

MILITANT ISLAMICIST TERRORISM IN EUROPE: ARE FRANCE & THE UNITED KINGDOM LEGALLY PREPARED FOR THE CHALLENGE?

W. JASON FISHER*

INTRODUCTION

The London bombings in 2005, the ritual murder of Dutch filmmaker Theo Van Gogh in 2004, and the Madrid train bombings that same year highlight how the terrorist activities of militant Islamicists have effected Europe in recent years. Since 2001, police and intelligence services have foiled over thirty plots to conduct similar terrorist actions across Europe, several in the last eighteen months.¹ In addition to perpetrating attacks in Europe, militant Islamicists with ties to Europe have attempted and carried out acts of terror in other parts of the world. For example, Ahmed Ressay, the Algerian convicted for his involvement in the LAX/Millennium Plot, was radicalized in Milan, the leaders of the September 11, 2001, attacks on the United States (9/11) were introduced in Hamburg, and Omar Sheik,

* Judicial Clerk to the Honorable James O. Browning, United States District Court for the District of New Mexico; J.D./M.A. University of California, Berkeley, 2006. I am grateful to Professor Mayali for his counsel and direction. I would also like to thank Elena Rodriguez for her assistance and support.

1. For example, in October 2005, seven Muslim men were arrested "in Denmark in connection with an alleged terrorist plot involving suicide vests in Bosnia . . ." In April 2005, several members of the Hofstad Network were arrested in the Netherlands and accused of planning to assassinate a series of Dutch politicians and attack the Netherlands' only nuclear reactor and Schiphol Airport. In October 2004, approximately thirty North African men were detained in connection with a plot to attack Spain's National Court "with a truck loaded with a half-ton of dynamite . . ." In April 2004, Belgian federal police prevented attacks planned against a Jewish school and the inauguration of a high-speed train tunnel, both in Antwerp. In March 2004, eight British citizens thought to be of Pakistani descent were found with half a ton of fertilizer used in bomb-making. Five were arrested and face terrorism charges, and three were charged with possession of a half-ton of ammonium nitrate. In March 2003, nine North African residents of the United Kingdom were arrested for preparing ricin for use in a terrorist plot and were charged with producing chemical weapons. *Islamic Extremism in Europe: Statement Before the S. Foreign Relations Comm., Subcomm. on European Affairs*, 109th Cong. 3 (2006) [hereinafter *Islamic Extremism in Europe*] (statement of Robin Niblett, Executive Vice President and Director, Europe Program, the Center for Strategic and International Studies); Zachary K. Johnson, *Chronology: The Plots*, FRONTLINE, Nov. 8, 2006, <http://www.pbs.org/wgbh/pages/frontline/shows/front/special/cron.html>.

who took part in the kidnapping and murder of Wall Street Journal Reporter Danny Pearl, was born in the United Kingdom.²

The above examples are not to suggest that Europe's Muslim population at large is a terrorist threat. Undoubtedly, most of Europe's Muslims are peaceable, law-abiding citizens. Nor is it suggested that terrorism is new to Europe. Europe has confronted several waves of terrorism, including those associated with nationalism, anarchism, and the radical left. However, Europe is facing a small but powerful minority in militant Islamicism, one with unique grievances and aims that has demonstrated a willingness to kill on a considerable scale.

France's domestic intelligence service, *les Renseignements Generaux*, has attempted to create a formula to measure the number of fundamentalists and estimates that, based on France's Muslim population of six million, there are approximately 9,000 potentially dangerous militant Islamicists.³ While a satisfactory treatment of the many specific and varied grievances and goals of militant Islamicists is beyond the scope of this article, it will suffice here to note that militant Islamicists generally blame what they perceive as Western imperialism for the subjugation, oppression, and ills of Muslims throughout the world and that they are willing to use force in attempting to end Western interference.⁴ The terrorist attacks militant Islamicists undertake tend to be more physically destructive—both in terms of harm to property and individuals—than previous acts of terrorism carried out in Europe. European terrorist casualty ratios (the number of those injured and killed in a terrorist attack divided by the total number of terrorist attacks) have significantly increased with the emergence of militant Islamicist terrorism. For example, the 1970s produced an average casualty per incident rate of 4.47, the 1980s 4.87, the 1990s 12.29, and the period 2000–2003 14.49.⁵

Militant Islamicist terror groups tend to be operationally autonomous but ideologically affiliated. This has led to the development across Europe

2. *Islamic Extremism in Europe: Hearing Before the Subcomm. on Europe and Emerging Threats of the H. Comm. on International Relations*, 109th Cong. 6–7 (2005) [hereinafter *Islamic Extremism Hearing*] (statement of Peter Bergen, Fellow, The America Foundation).

3. See *id.* at 33–34 (statement of Claude Moniquet, President and Director General, European Strategic Intelligence and Security Center); Robert S. Leiken, *Europe's Angry Muslims*, 84-4 FOREIGN AFF. 120, 122 (2005).

4. For a detailed discussion of the grievances, beliefs, and goals of militant Islamicists, see generally DANIEL BENJAMIN & STEVEN SIMON, *THE AGE OF SACRED TERROR: RADICAL ISLAM'S WAR AGAINST AMERICA* (2003); JOHN L. ESPOSITO, *UNHOLY WAR: TERROR IN THE NAME OF ISLAM* (2002).

5. Robert S. Leiken, *Europe's Mujahideen: Where Mass Immigration Meets Global Terrorism*, CENTER FOR IMMIGRATION STUDIES: BACKGROUNDER 4 (Apr. 2005), available at <http://www.cis.org/articles/2005/back405.pdf>.

of a loosely associated militant Islamicist network that shares knowledge and resources. That nature, moreover, has afforded militant Islamicists, whether citizens, foreign residents, or illegal immigrants, a certain degree of cover in Europe's highly concentrated suburban Muslim enclaves. From there, it is feared, militant Islamicists may be able to expand their social base by attracting marginalized and alienated European-born Muslim youths, young persons who feel trapped in the high unemployment, low-income environment of the enclaves or as non-integrated members of the wider societies in which they live, or both.⁶ Some evidence suggests that that is already happening and in a manner that spans the socio-economic spectrum. In 2003, a network that recruited hundreds of young enclave Muslims from Germany, France, Sweden, Italy, and the Netherlands for training with militant Islamicists fighting in Iraq was discovered and dismantled.⁷ Two of the perpetrators of the 2005 London bombings were British-born, university-educated Muslims, one from an upper-middle class background,⁸ and Omar Sheik was born in the United Kingdom to a wealthy family and graduated from the London School of Economics.⁹ The involvement of young Muslim European citizens expands the scope of the militant Islamicist terrorist threat as they may take advantage of their familiarity with modern western society and ability to travel quite freely to many parts of the world to conduct terrorist activities. For example, both Zacarias Moussaoui, the infamous "twentieth hijacker," and Richard Reid, the "shoe bomber," French and British citizens respectively, were able to secure entry into the United States without visas through the US-EU Visa Waiver Program.¹⁰

6. Overall, residents of suburban Muslim enclaves suffer more crime, earn less income, achieve lower levels of educational attainment, and experience higher levels of unemployment—nearly forty percent—than is typical of the members of the wider state societies in which they live. Humayun Ansari, *The Legal Status of Muslims in the UK*, in THE LEGAL TREATMENT OF MUSLIMS IN EUROPE 255, 257 (Roberta Aluffi & Giovanna Zincone eds., 2004); John Carreyou, *Muslim Groups May Gain Strength From French Riots*, WALL ST. J., Nov. 7, 2005, at A1, A15; John Carreyou, *The Shame of the Cités: French Unrest Finds a Home in Projects*, WALL ST. J., Nov. 14, 2005, at A1, A14; see also *Islamic Extremism Hearing*, supra note 3, at 34–35 (statement of Claude Moniquet); *Islamic Extremism in Europe*, supra note 1, at 4–5 (statement of Robin Niblett); ROBERT J. PAULY, JR., ISLAM IN EUROPE: INTEGRATION OR MARGINALIZATION? 39 (2004).

7. See *Islamic Extremism Hearing*, supra note 2, at 30 (prepared statement of Lorenzo Vidino, Deputy Director, the Investigative Project); see generally Leiken, supra note 3, at 128–29.

8. See Sandra Laville & Dilpazier Aslam, *Mentor to the Young and Vulnerable*, GUARDIAN, July 14, 2005, at 3, available at <http://www.guardian.co.uk/attackonlondon/story/0,16132,1528112,00.html>; Sandra Laville & Ian Cobain, *From Cricket-Lover Who Enjoyed a Laugh to Terror Suspect*, GUARDIAN, July 13, 2005, at 1, available at <http://www.guardian.co.uk/attackonlondon/story/0,16132,1527429,00.html>.

