

Name: Eda Seyhan  
Candidate number: 630691  
Supervisor: Dr Lutz Oette

LLM in Human Rights, Conflict and Justice  
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# **Temporary Exclusion Orders: Beyond a human rights critique of pre-emptive security**

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Family name: Seyhan

First Name: Eda

Programme of Study: LLM in Human Rights, Conflict and Justice

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## **Abstract**

Temporary Exclusion Orders (TEOs) exclude British residents suspected of terrorism-related activity abroad from the UK unless and until they agree to certain conditions set by the Home Secretary. The debate on TEOs during their passage into law examined them from a human rights perspective. This paper goes beyond a human rights critique to analyse TEOs through the wider lens of pre-emption, the operative logic of contemporary counter-terrorism. By doing so, this paper demonstrates that TEOs are not a new measure to deal with an exceptional threat, as parliamentarians suggested during the debate on TEOs. It suggests that a human rights critique should be supplemented by a wider critique of pre-emption.

“It would seem that evidence-based decision making has been compromised by fears of a dangerous future, leading to a pre-emptive delirium in which risky others are indelicately identified, branded, and discriminated against.”

Gabe Mythen and Sandra Walklate<sup>1</sup>

## **Introduction**

In September 2014, the United Nations Security Council expressed “grave concern over the acute and growing threat posed by foreign terrorist fighters” (“FTFs”), that is, those who travel to states other than their states of residence or nationality to participate in terrorism-related activities.<sup>2</sup> In 2015 the UK Home Office maintained that 850 “individuals of national security concern” had travelled from the UK to Syria and Iraq since the start of the conflicts in those countries.<sup>3</sup> Partly in response to the perceived threat posed by British FTFs, the Joint Terrorism Analysis Centre raised the terrorist threat level in the UK from substantial to severe in August 2014. This prompted the Government to take legislative action, claiming that “the threat is now worse than at any time since 9/11...[it] has changed and so must our response.”<sup>4</sup>

The new legislation introduced to deal with the increased threat level was the Counter-Terrorism and Security Bill (the “CTS Bill”). Once passed in 2015, the Counter-Terrorism and Security Act 2015 (the “CTS Act”) became the seventh piece of counter-terrorism legislation enacted in the UK since 2001. Among other measures, it introduced new restrictions on travel aimed at potential or returning suspected FTFs. This paper focuses on one such measure, Temporary Exclusion Orders (“TEOs”), that were imposed “to disrupt and control the return to the UK of a British citizen reasonably suspected of involvement in terrorist activity abroad”.<sup>5</sup> The new measure allows the Home

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<sup>1</sup> Gabe Mythen and Sandra Walklate, ‘Pre-crime, regulation, and counter-terrorism: interrogating anticipatory risk’ (2010) 81(1) *Criminal Justice Matters* 34

<sup>2</sup> UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178

<sup>3</sup> Home Office, *CONTEST: The United Kingdom’s Strategy for Countering International Terrorism: Annual Report for 2015*, (Cm 9310, 2016), para 2.34

<sup>4</sup> HC Deb, 24 March 2015, vol 594, col 1377 (James Brokenshire MP)

<sup>5</sup> Explanatory Notes to the Counter-Terrorism and Security Bill 2014-15

Secretary to prohibit the return to the UK of individuals suspected of involvement in terrorism-related activity abroad, unless and until they accept certain conditions set out in a “permit to return”. I have chosen to focus on TEOs because, as a relatively new measure, they have been under-theorised. Where they have been subject to academic analysis, this has largely focused on their conformity with human rights law.<sup>6</sup>

To justify the new measure, the Government argued that returning suspected FTFs (referred to hereafter as “returnees”) posed an unprecedented threat which could not be managed using existing measures. While the new powers introduced may infringe civil liberties, the Government stated that they struck the right balance between security and liberty. Within parliament, there was cross-party consensus on the need for a measure like TEOs. Instead of questioning the Government’s rationale, the majority of criticisms of TEOs focused on their nonconformity with human rights principles and the rule of law. A number of the amendments suggested sought to render TEOs more compatible with the UK’s obligations under human rights law.

This essay suggests that criticising TEOs from a solely human rights perspective is an incomplete form of critique. Those who put forward criticisms on human rights grounds during the debate on TEOs largely accepted the Government’s rationale for the measure, viewing TEOs as a necessary, albeit unfortunate, incursion into civil liberties in light of the new and unparalleled threat posed by returnees. This paper argues that there is value in going beyond the human rights critique to question the broader logic that informs TEOs. It argues that the dominant logic of contemporary counter-terrorism is that of pre-emption. Under this logic, given the seriousness of the potential harm of a terrorist attack, to wait until a terrorist threat emerges is to wait too long; pre-emption dictates that governments must take decisive action to ensure security in the present even if they cannot be

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<sup>6</sup> See, for example:

Jessie Blackbourn and Clive Walker, ‘Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015’ (2016) 79(5) *The Modern Law Review* 840

Helen Fenwick, ‘Terrorism threats and temporary exclusion orders: counter-terror rhetoric or reality?’ (2017) 3 *European Human Rights Law Review* 247

sure of where or when or by whom an attack may occur. This paper will argue that TEOs exemplify the trend of pre-emptive security. They are not, however, an entirely novel legal instrument, with important antecedents in colonial history. By demonstrating how TEOs fit within a wider technique of governance, and mirror historically embedded legal forms, this paper demonstrates that TEOs are not, as its supporters have argued, an exceptional measure to deal with the exceptional threat posed by returnees. The paper uses this case study to further suggest that pre-emption should no longer be the predominant engine of counter-terrorism policies.

This paper begins by outlining the law on TEOs. Given that, according to the last publicly available information, only one TEO has been imposed and there is no information available as to the specifics of this TEO, the first chapter relies exclusively on the text of the legislation itself.<sup>7</sup> The second chapter summarises the debate on TEOs during the passage of the CTS Bill, which focused primarily on human rights concerns raised by parliamentarians and civil society actors. The third chapter details the nature and growth of pre-emption as a strategy for dealing with threats from terrorism. The fourth chapter applies this framework to TEOs, and explores the historical precedents of the measure. It demonstrates that TEOs exemplify pre-emptive security, and have important parallels in colonial history. The fifth chapter brings together the arguments of the preceding chapters, and provides a tentative critique of pre-emption as a counter-terrorism strategy.

## **Scope and Methodology**

There are a number of alternative theoretical models, or trends, within which TEOs could be located. One which has been subject to considerable academic endeavour is the state of emergency, with scholars arguing that, especially since 9/11, emergency measures have become embedded in ordinary law.<sup>8</sup> TEOs could be analysed as emergency-like measures given they are an exercise of

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<sup>7</sup> Nick Ferrari, 'Nick Ferrari's Tenacious Interview With Amber Rudd' (LBC, 29 May 2017) <[www.lbc.co.uk/radio/presenters/nick-ferrari/nick-ferraris-tenacious-interview-with-amber-rudd/](http://www.lbc.co.uk/radio/presenters/nick-ferrari/nick-ferraris-tenacious-interview-with-amber-rudd/)> accessed 30 June 2017

<sup>8</sup> Giorgio Agamben, *State of Exception* (University of Chicago Press 2005)

executive power with little judicial oversight which render individuals “objects of a pure de facto rule”.<sup>9</sup> This paper does not focus on the literature on emergency laws because the argument that TEOs are akin to emergency measures, thereby demonstrating that the emergency has become the norm, is not particularly novel. Ordinary counter-terrorism law in the UK has long mirrored emergency measures elsewhere, and the idea that post-9/11 “the emergency has become the norm” is now commonplace.<sup>10</sup> This paper seeks to go further, investigating the logic, that of pre-emption, underpinning the growth of many emergency-like measures such as TEOs.

A second trend within which TEOs could be located is the changing nature of citizenship. Preventing British nationals from returning to Britain, even for a short time, is at odds with the entitlement of citizens to reside in their country of citizenship. Scholars have noted how citizenship rights are increasingly conditional on certain forms of behaviour, as exhibited by laws to strip individuals of their citizenship on national security grounds.<sup>11</sup> To analyse TEOs within this trend, in addition to that of pre-emption, is not possible within the limited scope of this paper, although this could be a productive area for further investigation.

With respect to the research undertaken for this paper, primary sources examined include the CTS Act, its explanatory notes and related impact assessments, the European Convention on Human Rights (“ECHR”) memorandum and research paper provided by the Government in support of the CTS Bill, Hansard and documents arising from the legislative scrutiny of the CTS Bill by the Joint Committee on Human Rights (“JCHR”), the Home Affairs Committee and the House of Lords Constitution Committee. I will also refer to submissions and reports regarding the CTS Bill by civil society actors. There is no case law as yet on TEOs. In relation to the theory used in paper, I will draw

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<sup>9</sup> *ibid* 3

<sup>10</sup> Academic work making this argument, and often engaging with Giorgio Agamben’s thesis, is too abundant to list, but examples include: Michael Hardt and Antonio Negri, *Multitude: War and Democracy in the Age of Empire* (Penguin 2004); Alex Callinicos, *The New Mandarins of American Power: The Bush Administration’s Plans for the World* (Polity Press 2003)

<sup>11</sup> Pillai Sangeetha and George Williams, ‘Twenty-First Century Banishment: Citizenship Stripping in Common Law Nations’ (2017) 66(3) *International & Comparative Law Quarterly* 521

on literature from the fields of criminology and postcolonial legal theory. This paper adopts a socio-legal perspective, finding value in understanding how and why certain laws develop and how they relate to broader power structures in society. My theoretical approach is also informed by a belief in the value of a genealogical approach to law, and a commitment to “provincializing Europe” in our accounts of law.<sup>12</sup> The former involves uncovering the “past of the present”, in order to destabilise concepts that we know and take for granted. The latter views modern common law, not as the result of developments in Britain alone, but as constituted in part through Britain’s experimentation with different legal forms in its colonies.

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<sup>12</sup> Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press 2000)

## **Chapter 1: Temporary Exclusion Orders – the law**

As set out in the introduction, TEOs are one of many measures dealing with the perceived threat from returnees. Prior to the CTS Act, measures available to the UK authorities to restrict the travel of suspected FTFs included the cancellation or refusal of passports, nationality stripping and, for foreign nationals, the exclusion or deportation of individuals on national security grounds. TEOs fill a perceived gap in the legislation, allowing the authorities to prevent or manage the return to the UK of UK nationals whom they cannot or wish not to deprive of their British nationality. TEOs, the Home Office argues, are intended to “reduce the security risk to the UK resulting from the return of British citizens suspected of involvement in terrorism abroad”.<sup>13</sup>

An individual subject to a TEO is prohibited from returning to the UK unless their return is in accordance with a permit to return issued by the Secretary of State, or the result of their deportation by their host state.<sup>14</sup> If, without “reasonable excuse”, the individual returns to the UK in contravention of a TEO, they are guilty of an offence punishable by up to five years imprisonment.<sup>15</sup> The Secretary of State has the power to impose a TEO where the following conditions are met:

- A. the Secretary of State reasonably suspects that the individual is, or has been, involved in terrorism-related activity outside the UK;<sup>16</sup>
- B. the Secretary of State reasonably considers that it is necessary to protect the public from a risk of terrorism;<sup>17</sup>
- C. the Secretary of State reasonably considers that the individual is outside the UK;<sup>18</sup>
- D. the individual has the right of abode in the UK;<sup>19</sup> and

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<sup>13</sup> Home Office, *Overarching Impact Assessment for the Counter-Terrorism and Security Act 2015* (IA No: HO0150, 11 February 2015), para 26

<sup>14</sup> Counter-Terrorism and Security Act 2015 (CTSA 2015), s 2(1)

<sup>15</sup> CTSA 2015, ss 10(1) and 10(5)(a)

<sup>16</sup> CTSA 2015, s 2(3)

<sup>17</sup> CTSA 2015, s 2(4)

<sup>18</sup> CTSA 2015, s 2(5)

<sup>19</sup> CTSA 2015, s 2(6)

E. the Secretary of State has obtained permission from the courts to impose the TEO, or reasonably considers that the urgency of the case requires a TEO to be imposed without prior approval by the courts.<sup>20</sup>

While TEOs are technically a civil order, the standard of proof is lower than the usual civil standard of “balance of probabilities”. The Secretary of State need only “reasonably suspect” that the individual is or has been involved in terrorism-related activity. “Involvement in terrorism-related activity” is a very broad term and may include the “commission, preparation or instigation of acts of terrorism”; conduct which facilitates or gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so; or conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism-related activity.<sup>21</sup>

A TEO is valid for a maximum of two years, though an individual can be subject to a new TEO upon its expiry.<sup>22</sup> There is no limit on the number of TEOs to which an individual may be subject. While the TEO is in force, the excluded individual’s British passport is invalidated.<sup>23</sup> In order to return to the UK, an individual must apply for a “permit to return” which specifies the time, manner and place of the individual’s return.<sup>24</sup> The Home Secretary must issue the permit “within a reasonable period” if the subject applies for one, but may refuse to do so if the subject fails to attend an interview required by the Home Secretary.<sup>25</sup> The permit may also specify that the individual is subject to certain obligations upon return.<sup>26</sup> These include a requirement to report to a police station, attend appointments (potentially as part of a de-radicalisation program) and notification of their place of residence.<sup>27</sup>

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<sup>20</sup> CTSA 2015, s 2(7)

<sup>21</sup> CTSA 2015, s 14(4) and Sch 1 para 1(10)

<sup>22</sup> CTSA 2015, ss 4(3)(b) and 4(8)

<sup>23</sup> CTSA 2015, s 4(9)

<sup>24</sup> CTSA 2015, s 5(4)

<sup>25</sup> CTSA 2015, ss 6(1) and 6(2)

<sup>26</sup> CTSA 2015, s 5(2)

<sup>27</sup> CTSA 2015, s 9(2)

In non-urgent cases where the Secretary of State seeks permission from the court to impose a TEO, the court's function is not to consider the merits of the application but to determine "whether the relevant decisions [in relation to the five conditions listed above] of the Secretary of State are obviously flawed", applying judicial review standards.<sup>28</sup> The court may consider the application without the suspect individual being notified, present or given an opportunity to make representations.<sup>29</sup> Where there is evidence which would be contrary to the public interest to reveal, hearings make take place under a closed material procedure.<sup>30</sup> Under this procedure, the individual and his counsel would attend open proceedings but would not be present at closed proceedings, where sensitive evidence is presented. At the latter, the individual is represented by a Special Advocate. Once the Special Advocate has accessed the closed information, they can no longer communicate with their client. Closed material procedures are a means of ensuring the court has access to sensitive evidence while protecting it from wider disclosure.

