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## Establishing Control Order Regimes: The International Human Rights Law Implications for Pre-Conviction and Post-Release Control Orders

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## Notes:

# Establishing Control Order Regimes: The International Human Rights Law Implications for Pre-Conviction and Post-Release Control Orders

### ABSTRACT

*Control orders are restrictive measures placed on individuals that pose an identified threat to public safety as a component of domestic counterterrorism policy. Control orders and their compliance with International Human Rights Law have been the subject of extensive litigation within the European Court of Human Rights and domestic states courts. Controlling provisions are applied in either the pre-conviction or the post-release stage of a state's criminal procedure. Pre-conviction control orders face significant criticism for the potential conflicts with due process protections of the right to a fair trial and the broader right of liberty.*

*This Note describes the current jurisprudence and analyzes its potential application to states that have yet to fully establish control order regimes. Because there is a lack of evidence indicating that pre-conviction control orders are necessary to prevent coordinated terrorist attacks, this Note finds that states should weigh the protection of individual liberties over the undetermined benefits of such restrictions.*

*This Note concludes that states should only utilize pre-conviction control orders in the narrowest sense with ample oversight and judicial review mechanisms. It also concludes, however, that post-release control orders should be adopted into any system focused on terrorism prevention to prevent recidivism and ensure the reintegration of individuals previously engaged in terrorism-related activities into society. This Note is particularly pertinent to the number of Balkan states that are currently planning or considering implementing extensive control order regimes.*

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## I. INTRODUCTION

Control orders are an increasingly common and much-litigated component of coordinated domestic counterterrorism strategies. Control orders are conceptually similar to parole restrictions in the United States and proscribe conditions of life aimed at preventing the growth of terrorist organizations and the recurrence of terrorist acts. They include geographic restrictions on personal movements, communicating or associating with certain people, owning or using certain items, carrying out certain activities, including work, and accessing certain forms of technology, including the internet.<sup>1</sup> The common justifications for maintaining a control order regime are its abilities to quickly disrupt the planning of terrorist attacks, prevent future radicalization, and prevent recidivism.<sup>2</sup> Control orders are categorized based on the time they are used in a state's criminal justice system: (1) pre-conviction orders—any preventative detention or monitoring order that is issued prior to an individual being convicted for a terrorism-related crime—and (2) post-release orders—those that are imposed on an individual after they have been convicted for a

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1. See generally *Sec'y of State for the Home Dep't. v. AF* [2009] UKHL 28, [2010] 2 AC (HL) 269 (appeal taken from EWCA (Civ)); Amnesty Int'l, *United Kingdom: As Law Lords Hear Key Cases on Control Orders, Amnesty International Calls on the UK Government to Abandon Them*, AI Index EUR 45/011/2007 (July 5, 2007).

2. See Australian Human Rights Commission, Submission to the Parliamentary Joint Committee on Intelligence and Security, *Review of Certain Police Powers, Control Order, and Preventative Detention Orders* (Nov. 3, 2017) 12 [hereinafter Australian Human Rights Commission].

terrorism-related crime, have served any court-imposed sentence, and been released.<sup>3</sup>

Many states, such as the United Kingdom and Australia, have established control order regimes that have endured years of tailored litigation addressing their potential conflicts with International Human Rights Law (IHRL). However, as states without such experience are considering implementing control order regimes, such as Albania, Kosovo, and North Macedonia, two key legal questions must be addressed: (1) are control orders necessary to proactively address terrorist threats and (2) how can control order regimes be established in a way that does not violate individual protections granted by IHRL? The answer to the latter question, as this Note discusses in Part IV, changes depending on whether control orders are utilized in the pre-conviction or post-release context.

## II. BACKGROUND

Control orders are shaped to the particular perpetrator, but often include tracking devices, reporting intervals with official monitoring akin to parole, and biometric data and monitoring.<sup>4</sup> While control orders have been utilized pre-conviction or in lieu of extradition, there is a growing acceptance of the usefulness of post-release control orders to continue monitoring potentially dangerous criminal subjects who have not been deterred from terrorist involvement.<sup>5</sup> By most measures, a post-release control order regime makes the typical conditions required to issue a control order easier to satisfy and resolves some of the problems critics of control orders highlight.<sup>6</sup> Courts consider executive officials to be better placed than the judiciary to decide measures that are necessary to protect the public from terrorism-related activities.<sup>7</sup> Generally, control orders can only be made by a secretary of state, attorney general, or equivalent state official and must be issued by a court.<sup>8</sup> They must have a statutory time limit with

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3. See Australian Attorney-General's Department, *Control Orders, Preventative Detention Orders, Continuing Detention Orders and Powers in Relation to Terrorist Acts and Terrorism Offences* (Report, 2022) 5–6 [hereinafter *Annual Report*] (separating control orders into continuing and preventative detention orders).

4. See *id.* at 7–8 (listing forms of police powers in relation to terrorist acts and offenses).

5. See, e.g., HUM. RTS. WATCH, *REPRESSION OF FORMER POLITICAL PRISONERS IN TUNISIA* (2010) (providing examples of post-release monitoring processes in Tunisia, including frequent visits by police officers and restrictions on movement) [hereinafter *HUM. RTS. WATCH, TUNISIA*].

6. See discussion *infra* Part III.B.

7. See *Sec'y of State for the Home Dep't. v. MB* [2007] UKHL 46, [13], [2008] 1 AC (HL) 440 (appeal taken from EWCA (Civ)) (explaining that the Secretary of State makes control orders and courts confirm the control orders).

8. See *id.*

opportunity for renewal through adversarial judicial proceedings.<sup>9</sup> For example, in Switzerland, they are issued for a six-month period with the option for a one-time renewal, while in Australia, they are limited to twelve months with an additional opportunity for renewal.<sup>10</sup>

Control orders that fail to comply with the complainants' right to a fair hearing under Article 6 of the European Convention on Human Rights (ECHR) are invalid for states party to the treaty.<sup>11</sup> In the context of post-release control orders, judges must assess whether in light of the punishment imposed and the particular circumstances of the suspect following release it can be determined that the suspect has not been deterred from terrorist activity or has re-engaged in identified terrorism-related activity.<sup>12</sup> There is precedent both at the European Court of Human Rights (ECtHR) and elsewhere to indicate the ways in which a control order regime can be implemented.<sup>13</sup> These same cases also highlight the ways in which control orders can push up against or outright violate IHRL.<sup>14</sup> The primary concern posited by critics of control orders focuses on the due process issues with issuing preventative detention orders outside of the normal criminal justice processes.<sup>15</sup>

#### A. Control Order Regime Due Process Concerns

In international law, due process protections are laid out in numerous agreements memorialized in the mid-twentieth century. The protection of human rights in the broadest sense was codified in the

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9. See HUM. RTS. WATCH, COMMENTARY ON PREVENTION OF TERRORISM BILL 6 (2005).

10. See LOI FÉDÉRALE SUR LES MESURES POLICIÈRES DE LUTE CONTRE LE TERRORISME [PMCT] [Federal Act on Police Measures to Combat Terrorism] June 13, 2021, RO 2021 565, art. 23g (Switz.); *Criminal Code Act 1995* (Cth) s104.5 (Austl.).

11. See European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, E.T.S. No. 5.

12. See *Sec'y of State for the Home Dep't. v. AT* [2009] EWHC 512, [18] (Admin) (UK).

13. See generally *Sec'y of State for the Home Dep't. v. AF* [2009] UKHL 28 [77] (discussing whether the procedure involved in making a control order violated the right to a fair hearing); *De Tommaso v. Italy*, App. No. 43395/09, 205 Eur. Ct. H.R. (Feb. 23, 2017), <https://hudoc.echr.coe.int/fre?i=001-171804> [<https://perma.cc/H2KQ-HTKP>] (archived Sept. 10, 2023) (discussing the level of vague language and judicial discretion permissible in a control order regime); *Timofeyev v. Russia*, App. Nos. 45431/14 & 22769/15, 384 Eur. Ct. H.R. (Jan. 2021), <https://hudoc.echr.coe.int/fre?i=002-13097> [<https://perma.cc/DX5Z-A99J>] (archived Sept. 10, 2023) (discussing whether the control order measures were proportionate to the states goals); *İletmiş v. Turkey*, App. No. 29871/96, 811 Eur. Ct. H.R. (2005) (discussing the legality of withholding a passport in the context of control order measures).

14. See generally *AF* [2009] UKHL 28; *De Tommaso*, 205 Eur. Ct. H.R.; *Timofeyev*, 384 Eur. Ct. H.R.; *İletmiş*, 811 Eur. Ct. H.R.

15. See Amnesty Int'l, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe*, at 48, AI Index EUR 01/5342/2017 (Jan. 17, 2017) [hereinafter Amnesty Int'l].

