King's Student Law Review

Title: The War on Terror as a War on Human Rights: Should preventive detention be used as a counterterrorism mechanism against suspected terrorists?

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Source: *The King's Student Law Review*, Vol XI, Issue I

Published by: King's College London on behalf of The King's Student Law Review

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The War on Terror as a War on Human Rights: Should preventive detention be used as a counterterrorism mechanism against suspected terrorists?

Jack Bickerton

The threat of international terrorism is entrenched in the headlines of the media, the mind of the citizen and the laws of the State. Western nations have, in a post-9/11 world, adopted exceptional measures applicable to (suspected terrorists to respond to the threat and enhance security. Preventive detention is one of those exceptional measures: the detention of those yet to commit an offence—without trial—on the basis that they are perceived as dangerous and risk committing an offence in the future. This article critically analyses preventive detention and questions whether it should be used, and, if so, how. A consideration of the international human rights framework suggests that the use of preventive detention conflicts with the fundamental rights to liberty, fair trial, and due process. The ubiquity of exceptional measures appears attributable to the war model of counterterrorism, rather than the criminal model. The former is arguably the most contentious through perceiving the act of terrorism as war, thus enabling states to treat terrorist suspects as enemy combatants; thus, allowing for the often-extreme laws of war to be applied in an ostensible criminal context. The latter, as the name suggests, treats terrorism as a criminal offence thus categorising terrorists as criminals and subjecting them to the standard criminal process. This article purports that the use of the war model is problematic in that it allows for an application of preventive detention that is inconsistent with human rights. Preventive detention can be an effective mechanism in counterterrorism strategies, but caution should be taken in its use. The crime model should prevail and ensure the use of exceptional measures is reasonable and proportionate. Suspected terrorists are human beings; they should enjoy the human rights conferred to us all, irrespective of the abhorrence or reprehensibility of the anticipated crimes.

Introduction

The cataclysmic events of 11 September 2001 (9/11) projected terrorism to new relevance in political and legal discourse internationally. Immediately following the al Qaeda (AQ) attacks, the then president of the United States (US), George W. Bush, infamously stated: 'Our *war on terror* begins with al Qaeda, but it does not end there. It will not end until every

terrorist group of global reach has been found, stopped and *defeated'*.[1] This seemingly militaristic style of address can be argued as a triggering catalyst in the transformation of counterterrorism regimes in the Western world resulting in a potentially apparent disregard to the international human rights framework through undermining the right to liberty, fair trial, and due process.

Arguably, the most pertinent transformation in counterterrorism is the paradigmatic shift from the crime model to the war model. As will be discussed in Part II of this article, the former maintains the view that those who commit, or are seen at risk of committing, terror offences are criminals and should be perceived as such. Alternatively, the latter perceives terrorism as an act of war and thus categorises (suspected) terrorists as enemy combatants and applies the laws of war to counterterrorism. The use of preventive detention as an exceptional measure in countering terrorism is one found in both the crime model and the war model. This article questions whether this mechanism should be used against suspected terrorists and how it can be used consistently with the international human rights framework. Through examining this question through the lens of either the crime or war model, the problematic nature of the mechanism can be better understood. In the US context, for example, the prioritisation of the laws of armed conflict to counter terrorism has resulted in security at the expense of due process safeguards. Using the semantics of war, counterterrorism has resulted in an apparent undermining of human rights protections.[2] Ostensibly, the "war on terror" justifies the subversion of human rights through identifying suspected terrorists as enemy combatants in the course of war.[3] Some of the most vexing legal questions of the day fall to debates around liberty and security,[4] which is inextricably linked to preventive detention.

This article proceeds with the following parts. Part I explores preventive detention and its conflict with human rights. Part II presents the war model and the crime model and explains their influence on counterterrorism regimes. The models and their implications for the suspected terrorist will be critically analysed. Particularly, the war model is criticised as unjustified in the absence of a legally recognised war. Part III forms the crux of the article's analysis in questioning the use of preventive detention and considering how the mechanism can be used in accordance with human rights. Through exploring arguments on both sides, the risks associated with preventive detention will be exemplified. Ultimately, it will be argued that preventive detention needs be used due to the existence of a terror threat.

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[1] Text of George Bush's speech <www.theguardian.com/world/2001/sep/21/september11.usa13 (emphasis added) > accessed 2 June 2019.

[2] Joan Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights', (2003) 14(2) European Journal of International Law 241, 263.

[3] Paul Hoffman, 'Human Rights and Terrorism', (2004) 26 Human Rights Quarterly 932, 939.

[4] David Cole, 'Out of the Shadows: Preventive Detention, Suspected Terrorists, and War', (2009) 97(3) California Law Review 693, 695.

However, it will also be argued that this threat may be exaggerated, and that in any event, the terror threat should not render preventive detention any less exceptional; it should be reserved for exceptional situations. A recurring theme throughout is the need to balance liberty and security for, as of the utmost importance.

1. Preventive detention and its impact on human rights

The global *fight* against terrorism has triggered States to adopt exceptional counterterrorism mechanisms to enhance security. However, this has been at the expense of fundamental liberties, arguably disproportionately. This section explains what preventive detention is and how it operates as a legal mechanism. It also discusses the conflict between the mechanism and human rights, particularly the right to liberty, fair trial, and due process safeguards.

1A: What is preventive detention?

The detention of individuals is most prominent in the criminal context where those guilty of offences receive custodial sentences as punishment. The judicial finding of guilt justifies the deprivation of liberty – basing the detention on the commission of an offence. Preventive detention relies on very different principles. An example of preventive detention is the detaining of enemy combatants as prisoners of war (POWs) in the course of armed conflict. POWs may be preventively detained until the cessation of hostilities,[5] which whilst not being a fixed end date like a sentence given in the criminal courts, is a conceptual end point, rendering the detention definite. As will be expanded upon below, this is, perhaps controversially, particularly relevant for suspected terrorists. Though outside the terrorism context, the preventive detention of POWs is mostly accepted due to the exigencies of legally recognised armed conflict.[6]

This can be better understood through focusing on the US and the UK, where preventive detention is not confined to the war context. In the criminal law, suspected criminals can be preventively detained pending trial when perceived to be at risk of flight or harming others.[7] This is not overly problematic since the detention is usually relatively brief. A further example, which is perhaps more problematic, is the preventive detention of serious sex offenders perceived as dangerous who have already served their sentence.[8] Other examples include the quarantine of people with infectious diseases,[9] and the detention of those with

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[5] Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 135, Article 118.

[6] Seumas Miller, 'The Moral Justification for the Preventive Detention of Terrorists', (2018) 37(2) Criminal Justice Ethics 122, 124.

[7] See (in UK context) Bail Act 1976, Schedule 1; or (in US context) Bail Reform Act of 1984 18 USC §§3141—3150, § 3142(d)(2).

[8] See, for example, Criminal Justice Act 2003, s.227, as amended by Criminal Justice and Immigration Act 2008, s.15(1).

