

Surveillance of terrorist suspects as a counter-terrorism method

VASILIKI CHALKIADAKI

*Dr. jur. (Freiburg), LL.M. (Freiburg / Strasbourg / Basel), Lawyer in
Athens (Greece), and Associate with Deloitte Legal in Munich (Germany)*

Introduction

The main question legal systems have been struggling with after the attacks on the World Trade Centre and the Pentagon on September 11, 2001, and especially after the constant rise of ISIS since 2011, is the question of prevention, and particularly whether it is possible to make terrorism “predictable.” In other words, whether it is possible to foresee, for purposes of effective prevention, based on information and intelligence by the police and the secret services, that a terrorist attack will be committed by certain individuals at a particular place in a specific time in the near future, in order to prevent it from happening. However, “terrorism” and “predictability” are mutually exclusive, since unpredictability is a substantial element of terrorism – precisely the element that spreads the terror. European legal orders have applied various counter-terrorism methods, either by reforming their existing criminal law provisions or by creating special counter-terrorism legislation. This study will examine the preventive solutions implemented by the legislations of two European countries that have been particularly confronted with terrorism and have, for this reason, developed strategies to counter the risk of terrorist attacks in the broadest way possible: France and the UK (more specifically, England and Wales).

As targets of terrorist organizations for some decades already, both countries have been particularly eager to reform and update their counter-terrorism framework. Relevant legislation in France has been

tested since the beginning of 2015, when gunmen attacked the Paris headquarters of the satirical magazine *Charlie Hebdo*, marking the start of a series of attacks against the country in the following months. In the wake of these attacks, new counter-terrorism legislation focusing on the surveillance of terrorist suspects has been introduced and constantly reinforced with new provisions creating mostly administrative measures to tackle the risk of terrorist attacks in the near future. England, on the other hand, has taken a more holistic approach to the risk of a future terrorist attack. It has not only reformed its criminal and administrative law and police practices, but has also attempted to address the problem of radicalization of individuals who live in the national territory yet are drawn to terrorism by using means other than legal coercion.

This study starts out with a general presentation of the legal framework and the police practices regarding the prevention of the risk of future terrorist attacks in France and England. Subsequently, the focus is on the (administrative) legal provisions governing the surveillance of terrorist suspects and affiliates in both countries. The analysis closes with the examination of the effectiveness of these means of terrorism prevention, while at the same time addressing the question whether the legislators should turn to alternative measures for the prevention of the risk of terrorism.

Prevention of the Risk of Terrorism in France and England: Legal Framework and Police Practices

1. The French legal system

France has been confronted with terrorism since the end of the 1970s when it experienced both left-wing revolutionary terrorism, mainly due to the activity of the terrorist group *Action Directe*,¹ and na-

¹ *Action Directe* was a radical left-wing underground organization in France, active between 1979 and 1987, which perpetrated a series of gun assaults and assassinations. See more in: M. Y. Dartnell, *Action Directe: Ultra-left terrorism in France 1979–1987*, London 1993, pp. 73–165; W. Dietl, K. Hirschmann and R. Topfoven,

tionalist-separatist terrorism by groups active in Brittany, Corsica, and the Basque Country.² By the early 1980s, however, and as the activity of the aforementioned groups more or less faded, France had become a target of Islamist terrorist groups. This triggered the gradual development of quite an extensive counter-terrorism legislation: at first, the legislation was aimed at dealing with already committed terrorist attacks by introducing to the French Penal Code (*Code Pénal*, hereinafter: CP) criminal offence provisions typically connected with terrorism but took in the following years a more preventive approach to counter the risk of terrorism.

In general, counter-terrorism provisions have existed in the French Penal Code since 1986 as part of the provisions on the protection of public security.³ The French legislator uses two legislative techniques to create the substantive elements of what is characterized as a “terrorist act.” On the one hand, specific, restrictively enumerated acts typically connected with terrorism, such as intentional homicide, explosion, arson, severe bodily harm, abduction, or damage to property, are defined as terrorist offences when committed in conjunction with an

Das Terrorismus-Lexikon: Täter, Opfer, Hintergründe, Frankfurt 2006, pp. 87-88.

² On the activities of the Basque organization ‘Iparretarrak’ see W. Dietl, K. Hirschmann and R. Tophoven, *Das Terrorismus-Lexikon: Täter, Opfer, Hintergründe*, Frankfurt 2006, pp. 57–61; A. Pérez Agote, ‘Prophétie auto-réalisée et deuil non résolu. La violence politique basque au XXI^e siècle’, in: X. Crettiez and L. Muchielli (eds.), *Les Violences Politiques en Europe: un état des lieux*, Paris 2010, pp. 105-122. On the terrorist groups in Brittany see: A. Pérez Agote, ‘Prophétie auto-réalisée et deuil non résolu. La violence politique basque au XXI^e siècle’, in: X. Crettiez and L. Muchielli (eds.), *Les Violences Politiques en Europe: un état des lieux*, Paris 2010, pp. 105-122. On the Corsican separatism see X. Crettiez, ‘La violence politique en Corse: état des lieux’, in: X. Crettiez and L. Mucchielli (eds.), *Les Violences Politiques en Europe: un état des lieux*, Paris 2010, pp. 123-139; H. Kushner, *Encyclopedia of Terrorism*, Thousand Oaks 2003, pp. 256-257; R. Ramsay, *The Corsican Time-Bomb*, Manchester 1983, pp. 118-119, 200–201, 205.

³ The relevant provisions were introduced with the law 86-1020 of 9 September 1986 (*Loi n° 86-1020 du 9 septembre 1986 relative à la lutte contre le terrorisme et aux atteintes à la sûreté de l’Etat*). See more in: V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 179-180.

individual or collective enterprise which aims at a serious disruption of the public order through intimidation or terror (Art. 421-1 CP); it is in this way that these acts attain a special gravity in the context of terrorism (the so-called *terrorisme par référence*, or “terrorism on the basis of referral [to other criminal provisions]”). This special gravity, attributed to the commission of specific criminal offences by the purpose of intimidating the public, is the subject matter of the aforementioned “terrorist criminal offence”⁴ On the other hand, the CP itself defines certain acts *ab initio* as terrorist (*infractions terroristes autonomes*, or “autonomous terrorist offences”). All the acts in this category share the fact that the substantive elements are fulfilled regardless of whether the terrorist attack takes place or not. The legislator intervenes in order to prevent the (future) commission of a specific criminal offence (in the case of “eco-terrorism” in Art. 421-2 CP) or the commission of more serious criminal offences (terrorist acts) by thwarting their development already at the preparation stage (the so-called *infractions obstacles*, or “obstacle offences”).⁵

The *Code Pénal* defines the following acts as “obstacle offences”:⁶ the financing of terrorism, namely making one’s assets available for terrorist purposes (*terrorisme financier*, or *terrorisme par financement*, Art. 421-2-2 CP);⁷ the so-called “presumed terrorism,” namely the disproportionality between income and lifestyle of a person when he or she has regular contacts with persons involved in the financing of a terrorist activity or engaging in terrorist activity in any way (*terrorisme présumé*,

⁴ Y. Mayaud, *Terrorisme*. Dalloz – Répertoire de droit pénal et de procédure pénale (Online), Paris 2015, paras. 8, 51.

⁵ Y. Mayaud, *Terrorisme*. Dalloz – Répertoire de droit pénal et de procédure pénale (Online), Paris 2015, paras. 8, 51.

⁶ V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 181-187.

⁷ C. André, *Droit Pénal Spécial*, Paris 2015, para. 483; E. Dreyer, *Droit Pénal Spécial*, Paris 2012, paras. 761–762; V. Malabat, *Droit Pénal Spécial*, Paris 2015, para. 912; Y. Mayaud, *Terrorisme*. Dalloz – Répertoire de droit pénal et de procédure pénale (Online), Paris 2015, paras. 75-78.