UN Charter in 1945.<sup>16</sup> The preamble and Article 1(3) state that one of the primary reasons for establishing the organization was “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>17</sup>

In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights, without a dissenting vote, elucidating what the UN Member States considered to be the basic principles of human rights.<sup>18</sup> Specifically, Article 10 of the declaration states that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”<sup>19</sup> Article 11 further provides that “[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”<sup>20</sup> While these due process rights did not initially create obligations for states because the Universal Declaration of Human Rights was not a binding treaty, they do now because they have become Customary International Law (CIL).<sup>21</sup>

CIL is a subset of international law that derives its rules from (1) consistent and widespread state practice and (2) states’ opinion that such practice is legally binding (known as *opinio juris*).<sup>22</sup> While treaties only bind the states party to the treaty, CIL is binding on all states.<sup>23</sup> Some of the indicators that the Universal Declaration of Human Rights has been adopted into CIL include the incorporation of the provisions in many state’s domestic laws, references to the duty of states to respect the declaration in UN resolutions, official statements criticizing states for such human rights violations, and court decisions that have used the declaration as a standard for judicial decision-making.<sup>24</sup>

Following the declaration, the binding International Covenant on Civil and Political Rights (ICCPR) codified the due process provisions

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16. See James W. Skelton, Jr., *Standards of Procedural Due Process Under International Law vs. Preventive Detention in Selected African States*, 2 HOUS. J. INT’L L. 307, 308 (1980).

17. U.N. Charter art. 1, ¶ 3.

18. Skelton, *supra* note 16, at 309.

19. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 10 (Dec. 10, 1948).

20. *Id.* at art. 11.

21. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMPAR. L. 287, 345–46 (1995).

22. *Id.* at 319.

23. Skelton, *supra* note 16, at 309.

24. See Hannum, *supra* note 21, at 322.

when the UN General Assembly adopted it in 1966.<sup>25</sup> Article 9(1) of the covenant states that “no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”<sup>26</sup> Article 14 adds that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>27</sup> To date, 173 countries have ratified the ICCPR.<sup>28</sup> The United States issued numerous—the most out of all states parties—reservations, understandings, and declarations upon ratifying the ICCPR.<sup>29</sup> However, none of the reservations, understandings, and declarations directly implicate the rights that control orders may infringe upon.<sup>30</sup> Any state that establishes a control order regime will be bound by any human rights treaty—such as the ICCPR or ECHR—to which it is a state party and all states are bound by the obligations reflected in the ICCPR and the ECHR insofar as those obligations reflect CIL. Thus, a state must consider the use of control orders in accordance with their human rights obligations, even if its domestic laws lack due process protections.<sup>31</sup>

The first key due process concern over the use of pre-conviction control orders is the threat these administrative measures violate due process because they restrict the liberties of free movement and assembly without an official conviction.<sup>32</sup> The ICCPR is one of many treaties that recognizes the rights of individuals to a fair trial prior to conviction or punishment.<sup>33</sup> Although some control orders are established during conditions of national emergency (where some derogations are permissible under CIL),<sup>34</sup> the Human Rights Committee has interpreted the right to fair trial to be a liberty that may not be

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25. Skelton, *supra* note 16, at 311–12.

26. International Covenant on Civil and Political Rights art. 9, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force in 1976).

27. *Id.* at art. 14, ¶ 1.

28. See *Ratification Status for CCPR – International Covenant on Civil and Political Rights*, UNITED NATIONS HUM. RTS. TREATY BODIES, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en) (last visited Sept. 10, 2023) [<https://perma.cc/BL8C-FYH9>] (archived Aug. 19, 2023).

29. Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. UNIV. J. INT'L HUM. RTS. xxxvi, xxxvii (2005).

30. See *id.* at xl.

31. See Skelton, *supra* note 16, at 309.

32. See Amnesty Int'l, *supra* note 15, at 48.

33. International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171.

34. See discussion *infra* Part I.C.

suspended.<sup>35</sup> Thus, under the ICCPR, it is not permissible under IHRL for a state to violate the right to a fair trial under any circumstances.<sup>36</sup>

Another primary due process concern is that control order regimes will violate the lawful detention arrest or detention provisions by allowing monitoring mechanisms to be in place prior to the official arrest or conviction of the individual in question.<sup>37</sup> In particular, the concern is focused on control orders that allow for curfews to be instituted against individuals that pose a potential threat instead of being restricted to individuals that have been officially arrested.<sup>38</sup>

Amnesty International has provided their own solution to these potential abuses of liberty by specifically calling on all EU states to:

- (1) Ensure that any measure to control a person's freedom of movement and associated rights adversely affected by the application of administrative control measures is both necessary and proportionate to achieve a legitimate governmental aim.
- (2) Ensure that any control measure has prior judicial authorization and ongoing judicial or other independent supervision.
- (3) Ensure that people are told why they have been subjected to control measures and can access the information that is the basis for the measures so that they can effectively mount a challenge.
- (4) Guarantee that if control measures, singularly or taken together, amount to a deprivation of liberty, an affected person has the full range of fair trial safeguards to challenge such a deprivation of liberty.
- (5) Ensure that if a person is reasonably suspected of having committed a terrorism-related act, he or she should be charged and prosecuted in a fair trial.<sup>39</sup>

Some of these concerns have come to life. In Tunisia, for example, the court system was required to impose control orders at the time of sentencing but chose to have a second trial for Abdelkarim Harouni—after he was already in prison—to add an additional two years of

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35. Hum. Rts. Comm., General Comment No. 32, ¶¶ 6, 59, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007); Hum. Rts. Comm., General Comment No. 29, ¶¶ 7, 15, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001). The Human Rights Committee is a treaty-based body of independent experts tasked with monitoring the implementation and adherence of states to the ICCPR. See *Human Rights Committee*, UNITED NATIONS HUM. RITS. TREATY BODIES, <https://www.ohchr.org/en/treaty-bodies/ccpr> (last visited Sept. 10, 2023) [<https://perma.cc/YG9J-9U49>] (archived Aug. 19, 2023).

36. Hum. Rts. Comm., General Comment No. 29, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

37. Amnesty Int'l, *supra* note 15, at 49–50.

38. *See id.*

39. *Id.* at 49 (numerics added).

administrative control after his release.<sup>40</sup> During this administrative release period, Harouni was required to check in with government officials every day.<sup>41</sup> The applicability of Amnesty International's recommendations to control order regimes such as Tunisia's will be addressed further in Part III of this Note.

The remaining concerns, including judicial review mechanisms, low standards of proof, and lack of duration limitations, can best be understood within the context of the early UK regime.<sup>42</sup> In 2005, the UK established their first control order regime through the Prevention of Terrorism Act.<sup>43</sup> The system initially distinguished between derogating control orders and non-derogating controls orders, the former of which was never utilized.<sup>44</sup> The text defined control orders as "an order made against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism."<sup>45</sup> The Act proceeded to provide a non-exhaustive list of restrictions that could be imposed upon an individual, including limiting associations with specified persons, places of residence, individuals granted access to such places of residence, access to specified locations, movements within or outside the country, and a requirement for specified persons to be allowed to enter and search any place of residence.<sup>46</sup> Human Rights Watch submitted a letter to the UK Parliament on the bill that outlined many of the IHRL concerns with the legislation, particularly focused on the granting of power to the executive to issue "control orders for an indefinite period of time on the basis of a low standard of proof and the use of secret evidence."<sup>47</sup>

The non-derogating control order legislation imposed a "reasonable grounds" standard that falls short of the "beyond a reasonable doubt" standard required for a criminal conviction.<sup>48</sup> The Act also did not allow for adequate judicial review of the expansive executive actions.<sup>49</sup> Instead of being permitted to conduct a de novo review of a typical appeal process, UK courts were only entitled to review the scope of the Secretary's powers.<sup>50</sup> Even further, the bill allowed the Secretary of State to determine when material should not

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40. See HUM. RTS. WATCH, TUNISIA, *supra* note 5, at 11–14.

41. See *id.*

42. Hum. Rts. Watch, *Letter to the UK Parliament on Control Orders* (Mar. 2, 2009), <https://www.hrw.org/news/2009/03/02/letter-uk-parliament-control-orders> [<https://perma.cc/QUJ7-KWJV>] (archived Sept. 10, 2023) [hereinafter *Letter to the UK Parliament*].

43. Stuart Wallace, *Derogations from the European Convention on Human Rights: The Case for Reform*, 20 HUM. RTS. L. REV. 769, 777 (2020).

44. See *id.* at 778–79.

45. Prevention of Terrorism Act 2005, c. 1 (UK).

46. *Id.*, c. 4.

47. See *Letter to the UK Parliament*, *supra* note 42; COMMENTARY ON PREVENTION OF TERRORISM BILL, *supra* note 9, at 3–4.

48. COMMENTARY ON THE PREVENTION OF TERRORISM BILL, *supra* note 9, at 4.

49. See *id.* at 5.

50. *Id.*

be disclosed and required the courts to consider secret evidence to meet the “reasonable grounds” standard.<sup>51</sup> Such orders were in place for twelve months and could be renewed indefinitely if the Secretary of State considered there to be a pressing public risk of release.<sup>52</sup> This Act was followed by a series of cases challenging the validity of the control orders in light of IHRL.<sup>53</sup>

### B. *European Court of Human Rights Jurisprudence*

There are three provisions of the ECHR that are relevant to the implementation and monitoring of control order regimes. Article 5 of the ECHR establishes the parameters for the use of a control order.<sup>54</sup> The article establishes a “right to liberty,” particularly a right to physical liberty, for individuals and describes protections to prohibit arbitrary deprivation of the right.<sup>55</sup> Article 5 creates a restrictive body of IHRL that allows the “right to liberty” to be restricted only in a specified list of scenarios.<sup>56</sup> The provisions relevant to control orders include:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.<sup>57</sup>

Article 6 of the ECHR protects the “right to a fair trial,” meaning a right to a trial conducted within a reasonable amount of time and by

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51. *Id.*

52. *Id.* at 6.