[9] See, for example, Public Health (Control of Disease) Act 1984, s.45(G).

psychosocial impairments perceived as being a danger to themselves and/or others.[10] Preventive detention is not contrary to the law and in fact can be traced to a 1361 English statute[11] where parliament were concerned that soldiers returning from war would not peacefully reintegrate back into societal life.[12]

Post-9/11, preventive detention has been adopted in counterterrorism strategies in many countries. The criminal law, however, poses "legal constraints" in utilising preventive detention which has motivated a shift to the use of preventive detention akin to the war context whereby POWs are preventively detained.[13] This, however, as is explored in Part II, is controversial since it is uncertain whether suspected terrorists can truly be categorised as combatants, despite the rhetoric associated with the "war on terror". The linguistics of war have been adopted by both State and terrorists, though this does not necessarily lead to a legal categorisation. The prediction of future behaviour may not be a solid enough foundation to justify deprivation of liberty. The use of preventive detention conflicts with the right to liberty and a fair trial since it detains individuals on the basis of suspicion, which raises concerns as to whether States can legitimately derogate from human rights in the name of security. In the European context, for example, States can derogate from the European Convention on Human Rights by virtue of Article 15. When deciding the legitimacy of such a derogation, Article 15 stipulates three conditions: the derogation must be in time of war or public emergency which threatens the life of the nation, it must not go beyond the exigencies of the situation to which it is based, and it must not be inconsistent with other international obligations.[14] Therefore, it must be examined whether the breaches of human rights associated with preventive detention – if justified by the exigency of war in a terrorist situation – are legitimate derogations in accordance with international legal principles.

1B: The human rights aspect

The Universal Declaration of Human Rights (UDHR) proclaims that 'all human beings are born free and equal in dignity and rights'.[15] Thus, all human rights, irrespective of their

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[10] See, for example, Mental Health Act 1983, ss. 2, 3.

[11] Justices of the Peace Act 1361. The act conferred "justices of the peace" specific duties and powers to prevent "breaches of the peace", such as rioting or affray. One such power was imprisonment. The act remains enforceable today.

[12] Graham McBain, 'Modernising the Law: Breaches of the Peace and Justices of the Peace', (2015) 8(3) Journal of Politics and the Law 158, 207.

[13] Douglas Cassel, 'Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints Under International Law', (2008) 98(3) Journal of Criminal Law and Criminology 811, 830.

[14] European Court of Human Rights, *Guide on Article 15 of the European Convention on Human Rights: Derogation in time of Emergency,* (Council of Europe, 31 December 2019), 6 <https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf.

[15] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)), Article 1.

category, apply equally to all human beings simply by virtue of being part of the "human family".[16] In being part of the human family, it would appear that the the suspected terrorist should retain their fundamental human rights regardless of the reprehensibility or magnitude of terrorism. Preventive detention therefore raises issues regarding the State's ability to effectively counter terrorism whilst adhering to human rights, whilst appropriately balancing security and liberty.

The international human rights framework permits derogations of human rights in a public emergency.[17] For example, as noted above, Article 15 ECHR specifies conditions as to where a State can derogate from obligations in times of war or public emergency. Indeed, terrorism may constitutes a risk to the public great enough as to justify this; yet there is an difference between derogation and abandonment. Hoffman states that impulsive abandonment of human rights is "shortsighted and self-defeating".[18] Indeed, human rights can be subverted where necessary, but derogations do not permit outright abandonment of human rights. Of course, terrorism directly impacts upon human rights, most obviously the right to life[19] Whilst the human rights impacts on the victims of terrorism are obvious, less so is the adverse impact on terrorists' human rights arising from exceptional counterterrorism strategies.[20] The most significant of these rights are the right to liberty[21] and the right to a fair trial.[22]

The right to liberty has long been recognised in many jurisdictions.[23] In the UK for example, *habeas corpus* protects individuals from unlawful detention. In the US, the Fourth Amendment of the Bill of Rights ensures the right to be free from unreasonable searches and seizures.[24] Presently, the International Convention on Civil and Political Rights confers a right to liberty to all and prohibits 'arbitrary arrest or detention'.[25] The European Convention on Human Rights (ECHR) bestows a right to liberty for all and asserts that no one shall be deprived of that liberty unless derogations apply, such as where deprivation is ordered by a competent court.[26]

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[16] Ibid, Preamble.
[17] For example, under the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171, Article 4. (ICCPR)
[18] Hoffman (n 3), 933.
[19] ICCPR (n 17), Article 6.
[20] Office of the United Nations High Commissioner for Human Rights, (OHCHR) *Human Rights, Terrorism and Counter-terrorism,* Fact Sheet No. 32, 1
[21] ICCPR (n 16), Article 9.
[22] Ibid, Article 14.
[23] Rhona Smith, *International Human Rights Law (8th Edition),* (Oxford University Press, 2017), 262.
[24] The Constitution of the United States of America: Bill of Rights, (adopted 4 March 1789, ratified 15 December 1791) USA-010, Fourth Amendment.
[25] ICCPR (n 17), Article 9(1).
[26] European Convention on Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, Article 5(1) and Article 5(1)(a).

Preventive detention deprives the right to liberty, though this right can legitimately be violated as a response to a public emergency, or to punish where an individual is guilty of a criminal offence. If the threat of terrorism amounts to a legitimate derogation, then "cherished" liberties can be undermined in the name of security.[27] Waldron persuasively asserts that a reduction of liberty is unreasonable unless "something else" is increased[28] - for example, in the criminal context punishing an individual is seen to maximise justice. Detention of a suspected terrorist may likewise be justified if the deprivation of liberty maximises security. Yet, this may be an unreasonable balance between liberty and security. In considering fair trial rights, which ensure that other rights are only undermined where decided by a competent court, the balance may be unreasonable since the suspected terrorist may not to be subject to a fair trial nor have access to due process.[29]

If we accept that international human rights apply to all, then the aforementioned rights should be applicable to suspected terrorists facing preventive detention. Even in a public emergency which justifies derogations, States should, so far as is possible, give due accord to the rights stipulated by the international human rights framework. Article 15 of the ECHR, for example, requires that derogations must be in accordance with the exigencies of the emergency, which implies that States should firstly uphold human rights and secondly derogate from them if necessary. Preventive detention is seemingly contrary to those rights unless a competent court can hold, on the evidence, that there is a risk of a terror act materialising. Whether States should use preventive detention therefore appears dependent on whether their counterterrorism strategy is premised in either the war model or crime model. The latter is argued as being most consistent with the international human rights framework.

