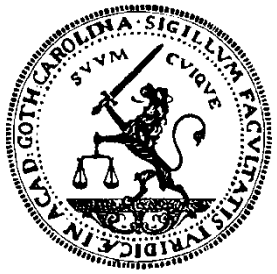

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Detention of Non-Citizens Suspected of Future Terrorist Crimes

A study of the relationship between preventive security detention in Swedish immigration legislation and fundamental principles of justice and the rule of law

LAGM01 Graduate Thesis

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Contents

Summary

The thesis examines the relationship between the detention regime in the Special Controls of Aliens Act (SFS 1991:572, SCAA) and the right to personal liberty and security; the presumption of innocence; and the principle of legality. The aim is to assess whether the legislation is a suitable counter-terrorism measure from a rule of law perspective. The thesis also aims to place the SCAA in an international context, and it therefore examines how the detention rules relate to the international academic discourse on preventive security detention of suspected terrorists. Further, the thesis compares the conditions for detention according to the SCAA to detention as part of criminal procedure, in order to examine whether the decision to place counter-terrorism rules in migration law rather than criminal law has resulted in a weaker protection of individual procedural rights.

The SCAA enables expulsion of aliens who constitute a threat to national security or who it can be feared will in the future commit a crime of terrorism. The alien may be detained pending deportation. The thesis finds that the conditions for detention according to the SCAA differs from detention in a criminal law context in mainly three ways: i) the prerequisites for detention are less precise, ii) the standard of proof is lower, and iii) the procedural protection is less extensive. An effect of this is that the protection of personal liberty, the presumption of innocence and the principle of legality is significantly weaker than in criminal law.

In spite of this, it appears that the SCAA does not violate the articles in the European Convention on Human Rights that protect the three aforementioned principles. The primary reason for this is that since the legislation belongs to administrative law, it falls outside the scope of the articles. In the thesis it is argued that since the legislations' primary purpose is crime prevention this is a circumvention of the Convention, and that the fact that this renders the practical protection of individual rights significantly weaker than it would have been in criminal law implies that the solution is undesirable from a human rights perspective. The SCAA can also be criticized because it is discriminatory as it only applies to non-citizens, and because it fails to fulfill its purpose of ensuring that presumptive terrorists cannot reside freely in Sweden. The latter is an effect of the fact that that many of the persons the Act is intended to be applied to cannot be deported due to risks of persecution in the receiving country, and that the ECHR does not permit continued detention in this situation. As an alternative to the current legislation the thesis recommends and examination of the merits of exclusively dealing with terrorism suspects through criminal law, which would mean an increased protection of individual procedural rights while also decreasing the risk that decisions which are necessary for security reasons cannot be enforced.

Sammanfattning

Uppsatsen undersöker hur förvarsbestämmelserna i lagen om särskild utlänningskontroll (1991:572, härefter LSU) förhåller sig till rätten till frihet och säkerhet, oskyldighetspresumtionen samt legalitetsprincipen. Detta syftar till att utreda huruvida lagstiftningen utifrån ett rättssäkerhetsperspektiv är en lämplig åtgärd för att förhindra terrorism. Uppsatsen syftar även till att placera LSU i en internationell kontext, och undersöker därför hur förvarsbestämmelserna förhåller sig till den internationella akademiska diskussionen om förebyggande frihetsberövande av misstänkta terrorister. Vidare jämför uppsatsen förutsättningarna för frihetsberövande genom tillämpning av LSU med förutsättningarna för frihetsberövande inom ramen för straffprocessen. Detta görs i syfte att undersöka huruvida placeringen av terrorismförebyggande lagregler i utlänningsrätten, snarare än straffrätten, har inneburit ett försämrat processuellt rättsskydd för den enskilde.

LSU möjliggör utvisning av utlänningar som utgör ett hot mot rikets säkerhet eller som kan befaras att i framtiden komma att begå ett terrorbrott. I väntan på utvisning får utlänningen frihetsberövas. I uppsatsen konstateras att förutsättningarna för frihetsberövande enligt LSU skiljer sig från motsvarande regler inom straffprocessen på framförallt tre punkter: i) rekvisiten för frihetsberövande är mindre preciserade, ii) beviskravet är lägre och iii) de processuella reglerna till skydd för den enskilde är mindre omfattande. Vidare konstateras att detta innebär att skyddet för rätten personlig frihet, oskyldighetspresumtionen och legalitetsprincipen är avsevärt svagare än i straffrätten.

Trots detta konstateras att LSU sannolikt inte strider mot de artiklar i Europakonventionen som reglerar de tre respektive principerna. Detta beror i huvudsak på att lagstiftningen hör till förvaltningsrätten, och därför inte omfattas av artiklarnas tillämpningsområde. I uppsatsen argumenteras för att detta, mot bakgrund av att lagstiftningens huvudsakliga syfte är brottsprevention, utgör ett kringgående av den enskildes mänskliga rättigheter. Att det praktiska skyddet för dessa rättigheter är avsevärt sämre än i straffrätten talar för att den valda lösningen inte är att föredra ur ett rättighetsperspektiv. Därutöver kan lagstiftningen kritiseras dels eftersom den är diskriminerande, då den enbart drabbar icke-medborgare, dels eftersom den är ineffektiv i förhållande till sitt syfte, att se till att presumtiva terrorister inte kan vistas fritt i Sverige. Det senare beror på att en stor del av de individer lagen är tänkt att tillämpas på inte kan utvisas på grund av risk för förföljelse i mottagarlandet, och att Europakonventionen i dessa fall inte tillåter ett fortsatt frihetsberövande. Som alternativ till dagens reglering förordas en utredning av möjligheten att i stället uteslutande hantera terrorismprevention inom ramen för straffprocessen, vilket skulle innebära ett förstärkt rättsskydd för enskilda samt minska risken för att beslut som av säkerhetsskäl anses nödvändiga inte kan verkställas.