53. *See* Sec’y of State for the Home Dep’t. v. JJ [2007] UKHL 45, [1]– [3], [2008] 1 AC 385 (considering the validity of control orders imposed on six individuals suspected to have been involved in “terrorism-related activities” but not charged with any related offense); Secretary of State for the Home Dept. v. AF [2009] UKHL 28, [23] (examining the validity of control orders imposed on an individual with alleged links with extremists where the case against him was closed material).

54. *See* EUROPEAN CT. ON HUM. RTS., GUIDE ON ARTICLE 5 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: RIGHT TO LIBERTY AND SECURITY 8 (updated Feb. 28, 2023), <https://ks.echr.coe.int/web/echr-ks/article-5> [<https://perma.cc/3SW5-ETT7>] (archived Sept. 11, 2023).

55. *See id.*

56. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 11, at art. 5.

57. *Id.*

an impartial and independent tribunal.<sup>58</sup> Finally, Article 7, the “no punishment without law” provision, protects individuals from being punished for actions that were not considered criminal offenses at the time the conduct occurred.<sup>59</sup>

In 2007, a UK appellate court analyzed the legality of the Prevention of Terrorism Act after six individuals were subjected to pre-conviction control orders.<sup>60</sup> The court found the government violated Article 5 of the ECHR and held that certain house arrest measures resembled conventional modes of imprisonment enough to constitute a deprivation of liberty without a fair trial, in clear violation of IHRL;<sup>61</sup> “the effect of the 18-hour curfew, coupled with the effective exclusion of social visitors, meant that the controlled persons were in practice in solitary confinement for this lengthy period every day for an indefinite duration [and] very little opportunity for contact with the outside world.”<sup>62</sup> The court also placed an emphasis on the importance of the ability of controlled individuals to live a relatively normal life when valid restrictions are placed on their movements.<sup>63</sup> In this case, “the requirement to obtain prior Home Office clearance of any social meeting outside the flat in practice isolated the controlled persons during the non-curfew hours . . . [meant that] [t]heir lives were wholly regulated by the Home Office, as a prisoner’s would be, although breaches were much more severely punishable.”<sup>64</sup> In fact, the appellate court went as far as claiming that individuals in prison were granted more freedom than the controlled individuals because of the opportunities to “enjoy the association with others and the access to entertainment facilities which a prisoner in an open prison would expect to enjoy.”<sup>65</sup>

In 2009, the UK statute was once again found invalid under IHRL, specifically in violation of Article 6 of the ECHR that protects the right to a fair trial.<sup>66</sup> In this case, the court questioned whether certain information being withheld from the controlled party constituted an unfair trial.<sup>67</sup> In the UK, at that time, judges required proof of reasonable suspicion that an individual was involved in terrorist-related activities in order to issue a control order.<sup>68</sup> That information was frequently not shared with the controlled party’s counsel.<sup>69</sup> This series of litigation led to the adoption of the Terrorism Prevention and

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58. *Id.* at art. 6.

59. *Id.* at art. 7.

60. Sec’y of State for the Home Dep’t. v. JJ [2007] UKHL 45, [3].

61. *Id.* at [15].

62. *Id.* at [24].

63. *See id.*

64. *Id.*

65. *Id.*

66. Sec’y of State for the Home Dep’t. v. AF [2009] UKHL 28, [1].

67. *Id.* at [62]–[64].

68. *See id.*

69. *See id.* at [64].

Investigation Measures (TPIM), passed in 2011 in an attempt to utilize control orders in a manner that complied with the ECHR.<sup>70</sup> Part II.C of this Note will discuss the current UK control order regime in greater depth.

The ECtHR has made significant headway with other European administrative control regimes in outlining the outer bounds of control order legality over the past couple of decades.<sup>71</sup> In *De Tommaso v. Italy*, the ECtHR considered whether a control order requiring an individual to report to the police weekly, begin looking for work, not move from his current place of residence, not associate with individuals with a criminal record, and stay within his residence between the hours of 10 p.m. and 6 a.m. had violated Article 5 of the ECHR.<sup>72</sup> The court ruled these measures did not reach the threshold of deprivation of liberty in Article 5 and noted in particular that the individual had been allowed to maintain a social life by being authorized to leave his residence during the day.<sup>73</sup> The court placed significant weight on whether an individual was allowed to participate in what it viewed as the crucial pillars of modern life.<sup>74</sup> The common requirement for the issuance of a control order is evidence that a controlee poses a present danger to society.<sup>75</sup> The court observed that such danger is “not necessarily linked to the commission of a specific offence, but rather to the existence of a complex situation of a certain duration indicating that the individual had a particular lifestyle that prompted alarm for public safety.”<sup>76</sup>

Control orders, particularly pre-conviction orders, have also been considered in light of Article 7 of the ECHR.<sup>77</sup> In *Timofeyev and Postupkin v. Russia*, the court considered the validity of supervision

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70. See Wallace, *supra* note 43, at 778–79.

71. See *De Tommaso v. Italy*, App. No. 43395/09, 205 Eur. Ct. H.R. 21 (Feb. 23, 2017), <https://hudoc.echr.coe.int/fre?i=001-171804> [<https://perma.cc/H2KQ-HTKP>] (archived Sept. 10, 2023) (holding that control order requiring individual to report to police weekly and remain at residence under curfew did not violate his Article 5 rights); *Timofeyev v. Russia*, App. Nos. 45431/14 & 22769/15, 384 Eur. Ct. H.R. 1–2 (Jan. 2021), <https://hudoc.echr.coe.int/fre?i=002-13097> [<https://perma.cc/DX5Z-A99J>] (archived Sept. 10, 2023) (holding that supervision measures imposed based on the individual's threat of recidivism did not violate the individual's Article 7 rights); *İletmiş v. Turkey*, App. No. 29871/96, 811 Eur. Ct. H.R. 5–6 (2005) (holding that preliminary investigation lasting fifteen years violated citizen's Article 6 right to a “hearing within a reasonable time”).

72. EUROPEAN CT. OF HUM. RTS., GUIDE TO THE CASE-LAW OF THE EUROPEAN OF : TERRORISM 28–29 (2022), <https://ks.echr.coe.int/web/echr-ks/terrorism> [<https://perma.cc/8JHR-GJQJ>] (archived Sept. 11, 2023).

73. *Id.* at 29.

74. See *id.*

75. See *De Tommaso*, 205 Eur. Ct. H.R. at 21 (observing that an individual must be deemed to pose a “current danger” based on his lifestyle for the court to impose a control order).

76. See *id.*

77. See *Timofeyev v. Russia*, App. Nos. 45431/14 & 22769/15, 384 Eur. Ct. H.R. 2 (Jan. 2021), <https://hudoc.echr.coe.int/fre?i=002-13097> [<https://perma.cc/DX5Z-A99J>] (archived Sept. 10, 2023).

measures imposed on a convicted individual post-release.<sup>78</sup> The court reasoned that because the imposition of the supervision measures depended on the threat of recidivism and not on the individual's guilt, it did not fall within the scope of Article 7.<sup>79</sup> This reasoning could be applied to the majority of post-release control orders that focus on the level of "dangerousness" posed by the individual requiring additional surveillance or restrictions.<sup>80</sup> However, pre-conviction control orders remain open to conflicts with Article 7 given that they could be issued for conduct that was not criminal at the time of the offense.<sup>81</sup>

When a control order includes a restriction on leaving the territory, Article 2 of Protocol No. 4 to the ECHR—which states that restrictions on liberty, including restrictions on moving residences or leaving the territory, can be legally established when they are "necessary in a democratic society in the interests of national security or public safety"—applies.<sup>82</sup> In *İletmiş v. Turkey*, the state confiscated the passport of an individual for several years after charging him with separatist activities that threatened national security.<sup>83</sup> The court found this violated the controlee's rights and noted that the longer the passport was held without legitimate evidence of need provided, the less legitimate the need for the action became.<sup>84</sup> This indicates that extensive prohibitions on controlee's leaving the territory must be accompanied by evidence of a continuing public safety reason to maintain the order.<sup>85</sup> Additionally, while the ECtHR found Italy did not violate Article 5 of the Convention in *De Tommaso v. Italy*, Italy did violate Article 2 of Protocol No. 4 because of the excessively broad and undefined language in Italy's control order regime legislation.<sup>86</sup>

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78. *See id.*

79. *See* EUROPEAN CT. OF HUM. RTS., *supra* note 72, at 27 (holding that the supervision methods were preventative, not punitive, and thus not a penalty under Article 7).

80. *See De Tommaso*, 205 Eur. Ct. H.R. at 21–22 (reasoning that an individual must pose a "current danger" to justify the imposition of a control order).

81. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 11, at art. 7 (stating that an individual cannot be found guilty of or punished for a criminal offense for an act or omission that was not legally a criminal offense at the time it was committed).