2. Two Approaches to Terrorists: Enemies or Criminals?

2A: The War Model

Through perceiving terrorism as insurgency or war,[30] States treat terrorists as "enemy combatants" and thus apply laws of armed conflict.[31] Terrorists are capable of catastrophic damage, thus motivating a war model, the terror threat being so great as to justify the

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[27] John Ip, 'Comparative Perspectives on the Detention of Terrorist Suspects', (2007) 16 Transnational Law & Contemporary Problems 773, 775.
[28] Jeremy Waldron, 'Security and Liberty: The Image of Balance', (2003) 11(2) The Journal of Political Philosophy 191, 209.
[29] OHCHR (n 20) 37.
[30] Ronald Crelinsten, 'Perspectives on Counterterrorism: From Stovepipes to a Comprehensive Approach', (2014) 8(1) Perspectives on Terrorism 1, 2.
[31] Geneva Conventions; Hague Conventions; and Customary International Humanitarian Law are legal frameworks which offer differing laws applicable to conflict.

deployment of war-like measures to enhance security.[32] As part of their counter terrorism strategy since 9/11, The US has preventively detained suspected terrorists pending the cessation of hostilities – those hostilities being the purported "war on terror".[33] War is legally defined in Common Article 2 of the Geneva Conventions as 'cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them', and also as 'all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance'.[34]

The "war on terror" was a declaration of rhetorical war and does not substantively correspond with Common Article 2. AQ are not a "High Contracting Party" or a State. It has no nationality or single territorial base.[35] Yet, the rhetoric associated with the US-AQ conflict has had significant consequences for the way suspected terrorists are categorised in the US.[36] If the "war on terror" was an international armed conflict, those suspected terrorists preventively detained would need be conferred POW status.[37] However, the US, despite relying on the laws of armed conflict, initially denied POW status for terrorists on the basis that they are not lawful combatants and thus do not fall under Article 118 of the Third Geneva Convention. Thus, the US created a "legal black hole" in the form of Guantanamo Bay,[38] whereby suspected terrorists were denied the protections of criminal, human rights, and humanitarian law.[39]

Through using the laws of armed conflict, the US effectively detained individuals on the basis of an indefinite war waged against an 'ill-defined enemy on a worldwide battlefield'.[40] This appears significantly contrary to human rights and international law holistically, though it may be perceived as highly effective in deterring terrorism as compared to the crime model. Exceptional measures, such as preventive detention, are more flexible in wartime than in peacetime.[41] Due process requirements become less stringent and there is a leniency in securing convictions, offering a perceivable improved efficacy in countering terrorism. The war model 'offers much freer rein' than the crime model, thus giving it great appeal in the

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[32] Vaughan Lowe, ''Clear and Present Danger': Responses to Terrorism', (2005) 54(1) The International and Comparative Law Quarterly 185, 185.
[33] Third Geneva Convention (n 5) Article 118.
[34] Geneva Conventions, Common Article 2.
[35] Lowe (n 32) 189.
[36] For further discussion, see Christopher Greenwood, 'War, terrorism and international law', (2003) 56 Current Legal Problems 505; Terry Gill and Elies van Sliedregt, 'Guantánamo Bay: A Reflection On The Legal Status And Rights Of 'Unlawful Enemy Combatants', (2005) 1(1) Utrecht Law Review 28.
[37] Third Geneva Convention (n 5) Article 118.
[38] Johan Steyn, 'Guantanamo Bay: The Legal Black Hole', (2004) 53(1) International and Comparative Law Quarterly 1.
[39] Tom Bingham, *The Rule of Law,* (Penguin Books, 2011) 137.
[40] Ibid, 137.
[41] Andrew Silke, 'Retaliating Against Terrorism', in Andrew Silke, *Terrorism, Victims and Society: Psychological Perspectives on Terrorism and its Consequences,* (Wiley, 2003) 223.

often purported post-9/11 climate of fear.[42] However, it is exactly this governmental freedom that renders the war model controversial for it not only provides leniency, it also reduces governmental accountability in relation to human rights violations. A war model may permit the use of lethal force or justify collateral damage to innocent civilians.[43] Essentially, due to a climate of fear amongst the populace, practices that would not normally be accepted during peacetime becomes more acceptable because that climate of fear creates a similar experience to that of war.

The impacts of the war model on the trial process further problematise preventive detention. In criminal proceedings, suspected terrorists would –as would any ordinary criminal suspect – be subject to a criminal trial and the protections therein. Alternatively, where the terrorist suspect is perceived a combatant, the suspect may be subject to a military tribunal. This may be seen as desirable by a State aiming to be perceived as effectively countering terrorism, since military tribunals are far less demanding in terms of evidence. For example, "Mere group membership" is sufficient to justify action as compared to a criminal trial which requires evidence (beyond reasonable doubt) of "specific criminal conduct".[44] Another difference is the permissibility of hearsay evidence which is given greater weight in military tribunals.[45]Additionally, the due process requirements involved can act as a barrier in securing a successful conviction for the trial process is more arduous for the prosecution.[46] Thus, whilst the war model increases the ability to secure convictions, this is at the expense of the stringent due process requirements of the criminal justice system which aim to avoid erroneous convictions. As will be discussed in Section Three, this is problematic in relation to preventive detention and the risks of procuring miscarriages of justice.

In times of fear, action s which violate human rights may appear easily justified in the name of security. The war model should not be taken as the accepted approach to counter terrorism for there is no legal armed conflict and there may be disproportionate impacts on human rights. What is more, States may actually be giving terrorist organisations exactly what they seek to cause, that being the encouragement of terrorism through a war like rhetoric. Through engaging in violence and fighting fire with fire, terrorists may be seen as martyrs, thus fuelling extreme ideological causes. States are the only ones who can defeat us in the "war on terror"

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[42] David Luban, 'The War on Terrorism and the End of Human Rights', (2002) 22(3) Philosophy and Public Policy Quarterly 9, 9.

[43] Law and Customs of War on Land (Hague, IV), (adopted 18 October 1907, entered into force 26 January 1910, 539 UNTS 631, Articles 22 – 28; see also, Ibid, 9.

[44] Robert Chesney and Jack Goldsmith, 'Terrorism and the Convergence of Criminal and Military Detention Models', (2008) 60(4) Stanford Law Review 1079, 1081.

[45] Hearsay evidence is permissible in US military tribunals by virtue of the Military Commissions Act of 2006, §949a; For discussion on the use of hearsay evidence in war trials, see Michaela Halpern, 'Trends in Admissibility of Hearsay Evidence in War Crime Trials: Is Fairness Really Preserved?', (2018) 29 Duke Journal of Comparative and International Law 103.