Preface

As the time has come for me to conclude this thesis, and with it my time as a student, there are a few people to whom I wish to express my gratitude.

Firstly, I would like to thank my supervisor, Karol Nowak, for your advice and encouragement.

Robin Clapp, thank you for your incredibly thorough and competent proof-reading.

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Naturally, I also want to mention my friends. I could not have asked for better people to share these last few years with, and for that I am grateful to each and every one of you. Clara, Ellen, Hedvig and Johanna: thank you also for your proof-reading efforts.

Finally, to my family and to Björn, who have helped me with everything from kind and encouraging words to long hours of proof-reading and late nights spent listening to me attempting to sort out my thoughts on terrorism and human rights: thank you for supporting me in this thesis writing project. More importantly, thank you for everything else.

Lund, May 2021
Matilda Bergström

Abbreviations

ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
LSU	Lagen (1991:572) om särskild utlänningskontroll
SCAA	Special Controls of Aliens Act
SÄPO	Säkerhetspolisen (The Swedish Security Service)
UDHR	Universal Declaration of Human Rights

1 Introduction

1.1 Background

'Someone must have been telling tales about Josef K., for one morning, without having done anything wrong, he was arrested.'[1] With this famous sentence, Franz Kafka begins the story of Josef K., a man innocently accused of and eventually harshly punished for a crime the nature of which is never disclosed even to him. The treatment of K. is often seen as the epitome of the failure to respect due process requirements. K. is not awarded a presumption of innocence, he is never informed of the charges against him, and he has no opportunity to confront any witnesses. At the end of the novel, he is executed; he is given the ultimate punishment for a crime he has not committed. For the reader, it is natural to sympathize with the despair and helplessness K. experiences in this situation. The story provokes indignation over the unfairness and the lack of justice. However, Kafka makes it natural for the reader to react this way, by revealing a central premise already in the first sentence: that K. has done nothing wrong. Reading *The Trial*, we know from the outset that we are dealing with an innocent man, eventually unfairly convicted without having had a chance to defend himself. That this is a gross miscarriage of justice is evident. Would we feel as strongly about the matter if the novel was instead told from the perspective of a state agent participating in the procedure, and we learned of this person's deep conviction that K. was a highly dangerous individual whose removal from society was absolutely necessary to protect it from crimes of disastrous proportions? Would we experience the same indignation over the unjustness of the procedure if we were comfortably assured that the execution of K. ultimately saved society from disaster – that while reached through an imperfect procedure, the conclusion of that procedure was actually correct? Perhaps, perhaps not. That is not for this thesis to answer; as this is a thesis of law and not one of literary studies, its purpose cannot be to analyse readers' reception of *The Trial*. However, the question posed above can easily be rephrased so as to apply to the legal and political reality of the 21st century. What legal protection are we prepared to award to persons we believe are ultra-dangerous? Or, conversely, which legal protections and human rights is it acceptable to disregard in order to protect society as a whole?

One area where this question is frequently relevant is the matter of terrorism prevention. The potential grand scale of terrorist crimes together with their nature of being aimed at society as a whole often provokes feelings of great fear and anger, sometimes leading to the conclusion that potential terrorists must be stopped at any cost. This actualizes questions about the role of human rights, and the extent to which they do or ought to apply to terrorists and terrorist suspects. In this thesis, I aim to examine one aspect of this question.

The thesis focuses on the Swedish Special Controls of Aliens Act (SFS 1991:72, hereafter SCAA). It is an administrative law act, primarily regulating deportation. The Act is applied in so called qualified security matters, and enables deportation of non-citizens who are thought to be threats to national security or who it is feared will commit or participate in the commission of a terrorist crime. Pending

[1] Franz Kafka, *The Trial* (tr Mike Mitchell, Oxford University Press 2009), 5.

deportation, these individuals can be detained. A special problem arises when impediments to enforcement, such as risk of ill-treatment in the receiving country, makes deportation impossible. In such situations, some call for continued detention of the individuals whereas others claim that this would violate international law. This thesis aims to examine the detention provisions in the SCAA by comparing them to detention in a criminal law context and relating them to three fundamental principles of justice and the rule of law: the prohibition of arbitrary detention, the presumption of innocence, and the principle of legality.

1.2 Purpose and research questions

The main purpose of this thesis is to analyse the relationship between the detention rules in the SCAA and human rights and the rule of law, more specifically the prohibition of arbitrary detention, the presumption of innocence, and the principle of legality, in order to evaluate the chosen legal solution's suitability from a human rights perspective. More specifically, the thesis aims to examine whether the placement of counter-terrorism rules in a migration law context, rather than a criminal law context, has detrimentally affected the practical enjoyment of suspects' human rights. To do this, the thesis compares the preconditions for detention in the SCAA to the preconditions for detention within the criminal law system and then relates the results of this comparison to the aforementioned principles. The point of this is to examine whether the protection of these principles is weaker in this context than it is in an ordinary criminal procedure. The reason why it is relevant to compare the SCAA to criminal procedure rather than to other instances of detention regulated by administrative law is that the Act's main purpose is very explicitly one of preventing criminal acts. This distinguishes it from administrative detention for mental health or drug abuse reasons, as such detention primarily aims at benefitting the detainee, and places it closer to the criminal law of which crime prevention is obviously a core purpose. Thus, by comparing the SCAA to the criminal law system, it is possible to see whether the Act enables measures of crime prevention which for various reasons, such as human rights constraints, would not be allowed within that system. This opens up for fulfilling the thesis' main purpose by assessing whether the existence of such opportunities is desirable. The thesis does not aim to reach a definite conclusion on the matter of which strategies of terrorism prevention are generally preferable, but rather to identify and discuss flaws in the existing legislation from a human rights perspective. Additionally, the thesis aims to place the Swedish legislation in a global context by relating it to international theories of counter-terrorism. Hopefully, the discussion in this thesis can serve as basis for future research on terrorism prevention and human rights.