82. *See* Protocol No. 4 to Amend the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Sept. 16, 1963, E.T.S. No. 46 [hereinafter ECHR Protocol 4].

83. *See İletmiş v. Turkey*, App. No. 29871/96, 811 Eur. Ct. H.R. 14, 24, 31 (2005) (detailing how police confiscated individual's passport in 1992, and another passport was not issued to him until after July 1, 1999).

84. *Id.* at 47 (holding that with the passing of time without evidence, the applicant's right to freedom of movement outweighed the prevention of crime).

85. *See id.* at 48 (observing that because no evidence of threat to public safety emerged during individual's fifteen-year prohibition from leaving country, the prohibition was not justified).

86. EUROPEAN CT. OF HUM. RTS., *supra* note 72, at ¶ 79.

### C. *Derogations Law*

Understanding derogations law is crucial to understanding how control order regimes can better be written within legislation and implemented by law enforcement officers. Article 15 of the ECHR codifies derogations to European human rights law as follows:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.<sup>87</sup>

Prior to derogations law, human rights protections were frequently eroded during times of public emergency.<sup>88</sup> The ECHR specifies some rights that are non-derogable.<sup>89</sup> This includes protections on the right to life, prohibitions on torture, prohibitions on slavery, and protection from punishment without due process of the law.<sup>90</sup> These rights are to be protected no matter how severe the state of national emergency existing within a nation is.<sup>91</sup>

The ECtHR has interpreted the first condition for permissible derogations—the “public emergency” requirement—narrowly.<sup>92</sup> In *Lawless v. Ireland*, the ECtHR defined a “public emergency threatening the life of the nation” as “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed.”<sup>93</sup> The court found this circumstance was present in the

87. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 11, at art. 15.

88. See Wallace, *supra* note 43, at 770 (emphasizing how “[t]he implementation of emergency laws in the absence of derogation has also led to significant erosion of human rights protection”).

89. See European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 11, at art. 2 (right to life); *id.* at art. 3 (prohibition of torture); *id.* at art. 4 (prohibition of slavery and forced labour); *id.* at art. 7 (no punishment without law).

90. See European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 11, at art. 2 (right to life); *id.* at art. 3 (prohibition of torture); *id.* at art. 4 (prohibition of slavery and forced labour); *id.* at art. 7 (no punishment without law).

91. See European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 11, at art. 15, ¶ 2 (“No derogation from Article 2 [in time of war or other public emergency], except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.”); Wallace, *supra* note 43, at 770.

92. See Wallace, *supra* note 43, at 770–71 (defining ‘public emergency’ as “an exceptional situation of crisis or emergency” that affects the entire population and poses a threat to the organized life of the state).

93. *Lawless v. Ireland* (No. 3), App. No. 332/57, 2 Eur. Ct. H.R. (1961) 28.

case, as a secret army had been conducting unconstitutional activities within Ireland while launching operations out of a neighboring state.<sup>94</sup> In contrast, the ECtHR, in *Dareskizb Ltd. v. Armenia*, found that there was insufficient evidence to conclude that massive protests by political opposition members in Armenia—following the announcement of preliminary election results in 2008—reached the threshold of a public emergency.<sup>95</sup> Therefore, the derogations made by the government, including restrictions on the media and freedom of expression generally, were not justified by derogations law.<sup>96</sup>

The second requirement—that states only take derogating measures that are strictly required by the threat posed—has also been interpreted with a more narrow lens.<sup>97</sup> Although the court has recognized that states are afforded a margin of appreciation to determine the extent of the national threat and what actions should best be taken to alleviate such exigencies,<sup>98</sup> the ECtHR has made it clear that this power is not unlimited.<sup>99</sup> In *Aksoy v. Turkey*, the court found that the Turkish government had not strictly tailored the derogation to the threat when an individual was held for fourteen days before being granted access to a judge.<sup>100</sup> The ECtHR rejected Turkey's argument that the widespread terrorism in the region prevented judicial intervention for the two weeks on the basis that it lacked the proper evidence to indicate such action was necessary as a result of the identified threat of terrorism.<sup>101</sup> Similarly, in *Sahin Alpay v. Turkey* and *Mehmet Hasan Altan v. Turkey*, the court found Article 5 violations occurred when two journalists were arrested and detained following a coup attempt.<sup>102</sup> Once again, the court reasoned that the derogations taken were not proportionate or strictly applied to the stated public emergency.<sup>103</sup>

Finally, derogations require a public notice of “the measures taken, the reasons justifying them, and the date on which they cease to apply.”<sup>104</sup>

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94. See EUROPEAN CT. OF HUM. RTS., FACT SHEET – DEROGATION IN TIME OF EMERGENCY 3 (2022).

95. See *id.* at 6 (concluding that there was insufficient evidence that the protests threatened “the life of the nation” and justified a derogation under Article 15).

96. See *id.*

97. See *id.*

98. See *id.* at 7 (the Ireland v. United Kingdom court noting each state must determine if the “life” of a nation is threatened by a public emergency and, if so, identify the measures necessary to overcome the emergency).

99. See *id.* at 8.

100. See *id.*

101. See *id.*

102. See *id.* at 9.

103. See *id.*

104. *Id.* at 11 (examining the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, § 3, Nov. 4, 1950).

Justifying control orders as a form of derogation under IHRL can complicate compliance with the ECHR and ICCPR.<sup>105</sup> Such control orders must be necessary for a state of public emergency and strictly construed to target the identified threat.<sup>106</sup> This problem was clearly identified within the 2005 Prevention of Terrorism Act in the UK regime, where a derogating control order was one that imposed obligations that reached the threshold for a deprivation of liberty under Article 5 of the ECHR.<sup>107</sup> There is a concern that states will use derogating control orders as a way to circumvent the due process and basic liberty protections under IHRL without tailoring them enough to a public emergency to balance the harms to individual rights.<sup>108</sup>

#### D. Control Order Regime Provisions

The different ways that states have chosen to utilize control orders provide ample data for understanding how new control order regimes can and should be established. The modern UK control order regime, established under the TPIM, prohibits the application of terrorism prevention and investigative measures to an individual unless several conditions are met.<sup>109</sup> The listed conditions in the TPIM include the belief that the individual has been involved in relevant terrorism-related activity, some of this relevant activity is new, it is reasonably necessary for control order measures to be used to protect the public, the specific measures requested are reasonably considered necessary to restrict the individual's involvement in terrorism-related activity, and the court has granted such permission or the urgency of the case calls for action without such permission.<sup>110</sup>

While the TPIM restricts the use of control orders in more ways than the old UK regime, such as providing an exclusive list of twelve measures that may be utilized instead of leaving such discretion to the Secretary of State, it expands the program in a few key ways.<sup>111</sup> For example, the TPIM added an "overnight residence measure" that would restrict an individual's freedom of movement and confine them to their own residence overnight. Added protections can be found in the electronic monitoring measures. While the Secretary of State can

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105. See Wallace, *supra* note 43, at 772 (quoting the ECtHR as stating that there is no explicit requirement that emergencies and corresponding derogations must be temporary).

106. See *id.* at 789 (emphasizing that Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms specifies that a public emergency must threaten the life of the nation before derogation may be adopted).

107. See Prevention of Terrorism Act 2005, c.2, Explanatory Notes ¶¶ 44–45 (UK).

108. *Letter to the UK Parliament*, *supra* note 42.

109. See Terrorism Prevention and Investigation Measures Act 2011, c.23, Explanatory Notes ¶¶ 61–65 (UK).

110. *Id.*

111. Clive Walker, *The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!*, 34 MELB. UNIV. L. REV. 144, 150 (2013).

regulate the possession and use of electronic devices under the TPIM, a contolee must have access to a landline, in-home computer with internet access, and a mobile phone without internet access.<sup>112</sup> Even further, the TPIM requires that freedom of association restrictions be targeted at specific individuals instead of the blanket ban on social activities that was allowed under the previous control order regime.<sup>113</sup> Additional protections for financial independence were also added in this legislation, with contolees being allowed—at minimum—one bank account.<sup>114</sup> The Secretary may still restrict access to specific financial services.<sup>115</sup> The UK now has one of the more restrictive control order regimes compared to similarly situated states.

In June of 2021, Switzerland adopted the Federal Act on Police Measures to Combat Terrorism (MPT) with conditions listed in Article 23(f) that are required in order to impose control order measures.<sup>116</sup> This includes requirements for the risk of the individual to “not appear to be effectively addressable by social, integrative, or therapeutic measures,” for typical means of terrorism prevention to not be sufficient, and for no substituting derogation order to have already been made.<sup>117</sup> These requirements are fewer in number, have a lower threshold to meet, and allow for more discretionary analysis than the UK regime.<sup>118</sup> The MPT also provides a list of appropriate measures available according to the discretion of the federal police, such as requiring an individual to attend meetings, prohibiting contact with specified persons, prohibiting certain movements outside of a designated perimeter, prohibiting the individuals travel outside the territory, monitoring an individual’s location via electronic surveillance devices, and instituting house arrest in the case of violation of one of such previously mentioned orders.<sup>119</sup>

In December of 2019, New Zealand passed the Terrorism Suppression (Control Orders) Act allowing restrictions to be placed on those returning to New Zealand after engaging in terrorist acts overseas.<sup>120</sup> After observing how the control orders were utilized, the New Zealand Ministry of Justice recommended that the legislature limit the use of control orders to only apply to individuals that have

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112. *Id.* at 152.