[46] Chesney and Goldsmith (n 44) 1081.

for overreactions alter the balance of political power, thus allowing terrorists to achieve their destructive aims.[47]

2B: The Crime Model

The crime model treats terrorism as a criminal offence and perceives suspected terrorists as criminal suspects subject to due process.[48] This criminalises terror offences, including, *inter alia*, the supporting of a terrorist organisation,[49] the encouragement of terrorism,[50] the possession of articles which 'give rise to a reasonable suspicion' that they will be used for terrorist related purposes,[51] and the taking of hostages for politically motivated means.[52] By following principles such as due process, the crime model seemingly upholds human rights. In the UK context, if suspected terrorists are perceived as criminals, then due process rights stand undiminished. The Human Rights Act 1998 incorporates the fundamental human rights enshrined in the ECHR directly into British constitutional law.[53] The due process principles are thus ingrained into UK law, including a right to be presumed innocent until proven guilty.[54] If a suspected terrorist is to be charged with a criminal offence, then those rights must be upheld.[55] A crime model therefore appears consistent with the international human rights framework; albeit that States can derogate from the ECHR in times of public emergency.[56]

As terrorist acts are criminal offences, those suspected of terrorism are criminal suspects. Thus, if a suspected terrorist is found guilty of an offence, then they will be punished as a criminal.[57] Where act of terrorism which have caused fatalities, the terrorist actors will usually be tried for murder and sentenced proportionally. Likewise, in less extreme cases, such as where individuals engage in fund-raising for the purposes of terrorism, those individuals will usually be tried for that lesser offence.[58] Different courses of action will not be justified only because a criminal offence is terror-related, albeit that this may be considered an aggravating factor in the sentencing process.[59]

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[47] Yuval Noah Harari, *21 Lessons for the 21st Century*, (Jonathan Cape, 2018) 163.
[48] See Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice', (2005) 32(4) Journal of Law and Society 507. See, also, Clive Walker, 'Clamping Down on Terrorism in the United Kingdom', (2006) 4 Journal of International Criminal Justice 1137.
[49] Terrorism Act 2000, s.12.
[50] Terrorism Act 2006, s.1
[51] Terrorism Act 2000, s.57.
[52] Terrorism Act 2006, Schedule 1, para.4; Taking of Hostages Act 1982, s.1.
[53] Human Rights Act 1998, s.1; Zedner (n 46) 519.
[54] ECHR (n 26) Article 6(2).
[55] Application 4483/70 *X v Federal Republic of Germany* (1972).
[56] See *Chahal v United Kingdom* (1996) 23 EHRR 413.
[57] Miller (n 6) 127.
[58] Terrorism Act 2000, s.15.
[59] See, for example, Criminal Justice Act 2003, Schedule 21 in relation to the determination of the minimum term in mandatory life sentences.

This is more difficult in relation to suspected terrorists, as there can be no finding of guilt where an offence is yet to be committed. Even so, the ordinary criminal law would still apply, including bail law. A European Commission Green Paper on the presumption of innocence explicitly states that an individual whose guilt is yet to be proved and judicially pronounced should not be subject to pre-trial detention unless "overriding reasons" justify it, such as those derogations listed in Article 5 ECHR.[60] In any event, preventive detention must be for a "reasonable period" and cannot be indefinite.[61] The European Commission recognises it as an "exceptional measure".[62] The crime model reflects these points and would allow for the preventive detention of suspected terrorists where there has been an appropriate charge of a criminal offence alongside the perceived risks to security. Where there is no charge, however, suspected terrorists can only be detained for 24 hours pending charge, though this can be extended up to 36 hours to obtain further evidence, or up to 96 hours with permission from a competent court.[63]

This, however, is not what is necessarily occurs in practice in the UK. Suspected terrorists have been subject to different pre-trial detention periods which operate as preventive detention. The Terrorism Act 2000 initially legislated that suspected terrorists could be detained for seven days, rather than 24 hours.[64] In 2003 the period was increased to 14 days,[65] and following the 7 July 2005 bombings (7/7), to 28 days in 2006.[66] It now stands at 14 days, and although, the detention is subject to fairly stringent review requirements,[67] Liberty has noted it is the highest length of pre-charge detention in any democracy.[68] Whilst the UK appears to have adopted the crime model approach, this suggests that the war model has influenced counterterrorism strategy outside of the US. The UK has also adopted various exceptional measures to counter terrorism. The British government has in the past derogated from the right to liberty by virtue of Article 15 ECHR due to its impeding effect in detaining suspected terrorists.[69] Like Article 4 ICCPR, Article 15 permits derogations in times of war, but only to the extent required by the 'exigencies of the situation'.[70] The judiciary appeared

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[60] Commission of the European Communities, *Green Paper: The Presumption of Innocence*, COM(2006)174, Brussels, 24 April 2006), 5.
[61] ibid, 6.
[62] Commission of the European Communities, *Green Paper on mutual recognition of non-custodial pre-trial supervision measures,* COM(2004)562, (Brussels, 17 August 2004), 3.
[63] Police and Criminal Evidence Act 1984, ss. 41 – 45.
[64] Terrorism Act 2000, Schedule 8.
[65] ibid, (amended by Criminal Justice Act 2003, s.306).
[66] ibid, (amended by Terrorism Act 2006, s.23).
[67] Terrorism Act 2000, Schedule 8, Part 1A
[68] Liberty, 'Extended Pre-Charge Detention', (Liberty Human Rights) <www.libertyhumanrights.org.uk/human-rights/countering-terrorism/extended-pre-charge-detention> accessed 2 August 2019.
[69] See *Chahal* (n 56).
[70] ECHR (n 25) Article 15.

reluctant to accept the "war on terror" as justifying the derogation and subsequently the government revoked the derogation.[71] Various other exceptional legislative manoeuvres have been enacted and repealed, including the Prevention of Terrorism Act 2005 which allowed for control orders that effectively deprived liberty through the use of house arrests,[72] and the Anti-Terrorism, Crime and Security Act 2001 which legislated indefinite detention of suspected terrorists without trial.[73]

These examples of exceptional measures were promulgated in the immediate aftermath of 9/11 and have since been repealed. Whilst evidence of a war model approach can be seen in the UK, the crime model predominates. The criminal justice system accords the right to a fair trial to all, regardless of the abhorrence of crimes committed. Seemingly, the crime model, insofar as is possible, gives greater weight to liberty over security as compared to the war model. It can be argued that the suspected terrorist tried under a criminal model would enjoy their human rights to a greater extent than in under a war model. The crime model would hopefully ensure that suspected terrorists would, *inter alia,* have innocence presumed.[74] She would enjoy due process, which Packer describes as an "obstacle course" with each stage of the criminal process acting as a safeguard to prevent erroneous convictions.[75] Requirements such as the presumption of innocence and access to legal counsel,[76] aim to minimise mistakes in the criminal process, thereby ensuring human rights are respected.[77] A crime model makes human rights and the rule of law the "bedrock" of counterterrorism strategies, thus rendering it more appealing than the war model from a human rights perspective.[78]

2C: Enemy Combatant or Criminal?

