domestic advocates concerned with counter-terrorism policy in the United States. On the one hand, it provides critical insights on how to better design and deploy an ATPCMs regime consistent with the international rule of law. On the other, it testifies to the fact that it is not necessary to sacrifice those values inherent in a free democratic society to ensure society’s safety.

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619. Research to date has produced no information altering our finding that these provisions have still not been utilized.

620. Steve Mariotti, *Dear Americans: This Law Makes It Possible to Arrest and Jail You Indefinitely Anytime*, HUFFPOST (Sept. 2, 2016), <https://tinyurl.com/ydyzhv79>.

621. Several of President Trumps aggressive anti-immigrant policies aimed at discouraging migration generally, such as family separation and restricting the rights of persons seeking asylum, could well serve as harbingers for similar, strong-arm tactics to counter terrorism under existing laws. Cf. Jeremy Stahl, *These Horrifying Family Separation Cases Have All Happened Since Trump “Ended” the Policy*, SLATE (Aug. 1, 2019), <https://tinyurl.com/y49akp9c>.

622. *Supra* note 417 and accompanying text.