The suspect individual cannot appeal the decision to impose a TEO but can, if they are in the UK, apply for a review of that decision or the decision to impose obligations upon the individual's return under section 11 of the CTS Act.<sup>31</sup> The same rules of court apply as in the prior permission stage. A judicial review standard is applied and the court may operate under a closed material procedure where there is material that would be contrary to the public interest to disclose. The statutory right to apply for a review under section 11 is in addition to the general right to apply for judicial review of administrative decisions.

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<sup>28</sup> CTSA 2015, s 3(2)

<sup>29</sup> CTSA 2015, s 3(3)

<sup>30</sup> CTSA 2015, Sch 3

<sup>31</sup> CTSA 2015, s 11(1)

## **Chapter 2: The debate on TEOs**

This purpose of this section is to outline the debate on TEOs during the passage of the CTS Bill, which centred on the measure's nonconformity with human rights principles and the rule of law. While questions were also raised as to the workability of TEOs and the potential diplomatic consequences of "offshoring" British security threats,<sup>32</sup> most parliamentarians and civil society actors approached the debate from a civil liberties perspective. As Hazel Blears MP advised the House of Commons, "our guide in our scrutiny of this Bill" should be "the language of universal human rights".<sup>33</sup> A full analysis of whether TEOs comply with the UK's obligations under international human rights law is beyond the scope of this section, which analyses the issues debated by parliamentarians during the passage of the legislation. In subsequent chapters, this paper will argue that criticism of TEOs from a purely human rights perspective, as outlined in this chapter, is an incomplete means of understanding and opposing the measure.

### **2.1 Statelessness**

The first key concern raised by parliamentarians and civil society actors was that TEOs would render individuals *de facto* stateless by stripping them of a passport and prohibiting their return to the UK, unless and until certain conditions are met. An individual is *de facto* stateless if he is "unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality".<sup>34</sup> Parliamentarians suggested that individuals who refuse to accept the conditions set out

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<sup>32</sup> Guy S Goodwin-Gill, 'Temporary Exclusion Orders' and their Implications for the United Kingdom's International Legal Obligations', (Submission to the JCHR, 2 December 2014) <[https://www.parliament.uk/documents/joint-committees/human-rights/GSGG-Counter\\_Terrorism\\_JCHRFinal.pdf](https://www.parliament.uk/documents/joint-committees/human-rights/GSGG-Counter_Terrorism_JCHRFinal.pdf)> accessed 10 June 2017

<sup>33</sup> HC Deb 2 December 2014, vol 589, col 235 (Hazel Blears MP)

<sup>34</sup> UN Ad Hoc Committee on Refugees and Stateless Persons, 'A Study of Statelessness, United Nations, August 1949, Lake Success - New York' (1 August 1949) UN Doc E/1112, s III para 2.

in the “permit to return” would be rendered *de facto* stateless.<sup>35</sup> An additional concern was the period of time, which may “be a matter of years”, between the imposition of a TEO and when the individual arrives in the UK, during which an individual could be deemed *de facto* stateless.<sup>36</sup> Some parliamentarians were even more critical, arguing that TEOs were a form of exile that “has not been tolerated in this country since the late 17th century.”<sup>37</sup> This concern was echoed by civil society groups.<sup>38</sup> The National Council for Civil Liberties (commonly known as Liberty) argued that return may be prevented for certain British citizens in practice, including “those without sufficient money or means, those being controlled by another or resident in a failed or failing State” and to those individuals “unwilling or unable to attend an interview or return in the manner prescribed by the Home Secretary”.<sup>39</sup>

This criticism was repeatedly rejected by the Government. Then Home Secretary Theresa May argued that TEOs do not exile British citizens but merely require them to return on “our terms”.<sup>40</sup> The Government also stated that individuals would remain British nationals and be entitled to consular assistance.<sup>41</sup> With the exception of the criticisms noted above, there was widespread acceptance by parliamentarians, including the Opposition, of the view put forward by the Government, i.e. that TEOs imposed a system of managed return rather than exile. Some commentators did, however, draw attention to the inconsistency of the Government’s position on TEOs.<sup>42</sup> When the measures were first announced, the Government called them “a targeted,

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<sup>35</sup> HC Deb 2 December 2014, vol 589, col 211 (Sir Menzies Campbell MP)

<sup>36</sup> HL Deb 20 January 2015, vol 758, col 1294 (Lord Bates)

<sup>37</sup> HC Deb 2 December 2014, vol 589, col 228 (Dominic Grieve MP)

<sup>38</sup> See, for example, Human Rights Watch, ‘UK: New Counterterrorism Bill Curbs Rights’ (1 December 2014) < <https://www.hrw.org/news/2014/12/01/uk-new-counterterrorism-bill-curbs-rights> > accessed 15 June 2017

<sup>39</sup> House of Commons Home Affairs Committee, *Oral evidence: Counter-Terrorism and Security Bill*, (HC 2014-15, 838), Q82 and Q112

<sup>40</sup> HC Deb 2 December 2014, vol 589, col 210

<sup>41</sup> HC Deb 15 December 2014, vol 589, col 1207 (Theresa May MP)

<sup>42</sup> HL Deb 20 January 2015, vol 758, cols 1312 (Baroness Warsi)

discretionary power to allow us to exclude British nationals from the UK.”<sup>43</sup> James Brokenshire MP stated that TEOs allowed the government “to facilitate the return of an individual in a controlled way and, frankly, *to keep them* out if they do not adhere to that.”<sup>44</sup> Since the passage of the CTS Bill, the Government has again emphasised the element of exclusion over that of managed return, with Home Secretary Amber Rudd recently calling TEOs measures to “keep the potential terrorists out of this country”.<sup>45</sup>

A related issue raised regarding TEOs was the potential violation of the UK’s obligation under article 12 of the International Covenant on Civil and Political Rights, which protects the right to freedom of movement. More specifically, article 12(4) states that “no one shall be arbitrarily deprived of the right to enter his own country.”<sup>46</sup> The UN Human Rights Committee clarified that the term “arbitrarily” means that “even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances” adding “that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable.”<sup>47</sup> The issue of incompatibility with article 12(4) was raised by the JCHR<sup>48</sup> and the Equality and Human Rights Commission.<sup>49</sup> When questioned on this issue, James Brokenshire MP argued that the exclusion of suspected individuals would not be arbitrary, as it would be based on the criteria set out in the CTS Act and, furthermore, because a TEO

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<sup>43</sup> Prime Minister’s Office, ‘PM statement on European Council and tackling extremism’ (1 September 2014) <<https://www.gov.uk/government/speeches/pm-statement-on-european-council-and-tackling-extremism>> accessed 30 June 2017

<sup>44</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Security Bill - Minutes of evidence: James Brokenshire MP, 3 December 2014*, (HC 859), Q27, emphasis added

<sup>45</sup> Nick Ferrari, ‘Nick Ferrari’s Tenacious Interview With Amber Rudd’ (LBC, 29 May 2017)

<sup>46</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 12(4)

<sup>47</sup> UN Human Rights Committee ‘General Comment No. 27 (67), Freedom of movement, article 12’ (1 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9, para 21

<sup>48</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Security Bill* (2014-15, HL 86-V, HC 859-V) para 3.4

<sup>49</sup> Equality and Human Rights Commission, ‘Counter Terrorism and Security Bill 2014-15: Second Reading, House of Lords’ (January 2015) <<https://www.equalityhumanrights.com/en/file/14456/download?token=R0k5HteC>> accessed 15 June 2017, 5

does not deprive an individual of the right to return to the UK but merely subjects it to certain conditions.<sup>50</sup>

One of the two substantive amendments suggested to the CTS Bill by the Opposition would have removed the risk of non-compliance with article 12(4) and the UK's duty to prevent statelessness. Under the amendment, a "notification and managed return" order, rather than a TEO, could be imposed.<sup>51</sup> Under the order, transport carriers would be obliged to notify the UK authorities of the planned return of a suspect, which would permit their immediate management upon return, whether by criminal prosecution, the imposition of a Terrorism Prevention and Investigation Measure (TPIM) or a program of de-radicalisation. This order would not, therefore, restrict an individual's ability to return to the UK, but merely facilitate their speedy interception by law enforcement on arrival. The JCHR suggested a similar amendment to James Brokenshire MP, who argued that the amendment "would seriously limit the operational effectiveness of the power and thus our ability to manage the threat these individuals pose to the British public".<sup>52</sup> Then Home Secretary Theresa May objected to the disclosure of names of potential terrorism suspects to transport carriers.<sup>53</sup> The Opposition did not push the amendment to a vote. The Independent Reviewer of Terrorism Legislation David Anderson QC explained the Government's objection to the amendment as such, "it may be that the by-product of some people choosing not to come back but to stay out there is seen in some quarters as a welcome one".<sup>54</sup>

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<sup>50</sup> Letter from James Brokenshire MP to Joint Committee on Human Rights, 'Counter-Terrorism and Security Bill: Legislative Scrutiny' (20 January 2015), 4

<sup>51</sup> HC Deb 15 December 2014, vol 589, cols 1119-1234

<sup>52</sup> Letter from James Brokenshire MP to Joint Committee on Human Rights, 'Counter-Terrorism and Security Bill: Legislative Scrutiny' (20 January 2015), 4

<sup>53</sup> HC Deb 15 December 2014, vol 589, col 1209

<sup>54</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Security Bill - Minutes of evidence: David Anderson, 27 November 2014* (HC 836), Q11

## 2.2 Judicial oversight and due process

The second key area of concern regarding TEOs was the lack of judicial oversight. In the first draft of the CTS Bill, there was no requirement that the Home Secretary seek court permission before imposing a TEO and no statutory judicial review mechanism. The JCHR and the House of Lords Constitution Committee, among others, were all highly critical of the lack of judicial oversight.<sup>55</sup> David Anderson speaking to the Home Affairs Committee noted that “in peacetime we have never accepted the power of the Home Secretary simply to place someone under Executive constraint for two years without providing for some relatively speedy process of appeal.”<sup>56</sup> In their closing remarks on the bill in the House of Commons, the Opposition identified the lack of judicial oversight of TEOs as their main concern.<sup>57</sup> After much debate on this issue, the Opposition tabled an amendment requiring prior court permission in non-urgent situations.<sup>58</sup> Although the amendment did not pass at the Commons stage, the Government took on board this criticism and tabled an amendment in the House of Lords which included judicial approval at the permission stage and a statutory mechanism for in-country judicial review.<sup>59</sup>

Despite the success of the amendment, due process concerns remained in relation to TEOs. Parliamentarians voiced concerns over the effectiveness of the right to review, specifically on the feasibility of an out-of-country judicial review and availability of legal aid.<sup>60</sup> As David Anderson stated, “the practicalities of bringing a case for judicial review in London are pretty difficult” for those effectively stranded abroad, potentially in areas of conflict.<sup>61</sup> Many commentators also

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<sup>55</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Security Bill* (2014-15, HL 86-V, HC 859-V) para 3.14; House of Lords Constitution Committee, *Counter-Terrorism and Security Bill* (HL 2014-15, 92) para 11

<sup>56</sup> House of Commons Home Affairs Committee, *Oral evidence: Counter-Terrorism and Security Bill*, (HC 2014-15, 838) Q140

<sup>57</sup> HC Deb 7 January 2015, vol 590, cols 341-343 (Yvette Cooper MP)

<sup>58</sup> HC Deb 6 January 2015, vol 590, col 165-171

<sup>59</sup> HL Deb 20 January 2015, vol 758, cols 1258-1273

<sup>60</sup> See, for example, HC Deb 2 December 2014, vol 589, col 212 (Yasmin Qureshi) and col 237 (Sir Menzies Campbell MP)

<sup>61</sup> House of Commons Home Affairs Committee, *Oral evidence: Counter-Terrorism and Security Bill*, (HC 2014-15, 838) Q141

highlighted the limited nature of judicial review, which is restricted to an examination of the lawfulness, rather than the merits, of the Home Secretary's decision.<sup>62</sup>

Submissions by civil society actors also highlighted that an individual subject to a TEO would not enjoy the safeguards of the criminal justice system, despite the onerous nature of the measure.<sup>63</sup> This is a critique made of many administrative counter-terrorism measures, which are designated as civil orders under domestic law but impose penal-like sanctions, and attract criminal liability if breached. As this was not a key area of the parliamentary debate on TEOs, perhaps because criticisms of this nature have been made so regularly of counter-terrorism measures, this paragraph offers only a brief explanation of the concerns. TEOs can be imposed in the absence of evidence to a criminal standard of any terrorism-related activity. Breaching a TEO is, however, a criminal offence, allowing the authorities "a 'quick and dirty' route to enforcement action" without the need for a criminal conviction based on terrorism-related activity.<sup>64</sup> As notice of TEOs may be deemed to have been given, and court proceedings may proceed *ex parte*, individuals do not have the ability to defend themselves from the allegations. Even where individuals have access to the court, the use of closed material procedures may undermine the right to a fair trial. In short, TEOs evade key procedural safeguards, such as the right to fair trial and the presumption of innocence, which, although not technically required for civil orders, should be adhered to given the severity of the restrictions.