The main, overarching research question of the thesis is the following:

> *Is the system of detention of aliens suspected of involvement in terrorist offences established by the Swedish Special Controls of Aliens Act ('Lagen om särskild utlänningskontroll', SFS 1991:572) a suitable tool of counter-terrorism?*

The analysis of the main research question will be based on the answers to the following sub-questions:

Does the detention regime in the SCAA constitute preventive security detention?

How do the conditions for detention of aliens suspected of involvement in terrorist offences established by the SCAA differ from the conditions for detention within the Swedish criminal law system?

How does the detention system of the SCAA relate to the following fundamental principles of justice as they are defined in the European Convention on Human Rights (ECHR): the prohibition of arbitrary detention, the principle of legality and the presumption of detention?

1.3 Theoretical foundations

1.3.1 The fundamental position of individual human rights in a liberal democracy

In *Marab v. IDF Commander*, the Israeli Supreme Court made the following pronouncement: 'It must always be kept in mind that detention without the establishment of criminal responsibility should only occur in unique and exceptional cases. The general rule is one of liberty. Detention is the exception.'[2] In *Boumedienne v. Bush*, the US Supreme Court stated that: 'the practice of arbitrary imprisonments [has] been, in all ages, [one of] the favorite and most formidable instruments of tyranny'.[3] These two quotes illustrate the traditional role of physical liberty in liberal democracy – a fundamental value, to be limited only in exceptional circumstances.[4] This perspective on individual rights and liberty is one of the theoretical assumptions underpinning this thesis.

The role of individual human rights is tightly connected to the rule of law, as the rule of law can be considered a necessary tool to ensure that individual rights are respected by the state. The rule of law requires foreseeability, and respect for the principle of legality.[5] Key features of the rule of law include precise and specific rules, equality before the law, openness and transparency in how the rules are applied, and an independent judiciary.[6] The rule of law and the protection of fundamental human rights are commonly considered necessary elements of democracy.[7] The connection between the rule of law, democracy, and human rights has been frequently emphasised by the European Court of Human Rights

[2] HCJ 3239/02 *Marab v. IDF Commander in the West Bank* 57(2) 349 (Supreme Court of Israel 2003), § 20.
[3] *Boumedienne v. Bush* 553 U.S. 723 (Supreme Court of the United States 2008).
[4] Tim Stahlberg and Henning Lahmann, 'A Paradigm of Prevention: Humpty Dumpty, the War on Terror, and the Power of Preventive Detention in the United States, Israel, and Europe' (2011) 59 *The American Journal of Comparative Law* 1051, 1053.
[5] Alexander Peczenik, *Vad är rätt?* (Norstedts Juridik 1995), 45-46.
[6] Ibid 51–52.
[7] Ibid 83–85.

(ECtHR).[8] This thesis subscribes to the notion that it is desirable for states to strive for a strong protection of the rule of law.

Rule of law principles may sometimes be at odds with state aspirations of collective security.[9] One instance where this conflict can be seen is in the matter of terrorism prevention, where individual liberty is often positioned as contrary to collective security.[10] The relationship between counter-terrorism and liberty is further elaborated on in Chapter 2.

While this thesis cannot fully examine the extent of the global terrorist threat, it subscribes to the view that state assertions that the terrorism threat warrants a lowering of human rights standards can and should be questioned. I acknowledge that a different position in this matter would be possible. Naturally, such a choice would yield a different analysis and possibly a different response to the thesis' main research question. However, this thesis subscribes to the liberal theory described above according to which individual human rights are a foundation for a fair and democratic society, and this starting point would be difficult to reconcile with the idea that human rights standards should be lowered in the interests of collective security. Thus, it is necessary for the thesis to assume that a suitable counter-terrorism strategy is one that ensures effective human rights protection.

1.3.2 A taxonomy of preventive detention

To facilitate the analysis of the detention system of the SCAA, I make use of a taxonomy of preventive detention created by Stella Burch Elias, professor of international law at the University of Iowa. According to Elias, debate on preventive detention is limited as it is unclear what exactly the term means. It is sometimes used to describe systems of pre-charge detention, pre-trial detention, administrative detention, immigration detention and national security detention.[11] By applying Elias' framework to the Swedish system, I hope to avoid this confusion. In a comparative study examining systems of terrorism-related preventive detention in thirty-two countries, Elias divides the detention regimes into three different categories: the pre-trial detention framework, the national security detention framework and the immigration detention framework. The lines between these frameworks are often blurred.[12]

In states using the pre-trial detention framework, terrorist suspects are placed in detention in accordance with rules established under criminal law. Some such states allow deviations from ordinary criminal rules in cases of terrorist suspects, for example by allowing longer periods of pre-charge detention. The pre-trial detention framework is, however, firmly based in criminal law, and 'preventive detention' is only intended and used as a provisional tool to be employed pending trial.[13] A result of this is that in