This section examines whether the terrorist is an enemy combatant or a criminal. There are divergent opinions in the literature with Miller, for example, asserting that terrorists 'are not merely analogous to enemy combatants; they *are* enemy combatants'.[79] Opposing this is McCormack who extensively argued that detention is "about crime" and terrorists are criminals.[80] The former view is grounded in the war model and views terrorism as so distinct

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[71] *A v Secretary of State for the Home Department* [2005] 2 AC 68.
[72] Prevention of Terrorism Act 2005, ss. 1 – 9.
[73] Anti-Terrorism, Crime and Security Act 2001, s.23.
[74] *Woolmington v DPP* [1935] UKHL 1.
[75] Herbert Packer, 'Two Models of the Criminal Process', (1964) 113 University of Pennsylvania Law Review 1, 13.
[76] ECHR (n 25) Articles 14(3)(b) and 14(3)(d).
[77] Packer (n 75) 15.
[78] OHCHR, (n 20) 2.
[79] Miller (n 6) 130.
[80] Wayne McCormack, 'Detention of Mega-Terrorists: It's About Crime', (2011) 30 Criminal Justice Ethics 82, 88.

from common crime and akin to armed conflict. The latter adheres to the rule of law and human rights by perceiving terrorists as human beings engaging in criminal offences.

For individuals to be classed as enemy combatants, there must be a legally recognised conflict by virtue of Common Article 2. The "war on terror" does not appear to meet this criterion. Establishing combatant status in relation to terrorism on domestic soil therefore falls at the first hurdle. As terrorists cannot be legally defined as lawful combatants, it appears they must be criminals. However the US approaches this a third way, with a categorisation of unlawful combatants,[81] though this is not explicitly contained in international humanitarian law.[82] A common analogy drawn with this in the literature compares terrorists to sex offenders, advocating for preventive detention for high risk sex offenders post-sentence based on the risk they continue to poses.[83] Sex offenders are clearly subject to the criminal justice system, suggesting that preventive detention of terrorists on the basis of public risk is a criminal approach. Terrorists convicted of offences can similarly be preventively detained by virtue of their dangerousness. However, the preventive detention of suspected terrorists who have not been convicted cannot be so readily justified.

There is clearly a tension. Upholding criminal justice safeguards potentially risks allowing terrorists to walk free. Yet the "war on terror" is political rhetoric aiming to galvanise citizen support.[84] Whilst the criminal categorisation may problematise counterterrorism strategies through its stringent due process requirements, political rhetoric should not be used to justify the undermining of such requirements in a manner inconsistent with the international human rights framework.

Some argue that the "magnitude of devastation" caused by terrorism is so great as to require an alternative to the criminal process.[85] Falk coined the term "mega-terrorists" which represents those terrorists who are so dangerous as to cause mass destruction such as the events of 9/11.[86] Such a level of destruction is so far beyond ordinary criminal activity as to justify a different course of action. Terrorism impacts large numbers of people and challenges state legitimacy whilst ordinary criminals only affect few people and do not directly challenge the state.[87] Scheid postulates that there must therefore be a distinction between mega-

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[81] *Boumediene v Bush* (2008) 553 US 723.
[82] International Committee of the Red Cross, 'The relevance of IHL in the context of terrorism', (2011) <www.icrc.org/en/doc/resources/documents/faq/terrorism-ihl-210705.htm> accessed July 2020.
[83] See Miller (n 6).
[84] Lawrence Freedman, 'Defining War' in Yves Boyer and Julian Lindley-French, *The Oxford Handbook of War,* (Oxford University Press, 2012) 20.
[85] Don Scheid, 'Indefinite Detention of Mega-Terrorists in the War on Terror', (2010) 29 Criminal Justice Ethics 1, 2.
[86] Richard Falk, *The Great Terror War,* (Arris Books, 2003).
[87] ibid, 4.

terrorism and common crime, and that the former operates in a "quasi-war" context whereby an armed conflict paradigm is satisfied, thus justifying exceptional measures.[88].

Preventive detention should be an exceptional measure. The war model "normalises" its exceptional nature by using the rhetoric associated with war and detaining suspected terrorists in the name of security.[89] On the contrary, the crime model maintains elements of due process and human rights, thus limiting the use of preventive detention by ensuring it is an exceptional measure. Any neglect of due process is "counterproductive"[90] for the protection of democracy can only be achieved through, *inter alia*, adhering to due process, which is vital to any counterterrorism strategy.[91] Departing from the crime model may actually undermine liberty, a paradox since this is what terrorists often seek to destroy.[92] The crime model, in stark contrast to the war model, prioritises liberty over security, ensuring compliance with human rights.

The necessity for States to respond to the terror threat is undeniable. Whether used in a war or crime model, the use of preventive detention aims to apprehend terrorists and prevent terror attacks. Suspected terrorists, regardless of whether perceived as "mega" or not, should be categorised as criminal suspects so that human rights can be upheld.

3. A Necessary Counterterrorist Tool: Use with Exceptional Caution

There are many mechanisms that can be adopted to counter terrorism; at the least extreme, passports can be seized to prevent suspected terrorists leaving/entering countries.[93] At the most extreme, torture may be offered as a theoretically viable, albeit legally prohibited, mechanism.[94] This article has presented preventive detention as a potential exceptional measure adopted in counterterrorism strategies. Whilst absolute answers can be given in the context of torture, for example, preventive detention remains open for debate.[95] Additionally, two models of counterterrorism have been discussed that have great implications on how those counterterrorism strategies adhere to human rights. Preventive detention, whether utilised in a war model or a crime model, is controversial. Possibly the most pertinent example

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[88] ibid, 4 – 5.
[89] Often argued in academic discourse on counterterrorism is the UK is the idea that the exceptional is being "normalised", i.e., no longer being perceived as exceptional due to its use. For an example in the UK context see Stefano Bonino, '*Prevent*-ing Muslimness in Britain: The Normalisation of Exceptional Measures to Combat `Terrorism', (2013) 33(3) Journal of Muslim Minority Affairs 385.
[90] Zedner (n 48) 524.
[91] Paul Wilkinson, *Terrorism and the Liberal State,* (Macmillan, 1977) 121.
[92] Zedner (n 48) 524.
[93] Counter-Terrorism and Security Act 2015, s.1.
[94] Torture is prohibited under Article 7 ICCPR and Article 4 ICCPR explicitly states there can be no derogations.
[95] Cole (n 4) 695.

of that controversy is the continued detention of terrorist suspects in Guantanamo Bay by the US. Guantanamo has generated much debate, especially from a human rights perspective.[96]

The final part of this article presents the debate surrounding preventive detention and ultimately adopts a broad view that it should be used, suggesting an approach that takes account of human rights.

3A: Dangerousness and Morally Justifiable Preventive Detention

Preventive detention is premised on the idea of risk to the public. A criminal denied bail due to flight risk,[97] a person suffering from psychosocial disabilities assessed as posing danger to himself or others,[98] or an "enemy combatant" in the course of armed conflict[99] may all be considered dangerous. Yet preventive detention is justified only by a prediction of future acts. This has been described as crude guesswork permitting detention on the basis of assumptions[100] Scheid argues that this is reasonable in the case of the "mega-terrorist", but this does not ameliorate the problem of guesswork.[101] Guiora suggests that determining a threat of mega-terrorism is in itself problematic as it relies on intelligence that may not be accurate.[102] To adopt Scheid's idea of applying the use of preventive detention to the specific "very dangerous" few should not render deprivation of liberty any less serious.