113. *Id.*

114. *Id.* at 153.

115. *Id.*

116. LOI FÉDÉRALE SUR LES MESURES POLICIÈRES DE LUTE CONTRE LE TERRORISME [PMCT] [Federal Act on Police Measures to Combat Terrorism] June 13, 2021, RO 2021 565, art. 23f (Switz.).

117. *Id.*

118. *See* Terrorism Prevention and Investigation Measures Act 2011, c.23, Explanatory Notes ¶¶ 61–65 (UK).

119. PMCT, RO 2021 565, at arts. 23j–23q (Switz.).

120. N.Z. MINISTRY OF JUST., IMPACT SUMMARY: EXTENDED CONTROL ORDERS 3 (2020).

been previously convicted on terrorism-related charges.<sup>121</sup> The Counter-Terrorism Acts (Designations and Control Orders) Amendments Bill was signed into law by the Governor-General in May of 2023.<sup>122</sup> The bill also includes notification requirements for when an individual's terrorism designation is altered or reviewed.<sup>123</sup>

In Australia, the control order regime was modeled after the old UK control order measures and includes a more extensive list of measures than the current UK regime.<sup>124</sup> The Australian Federal Police can apply to the courts for a control order to be issued for an individual.<sup>125</sup> The court must also consider an individual's financial and physical circumstances before approving an application.<sup>126</sup> The criminal code requires the Australian Federal Police Minister to provide an annual report on the operation of control orders within the state.<sup>127</sup> The data provided in these annual reports includes the number of control orders issued, the number of control orders that the federal police chose not to confirm, the amount confirmed at hearing, the amount declared void at hearing, the particular details of the complaints and information related to the control orders, the number and type of monitoring control orders executed, and the results of any investigations into the control order system by the Australian Federal Police.<sup>128</sup> During the most recent inspection reported in November 2021, the federal police did not identify systematic compliance issues.<sup>129</sup> However, thirty-nine instances of noncompliance were discovered, resulting in the inspecting agency providing four general practice suggestions for improvement and six specific suggestions to address the compliance issues found.<sup>130</sup>

Tunisia has a version of control orders that are categorized under "additional penalties of administrative controls."<sup>131</sup> Articles 23 and 24 of the Tunisian Penal Code grant the authority to the administration to determine the specific location where a former prisoner must reside after release.<sup>132</sup> The duration of this order and the restrictions on the former prisoner's ability to leave are determined at the time of sentencing.<sup>133</sup> Within these variations between control order regimes,

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121. *See id.* at 5, 7.

122. Counter-Terrorism Acts (Designations and Control Orders) Amendments Bill (176–2) (select committee report) (N.Z.).

123. *Id.*

124. *See* Terrorism Prevention and Investigation Measures Act 2011, c.23, Explanatory Notes ¶¶ 61–65 (UK); *Criminal Code Act 1995* (Cth) s104.5 (Austl.).

125. *Criminal Code Act 1995* (Cth) s104.5 (Austl.).

126. *Id.*

127. *Annual Report*, *supra* note 3, at 1.

128. *Id.*

129. *Id.* app. at 2 (Commonwealth Ombudsman Report).

130. *Id.*

131. HUM. RTS. WATCH, TUNISIA, *supra* note 5, at 13.

132. *Id.*

133. *Id.* at 9.

the key provisions that provide limitations and enforcement mechanisms include: the state official issuing the order must ensure there is evidence available to justify the reasonableness of the order; there must be evidence indicating the potential controlee poses a danger to society; the potential controlee must be given notice of the order with relevant evidence indicating its necessity; judicial review must be available (preferably at a set timetable); and there must be an opportunity for the individual to appeal the control order.<sup>134</sup>

### III. ANALYSIS

Some commentators argue that states created control order regimes in response to their inability to use derogations law under the narrowly defined constraints of the ECHR.<sup>135</sup> If this is correct, then control orders are an attempt to circumvent IHRL requirements by depriving individuals of their liberties without the necessary emergency and proportionality required by the ECHR.<sup>136</sup> In a more positive light, control orders that are less restrictive than what is allowed under derogations law can be viewed as a compromise between considering human rights and national security concerns.<sup>137</sup> Control orders were created with the intention of preventing ideological radicalization and future terrorist attacks from ever occurring. As New Zealand has explained it, control orders “seek to uphold public safety, prevent terrorism, and support a person’s rehabilitation and reintegration.”<sup>138</sup> By definition, a goal of prevention cannot be reasonably achieved by derogations law.<sup>139</sup> Derogations require a public emergency to already exist and for the measures being taken to be narrowly tailored to resolve the emergency.<sup>140</sup> In order to prevent an emergency from occurring in the first place, a different legal regime is necessary to allow more leeway in official action and for responses to be tailored to the circumstances. This is the foundation for the establishment of a control order regime over reliance on derogations law.

In response to Australia lowering the minimum age for an individual to be subject to a control order from sixteen years old to fourteen years old, Human Rights Watch expressed concern over the

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134. See *Sec’y of State for the Home Dep’t. v. AF* [2009] UKHL 28, [31]; *De Tommaso v. Italy*, App. No. 43395/09, 205 Eur. Ct. H.R. 12 (Feb. 23, 2017); *Timofeyev v. Russia*, App. Nos. 45431/14 & 22769/15, 384 Eur. Ct. H.R. 2 (Jan. 2021); *İletmiş v. Turkey*, App. No. 29871/96, 811 Eur. Ct. H.R. 7 (2005).

135. See Wallace, *supra* note 43, at 778–79.

136. See *id.*

137. See *id.*

138. *Control Orders*, N.Z. MINISTRY OF JUST., <https://www.justice.govt.nz/courts/civil/control-orders/> (last visited Sept. 12, 2023) [<https://perma.cc/GNZ5-LE79>] (archived Aug. 20, 2023).

139. See Wallace, *supra* note 43, at 772.

140. See *id.*

state “incrementally chip[ping] away at fundamental rights.”<sup>141</sup> This concern, which is shared by many commentators on this topic,<sup>142</sup> is part of the larger issue of balancing national security concerns with protecting individual liberties. If control order regimes are structured too leniently—such as lower burden of proof or less oversight—there will almost certainly be due process violations when individual liberties are deprived without the necessary cause or notice provided to the controlled individual.

A series of court opinions addressing the legal challenges against the early UK control order regime demonstrated the problems associated with a lenient control order regime.<sup>143</sup> The early UK regime functionally imprisoned individuals within their own homes with the eighteen-hour curfews and extensive social restrictions.<sup>144</sup> Coupling this with the lack of transparency in information provided to controlled individuals, the UK system failed to balance the rights being deprived with the amount of terrorism being prevented.<sup>145</sup>

The threat that terrorism poses to modern society must be at the forefront of any cost-benefit analysis when considering control order regimes in general and, more specifically, the benefits and drawbacks to controlling provisions. The analysis for pre-conviction and post-release orders differs significantly because of the legal context for each controlling provision. Pre-conviction orders present more of a concern for violations of individual liberty and are viewed as attempts to avoid IHRL law, while post-release orders can be considered an extension of the criminal justice system and an alternative type of sentencing.

#### A. *Pre-conviction Control Orders*

Individuals who participate in a terrorist network but have not been convicted of any terrorism-related offenses pose an identifiable threat to public safety.<sup>146</sup> In particular, individuals that have chosen to engage in terrorist or extremist activity overseas before returning to their home states present the primary justification for pre-conviction

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141. Georgie Bright, *Australia Expands ‘Control Order’ on Children*, HUM. RTS. WATCH (Nov. 22, 2016), <https://www.hrw.org/news/2016/11/23/australia-expands-control-orders-children> [<https://perma.cc/3EPQ-P59U>] (archived Sept. 12, 2023).

142. See e.g., *Inquiry into the Counter-Terrorism Legislation Amendment Bill (No. 1) 2015*, AUS. HUM. RTS. COMM’N. (Dec. 9, 2015) (recommending the bill lowering the age requirements not be passed for human rights concerns); Austin Ramzy, *Australia Seeks Lower Age Threshold for Antiterror Controls*, N.Y. TIMES (Oct. 13, 2015) <https://www.nytimes.com/2015/10/14/world/australia/australia-proposes-extending-antiterror-controls-to-people-as-young-as-14.html> (reporting on civil society groups questioning the reach of the bill) [<https://perma.cc/KJ34-FM3Y>] (archived Oct. 18, 2023).

143. See *Sec’y of State for the Home Dep’t. v. JJ* [2007] UKHL 45, [3]; *Sec’y of State for the Home Dep’t. v. AF* [2009] UKHL 28, [24].

144. *Sec’y of State for the Home Dep’t. v. AF* [2009] UKHL 28, [24].