9. *Islamic Extremism Hearing*, supra note 2, at 7 (statement of Peter Bergen); *id.* at 26–28 (prepared statement of Lorenzo Vidino).

10. Leiken, supra note 3, at 134.

As the foregoing indicates, it is crucial that European states have legal regimes in place that will allow them to counter terrorism and, in particular, militant Islamicist terrorism, actively and effectively. That said, it is imperative that any such counter-terrorism laws strike a balance between national security and the principles of liberal democratic freedom. However, achieving that balance can be difficult, considering the freedom and openness that characterizes liberal democratic states is often what places them at increased risk of terrorist attack. With a primary objective of securing the physical safety of their citizens, the tendency of liberal democratic states is to respond to terrorist “shocks” immediately, visibly, and usually before understanding the true nature of the threat that they face. This type of response further complicates the reaching of a balance between security and freedom.¹¹ Moreover, it is especially important that European states with large minority Muslim populations, such as France, the Netherlands, Germany, and the United Kingdom, establish and implement counter-terrorism laws in a fashion that Muslims perceive as balanced and fair.¹² Otherwise, those states may face backlashes from discontented Muslim minorities. European states must also take care not to add to any racist or anti-immigrant sentiments with how they design and apply their counter-terrorism laws.

This Article seeks to take a first step in advancing the development of effective and balanced comprehensive counter-terrorism regimes in Europe and the rest of the world by presenting a comparison of current French and British counter-terrorism laws. France and the United Kingdom provide good counterpoints for a focused, structured comparison. Both previously adopted the sort of specific comprehensive counter-terrorism legislation that the European Council called for in the wake of 9/11;¹³ the legal traditions of both countries evolved from liberal

11. See generally Laura Donohue, *Criminal Law: Anglo-American Privacy and Surveillance*, 96 J. CRIM. L. & CRIMINOLOGY 1059 (2006); see also, e.g., Adam Tomkins, *Legislating Against Terror: the Anti-Terrorism, Crime and Security Act 2001*, 2002 PUB. L. 205, 205–07 (2002).

12. Muslim minorities comprise approximately five to nine percent of the population of France, six percent of the Dutch population, nearly four percent of the German population, and just under three percent of the population in the United Kingdom. Leiken, *supra* note 5, at 5.

13. Jan Wouters & Frederik Naert, *Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures Against Terrorism After "11 September,"* 41 COMMON MKT. L. REV. 909, 929 n.128 (2004). For more information on post-9/11 European Council measures pertaining to terrorism, including the European Arrest Warrant, the definition of “terrorism,” specific criminal offenses, financial controls, and Joint Investigation Teams, see generally Mar Jimeno-Bulnes, *After September 11th: The Fight Against Terrorism in National and European Law. Substantive and Procedural Rules: Some Examples*, 10 EUR. L.J. 235 (2004); Sionaidh Douglas-Scott, *The Rule of Law in the European Union—Putting the Security into the “Area of Freedom, Security and Justice,”* 29 EUR. L. REV. 219 (2004). For information concerning the relationship between the legislation of individual member states and the European Council and

democratic customs that guard the individual from unwarranted state interference.¹⁴ And, as documented above, both countries have connections to recent militant Islamicist terrorist activities. In addition, while security scholars and professionals have long praised France's counter-terrorism regime as being one of the most encompassing and effective in the world, they have derided the failings of the United Kingdom's regime, both prior to and following the 2005 London attacks.¹⁵ Part I compares the counter-terrorism laws of France and the United Kingdom, touching briefly on their implementation. It demonstrates that those states' regimes are quite similar and points to the conclusion that any substantial difference in effectiveness between them has more to do with implementation than legislation. Part II discusses possible reasons for any such significant difference in implementation.

I. COUNTER-TERRORISM LAWS IN FRANCE AND THE UNITED KINGDOM

France's legal regime for countering terrorism centers on the terrorism laws of September 9, 1986, July 10, 1991, July 22, 1996, November 15, 2001, and March 18, 2003, and on the articles of the Penal and Criminal Procedure Codes relating to terrorism.¹⁶ The 1986, 1991, and 1996 laws were enacted, in large part, in response to the activities of international terrorist groups relating to France's past and present relationships with North Africa. In contrast, the 2001 and 2003 laws were passed in reaction to 9/11, and they focused on improving terrorism prevention measures.¹⁷

Common Positions and Framework Decisions, see generally CHRIS VINCENZI & JOHN FAIRHURST, *LAW OF THE EUROPEAN COMMUNITY* (3d ed. 2002).

14. Dirk Haubrich, *Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared*, 38 *GOV'T & OPPOSITION* 3 (2003).

15. See, e.g., *Islamic Extremism Hearing*, *supra* note 2, at 8–9 (statement of Peter Bergen); John Diamond & Matt Kelley, *Islamic Radicals Can Find Nest in Nations of Europe*, *USA TODAY*, July 10, 2005, available at http://www.usatoday.com/news/world/2005-07-10-europe-terror_x.htm; Leiken, *supra* note 3, at 130; Stephen Ulph, *Londonistan*, *TERRORISM MONITOR*, Feb. 25, 2004, at 1, available at http://www.jamestown.org/terrorism/news/uploads/ter_002_004.pdf; *Islamic Extremism Hearing*, *supra* note 2, at 28–29 (prepared statement of Lorenzo Vidino).

16. Law No. 86-1020 of Sept. 9, 1986, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Sept. 10, 1986, p. 10956; Law No. 91-646 of July 10, 1991, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 13, 1991, p. 9167; Law No. 96-647 of July 22, 1996, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 23, 1996, p. 11104; Law No. 2001-1062 of Nov. 15, 2001, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Nov. 16, 2001, p. 18215; Law No. 2003-239 of Mar. 18, 2003, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Mar. 19, 2003, p. 4761; *CODE PÉNAL* [C. PÉN.] art. 421 (Fr.); *CODE DE PROCÉDURE PÉNALE* [C. PR. PÉN.] art. 706 (Fr.).

17. See Stephanie Dagon, *Country Report on France*, in *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY?* 267, 268–79 (Christian Walter et

The United Kingdom's counter-terrorism legal regime is centered on the Terrorism Act of 2000 ("TA 2000"), Anti-Terrorism, Crime and Security Act of 2001 ("ATCSA"), Prevention of Terrorism Act of 2005 ("POTA"), and Terrorism Act of 2006 ("TA 2006").¹⁸ The TA 2000 was the first permanent counter-terrorism legislation the British Parliament passed and was, in large measure, a response to the revelation that young Muslims from Pakistani enclaves in the United Kingdom were recruited to fight against Indian forces in Kashmir.¹⁹ The ATCSA was enacted in reaction to 9/11, while the POTA was passed to replace ATCSA provisions concerning the detention of foreigners. Following the London bombings, Parliament enacted TA 2006, which was directed at criminalizing the encouragement of terrorism and expanding the powers of arrest and detention with respect to terrorist offenses.²⁰

As a general matter, France classifies an offense as a "terrorist offense" if it contains a terror intent element—if an "individual or collective undertaking" is "intentionally" designed "to cause a serious disturbance to public order by means of intimidation or terror."²¹ As such, if one of the many ordinary offenses listed in article 421-1 of the Penal Code, such as kidnapping, property destruction, or money laundering, is carried out with the requisite terror intent element, that ordinary offense is considered a terrorist offense, and the perpetrator is tried according to special terrorism protocols and sentencing guidelines.²² France has also defined new terrorism-specific offenses, namely environmental terrorism and membership in a terrorist group; however, the number of such terrorism-specific offenses is few. The vast majority of terrorist offenses are classified as such using the "terror intent" element approach.²³

The United Kingdom, rejecting the recommendation of the Lloyd Commission, which was created to report on the need for permanent counter-terrorism legislation in the United Kingdom, chose not to subscribe to a terror element approach for classifying which offenses are

al. eds., 2004); Kevin A. O'Brien, *France*, in *EUROPE CONFRONTS TERRORISM* 19, 20–25 (Karin von Hippel ed., 2005).

18. Terrorism Act, 2000, c. 11 (Eng.); Anti-Terrorism, Crime and Security Act, 2001, c. 24 (Eng.); Prevention of Terrorism Act, 2005, c. 2 (Eng.); Terrorism Act, 2006, c. 11 (Eng.).

19. See Rainer Grote, *Country Report on the United Kingdom*, in *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY?* 591, 592–97 (Christian Walter et al. eds., 2004); PAULY, JR., *supra* note 6, at 115.