In a recent article, Miller asserts the mechanism may be "morally justified" where there is evidence that an individual is a member of a proscribed terrorist group as this presents "standing intention" to commit, or assist in committing, murder.[103] In other words, the membership designates the suspected terrorist as so dangerous as to justify the detention. Miller postulates that moral justification is derived from three elements. To be justified, preventive detention must be:

1. effective in that it substantially reduces the terrorist threat without a "countervailing downside";
2. necessary because there are no less extreme, yet effective, mechanisms available; and
3. proportionate, which is assessed by considering whether the terrorist threat is "serious and ongoing".[104]

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[96] Miller (n 6) 122.
[97] *United States v Salerno* (1987) 481 US 739.
[98] *Kansas v Crane* (2002) 534 US 407.
[99] *Hamdi v Rumsfeld* (2004) 542 US 507.
[100] McCormack (n 80) 85.
[101] Scheid (n 85) 5.
[102] Amos Guiora, 'Indefinite Detention of Mega-Terrorists: A Road We Must Not Travel', (2011) 30(1) Criminal Justice Ethics 74, 75 – 76.
[103] Miller (n 6) 123.
[104] Ibid.

Firstly, it must be asked whether the mechanism is effective in reducing the terrorist threat without countervailing downsides. Whilst preventive detention is *prima facie* effective in reducing the terror threat from the individual suspect, it does not necessarily remove the holistic threat. Perhaps preventive detention has the paradoxical effect of both reducing and increasing the terror threat of terrorism. Ip asserted that Guantanamo is a "propaganda gift" to the very groups sought to be prevented.[105] In violating human rights, those impacted are disenfranchised, resulting in susceptibility to becoming radicalised and joining terror organisations.[106].

The second strand concerns necessity, and questions whether alternative mechanisms that could be used to achieve the same preventive effect. For example, Scheid presents, though does not advocate for, assassination as an alternative.[107] completely preventing the occurrence of a terror attack. However, such an extreme approach has greater countervailing factors than preventive detention, and potentially fuels propaganda amongst terror groups.[108] The risk of assassination as a counterterror mechanism is illustrated by the death of Jean Charles de Menezes in London (2005).[109] Following the 7/7 bombings, the British Metropolitan Police (MET) assassinated Jean Charles under the mistaken belief that he was a suspected suicide bomber.[110] Restrained and not presenting as suspicious, Jean Charles was subject to lethal force.[111]

Finally, is the post-9/11 terrorist threat so serious and ongoing to render the use of preventive detention proportionate? Miller raises a potential argument that this is dependent on the specific terrorist organisation in question. "Specific assumptions" can be made that groups such as so-called Islamic State (IS) pose such a serious and ongoing threat to security through their aim to establish a "human-rights-violating caliphate" as to render the mechanism proportionate.[112] Alternatively, for groups such as the Irish Republican Army (IRA), it can be argued that they should not have been subject to preventive detention for their aims may be perceived as "morally justified", particularly for the advocates of those aims.[113] Miller suggests the IRA, despite being a proscribed terrorist organisation in the UK,[114] did not cause

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[105] Ip (n 27) 870.
[106] Hoffman (n 3) 935.
[107] Scheid (n 85) 7 (footnote 27 of Scheid's article).
[108] Miller (n 6) 124; Cole (n 5) 695 – 696.
[109] BBC News, 'Profile: Jean Charles de Menezes', (BBC News, 10 June 2015) <www.bbc.co.uk/news/uk-33080187> accessed 8 July 2019.
[110] For discussion see Alastair Finlan, 'The perils of special approaches to counterterrorism: the shooting of Jean Charles de Menezes in 2005', (2013) 29(3) Defense and Security Analysis 188.
[111] ibid, 189.
[112] Miller (n 6) 123.
[113] Ibid.
[114] Terrorism Act 2000, Schedule 2.

the same level of globalised destruction as IS, and thus preventive detention would be disproportionate. This argument may well be read rather controversially for how is anyone to judge whether a specific terrorist groups aims are morally justified or not. The fundamental point to be taken, however, is that perceptions of terrorism and the way in which States are to counter terrorism may need to be reconsidered. In engaging in terror acts, human beings are likely to view their actions as morally justified – regardless of the perception of others as those actions being heinous acts of violence. The argument presented by Miller may cause consideration of other counter terrorism measures that do not result in interferences with human rights which may well perpetuate the terror problem. By assuming that those who commit acts of terrorism view their actions as justified, perhaps States can adopt counterterrorism measures that are far more compliant with international human rights law than this paper argues them to be. Preventive detention is an exceptional measure and to use it should be a last resort. Preventive detention is only proportionate where no other effective less-exceptional measure exists.

Miller's argument regarding "specific assumptions" suggests that where the aims of a terrorist group are less reprehensible, then less exceptional mechanisms should be adopted.115 Yet reprehensibility is a value judgement 'in the eyes of the beholder: one man's radical is another man's freedom fighter'.[116] Generally, individuals engaging in terrorism are ideologically motivated and believe themselves to be acting with moral justification. The subjective experiences of any individual suspected to be engaging in terrorism need to be considered before undermining their human rights. Moreover, any fear of terrorism – or "mega-terrorism", should not be used to justify the use of human-rights-violating practices by default.

Overall, there is clear motivation for using preventive detention based on dangerousness; it is ubiquitous in legal frameworks such as mental health law or the laws of armed conflict. It can be effective and may be necessary since there are no mechanisms that have less impact on liberty yet achieve that effect. Whilst preventive detention should be used over other mechanisms such as lethal force or deportation, the mechanism should not be justified unequivocally and used inconsistently with human rights. It must be used proportionately insofar as the particular threat reasonably calls for such a response

[115] Miller (n 6) 123.

[116] Peter Neumann, 'The trouble with radicalization', (2013) 89 International Affairs 873, 878; Boaz Ganor, 'Defining Terrorism: is One Man's Terrorist another Man's Freedom Fighter?', (2002) 3(4) Police Practice and Research 287.

3B: The Problem of False Positives

Preventive detention can be an effective mechanism and, with no clear alternatives achieving the same effect with less countervailing downsides, it is necessary. Its proportionality remains dubious, as will be explored in the following section. Effectiveness and necessity should not permit States to exercise unfettered power. This will be illustrated through the problem of false positives.