Art. 421-2-3 CP);⁸ the encouragement – by any means – of persons to join a terrorist organization (*terrorisme par recrutement*, Art. 421-2-4 CP);⁹ the participation in a terrorist organization (*terrorisme par groupement ou entente*, Art. 421-2-1 CP), either as a simple member with or without an active role in the terrorist operations, or as a leader;¹⁰ the direct encouragement to commit terrorist acts and the glorification of terrorist violence (*terrorisme par provocation ou apologie*, Art. 421-2-5 CP) – the commission of these two acts through the internet is considered an aggravating circumstance;¹¹ finally, the preparation to commit a terrorist act (*préparer la commission d'une des infractions mentionnées au [Titre] II*¹²), described as an individual enterprise (*terrorisme par entreprise individuelle*¹³), whose substantive elements are the research, procurement, and production of dangerous objects or substances, the collection

⁸ C. André, *Droit Pénal Spécial*, Paris 2015, para. 484; E. Dreyer, *Droit Pénal Spécial*, Paris 2012, para. 763; V. Malabat, *Droit Pénal Spécial*, Paris 2015, para. 912; Y. Mayaud, *Terrorisme. Dalloz – Répertoire de droit pénal et de procédure pénale* (Online), Paris 2015, paras. 79-82.

⁹ C. André, *Droit Pénal Spécial*, Paris 2015, para. 485; V. Malabat, *Droit Pénal Spécial*, Paris 2015, para. 912; Y. Mayaud, *Terrorisme. Dalloz – Répertoire de droit pénal et de procédure pénale* (Online), Paris 2015, para. 84.

¹⁰ C. André, *Droit Pénal Spécial*, Paris 2015, para. 482; E. Dreyer, *Droit Pénal Spécial*, Paris 2012, paras. 759–760; V. Malabat, *Droit Pénal Spécial*, Paris 2015, para. 911; Y. Mayaud, *Terrorisme. Dalloz – Répertoire de droit pénal et de procédure pénale* (Online), Paris 2015, paras. 57, 67. On the autonomy of s. 421-2-1 CP with regard to the provisions on the criminal organization see Y. Mayaud, *Terrorisme. Dalloz – Répertoire de droit pénal et de procédure pénale* (Online), Paris 2015, paras. 67-74.

¹¹ C. André, *Droit Pénal Spécial*, Paris 2015, para. 486; J.-J. Hyest and A. Richard, *Rapport des Sénateurs sur le projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme*, Paris 2014, pp. 42–48; V. Malabat, *Droit Pénal Spécial*, Paris 2015, para. 913; Y. Mayaud, *Terrorisme. Dalloz – Répertoire de droit pénal et de procédure pénale* (Online), Paris 2015, paras. 85–89; S. Pietrasanta, *Rapport pour l'Assemblée Nationale sur le projet de loi (n° 2110), renforçant les dispositions relatives à la lutte contre le terrorisme* (N° 2173, Assemblée Nationale), pp. 91-94.

¹² It refers to the part “Titre II: Du terrorisme” of the CP.

¹³ V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 186-187.

of information on places or people that facilitates their surveillance or the commission of an attack, the training for terrorist purposes and the production of the means for these purposes, the visits to certain internet pages, or the procurement of documents that encourage terrorist acts, and the stay at a terrorist camp abroad (Art. 421-2-6 CP).¹⁴ The commission of the relevant acts by only one person suffices for the criminalization of the offence; the participation in a terrorist organization is not a prerequisite. In addition, the criminalization of these offences does not depend on whether the terrorist act has ultimately been committed or not. The criminalization of acts by using a terminology that permits broad interpretation, such as “financing,” “encouragement (to join a terrorist organization),” “keeping regular contact,” and “participation (in a terrorist organization)” indicates that the limits of criminal liability are placed in a very preliminary¹⁵ stage of a terrorist attack that may actually never successfully be carried out.

Apart from these criminal law provisions, France has introduced administrative measures, primarily in the Code of Home Security (*Code de Sécurité Intérieure*, hereinafter: C.Séc.Int.). Most of these provisions refer to the collection of information and the intelligence gathering by the secret services, in particular to surveillance by means of technology. A new, recently added provision has created a ban on international travel to prevent persons living on French territory from traveling to typical “terrorist” destinations such as Syria or Afghanistan in order to receive training in terrorist camps or to fight alongside ISIS in France or abroad. Besides the Code of Home Security, a series of laws

¹⁴ C. André, *Droit Pénal Spécial*, Paris 2015, para. 487; J.-J. Hiest and A. Richard, *Rapport des Sénateurs sur le projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme*, Paris 2014, 49–51; V. Malabat, *Droit Pénal Spécial*, Paris 2015, para. 913; Y. Mayaud, *Terrorisme. Dalloz – Répertoire de droit pénal et de procédure pénale* (Online), Paris 2015, paras. 90–100; S. Pietrasanta, *Rapport pour l'Assemblée Nationale sur le projet de loi (n° 2110), renforçant les dispositions relatives à la lutte contre le terrorisme*, pp. 98-101.

¹⁵ On the criminal liability in the preliminary stage of terrorist attacks see V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 187-190.

have created databases of persons suspected of threatening the public order over the last decades; these laws have been constantly reformed to broaden the scope of persons eligible to have their personal data stored by the police and the secret services. These administrative measures will be analyzed in the following part.

In terms of law enforcement practices, an important role in the prevention of terrorist violence is the cooperation between police, intelligence agencies, and the judiciary. Information sharing has led to the gathering of comprehensive intelligence, which is another important tool in the prevention of terrorist attacks. As part of the reform¹⁶ of the intelligence services in 2008, the *Direction Centrale du Renseignement Interieur* ("Headquarters of Home Intelligence Service", hereinafter: DCRI),¹⁷ which emerged by fusing the *Direction de la Surveillance du Territoire* ("Direction of Surveillance of the Territory," hereinafter: DST) and the *Direction Centrale des Renseignements Généraux/Renseignements Généraux* (Headquarters of the Intelligence Service", hereinafter: RG),¹⁸ was given a key role in collecting and analyzing terrorism-related information, mostly on Islamist terrorist organizations.¹⁹ The shadows of the past, however, have been haunting the new intelligence service structure: whereas the informal organizational routines of the intelli-

¹⁶ For an analysis of the reform with further references see V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 203-206.

¹⁷ The DCRI is the French homeland security agency, which has also police powers.

¹⁸ The RG was created with the Décret n° 85-1057 du 2 octobre 1985 relatif à l'organisation de l'administration centrale du ministère de l'intérieur et de la décentralisation and the DST with the Décret n°82-1100 du 22 décembre 1982 fixant les attributions de la direction de la surveillance du territoire. On the competences of DST and RG see G. Segell, *The French Intelligence Services*, in: T. Jäger and A. Daun (eds.), *Geheimdienste in Europa: Transformation, Kooperation und Kontrolle*, Wiesbaden 2009, pp. 44-46..

¹⁹ On the powers and the division of competences among the French agencies that dealt with terrorism see the analysis of Foley, in: F. Foley, *Countering Terrorism in Britain and France: Institutions, norms and the shadow of the past*, Cambridge 2013, pp. 94, 101-121.

gence services facilitated a close cooperation with a part of the judiciary described as the “investigating judges” (*juges d instruction*²⁰), they made it harder or even impossible to cooperate with a large number of agencies in the field of information and intelligence analysis (*Renseignements généraux de la préfecture de police/Direction du Renseignement de la Préfecture de Police de Paris, Gendarmerie*) and in criminal prosecution (*police judiciaire* or “judicial police”²¹). The reform of the C.Séc.Int. in 2015 has broadened the scope of duties of law enforcement agencies in general, though, once again, particular consideration was given to intelligence gathering through the creation and use of databases with personal data of (potential) terrorists and their contact persons. Since 2009, several of these “anti-terrorism databases” have been in operation, including the databases PASP²² and – the so-called “defence secret” – CRISTINA,²³ used by the DCRI to monitor acts of terrorism and

²⁰ More on the investigating judges in H. Vlamynck, *Droit de la police*, Paris 2011, para. 81. Also: M. McColgan and A. Attanasio, *France: Paving the Way for Arbitrary Justice* (Report for FIDH), 1999 (online source), pp. 31-32. Particularly on the relations between the investigating judges and the counter-terrorism agencies see J. Shapiro and B. Suzan, ‘The French experience of counter-terrorism’, *Survival* 2003/1, 75, 77-79 (on the period before the reform); N. Cettina, *Antiterrorisme: Une Fragile Coordination?*, 2011 (online source), 6; F. Foley, *Countering Terrorism in Britain and France: Institutions, norms and the shadow of the past*, Cambridge 2013, pp. 122, 124-129 (on the period after the reform).