145. See *id.*

146. See N.Z. MINISTRY OF JUST., COVERSHEET: CONTROL ORDERS 9 (2019).

control orders.<sup>147</sup> Many states have chosen pre-conviction orders as their method of detaining and monitoring such individuals without sufficient evidence of criminal activity—either because the evidence is difficult to obtain abroad or there is not an “associating with terrorists” crime in the criminal code—for an official charge.<sup>148</sup> Evidence discussing the success of control orders is difficult to ascertain given the secretive nature of terrorism prevention operations.<sup>149</sup> In the case of the UK, the government has provided conflicting evidence on the effectiveness of the particularly restrictive early control order regime that was in place from 2005–2011.<sup>150</sup> For instance, “[i]n some cases control orders have successfully prevented involvement in terrorism-related activity. In the majority of cases, they have restricted and disrupted that activity without entirely eliminating it.”<sup>151</sup> Control order regimes become more concerning when they are viewed as alternatives to the criminal justice system instead of extensions, as in the case of the early UK regime. In spite of these concerns, control orders retain their appeal since they can be granted when there may not be enough evidence to sustain a criminal prosecution against an individual.<sup>152</sup> This can only be justified under IHRL when there is a present danger and an urgent need to limit the liberties of a particular individual.<sup>153</sup>

For any state to have a functioning pre-conviction control order regime that does not violate international human rights law, the enforcement agency and legislators charged with creating the program must avoid arbitrary restrictions and overly intrusive measures.<sup>154</sup> In 2017, the Australian Human Rights Commission submitted a review of Australia’s control order and preventative detention regime to the Parliamentary Joint Committee on Intelligence and Security.<sup>155</sup> One of the key recommendations from the report concluded that there was a lack of adequate evidence to demonstrate that the control order regime was “necessary and proportionate” to preventing future acts of terrorism.<sup>156</sup> An important consideration for the legal analysis of any control order regime is mentioned in the commission’s statement on the background human rights law at play: arbitrariness.<sup>157</sup>

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147. *Id.* at 15.

148. *See id.*

149. Walker, *supra* note 111, at 154.

150. *See id.*

151. *Id.*

152. *See* Australian Human Rights Commission, *supra* note 2, at 9–10, 12.

153. *See id.* at 9–10.

154. *Id.* at 11.

155. *Id.* at 4.

156. *Id.* at 14.

157. *See id.* at 7.

A key pillar of human rights law is the protection against arbitrary deprivations of liberty.<sup>158</sup> The commission accurately states that the burden must be placed on the government to demonstrate when a deprivation of liberty is justified by a legitimate national security interest or public emergency threat.<sup>159</sup> The commission expressed concerns over the monitoring mechanisms that Australia uses to ensure compliance with the control orders.<sup>160</sup> Instead of requiring evidence that a control order is actively being violated in order to grant a warrant for further monitoring, the issuing authority may grant it merely if it would “be likely to substantially assist in determining whether a control order has been or is being complied with.”<sup>161</sup> Concerns on the balancing of intrusiveness with the threat reduction that a control order provides are common and must be considered with new regimes. States must be careful, particularly when dealing with pre-conviction orders, to ensure that every controlling provision issued is justified by an identifiable danger and contains duration or scope of limitations that balance individual liberties with the public safety.

Most of the criticism of control order regimes focuses on the use of pre-conviction orders. For example, the list of recommendations discussed in Part II.C, that Amnesty International summarized as a starting point for states to ensure they are not violating individual liberties, are mostly targeted at pre-conviction legal concerns.<sup>162</sup> Ensuring that any order is necessary and proportionate and that notice is provided to a controlee can be applied to both types of orders.<sup>163</sup> However, the recommendations to ensure that a fair trial has occurred, that a judicial order has been granted, and that the individual is reasonably suspected of being involved in terrorist activities only arise in the pre-conviction stage of control orders.<sup>164</sup> Issuing a post-release order, by definition, requires a previous judicial sentence and fair trial. Given the extent of these concerns, it follows that states should be more cautious with implementing a pre-conviction control order regime than the less legally concerning post-release control order provisions.<sup>165</sup> However, Amnesty International’s list of recommendations comes with the assumption that a state has the resources, infrastructure, and inter-agency coordination necessary to monitor the implementation of control orders more closely.<sup>166</sup> This is not necessarily true for all states.

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158. See Commission on Human Rights Res. 1998/41, U.N. Doc. E/CN.4, at ¶ 5 (Apr. 17, 1998).

159. Australian Human Rights Commission, *supra* note 2, at 7.

160. See *id.* at 11.

161. See *id.* at 11.

162. See Amnesty Int’l, *supra* note 15, at 48–49.

163. See *id.*

164. *Id.*

165. See *id.*

166. See *id.*

There are some pre-conviction control order provisions that would be relatively simple for states that lack agency cooperation or reliable judicial review mechanisms to implement. For example, while house arrest orders require consistent monitoring, judicial review, and coordination, Australia's regime provides an alternative. In addition to electronic monitoring, Australia's Criminal Code allows for state officials to impose a requirement that an individual carry a mobile phone with them at all times and be available to answer any call from specified authorities.<sup>167</sup> The individual must comply with any directions given, such as a check-in, and if unable to answer, they must call back as soon as possible.<sup>168</sup> Utilizing this method of telecommunications restrictions could resolve many of the human rights law concerns mentioned in previous sections of this Note. For example, a controlee would be granted freedom of movement while understanding that they must be available to authorities at any given time. This has the potential to discourage outright involvement with terrorist groups or the active planning of events that could pose a threat to national security.

Theoretically, it would be even more effective to combine this restriction with limitations on who a controlee may socialize with.<sup>169</sup> Control orders frequently limit social interactions to close family members and friends with an express prohibition on meeting with known members of terrorist organizations, individuals with previous convictions for terrorism-related charges.<sup>170</sup> The ECtHR previously found this restriction to be valid under Article 5 so long as an individual is allowed to engage in enough social activities to participate in a modern society.<sup>171</sup> With this theoretical combination, individuals would be frequently reporting their whereabouts, avoiding contact with radicalizing individuals, and remaining in contact with enforcement officials. This affords a great deal of free movement and grants the opportunity for controlees to live relatively normal lives while ensuring there are appropriate mechanisms that limit the potential threat they pose to national security. This method has potential to better balance the national security concerns, which proponents of control order regimes often cite, with broader conceptions of individual liberties.

On the other hand, the telecommunications clause that allows for an individual to return a call within a practicable time period could grant enough leniency for any individual to leave one location before speaking with law enforcement officers. Additionally, this type of control order would only be impactful in a system with enough

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167. *See Criminal Code Act 1995* (Cth) s104.5 (Austl.).

168. *See id.*

169. *See De Tommaso v. Italy*, App. No. 43395/09, 205 Eur. Ct. H.R. 46 (Feb. 23, 2017).

170. *See id.* at 4, 17–18.

171. *See id.* at 19–21.

manpower and agency coordination to ensure that officers are periodically tracking and calling controlees. The intelligence available to such enforcement agency would also need to be of a high enough caliber for the control order to correctly include a list of individuals that the controlee would be prohibited from contacting.<sup>172</sup> If the tracking technology is not available, the network of intelligence is incapable of ascertaining whether or not an individual has been in contact with a member of watch list, or the agency in charge of such tasks is not organized enough to conduct periodic check-ins, this type of control order may fail to have the desired impact.

Telecommunications interception remains one of the “most effective, efficient, and low risk counterterrorism investigative techniques.”<sup>173</sup> However, openly utilizing such information for an arrest warrant or any other judicially authorized detention order has the potential to create its own set of problems.<sup>174</sup> There is a danger in compromising methods of interception by revealing such information; it could create conflicts between intelligence gathering agencies and local law enforcement agencies, and there would be additional burdens to gathering, cataloging, and disclosing such information.<sup>175</sup> Without appropriate interagency coordination, such a strategy has the potential to be more harmful to the system itself than the theorized benefits of improved efficiency in identifying terrorist threats. Once again, determining the correct controlling provision to apply requires a balancing of interests, costs, and benefits. Without as many due process concerns as pre-conviction orders, it is much easier to calculate this balancing of interests for post-release control orders.

### B. *Post-release Control Orders*

A post-release control order should be considered an extension of the criminal procedure system already in place in a country. It may be useful to view these provisions as analogous to parole curfew and location requirements that are already in place in many countries. The more cautious that states become with the use of pre-conviction orders to combat the threat terrorism poses to public safety, the more resources should be reserved for post-release monitoring.<sup>176</sup> As some of the Balkan states have discovered, “[w]ith the definition of terrorist-related offences having broadened while sentences have become

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172. See Walker, *supra* note 111, at 152.

173. *Id.* at 174 (internal quotation marks omitted).

174. See *id.*

175. *Id.*

176. Ryan J. Williams, *Approaches to Violent Extremist Offenders and Countering Radicalisation in Prisons and Probation* 19 (RAN Ctr. Of Excellence, Working Paper, 2016) (emphasizing that, for post-release monitoring to provide support sufficient to help reduce recidivism rates amongst convicted offenders, staff should be knowledgeable of relevant cultural and religious backgrounds).

shorter . . . there may be very little opportunity to rehabilitate offenders in prison.”<sup>177</sup> In this context, post-release measures that allow for monitoring and association restrictions on individuals with terrorism-related convictions are a necessary component of counterterrorism policy.<sup>178</sup>

Many of the potential issues associated with pre-conviction control orders are non-existent in the post-release control order world. For example, the requirements laid out in the current UK regime and referred to in ECtHR cases—that an individual must be a present danger to society—may be satisfied with the evidence for a conviction that has already been gathered and successfully used in a court of law.<sup>179</sup> The only additional piece of evidence required would be a nexus between the individual’s actions that resulted in a terrorism-related conviction and the proof that there is a current threat that they pose to public safety.<sup>180</sup> However, the conviction can act as evidence of a lifestyle connected to terrorism-related activities.