[8] See i. a. *Riepan v. Austria* App no. 35113/97 (ECtHR 14 November 2000), § 27; *Poitrimol v. France* App no. 14032/99 (ECtHR 23 November 1993), § 38; *Jorgic v. Germany* App no. 74613/01 (ECtHR 12 July 2007), § 64; *Guðmundur Andri Ástráðsson v. Iceland* [GC] App no. 26374/18 (ECtHR 1 December 2020), § 227.
[9] Peczenik (n 5), 45-46.
[10] Stahlberg and Lahmann (n 4), 1053. See also Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford University Press 2007), 21–26.
[11] Stella Burch Elias, 'Rethinking 'Preventive Detention' from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects' (2009) 41 *Columbia Human Rights Law Review* 99, 105.
[12] Ibid 108.
[13] Ibid 131–133.

pre-trial detention systems, detention requires a suspicion of a past criminal offence and the idea is that the matter of the detainee's criminal guilt will eventually be tried by a court of law.[14]

The national security detention framework refers to states in which terrorist suspects are held in preventive detention based on constitutional rules, executive decrees or other acts issued in response to a declaration of a state of emergency and justified by reference to national security.[15] States employing this framework refer different types of acts as justifications for detention, but have in common a high level of deviation from established norms of due process and fair treatment. For example, indefinite detention and lack of access to counsel and notification of charges as well as ill-treatment or even torture are all significantly more common in national security detention framework states than in states detaining terrorist suspects under one of the other two frameworks. Elias classifies the detention of 'unlawful enemy combatants' at Guantánamo Bay an instance of national security detention.[16]

The immigration detention framework is defined by the fact that detention is not based in criminal law, but on administrative immigration law. More specifically, the grounds for detention are created through a mix of terrorism-specific and immigration statutes. As a result, rules on preventive detention only apply to non-citizens. Another effect is that detainees need not have been convicted or even suspected of past criminal acts. Additionally, placing the detention within administrative rather than criminal law means that detainees can be denied traditional procedural protections.[17] Elias contends that while practically, immigration detention could be considered as a middle ground between the pre-trial detention framework and the national security detention framework because it is more rights-stripping than the former but less so than the latter, theoretically it should not be seen as such. Instead, Elias regards the immigration detention framework as orthogonal to the other frameworks and to traditional approaches to counter-terrorism in the sense that it is based in an entirely separate area of law.[18]

Canada, New Zealand and South Africa use the immigration detention framework. These three states also deal with the prevention, punishment and investigation of terrorism by criminal law measures. However, parallel to this, the states use preventive detention of terrorist suspects within the immigration legal framework. Notably, this detention is more rights-stripping than counter-terrorism measures within the states' respective criminal legal systems.[19] In the states covered by Elias' study, terrorist suspects placed in immigration detention are generally awarded some fundamental procedural rights such as prompt notification of charges, judicial review and access to counsel.[20]

According to Elias, differentiating between the three different frameworks is crucial. Which of these options a state has employed for a framework of preventive detention of terrorist suspects has great impact on how that system is applied, and it appears to determine the allowed period of detention as well as the detainee's right to be notified of charges, access to counsel and to judicial review. For

[14] Elias (n 11), 133 and 156.
[15] Ibid 179.
[16] Ibid 203–204.
[17] Ibid 159–160.
[18] Ibid 177–178.
[19] Ibid 159.
[20] Ibid 177.

example, in most states that base preventive detention on the penal code, thus having opted for a framework of pre-trial detention, the detainee must be notified of charges within 24 or 48 hours. On the other hand, states using a national security framework often do not mandate any such notification at all. In Elias' study, almost all states who base preventive detention on a national security framework allow indefinite detention of terrorist suspects, whereas states adhering to the other two frameworks do not.[21]

Using this taxonomy to analyse the detention rules in the SCAA creates the opportunity to place the Swedish legislation in a global context. The focus on detention as such, rather than deportation, together with the employment of Elias' framework also facilitates a critical reading of the Swedish legal framework. By changing the starting point from deportation to detention, it becomes possible to depart from the traditional view that detention is a standard and necessary tool in a migration law context and instead regard the migration law context itself as a tool used to justify detention. This in turn opens up for a more general critical analysis of the legal framework and its suitability as a measure of counter-terrorism. This makes it possible to ask not only in which situations this type of migration law rules comply with human rights standards, but also whether it is desirable to place such rules in a migration law context in the first place.

1.4 Methodology

Since the emergence of human rights in the 20th century, its role as a tool for societal change as well as for legal analysis has increased significantly. According to Damian A. Gonzalez-Salzberg and Loveday Hodson, human rights research is to a great extent doctrinal, in the sense that it focuses on the letter of the law. That is, it focuses on analysing the meaning of different rules, how the rules relate to each other or possibly attempting to predict future developments of the law.[22] What Gonzalez-Salzberg and Hodson describe as 'doctrinal' is similar to what Jan Kleineman calls the legal dogmatic method ('rättsdogmatisk metod'), that is, the practice of determining the meaning of the law by studying recognised primary sources of law such as international and domestic legislation, jurisprudence and, within some jurisdictions, preparatory works, with some help from secondary sources such as scholarly literature.[23] This method is employed in this thesis, as any discussion of the law reasonably has its starting point in defining what the law is. More specifically, I first look at the meaning of the SCAA, then at the meaning of relevant rules in the ECHR and of corresponding rules in Swedish criminal law. I then analyse how these different rules relate to each other. One methodological difficulty in this regard is that as the SCAA is only intended to be applied in exceptional cases, there is very little jurisprudence. Additionally, many of the actual assessments are not made by courts but by the Swedish Security Service (Säkerhetspolisen, hereafter SÄPO), and this material is often classified. This makes it more difficult to study exactly how different terms in the law are interpreted, which makes a heavier reliance on preparatory works necessary. In Swedish law, preparatory works are often considered as valid sources of law and thus