²¹ G. Segell, ‘The French intelligence services’, in: T. Jäger and A. Daun (eds.), *Geheimdienste in Europa: Transformation, Kooperation und Kontrolle*, Wiesbaden 2009, pp. 46-48.

²² On the anti-terrorism databases before PASP see D. Batho and J.-A. Bénisti, *Rapport d’information pour l’Assemblée nationale sur les fichiers du police*, Paris 2009, pp. 68-72; V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 212-217; Y. Mayaud, *Terrorisme. Dalloz – Répertoire de droit pénal et de procédure pénale* (Online), Paris 2015, paras. 315–317.

²³ On CRISTINA see V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 217-219; L. Delabie, ‘CRISTINA sous l’oeil du Conseil d’État: les fichiers classés secret défense sont sous contrôle’, *AJDA* 2010/33, 1878–1882; J.-M. Pastor, ‘Le décret créant le fichier CRISTINA pouvait être dispensé de publication’, *AJDA* 2010, 812.

espionage.

2. *The English legal system*

England has been struggling with terrorism much longer than France due to the actions of the IRA since the beginning of the 20th century. The UK tried to combat the separatist IRA-terrorism with legal provisions that applied in part to Northern Ireland and in part to the UK as a whole.²⁴ After the attacks on the World Trade Centre, the new challenge of international Islamist terrorism led to the development of the CONTEST concept, a macro-level counter-terrorism strategy aimed not only at reducing the risk of terrorist attacks but also at strengthening the perception of security among the population," (...) so that people can go about their lives freely and with confidence."²⁵ This holistic approach to the risk of terrorist violence is based on four pillars: the *Pursue* pillar for measures against attacks that have already been committed (near term response to terrorism, mostly the criminal and administrative legal framework), the *Prevent* pillar for measures against forthcoming attacks, to prevent them from taking place (longer term measures than *Pursue*) – both pillars aim at reducing the likelihood of a terrorist attack; the *Protect* pillar for measures to reduce the

²⁴ On the armed struggle of the IRA and the legal framework to combat the IRA terrorism see: R. Alonso, *The IRA and Armed Struggle*, New York 2007, pp. 1-194; W. Dietl, K. Hirschmann and R. Tophoven, *Das Terrorismus-Lexikon: Täter, Opfer, Hintergründe*, Frankfurt 2006, pp. 61-64; P. Neumann, *IRA: Langer Weg zum Frieden*, Hamburg 1999, pp. 7-217; A. Oehmichen, *Terrorism and Anti-Terror Legislation: The terrorised legislator?* Antwerpen 2009, pp. 135-136, 138-139; C. Walker, *Terrorism and the Law*, Oxford 2011, paras. 1.140–1.146. On the so-called *Diplock courts* and the special procedures for IRA terrorists see J. Jackson and S. Doran, *Judge without Jury. Diplock trials in the adversary system*. Oxford 1995, pp. 1-286; D. Korff, *The Diplock Courts in Northern Ireland: A fair trial?* Utrecht 1985, pp. 17-100. On the practice of internment see C. Delisle, *Leading to Peace: Prisoner resistance and leadership development in the IRA and Sinn Fein*, Ottawa 2012, pp. 107-115; A. Oehmichen, *Terrorism and Anti-Terror Legislation: The terrorised legislator?* Antwerpen 2009, pp. 146-147.

²⁵ HM Government (ed.), *CONTEST: The United Kingdom's strategy for countering terrorism*, London 2011, p. 9.

vulnerability of the public and the national infrastructure to an attack (long term measures); and the *Prepare* pillar to reduce impact and duration of the disruption in the event of a terrorist attack, by taking into consideration national emergency plans and ensuring that the relevant arrangements are effectively implemented.²⁶ The present *Pursue*-pillar focuses on legislation and law enforcement practices.

English counter-terrorism legislation is very comprehensive. The English legislator has always aimed at countering the risk of terrorism within the limits of criminal justice as much as possible. Already before the attacks of 11 September 2001, the UK introduced the Terrorism Act 2000, a legislative apparatus of both substantive and procedural criminal law provisions, which addressed, for the first time, all forms of terrorism – including international – and not just the separatist IRA-terrorism, as had been the case for decades.²⁷ The key piece of reform of this Act was the provision on the legal definition of terrorism;²⁸ it was also the first time to provide for the prosecution of terrorist financing,²⁹ as practice had already proven it a most effective counter-terrorism method facilitating the prevention of an attack at its onset. Characteristic elements of the act are the listing of specific organizations as “proscribed terrorist organizations” and the use of the legislative technique of scheduled offences: the counter-terrorism legislation is based on a list of criminal offences typically committed in the context of a terrorist attack, such as intentional homicide, arson, or abduction. In the context of counter-terrorism, this legislative technique has the

²⁶ D. Omand, *Securing the State*, London 2010.64. On the CONTEST (COunter-TERRORism Strategy) concept see: HM Government (ed.), *CONTEST: The United Kingdom’s strategy for countering terrorism*, London 2011, pp. 1–18; V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 241–244 (with further references).

²⁷ See a brief presentation of the Act in V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 230–232.

²⁸ R. Talbot, *Draconian powers, Experimentation and Human Rights in British Counter-terrorism Legislation*, in: J. McEldowney and G. Weick (eds.), *Human Rights in Transition*. Frankfurt 2003, pp. 138–140.

²⁹ See Arts. 14–18 TA 2000.

advantage of dealing with terrorism by “regular” or general laws instead of implementing special legislation that might be considered disconcerting or of questionable effectivity. In addition, this technique allows for a differentiated treatment of the two distinct forms of terrorism (IRA-separatist and Islamist).³⁰ Along with the more recent Terrorism Act 2006, a series of precursor offences have been introduced and are still in force: the training to use weapons and explosives (Arts. 54, 55 TA 2000), which was later broadened to include all kinds of training for terrorist purposes (Arts. 5–8 TA 2006);³¹ the possession of objects and information on terrorist purposes (Arts. 57 and 58 TA 2000 respectively);³² specific “acts preparatory to terrorism” (Art. 5 TA 2006), which are not explicitly mentioned in the text of the provision and may include any act that could derive from the membership to a terrorist organization – the perpetrator needs to commit (or assist in the commission of) the acts with the purpose of committing (or assisting the commission of) them as well as with the purpose of encouraging terrorism by the commission (or the relevant assistance);³³ the membership or support provided to one of the proscribed organizations (Arts. 11, 12 TA 2000 respectively);³⁴ the direction of the terrorist organization, which is provided for as a distinct criminal offence and is not subsumed under the membership (Art. 56 TA 2000);³⁵ and the encourage-

³⁰ More on the proscription in S. Forster, *Freiheitsbeschränkungen für mutmaßliche Terroristen. Eine Analyse der Terrorismusgesetzgebung des Vereinigten Königreichs*, Freiburg 2010, pp. 151-161; C. Walker, *Terrorism and the Law*, Oxford 2011, paras. 8.18-8.49.

³¹ A. Jones, R. Bowers & H. D. Lodge, *Blackstone's Guide to TA 2006*, para. 3.20; C. Walker, *Terrorism and the Law*, Oxford 2011, paras. 5.10-5.18, 5.24-5.26.

³² F. Galli, *The Law on Terrorism: The UK, France and Italy compared*, Brussels 2015, 60–61; P. Roberts, ‘Criminal procedure, the presumption of innocence and judicial reasoning under the Human Rights Act’, in: H. Fenwick, G. Phillipson & R. Masterman (eds.), *Judicial Reasoning under the UK Human Rights Act*, Cambridge 2007, 383–390; C. Walker, *Terrorism and the Law*, Oxford 2011, paras. 5.44–5.45, 5.72-5.80.

³³ C. Walker, *Terrorism and the Law*, Oxford 2011, paras. 5.90-5.103.

³⁴ TA 2000, Explanatory Notes: Sections 11-12, 13.