Where there is a "false positive" there is also a "true positive". Neumann presents the argument that for every innocent detained, at least one guilty individual is detained correctly, thereby reducing the terror threat.[117] If States are to use preventive detention as standard counter terrorism practice, they risk detaining innocent people; albeit whilst also detaining those dangerous individuals. Where the terror threat is perceived as so dangerous as to justify a liberal use of preventive detention, there is a higher risk of the materialisation of false positives. In any case, the detention of the innocent should be avoided. Any acceptance of false positives appears contrary to fundamental legal principles of fairness. Blackstone asserted that it is more desirable that ten guilty individuals go free than one innocent individual suffer.[118] Notwithstanding this, Scheid purports that the threat of terrorism is so great as to undermine this, arguing that Blackstone's maxim could be reversed, making it far more desirable for ten innocent people to be detained so that one mega-terrorist is prevented.[119] Scheid presents the terror threat as so extreme as to justify increased room for error in the justice system.[120] The wrongful imprisonment of the *Birmingham Six* illustrates precisely what can happen where the threat of terrorism influences the justice system[121] In contravening central principles of justice in the context of terrorism—such as by accepting more such false positives—there is further erosion of the principles of law and of due process. Rather than accepting false positives due to the severity of the terror threat, the upholding of human rights and the avoidance of miscarriages of justice can be argued as far more important.

It is unlikely that the world will ever be free from terrorism and preventive detention appears the only mechanism to prevent terrorism where the threat is particularly pressing.[122] Presumptions must be accepted if preventive detention is to be used, though this does not vindicate an increased risk of human rights violations. To interfere with, and perhaps

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[117] ibid.
[118] William Blackstone, *Commentaries on the Laws of England: Volume 4 Of Public Wrongs (1769),* (Beacon Press, 1962) 420.
[119] Scheid (n 85) 9.
[120] ibid, 10.
[121] *R v Mcllkenny, Hill, Power, Walker, Hunter and Callaghan* [1992] 2 All ER 417; (1991) Cr App R 287.
[122] Bingham (n 39) 135.

undermine, human rights in the name of security may well declare the terrorists victorious.[123] Much caution need be taken in utilising preventive detention. The following section presents the crime model as a basis for ensuring that preventive detention is used with the last possible impact on human rights.

3C: The Crime Model Prevails

This article suggests that the war model detrimentally impacts the international human rights framework built following the Second World War.[124] The "war on terror" has led to counterterrorism strategies, even where ostensibly grounded in a crime model, to adopt exceptional measures that tip the liberty-security balance towards the latter. Western states have 'lost the moral high ground on human rights issues' resulting in not only the undermining of individual liberties, but also international efforts to promote and protect human rights.[125] The current terror threat calls for something to be done to protect the public. This section argues that it should be used within the strict parameters of the crime model to ensure that disproportionate human rights violations do not occur.

This final section considers two factors that illustrate how the crime model offers better adherence to the international human rights framework whilst ensuring effective counterterrorism strategy. The first is that preventive detention must be non-punitive in order to be fair and the second considers whether the terror threat is overstated, making exceptional measures less readily justified or proportionate than claimed.

Preventive detention is intended as a mechanism to prevent the materialisation of terrorism. This requires it to be non-punitively, in a just society a human being should not be punished for offences they have not committed.[126] Hart's five elements of punishment would render preventive detention punitive where it is:

(1) Painful or unpleasant;
(2) A consequence for an offence against legal rules;
(3) Against an actual or supposed offender of the breach;
(4) Intentionally administered by human beings other than the offender; and
(5) Imposed by an authority constituted by a legal system.[127]

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[123] Zedner (n 48) 510.
[124] Hoffman (n 3) 938.
[125] Surya Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', (2011) 33(1) Human Rights Quarterly 201, 221.
[126] Cole (n 4) 67.
[127] H. L. A Hart, *Punishment and Responsibility,* (Oxford University Press, 1968), 4 – 5.

In the context of suspected terrorism, one could argue that detention is unpleasant, both in deprivation of liberty and potentially in the conditions of detention. Obviously, detention is unpleasant; one only need look to the conditions at Guantanamo to see precisely how unpleasant the detention of suspected terrorists can be, The suspected terrorist (supposed offender) is detained by the state and legal system who intentionally administer the detention.[128] Only the second strand of Hart's elements is arguable for, "strictly speaking", the suspected terrorist has yet to commit an offence.[129] There is undoubtably a blurred line between the punitive and non-punitive nature of the detention of suspected terrorists, especially when considering four-out-of-five of Hart's elements are satisfied. The abhorrence associated with terrorism may motivate States to punish, which is undoubtably an unjust deprivation of human rights.

The crime model adheres to central principles of fairness, due process and the rule of law; which respects human rights. Utilising the crime model may assist in non-punitive preventive detention since where States have to subject suspected terrorists to a fair trial, there may be less risk of it being indefinite. Where there is a short and fixed end date, unpleasantness is reduced thus rendering the mechanism less punitive and more preventive. Long periods of detention are akin to a custodial sentence, which is indeed a punishment. Through standing trial, suspected terrorists would be subject to a fair and independent tribunal who, on the evidence, could ascertain beyond reasonable doubt that the suspect is a threat. Preventive detention should be based on evidence heard by a competent court, which could include numerous factors such as psychological evaluations, age, radicalisation, terrorist training and an apparent willingness to engage in terror attacks.[130] The crime model offers that any predictions made would at least be consistent with human rights.

The second factor to consider is whether the terror threat is so great as to truly justify departure from the criminal process. It seems not; the current terror threat is perhaps "overstated".[131]

It is not clear how the magnitude of threat is, or should be, understood. However, one measure may be in the resulting harms. For example, in 2017 – 2018 in the UK there were 280 homicides attributable to knife crime,[132] as compared to terrorism which caused the deaths of forty-two.

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[128] Anthony Gray, 'Internment of terrorism suspects: human rights and constitutional issues', (2018) 24(3) Australian Journal of Human Rights 307, 320.
[129] ibid.
[130] Scheid offers these factors in relation to determining dangerousness, though I consider them to be equally fruitful in ascertaining probability of causing harm: Scheid (n 85) 10.
[131] Wayne McCormack, 'Detention of Mega-Terrorists: It's About Crime', (2011) 30 Criminal Justice Ethics 82, 83.
[132] Grahame Allen and Lukas Audickas, *Knife crime in England and Wales,* (Briefing Paper SN4304, House of Commons, 9 November 2018) 7.

Moreover, consider the level of gun related homicides in the US which were reported in 2017 to be at 14,542.[133] In looking at these statistics, is could be argued that as those suspected of engaging in terrorism are to be preventively detained on the basis of dangerousness, then those suspected of engaging in knife or gun crime should be subject to the same. If deaths are to be used as a measure of dangerousness, then perceptibly knife/gun crime is far more dangerous. It is doubtful however that such examples would be given the same weight as the terror threat. Perhaps this is owing to the other impacts resulting from globalised terrorism such as political and economic impacts. However, what the above comparison seeks to explain is that the terror threat may perhaps be overstated and as such should not be used to justify interferences with human rights that could be avoided. Human rights should always prevail.

Recalling Scheid's argument relating to the threat of mega-terrorism being so extreme as to justify detention, the above is highlighted. Scheid's "logical conclusion" is that 'because terrorists (who endanger national security) are distinct from criminals, minimising their rights is legitimate. Therefore, because mega-terrorists are *really* dangerous, their rights must *really* be minimised'.[134] Taking the first strand of this, the legitimacy of minimising rights is dependent on the impact of terrorism on the public interest. The second strand is particularly problematic for it may lead to the diminishing of human rights for more than just the 'mega-terrorist'.