[21] Elias (n 11), 117–120.
[22] Damian A. Gonzales-Salzberg and Loveday Hodson, 'Introduction: Human Rights Research beyond the Doctrinal Approach' in Damian A. Gonzalez-Salzberg and Loveday Hodson (eds), *Research Methods for International Human Rights Law* (Routledge 2020), 2.
[23] Jan Kleineman, 'Rättsdogmatisk metod' in Maria Nääv and Mauro Zamboni (eds), *Juridisk metodlära* (2nd edition, Studentlitteratur 2018), 28.

given greater weight than is common internationally. Their value is, however, lower than the law itself and lower than jurisprudence, and it is somewhat disputed whether they are really to be considered formal sources of law also in the Swedish context. In the absence of status as formal sources of law preparatory works can, however, serve as relatively authoritative interpretations, and in a Swedish context they tend to be of great practical significance when determining how a law will be applied in practice.[24] In addition to this, I use secondary sources such as newspaper articles and government issued reports on the law's application in an attempt to clarify how the law is applied in practice. This does not strictly fall within the confines of the legal dogmatic method, as the way in which a law is commonly interpreted and how it works in practice are questions which must be distinguished from the matter of how the law is supposed to be interpreted.[25] In this context, I contend that the focus on human rights motivates taking such considerations into account. A practically useful analysis of whether a piece of legislation ensures effective protection of human rights requires an analysis not only of what the legal rules mean if interpreted correctly, but also of their practical and even potential effects on society. This is in line with how Gonzalez-Salzberg and Hodson reason when pointing out that the doctrinal method is not the only useful approach to human rights. Moving beyond the letter of the law and from different perspectives discussing the merits of said law can offer insights which are useful in order to achieve or at least examine what is perhaps the ultimate purposes of human rights, such as eradicating injustice.[26]

Further, the claim that law and politics cannot be distinctly separated from one another is inspired by the critical legal studies movement and its fundamental thesis that legal rules do not exist in a vacuum and therefore cannot be analysed outside of their context. According to the critical legal studies movement, this idea is related to the concept of the indeterminacy of the law. This refers to the claim that the law does not necessarily provide a definite answer to how a case should be resolved, as the law can often recognise as equally valid two opposite claims. As a result of this, ultimately the determination of how to resolve a question becomes the result of a political choice.[27] I believe that these claims are highly relevant to the subject matter of this thesis. Counter-terrorism as a subject exists in the intersection between law and politics, both domestic and international, and therefore, studying it from an isolated legal perspective could be limiting. Matters of counter-terrorism are often related to the complex task of balancing national security concerns against individual human rights. Generally, both of these interests are recognised and protected by the legal order. As Chapter 8 of this thesis shows, there are many instances where the law is silent on how to correctly conduct this balancing. In line with the indeterminacy thesis, the determination of such matters thus turns into a choice of policy rather than a pure application of legal rules.

Thus, the analysis in this thesis takes into account not only the established content of the law, but also the context in which the law exists. This means that potentially, things such as international counter-terrorism discourse, domestic statistics of the SCAA's application, practical effects of the legislation and public debate on its merits could be relevant to the determination of the Act's suitability as well as

[24] Kleineman (n 23), 28–29.
[25] Ibid 38–39.
[26] Gonzalez-Salzberg and Hodson (n 22), 3.
[27] Andrea Bianchi, *International Law Theory*, (Oxford University Press 2016), 135-137.

of the proper interpretation of ECHR rights. The question is whether such an approach can be considered as an aspect of the legal dogmatic method or whether it necessitates the use of other methods. In Kleineman's view, the legal dogmatic method is not limited to determining the content of the law, but also allows for what he calls legal dogmatic analysis[28] and for criticism of the law.[29] Kleineman's description of legal dogmatic analysis and criticism is centred around internal coherence of the law or around determining whether a law fulfils its purpose, where the latter is only relevant insofar as the purpose is recognised by a source of law itself.[30]

Claes Sandgren on the other hand describes a similar but somewhat freer analysis of the law as the legal analytical method. He characterises this as a method which allows a freer analysis, as it is not limited to finding out what the law says and as it may take sources which are not part of the legal hierarchy into account, and can therefore discuss the law based on a larger variety of perspectives than the legal dogmatic method allows. The analysis must not necessarily lead to a definitive answer to the question of how the law ought to look, but can serve to illuminate the merits of different solutions.[31] To the extent that the thesis looks at the relationship between the legal meaning of the SCAA and the respective principles of human rights, the legal dogmatic analysis described by Kleineman suffices as a method since the analysis is based on the relationship between different legal rules and the protection of values which are explicitly recognised by the legal order. However, the thesis also moves beyond this by taking other perspectives into account. For example, the practical effects of the law, also in the absence of a binding legal precedent, are discussed, as is the Act's merits in relation to for example public and academic debate about counter-terrorism and its role in society. In these parts, the methodology employed is better characterised as what Sandgren calls the legal analytical method.

1.5 Contribution to existing knowledge

While Swedish legal doctrine contains some accounts for the meaning of the legal rules in the SCAA, the Act has barely been the subject of any critical academic debate. The protection of legal security in the expulsion procedure according to the Act was examined in a 2020 bachelor thesis in law from Lund University, which among other things found that there is reason to question whether the high level of secrecy and low degree of party insight is compatible with the right to an effective remedy in the ECHR.[32] Searches for research publications or scholarly articles on the Act in Swedish university databases and academic journals yield no results. However, the Act has been frequently discussed in the media, were various persons including legal experts have expressed concerns about its compatibility with fundamental principles of the rule of law. This implies that more in depth treatment of the Act in academia is warranted.