³⁵ C. Walker, *Terrorism and the Law*, Oxford 2011, paras. 5.33-5.41; C. Walker and

ment to commit terrorist acts (Arts. 1–4 TA 2006).³⁶

Key elements of this strategy are the administrative measures provided for in the Anti-terrorism, Crime and Security Act 2001 (repealed) and Prevention of Terrorism Act 2005 (repealed), as well as in the Terrorism Prevention and Investigation Measures Act 2011 and the Counter-Terrorism and Security Act 2015. These administrative measures are the already abolished administrative detention and control orders, the terrorism prevention and investigation measures, and the temporary exclusion orders respectively. In addition, terrorism-related administrative measures are included in the Terrorist Asset-Freezing etc. Act 2010, targeting the financing of terrorist acts by restricting the financial activity of persons or institutions by means of the so-called designation orders. All these measures constitute a system of restrictions imposed on the activities of specific individuals in order to prevent them from preparing a terrorist attack, usually by means of decisions of administrative organs (*orders*) and not by court judgments, as will be analyzed in the next part of this study.

Turning to the question of law enforcement, the agencies most involved in terrorism-related work are the MI5 and specific police agencies such as the Counter-terrorism Command of the Metropolitan Police. Especially after 11 September 2001, the Government, the police, and the secret services sought to reinforce the role of these agencies in countering terrorism. A number of official top-down reforms in the field of cooperation between the police and the secret services were undertaken in the first years after the attack on the World Trade Centre, though they were only partially successful. Initially, the competences of the MI5 and the counter-terrorism departments of the London Metropolitan Police (Special Branch, Anti-terrorism Branch) were very much distinct. The MI5 was the only agency for intelligence gathering;

K. Reid, 'The offence of directing terrorist organisations', *Crim. L. R.* 1993, 670-674.

³⁶ F. Galli, *The Law on Terrorism: The UK, France and Italy compared*, Brussels 2015, 78; M. Conway & C. Walker, 'Countering terrorism via the internet', in: G. Lennon & C. Walker, *Routledge Handbook of Law and Terrorism*, London 2015, pp. 423-427; A. Staniforth, *Preventing Terrorism and Violent Extremism*, Oxford 2014, pp. 158-161.

nevertheless, the intelligence gathered by MI5 constituted impermissible evidence for the court. On the other hand, the London Metropolitan Police was only active in the prosecution stage and primarily dedicated to evidence collection for presentation before the court. Over the years, however, this distinction gradually faded, to be restored *de facto* again in 2006, with the fusion of the two Branches of the London Metropolitan Police into one, the so-called "Counter-Terrorism Command" (hereafter: CTC).³⁷ The CTC was responsible both for the collection of information to be presented as evidence before the court and for the prosecution of suspected terrorists. Over time, the CTC focused more on criminal prosecution, using a general analysis of the available data. As a result, the Special Branch's specialization in the particularities of Islamist terrorism, acquired after years of focusing only on this area of expertise, slowly disappeared, as it was no longer indispensable. Hence, more space for information analysis and management was left to the MI5. The following pattern emerged: intelligence gathering and related activities were the competence of MI5, investigations and criminal prosecution generally that of the CTC. On the other hand, the cooperation between the law enforcement agencies in general and the judiciary has been limited to certain specific aspects of the prosecution (cooperation of the Crown Prosecution Service with the Police, only rarely with MI5).³⁸

In addition, two specialized departments were created for the gathering and analysis of intelligence in the years following the attack on the World Trade Centre. The Joint Terrorism Analysis Centre (hereinafter: JTAC) within the MI5 consists of police officers, secret service agents, and military officers; its competences include the determination of the national terrorism threat level,³⁹ the release of relevant warnings

³⁷ F. Foley, *Countering Terrorism in Britain and France: Institutions, norms and the shadow of the past*, Cambridge 2013, pp. 150-152.

³⁸ F. Foley, *Countering Terrorism in Britain and France: Institutions, norms and the shadow of the past*, Cambridge 2013, pp. 152-154.

³⁹ The national threat levels are the alert states that have been in use since 2006 by the British government to warn of the likelihood of a terrorist attack in the UK,

for the Government, and the compilation of detailed reports on status and activities of various terrorist organizations for use by the government and other institutions and organizations in order to create more sophisticated counter-terrorism strategies.⁴⁰ The Police International Counter Terrorism Unit (hereinafter: PICTU) was the second department, this time created within the Metropolitan Police, consisting only of police officers tasked with the dissemination of the intelligence of the MI5 and the JTAC among a broad network of police officers.⁴¹

The description of the counter-terrorism strategy in England would not be complete without the so-called Neighbourhood Policing. Since September 11, 2001, the phenomenon of home grown terrorists in England has reached alarming dimensions, in terms of numbers and consequences. For the identification of the potential “next-door terrorists”, the police has been gradually oriented to systematically use information collected from individuals and other social actors in the neighbourhood in order to put those prone to commit terrorist acts and even suicide attacks under surveillance. In addition, special neighbourhood police units have been created (the *Police Community Support Officers*) to address the demand for more – or more evident – police presence in the neighbourhood to prevent crime and anti-social behaviour. This pattern of special police units at the neighbourhood level in conjunction with the information exchange with local social actors (e.g. social workers, children’s social services, youth education services, health centres) constitutes Neighbourhood Policing, which has been gradually systematized and conceptualized into a concrete

so that government departments and agencies can react accordingly. The five different levels are as follows: low – moderate – substantial – severe – critical. See more information online: <https://www.gov.uk/terrorism-national-emergency>.

⁴⁰ On the development and role of JTAC see F. Foley, *Countering Terrorism in Britain and France: Institutions, norms and the shadow of the past*, Cambridge 2013, pp. 163-167; A. Staniforth, *Preventing Terrorism and Violent Extremism*, Oxford 2014, p. 110.

⁴¹ F. Foley, *Countering Terrorism in Britain and France: Institutions, norms and the shadow of the past*, Cambridge 2013, p. 167.

policing scheme with its own rules and principles.⁴² In the context of counter-terrorism in particular, the focus of Neighbourhood Policing is on the collection of any kind of information with relevance to potential terrorists and terrorist suspects living in a specific neighbourhood.⁴³ However, an analysis of the aspects of Neighbourhood Policing is not an objective of this study, which focuses on the administrative counter-terrorism measures provided for by legal provisions. The following chapter returns to the presentation of counter-terrorism legislation and analyzes the relevant administrative law provisions for the surveillance –in a broader sense– of potential terrorists and terrorist suspects.

Administrative Law Provisions on Surveillance of Terrorist Suspects

1. France

The escalation of terrorist violence worldwide due to the rise of ISIS in Iraq and Syria since 2011 gave birth to the phenomenon of French citizens travelling abroad with the purpose to participate in this organization's armed conflict and even to return to France to continue its mission by committing serious attacks. The legislative response to this phenomenon was the law on "reinforcing the provisions regarding the struggle against terrorism"⁴⁴ of November 2014. It added not only two new provisions to the French Penal Code (on the encouragement to and glorification of terrorist acts, and on the individual terrorist enterprise) but also established in the Code of Home Security the administrative prohibition of leaving the French territory.⁴⁵ Under the new rule, such a prohibition shall be applied to any French citizen who gives rise to "serious reasons" to believe that this person has engaged

⁴² Association of Chief Police Officers (ed.), *Practice Advice on Professionalising the Business of Neighbourhood Policing*. London 2006, pp. 6-11. On the difference with community policing, see M. Rowe, *Introduction to Policing*, London 2014, pp. 95-118.

⁴³ V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 296-301.

⁴⁴ Loi n° 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme.