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<sup>62</sup> HC Deb 15 December 2014, vol 589, col 1233 (Jeremy Corbyn MP)

<sup>63</sup> Liberty (the National Council for Civil Liberties), 'Liberty's second reading briefing on the Counter-Terrorism and Security Bill in the House of Commons', (December 2014) <  
<https://www.liberty-human-rights.org.uk/sites/default/files/Liberty%27s%20Second%20Reading%20Briefing%20on%20the%20Counter-Terrorism%20%26%20Security%20Bill%20in%20the%20House%20of%20Commons.pdf>>  
accessed 15 June 2017, para 27

<sup>64</sup> Peter Squires and Dawn Stephen, 'Pre-crime and precautionary criminalisation' (2010) 81(1) Criminal Justice Matters 28

## 2.3 Torture and non-refoulement

A third critique that was made of TEOs is that they are a form of “stationary rendition”.<sup>65</sup> An individual subject to a TEO could be left in a country where they are at risk of torture and ill-treatment, a risk heightened by their identification by the UK as a terrorism suspect. This risk is especially pertinent in light of the common theatres of conflict involving British FTFs, such as Syria and Somalia, and the dismal human rights record of their neighbouring countries, such as Turkey and Kenya.<sup>66</sup> The absolute prohibition on torture includes an obligation on states not to return individuals to places where they are at risk of torture, in line with the principle of non-refoulement and as set out in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>67</sup> Parliamentarians raised this concern, pointing out that “[w]e will not deport other countries’ nationals to their home countries if we think that there is such a risk, yet we are happy to do so if it is one of our nationals to whom a TEO applies.”<sup>68</sup> Liberty also articulated this critique, arguing that TEOs, which “prevent an individual departing from a place where they face a real risk of torture[,] breach the State’s human rights obligations.”<sup>69</sup> The “notification and managed return order” suggested by the Opposition would have mitigated this concern by allowing individuals to return to the UK without restrictions. The Government, however, disregarded this critique, relying on the fact that the ECHR memorandum provided with the CTS Bill specified that the Home Secretary would not apply a TEO if it would expose an individual to treatment contrary to Article 2 (right to life) or Article 3 (torture and ill-treatment) of the ECHR.<sup>70</sup>

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<sup>65</sup> HC Deb 15 December 2014, vol 589, col 1217 (Frank Dobson MP)

<sup>66</sup> Liberty (the National Council for Civil Liberties), para 24-25

<sup>67</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT)

<sup>68</sup> HL Deb 13 January 2015, vol 758, col 693 (Lord Harris)

<sup>69</sup> Liberty (the National Council for Civil Liberties), para 21

<sup>70</sup> Home Office, *Counter-Terrorism and Security Bill: European Convention on Human Rights Memorandum* (Cm 059, 2014) para 13

## 2.4 Concluding observations

Throughout the discussion on TEOs in parliament, two overarching themes are apparent. Firstly, the idea that the threat posed by returnees is new and unprecedented, and therefore requires new powers, was widely repeated. “We are in the midst of a generational struggle against a deadly terrorist ideology” stated Theresa May, one which required the “swift passage” of new laws.<sup>71</sup> Shadow Home Secretary Yvette Cooper agreed, stating that the Opposition supported the CTS Bill “because it responds to new and changing threats”.<sup>72</sup> Secondly, parliamentarians repeatedly expressed a commitment to striking the correct balance between civil liberties and the obligation to ensure security. George Howarth MP stated that “the loss of civil liberties on the one hand always has to be balanced against the gains in national security on the other hand”.<sup>73</sup> Martin Horwood MP confirmed that the “Labour Opposition and Liberal Democrat Ministers have accepted that the Bill broadly strikes the right balance” between security and liberty.<sup>74</sup> Others maintained that TEOs got “that balance slightly wrong”.<sup>75</sup>

These recurring statements point towards an underlying belief shared by many participants in this debate, summarised as follows; in general, we uphold security and liberty as principles of equal worth but, in exceptional circumstances when confronted with new threats, we must tilt this balance in favour of security. Sir Menzies Campbell MP articulated this underlying belief thus, “[i]t is important that people understand that what we are facing is unprecedented, and that in such conditions, in deciding where the balance rests between security and privacy, it may be felt necessary to tilt the balance in a direction other than that in which one would normally wish to tilt it.”<sup>76</sup> In other words, TEOs are not the “normal” workings of the modern liberal British state, but a justified deviance from the norm. From this premise, the debate naturally turns to deciding where exactly the

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<sup>71</sup> HC Deb 2 December 2014, vol 589, col 217

<sup>72</sup> *ibid*, col 218

<sup>73</sup> *ibid*, col 254

<sup>74</sup> *ibid*, col 250

<sup>75</sup> HC Deb 15 December 2014, vol 589, col 1220 (Caroline Lucas MP)

<sup>76</sup> HC Deb 2 December 2014, vol 589, col 235

line between security and liberty should be drawn, in light of the new threat. The suggestions of civil society actors and amendments tabled by politicians, as discussed above, all serve to slightly tilt the balance back towards civil liberties. Few, however, truly questioned the underlying premise of the measures.

This paper will demonstrate that to believe in the underlying premise of TEOs requires a degree of historical amnesia. This was aptly demonstrated by Chris Bryant MP who declared that exile had a bad history in Britain but, instead of referring to the more recent parallel of exclusion of Northern Ireland-related terrorism suspects (discussed in section 4.3 below), he based his view on the fact that “when Richard II exiled Henry Bolingbroke, he simply went abroad, gathered a whole load of allies and came back to this country and removed the King.”<sup>77</sup> An examination of much more recent legal strategies to manage threats to national security reveals that measures like TEOs are hardly new or aberrant at all. As subsequent chapters will explain, they are part of a wider growth in pre-emptive security measures. The idea of a balance between liberty and security itself makes little sense when one considers the trajectory of recent counter-terrorism legislation. The CTS Act is the seventh piece of counter-terrorism legislation since 9/11, with each one requiring a shift towards security. If there have been six successive tilts towards security, then one must assume that a situation of serious imbalance persists. This raises doubts about the validity of the underlying premise, that we need only, in these exceptional circumstances, tilt the balance slightly in favour of security. Not every parliamentarian or commentator agreed with this premise. I will quote at length from Pete Wishart MP, who opposed TEOs outright, as his contribution was one of very few that questioned the underlying justification for TEOs:

“Here we go again, with yet another counter-terror Bill to tackle yet another threat posed by extremism — yet another essential set of measures to keep our nation safe, and to be rushed through at breakneck speed — accompanied, predictably, by yet another escalation of the threat that we are supposed to be experiencing.... As we have heard so many times in so

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<sup>77</sup> *ibid*, col 234

many speeches, we live in an era in which there will always be an existing, growing threat for us to address. So what do we do? We do the same things. We are working towards depriving people of statehood. We are preventing people from travelling, and we are considering home arrest without trial. It is all the usual stuff.”<sup>78</sup>

The next chapter examines how “the usual stuff” is increasingly informed by a pre-emptive logic.

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<sup>78</sup> *ibid*, col 254

### **Chapter 3: Pre-emptive security**

There is now a substantial body of literature on the prevalence of pre-emption in contemporary security.<sup>79</sup> Stockdale defines pre-emption as a strategy under which “anticipatory interventions are undertaken in the present for the purpose of protecting against potentially catastrophic dangers located in the unknown – and ultimately unknowable – future”.<sup>80</sup> Scholars such as Amoore and de Goede have specifically examined the role of pre-emption in European counter-terrorism practices, such as the freezing of financial assets and bulk surveillance.<sup>81</sup> Pre-emption is the antithesis of the post-crime criminal justice system, which presumes innocence and progresses through investigation and trial to, in some cases, punishment. Indeed, the eminent judge Lord Denning stated that “[i]t would be contrary to all principle for a man to be punished, not for what he has already done but for what he may hereafter do.”<sup>82</sup> Pre-emptive security measures, unlike criminal sanctions, act on individuals before and in the absence of crime in the name of security.

This chapter details the theoretical lens of pre-emption, which the subsequent chapter applies to TEOs. It begins by outlining the historical trajectory of pre-emption, including its growth in significance in post-9/11 counter-terrorism strategies, and by explaining in further detail the conceptual meaning of pre-emption. Drawing on the literature and examples of pre-emption, it identifies three key features of pre-emptive security measures. In the subsequent chapter, these three features are applied to TEOs to analyse the extent to which TEOs fall within the trend towards pre-emption in contemporary counter-terrorism.

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<sup>79</sup> See, for example:

Alan M Dershowitz, *Preemption: A Knife That Cuts Both Way* (WW Norton 2007); Cian C Murphy, *EU Counter-terrorism Law: Pre-emption and the Rule of Law* (Hart Publishing 2015); Lucia Zedner, ‘Preventive justice or pre-punishment? The case of control orders’ (2007) 60(1) *Current Legal Problems* 174; Marieke De Goede, ‘The politics of preemption and the war on terror in Europe’ (2008) 14(1) *European Journal of International Relations* 161

<sup>80</sup> Liam P.D. Stockdale, ‘Imagined futures and exceptional presents: a conceptual critique of ‘pre-emptive security’ (2013) 25(2) *Global Change, Peace & Security* 142

<sup>81</sup> Louise Amoore and Marieke de Goede, ‘Governance, risk and dataveillance in the war on terror’ (2005) 43(2) *Crime, Law and Social Change* 149

<sup>82</sup> *Everett v Ribbands* [1952] 2 QB 198 (CA) [206]

### 3.1 The growth in pre-emptive security

Some scholars, such as Massumi and de Goede, trace the growth in pre-emptive strategies in contemporary counter-terrorism to the War on Terror.<sup>83</sup> The 2002 US National Security Strategy outlined the pre-emptive approach to the War On Terror thus, “the greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty exists as to the time and place of the enemy’s attack.”<sup>84</sup> The logic of pre-emption elucidated here not only informed the launch of the war in Iraq in 2003 but also manifests in the domestic War on Terror.<sup>85</sup> Former US President George Bush Jr made this link explicit, stating that “[o]ur methods for fighting this war at home are very different from those we use abroad, yet our strategy is the same... [w]e’re determined to stop the enemy before they can strike our people.”<sup>86</sup>

To justify the growth in pre-emptive measures, governments have argued that the threat from terrorism changed materially after 9/11. As former UK Prime Minister Tony Blair stated, “my view after September 11th was that our whole analysis of the terrorist threat and extremism had to change.”<sup>87</sup> According to advocates of this approach, the “new terrorism” is characterised by domestic terrorists, locally autonomous ‘ sleeper cells ’ or individual actors loosely tied to a global network, and new technologies facilitating mass casualty attacks.<sup>88</sup> The “new terrorism”, it is argued, can “strike anywhere, at any time”.<sup>89</sup> In the UK context, the 2005 London bombings provided the authorities with

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<sup>83</sup> Marieke De Goede, ‘The politics of preemption and the war on terror in Europe’: Brian Massumi, ‘Potential Politics and the Primacy of Preemption’ (2007) 10(2) Theory and Event (unpaginated)

<sup>84</sup> The White House, ‘The National Security Strategy of the United States’ (September 2002) 15

<sup>85</sup> Marieke De Goede, ‘The politics of preemption and the war on terror in Europe’ 162

<sup>86</sup> ‘President Bush Delivers Remarks On Homeland Security’ (The New York Times, 10 September 2003) < <http://www.nytimes.com/2003/09/10/politics/president-bush-delivers-remarks-on-homeland-security.html> > accessed 12 June 2017

<sup>87</sup> Report of a Committee of Privy Counsellors, ‘Transcript of Evidence of The Rt. Hon. Tony Blair’, (The Iraq Inquiry, 21 January 2011) < <http://www.iraqinquiry.org.uk/media/230337/2011-01-21-transcript-blair-s1.pdf> > accessed 12 September 2017, 4–5

<sup>88</sup> Thomas Mockaitis, *The New Terrorism: Myths and Realities* (Praeger Security International 2007)

<sup>89</sup> Marieke De Goede and Samuel Randalls, ‘Precaution, Pre-Emption: Arts and Technologies of the Actionable Future’ (2009) 27(5) Environment and Planning 861

evidence of this apparent new threat, with the Anti-Terrorist Branch of the Metropolitan Police stating in the aftermath of the bombings that:

“the advent of terrorist attacks designed to cause mass casualties, with no warning, sometimes involving the use of suicide... means that we can no longer wait until the point of attack before intervening. The threat to the public is simply too great to run that risk.”<sup>90</sup>

This statement demonstrates the link between an unknowable, but potentially catastrophic, future harm and pre-emptive security measures in the present – when the potential harm is so great, governments argue they must intervene in the present, even in the face of uncertainty.