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[28] Kleineman (n 23), 36.
[29] Ibid 40.
[30] Ibid 33 and 44.
[31] Claes Sandgren, *Rättsvetenskap för uppsatsförfattare – ämne, material, metod och argumentation* (4th edition, Nordstedts Juridik 2018), 50–52.
[32] Julia Löfqvist, 'Vems säkerhet? – Rättssäkerheten i kvalificerade säkerhetsärenden och dess förhållande till skyddet för rikets säkerhet' (Bachelor thesis in law, Lund University 2020) <http://lup.lub.lu.se/student-papers/record/9010398> accessed 1 May 2021.

Internationally, the matter of similar legal regimes as well as theoretical considerations about the relationship between terrorism prevention and human rights has been dealt with more frequently. Preventive security detention of terrorist suspects in particular has for example been extensively treated by Elias in 'Rethinking 'Preventive Detention' from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects' and Claire Macken in *Counter-terrorism and the Detention of Suspected Terrorists – Preventive Detention and International Human Rights Law*. A more detailed overview of the international discussion regarding this matter is provided in Chapter 2.

This thesis attempts to start filling an existing void in Swedish academia, by examining claims made in the public debate and relating the Swedish framework to the international scholarly discussion.

1.6 Terminology

In this thesis, the terms 'preventive detention', 'security detention' and 'preventive security detention' are all used. The delineation between these terms is not entirely clear in the existing scholarship, as they are all occasionally used to describe the situation in which individuals are detained not because they have been convicted of a crime, but because there is a fear that if not detained, they will act in a way that threatens security. The words 'preventive' and 'security' refer to different aspects of this definition; while 'preventive' takes aim at the nature of the detention (it seeks to prevent acts from being committed, not to punish acts already committed), 'security' defines the protected interest warranting the detention (security). For clarity I have chosen to mainly use the term 'preventive security detention' as it captures both of these important defining elements and explicitly excludes preventive detention for other reasons than security. However, the terms 'preventive detention' and 'security detention' are occasionally used, mainly in reference to works by other authors. The purpose of this is merely to accurately reflect the terminology used by these authors and not to convey a difference in meaning. In my understanding, all three terms refer to the same phenomenon. Chapter 2 provides a more elaborate account for definitions.

1.7 Delimitations

This thesis exclusively deals with preventive security detention in a terrorism context. As a result of this, preventive detention for other purposes is not included. This is because as stated above, the terrorism context is sometimes invoked as a justification of lowered fair trial standards. Therefore, it is from a human rights perspective especially relevant to examine the conditions for detention in this context.

The human rights instrument in focus will be the ECHR, even though relevant rules exist also in for example the International Covenant on Civil and Political Rights (ICCPR). The reason for this is that the ECHR is the most directly relevant instrument in a Swedish context, due to its direct applicability in Swedish courts and because of European Court of Human Rights (ECtHR) jurisdiction over individual cases. The examination of the ECHR is in turn limited to three fundamental principles: the right to arbitrary detention, the presumption of innocence and the principle of legality. It would be possible to also focus on for example the right to an effective remedy in Article 13, or to Article 1 of Additional Protocol 7 which governs the conditions for lawful expulsion of aliens. The three principles have been

chosen because in my assessment they are the ones most clearly relevant to detention and thus to the thesis' purpose.

The thesis does not look at derogations from human rights instruments after a declared state of emergency. This is relevant to the general context of preventive security detention as many states use it, but as the Swedish legislation is not based on such a derogation that is not relevant to the SCAA. However, some attention is brought to the emergency rhetoric used to justify practices that despite the absence of a formal declaration of derogation deviate from human rights norms.

Any discrepancy between Swedish criminal law *per se* and international human rights standards is not discussed. This would be relevant to conduct a full evaluation of the Swedish counter-terrorism strategy, as naturally, terrorist suspects are in many cases dealt with through criminal law. It would for example be possible to focus on long periods of pre-trial detention or on the admittance of illegally obtained evidence. However, this falls outside the purpose of this thesis which is to examine how certain counter-terrorism measures outside the criminal procedure affect the protection of human rights and justice.

The thesis is focused on preventive detention, and therefore does not fully cover the question of how the rules of deportation in the SCAA relate to criminal law and to the human rights principles in question. The grounds for deportation are, however, extensively covered as a deportation order is a necessary precondition for detention, and the conditions for deportation are thus indirectly also conditions for detention. Therefore their adherence to human rights principles and their relationship to criminal law are directly relevant to the thesis.

1.8 Outline

The thesis starts out by in Chapter 2 presenting definitions and key features of preventive security detention, and thereafter giving an overview of the central arguments in favour of and against such detention. The purpose of this is to place the SCAA in a global context and to examine the extent to which arguments for and against preventive detention of terrorist suspects in the international scholarly literature are relevant to the thesis' main research question, that is, to the suitability of the SCAA's detention regime as a counter-terrorism tool.