⁴⁵ Art. L.224-1 C.Séc.Int.

in travelling to a foreign country for the purpose of participating in terrorist activities there or of getting to operation fields where conditions exist to prepare for an attack on France upon his or her return. It is an administrative measure, by a written and reasoned decision of the Minister for Home Affairs, imposed for a duration of six months after the person has been notified of the prohibition, with a possible extension not to exceed two years in total. The person's identity card and passport are declared invalid, so that he or she has to carry a special document with their credentials for as long as the prohibition exists. Any travels abroad – or even the attempt to do so – constitute criminal offences. The Minister of Home Affairs even has the power to inform airlines, transport companies, and travel agencies of the prohibition imposed on a certain individual, so that the person has no chance to travel abroad in the first place.⁴⁶

Another fundamental counter-terrorism law is the law on intelligence, which was enacted in July 2015 and added an entire part (*Livre VIII*) to the Code of Home Security called *Du renseignement* ("On intelligence").⁴⁷ This part defines the mission of specialized intelligence services and the conditions under which these services may use technology (such as security interceptions, GPS systems, etc.) to access massive (connection) data in order to collect any piece of information possibly relevant to certain public interests restrictively enlisted⁴⁸ in the C.Séc.Int., including personal data.⁴⁹ The law on intelligence provides that these intervention techniques may be used by specialized intelligence services after relevant authorization by the Prime Minister. The latter is obliged first⁵⁰ to consult the "National Commission for the con-

⁴⁶ V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 191-192; Y. Mayaud, *Terrorisme. Dalloz – Répertoire de droit pénal et de procédure pénale* (Online), Paris 2015, paras. 344-351.

⁴⁷ Loi n° 2015-912 du 24 juillet 2015 relative au renseignement.

⁴⁸ Art. L.811-3 C.Séc.Int.

⁴⁹ Arts. L.821-1–L.821-8 C.Séc.Int.

⁵⁰ Art. L.822-1 C.Séc.Int.

trol of information techniques" (hereafter: the Commission)⁵¹, an independent (administrative) authority handling, among others, the complaint of any individual with a direct and personal interest in the collected information.⁵² The law also regulates the length of time the collected data will be stored by the intelligence services,⁵³ provides for a specific regime of authorization and control for international surveillance measures, and establishes a judicial remedy before the Conseil d'État open to the Commission and to anyone with a direct and personal interest.⁵⁴ The law also provides procedural exemption rules in order to safeguard national security secrets.

Besides these provisions, the following points need to be emphasized in the context of surveillance techniques used against terrorism:

- in Art. L.811-3 C.Séc.Int., the law explicitly refers to the prevention of terrorism as a distinct public interest (along with national security, France's essential economic and scientific interests, the fundamental interests of foreign policy, and the prevention of the continuation of activities of dissolved combat groups and militia), for which the collection of information by secret services is permitted;
- in Arts. L.851-3, 851-4 C.Séc.Int., referring to the collection of information and documents⁵⁵ of the networks of service providers (bulk data, such as a list of incoming and outgoing calls of a subscriber, the date and duration of the communication, the location of a terminal piece of equipment, etc.), the law includes provisions stating that the collection of information relevant to an individual previously recognized as a threat may be operated in real-time on the networks and operators of electronic communication only for counterterrorism

⁵¹ The synthesis and powers of the Commission (Commission nationale de contrôle des techniques du renseignement) were specified in the law on intelligence (Loi n° 2015-912 du 24 juillet 2015 relative au renseignement) and subsequently incorporated into the Code of Home Security (Arts. L.831-1-L.833-11 C.Séc.Int.).

⁵² Art. L.833-4 C.Séc.Int.

⁵³ Art. L.822-2 C.Séc.Int.

⁵⁴ Art. L.833-4 C.Séc.Int.

⁵⁵ See also the new Art. L.851-1 C.Séc.Int.

needs. Such data collection procedures may be operated by specialized intelligence service agents individually commissioned for this purpose and after consultation with the Commission. These specialized agents may also request the Prime Minister to lift the anonymity of the data circulated by operators of electronic communication networks, based only on the automatic processing of anonymous elements that may constitute a potential terrorist threat;

– following the authorization described in the law⁵⁶ and exclusively for the purpose of preventing a terrorist attack, as explicitly stated in law, the use of a device of proximity (e.g. radar, antenna, or any kind of sensor) is allowed for a strictly defined period to intercept directly any communication sent or received by the terminal equipment. In other words, the intelligence services may request the right to put hidden microphones in a room, in computers or on objects such as cars, or to use antennae to capture telephone conversations or mechanisms that capture text messages; in this way, the law actually legalizes tools of mass surveillance.⁵⁷

The collected information is stored in DCRI databases. Two of its databases operate as the main counter-terrorist databases following a long history⁵⁸ of name changes and debates on the scope of information and data to be stored on them: the database *Prévention des atteintes à la sécurité publique* ("Protection against offending public security," hereinafter: PASP) and the *Centralisation du renseignement intérieur pour la sécurité du territoire et des intérêts nationaux* ("Centralization of intelligence for the security of the territory and the national interests", hereinafter: CRISTINA). PASP was created⁵⁹ in 2009 to cover information

⁵⁶ Arts. L. 851-5, L. 853-1, L. 853-2 C.Séc.Int.

⁵⁷ V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 193-194.

⁵⁸ V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 209-216.

⁵⁹ Décret n° 2009-1249 du 16 octobre 2009 portant création d'un traitement de données à caractère personnel relatif à la prévention des atteintes à la sécurité publique.

and intelligence relevant to the threats to public security and public order in general, although it was primarily intended to include data of persons involved in sport-related violence or violence in urban communities. De facto, however, it evolved into a counter-terrorism database, with the purpose of storing and analyzing information on specific persons, whose individual or collective activity indicates that they may significantly disturb public security.⁶⁰ Such “indications” exist on the basis of facts known to the intelligence services that provide reasons for the hypothesis that certain individuals (are prone to) engage in violence. A decree defines the kind of personal data to be stored in the database. The duration of storage is quite long: ten years after the last event that triggered the entry of the individual into the database.⁶¹

CRISTINA was created,⁶² in the framework of the 2008 reform of the intelligence services, as a database for information and intelligence relevant to terrorism, espionage, and, more generally, any activity possibly relevant to national interests.⁶³ In fact, CRISTINA took over all the data that had been stored in confidential DST and RG databases since 1986 and has been treating them in a closed system. Classified as “national defence secret,”⁶⁴ CRISTINA contains all highly confidential data relevant to the work of the DCRI; its creation was not even published in the official Gazette, officially to protect the relationship of trust and

⁶⁰ V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 216-217.

⁶¹ Arts. 4, 5 Décret n° 2009-1249 du 16 octobre 2009 portant création d’un traitement de données à caractère personnel relatif à la prévention des atteintes à la sécurité publique.

⁶² CRISTINA was created in the context of the founding of the DCRI (Décret n° 2008-612 du 27 juin 2008 portant modification du décret n° 85-1057 du 2 octobre 1985 relatif à l’organisation de l’administration centrale du ministère de l’intérieur et de la décentralisation).

⁶³ V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 217-219.

⁶⁴ The definition and the treatment of data characterized as “national defence secrets” (*secrets-défense*) are found in the French Code of Defence (Arts. R.2311-1–R.2311-9 C. Déf.).

confidentiality between DCRI and the rest of the secret services. The DCRI is the only agency with control over the database, meaning that only a limited number of DCRI officials have access to its information. As a result, the data stored in it remain secret and undisclosed even to persons affected. If an individual specifically requests disclosure of whether their name is stored in CRISTINA or not, a judge has to visit the DCRI Headquarters and check on the spot whether pertinent data exists in the system. There is no deadline for storing such data: it will be removed from the database “after the purpose for storage has been served”, that is, practically never.⁶⁵

2. *England*

A fundamental part of the English counter-terrorism strategy have always been the administrative measures provided for in the repealed Anti-Terrorism, Crime and Security Act 2001 (hereinafter: ATCSA 2001) and Prevention of Terrorism Act 2005 (hereinafter: PTA 2005), as well as in the Terrorism Prevention and Investigation Measures Act 2011 (hereinafter: TPIMA 2011), and the Counter-Terrorism and Security Act 2015 (hereinafter: CTSA 2015). These measures include the – already abolished – administrative detention and control orders as well as the terrorism prevention and investigation measures, currently in force, and the temporary exclusion orders respectively. The ATCSA 2001 introduced procedural changes regarding the deportation of certain foreigners, who, based on indications held by the Government, were deemed to be involved in international terrorist activities. In particular, the act authorized the State to detain individuals suspected of being related to international terrorism for an indefinite period of time, who could not be deported for practical reasons (e.g., lack of transportation between the UK and the place where the individual came from) or legal reasons (e.g., imminent risk of being subjected to torture in the place he or she came from, which would be a violation of Art. 3

⁶⁵ V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 218-219.