20. See David Bonner, *Managing Terrorism While Respecting Human Rights? European Aspects of the Anti-Terrorism Crime and Security Act 2001*, *EUR. PUB. L.* 8:4, 497, 497–502 (2002); Paul Cornish, *The United Kingdom*, in *EUROPE CONFRONTS TERRORISM*, *supra* note 17, at 146, 154–56; Grote, *supra* note 19; PAULY, JR., *supra* note 6, at 115; Tomkins, *supra* note 11, at 205–14.

21. Dagon, *supra* note 17, at 268–69.

22. *Id.* at 268–70.

23. *Id.* at 270.

terrorist offenses.²⁴ Instead, ordinary crimes are prosecuted as such, while certain offenses are deemed terrorist offenses because they are specifically enumerated as being so, such as directing a terrorist organization or inciting terrorism abroad.²⁵

The counter-terrorism regimes of France and the United Kingdom are examined below. The laws of each country are separated, primarily for discussion's sake, into three categories: immigration and asylum measures, preventive measures, and repressive measures. While some laws extend into more than one category, the classification structure can still be useful.

A. *Immigration and Asylum Measures*

Immigration and asylum laws can have an obvious impact on the threat foreigners involved in terrorism pose. While illegal entry is a major concern for European states, most actual and would-be foreign terrorist attackers have entered Europe legally.²⁶ Notable also is that the European Union (EU) has yet to harmonize immigration and asylum measures across member states,²⁷ despite the fact that the Schengen Agreement provides foreigners with access to all EU countries once they have secured entry into any one member state.²⁸ Immigration and asylum laws remain the prerogative of individual member states.

In France, the entry of foreigners is subject to generally applicable legislation or to texts specifically applicable to asylum seekers and refugees. In either case, in accordance with the *Ordonnance* of November 2, 1945, "administrative authorities may refuse entry to a foreigner," even one in possession of required documentation, "suspected of or already representing a threat to national security or public order."²⁹

Article 13 of the Law of July 25, 1952, requires asylum seekers to demonstrate that living in their countries of origin constitutes a threat to their lives, liberties, or would subject them to torture or other inhuman treatment or punishment.³⁰ The Minister of the Interior, in consultation

24. Grote, *supra* note 19, at 609–10.

25. See Terrorism Act, 2000, c. 11, §§ 54, 56 (Eng.).

26. A study by the Nixon Center for Immigration Studies examined 373 suspected or convicted terrorists who resided in or crossed national borders in Western Europe and North America since 1993. The study found that only six percent of the sample had entered countries illegally. Leiken, *supra* note 5, at 11.

27. Gisbert Brinkmann, *The Immigration and Asylum Agenda*, 10 EUR. L.J., 182, 197 (2004).

28. See generally Kees Groenendijk, *Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?*, 10 EUR. L.J., 150 (2004).

29. Dagron, *supra* note 17, at 303–04.

30. *Id.* at 303–05.

with the Minister of Foreign Affairs, decides whether to grant a request for asylum.³¹ Such requests may be denied if an applicant represents a threat to public order or if his or her admission into France would not be compatible with the interests of the State.³² The Minister of the Interior has complete discretion and need not justify those asylum decisions.³³ In a concerted effort to prevent militant Islamicists from proselytizing to or radicalizing France's mostly North African Muslim population, France adopted a policy, during the 1990s, of denying asylum to Arab and Middle Eastern radical Islamicists even when France's neighbors welcomed them.³⁴

The Law of July 25, 1952, also governs France's conferment of refugee status. In conformance with that law, status must be granted "to all persons persecuted for their actions in favor of freedom, to persons protected by the High Commissioner for Refugees and to persons whose status is in conformity with the definitions of the term 'refugee' according to the 1951 Refugee Convention."³⁵ However, pursuant to article 1(f) of the Refugee Convention, persons "connected with the preparation or commission of terrorist acts" anywhere may not be granted the status of a "refugee."³⁶

French authorities may strip foreign residents of their legal authority to reside in France. The administrative authorities may refuse renewal of a residency permit granted for a period of a year,³⁷ if the presence of a foreign resident subject to such renewal is determined a threat to public order.³⁸ Furthermore, all foreign residents may be expelled from France if they "constitute a serious threat to the public order or where it is absolutely necessary for State safety or public security."³⁹ However, both French and international law, which prohibit people from being removed to countries where they would face persecution, limit expulsion.⁴⁰

Despite the existence of such potential limitations on deportation, French authorities have aggressively availed themselves of the expulsion option. The former U.K. Minister of State for Europe, Denis MacShane, speaking on that subject, stated, "In France there is a long tradition of political exile, but on condition that people who accept asylum do not use

31. *Id.* at 304.

32. *Id.* at 304–05.

33. *Id.* at 305.

34. Leiken, *supra* note 3, at 130.

35. Dagron, *supra* note 17, at 305.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 306.

40. *Id.*

French territory to propagate hate campaigns.”⁴¹ That sentiment has led to the deportation of two alleged fundamentalist imams and the Algerian imam Abdelkader Bouziane after he publicly defended wife beating and stoning adulterous women.⁴² With regard to the expulsion of radical and militant Islamicists, former French Prime Minister Dominique de Villepin has explained that “[u]nder the cover of religion, individuals present on our soil have been using extremist language and issuing calls for violence . . . these favor the installation of terrorist movements. It is necessary therefore to oppose this together and by all available means.”⁴³

U.K. authorities, like their French counterparts, may not grant refugee status to persons connected with the preparation or commission of acts of terrorism. Further, in accordance with the ATCSA, authorities may deny asylum requests solely on the basis that applicants are not entitled to refugee status.⁴⁴ An asylum appeal begins by considering the statements in the Secretary of State’s certificate denying application of the Refugee Convention.⁴⁵ Unlike France, however, the Secretary’s decisions on such matters may be appealed to the Special Immigration Appeals Commission (SIAC), and where a certificate is revoked, appeal may be sought on a point of law.⁴⁶

Both before and after the passage of the ATCSA, U.K. authorities adhered to a liberal asylum policy. This led French-Algerian journalist Mohammed Sifaoui to comment that “the most sought-after terrorists in the world have found shelter in the UK . . . [t]hey propagate their ideology there [and] . . . Islamists considered the UK as a secondary base for their actions.”⁴⁷ The French have mockingly labeled the United Kingdom’s capital city “Londonistan” and “*l’antechambre de l’Afghanistan*.”⁴⁸

The United Kingdom, like France, reserves the authority to expel foreign residents who have engaged in terrorist activities. However, given that militant Islamicists, such as clerics Abu Hamza, Abu Qatada, and Omar Bakri Mohammed, were able to operate openly for years without being deported, it seems that U.K. authorities, unlike their French

41. *Focus: The Crackdown in the Fight Against Terrorism*, OBSERVER, Aug. 7, 2005, at 14, available at <http://observer.guardian.co.uk/focus/story/0,6903,1544134,00.html>.

42. Peter Ford, *France Tries to Soften Local Style of Islam*, CHRISTIAN SCI. MONITOR, May 6, 2004, at 1, available at <http://www.csmonitor.com/2004/0506/p01s04-woeu.html>.

43. *Id.*

44. See Anti-Terrorism, Crime and Security Act, 2001, c. 24, §§ 33(1)–(2) (Eng.).

45. *Id.* § 33(3).

46. *Id.* §§ 33(3)–(9).

47. Jamie Campbell, *Why Terrorists Love Britain*, NEW STATESMAN, Aug. 9, 2004, available at <http://www.newstatesman.com/200408090012>.