The UK courts have been clear several times that preventive detention should only be used in exceptional circumstances; for example in *A v SSHD*, in which Lord Nicholls described preventive detention as 'anathema to the rule of law'[135] and Lord Scott as 'the stuff of nightmares'.[136] It is the view of this analysis that the current terror threat does not always amount to exceptional circumstances and so the use of preventive terrorism should be limited. It is the opinion of this paper that the idea of the terror threat being serious, ongoing and of top priority is premised on "war on terror" rhetoric and thus the use of exceptional measures responds to that rhetoric and creates the illusion that security is enhanced. States should refrain from the appeal in diminishing due process for despite presenting the State as taking appropriate action to superficially counter the perceived terrorist threat, the easier conviction may not actually be all that productive due to the human rights issues discussed throughout this paper.[137] The terrorist threat is tangible, but this is no justification for circumventing human rights disproportionately.

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[133] Kenneth Kochanek, et al., *Deaths: Final Data for 2017 (*(National Vital Statistics Report, Vol 68 No. 9, 24 June 2019) <www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_09-508.pdf> accessed 10th July 2020; McCormack also draws a similar comparison with 2009 statistics, see: McCormack (n 139) 83.

[134] Guiora (n 102) 76.

[135] *A v SSHD* (n 106),at [127] (Lord Nicholls).

[136] Ibid, at [149] (Lord Scott}.

[137] Waldron (n 28) 209.

Zedner proposes that the balance between liberty and security has become a balance between the security of the majority and the liberty of the minority, with the former being given priority.[138] One only need look to statistics relating to terror-related arrests to see this in practice for there are disproportionate arrests as opposed to convictions[139] In furthering disenfranchisement between "us and them", Zedner warns that allowing disproportionate action in countering terrorism risks such exceptional mechanisms ultimately impacting on the majority, and may lead the adoption of more draconian human-rights-violating practices.[140] The criminal justice system more effectively ameliorates human rights concerns in counterterrorism.

The practice of imprisoning people for criminal wrongs is "morally justified",[141] but this does not render preventive detention an acceptable mechanism for those suspected of terror-related offences without due regard to human rights. Whilst preventive detention may be morally justified in exceptional circumstances, but even Miller in arguing for the preventive detention of mega-terrorists appreciates that where inconsistencies with the crime model and human rights arise, such justification is diminished.[142] Where States contravene human rights in relation to one threat, the human rights of all may be jeopardised. Not only "self-defeating", the disproportionate undermining of human rights and favouring of security may constitute an "undeserved victory" for the very perpetrators of international terrorism.[143] The War on Terror is a War on Human Rights: This article suggests that language of war should therefore be abandoned and replaced with the central principles within the international human rights framework.

Conclusion

The presumption of innocence is central to democratic legal systems whereby human rights are respected and the rule of law upheld. Rights to liberty and fair trial should be ensured unless there is permissible derogation as stipulated by the international human rights framework. Preventive detention of suspected terrorists not only risks disproportionate violations of human rights to them, but also the undermining of the human rights of all. This article therefore makes the following claims:

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[138] Ronald Dworkin, 'Terror and the Attack on Civil Liberties', New York Review of Books (6 November 2003).
[139] See Grahame Allen and Noel Dempsey, *Terrorism in Great Britain: the statistics*, (Briefing Paper CBP761319, House of Commons, 7 June 2018) 19.
[140] Zedner (n 48) 515.
[141] Miller (n 6) 124.
[142] ibid, 138.
[143] Hoffman (n 3) 955.

Firstly, the reality of terrorism necessitates the maintenance of security. Counterterrorism is a significant part of a States' policy. Whilst terrorism is a real threat, its severity should not be overstated in order to justify the chosen approach.[144]

Secondly, preventive detention may be necessary in order to counter terrorism. It appears the less severe option as compared to assassination. Therefore, this article argues that preventive detention should be used where true consideration of international of human rights has taken place. The reprehensibility of terrorism cannot be understated, yet the importance of human rights need be maintained. To render preventive detention as necessary, States must be able to show that the use of preventive detention is proportionate to the threat in question. Using terrorism in and of itself is not enough to render interference with human rights necessary. Where the exigencies of the situation—such as the magnitude of risk, the threat purported, and the subjective experiences of the suspect—require, then preventive detention may be a necessary counterterror tool. Exigencies must be based on the subjective fact of any particular case, not on a perceive terror threat that may be overstated or based on political post-9/11 rhetoric. However, through analysing the conflict between preventive detention and human rights, this conclusion holds insofar as the mechanism is used in exceptional circumstances and remains subject to fair trial and due process. Terrorism is not an exceptional circumstance in perpetuity and in turn does not justify the use of exceptional measures without considering the present situation at hand when deciding whether to preventively detain.

Thirdly, through critical analysis of the war model and the crime model, with the former appearing presently more influential, the crime model should prevail. The war model has procured "innumerable deleterious consequences"[145] and has rather ironically led to a simultaneous war on human rights against those suspected of committing0 acts of terror. Thus, the crime model is argued to form the crux of counterterrorism strategies to ensure prevention whilst also protecting human rights.

Conclusively, this article has presented an argument for protection of the human rights of those perceived to be terrorists and therefore so dangerous as to be preventatively detained. This argument does not undermine the reprehensibility of terrorism; rather, it seeks to reinstate the importance of human rights. This paper has presented statistics that show the number of deaths arising from other forms of murder are far higher than those arising from terror acts. Seemingly, we are far more likely to be stabbed on the streets of London or shot in a school in Florida. Yet, it appears that counterterrorism strategies allow for a use of exceptional measures against those suspected of terrorists not seen in ordinary crime, which falls to the use of a war model of counterterrorism. The fear generated by the war on terror

[144] Hoffman (n 3) 954.
[145] McCormack (n 80) 88.

has led to a fragility in the respect for human rights and liberty.[146] However, the threat of terrorism should not be the paramount fear; the disproportionate use of exceptional mechanisms, such as preventive detention, cannot enhance security in and of itself. Security is an "open-textured" concept as it is incredibly difficult to measure and define. Just because on group of people feel secure and safe, does not mean that all do. Where States are seen to prevent acts of terrorism through potentially unjust human rights violations, others may fear their human rights being disproportionately affected as a result. Concepts such as security can easily be utilised in political rhetoric to justify practices contrary to human rights.[147] It would seem that for security to be achieved, liberties must prevail and all individuals, regardless of their crimes, should receive their basic rights under the international human rights framework.[148] The upholding of human rights is paramount. The prospect of States depriving certain groups of human rights should surely incite far more fear than the possibility of terrorism.

[146] Ronald Dworkin, 'The Threat to Patriotism', New York Review of Books (28 February 2002).
[147] Zedner (n 48) 516.
[148] Hoffman (n 3) 954.