ECHR). According to ATCSA 2001, (even short) delays in the deportation process triggered the implementation of administrative detention, a form of imprisonment implemented by decision (issuance of the so-called “detention certificate”) of the Secretary of State, during which the individual would be held in custody for an indefinite period of time based only on the Secretary’s assumption that the individuals in question were involved in international terrorism.⁶⁶ The persons would only be released if a state were ready to accept them. Only the government could repeal the detention. A remedy against the decision of imposing the administrative detention was examined by the Special Immigration Appeals Commission (hereinafter: SIAC).⁶⁷ The incompatibility of this administrative detention with the ECHR was repeatedly stated in the doctrine and in jurisprudence, and was also confirmed by the House of Lords. The latter did not automatically annul the provisions on detention, but its decision *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*⁶⁸ triggered a debate in the doctrine that led to a legislative change with the enactment of the PTA 2005, which abolished the administrative detention and introduced the so-called “control orders”.⁶⁹

⁶⁶ S. Forster, *Freiheitsbeschränkungen für mutmaßliche Terroristen. Eine Analyse der Terrorismusgesetzgebung des Vereinigten Königreichs*, Freiburg 2010, p. 167.

⁶⁷ The Special Immigration Appeals Commission is a superior court of record in the United Kingdom established by the Special Immigration Appeals Commission Act 1997, presided by a High Court judge with whom two other Judges adjourn.

⁶⁸ *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56 (Decision of 16.12.2004). Comments on this judgment in: D. Feldman, *United Kingdom: House of Lords on Anti-terrorism, Crime and Security Act 2001 in A. and others v. Secretary of State for the Home Department and X and another v. Secretary of State for the Home Department, Decision of 16 December 2004* (Terrorism, Human Rights and their Constitutional Implications – case note), *EuConst* 2005/3, 535-546. See also F. Foley, *Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past*, Cambridge 2013, pp. 213–214.

⁶⁹ F. Foley, *Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past*, Cambridge 2013, 213–215. More on the administrative detention see S. Forster, *Freiheitsbeschränkungen für mutmaßliche Terroristen. Eine Analyse der*

The control orders were defined in the PTA 2005 as measures that impose certain obligations on specific persons in order to prevent them from pursuing “terrorism-related activity”⁷⁰ as a way to protect the public from the risk of a terrorist attack. The law defined “involvement in terrorism-related activity” as follows: the commission and preparation of, as well as the instigation to terrorist acts; the facilitation and encouragement to the commission of, preparation of, and instigation to terrorist acts; the support or help to persons for whom it is known or believed that they maintain contacts with terrorist suspects and participate in the commission of, preparation of, and instigation to terrorist acts. The PTA 2005 included a detailed list of specific restrictions (Art. 1 para. 4 PTA 2005) to be imposed by means of a control order, such as curfews, electronic monitoring, limitations on the use of certain objects (e.g., computers) or of means of communication (e.g., the internet), restrictions on contacts with specific persons (so-called “association bans”), travel bans, and self-deportations. As a rule, these restrictions were cumulatively imposed.⁷¹ In terms of the way in which they were imposed, there were two kinds of control orders: derogating control orders (Art. 4 PTA 2005), imposed exclusively by court decision upon request by the Secretary of State, and non-derogating control orders (Art. 2 PTA 2005), issued by the Secretary of State and confirmed by a court decision stating that the Secretary’s decision is not obviously flawed.⁷² Whether an order was characterized as derogating or non-derogating depended on whether it involved a “derogating obligation” for the individual or not, namely an obligation that is in principle incompatible with the right to freedom according to Art. 5 ECHR.⁷³ According to relevant case law, restrictions on the stay in a particular place or restrictions on the freedom of movement for a period of time

Terrorismgesetzgebung des Vereinigten Königreichs, Freiburg 2010, 166–176. Also V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, 260–263.

⁷⁰ See Art. 1 para. 9 PTA 2005.

⁷¹ C. Walker, *Terrorism and the Law*, Oxford 2011, paras. 7.17-7.18.

⁷² C. Walker, *Terrorism and the Law*, Oxford 2011, paras. 7.27-7.42.

⁷³ Art. 10 PTA 2005 in conjunction with Art. 14 paras. 1, 6 HRA 1998.

not to exceed 24 hours are compatible with Art. 5 ECHR. It was, however, questionable whether a restriction of individual freedom in the context of a control order could be construed to extend to detention. The prerequisites for the imposition of a derogating control order by the court (material the court may rely on to establish the involvement of the individual in terrorism-related activity; reasonable grounds for believing that the imposition of obligations on that individual is necessary to protect the public against the risk of terrorism; risk associated with a public emergency in respect of which there is a designated derogation⁷⁴ from the whole or a part of Art. 5 ECHR; the obligations to be imposed with the control order in question qualified as “derogating obligations”)⁷⁵ were much stricter than in a non-derogating control order, where the court only examined the “obvious flawlessness” of the Secretary of State’s decision to impose the order (based on reasonable grounds to suspect the individual’s involvement in terrorism-related activity and consider the control order necessary to protect members of the public from a risk of terrorism).⁷⁶

The compatibility of the control orders with the Human Rights Act 1998 and the ECHR was contested time and time again in theory and in case law.⁷⁷ This resulted, several years later, in the introduction of a

⁷⁴ See the Human Rights Act 1998 (Designated Derogation) Order 2001.

⁷⁵ Art. 4 para. 3 PTA 2005

⁷⁶ V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 263-267.

⁷⁷ See for instance: *Secretary of State v JJ and others*, [2006] EWCA Civ 1141 [2007] UKHL 45 (compatibility of the CO with Art. 5 Sch. 1 Part I HRA 1998, Art. 5 ECHR); *Secretary of State v MB and AF*, [2007] UKHL 46 (compatibility of the CO with Art. 6 para. 1 Sch. 1 Part I HRA 1998, Art. 6 ECHR); *Secretary of State for the Home Department v E and another*, [2007] UKHL 47 (compatibility of the CO with Art. 5 ECHR); *Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and another (Appellant) and one other action*, [2009] UKHL 28 (compatibility of the CO with Art. 6 EMRK). For a detailed analysis of the relevant case law see A. Oehmichen, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator?* Antwerpen 2009, 171–172. On the relationship of the CO with other ECHR rights see [2007] EWHC 233 (*Admin*) § 309; [2007] EWCA Civ 459 § 121; A [2008] EWHC 1382

system of different orders, the “terrorism prevention and investigation measures” (hereinafter: TPIMs) with the Terrorism Prevention and Investigation Measure Act 2011 (hereinafter: TPIMA 2011). The TPIMA 2011 is currently in force and explicitly declares, in its first section, the abolition of the control orders. The current version of the TPIMA 2011 has been subject to the reform of the Counter-Terrorism and Security Act 2015 and is slightly stricter than the originally enacted TPIM system.⁷⁸ Similar to their predecessors, the TPIMs address individuals constituting a potential terrorist threat for the public who cannot be prosecuted on the basis of criminal law provisions, nor be deported, if they are foreigners, on the grounds of lack of evidence. The TPIMs are, in fact, the restrictions provided for in Schedule 1 of the Act and are imposed by notice of the Secretary of State (a “TPIM notice”). The Act requires that five conditions, which need to exist cumulatively at the time of the imposition of the order, be fulfilled:⁷⁹ first, the Secretary of State has reason to believe that an individual is or has been involved in terrorist activity; second, some or all of the activity at stake (which triggered the imposition of the TPIM) is “new terrorism-related activity”⁸⁰; third, the Secretary of State reasonably considers it necessary to impose TPIMs on the individual in order to protect the public from a risk of terrorism; fourth, the Secretary of State reasonably finds the imposition of TPIMs on the individual necessary to prevent or restrict the individual’s involvement in terrorism-related activity; finally, the Secretary of State needs prior court permission, in accordance with Art. 6 TPIMA 2011 and similarly to the previous system of control orders, or, in urgent cases, the Secretary of State may impose TPIMs without obtaining such a permission, in so far as he or she asks for the TPIM notice immediately after the imposition of the measure, according to Art. 7 in conjunction with Schedule 2 TPIMA 2011. The meaning of the term

(Admin); *Rideh* [2008] EWHC 2019 (Admin); also *A v United Kingdom*, App. no 3455/05 of 19.2.2009 (134).