48. John Kampfner, *Why the French Call Us Londonistan*, NEW STATESMAN, Dec. 9, 2002, at A1, available at 2002 WL 5238232; Ulph, *supra* note 15, at 1.

counterparts, hesitated to remove foreign residents suspected of terrorist-related activities.⁴⁹ Under the Immigration Act of 1971, the Secretary of State may issue deportation orders against foreign residents if he or she deems removal to be in the interest of national security or “conducive to the public good.”⁵⁰ In accordance with the POTA, the Secretary may issue control orders against foreign nationals, prohibiting or restricting their entrance or presence within the United Kingdom, if considered “necessary for purposes connected with preventing or restricting involvement by [those] individual[s] in terrorism-related activit[ies].”⁵¹

“Terrorism-related activity” includes “the commission, preparation or instigation of acts of terrorism” and conduct that facilitates or encourages the commission of such acts.⁵² The TA 2000 defines terrorism as the use or threat of action “designed to influence the government or an international governmental organization or to intimidate the public . . . for the purpose of advancing a political, religious or ideological cause,” including serious violence against others or endangering lives, serious damage to property, serious risk to health or safety of the public, or actions designed to seriously disrupt an electronic system.⁵³ The Secretary’s order of deportation on national security grounds may be appealed to the SIAC,

49. Abu Hamza was granted refuge in the United Kingdom in 1979 after fighting with the mujahideen in Afghanistan. He led the Finsbury Park Mosque in London until the British government shut it down in 2003. While at the Mosque, he openly advocated the use of terrorism, recruited and raised funds for militant Islamicist terror groups, and advised Moussaoui, Reid, and eight British Muslims caught plotting terrorist attacks in Yemen in 1998. See *Islamic Extremism Hearing*, *supra* note 2, at 9 (statement of Peter Bergen); EVAN F. KOHLMANN, AL-QAIDA’S JIHAD IN EUROPE: THE AFGHAN-BOSNIAN NETWORK 189–90 (2004); Dominic Casciani *Profile: Abu Hamza*, BBC NEWS, Feb. 7, 2006, available at http://news.bbc.co.uk/2/hi/uk_news/4644960.stm (last visited Oct. 3, 2007).

Abu Qatada, described as a key figure in an Al-Qaeda related terrorist activity, was granted refugee status in the United Kingdom in 1994. Since that time, Jordan convicted him of terrorist activities in absentia. After being held in Belmarsh prison for two years, Qatada was released on bail and now faces extradition to Jordan. See *Profile: Abu Qatada*, BBC NEWS, May 5, 2006, available at http://news.bbc.co.uk/2/hi/uk_news/4141594.stm (last visited Oct. 3, 2007).

Omar Bakri was granted asylum in the United Kingdom in 1985 after being deported from Saudi Arabia for espousing his radical views. In 1997, Bakri established al Muhajiroun (the Migrant’s Movement), which subsequently became the most visible radical Islamicist group in the United Kingdom with branches in thirty cities and towns. Before being barred from re-entering the United Kingdom in August 2005, Bakri openly referred to acts of terror as heroic, including the attacks on the U.S. embassies in Africa and the USS Cole. Bakri also had ties to two British Muslims who carried out a suicide bombing at Mike’s Place in Tel Aviv, and was alleged to have raised funds and recruited individuals for militant Islamicist terrorist activities. See *Islamic Extremism Hearing*, *supra* note 2, at 9 (statement of Peter Bergen); see generally QUINTAN WIKTOROWICZ, RADICAL ISLAM RISING: MUSLIM EXTREMISM IN THE WEST 6–10, 72–76 (2005); Kevin Sullivan, *Under New Guidelines, Britain will Deport Terror Supporters*, WASH. POST, Aug. 25, 2005, at A15.

50. Immigration Act, 1971, c.77, §§ 3, 5 (Eng.).

51. See Prevention of Terrorism Act, 2005, c. 2, §§ 1(3), 1(4)(g) (Eng.).

52. *Id.* § 1(9).

53. *Id.* § 15(1); see Terrorism Act, 2000, c. 11, § 1 (Eng.).

and with leave, further appealed to an appropriate appeals court; control orders may be appealed to the High Court.⁵⁴ Deportations resulting from such orders are, as in France, limited to the extent that they would result in foreign nationals being sent to countries where they would face torture or inhuman treatment.⁵⁵

The POTA control order scheme resembles the exclusion order system applied in Northern Ireland from 1974 to 1998 under successive Prevention of Terrorism Acts. It was designed to replace the ATCSA provisions that, in 2004, the House of Lords held contravened the ECHR.⁵⁶ Those now-repealed ATCSA provisions allowed for the indefinite detention of foreign nationals the Home Secretary certified as terrorism-related national security threats when deportation was not permitted due to concerns over torture and inhuman treatment by the receiving state.⁵⁷ Rather than permit the indefinite detention of such persons without trial, the POTA authorizes the Home Secretary to issue control orders circumscribing their movement, the most restrictive of which the High Court must approve.⁵⁸ The POTA makes the violation of a control order a prosecutable offense.⁵⁹

It appears that French and British laws grant authorities roughly equivalent powers to deny entry to asylum and refuge seekers and to expel foreign residents who represent terrorist threats. However, it seems that U.K. authorities have historically adhered to more liberal entry policies than French authorities concerning asylum claimants, refuge seekers, and general international visitors, and that the British have more docilely pursued the deportation of radical and militant Islamicists.

B. Preventive Measures

Preventive laws can help states counter and prepare for the threats that terrorists pose. Preventive measures include those concerning the proscription of terrorist organizations, searches, the collection and sharing

54. See Prevention of Terrorism Act, 2005, c. 2, § 10 (Eng.); Special Immigration Appeals Commission Act, 1997, c. 68, §§ 2, 7 (Eng.).

55. See Grote, *supra* note 19, at 620.

56. *A and Others v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.), available at <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&others.pdf>; David Bonner, *Checking the Executive? Detention Without Trial, Control Orders, Due Process and Human Rights*, 12 EUR. PUB. L., 45, 60–62 (2006).

57. See Mary Arden, *Human Rights in the Age of Terrorism*, 121 L.Q. REV. 604, 605–10 (2005); Brice Dickson, *Law Versus Terrorism: Can Law Win?*, 1 EUR. HUM. RTS. L. REV. 11, 19–25 (2005).

58. See Prevention of Terrorism Act, 2005, c. 2, §§ 1–4. Under the Prevention of Terrorism Act, control orders may be extremely restrictive, limiting a person's access to his or her residence or other specified location and restricting a person's associations with others. See *id.* § 1.

59. *Id.* § 9.

of information, the enhancement of security at particular points, and the suppression of terrorist groups' financial activities.

In France, the government may proscribe groups concerned with supporting, planning, or conducting terrorist activities. Article 3 of the Law of July 15, 1901, allows administrative authorities to obtain judicial orders to shut down associations if they are incompatible with public order or accepted standards of behavior. Such decisions on the part of French authorities do not require associations to have previously committed illegal acts; the law is preventative in that sense.⁶⁰ The French President, under the Law of January 10, 1936, and the Law of September 9, 1986, may also shut down groups or arrangements that call for armed demonstrations in the streets, advocate racial violence, or exist for the purpose of preparing terrorist attacks in France or abroad.⁶¹ Such a Presidential decree was used to dissolve the group *Unite Radicale* in 2002.⁶²

The TA 2000 grants the British Home Secretary powers of proscription similar to those available to executive authorities in France. The Home Secretary has broad discretion to proscribe groups that the Secretary believes are concerned with committing acts of terrorism, and in preparing, promoting, or encouraging terrorism.⁶³ The TA 2000 also makes it a crime to belong or to profess to belong to a proscribed organization, to invite support or to arrange meetings for a proscribed organization, or to wear items of clothing or articles typical of a proscribed organization.⁶⁴ To prevent proscribed organizations from avoiding proscription by changing their names, the TA 2006 allows the Home Secretary to amend the list of proscribed organizations immediately to reflect any such name changes.⁶⁵ Proscribed organizations may appeal their proscription to the Proscribed Organizations Appeal Commission and, if warranted, the Court of Appeal.⁶⁶

In periods of elevated terror threat, the French government may institute the *Vigipirate* plan. Conceived in 1978 during the wave of far-left terrorism associated with the Red Army Faction and Red Brigades, *Vigipirate* mobilizes law enforcement, customs, intelligence agencies, and

60. See Dagron, *supra* note 17, at 289.

61. See Law No. 2003-239 of Mar. 18, 2003, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 19, 2003, p. 4787; Dagron, *supra* note 17, at 289–90 (discussing the Law on Paramilitary Groups of January 10, 1936).

62. Dagron, *supra* note 17, at 290.

63. Terrorism Act, 2000, c. 11, § 3 (Eng.).

64. *Id.* §§ 11–13.