Additionally, Article 7 of the ECHR—the “no punishment without law” clause—is not a concern within post-release control orders because the applications are based on risks of recidivism.<sup>181</sup> In the Australian Human Rights Commission report discussed previously, one of the key recommendations was to allow for a post-release control order regime to be established as an alternative to continuing detention orders.<sup>182</sup> Courts should have the option to pursue restrictive control measures overextending an individual’s detention time when the risk posed by an individual could be mitigated with fewer deprivations of their liberties.<sup>183</sup> Viewing it as a method to limit the risk of public safety while depriving fewer liberties, this type of control order does not face the same human rights law concerns as the rest of the Australian preventative detention orders—which are applied pre-conviction—do.<sup>184</sup>

The same concerns over state resources and capacity for inter-agency coordination apply to post-release control orders to a lesser extent than they do to pre-conviction orders. For example, some of the problems with the Tunisian control order regime have less to do with the control order legislation itself and are more connected to procedural

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177. *Id.*

178. *See id.*

179. *See* discussion *supra* Part II.B; *De Tommaso v. Italy*, App. No. 43395/09, 205 Eur. Ct. H.R. 4 (Feb. 23, 2017).

180. *See* discussion *supra* Part II.B.

181. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 11, at art. 7.

182. Australian Human Rights Commission, *supra* note 2, at 14.

183. *See id.* at 12.

184. *See id.* at 11.

and structural issues within the Tunisian court system.<sup>185</sup> There are several cases where ex-prisoners have sued the Interior Ministry for its refusal to grant them a passport (in violation of Tunisian law). However, “even in cases where the court has ruled in the plaintiff’s favor, the authorities have refused to implement the decision. And the courts have re-imprisoned men who traveled outside their districts even though the ‘confinement orders’ they allegedly violated were never provided to them in writing.”<sup>186</sup> In the case of Abdelkarim Harouni, although a trial court issued the order while he was in the process of serving his sentence, he was not informed of his additional administrative control order until after his release from prison.<sup>187</sup> These actions were taken without the presence of a corresponding law in the Tunisian Criminal Code.<sup>188</sup> Harouni was also surveilled by police at his own wedding, arrested and interrogated on numerous occasions, and told he was being released “with a warning to stop all his human rights and political activities and to refrain from all contact with the media.”<sup>189</sup>

In states that struggle with government corruption and weakened judiciaries, like Tunisia, it is more difficult to legally establish any control order regime that would not threaten the human rights of citizens that either already served their sentences or have yet to be convicted on any charges.<sup>190</sup> Even if the *de jure* system was set up correctly, the application of the administrative measures would continue to be abused by authorities without effective oversight mechanisms.<sup>191</sup> When considering post-release control orders, Balkan states have accepted that “multi-agency cooperation is necessary between prisons, probation (or equivalent), police and community service providers to ensure that information is shared and that offenders and ex-offenders are provided with the necessary interventions and support structures” to prevent recidivism.<sup>192</sup>

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185. See discussion *supra* Part II.A; see generally HUM. RTS. WATCH, TUNISIA, *supra* note 5 (critiques of the Tunisian control orders focus on reported harassment from police officers, corruption in their imposition, and a lack of independent judicial review).

186. HUM. RTS. WATCH, TUNISIA, *supra* note 5, at 1.

187. *Id.* at 11.

188. *Id.* at 12.

189. *Id.* at 12–13.

190. See generally *id.*

191. See generally *id.* (where a lack of judicial oversight has led to police using harassment and intimidation measures in administering control order measures).

192. Williams, *supra* note 176, at 19. Albania, North Macedonia, Kosovo, and other Western Balkan states have signed onto a action plan with RAN to build their institutional capacity to counter extremism. RAN in the Western Balkans, EUR. COMM’N [https://home-affairs.ec.europa.eu/networks/radicalisation-awareness-network-ran/ran-western-balkans\\_en](https://home-affairs.ec.europa.eu/networks/radicalisation-awareness-network-ran/ran-western-balkans_en) [https://perma.cc/KRZ7-P5M9] (archived Oct. 18, 2023).

### C. Control Order Regimes in the Balkan States

Understanding the types of control order measures, the ways in which they can be applied in a state's criminal justice system, and the implications of using such measures will be important considerations for countless states moving forward as counterterrorism law continues to adapt with the policy landscape. Currently, these considerations are important to several Balkan states that have begun the process of implementing control order regimes or have publicly indicated such an interest. This Note focuses particularly on Albania, North Macedonia, and Kosovo to illustrate the recent regional developments.

Albania began establishing its control order regime in 2020 by passing law no. 18/2020 for "preventive measures in the framework of strengthening the fight against terrorism" and is continuing to develop this legal framework.<sup>193</sup> Recently, a control order was issued against Albanian individuals suspected of involvement in a drug trafficking operation.<sup>194</sup> Kosovo, Albania, and North Macedonia each have criminal codes that define and criminalize acts of terrorism, which are necessary prerequisites to implementing any control order regime.<sup>195</sup>

In Kosovo, individuals were being investigated under a control order before their eventual arrest for activities connecting them to financing Islamist militants fighting in Syria and Iraq.<sup>196</sup> Kosovo will continue to be well-positioned to legislate a control order regime as long as Mission in Kosovo—one of the Organization for Security and Cooperation in Europe's largest field operations offering support to the planning and implementation of counterterrorism policies in the state—continues.<sup>197</sup>

In North Macedonia, recent developments demonstrate that the inter-agency cooperation necessary to support a post-release control order regime exists. In May 2022, the UN Office on Drugs and Crime and the Organizations for Security and Cooperation in Europe's

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193. Albania's Response to Fionnuala Ní Aoláin (Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism), *Human Rights, Humanitarian Law and Counter-Terrorism*, ¶ 3, U.N. Doc. A/75/337 (Sept. 3, 2020) (internal quotation marks omitted).

194. See Eduart Halili, *Two Albanians Arrested for Drug Trafficking in Croatia*, ALBANIAN DAILY NEWS (Dec. 16, 2022), <https://albaniandailynews.com/news/two-albanian-arrested-for-drug-trafficking-in-croatia> [<https://perma.cc/6VQL-PUK4>] (archived Aug. 19, 2023).

195. See CRIMINAL CODE OF THE REPUBLIC OF KOSOVO [CRIM. CODE KOS.] arts. 128–35; CRIMINAL CODE OF THE REPUBLIC OF ALBANIA [CRIM. CODE ALB.] arts. 230–34; Кривичен законик [CRIM. CODE MACED.] art. 313.

196. Perparim Isufi, *Kosovo Remands Suspected Islamist Militant Funder*, BALKAN INSIGHT (Mar. 18, 2016), <https://balkaninsight.com/2016/03/18/kosovo-suspect-in-detention-for-financing-terror-03-18-2016-3/> [<https://perma.cc/65NG-P2H7>] (archived Aug. 19, 2023).

197. See *OSCE Mission in Kosovo: Countering Terrorism*, OSCE <https://www.osce.org/mission-in-kosovo/countering-terrorism> [<https://perma.cc/SE9U-PUQE>] (archived Aug. 19, 2023).

Transnational Threats Department conducted a joint training exercise with experts from North Macedonia's Public Prosecutor's Office for Combating Organized Crime and Corruption, the Ministry of Internal Affairs, the Customs Administration, the Financial Police Office, the Intelligence Agency, the Ministry of Defense, Ministry of Justice, Financial Intelligence Office, and the Agency for National Security to strengthen their ability to conduct terrorism financing investigations.<sup>198</sup> Such demonstrated collaboration will streamline communication on controlee surveillance and control order implementation.

Considering the resources a state has to effectively and legally implement a control order regime has become particularly relevant in assessing their legality, as several Balkan states have expressed interest in creating processes to utilize control orders.<sup>199</sup> The primary concern with many of the Balkan states that are currently working to implement control order regimes is the lack of agency coordination and the prevalence of corruption within their criminal justice systems. As the United States Department of State has reported, "corruption and barriers to information sharing among government agencies, insufficient intra-agency coordination, and a poorly functioning judicial system continued to hinder Albania's law enforcement efforts at all levels."<sup>200</sup> RAN in the Western Balkans—a project created to implement the priorities set out in an action plan signed by the European Commission and representatives from Bosnia and Herzegovina, Albania, Kosovo, Montenegro, North Macedonia, and Serbia—considered the pre-conviction control order monitoring mechanisms present in many EU member states.<sup>201</sup> While it was characterized as an attempt to rehabilitate individuals that have been linked to violent extremism, the organization expressed concern over the potential of such orders to increase alienation of these groups.<sup>202</sup>

The amount of caselaw within the ECtHR and domestic courts that invalidates different controlling provisions for violating IHRL indicates that control orders can be dangerous even in states with less

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198. *OSCE and UNODC support North Macedonia in conducting efficient counter-terrorism financing investigations*, OCSE (May 13, 2022), [HTTPS://WWW.OSCE.ORG/SECRETARIAT/518205](https://www.osce.org/secretariat/518205) [<https://perma.cc/6EQB-AYD6>] (archived Aug. 19, 2023).