While the War on Terror provided an impetus for the growth of pre-emptive measures, it would be incorrect to view 9/11 as the origin of pre-emptive practices in law. These measures, and their incompatibility with due process standards, have an important historical trajectory. As Dershowitz illustrates, “crime prevention has always played a significant, though largely unarticulated, role in the Anglo-American legal system”.<sup>91</sup> This paper delves into this history in order to avoid the ahistoricism and Anglocentrism<sup>92</sup> of some accounts of counter-terrorism laws and to reveal how deeply embedded illiberal practices of pre-emption are.

Criminologists have argued that risk prevention has played a significant role in criminal justice since the late 1980s.<sup>93</sup> The term “actuarial justice”<sup>94</sup> came into usage in the early 1990s to

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<sup>90</sup> House of Commons Home Affairs Committee, *Terrorism Detention Powers*, (HC 2005-06, 910-I) Annex

<sup>91</sup> Dershowitz, 40

<sup>92</sup> Dershowitz exemplifies the Anglocentric approach of some scholars of pre-emption. In his book *Preemption*, he sets out to examine the history of pre-emptive practices within the Anglo-American legal tradition, and yet he ignores laws implemented by British colonial authorities outside of North America despite the important influence such laws (in India and Ireland for example) had on the development of pre-emptive practices in Britain. Agamben similarly provides a genealogy of ‘exception’ in his work *State of Exception* which largely overlooks the key role imperialism played in the development of the doctrine of state of emergency.

<sup>93</sup> Jude McCulloch and Dean Wilson, *Pre-crime: Pre-emption, precaution and the future* (Routledge 2015) 15

<sup>94</sup> Malcolm Feeley and Jonathan Simon, ‘Actuarial Justice: The Emerging New Criminal Law’, in David Nelken (ed), *The Futures of Criminology* (Sage 1994)

capture the use of risk assessments, involving the classification and management of suspect populations, as a tool in the fight against crime. The growth of civil preventative orders, such as the Sexual Offences Prevention Order (“SOPOs”) which aims at protecting the public from serious sexual harm, are an example of the risk-based approach.<sup>95</sup> Pre-emption differs from risk prevention in its relationship to future events; while a risk-based approach seeks to quantify and analyse risks, the pre-emptive approach seeks to manage unpredictable and unknown future harms. Nevertheless, the increased significance of pre-emptive security measures post-9/11 is linked to the longer trend of risk-based approaches to crime and security. The fact that TEOs share similarities with SOPOs, both civil preventative orders with criminal consequences if breached, demonstrates how pre-emptive security builds upon existing methods of crime prevention.

Pre-emptive measures also have much older historical parallels in administrative legal instruments enacted for the purposes of public protection from those deemed dangerous. Those considered “dangerous lunatics”, for example, under the Criminal Lunatics Act 1800 could be confined in part “for the better Prevention of Crimes being committed by Persons insane”.<sup>96</sup> In the Victorian era, laws dealing with ‘vagrants’ or ‘habitual offenders’ relied on categories of “simple designation, rooted in primarily ideological constructions of contamination, danger, and suspect ‘otherness’” which “seemed to justify a wholesale suspension of rights to due process”.<sup>97</sup> These legal instruments effectively subjected certain classes of individuals, justified on their perceived inherent propensity to inflict harm, to separate systems of law. Pre-emptive security measures similarly create new legal subjects with lesser procedural rights, such as the returnee subject to a TEO or the controlee subject to a control order, based on an imagined future harm.

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<sup>95</sup> Lucia Zedner, *Security* (Routledge 2009) 82

<sup>96</sup> Susan Donkin and Mark Finnane, ‘Fighting Terror with Law? Some Other Genealogies of Pre-emption’ (2013) 2(1) *International Journal for Crime and Justice* 6

<sup>97</sup> Peter Squires and Dawn Stephen, ‘Pre-crime and precautionary criminalisation’, 28

Pre-emptive security finds its deepest roots in colonial history. Scholars have argued that contemporary “counter-terrorism has provided a domestic, peacetime adaption of strategies developed to deal with the essentially wartime exigencies of a colonial power.”<sup>98</sup> Indeed, counter-insurgency doctrine dictated that, as under a pre-emptive rationale, swift and decisive action was necessary to repress even non-violent anti-imperialist activities.<sup>99</sup> Looking at law more specifically, Hussain has demonstrated that colonialism offers the best historical example “for any theoretical study of norm and exception, rule of law and emergency”.<sup>100</sup> As Stoler states, imperial states operate by definition “as states of exception that vigilantly produce exceptions to their principles”.<sup>101</sup> To deal with riots, insurgencies, and opposition to colonial rule, while maintaining the outward appearance of a superior respect for the rule of law and liberal principles, exceptions to the rule of law had to be made by colonial powers. As with other colonial legal instruments, emergency measures, which were often pre-emptive, found their way back to the metropolitan centre. It is not a surprise, therefore, that there are strong parallels between pre-emptive measures to deal with threats to national security in Britain and laws used to govern rebellious native subjects in Britain’s colonies. Detention without trial, for example, was used against activists resisting British rule in Malaya, India and Kenya, against opponents to Apartheid in South Africa (where it was limited to 90 days), and later against foreign terrorism suspects in Belmarsh prison in the UK. Section 4.3 provides further examples of colonial legal instruments with direct relevance to TEOs.

### **3.2 The nature of pre-emption**

Having discussed the rise in significance of pre-emption in the post-9/11 security environment, it is useful to examine in greater detail what constitutes “pre-emptive security”.

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<sup>98</sup> Jenny Hocking, *Beyond Terrorism: The Development of the Australian Security State* (Allen and Unwin 1993) 19

<sup>99</sup> Feargal Cochrane, ‘Not so extraordinary: the democratisation of UK counterinsurgency strategy’, (2013) 6(1) *Critical Studies on Terrorism* 29

<sup>100</sup> Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press 2003) 31

<sup>101</sup> Ann Laura Stoler, *Haunted by Empire: Geographies of Intimacy in North American History* (Duke University Press 2006) 57

Massumi argues that what distinguishes pre-emption from other methods of influencing future outcomes, such as deterrence, is that its “epistemology is unabashedly one of uncertainty, and not due to a simple lack of knowledge”.<sup>102</sup> According to a pre-emptive logic, the future occurrence which must be disrupted is not yet knowable – rather than simply countering known threats, a pre-emptive strategy requires states to take action against potential threats that are yet to emerge and cannot be specified. It is the potential for mass harm and climate of fear and uncertainty that terrorism creates which lends itself to a pre-emptive strategy; because the potential harm is so great, we cannot risk letting the threat emerge. Uncertainty, rather than paralysing action in the present, justifies even greater precautionary action. This reasoning has echoes of the precautionary principle in environmental law, which directs that, where catastrophic harm is a potential, uncertainty or a lack of knowledge about the risk of this harm is not an adequate reason for inaction.<sup>103</sup> To borrow the terminology employed by Former US Secretary of Defense Donald Rumsfeld, pre-emption demands that governments deal with both “known unknowns”, i.e. threats which can be estimated using expert analysis and risk assessments, and “unknown unknowns” which are threats that we do not even know that we do not know about.<sup>104</sup>

Threats that are beyond knowledge can only be imagined. Indeed, the 9/11 Commission Report cited a “failure of imagination” as the reason why intelligence agencies had failed to foresee the 9/11 attacks.<sup>105</sup> Similarly, Security Minister Tony McNulty urged the British public to “imagine two or three 9/11s” when his Government were pushing through the 2008 Counter-Terrorism Bill.<sup>106</sup> In effect, we are invited to consider our lack of knowledge about future terrorist attacks as, not a

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<sup>102</sup> Brian Massumi, ‘Potential Politics and the Primacy of Preemption’, para 13

<sup>103</sup> Stockdale, 146

<sup>104</sup> US Department of Defense, ‘DoD News Briefing - Secretary Rumsfeld and Gen. Myers, (12 February 2002) <<http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636>> accessed 12 June 2017

<sup>105</sup> National Commission on Terrorist Attacks Upon the United States, ‘The 9/11 Commission Report’ (22 July 2004) <<http://www.9-11commission.gov/report/911Report.pdf>> accessed 12 September 2017, 11.1

<sup>106</sup> Bob Roberts, ‘Minister warns of “peril” as he pushes for 42-day lock-up’ (Daily Mirror, 23 January 2008) <[www.mirror.co.uk/news/top-stories/2008/01/23/minister-warns-of-peril-as-he-pushes-for-42-day-lock-up-115875-20294998/](http://www.mirror.co.uk/news/top-stories/2008/01/23/minister-warns-of-peril-as-he-pushes-for-42-day-lock-up-115875-20294998/)> accessed 12 May 2017

barrier to action, but the basis of action. Pre-emption requires us “to not only imagine the unknowable, but to act on it”.<sup>107</sup> This requires decision-makers “to take into account doubtful hypotheses and simple suspicions... to take the most far-fetched forecasts seriously.”<sup>108</sup> This is not to say that decisions are entirely speculative, but rather to recognise that a pre-emptive approach relies a substantial degree on the exercise of imagination.

### **3.3 Features of pre-emptive security measures**

This section details some examples and key features of pre-emptive security measures. Examples of such measures give credence to the view that pre-emption is the predominant operative logic in the field of counter-terrorism. Counter-radicalisation programs, for example, seek “to act before the subjects of its interventions have even considered the possibility of committing an act of terrorism.”<sup>109</sup> Administrative detention of counter-terrorism suspects is in effect pre-emptive detention, applying to individuals who might commit or encourage attacks in the future. Bavaria is the most recent authority in Europe to pass a law allowing the administrative detention of terrorism suspects, justifying this measure in pre-emptive terms by stating that “[t]he most efficient defense against dangers is to not let them emerge at all”.<sup>110</sup> Data retention and bulk surveillance is another measure justified along pre-emptive lines; as everyone could be a potential danger in an unknowable future, so all data should be retained and scanned “just in case”. Terrorist financing laws also serve a pre-emptive function, requiring the analysis of vast amounts of financial data in order to freeze assets that might be supporting terrorist networks.<sup>111</sup> The growth of “pre-crime” measures which assign criminal liability to acts far removed from even the preparatory acts preceding a terrorist attack are also pre-emptive in nature.

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<sup>107</sup> Thomas Martin, ‘Governing an Unknowable Future: The Politics of Britain’s Prevent Policy’ (2014) 7(1) *Critical Studies on Terrorism* 64

<sup>108</sup> Stockdale, 145

<sup>109</sup> Martin, 64

<sup>110</sup> Sabrina Pabst, ‘Bavaria ramps up security measures against terrorist threats’ (DW, 25 July 2017) <<http://www.dw.com/en/bavaria-ramps-up-security-measures-against-terrorist-threats/a-39829936>> accessed 10 September 2017

<sup>111</sup> de Goede, ‘The politics of preemption and the war on terror in Europe’, 166

Three key features of these pre-emptive security measures may be identified.<sup>112</sup> Firstly, the measures, unlike criminal sanctions, aim at incapacitation or exclusion rather than punishment or rehabilitation. The UK's counter-terrorism strategy sees disruption of terrorism as a key goal in the exercise of counter-terrorism powers.<sup>113</sup> Even in criminal prosecutions for terrorism offences, incapacitation has been identified as a key goal.<sup>114</sup> Administrative detention is a clear example of the desire to incapacitate, as it aims to take "suspected terrorists off the streets" rather than punish them for any past wrongdoing.<sup>115</sup> Any past actions of those administratively detained are only relevant in so far as they indicate a propensity to commit further harm. Deportation of individuals on national security grounds and the seizing and freezing of assets are also measures aimed at the incapacitation or exclusion of potential terrorists.

Secondly, the target of the measures is very broad. In the absence of clear information as to who constitutes a threat, the net must be cast wide to catch anyone and anything that could be potentially threatening.<sup>116</sup> Practically, this is achieved through a low standard of proof and broadly drafted legislation, which allows for more individuals to be caught within the threshold for anticipatory action. Former US Treasury Secretary Paul O'Neill made explicit the link between a pre-emptive strategy and low standards of proof, stating that, in the aftermath of 9/11, the authorities set up "a new legal structure to freeze assets on the basis of evidence that might not stand up in court ... because the funds would be frozen, not seized, the threshold of evidence could be lower and the net

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<sup>112</sup> Two of these three features were identified in a previous essay, see Eda Seyhan, 'A Critique of the Proposed EU Directive on Combating Terrorism', (Essay submitted in course 15PPOH034, SOAS 2017) 4-5

<sup>113</sup> Home Office, *CONTEST: The United Kingdom's Strategy for Countering International Terrorism: Annual Report for 2015*, (Cm 9310, 2016), para 2.7

<sup>114</sup> *R v Martin (Patrick Hugh)* [1999] 1 Cr App R (S) 477 (CA) 480

<sup>115</sup> US Department of Justice, 'Attorney General John Ashcroft Prepared Remarks for the US Mayors Conference' (25 October 2001)

<[https://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10\\_25.htm](https://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm)> accessed 10 September 2017

<sup>116</sup> Cian C Murphy, *EU Counter-terrorism Law: Pre-emption and the Rule of Law* (Hart Publishing 2015) 80

wider.”<sup>117</sup> As a consequence of this, in regimes of pre-emptive security, there is a high incidence of “false positives” but low significance given to these. Pre-emptive security is a form of “worst case scenario” planning – where a very improbable disaster can trump all other considerations if it is sufficiently terrible. Dick Cheney made this reasoning an explicit part of the War on Terror, stating that even if there was only “a one percent chance” that a threat was real, i.e. that the “worst case scenario” was to eventuate, “we have to treat it as a certainty in terms of our response.”<sup>118</sup> As David Runciman argues, this approach “does not take seriously enough the downside of getting things wrong” i.e. of false positives.<sup>119</sup> “False positives”, as a result, frequently occur in contemporary counter-terrorism practice. The killing of Jean Charles de Menezes, mistaken for a suspected suicide bomber, by Metropolitan police officers on 22 July 2005 is one example of what goes wrong when the net is cast so wide.