65. Terrorism Act, 2006, c. 11, § 22 (Eng.).

66. Terrorism Act, 2000, c. 11, §§ 5–6 (Eng.).

the military, if necessary, to enhance the security of sensitive points and networks, such as nuclear plants, major industrial installations, highways, and train stations.⁶⁷ *Vigipirate* may be implemented in a range of forms along an intensity/breadth continuum; an elevated form has been in place since September 12, 2001.⁶⁸

In its current form, *Vigipirate* allows authorities to conduct bag and body searches and limited forms of inquiry at designated public places, and to extend such search power to private security firms and national rail service employees.⁶⁹ The *Vigipirate* plan also grants the *procureur de la Republique* the power to authorize the judicial police—the law enforcement division tasked with assisting the judiciary—to search vehicles in public areas where no criminal offense is being perpetrated, so long as such searches are tied to an investigation relating to terrorism.⁷⁰ Moreover, under *Vigipirate*, the judicial police may search a vehicle in a public area without authorization from the *procureur de la Republique* if “plausible grounds” exist to suspect persons inside the vehicle of attempting, having attempted, or having already carried out a criminal offense.⁷¹ With respect to biological and nuclear materials, *Vigipirate* enhances security at facilities involved in the production, storage, and transport of hazardous biological agents, redefines conditions for the handling, possessing, and transferring of poisonous substances, and restricts access to, surveillance of, and flights over nuclear facilities.⁷²

U.K. authorities, similar to their French counterparts, have broad security enhancing powers designed to prevent terrorism, though on a

67. O’Brien, *supra* note 17, at 25–26. In France, with respect to law enforcement, terrorism is the primary responsibility of the *Groupe d’Intervention de la Gendarmerie Nationale* (GIGN), which is most active in non-urban areas, and the *Recherche, Assistance, Intervention et Dissuasion*, which is most active in urban areas. With respect to intelligence, the lead agencies concerned with terrorism are the *Direction de la Surveillance du Territoire*, which is primarily responsible for counter-terrorist activities in France, the *Renseignements Generaux* (DCRG), which collects intelligence on groups, and the *Generale de la Securite Exterieur* (DGSE), France’s foreign intelligence agency. The *Unite de Coordination de la Lutte Anti-Terroriste* (UCLAT) oversees and coordinates the counter-terrorism efforts of those agencies and organizations. *Id.* at 29–30; PETER CHALK & WILLIAM ROSENAU, *CONFRONTING THE “ENEMY WITHIN”* 17–23 (2004).

68. O’Brien, *supra* note 17, at 26–27. As originally conceived, the *Vigipirate* plan could be implemented in *Simple* or *Renforce* mode. As of March 2003, the plan was further stratified into phased levels of alertness, *jaune*, *orange*, *rouge*, and *ecarlate*. On September 12, 2001, the *Vigipirate Renforce* was implemented, and since March 2003, the plan has alternated between its *orange* and *rouge* levels. *Id.*

69. Haubrich, *supra* note 14, at 11–13.

70. Dagron, *supra* note 17, at 285; Law No. 2003-239 of Mar. 18, 2003, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Mar. 19, 2003, arts. 12, 13.

71. Dagron, *supra* note 17, at 285.

72. *Id.* at 283–84.

permanent rather than specially instituted basis.⁷³ British police may arrest and search persons, without warrants, if they have reasonable grounds for suspecting those persons have been or are involved in committing, preparing, or instigating terrorist acts.⁷⁴ Further, even if lacking reasonable grounds, the police, immigration authorities, and customs officers may stop, question, and detain persons traveling to, from, or within the United Kingdom to determine whether they have been involved in committing, preparing, or instigating terrorist acts.⁷⁵

In the United Kingdom, senior police officials may also authorize additional search powers, including the stopping and searching of pedestrians, vehicles, and vehicle occupants, for use in designated geographic areas if they deem such measures expedient for the prevention of terrorist activities. Such authorizations may remain in force for a period of twenty-eight days, may be renewed, and are subject to Home Office confirmation within forty-eight hours of their being issued.⁷⁶ Senior police officials may authorize the prohibition of parking in certain areas if they consider doing so “expedient for the prevention of acts of terrorism.”⁷⁷

With regard to toxic substances, hazardous biological materials, and the nuclear energy industry, the ATCSA introduced a range of new security measures in the United Kingdom similar to those *Vigipirate* puts in place in France.⁷⁸ They include: allowing the police to request information about persons who have access to dangerous chemical and biological substances; obliging occupiers of facilities holding chemical and biological materials to implement security improvements that the police recommend; and restricting the sharing of information related to nuclear sites.⁷⁹

Several laws give French authorities the ability to collect and share information concerning individuals and groups suspected of having ties to terrorism. The Law of July 10, 1991, authorizes the Prime Minister, at the

73. In the United Kingdom, with respect to law enforcement, terrorism is the primary responsibility of the Metropolitan Police Department’s Special Branch (MPSB) and the forty-three provincial Special Branches that it helps oversee and coordinate. With respect to intelligence efforts concerning terrorism, the Security Service, MI5, is responsible for internal intelligence and counter-terrorism activities. The Secret Intelligence Service, MI6, the United Kingdom’s foreign intelligence service, and the Government Communications Headquarters (GCHQ), which intercepts and codes communications, also contribute to counter-terrorism efforts. Ordinarily, MI6 and GCHQ coordinate with MI5 and the MPSB interface directly. CHALK & ROSENAU, *supra* note 67, at 7–15.

74. Terrorism Act, 2000, c. 11, §§ 40–43 (Eng.).

75. Anti-Terrorism, Crime and Security Act, 2001, c. 24, § 118 (Eng.); Terrorism Act, 2000, c. 11 (Eng.).

76. Terrorism Act, 2000, c. 11, §§ 44–46 (Eng.).

77. *Id.* § 48.

78. *See* Grote, *supra* note 19, at 606–09.

79. Anti-Terrorism, Crime and Security Act, 2001, c. 24, §§ 61–63, 79–80 (Eng.).

request of the Ministers of the Interior, Defense, and Economy, Finance, and Industry, to order the interception of private communications issued, transmitted, or received via telecommunication.⁸⁰ The Prime Minister may only give an interception order if he believes such communications bear on national security or the prevention of terrorism or organized crime; he must, along with the three requesting ministers, present a reasoned decision to that end in writing.⁸¹

The current *Vigipirate* plan also allows authorities to require internet providers to store and make available client contact information, and to disclose encryption keys so that digital information can be deciphered; such information can be shared without the knowledge of the individual being monitored.⁸² The Law of March 18, 2003, authorizes the gendarmerie and the judicial police to survey personal files, apart from any criminal record, contained in police data-processing systems. In addition, the Law of March 18, 2003, allows administrative authorities to obtain access to such files when considering whether to bestow French citizenship or grant residency extensions.⁸³ Concerning the collection of genetic information, article 29 of the Law of March 18, 2003, permits French law enforcement authorities to obtain, from persons who have committed or are suspected of having committed felonious crimes, genetic data for retention in the national files of genetic information.⁸⁴

The ATCSA provides British authorities with information collection and sharing capabilities comparable to those that French authorities possess. In accordance with the ATCSA, communications providers, such as telephone and internet companies, may be required to retain information concerning their customers—that is, who they contact, when, and from where—and to make such information available to law enforcement and intelligence agencies.⁸⁵ The ATCSA gives the Home Secretary broad discretion to determine the specific aspects of any such communications retention requirements.⁸⁶

80. Law No. 91-646 of July 10, 1991, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 13, 1991, p. 9167; see Dagron, *supra* note 17, at 285–86.

81. Law No. 91-646 of July 10, 1991, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 13, 1991, arts. 3, 4.

82. Law No. 2001-1062 of Nov. 15, 2001, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Nov. 16, 2001, arts. 29, 20; see Haubrich, *supra* note 14, at 11–12.

83. See Law No. 2003-239 of Mar. 18, 2003, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 19, 2003, arts. 21, 24; Dagron, *supra* note 17, at 287–88.

84. See CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 706-55 (Fr.); Dagron, *supra* note 17, at 287.

85. Anti-Terrorism, Crime and Security Act, 2001, c. 24, §§ 101–104 (Eng.); Grote, *supra* note 19, at 617–18.

86. Anti-Terrorism, Crime and Security Act, 2001, c. 24, §§ 101–104 (Eng.).

Under the ATCSA, administrative authorities may also share any personal information they have with one another for the purposes of any criminal investigation.⁸⁷ This includes disclosures of the customs and inland revenue services to intelligence agencies.⁸⁸ The only requirement limiting such sharing of personal information is that the disclosing authority must be satisfied that the disclosure is proportionate to what is sought to be achieved by it.⁸⁹ Once such information has been made available, there appears to be little control over its use for purposes unrelated to the precipitating criminal investigation or holding this information in some sort of law-enforcement databank.⁹⁰

Another goal of France's counter-terrorism laws is the suppression of financial activities that support terrorism. Those involved in transactions must adhere to reporting requirements, which provide the central mechanism for French authorities to monitor and suppress financial activities tied to terrorism. Banks, notaries, attorneys, jewelers, real estate brokers, auditors, and persons engaged in like professions, as well as casino operators and persons who regularly engage in trade involving precious stones and works of art, are required to report suspicious transactions that might be linked to terrorist activities to the French Financial Intelligence Unit ("TRACFIN").⁹¹ Individuals to whom that suspicious transactions reporting model does not apply and who carry out, monitor, or provide advice concerning movements of capital must report operations relating to criminal activities, including terrorism, of which they have knowledge to the *procureur de la Republique*.⁹² Additionally, all persons transferring funds, securities, or other financial instruments with a conversion value of 7,600 euros or more into or out of France, without employing an intermediary, such as a credit institution or service organization, must file a declaration with customs.⁹³ Once a report to TRACFIN or the *procureur* is made or a customs declaration is filed, authorities rely on arrests, seizures, and prosecutions, if they determine such treatment is warranted, to prevent the proceeds of such a transaction from being used to finance the activities of terrorists.⁹⁴

Legislation in the United Kingdom gives British authorities powers, not unlike those that their French counterparts possess, to curtail financial

87. *Id.*

88. *Id.* § 19.