Chapter 3 presents the legislation the thesis revolves around, the SCAA. Initially, the background and purpose are presented. Thereafter, the rules governing grounds for deportation, detention and impediments to enforcement are dealt with. These rules are relevant to the thesis' research question as they govern under which circumstances detention based on the SCAA is legal. Thereafter, procedural rules, including standards of evidence, employed in the SCAA in particular and in administrative law in general, are presented. This is necessary as in practice, procedural rules hugely impact the individual's chances of protecting his interests and thus also his practical enjoyment of human rights. Section 3.6 deals with the practical application of the Act in order to enable an assessment of the Act's practical effects. Finally, Section 3.7 gives an overview of the central arguments used in the Swedish debate surrounding the SCAA. In the analysis, these arguments are related to the arguments presented in Chapter 2 and used as part of the basis for the discussion of the main research question.

Chapter 4 presents the relevant rules of Swedish criminal law. The chapter largely mirrors chapter 3, by describing first the grounds for detention and thereafter relevant procedural rules and principles. This is necessary to enable a comparison between detention according to the SCAA and detention within a criminal law framework.

Chapters 5 to 7 describe the three principles enshrined in the ECHR against which the SCAA will be measured in the analysis. Chapter 5 deals with the right to personal liberty, chapter 6 with the presumption of innocence and chapter 7 with the principle of legality. Chapter 5 starts out by describing the meaning of the right to personal liberty under Article 5 of the ECHR, and then moves on to detail the conditions under which deprivations of liberty can be justified under the Article. Chapter 6 starts with an introduction to the presumption of innocence, then goes on to deal with the conditions for the presumption's applicability and finally describes the consequences of the presumption being applicable. Chapter 7 follows the same structure in relation to the principle of legality. The focus on applicability in relation to the presumption of innocence and the principle of legality is necessary because as these principles are phrased in the ECHR, they are only applicable if there is a criminal charge. Therefore, the assessment of their relationship to the SCAA in the analysis necessarily entails a discussion about whether or not an application of the SCAA implies the existence of a criminal charge.

In Chapter 8, conclusions are drawn based on the previous chapters and the research questions are analysed and answered. In Chapter 9, the thesis' conclusions are summarised and potential future measures are suggested.

2 Preventive security detention

2.1 Introduction

This chapter presents definitions and key features of preventive security detention. Thereafter, it gives an overview of the central arguments in favour of and against such detention. The purpose of this is to enable an analysis in which the SCAA is placed in a global context, and assessed vis-à-vis the arguments for and against preventive detention of terrorist suspects in the international scholarly literature are relevant to the thesis' main research question, that is, to the suitability of the SCAA's detention regime as a counter-terrorism tool.

2.2 What is preventive security detention?

Claire Macken, professor at the College of Business and Law at RMTI University, defines preventive detention as detention ordered by the executive power as a means of preventing a person from committing crimes in the future. The suspicion that a person might commit a crime is sometimes based on previous criminal conduct or association with criminality, and sometimes not. Preventive detention is mainly employed to prevent crimes considered contrary to national and public interest. As the purpose of the detention is not to punish an individual for a past crime but to prevent potential future crimes, preventive detention is by definition not coupled with an intention to charge the detainee and conduct a trial.[33] Macken describes preventive detention as 'characteristically extrajudicial'.[34] According to Macken, a key feature of preventive detention is that it is ordered by the executive, rather than the judicial, branch. That the detention is subject to posterior review by judicial authorities does not alter the fact that it is originally ordered by administrative or ministerial authorities, which belong to the executive.[35]

Doug Cassel, professor of law at the University of Notre Dame, uses the term 'security detention' to signify detention of persons detained preventively as threats to security. This means that detention intended to lead to criminal prosecution falls outside of the scope of the term. Security detention is sometimes employed pending deportation or expulsion on security grounds. Cassel points out that detaining persons outside the context of criminal procedures avoids triggering certain rights enshrined in international human rights law, such as the right to speedy trial or release.[36]

Diane Webber, doctor of juridical science at Georgetown University who is specialised in matters of counter-terrorism, defines preventive detention in terrorist cases as 'detention before or without charge for the purpose of preventing a future terrorist attack'.[37] She further divides such detention into three

[33] Claire Macken, 'Preventive Detention and the Right to Personal Liberty and Security under Article 5 ECHR' (2006) 10 *The International Journal of Human Rights* 195, 196.
[34] Ibid 204.
[35] Claire Macken, *Counter-terrorism and the Detention of Suspected Terrorists – Preventive Detention and International Human Rights Law* (Routledge 2011), 7.
[36] Doug Cassel, 'International Human Rights Law and Security Detention' (2009) 40 *Case Western Reserve Journal of International Law* 383, 384.
[37] Diane Webber, *Preventive Detention of Terror Suspects – A New Legal Framework* (Routledge 2018), 4.

different situations: detention of a person thought to be about to commit a terrorist crime but in respect of whom there is not yet enough evidence to press charges, detention under immigration law for security reasons, and detention of persons against whom there might be enough evidence to press charges but this is deemed undesirable, for example because it might compromise sources.[38]

Elias defines the term as referring to detention without trial or charge. She classifies the detainees at Guantanamo as the 'perhaps […] most (in)famous prisoners held in "preventive detention" anywhere in the world'[39], before noting that while Guantanamo is widely criticised many commentators agree that some level of divergence from ordinary fair trial guarantees might be justified when it comes to terrorist suspects.[40]

Preventive security detention is an extraordinary feature of a legal system. Ordinarily, deprivations of liberty are based on criminal law, and are thus strictly regulated by rules of criminal procedure. For example, the requirement that guilt must be proven beyond reasonable doubt generally does not exist when it comes to preventive security detention.[41] The principle that criminal detention should only follow a finding of criminal guilt is thus undermined through preventive detention regimes, as persons are detained for their alleged criminal propensity without any criminal guilt having been established.[42]