Thirdly, pre-emptive security measures are characteristically executive, rather than judicial, actions. As pre-emptive measures are forward-looking, while the criminal justice system traditionally operates post-crime, these measures tend to be civil in nature, grounded in administrative, immigration or financial law. The use of civil law also permits the side-stepping of certain procedural safeguards, such as the presumption of innocence, which would be difficult to adhere to given the nature of pre-emptive decision-making. While there may be some limited judicial oversight, pre-emptive measures broadly concentrate power in the hands of the executive branch or private actors to whom this power is devolved. Butler calls those who exercise such power “petty sovereigns”, mid-level officials authorised by a pre-emptive rationality to “make sovereign decisions concerning the normality and abnormality of particular persons, behaviours and transactions, and to detain, question, monitor and freeze those considered abnormal”.<sup>120</sup> De Goede identifies immigration officers and

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<sup>117</sup> Quoted in de Goede, ‘The politics of preemption and the war on terror in Europe’, 166

<sup>118</sup> Margaret Warner, ‘The One Percent Doctrine’ (PBS, 4 July 2006)

<[http://www.pbs.org/newshour/bb/entertainment-july-dec06-suskind\\_07-04/](http://www.pbs.org/newshour/bb/entertainment-july-dec06-suskind_07-04/)> accessed on 15 May 2017

<sup>119</sup> David Runciman, ‘The Precautionary Principle’, (2004) 26(7) London Review of Books 12

<sup>120</sup> de Goede, ‘The politics of preemption and the war on terror in Europe’ 163

financial dataminers, who are able to make decisions about detention and asset freezing, as “petty sovereigns.”<sup>121</sup> As Butler points out these petty sovereigns lack legal and democratic accountability because, while they have the power to make unilateral decisions, they are “mobilized by aims and tactics of power they do not inaugurate or fully control.”<sup>122</sup> The power of petty sovereigns under a pre-emptive strategy goes hand in hand with the diminished space for judicial decision-making.

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<sup>121</sup> *ibid*

<sup>122</sup> Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso 2004) 56

## **Chapter 4: TEOs as a historically embedded pre-emptive practice**

Having outlined the theoretical model and detailed the most salient features of pre-emptive security measures, this section examines how TEOs fit within the pre-emptive trend in contemporary counter-terrorism. It begins with an explanation of the pre-emptive reasoning behind TEOs, and then assesses TEOs against the three features of pre-emptive security identified above. To avoid the ahistoricism of some accounts of counter-terrorism laws, and to counter the assertion by law-makers that TEOs are a new measure to deal with a new and exceptional threat, this section ends by identifying historical parallels of TEOs.

### **4.1 Pre-emptive reasoning**

The need to impose a TEO is established through a pre-emptive logic. These measures exclude individuals from the UK based on an assessment that they pose a threat of future terrorist attacks. They are imposed not on the basis of what suspects have done, or even implied that they might do, but on the basis of what the authorities imagine they may do in the future. Recalling Stockdale's definition of pre-emption, TEOs are "anticipatory interventions" in the lives of potential returnees that are "undertaken in the present for the purpose of protecting against potentially catastrophic dangers", namely mass casualty terrorist attacks launched or encouraged by returnees. These potential attacks are "located in the unknown - and ultimately unknowable - future."<sup>123</sup>

This lack of knowledge about future threats posed by returnees was demonstrated by Government documents provided with the CTS Bill. In the explanatory notes and factsheet provided, there were no references to concrete threats that TEOs target. The factsheet said in vague terms that "a number of these [who have travelled to Syria and Iraq] will have been radicalised and could pose a threat to the UK if they return here."<sup>124</sup> The Home Office provided a statement to Professor Clive

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<sup>123</sup> Stockdale, 142

<sup>124</sup> Home Office, *Factsheet – Part 1 Chapter 2 – Temporary Exclusion Orders* (2014), 1

Walker that “individuals who have travelled to the Syria theatre and engaged with extremist groups pose an increased risk on their return, due to the high probability of their having an increased capability and mindset to commit violent acts.”<sup>125</sup> A “probability” of having the “capability and mindset” to commit violent acts is two steps far removed from a concrete threat of a violent attack – it is, in effect, a fraction of a likelihood to cause harm. As detailed above, the “worst case scenario” logic that underpins pre-emptive reasoning leads governments to act on a fraction of a fraction of a chance of harm where the harm imagined is catastrophic. This “worst case scenario” was expressly referred to by one of the advocates of the measure, who urged parliamentarians to “think about what they would say if one of their constituents were murdered in that unbelievably atrocious manner [i.e. in a terrorist attack by a returnee].”<sup>126</sup>

Given the gravity of the measure, one might expect, during the parliamentary debate on the CTS Bill, a more detailed statement from the Government regarding the threat that returnees pose or criticism of this lack of certainty from other law-makers. Instead, the statements by Government representatives in parliament remained vague. Home Secretary Theresa May referred to “the very serious prospect” that returnees would “seek to radicalise others, or carry out attacks” in the UK.<sup>127</sup> An explicitly pre-emptive rationale was expressed by Lord Harris who, drawing on past examples, stated that, with mass casualty terrorist attacks, there is “a need to intervene very early to disrupt them, due to the risks of those casualties taking effect—perhaps before a full evidential picture had been built up.”<sup>128</sup> Only one parliamentarians requested evidence of a concrete threat which required TEOs to manage. Lord Lloyd exhibited a risk prevention rather than pre-emption approach when he questioned to what extent the existing risk would be increased “by allowing a further small group of suspects to return” and stated that “[u]nless it can be shown—it has not been shown—that by allowing

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<sup>125</sup> Clive Walker, ‘Annex 2: Foreign Terrorist Fighters and UK Counterterrorism Law’ in David Anderson QC, ‘The Terrorism Acts in 2015, Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and part 1 of the Terrorism Act 2006’ (December 2016), 101

<sup>126</sup> HC Deb 6 January 2015, vol 590, col 186 (Sir William Cash MP)

<sup>127</sup> HC Deb 2 December 2014, vol 589, col 207

<sup>128</sup> HL Deb 13 January 2015, vol 758, col 693

in the extra 250 people, if they choose to come, we shall be increasing the risk to a significant extent, the need for this Bill has simply not been made out.”<sup>129</sup>

Unlike Lord Lloyd, whose intervention questioned the underlying pre-emptive rationale of TEOs, parliamentarians on all sides made vague references to the danger that radicalised individuals returning to the UK pose and accepted the necessity of taking pre-emptive action. Hazel Blears MP, for example, justified the need for TEOs as follows:

“If 250 people have come back, perhaps one in nine or 10 of them will be radicalised to the extent that they may want to do us harm in this country. If that is the case, we are talking about 25 or 30 individuals who have come back trained, radicalised and experienced in conflict. That may sound like a small number, but in actual fact it is a significant and serious threat.”<sup>130</sup>

Apart from the initial figure of 250, the remaining calculation is purely imagined. There is no reference to “a rate of radicalisation” (assuming such a calculation is possible) of one in nine or 10 in any of the literature or Government statements. The “significant and serious threat” Blears identifies is the result of her own imagined calculus. Despite such vague and unsubstantiated references to threats, the measures were largely deemed necessary by parliamentarians. As Massumi states, the pre-emptive logic at play here is “unabashedly one of uncertainty”; according to supporters of the CTS Bill, we simply do not and cannot know what returnees might do upon return, and this is why they must be excluded from the UK until we can fully control their arrival.<sup>131</sup> The Government did not present evidence that the harm was probable if the CTS Bill was not passed; it merely suggested that it was possible, and a pre-emptive logic requires nothing more than that.

The uncertainty regarding the threat which returnees potentially pose is not limited to parliamentarians or the Government – it is a threat which cannot be known. Recalling Rumsfeld’s terminology above, TEOs are justified on the basis of unknown unknowns, not known unknowns

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<sup>129</sup> *ibid*, col 671

<sup>130</sup> HC Deb 2 December 2014, vol 589, col 238

<sup>131</sup> Massumi, para 13

which could be analysed and assessed for risk. This assertion is supported by the lack of certainty in the literature on returnees, which emphasises the difficulty in accurately profiling returnees. The EU's Radicalisation Awareness Network (RAN) identifies four different categories of returnees; those who are disillusioned by their life abroad, those who return for better living conditions, those who are captured and returned unwillingly and those who are sent to carry out an attack.<sup>132</sup> The RAN manual repeatedly refers to the fact that all returnees are different, stating that there is “no one-size-fits-all profile” and recommending tailored risk assessments for returnees when they return to understand better their reasons for returning and potential threat they pose. Shami Chakrabarti of Liberty summarised this uncertainty in her critique of TEOs; “the point is you don't know... he could be wicked and a war criminal, or he could be a naive adventurer, or he could be completely innocent in that he went out to have a look.”<sup>133</sup> Given the varying profiles of returnees, and the lack of certainty regarding the threat they potentially pose before their return, it is clear that TEOs are justified on the basis of an unknown but imagined future risk, rather than on concrete and quantifiable threats, in line with pre-emptive rationality.

## 4.2 Pre-emptive features

In terms of the features identified above, TEOs exemplify the emphasis of pre-emptive measures on incapacitation rather than punishment. As Home Secretary Theresa May stated, their aim is to “disrupt people's ability...to return to the country” if they may pose a threat.<sup>134</sup> By excluding individuals from the UK who are perceived to pose a future threat and invalidating their passports, these individuals are quite literally immobilized and prevented from launching terrorist attacks. Punishment is not an aim of TEOs, as past wrongdoing is only relevant to the imposition of a TEO if the individual represents a future threat. Condition A requires that an individual subject to a TEO is

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<sup>132</sup> EU Radicalisation Awareness Network, ‘RAN Manual: Responses to returnees: Foreign terrorist fighters and their families’, (2017) <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/ran\\_br\\_a4\\_m10\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/ran_br_a4_m10_en.pdf)> accessed 10 August 2017, 7

<sup>133</sup> Jess Bowie, ‘Interview: Shami Chakrabarti’ (Civil Service World, 23 January 2015) <<https://www.civilserviceworld.com/articles/interview/interview-shami-chakrabarti>> accessed 19 May 2017

<sup>134</sup> HC Deb 2 December 2014, vol 589, col 207

suspected of “involvement in terrorism-related activity outside the UK”, but this condition on its own does not suffice for the imposition of a TEO. Condition B must also be met, requiring that a TEO is “necessary to protect the public from a risk of terrorism”, demonstrating that TEOs are forward-looking rather than punitive in their emphasis. Measures akin to TEOs, such as control orders and TPIMs, have been judged by domestic courts to be preventative rather than punitive in their intention.<sup>135</sup>

The Government’s desire to fully incapacitate those subject to TEOs is further demonstrated by their rejection of the Opposition amendment creating a system of “notification and managed return orders”. These orders would have ensured the authorities were informed of an individual’s return to the UK, enabling their immediate intervention upon arrival. When asked why the Government rejected this system, James Brokenshire MP said:

“In all honesty, because of the potential risk of that individual. Even overseas, they may pose a direct threat to the UK by either seeking to radicalise or to control others within the UK, so we need to manage risk in an appropriate way.”<sup>136</sup>

In effect, Brokenshire argued that a system of managed return would not sufficiently incapacitate the suspect individual – they may still pose a risk. TEOs, unlike the suggested alternative, may permanently incapacitate those individuals who are dissuaded from ever returning to the UK or those who are forced to stay in zones of conflict and ultimately killed. Given the Government’s desire to incapacitate individuals, TEOs were the preferred option.