89. *Id.* § 17.

90. Grote, *supra* note 19, at 617.

91. Dagron, *supra* note 17, at 290–91.

92. *Id.* at 290.

93. *Id.*

94. *Id.* at 290–91.

activities associated with terrorism. U.K. authorities, via judicial order, may require financial institutions to provide information on accounts for up to ninety days if doing so would aid a terrorism investigation.⁹⁵ The TA 2000 and the ATCSA also oblige financial institutions, in general, to report knowledge or suspicion of terrorist financing.⁹⁶ The Treasury may freeze the assets of overseas governments and residents that have taken or are likely to take action detrimental to the U.K. economy, or that constitute a threat to the life or property of a national or resident of the United Kingdom.⁹⁷ Furthermore, police, customs, and immigration officers are authorized to seize and seek the forfeiture of cash if there are reasonable grounds to suspect the money is intended to be used for the purposes of terrorism, the money consists of the resources of proscribed terrorist organizations, or the cash represents property obtained through terrorism.⁹⁸

Counter-terrorism laws in France and the United Kingdom seem to provide equivalent powers, more or less, to authorities in those countries with respect to preventive measures. However, as was the case with regard to immigration and asylum measures, French authorities appear to pursue the use of those powers more vigorously than do their British counterparts. French authorities have shown a greater willingness to monitor militant Islamicists and take preventative steps to counter them. For example, in 2004, special police units were set up in each of France's twenty-two regions to conduct surveillance on mosques and Muslim bookshops and restaurants that militant Islamicists were thought to frequent.⁹⁹ In contrast, British authorities have traditionally been reluctant to involve themselves in the activities of religiously affiliated establishments, organizations, and institutions.¹⁰⁰ That it took four years for the U.K. Home Secretary to proscribe the militant Islamicist group al Muhajiroun serves to illustrate that point.¹⁰¹

95. Anti-Terrorism, Crime and Security Act, 2001, c. 24, sched. 2 (Eng.); Terrorism Act, 2000, c. 11, sched. 6 (Eng.).

96. Anti-Terrorism, Crime and Security Act, 2001, c. 24, sched. 2 (Eng.); Terrorism Act, 2000, c. 11, §§ 19–22 (Eng.).

97. Anti-Terrorism, Crime and Security Act, 2001, c. 24, § 4 (Eng.).

98. *Id.* sched. 1

99. See Ford, *supra* note 42; Jon Henley, *Imams to be Taught French Way of Life*, GUARDIAN, Dec. 8, 2004, available at <http://www.guardian.co.uk/france/story/0,11882,1368735,00.html>.

100. See *Islamic Extremism Hearing*, *supra* note 2, at 9–10 (statement of Peter Bergen); *id.* at 29 (prepared statement of Lorenzo Vidino).

101. *Islamic Extremism Hearing*, *supra* note 2, at 9–10 (statement of Peter Bergen).

C. Repressive Measures

Laws concerning repressive measures allow states to deal with those individuals who have engaged in or are suspected of having engaged in terrorist activities. Repressive measures include those that relate to the detention of suspects, investigation of crimes, judicial process, and sentencing.

French and British counter-terrorism laws provide that special detention standards apply during the investigation of terrorist offenses. French authorities may detain persons suspected of carrying out acts of terrorism for at least forty-eight hours without pressing charges. Within an initial forty-eight hour period, they may choose to bring detainees before a *magistrat du siege* to seek permission to hold them for an additional forty-eight hours, without charge.¹⁰² Also, under article 63-4 of the Code of Criminal Procedure, persons being held in police custody in France on suspicion of committing terrorist offenses are entitled to lawyers, if they so request, after seventy-two hours of detention, not twenty hours, as is the case with persons being detained for other types of crimes.¹⁰³

U.K. authorities, in comparison, may detain persons suspected of being involved with terrorist activities, without pressing charges, for an initial period of forty-eight hours and may seek judicial authorization to hold those suspects for an additional period of up to twenty-eight days.¹⁰⁴

U.K. authorities investigating crimes relating to terrorism may also benefit from section 38(B) of the TA 2000. This section makes it a criminal offense for persons with information they know or believe might be of material assistance in preventing the commission of terrorist acts or in securing the apprehension, prosecution, or conviction of other persons involved with terrorist activities, not to disclose such information to authorities as soon as practicable.¹⁰⁵ Failure to comply with this affirmative duty is punishable by imprisonment for up to five years.¹⁰⁶

With respect to jurisdiction, French courts maintain, with obvious implications for terrorists, universal jurisdiction. French courts may try persons having committed any of the offenses the Penal Code recognizes, where individuals concerned are in France, irrespective of the geographic location of the commission of the offense or the nationalities of the

102. Code de procédure pénale [C. pr. pén.] art. 706-23 (Fr.).

103. Code de procédure pénale [C. pr. pén.] art. 63-4 (Fr.).

104. Terrorism Act, 2006, c. 11, § 23 (Eng.); Terrorism Act, 2000, c. 11, sched. 8 (Eng.).

105. Terrorism Act, 2000, c. 11, § 38(B) (Eng.).

106. *Id.*

offenders and victims.¹⁰⁷ Courts in the United Kingdom do not enjoy such broad jurisdiction. British courts may, however, try U.K. nationals and foreign residents for the offenses the TA 2000 and the TA 2006 define, as well as other select offenses, regardless of where the offenses were committed.¹⁰⁸ The TA 2000 and the TA 2006 also allow U.K. courts to try non-British citizens for certain limited offenses committed outside of the United Kingdom.¹⁰⁹

Terrorist offenses warrant a centralized and specialized judicial process in France. According to the French Code of Criminal Procedure, the *procureur de la République*, the *juge d'instruction*, the *Tribunal correctionnel*, and the *Cour d'assises* of Paris must handle acts of terrorism; local prosecutors, magistrates, and courts are not permitted to do so.¹¹⁰ The French state has opted for such centralization in an effort to deal with the complexity and international character of terrorism. Magistrates, operating from Paris, may more easily specialize in handling terrorist offenses because they have access in one place to all the relevant information they might require, and they may exercise their competence over France's entire territory.¹¹¹ Additionally, a *Cour d'assises*, comprised of professional judges, hears cases involving alleged perpetrators of acts of terrorism who are eighteen-years of age or older; normally, a *Cour d'assises* made up of ordinary citizens hears criminal cases.¹¹² The French deemed such composition of the *Cour d'assises* necessary for judging acts of terrorism, since terrorism's complexity makes it difficult for ordinary citizens to do so.¹¹³

107. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 689 (Fr.), *quoted in* Dagron, *supra* note 17, at 293–94.

108. *See* Terrorism Act, 2006, c. 11, § 17 (Eng.); Terrorism Act, 2000, c. 11, §§ 63(A)–63(E) (Eng.).

109. *Id.*

110. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 706-17 (Fr.); *see* Dagron, *supra* note 17, at 292–93.

111. *See* Dagron, *supra* note 17, at 293. Intended as nonbiased arbiters, magistrates have fairly wide powers to open inquiries, authorize searches, issue subpoenas, and determine what constitutes an act of terrorism. CHALK & ROSENAU, *supra* note 67, at 21. This authority has prompted one security scholar to state that “the French legal system provides . . . anti-terrorism magistrates with powers that have no equal in Europe [or] the United States.” *Islamic Extremism Hearing*, *supra* note 2, at 28 (prepared statement of Lorenzo Vidino). With respect to the efficiencies and benefits of centralization, operating from Paris allows examining magistrates to work more closely with the DST, the DGSE, and UCLAT. CHALK & ROSENAU, *supra* note 67, at 21. Certain examining magistrates are tasked exclusively to terrorism cases and specialize further according to specific classes of terrorism, such as separatist, ideological, and religious. *Id.* This combination of authority, centralization, and specialization has made several terrorism-focused examining magistrates in France particularly effective and well known, such as Jean-Louis Bruguiere and Jean-Francois Ricard. *Id.*

112. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 706-25 (Fr.); *see* Dagron, *supra* note 17, at 295–96.