⁷⁸ Arts. 16–20 CTSA 2015.

⁷⁹ Art. 3 TPIMA 2011.

⁸⁰ Art. 3 para. 6 TPIMA 2011.

“involvement in terrorism-related activity” is the same as in case of the control orders. The possible restrictions to be imposed with a TPIM notice are enlisted and described in Schedule 1 of the Act.⁸¹ Some examples include: the requirement of remaining overnight at or within a specified residence; the requirement to give notice to the Secretary of State of the identity of any other individuals who (will) reside at the specified residence; the restrictions on the individual leaving a specified area or travelling outside that area; the restrictions on the individual’s association or communication with other persons, without the permission of the Secretary of State; the requirement to give notice to the Secretary of State before associating or communicating with other persons (whether at all or in specified circumstances); restrictions on the individual regarding the individual’s work or studies. The TPIM notices are valid for two years after circulation. The structure of the TPIM system indicates the legislator’s will to part with the draconic system of the control orders,⁸² as it is no longer possible, by way of example, for the authorities to relocate a person or impose long hours of curfew on them; instead, the curfews are shorter and apply only overnight. The individuals may travel within the UK or to another country as long as they provide the police with information regarding the address where they will be staying. Yet, despite these obvious fundamental differences, the fact that TPIMs may be imposed by a mere administrative decision is a strong indication to consider them successors to the control orders.⁸³

⁸¹ D. Lowe, *Policing Terrorism. Research Studies into Police Counterterrorism Investigations*. London 2015, pp. 39-40.

⁸² HM Government, *Review of Counter-Terrorism and Security Powers: Findings and recommendations*, London 2011, pp. 40-43.

⁸³ A. Staniforth, *Preventing Terrorism and Violent Extremism*, Oxford 2014, pp. 150-153. On the comparison of the two order types see also H. Fenwick, ‘Preventive anti-terrorist strategies in the UK and ECHR: control orders, TPIMs and the role of technology’, in: H. Fenwick. (ed.), *Developments in Counter-terrorist Measures and Uses of Technology*, London 2012, pp. 29-30; F. Foley, *Countering Terrorism in Britain and France: Institutions, norms and the shadow of the past*, Cambridge 2013, pp. 215-219; K. Syrett, ‘The United Kingdom’, in: K. Roach (ed.), *Comparative Counter-*

The most recent type of order is the temporary exclusion order (hereinafter: TEO), introduced by the Counter-Terrorism and Security Act 2015. This Act deals with the phenomenon of English nationals who travel to countries known as terrorist destinations, such as Syria or Afghanistan, to receive terrorist training and either engage in the activities of terrorist organizations in those countries or return to the UK and apply their knowledge in committing terrorist attacks. For this reason, the English legislator focused on prohibiting the return of these persons to the UK by imposing so-called “temporary exclusion orders” or by permitting their return only under certain conditions found in a “permit to return”.

The TEOs are orders that prohibit the return of English nationals who left the UK (presumably to engage in terrorist activity).⁸⁴ There are only two scenarios where a return is possible: first, if the Secretary of State issues a special permission to return before the return takes place; second, if the return takes place as part of a deportation of the individual to the UK.⁸⁵ TEOs are imposed by the Secretary of State under five conditions: first, the Secretary of State reasonably suspects that the individual is, or has been, involved in terrorism-related activity outside the United Kingdom; second, the Secretary of State reasonably considers the imposition of a TEO on the individual as necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism; third, the Secretary of State reasonably considers that the individual is outside the United Kingdom; fourth, the individual has the right of abode in the United Kingdom; finally, the court gives the Secretary of State permission under s. 3 CTSA 2015, or the Secretary of State reasonably considers that a temporary exclusion order needs to be imposed even without obtaining this permission due to the urgency of the case.⁸⁶

Terrorism Law, New York 2015, pp. 190-194.

⁸⁴ V. Chalkiadaki, *Gefährderkonzepte in der Kriminalpolitik*, Wiesbaden 2017, pp. 271-274.

⁸⁵ Art. 2 para. 1 CTSA 2015.

⁸⁶ Art. 2 paras. 2-8 CTSA 2015.

The imposition of a TEO is initiated by the Secretary of State by applying for the court's permission to impose the order on a certain individual. The court examines whether the Secretary's judgment on the fulfillment of each one of the five aforementioned conditions is "obviously flawed" or not. If this is not the case, the court is obliged to permit the issuance of the order. The procedure before the court may take place even without notifying the person affected by the order.⁸⁷ Only the Secretary of State may appeal the court's decision.⁸⁸ After the permission of the court, the Secretary of State is obliged to notify the individual (so-called "excluded individual") of the imposition of the order by handing them the notice of imposition, at which point the order comes into force. The duration of the order is two years after issuance; for this period, the person's passport is declared invalid.⁸⁹ A revocation of the TEO is possible any time, but only by the Secretary of State. In addition, the TEO may also be imposed without a prior court decision: in case of emergency, the Secretary of State's decision suffices for the imposition of the order.⁹⁰ The emergency of the situation needs to be explicitly stated in the TEO. However, after the imposition of the TEO by the relevant notice, the Secretary of State still has to apply for court confirmation of the imposition of the order. In such cases, the court examines exclusively whether the Secretary of State's decision on the existence of an emergency is obviously flawed or not.⁹¹

An excluded person may return to the UK only with a permit to return. The relevant application for issuance of the permit is directed to the Secretary of State, who must issue the permit within a reasonable amount of time after the application has been filed.⁹² The permit, however, may be issued subject to a requirement that the individual com-

⁸⁷ Details on the procedure: Sch. 3 CTSA 2015.

⁸⁸ Art. 3 paras. 2-9 CTSA 2015.

⁸⁹ Art. 4 paras. 1-3, 9-11 CTSA 2015.

⁹⁰ Arts. 1, 2 Sch. 2 CTSA 2015.

⁹¹ Art. 3 paras. 1, 2 Sch. 2 CTSA 2015. The procedure in the case of an emergency situation is specified in Sch. 2 CTSA 2015.

⁹² See Art. 6 CTSA 2015.

ply with conditions specified in the permit to return; if the person fails to comply with one of these conditions, the permit to return becomes invalid. The permit must specify the time, manner, and place where the person is permitted to arrive on return to the UK, including details such as the airline, shipping line, or other passenger carrier, or the flight, or other transport service the person must use. The Secretary may refuse issuing the permit, especially if the person was required to attend an interview with a constable or immigration officer and had failed to do so. Another scenario for a permit to return is when the Secretary of State considers the individual to be deported to the United Kingdom, or when, due to the urgency of the situation, it is expedient to issue a permit to return even absent an application by the excluded person. As with the TEOs, the Secretary of State may revoke a permit only under the conditions specifically mentioned in the law.⁹³

Upon the return of the excluded person to the UK, concrete restrictions may be imposed on them in the context of a TPIM, ranging from a notification requirement at the police station of their place of residence to the participation in special appointments and programs aiming at their deradicalization. Failure to comply may invalidate the permit and may even constitute a criminal offence if the failure occurred without reasonable excuse.⁹⁴

This analysis shows that after the abolition of a measure as invasive into the rights of an individual as the administrative detention, the English legislator has created a system of orders, whose name and impact on the rights of the individuals may vary, but the core idea behind their introduction remains the same: it is necessary to impose certain restrictions, restrictively enumerated in the law, on the activities of specific individuals in order to prevent them from preparing and committing a terrorist attack. These individuals have not yet committed a terrorist attack (or the criminal offence of preparatory acts for a terrorist attack); consequently, they cannot be convicted or even crimi-

⁹³ See Art. 8 CTSA 2015.