The second characteristic of pre-emptive measures is also demonstrated by TEOs. The low standard of proof required to impose a TEO and broad wording of the legislation ensures that a large proportion of potential returnees could be caught up in the measures. The standard of proof required for a TEO is that of “reasonable suspicion” rather than the common civil standard of “balance of

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<sup>135</sup> *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140, [2007] QB 415 [23]

<sup>136</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Security Bill - Minutes of evidence: James Brokenshire MP, 3 December 2014* (HC 859), Q27

probabilities” or the higher standard employed for TPIMs prior to 2015, that of “reasonable belief”.<sup>137</sup> As Fenwick states, “reasonable suspicion represents the lowest standard of proof used so far for such non-trial-based measures.”<sup>138</sup> “Reasonable suspicion” means that the Home Secretary believes that the subject *may* have been involved in terrorism-related activity, rather than believes that they *were* involved in terrorism-related activity as under the “reasonable belief” standard. In *O’Hara v Chief Constable of the RUC*, the House of Lords held that, in relation to the arrest of a terrorism suspect, the “reasonable suspicion” standard required a genuine suspicion by the arresting officer at the time (a subjective test) and reasonable grounds for forming such a suspicion (an objective test).<sup>139</sup> The objective element of the test does not, however, mean that “reasonable suspicion” must be grounded in solid evidence. In *Secretary of State for the Home Department v MB*, the court held that, in forming “reasonable suspicion”, one could take into account “a matrix of alleged facts, some of which are clear beyond reasonable doubt, some of which can be established on balance of probability and some of which are based on no more than circumstances giving rise to suspicion”.<sup>140</sup>

In short, this standard of proof allows for a considerable degree of uncertainty. David Anderson stated the “reasonable suspicion” threshold could be justified by “all the uncertainty there is out in Syria... intelligence officers state[d] that we have pretty limited coverage out there.”<sup>141</sup> This view is supported by Eurojust’s examination of prosecutions of returnees, which identified gathering and verifying evidence of alleged acts in Syria and Iraq as a key obstacle to prosecution.<sup>142</sup> Given the low standard of proof and difficulty of obtaining reliable evidence from the field, many potential

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<sup>137</sup> In *Secretary of State for the Home Department v CC, CF* [2012] EWHC 2837 (Admin), [2013] 1 WLR 2171, the court confirmed at paragraph 24 that “reasonable belief” imposes a higher standard than “reasonable suspicion”.

<sup>138</sup> Helen Fenwick, ‘Terrorism threats and temporary exclusion orders: counter-terror rhetoric or reality?’ (2017) 3 European Human Rights Law Review 251

<sup>139</sup> [1997] AC 286 (HL)

<sup>140</sup> [2006] EWCA Civ 1140, [2007] QB 415 [67]

<sup>141</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Security Bill - David Anderson*, 27 November 2014 (HC 836), Q17

<sup>142</sup> Eurojust, ‘Foreign Terrorist Fighters: Eurojust’s Views on the Phenomenon and the Criminal Justice Response’, (November 2016) <<http://statewatch.org/news/2017/mar/eu-eurojust-foreign-fighters-legal-response-report-restricted-11-16.pdf>> accessed on 10 May 2017, 25

returnees could fall within the requirements of a TEO. This was acknowledged by the Government, with Lord Ashton resisting an amendment to raise the standard of proof on the grounds that this “change would greatly reduce the number of individuals against whom the Home Secretary could use this power”.<sup>143</sup> The fact that the lower standard of proof means individuals might mistakenly be deemed to meet the requirements of a TEO is given low significance. The Home Office impact assessment states that “there is a risk of false positive matches on individuals of interest, but this will be mitigated by applying further scrutiny to the matches and ensuring that appropriate training is in place.”<sup>144</sup> As discussed above, “false positives” are commonly derived when pre-emptive reasoning dictates security decisions.

The broad and vague wording of the legislation mirrors other contemporary counter-terrorism laws.<sup>145</sup> Condition B requires the Secretary of State to “reasonably consider that it [the TEO] is necessary to protect the public from a risk of terrorism”. There is no clarification of the threshold of this risk – would a very minor risk still warrant a TEO? Must the risk be a risk of a terrorist attack, or of any terrorism-related activity? Must the risk be posed by the individual subject to a TEO, or is a risk that he/she influences or encourages others such that they represent a risk of terrorism sufficient? The definitions underlying the legislation are also broad. The Supreme Court stated, of the definition of “terrorism”, that it was “concerningly wide”.<sup>146</sup> The definition of “terrorism-related activity” also encompasses a wide range of behaviour that may not be widely understood as criminal. Case law on TEOs, if they are ever challenged in the courts, should aid in defining the contours of these legislative provisions. As it stands, both the low standard of proof and overly broad wording of the legislation ensures that many returnees could fall within the requirements of a TEO – casting the net wide in this

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<sup>143</sup> HL Deb 20 January 2015, vol 758, col 1275

<sup>144</sup> Home Office, *Impact Assessment: Counter-Terrorism and Security Bill – Temporary Exclusion Orders* (IA No: HO0144, 21 November 2014) 8

<sup>145</sup> Amnesty International, ‘Dangerously disproportionate: The ever-expanding national security state in Europe’ (EUR 01/5342/2017, 17 January 2017) <

[www.amnesty.org/en/documents/eur01/5342/2017/en](http://www.amnesty.org/en/documents/eur01/5342/2017/en)> accessed 15 June 2017, Chapter 2

<sup>146</sup> *R v Gul* [2013] UKSC 64, [2014] AC 1260 [3]

manner is a crucial element of pre-emptive security, when there is uncertainty as to who could pose a threat.

The third characteristic of pre-emptive security – the concentration of power in the executive – is aptly demonstrated by TEOs. TEOs are executive decisions, made by the Secretary of State on the advice of the security services, rather than orders made subsequent to a judicial decision. The role of the judiciary is limited to granting permission for the Secretary of State’s action unless their decision is “obviously flawed”. In urgent cases, judicial permission is not required. Judicial review of the decision provides another avenue of oversight but, at neither the permission nor review stage, is there a judicial examination of the merits of the decision. While the legislation authorises the Secretary of State to make decisions, in practice decisions are made by security officials and approved by the Secretary of State. Home Secretary Amber Rudd confirmed this in a radio interview, stating that “it’s up to the security services to decide which ones [returnees] are the ones which might need a TEO”.<sup>147</sup> This assertion was repeated by Prime Minister Theresa May who stated that the application of TEO powers “are operational decisions for the police and the security services”.<sup>148</sup> The need to “ensure that our law enforcement and intelligence agencies have the powers they need” was emphasised as a justification for the measure.<sup>149</sup> Indeed, attempts at making the legislation more prescriptive were resisted in the House of Lord on the basis that it would “tie people’s hands in responding in slightly different ways to slightly different levels of intelligence or knowledge about a particular individual”, with “people” referring to the security services who take decisions in this field.<sup>150</sup> Petty sovereigns in the security and intelligence forces are thus empowered to make serious interventions in the lives of potential returnees.

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<sup>147</sup> Nick Ferrari, ‘Nick Ferrari’s Tenacious Interview With Amber Rudd’ (LBC, 29 May 2017)

<sup>148</sup> Laura Burnip, ‘Anti-terror measure meant to stop British jihadis returning to UK after fighting for ISIS ‘has been used just once in two years’ (The Sun, 29 May 2017) <<https://www.thesun.co.uk/news/3671652/anti-terror-orders-used-once-manchester-attack-amber-rudd/>> accessed 20 July 2017

<sup>149</sup> HC Deb 2 December 2014, vol 589, col 207

<sup>150</sup> HL Deb 20 January 2015, vol 758, cos 1308 (Lord Bates)

### 4.3 Historical parallels

Having demonstrated how TEOs exemplify the pre-emptive turn in counter-terrorism, I explore in this section a few historical parallels of TEOs. The most direct parallel of TEOs is the power to impose exclusion orders under Part II of the Prevention of Terrorism (Temporary Provisions) Act 1974 (“PTA 1974”). The PTA 1974 was enacted in the aftermath of bombings by the Provisional IRA in Birmingham. The Home Secretary could exercise the power to impose an exclusion order if it appeared “expedient to prevent acts of terrorism (whether in Great Britain or elsewhere) designed to influence public opinion or Government policy with respect to affairs in Northern Ireland”.<sup>151</sup> Under section 3(3) of the PTA 1974, an exclusion order may be issued to an individual where the Home Secretary is satisfied that she/he “is concerned in the commission, preparation or instigation of acts of terrorism”<sup>152</sup>; or “is attempting or may attempt to enter Great Britain with a view to being concerned in the commission, preparation or instigation of acts of terrorism”.<sup>153</sup>

In some sense, this previous incarnation of exclusion orders was less pre-emptive than TEOs. They could be imposed on individuals either based on current behaviour *or* in anticipation of future acts, while TEOs are exclusively forward-looking. They also targeted a smaller subset of the population of “potential terrorists”, as exclusion orders could only be made against individuals who had some connection to a country outside of Great Britain<sup>154</sup> and could not be made against British citizens ordinarily resident in Great Britain for the 20 years prior.<sup>155</sup> Unlike TEOs, subjects could not apply for a permit to return to Great Britain. Nevertheless, exclusion orders are remarkably similar to TEOs. As with many elements of colonial penology, they focus on incapacitation and exclusion over punishment. They were executive orders, based on intelligence from security services, with no prior judicial approval required. They also targeted a wide range of suspects. The terms “preparation” and

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<sup>151</sup> PTA 1974, s3(1)

<sup>152</sup> PTA 1974, s3(3)(a)

<sup>153</sup> PTA 1974, s3(3)(b)

<sup>154</sup> PTA 1974, s3(2)

<sup>155</sup> PTA 1974, s4

“instigation” were much wider than their criminal counterparts “attempt” and “incitement”, and individuals attempting to enter Great Britain “need only harbour ‘some vague intention of terrorism’ in the future”.<sup>156</sup> The low standard of evidence required and broad wording and interpretation of the legislation led some to suggest that “it seems people are arrested on the grounds that they have been caught in the possession of an Irish accent”.<sup>157</sup> Despite the similarities between exclusion orders and TEOs, and their use up until the mid-1990s, there was no express mention of exclusion orders during the parliamentary debates on TEOs, demonstrating the historical amnesia apparent in debates on counter-terrorism laws.<sup>158</sup>

Travel bans and banishment were not only used as tools of counter-insurgency in Northern Ireland. After the launch of a campaign of insurgency by a Greek Cypriot militant group in 1955, the British colonial authorities banished from Cyprus four opponents of British rule, including Archbishop Makarios who was later to become the first President of the independent republic. The declaration of a state of emergency enabled the enactment of Emergency Regulation 7, which gave the authorities the power to deport and exclude individuals, including natives of Cyprus, from Cyprus. This was a purely executive order, with no right of appeal and no requirement for reasons to be provided for the order. Returning to Cyprus in breach of the order was a criminal offence. In a manner similar to the debate on TEOs, the deportation of the Archbishop gave rise to heated debate in the Foreign Office as to whether international law permitted states to exclude their own nationals.<sup>159</sup> It was justified on the grounds that the Archbishop was “a leading force in the terrorist movement”, although evidence of his involvement was based on secret intelligence.<sup>160</sup>

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<sup>156</sup> Clive Walker, *The prevention of terrorism in British Law*, (Manchester University Press 1992) 71

<sup>157</sup> K Livingstone, ‘Kilburn Defence Campaign Bulletin no.1’ (1990, December) 2, quoted in Josephine Doody, ‘Creating suspect communities: Exploring the use of exclusion orders in Northern Ireland’ (2012) 4(1) *Behavioral Sciences of Terrorism and Political Aggression* 77

<sup>158</sup> Mark Durkan MP came the closest to making this comparison, stating that he had “profound reservations about the whole idea of temporary exclusion orders, based on my experience in Northern Ireland where counter-terrorism legislation was often counter-productive.” HC Deb 6 January 2015, vol 590, col 198

<sup>159</sup> David Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Routledge 2007) 174

<sup>160</sup> HC Deb 21 December 1956, vol 562, col 1622 (Lena Jeger MP)

While exclusion orders are the most relevant precursor to TEOs, other measures undertaken by colonial authorities to restrict freedom of movement share features with TEOs. To deal with groups of perceived habitual offenders, the British enacted the Criminal Tribes Act 1871 in India.<sup>161</sup> Under the law, certain groups could be designated “criminal tribes” and their movement restricted for reasons of public safety and the prevention of crime. Designation as a “criminal tribe” was an executive decision, based on expert and secret evidence, with no possibility of legal review.<sup>162</sup> The Criminal Tribes Act 1871 sat outside the criminal justice system, requiring no evidence of past criminal activity prior to designation as a criminal tribe. Like TEOs, orders under the Criminal Tribes Act 1871 imposed significant restrictions on freedom of movement, were executive in nature and justified on the basis that those subject to the laws were crime-prone but evidence to a criminal standard of past misconduct was hard to adduce.

While these examples differ from TEOs in some ways, they are similar in certain key respects, including the use of unchecked executive power, restrictions on movement or outright bans from territory, secret evidence and an absence of due process safeguards. These examples demonstrate that measures like TEOs should not be seen as an exceptional deviation from the norm, nor should pre-emptive security practices be viewed as exceptional to the post-9/11 security environment. Rather, TEOs are part of a wider technique of governance that has deep historical roots, including in colonial systems of law from which many might believe current practices diverge.

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<sup>161</sup> Henry Schwarz, *Constructing the Criminal Tribe in Colonial India: Acting Like a Thief* (Wiley-Blackwell 2010)

<sup>162</sup> Mark Brown, *Penal Power and Colonial Rule* (Routledge 2014)

## **Chapter 5: Discussion**

The purpose of this section is to understand what insights can be drawn by bringing together the analysis, in chapter 2, of the debate on TEOs and the argument, in chapter 4, that TEOs are part of an existing, and historically embedded, trend in counter-terrorism. The key insight is that the underlying belief held by proponents and many critics of TEOs is based on a fallacy. This underlying belief, as set out in section 2.4, is that TEOs are a minor, and unfortunately necessary, deviation from the balance between security and liberty that the modern British state upholds. Critics would argue that they go too far towards security, relying on human rights arguments, while proponents argue that they strike the correct balance. Chapter 4 demonstrated this underlying premise to be false. TEOs are not a deviation from the normal workings of the British state. The liberal state has long adopted measures like TEOs that are pre-emptive in nature, and such measures have only increased in number since 9/11.