113. *See* Dagron, *supra* note 17, at 296.

In the United Kingdom, by comparison, terrorist offenses receive the same treatment from the judicial system as other crimes. While the British, having crafted counter-terrorism legislation since 2000, considered extending the Diplock system applicable to cases concerning terrorism in Northern Ireland to England and Wales, they have so far refrained from doing so.¹¹⁴ The Diplock system permits courts to sit without juries, while maintaining all the powers, authority, and jurisdiction of jury courts. In addition, the Diplock system restricts courts' granting of bail, allows judges to draw inferences of guilt from defendants' silence, and reverses the evidentiary burden of proof by placing it on the defendant in several circumstances.¹¹⁵

In France, when otherwise ordinary offenses are classified as terrorist offenses due to the intent with which they were carried out, as discussed above, courts may apply harsher sentences. In the United Kingdom, where the terror intent approach was rejected, no such sentencing scheme exists. Where the terror intent element is present, the maximum sentences initially available to the French courts are increased as follows: imprisonment for thirty years becomes life imprisonment; twenty years in prison becomes thirty; fifteen years becomes twenty; ten years becomes fifteen; seven years becomes ten; five years becomes seven; and where the initial applicable penalty was between one and three years, the penalty may be doubled.¹¹⁶

It appears that French and British counter-terrorism laws provide authorities with rather equivalent detention and investigation powers. U.K. authorities, in contrast to the patterns they have traditionally exhibited with regard to immigration, asylum, and preventive measures, have historically been willing to assertively implement the repressive measures at their disposal regarding detention and investigation. With respect to judicial process and sentencing, France's counter-terrorism efforts doubtlessly benefit from the centralization and specialization that its civil law tradition affords, and its terrorism-specific sentencing scheme may act as a deterrent and symbolic gesture. That said, it is not clear that the current U.K. system for prosecuting and trying terrorism cases is any less effective.

Part I presented a broad comparison of current counter-terrorism laws in France and the United Kingdom. Foremost, that comparison revealed what those two prominent European countries believe are the elements a

114. See Cornish, *supra* note 20, at 154–55; Grote, *supra* note 19, at 615.

115. LAURA K. DONOHUE, COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM 1922–2000, 124–25, 129, 193–94 (2001).

116. CODE PÉNAL [C. PÉN.] art. 421-3 (Fr.); see Dagon, *supra* note 17, at 296–97.

comprehensive counter-terrorism regime should include. The comparison also demonstrated that, overall, French and British counter-terrorism laws address most of those elements in a similar manner and that they tend to provide their countries' authorities with roughly equivalent powers. That, and the apparent hesitation with which U.K. authorities have pursued immigration, asylum, and preventive measures, suggest that the views security experts take of the relative effectiveness of the French and British counter-terrorism regimes must have more to do with the implementation of the laws that comprise them than the laws themselves. Part II examines possible explanations for any such substantial difference in implementation.

II. DIFFERENCES IN IMPLEMENTATION IN FRANCE AND THE UNITED KINGDOM

U.K. authorities' seeming reluctance to avail themselves of the powers their country's counter-terrorism laws afford them may have eroded entirely in the wake of the 2005 London suicide bombings.¹¹⁷ It is too early to tell. Future developments aside, three factors may help explain why, in contrast to their French counterparts, U.K. authorities have historically appeared hesitate to fully implement counter-terrorism legislation, i.e., in developing and pursuing policies, counter-terrorism laws reflect: (1) each nation's recent history, (2) their distinct judicial-system traditions, (3) the perception of Muslim communities and Muslim integration in each country.

The recent history of terrorist activities in France is long and varied. France's experiences with terrorism prompted it to adopt specific counter-terrorism legislation in 1986, spurred it to enact additional counter-terrorism laws subsequently, and have highlighted the relevance and utility of those legal measures for French authorities. Separatist organizations that engage in terrorism, such as the Basque group *Iparretarak* and the *Front de Liberation Nationale de la Corse* ("FLNC"), have been active in France since the mid 1970s.¹¹⁸ *Iparretarak* last claimed responsibility for terrorist acts in 1998, while the FLNC and its more radical offshoot,

117. See HOME OFFICE, REPORT OF THE OFFICIAL ACCOUNT OF THE BOMBINGS IN LONDON ON 7TH JULY 2005, 2005-6, H.C. 1087, available at <http://www.official-documents.gov.uk/document/hc0506/hc10/1087/1087.pdf> (last visited Oct. 3, 2007), for more information confirming and discussing such reluctance on the part of U.K. authorities; INTELLIGENCE AND SECURITY COMMITTEE, REPORT INTO THE LONDON TERRORIST ATTACKS ON 7 JULY 2005, 2006, Cm. 6785, available at <http://www.official-documents.gov.uk/document/cm67/6785/6785.pdf>.

118. Dagon, *supra* note 17, at 276-77.

Armata Corsa, last claimed responsibility for terrorist attacks in 2002.¹¹⁹ The radical left group *Action Directe* carried out many terrorist attacks targeting individuals and facilities associated with businesses and the military in France between 1979 and 1987.¹²⁰ Also during that period, the Lebanese Armed Revolutionary Front, Hezbollah, several groups linked to Palestine, and the Armenian Secret Army for the Liberation of Armenia conducted terrorist attacks against American, Israeli, and Turkish interests in France.¹²¹ Most pertinent perhaps to French authorities' treatment of the current terrorism threat militant Islamicists pose, the Algerian militant Islamicist organization *Groupe Islamique Armée* ("GIA") carried out a series of attacks on the Paris Metro in 1995, which resulted in eight deaths and approximately two hundred casualties, and in the Roubaix-Lille region in 1996.¹²² The GIA seeks to end France's support of the secular, military-backed Algerian government, which the GIA aims to overthrow, and is suspected of operating within France on an ongoing basis.¹²³

In contrast to the diverse recent history of terrorism in France, the United Kingdom's recent historical experience with terrorism, prior to the 2005 London bombings, almost exclusively involved groups connected to Northern Ireland. These groups included the Provisional Irish Republican Army, its offshoots, and the Ulster Defense Association and its affiliates.¹²⁴ Such groups, acting in accordance with the Good Friday Agreement, have not perpetrated a significant terrorist attack since 1998. British counter-terrorism legislation prior to the TA 2000, reflecting the United Kingdom's narrow experience with terrorism, was specifically designed to address terrorist activities tied to Northern Ireland.¹²⁵ U.K. authorities, despite terrorist developments on continental Europe, may have not perceived the immediacy of the militant Islamicist terror threat and, therefore, may not have pursued the use of their powers under counter-terrorism laws as vigorously as they might have otherwise to

119. *Id.*

120. See generally Michael Y. Dartnell, *Action Directe: Ultra-Left Terrorism in France, 1979–1987* (1995).

121. Dagon, *supra* note 17, at 278–79.

122. Johnson, *supra* note 1. Rachid Ramda, a suspect who French authorities wanted in connection to the Paris Metro bombings, was arrested and imprisoned in the United Kingdom in 1996 for his alleged involvement in those attacks but not extradited to France until December 2005. Daniel McGrory, *Terror Suspect Extradited After 10 Years*, TIMESONLINE, Dec. 2, 2005, <http://www.timesonline.co.uk/article/0,13509-1900234,00.html>.

123. See Dagon, *supra* note 17, at 279 n.41; Johnson, *supra* note 1. Since the Algerian government's decision to cancel the 1992 national election, which the radical Islamist party Islamic Salvation Front (FIS) was poised to win, the GIA have acted to oust the Algerian regime and to end France's support for it. PAULY, JR., *supra* note 6, at 50.

124. See generally DONOHUE, *supra* note 115.

125. See Grote, *supra* note 19, at 592–97.

confront militant Islamicists. British authorities' unfamiliarity with operating under new broad counter-terrorism laws applicable outside of the Northern Ireland context may have also contributed to their seeming hesitation to implement available measures aggressively.

The different traditions of the judicial systems in France and the United Kingdom may explain the apparent variance in those countries' implementation of counter-terrorism laws. The French judicial system rests on a civil law tradition that links it to the rest of the state apparatus and, as a result, operates with the other branches of the state in a rather indivisible manner. That relationship is likely to make the French judicial system more accepting of, and less likely to rebuke, the actions of executive authorities taken for counter-terrorism purposes.