⁹⁴ Arts. 9, 10 para. 3 CTSA 2015.

nally prosecuted for it. They are (merely) suspects in terms of the commission of terrorism-related acts; however, the activities and way of life in general of these persons requires some control by the state in order to prevent the risk of a terrorist attack. From the era of the draconic control orders to the recent introduction of the (more lenient) TEOs, it is evident that the English legislator aims to intervene as preventively as possible and to deal with the risk of terrorism at a preliminary stage in order to effectively prevent a terrorist attack. The legislator recognizes the serious intervention into the rights of individuals resulting from these orders, which is the main reason for requiring a court decision for their imposition. However, there are times where the situation demands a quick response and the immediate imposition of an order: this can be achieved more effectively by way of administrative provisions, which call for the imposition by the Secretary of State or by a police officer, and are confirmed by a court decision a posteriori. In the case of TEOs, the legislator takes it even one step further, in the sense that the court can basically only confirm the orders issued by the Executive and not examine the fulfillment of the prerequisites described in the law. This is a pattern also present in the most well-known orders, which focus on terrorist financing: the so-called “designation orders” according to the Asset-Freezing Act 2010. These orders involve creating a list of individuals whose financial activity needs to be restricted by freezing their assets based on the suspicion by the authorities that their assets are involved in terrorism financing. The only requirement for the imposition of a designation order is a reasoned decision by the Secretary of State and the Treasury, and the confirmation by a judge, which may also be provided a posteriori due to the urgency of the situation.⁹⁵ The pattern of a simple administrative process to im-

⁹⁵ Arts. 10–21 Asset-Freezing Act 2010. See C. Walker, *Terrorism and the Law*, Oxford 2011, paras. 9.187–9.198. Regarding the implementation of designation orders in practice: QC. D. Anderson, *Fourth Report on the operation of the Terrorist Asset-Freezing etc. Act 2010 (Review period: Year to 16 September 2014)*, London 2015, pp. 3–31; K. Syrett, ‘The United Kingdom’, in: K. Roach (ed.), *Comparative Counter-Terrorism Law*, New York 2015, p. 185.

pose such severe restrictions on the life of a person is the reason why the aforementioned administrative orders have so far been considered the most effective measure in the English counter-terrorism strategy.

Effectiveness of Administrative Measures as to the Prevention of Terrorism

With the purpose of preventing the outburst of terrorist activity on their territory, the French and the English legal orders have created a system of imposing severe restrictions on the lives of individuals who are merely suspected of being (or having been) involved in terrorism-related activity without yet fulfilling the substantive elements of a criminal offence relevant to terrorism. These restrictions are without a prior court judgment but a mere decision of the Executive (Minister of Home Affairs, Treasury, or, most usually, police officer), which may (or may not, as in the case of designation orders) be followed by a court judgment confirming *a posteriori* the implementation of the decision of the Executive. The reason is the easy implementation of these measures in situations the authorities characterize as “emergency”, without the prerequisites of the strict system of criminal law and its guarantees. The measures to be implemented may be very invasive as far as the rights of the person on whom they are imposed are concerned, as for instance in the case of the prohibition of leaving the French territory and its English counterpart, or the English TPIMs. Particularly England has developed an entire system of different orders, whereas in France such measures have only been recently introduced – with the law on “reinforcing the provisions regarding the struggle against terrorism” of 2014 – and refer only to French citizens travelling abroad for terrorist purposes. In England, the scope of the orders is much broader, since they regulate many aspects of the life of a suspected potential terrorist in order to control his or her activities and eventually prevent a terrorist attack.

Taking into account their actual function, these orders are also means of surveillance, in the sense that they allow for the monitoring of the activities of specific individuals regarded by the authorities as

potential security threats. In addition, the use of counter-terrorism databases by the police facilitates the surveillance of numerous persons over a longer period of time. The question arising from these facts is whether surveillance serves the purposes of counter-terrorism as effectively as it is believed and expected to do.

In this context, France serves as an example for the non-effectiveness of this surveillance pattern: the recent terrorist attacks in 2016 have demonstrated that, despite the various police practices and the setting-aside of the guarantees of the rule of law in favour of simpler administrative procedures, terrorist attacks have not ceased. England has not been confronted with an Islamist terrorist attack on its territory since the London car bombs in 2007; however, the police have thwarted at least six terrorist plots since then, which had been planned by English residents and English nationals who fought for extremist groups overseas and continued to return to England, thereby increasing the risk of terrorist attacks either by these very individuals or by persons radicalized by them. While the majority of returners will eventually not mount attacks in England, the large numbers involved mean that an attempt is highly likely in the near future.

Would a more intense surveillance pattern be the solution to the issue of the – imminent or not – risk of terrorism? In the context of the current legal framework, it seems that there is not much space for legal coercion as intervention against terrorism anymore, and that the answer to the relevant question should be searched for elsewhere, for instance in alternative measures outside of the legal sphere. Out of the two legal orders, the English legislator is the one that has recently made moves in this direction: apart from boosting the administrative apparatus with the introduction of the TEOs, the reform of the TPIM system and other provisions on administrative measures, the CTSA 2015 includes a part entitled “Risk of being drawn into terrorism”, which elaborates the *Prevent* pillar of the CONTEST strategy by creating measures targeting the radicalization process of specific groups of people as the root of all evil.

This law creates a general legal duty of “due regard to the need to

prevent people from being drawn into terrorism” for certain public sector entities, indicated as “specified authorities”. These authorities are enumerated in Schedule 6 CTSA 2015 and include local government, criminal justice, and police authorities (e.g., the governor of a prison or a young offender institution), education bodies (schools and universities), as well as child, health, and social care institutions (e.g. National Health Service trusts). The Secretary of State may issue a guidance for these authorities regarding the exercise of their duty of due regard, which the authorities are obliged to follow in forming their strategies against radicalization. If, in the opinion of the Secretary of State, a specified authority has failed to comply with the duty of due regard, the Secretary may give directions to ensure the enforcement of the performance of that duty and even issue a relevant mandatory order. In practice, this duty entails a requirement for teachers, doctors, psychologists, nurses, and other caregivers as well as teachers and other education professionals to report to the authorities any students and patients seen to be at risk of “extremism”.

More specifically, the aforementioned professionals need to identify individuals “at risk of being drawn into terrorism” (including violent and non-violent extremism), assess the level of risk they represent and refer them to the police-led multi-agency “Channel” programme where necessary.⁹⁶ Channel is a programme focusing on providing support at an early stage to people identified as vulnerable to being drawn into terrorism. Its multi-agency approach aims at developing the most appropriate support plan for the individuals concerned. This ambitious programme started already in 2012 after a five-year trial period with the purpose of protecting the individuals vulnerable to terrorist ideas from getting radicalized. Nevertheless, the first assessments⁹⁷ present an alarming picture: So far, thousands of individuals (including children) have been erroneously referred to the Channel, resulting in stig-

⁹⁶ HM Government, *Channel Duty Guidance – Protecting vulnerable people from being drawn into terrorism*, London 2015, pp. 10-13, 27.

⁹⁷ Open Society Justice Initiative, *Eroding Trust – The UK’s Prevent Counter-Extremism Strategy in Health and Education*, London 2016, pp. 11-116.

matization and fear of continued surveillance in the future. Especially the targeting of the “non-violent extremism,” in this broad sense, inevitably leads to serious concerns about violations of the right to freedom of expression under the Education Act (1986) and Art. 10 ECHR. So far, case studies and interviews on the effectiveness of the Channel programme have indeed suggested that Prevent has created a significant chilling effect on freedom of expression in schools and universities, and undermined trust between teachers and students.⁹⁸

These concerns aside, however, the Channel programme and the targeting of the process of radicalization in general still constitute first efforts to deal with terrorism using alternative measures that do not involve criminal or administrative law restrictions, although the recent insertion of the relevant part to the CTSA 2015 shows that it is difficult to exclude legal coercion entirely. It remains to be seen whether there is still margin for other alternative measures or whether legal coercion is inevitable in this context, despite the risk of drawing such schemes into extremes and even murkier waters.

⁹⁸ Open Society Justice Initiative, *Eroding Trust – The UK’s Prevent Counter-Extremism Strategy in Health and Education*, London 2016, 27-32, pp. 65-101.