199. *See generally* Williams, *supra* note 176 (describing the EU goals and strategies for encouraging struggling states to build the correct institutional protections for control orders).

200. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab.: Bureau of Counterterrorism, *Country Reports on Terrorism 2020: Albania (2023)* [hereinafter U.S. Dep't of State Albania Terrorism Report].

201. *See* Williams, *supra* note 176, at 5.

202. *See id.*

corruption and more reliable judicial review mechanisms.<sup>203</sup> In states that lack such institutional independence or effective oversight, a control order regime could be rampant with human rights law violations for years without the necessary changes being initiated. However, many states are working on alleviating such problems.

The Balkan region has recently shown a commitment to instituting effective counterterrorism policies and awareness of the need for monitoring high-risk offenders.<sup>204</sup> Albania has signed and ratified all twelve UN anti-terrorist conventions and protocols relating to terrorism and has several authorities within the Executive and Judicial branches responsible for suppressing and combatting terrorism.<sup>205</sup> Albania is in the process of implementing “deep reforms in the judicial sector continues, beginning with the vetting of Albania’s 800 judges and prosecutors for corruption, competence, and ties to organized crime.”<sup>206</sup> In 2017, Kosovo published its National Strategy Against Terrorism and Action Plan that built goals around the four foundational pillars of preventing, protecting, pursuing, and responding to terrorism.<sup>207</sup> North Macedonia published a similar strategic counterterrorism goal in the same year and expressed its determination to prevent the increase of foreign terrorist fighters emerging from the state.<sup>208</sup>

#### IV. SOLUTION

At a minimum, some sort of controlling provisions should be allowed as a tool for competent authorities to use in any state where there is a real and present danger of terrorism or violent extremism. Derogations law is too restrictive—considering the narrowly tailored and public emergency requirements—and allows for too many deprivations of liberty to be an effective option in a field of law that aims at preventing the public emergency from occurring in the first place. Ultimately, derogating control orders—like those initially proposed in the UK—are so legally tenuous that it would be hard to imagine a system that could implement them effectively without

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203. See generally *Sec’y of State for the Home Dep’t. v. AF* [2009] UKHL 28; *De Tommaso v. Italy*, App. No. 43395/09, 205 Eur. Ct. H.R. (Feb. 23, 2017); *Timofeyev v. Russia*, App. Nos. 45431/14 & 22769/15, 384 Eur. Ct. H.R. (Jan. 2021); *İletmiş v. Turkey*, App. No. 29871/96, 811 Eur. Ct. H.R. (2005).

204. See generally Committee of Experts on Terrorism (Codexter), *Profiles on Counter-Terrorist Capacity: Albania*, COUNCIL OF EUR. (Nov. 2014), <https://rm.coe.int/profiles-2014-albania-en/168064102e> [https://perma.cc/4VVU-USKY] (archived Aug. 16, 2023).

205. *Id.* at 9.

206. U.S. Dep’t of State Albania Terrorism Report, *supra* note 200.

207. See generally REPUBLIC OF KOS. MINISTRY OF INT’L AFFS., NATIONAL STRATEGY AGAINST TERRORISM AND ACTION PLAN 2018-2022 (2017).

208. See generally ALEKSANDAR VANCHOSKI, NATALIJA SHIKOVA & AFRODITA MUSLIU, ENHANCING THE UNDERSTANDING OF FOREIGN TERRORIST FIGHTERS (FTF): CHALLENGES FOR REHABILITATION, RESOCIALIZATION AND REINTEGRATION OF RETURNEES IN THE REPUBLIC OF NORTH MACEDONIA (NEXUS Civil Concept 2020).

violating IHRL. Since the evidence on the success rate for pre-conviction orders in preventing terrorist attacks is uncertain at best, it is difficult to justify the extensive use of such orders in light of the due process concerns.<sup>209</sup> However, the growing number of individuals being released from detention on terrorism-related charges indicates a gap in legal solutions that post-release control orders can fill.

Since there are persuasive reasons to use control orders, the inquiry moves to how they should be integrated into state criminal systems. Generally, this includes both how control order legislation should contain limiting mechanisms and how the enforcement of such measures requires review mechanisms to ensure compliance with IHRL. Specifically, limiting mechanisms must include an identification of a legitimate danger to the public or threat of recidivism, notice provided to the controlee, opportunities for appeal, and a requirement of judicial authorization for any control order extensions. The enforcement of such orders should be monitored by periodic reviews conducted by an independent commission, similar to the Australian reports mentioned previously. A balancing of individual liberties and the protection of national security must be at the forefront of every control order regime.

Governments that are considering implementing control order regimes must incorporate a reasonable threshold requirement before issuing the order. Otherwise, control orders can be used as a way to punish individuals and deprive them of liberties without a fair trial or judgment.<sup>210</sup> Additionally, including the provisions that are most likely to catch a threat of recidivism early into the legislation ensures that control orders remain effective. As discussed in Part III.B, telecommunications monitoring mechanisms combined with restrictions on who controlled individuals may associate with are the best method of prevention. With better coordination between intelligence agencies and law enforcement on the ground, potential terrorist activity can be monitored without excessively intrusive restrictions on individual's freedom of movement and social life.<sup>211</sup>

Many of the due process concerns that are brought up in relation to control orders would be resolved—or at least minimized—by the presence of reasonable restrictions on the system itself.<sup>212</sup> Some of these restrictions can be modeled after the Australian system. For example, the Attorney General is required—as mentioned previously in Part II.C—to provide an annual report on preventative detention orders, control orders, and other state actions connected to terrorism-

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209. See Walker, *supra* note 111, at 154.

210. See generally Amnesty Int'l, *supra* note 15 (expressing concern of pre-conviction control orders being used as an alternative to gathering the appropriate evidence necessary for a conviction).

211. See Walker, *supra* note 111, at 174.

212. See generally Amnesty Int'l, *supra* note 15.

related offenses.<sup>213</sup> Implementing this required reporting mechanism would resolve many of the transparency problems that result from the nature of control orders.<sup>214</sup> While much of the information that is connected to the issuing of control orders cannot be made public because of secret intelligence gathering operations, this reporting mechanism ensures that there is an element of review present in the system.<sup>215</sup> This increases the likelihood that change will be initiated in a reasonable timeframe if the control orders are used to encroach on human rights law protections without the necessary proportionality of benefits to national security interests.

Determining which institutions will oversee the controlee for the duration of the post-release order will need to be based on State needs and resources. As a state official must initiate the order, it is crucial that the corresponding National agency be involved in the consistent review and implementation of the subject. Local law enforcement can serve a vital function in assisting in this process through direct contact and monitoring of the controlee and are likely well positioned to take on this role because of the already existing parole and early release regimes in each of the three Nations.<sup>216</sup> Obstacles include the allocation of human and financial resources to the supervision of this new regime. Local law enforcement must be well manned and well equipped to handle the oversight. Communication between the local law enforcement and national security agencies or officials will need to be clear and constant. Channels of communication need to be established and strengthened before any type of controlled release regime can begin.

Pre-conviction orders should only be permitted in the narrowest of circumstances and carried out in systems that have effective inter-agency cooperation and independent judicial review mechanisms. Detaining or restricting the movement of individuals that have not been convicted of any crime raises due process concerns under both the ECHR, ICCPR, and the corresponding CIL that has arisen from such treaty based judicial bodies. However, post-release orders should be adopted in all criminal systems in order to provide an alternative to continued detention and reduce the threat of recidivism. There is little evidence to indicate that pre-conviction orders are more effective at preventing public dangers than gathering the evidence to officially arrest individuals of lower-level crimes, such as conspiracy or material support to terrorists.<sup>217</sup>

For countries that are unable to enact the extensive human rights protections and judicial review mechanisms—which may be the case

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213. *Annual Report*, *supra* note 3, at 1.

214. *See id.*

215. *See id.*

216. *See* CRIM. CODE MACED. arts. 55–57; CRIM. CODE KOS. arts. 64–65, 90–91; CRIM. CODE ALB. art. 64.

217. *See* Walker, *supra* note 111, at 154.

for many Balkan states—that are necessary for a pre-conviction control order regime to comply with international law, the best course of action is to establish a post-release order regime and boost local law enforcement’s ability to initiate arrest proceedings against those suspected of terrorist activity. Expanding the list of inchoate offenses or lowering the grounds needed to make an arrest are both alternatives that allow for judicial review, prevent arbitrariness, and balance the intrusiveness of the restrictions on an individual’s liberty.

## V. CONCLUSION

Control orders, in spite of their extensive IHRL implications, are necessary to prevent recidivism and protect public safety in states that frequently deal with terrorism threats. In the absence of evidence indicating that pre-conviction control orders—instead of official arrests initiated under typical criminal justice systems—are necessary to prevent coordinated terrorist attacks, states should choose to weigh the protection of individual liberties over the undetermined benefits of such restrictions. Such a balancing of interests comes out in favor of implementing post-release control order regimes and strengthening law enforcement’s ability to arrest individuals for terrorism-related offenses.

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