In the United Kingdom, by comparison, while there is no written constitution and the principle of parliamentary sovereignty is entrenched,¹²⁶ the British judicial system rests on a tradition of independence that continues to this day.¹²⁷ British courts have historically sided with the executive branch concerning issues of national security.¹²⁸ However, the independence of the courts, combined with their judicial review function, may have made British authorities weary of being found to have overstepped the bounds of the counter-terrorism laws under which they may act. As a result, British authorities may, as discussed above, use their powers relating to proscription, deportation, and control orders less aggressively than they otherwise might.

The Human Rights Act of 1998 ("HRA") increased the ability of British courts to review the "constitutionality" of laws and government actions by giving individuals the opportunity to argue for their ECHR rights in British courts, and by giving British judges the authority to adjudicate directly on ECHR issues.¹²⁹ The HRA may also have added, however, to British authorities' apparent weariness to implement the full repertoire of counter-terrorism measures available to them, and perhaps for good reason. In *A v. Secretary of State for the Home Department*, the House of Lords, acting pursuant to its authority under the HRA, held that the ATCSA's provisions relating to the indefinite detention of foreigners were incompatible with the ECHR.¹³⁰

126. Haubrich, *supra* note 14, at 24.

127. *See generally* Bonner, *supra* note 56.

128. *Id.* at 51–52.

129. Haubrich, *supra* note 14, at 24–25.

130. *A and Others*, *supra* note 56. For an analysis of the holding in *A and Others*, see Bonner, *supra* note 56, at 53–59; Dickson, *supra* note 57, at 19–24.

Differences in how France and the United Kingdom apparently perceive the susceptibility of their Muslim communities to radicalization by militant Islamicists and Muslim integration into their respective societies may further explain why French and U.K. authorities have seemed to implement their respective countries' counter-terrorism laws with differing degrees of intensity. Persons of Algerian descent make up approximately forty percent of France's Muslim population.¹³¹ This population figure, France's proximity to Algeria, the two countries' turbulent colonial relationship, and the French government's support for the current Algerian regime can lead to volatility in France. This is exemplified in the string of GIA perpetrated terrorist attacks in 1995 and 1996, several of which French-born members carried out.¹³² The potential for volatility, combined with quickly rising crime rates in France's *banlieues* (suburban Muslim enclaves) beginning in the mid-1990s and continuing to the present,¹³³ seems to have led French authorities to fear that militant Islamicists might be able to inspire French Muslims to engage in terrorist activities.

The longstanding French notions that foreigners should integrate as individuals, rather than as communities with distinct minority identities, and that integration into French society should entail the adoption, at least to some degree, of French secularism, may have compounded that concern.¹³⁴ That is, insofar as the resistance of Muslims in France to integrate in accordance with those notions has served to buttress the mistaken perception that they are a monolithic, fundamentalist community that opposes French societal norms.¹³⁵ Such a perception may have prompted French authorities to implement the counter-terrorism laws at their disposal in an especially vigorous manner.

U.K. authorities' perception of the susceptibility of U.K. Muslims to radicalization, which the traditional U.K. integration model reinforced, appears to contrast sharply with the view that their French counterparts seem to hold of France's Muslims. Historically, the United Kingdom's wider Muslim population, made up mostly of persons of Pakistani and Bangladeshi descent, had not demonstrated a propensity to adopt radical

131. PAULY, JR., *supra* note 6, at 38.

132. KOHLMANN, *supra* note 49, at 188–98.

133. PAULY, JR., *supra* note 6, at 50. Crime in the *banlieues* now accounts for seventy percent of all crime committed in France. Incidents of violent crime increased by 400 percent in the *banlieues* between 1993 and 1997, comparable trends were evident in 1999, 2000, 2001, and 2002. French law enforcement has classified 400 Muslim neighborhoods as “very dangerous,” a designation that signifies prevalent organized crime and possession of firearms. *Id.*

134. *See id.* at 42–43, 46.

135. *Id.*

Islamicist views or a willingness to engage in terrorist activities.¹³⁶ Also, notwithstanding the involvement of suburban Muslim enclave youth in inter-ethnic rioting in the West Midlands and West Yorkshire in 2001, crime rates in heavily concentrated Muslim areas were not a cause for alarm.¹³⁷ Those observations seem to have led U.K. authorities to perceive the possibility of U.K. Muslims taking part in terrorism as remote.¹³⁸

The United Kingdom's "separate multiculturalism" model of integration, which, in stark opposition to French assimilationism, accepts and supports the coexistence of distinctive minority communities, may have reinforced that view.¹³⁹ Separate multiculturalism would anticipate that radical and militant Islamicists, mostly from Arab and North African countries, would not be able to connect with and, therefore, would not be able to radicalize the United Kingdom's mostly Pakistani and Bangladeshi Muslims.¹⁴⁰ Furthermore, that integration model seems to have led U.K. authorities to take a somewhat hands-off approach with respect to radical and militant Islamicists operating in the broader U.K. Muslim community. According to an implicit understanding that has been termed the "covenant of security," British authorities would not interfere with radical and militant Islamicists, even those known to have been involved with terrorist activities elsewhere, so long as they did not conduct acts of terrorism within the United Kingdom.¹⁴¹ These perceptions, concerning the susceptibility of U.K. Muslims to radicalization and integration that U.K. authorities appear to have held, may have contributed to the lack of intensity with which U.K. authorities seemed to implement the counter-terrorism measures available to them.¹⁴²

Part II discussed three differences between France and the United Kingdom that may help explain why the authorities in those countries took seemingly dissimilar approaches to implementing counter-terrorism legislation. These differences include different historical experiences with terrorism, judicial-system traditions, and perceptions of domestic Muslim

136. See generally Richard Bartrop, *Muslims in Europe, Post 9/11: Understanding and Responding to the Islamic World* (2003).

137. See PAULY, JR., *supra* note 6, at 98–115.

138. HOME OFFICE, *supra* note 117; INTELLIGENCE AND SECURITY COMMITTEE, *supra* note 117.

139. PAULY, JR., *supra* note 6, at 110–11.

140. See BARTROP, *supra* note 136.

141. See Kampfner, *supra* note 48; Sandra Laville, *Banned Groups with Roots in UK Appeal to Disaffected Young Muslims*, GUARDIAN, Aug. 6, 2005, at 4, available at <http://politics.guardian.co.uk/terrorism/story/0,15935,1543732,00.html>; Sean O'Neill, *Islamic Cleric Declared War on Britain Six Months Ago*, TIMESONLINE, July 12, 2005, <http://www.timesonline.co.uk/article/0,22989-1690461,00.html>; Daniel Pipes, *British "Covenant of Security" with Islamists Ends*, NEW YORK SUN, July 8, 2005, at 6, available at <http://www.danielpipes.org/article/2742>.

142. See generally HOME OFFICE, *supra* note 117; INTELLIGENCE AND SECURITY COMMITTEE, *supra* note 117.

populations and integration. For these reasons, French authorities implemented counter-terrorism laws aggressively whereas U.K. authorities implemented laws in a fashion lacking comparable urgency and vigor.

CONCLUSION

Europe faces a considerable threat from militant Islamicist terrorists. As such, it is vital that European states have legal regimes in place that will allow them to counter terrorism actively and effectively. It is also crucial that those regimes balance the need for security with the principle of freedom. As an initial step in advancing the development of effective and balanced counter-terrorism regimes, this article presented a broad comparison of the counter-terrorism laws of two prominent European countries with long liberal-democratic traditions, France and the United Kingdom. The comparison between France and the United Kingdom demonstrates that those states believe a comprehensive counter-terrorism regime should encompass a range of elements, including entry, deportation, proscription, arrest, search, detention, the securitization of sensitive areas and dangerous substances, the collection and sharing of information, financing, investigation, judicial process, and sentencing. Furthermore, it showed that French and U.K. counter-terrorism laws address most of those elements in a similar fashion and that, generally, they provide their countries' authorities with rather equivalent powers. This article also endeavored to explain why, given the comparability of French and U.K. counter-terrorism laws, security scholars and professionals have tended to praise France's counter-terrorism regime but criticize the United Kingdom's. French and U.K. authorities' differing approaches to implementing their respective countries' counter-terrorism legislation lies at the center of that question. Recent historical experience, judicial-system tradition, and perceptions of domestic Muslim populations and integration appear to have led French authorities to pursue an aggressive approach. In contrast, those factors seem to have led U.K. authorities, at least prior to the 2005 London bombings, to pursue restrained implementation of their country's counter-terrorism laws. We see how countries' different social histories and traditions can affect the impact of similarly constructed laws designed to address the same issue.