If we recognise that TEOs are part of this wider trend of pre-emption, then the debate must turn to the desirability of that wider trend. It is this broader discussion “about the proper scope and function of our engines of control”<sup>163</sup> that was missing from the debate on TEOs. As Donkin and Finnane state, for critics of counter-terrorism laws it seems as though “the ‘rule of law’ itself, rather than justice or order or liberty or safety or security, is a fundamental value which must be protected at all costs.”<sup>164</sup> In the debate on TEOs, the narrow focus on compatibility with human rights and the rule of law took the place of a wider debate as to whether TEOs are good law at all. That pre-emptive powers are necessary and justified was taken for granted. All that remained was to ensure “strong checks on this power”<sup>165</sup> and to “scrutinise the practicalities”.<sup>166</sup>

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<sup>163</sup> Zedner, ‘Preventive justice or pre-punishment? The case of control orders’, 187

<sup>164</sup> Donkin and Finnane, 13

<sup>165</sup> HC Deb, 24 March 2015, vol 594, col 1384 (Diana Johnston MP)

<sup>166</sup> HC Deb 2 December 2014, vol 589, col 234 (Keith Vaz MP)

What would a debate about the desirability of a pre-emptive strategy look like? One could adopt the view that pre-emption is so embedded in contemporary counter-terrorism that, regardless of its overall desirability, direct opposition to it is ultimately unproductive. In this case, tweaking laws to ensure compatibility, as far as possible, with civil liberties is all that one could hope to achieve. Some commentators have taken this position and, rather than trying to oppose pre-emption, argued that we should develop a new jurisprudence of risk. This jurisprudence would occupy a space outside of the traditional civil and criminal divide, providing a new set of procedural safeguards and criteria for the application of administrative measures such that pre-emptive legal instruments are made more human rights-compliant. Zedner and Dershowitz are advocates of this approach, while Brown argues that, in successive judgements concerning pre-emptive administrative measures, a jurisprudence of risk is already emerging.<sup>167</sup>

This paper rejects this suggestion. Indeed, the history of pre-emptive practices in colonial methods of domination should be a red flag to those who advocate for a new jurisprudence of pre-emption. A pre-emptive strategy is inherently flawed. As de Goede highlights, the exercise of imagination in pre-emptive security is “decisively cultural work”.<sup>168</sup> In the absence of evidence of tangible threats, cultural representations and “political narratives of risk” ground security decisions.<sup>169</sup> McCulloch and Pickering are more explicitly critical of the role of imagination in pre-emptive security, stating that “imagination animated through prejudice and stereotypes, rather than objective fact or evidence that points to those facts, form the basis of police and security intelligence action.”<sup>170</sup> To imagine the future in certain ways, and not others, is a political choice.<sup>171</sup> To then act on this imagined future through the law means that the law itself is not neutral of wider structures of power.

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<sup>167</sup> Dershowitz, 190-250: Zedner, ‘Preventive justice or pre-punishment? The case of control orders’, 203: Mark Brown, ‘Prevention and the security state: Observations on an emerging jurisprudence of risk’, (2011) 8 *Champ pénal/ Penal field* < <http://champpenal.revues.org/8016>> accessed 12 June 2017

<sup>168</sup> Marieke de Goede, *European Security Culture: Preemption and Precaution in European Security* (Amsterdam University Press 2011) 16

<sup>169</sup> Mythen and Walklate, 35

<sup>170</sup> Jude McCulloch and Sharon Pickering, ‘Future threat: pre-crime, state terror, and dystopia in the 21st century’, (2010) 81(1) *Criminal Justice Matters* 33

<sup>171</sup> Martin, 75

This argument goes further than the claim that counter-terrorism policies are discriminatory in their implementation. It is to argue that pre-emptive security, by its nature, engenders discriminatory results.

In its exercise in the colonies, the inherently non-neutral nature of pre-emptive security is evident. While their reasoning was not as explicitly pre-emptive as in the current regime, colonial authorities associated threats to security and criminality in certain groups of individuals, such as the so-called “criminal tribes” of India, who were differentially managed. Law was a central tool in assigning different levels of rights to different categories of people. Hussain provides further detail in this respect in his analysis of “hyperlegality”, which he argues is a feature of both British colonial governance and contemporary counter-terrorism. Hyperlegality is a heightened use of “classifications of persons in the law” and of “special tribunals and commissions.”<sup>172</sup> In contemporary counter-terrorism, one can identify the use of classifications, such as “unlawful combatant” or “foreign terrorist fighter”, to enable the differential treatment of terrorism suspects and the growth of special tribunals, such as the Special Immigration Appeals Commission for individuals expelled on grounds of national security.<sup>173</sup> Hyperlegality could be viewed as a consequence of the pre-emptive approach to counter-terrorism. Separate categories of individuals and separate legal venues permit a pre-emptive rationality, with its lower standards of evidence, lesser procedural rights and deference to the executive, to operate outside the traditional criminal justice system. The combination of a bifurcated legal system and authority exercised through law, but informed by an inherently political and non-neutral rationality, offends the values of justice and equality that the liberal state purportedly upholds.

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<sup>172</sup> Nasser Hussain, ‘Hyperlegality’, (2007) 10(4) *New Criminal Law Review* 516

<sup>173</sup> I draw on my discussion of hyperlegality in: Eda Seyhan, ‘A Critique of the Proposed EU Directive on Combating Terrorism’, (Essay submitted in course 15PPOH034, SOAS 2017) 9

## **Conclusion**

James Brokenshire MP stated, in the debate on the CTS Act, that “the threat is now worse than at any time since 9/11...[it] has changed and so must our response.”<sup>174</sup> This paper has demonstrated that, while the threat may have changed, the response hardly has. TEOs, it has been argued, are not a new measure for exceptional times, but a form of pre-emptive security with colonial parallels. This paper showed, in chapter 3, that pre-emptive security itself is highly embedded in contemporary counter-terrorism, and has origins in much older techniques of governance. By putting forward this view, this paper has refuted the commonly held belief, expressed during the debate on TEOs and set out in chapter 2, that the measure represents a minor deviation from the normal workings of the British state required by the new and unparalleled threat posed by returnees. This commonly held belief lends itself to a discussion on purely human rights grounds, with efforts to tweak TEOs to ensure compliance with human rights or opposition to TEOs on the basis of human rights alone. Recognising that TEOs are embedded into a wider technique of governance encourages us to criticise this technique itself. In the discussion section, I have tentatively suggested such a wider critique of pre-emption.

This paper should not, however, be read as a critique of human rights. Indeed, legal challenges to pre-emptive counter-terrorism measures on human rights grounds have been one of the few catalysts for changes in the law. This paper simply states that human rights discourse alone is not sufficient. Human rights provides a necessary minimum standard, but does not articulate “a fully developed conception of the good society”.<sup>175</sup> In parliamentary discussion, unlike in a court of law, the stage is set for a wider debate about the role of the state, the nature of security, and how we should be governed. Chapter 2 demonstrated that this wider debate was eschewed in favour of a narrow discussion on TEO’s compliance with human rights law. This paper has provided a starting point for this wider debate to take place.

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<sup>174</sup> HC Deb, 24 March 2015, vol 594, col 1377

<sup>175</sup> Zedner, *Security*, 187

## **Bibliography**

### **Primary sources**

#### Cases

*Everett v Ribbands* [1952] 2 QB 198 (CA)

*O'Hara v Chief Constable of the RUC* [1997] AC 286 (HL)

*R v Gul* [2013] UKSC 64, [2014] AC 1260

*R v Martin (Patrick Hugh)* [1999] 1 Cr App R (S) 477 (CA)

*Secretary of State for the Home Department v CC, CF* [2012] EWHC 2837 (Admin), [2013] 1 WLR 2171

*Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140, [2007] QB 415

#### Legislation

The Counter-Terrorism and Security Act 2015

Explanatory Notes to the Counter-Terrorism and Security Bill 2014-15

Prevention of Terrorism (Temporary Provisions) Act 1974

#### International law sources

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT)

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

UN Ad Hoc Committee on Refugees and Stateless Persons 'A Study of Statelessness, United Nations, August 1949, Lake Success - New York' (1 August 1949) UN Doc E/1112

UN Human Rights Committee 'General Comment No. 27 (67), Freedom of movement, article 12' (1 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9

UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178

### **Secondary sources**

#### Hansard

HC Deb 21 December 1956, vol 562, col 1622

HC Deb 2 December 2014, vol 589, cols 207-257

HC Deb 9 December 2014, vol 589, cols 784-838  
HC Deb 15 December 2014, vol 589, cols 1173-1234  
HC Dec 16 December 2014, vol 589, cols 1305-1372  
HC Deb 6 January 2015, vol 590, cols 165 – 206  
HC Deb 7 January 2015, vol 590, cols 317- 354  
HC Deb, 24 March 2015, vol 594, col 1377  
HL Deb 13 January 2015, vol 758, cols 661 – 772  
HL Deb 20 January 2015, vol 758, cols 1208-1318  
HL Deb 2 February 2015, vol 759, cols 480-483

Bill documents and related submissions

‘Counter-Terrorism and Security Bill No 127 of 2014-15’ (Research Paper 14/63 House of Commons, 27 November 2014)

Counter-Terrorism and Security HC Bill (2014-15) [127]

Counter-Terrorism and Security HL Bill (2014-15) 92

Equality and Human Rights Commission, ‘Counter Terrorism and Security Bill 2014-15: Second Reading, House of Lords’ (January 2015) <  
<https://www.equalityhumanrights.com/en/file/14456/download?token=R0k5HteC>> accessed 15 June 2017

Goodwin-Gill, G S, ‘Temporary Exclusion Orders’ and their Implications for the United Kingdom’s International Legal Obligations’, (Submission to the JCHR, 2 December 2014) <  
[https://www.parliament.uk/documents/joint-committees/human-rights/GSGG-Counter\\_Terrorism\\_JCHRFinal.pdf](https://www.parliament.uk/documents/joint-committees/human-rights/GSGG-Counter_Terrorism_JCHRFinal.pdf)> accessed 10 June 2017

‘Counter-Terrorism and Security Bill No 127 of 2014-15’ (Research Paper 14/63 House of Commons, 27 November 2014)

Home Office, *CONTEST: The United Kingdom’s Strategy for Countering International Terrorism: Annual Report for 2015* (Cm 9310, 2016)

Home Office, *Counter-Terrorism and Security Bill: European Convention on Human Rights Memorandum* (Cm 059, 2014)

Home Office, *Factsheet – Part 1 Chapter 2 – Temporary Exclusion Orders* (2014)

Home Office, *Impact Assessment: Counter-Terrorism and Security Bill – Temporary Exclusion Orders* (IA No: HO0144, 21 November 2014)

Home Office, *Overarching Impact Assessment for the Counter-Terrorism and Security Act 2015* (IA

No: HO0150, 11 February 2015)

House of Commons Home Affairs Committee, *Oral evidence: Counter-Terrorism and Security Bill*, (HC 2014-15, 838)

House of Commons Home Affairs Committee, *Terrorism Detention Powers*, (HC 2005-06, 910-I)

House of Lords Constitution Committee, *Counter-Terrorism and Security Bill* (HL 2014-15, 92)

Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Security Bill* (2014-15, HL 86-V, HC 859-V)

Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Security Bill - Minutes of evidence: David Anderson, 27 November 2014* (HC 836)

Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Security Bill - Minutes of evidence: James Brokenshire MP, 3 December 2014* (HC 859)

Letter from James Brokenshire MP to Joint Committee on Human Rights, 'Counter-Terrorism and Security Bill: Legislative Scrutiny' (20 January 2015)

Liberty (the National Council for Civil Liberties), 'Liberty's second reading briefing on the Counter-Terrorism and Security Bill in the House of Commons', (December 2014) < <https://www.liberty-human-rights.org.uk/sites/default/files/Liberty%27s%20Second%20Reading%20Briefing%20on%20the%20Counter-Terrorism%20%26%20Security%20Bill%20in%20the%20House%20of%20Commons.pdf>> accessed 15 June 2017

Walker, C, 'Counter Terrorism and Security Bill 2014-15, Submission to the Joint Committee on Human Rights' (5 December 2014) < [https://www.parliament.uk/documents/joint-committees/human-rights/Prof\\_Clive\\_Walker\\_Submission.pdf](https://www.parliament.uk/documents/joint-committees/human-rights/Prof_Clive_Walker_Submission.pdf)> accessed 10 June 2017

## Books

Agamben, G, *State of Exception* (University of Chicago Press 2005)

Bonner, D, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Routledge 2007)

Brown, M, 'Liberal exclusions and the New Punitiveness', in Pratt, J et al (eds), *The New Punitiveness: Trends, Theories, Perspectives* (Willan 2005)

— —, *Penal Power and Colonial Rule* (Routledge 2014)

Butler, J, *Precarious Life: The Powers of Mourning and Violence* (Verso 2004)

Callinicos, A, *The New Mandarins of American Power: The Bush Administration's Plans for the World* (Polity Press 2003)

Chakrabarty, D, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press 2000)

- de Goede, M, *European Security Culture: Preemption and Precaution in European Security* (Amsterdam University Press 2011)
- Dershowitz, A M, *Preemption: A Knife That Cuts Both Way* (WW Norton 2007)
- Feeley, M and Simon, J, 'Actuarial Justice: The Emerging New Criminal Law', in Nelken D (ed) *The Futures of Criminology* (Sage 1994)
- Hardt, M and Negri, A, *Multitude: War and Democracy in the Age of Empire* (Penguin 2004)
- Hocking, J, *Beyond Terrorism: The Development of the Australian Security State* (Allen and Unwin 1993)
- Hoffman, B, *Inside Terrorism* (Columbia University Press 2006)
- Hussain, N, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press 2003)
- McCulloch, J and Wilson, D, *Pre-crime: Pre-emption, precaution and the future* (Routledge 2015)
- McCulloch, J and Pickering, S, 'Counter-terrorism: The Law and Policing of Pre-emption' in Lynch, A et al (eds), *Counter-Terrorism and Beyond The Culture of Law and Justice After 9/11* (Routledge 2010)
- Mockaitis, T, *The New Terrorism: Myths and Realities* (Praeger Security International 2007)
- Murphy, C C, *EU Counter-terrorism Law: Pre-emption and the Rule of Law* (Hart Publishing 2015)
- Neocleous, M, *Critique of Security* (McGill-Queen's University Press 2008)
- Schwarz, H, *Constructing the Criminal Tribe in Colonial India: Acting Like a Thief* (Wiley-Blackwell 2010)
- Shenhav, Y, 'Imperialism, Exceptionalism and the Contemporary World' in Svirsky, M and Bignall, S (eds) *Agamben and Colonialism* (Edinburgh University Press 2012)
- Simmons, W P, *Human Rights Law and the Marginalized Other* (Cambridge University Press 2011)
- Stoler, A L, *Haunted by Empire: Geographies of Intimacy in North American History* (Duke University Press 2006)
- Syrett, K, 'The United Kingdom' in Roach, K (ed), *Comparative Counter-Terrorism Law* (Cambridge University Press 2015)
- Walker, C, *The prevention of terrorism in British Law*, (Manchester University Press 1992)  
 — — , *Terrorism and the Law* (Oxford University Press 2011)  
 — — , *Blackstone's Guide to The Anti-Terrorism Legislation* (3<sup>rd</sup> ed, Oxford University Press 2014)
- Zedner, L, *Security* (Routledge 2009)

## Articles

- Amoore, L and de Goede, M, 'Governance, risk and dataveillance in the war on terror', (2005) 43(2) *Crime, Law and Social Change* 149
- Amoore, L, 'Risk before Justice: When the Law Contests Its Own Suspension' (2008) 21(4) *Leiden Journal of International Law* 847
- Anderson, B, 'Preemption, precaution, preparedness: anticipatory action and future geographies' (2010) 34(6) *Progress in Human Geography* 777
- Aradau, C and van Munster, R, 'Governing Terrorism through Risk: Taking Precautions, (un)Knowing the Future' (2007) 13(3) *European Journal of International Relations* 106
- Blackbourn, J and Walker, C, 'Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015' (2016) 79(5) *The Modern Law Review* 840
- Brown, M, 'Prevention and the security state: Observations on an emerging jurisprudence of risk' (2011) 8 *Champ pénal/Penal field* < <http://champpenal.revues.org/8016>> accessed 12 June 2017
- Cochrane, F, 'Not so extraordinary: the democratisation of UK counterinsurgency strategy', (2013) 6(1) *Critical Studies on Terrorism* 29
- Comaroff, J L, 'Colonialism, Culture, and the Law: A Foreword' (2001) 26(2) *Law & Social Inquiry* 305
- De Goede, M, 'Beyond Risk: Premediation and the Post-9/11 Security Imagination' (2008) 39 *Security Dialogue* 155
- —, 'The politics of preemption and the war on terror in Europe' (2008) 14(1) *European Journal of International Relations* 161
- De Goede, M and Randalls, S, 'Precaution, Pre-Emption: Arts and Technologies of the Actionable Future' (2009) 27(5) *Environment and Planning* 859
- De Goede, M, Simon, S and Hoijsink, M, 'Performing preemption' (2014) 45(4) *Security Dialogue* 411
- Donkin, S and Finnane, M, 'Fighting Terror with Law? Some Other Genealogies of Pre-emption' (2013) 2(1) *International Journal for Crime and Justice* 3
- Doody, J, 'Creating suspect communities: Exploring the use of exclusion orders in Northern Ireland' (2012) 4(1) *Behavioral Sciences of Terrorism and Political Aggression* 77
- Fenwick, H, 'Preventive anti-terrorist strategies in the UK and ECHR: Control orders, TPIMs and the role of technology' (2011) 25(3) *International Review of Law, Computers & Technology* 129
- —, 'Responding to the ISIS threat: extending coercive nontrial-based measures in the Counter-Terrorism and Security Act 2015' (2016) 30(3) *International Review of Law, Computers & Technology* 174
- —, 'Terrorism threats and temporary exclusion orders: counter-terror rhetoric or reality?' (2017) 3 *European Human Rights Law Review* 247
- Heath-Kelly, C, 'Reinventing prevention or exposing the gap? False positives in UK terrorism governance and the quest for pre-emption' (2012) 5(1) *Critical Studies on Terrorism* 69
- Hussain, N, 'Hyperlegality' (2007) 10(4) *New Criminal Law Review* 514

- Kapoor, N, 'On the North West 10(12): Postcoloniality, the British racial state and the war on terror' (2013) 20(1) *Identities* 61
- Martin, T, 'Governing an Unknowable Future: The Politics of Britain's Prevent Policy' (2014) 7(1) *Critical Studies on Terrorism* 62
- Massumi, B, 'Potential Politics and the Primacy of Preemption' (2007) 10(2) *Theory and Event* (unpaginated)
- McCulloch, J and Pickering, S, 'Pre-Crime and Counter-terrorism: Imagining Future Crime in the 'War on Terror'' (2009) 49(5) *British Journal of Criminology* 628  
 — —, 'Future threat: pre-crime, state terror, and dystopia in the 21st century' (2010) 81(1) *Criminal Justice Matters* 32
- Mythen, G and Walklate, S, 'Terrorism, Risk and International Security: The Perils of Asking 'What If?'' (2008) 39 *Security Dialogue* 221  
 — —, 'Pre-crime, regulation, and counter-terrorism: interrogating anticipatory risk' (2010) 81(1) *Criminal Justice Matters* 34
- Mythen, G, Walklate, S and Khan, F, "'I'm A Muslim, But I'm Not A Terrorist": Victimization, risky identities and the performance of safety' (2009) 49(6) *British Journal of Criminology* 736
- Neocleous, M, 'Security, Liberty and the Myth of Balance: Towards a Critique of Security Politics' (2007) 6 *Contemporary Political Theory* 131
- Reynolds, J, 'The Long Shadow of Colonialism: The Origins of the Doctrine of Emergency in International Human Rights Law' (2010) *Comparative Research in Law & Political Economy Research Paper* 19/2010 <  
<http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1086&context=clpe>> accessed 10 July 2017
- Runciman, D, 'The Precautionary Principle' (2004) 26(7) *London Review of Books* 12
- Sangeetha, P and Williams, G, 'Twenty-First Century Banishment: Citizenship Stripping in Common Law Nations' (2017) 66(3) *International & Comparative Law Quarterly* 521
- Simon, S, 'Suspicious Encounters: Ordinary preemption and the securitization of photography' (2012) 43(2) *Security Dialogue* 157
- Squires, P and Stephen, D, 'Pre-crime and precautionary criminalisation' (2010) 81(1) *Criminal Justice Matters* 28
- Stockdale, L P D, 'Imagined futures and exceptional presents: a conceptual critique of 'pre-emptive security'' (2013) 25(2) *Global Change, Peace & Security* 141
- Tulich, T, 'Adversarial Intelligence? Control Orders, TPIMS and Secret Evidence in Australia and the United Kingdom' (2012) 12(2) *Oxford University Commonwealth Law Journal* 341
- Walker, C, 'The Treatment of Foreign Terror Suspects' (2007) 70 *The Modern Law Review* 427
- Wall, D, 'From post-crime to pre-crime: preventing tomorrow's crimes today' (2010) 81(1) *Criminal Justice Matters* 22

Zedner, L, 'Preventive justice or pre-punishment? The case of control orders' (2007) 60(1) Current Legal Problems 174

— —, 'Pre-crime and pre-punishment: a health warning' (2010) 81(1) Criminal Justice Matters 24

#### Other secondary sources

— —, 'President Bush Delivers Remarks On Homeland Security' (The New York Times, 10 September 2003) <<http://www.nytimes.com/2003/09/10/politics/president-bush-delivers-remarks-on-homeland-security.html>> accessed 12 June 2017

Amnesty International, 'Dangerously disproportionate: The ever-expanding national security state in Europe' (EUR 01/5342/2017, 17 January 2017) <[www.amnesty.org/en/documents/eur01/5342/2017/en](http://www.amnesty.org/en/documents/eur01/5342/2017/en)> accessed 15 June 2017

Amnesty International, 'United Kingdom: Submission to the Human Rights Committee' (EUR 45/1793/2015, 29 June 2015) <<https://www.amnesty.org/en/documents/eur45/1793/2015/en>> accessed 15 June 2017

Bowie, J, 'Interview: Shami Chakrabarti' (Civil Service World, 23 January 2015) <<https://www.civilserviceworld.com/articles/interview/interview-shami-chakrabarti>> accessed 19 May 2017

Burnip, L, 'Anti-terror measure meant to stop British jihadis returning to UK after fighting for ISIS 'has been used just once in two years' (The Sun, 29 May 2017) <<https://www.thesun.co.uk/news/3671652/anti-terror-orders-used-once-manchester-attack-amber-rudd/>> accessed 20 July 2017

EU Radicalisation Awareness Network, 'RAN Manual: Responses to returnees: Foreign terrorist fighters and their families', (2017) <[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/ran\\_br\\_a4\\_m10\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/ran_br_a4_m10_en.pdf)> accessed 10 August 2017

Eurojust, 'Foreign Terrorist Fighters: Eurojust's Views on the Phenomenon and the Criminal Justice Response', (November 2016) <<http://statewatch.org/news/2017/mar/eu-eurojust-foreign-fighters-legal-response-report-restricted-11-16.pdf>> accessed on 10 May 2017

Ferrari, N, 'Nick Ferrari's Tenacious Interview With Amber Rudd' (LBC, 29 May 2017) <[www.lbc.co.uk/radio/presenters/nick-ferrari/nick-ferraris-tenacious-interview-with-amber-rudd/](http://www.lbc.co.uk/radio/presenters/nick-ferrari/nick-ferraris-tenacious-interview-with-amber-rudd/)> accessed 30 June 2017

Human Rights Watch, 'UK: New Counterterrorism Bill Curbs Rights' (1 December 2014) <<https://www.hrw.org/news/2014/12/01/uk-new-counterterrorism-bill-curbs-rights>> accessed 15 June 2017

Moore, J M, 'Is the Empire coming home? Liberalism, exclusion and the punitive State' (British Society of Criminology Conference, Liverpool, June-July 2014) <<http://eprints.uwe.ac.uk/25295>> accessed 30 April 2017

National Commission on Terrorist Attacks Upon the United States, 'The 9/11 Commission Report' (22 July 2004) <<https://www.9-11commission.gov/report/911Report.pdf>> accessed 12 September 2017

Pabst, S, 'Bavaria ramps up security measures against terrorist threats' (DW, 25 July 2017) <<http://www.dw.com/en/bavaria-ramps-up-security-measures-against-terrorist-threats/a-39829936>> accessed 10 September 2017

Prime Minister's Office, 'PM statement on European Council and tackling extremism' (1 September 2014) <<https://www.gov.uk/government/speeches/pm-statement-on-european-council-and-tackling-extremism>> accessed 30 June 2017

Report of a Committee of Privy Counsellors, 'Transcript of Evidence of The Rt. Hon. Tony Blair', (The Iraq Inquiry, 21 January 2011) < <http://www.iraqinquiry.org.uk/media/230337/2011-01-21-transcript-blair-s1.pdf>> accessed 12 September 2017

Roberts, B, 'Minister warns of "peril" as he pushes for 42-day lock-up' (Daily Mirror, 23 January 2008) < [www.mirror.co.uk/news/top-stories/2008/01/23/minister-warns-of-peril-as-he-pushes-for-42-day-lock-up-115875-20294998/](http://www.mirror.co.uk/news/top-stories/2008/01/23/minister-warns-of-peril-as-he-pushes-for-42-day-lock-up-115875-20294998/)> accessed 12 May 2017

Seyhan, E, 'A Critique of the Proposed EU Directive on Combating Terrorism', (Essay submitted in course 15PPOH034, SOAS 2017)

The White House, 'The National Security Strategy of the United States' (September 2002)

US Department of Defense, 'DoD News Briefing - Secretary Rumsfeld and Gen. Myers, (12 February 2002) < <http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636>> accessed 12 June 2017

US Department of Justice, 'Attorney General John Ashcroft Prepared Remarks for the US Mayors Conference' (25 October 2001) <[https://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10\\_25.htm](https://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm)> accessed 10 September 2017

Walker, C, 'Annex 2: Foreign Terrorist Fighters and UK Counterterrorism Law' in Anderson Q.C., D, 'The Terrorism Acts in 2015, Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and part 1 of the Terrorism Act 2006' (December 2016)

Warner, M, 'The One Percent Doctrine' (PBS, 4 July 2006) <[http://www.pbs.org/newshour/bb/entertainment-july-dec06-suskind\\_07-04/](http://www.pbs.org/newshour/bb/entertainment-july-dec06-suskind_07-04/)> accessed on 15 May 2017