2.3 Background and purpose of preventive security detention in the modern era

In the 21st century, the most common reason for introducing preventive security detention into a state's legal system is as a means to combat terrorism. This is sometimes considered necessary to overcome difficulties associated with preventing, investigating and adjudicating terrorism crimes.[43] Such difficulties can for example refer to a fear that sensitive intelligence sources would be compromised if they needed to be explicitly accounted for in an ordinary trial.[44] The detention can function either to prevent the commission of future crimes or to incapacitate a suspect during a period of time in order to facilitate intelligence gathering. Preventive security detention for such intelligence purposes should, however, be distinguished from detention for the purpose of interrogating the detainee.[45] The alleged unsuitability of criminal law as a tool for terrorism prevention is sometimes used as an argument in favour of solutions other than what Elias calls pre-trial detention. Critics of pre-trial detention solutions claim that it is difficult to reconcile counter-terrorism with the retrospective nature of criminal law, because counter-terrorism ideally prevents terror attacks before they have taken place. In addition to this, it has been claimed that using criminal law to deal with terrorist suspects is doomed to fail because high standards of evidence and rules regarding inadmissibility of evidence obtained through illegitimate

[38] Webber (n 37) 4–5.
[39] Elias (n 11), 102.
[40] Ibid 102–103.
[41] Macken, *Counter-terrorism and the Detention of Suspected Terrorists* (n 35), 15.
[42] Ibid 18.
[43] Ibid 15.
[44] Elias (n 11), 203.
[45] Macken, *Counter-terrorism and the Detention of Suspected Terrorists* (n 35), 8.

means will make it disproportionately difficult to convict terrorists.[46] For example, Robert M. Chesney and Jack L. Goldsmith, professors of law at the universities of Texas and Harvard respectively, argue that the criminal law model, while being the most legitimate basis for detention, is as a result of its rigorous demands on evidence and procedural protection of the defendant unable to meet what they consider the central legal challenge of modern terrorism, namely to achieve 'the legitimate preventive incapacitation of uniformless terrorists who have the capacity to inflict mass casualties and enormous economic harms and who thus must be stopped before they act.'[47] In this context Elias points out firstly that statistically, this claim appears to be false as a large number of prosecutions of terrorist suspects in fact do result in convictions, and secondly that the rules intended to protect the defendant's human right to a fair trial can also be seen as a benefit. Elias also points out that it is possible to circumvent this problem by criminalizing preparation, attempt and incitement of serious crimes, which enables the intervention of criminal law before the crime has been completed.[48]

Regarding the retrospective nature of criminal law, it can be noted that criminal law in general is considered as having a preventive, as well as a punitive, aim. Prevention is intended to take place both in the form of individual prevention through incapacitation of individuals who have offended and through so called general prevention, with the ambition of deterring persons in general from offending.[49]

2.4 Criticism of preventive security detention

Preventive detention is one of the most contentious issues of counter-terrorism policy. One reason for this is that preventive detention by definition relies on predictions, and predictions are not necessarily reliable. Controversial issues related to this include not only the assessment of the potential detainee's dangerousness, but also of the terrorism threat as a whole. Preventive security detention is naturally a significant infringement of an individual's right to liberty, and, as mentioned above, it can be considered an extraordinary measure. This is often justified by reference to the gravity and scale of the terrorism threat, which raises questions of the reliability of the government's assessment that this threat is grave enough to warrant certain extraordinary measures.[50] Viktor V. Ramraj, professor of law specialised in constitutional law and emergency powers, warns that measures may become disproportionate when fear of the worst-case scenario, rather than the most likely scenario, determines the legal response to a risk.[51]

While Elias describes the immigration detention framework as less rights-infringing than the national security detention framework, it is nevertheless not free from critique. For example in 2007, the South African Human Rights Commission criticized the South African government for using a loophole in refugee law to detain persons suspected of crimes but where evidence was not sufficient for criminal prosecution. Immigration detention as a counter-terrorism measure has also been criticised for creating

[46] Elias (n 11), 156–157.
[47] Robert M. Chesney and Jack L. Goldsmith, 'Terrorism and the Convergence of Criminal and Military Detention Models' (2010) 60 *Stanley Law Review* 1079, 1081.
[48] Elias (n 11) 156–157.
[49] Nils Jareborg and Josef Zila, *Straffrättens påföljdslära* (6th edition, Norstedts Juridik 2020), 76-77; Petter Asp, Magnus Ulväng and Nils Jareborg, *Kriminalrättens grunder* (2nd edition, Iustus förlag 2013), 30-31.
[50] Macken *Counter-terrorism and the Detention of Suspected Terrorists* (n 35), 102–104.
[51] Viktor V. Ramraj, 'Terrorism, Risk Perception and Judicial Review', in Viktor V. Ramraj, Michael Hor and Kent Roach (eds.) *Global Anti–Terrorism Law and Policy*, (Cambridge 2005), 116.

different standards for 'insiders' and 'outsiders', as it very clearly distinguishes between citizens and non-citizens and makes it significantly easier to detain non-citizens.[52] The United Kingdom rejected the immigration detention framework after the House of Lords found that it violated detainee rights in ways which could not be justified. Subsequently, the United Kingdom has instead adopted a pre-trial detention framework for suspected terrorists.[53]

There are several scholars who argue that some form of preventive detention can be both necessary to protect society and acceptable from a human rights standpoint, but that constructing it as a part of the criminal law framework is preferable to other solutions such as the migration law framework or the national security framework. For example, Macken favours what she calls a 'pre-charge detention framework', in which criminal law is accommodated to the particular challenges of terrorism prevention by enabling detention at a slightly earlier stage than normally, while still maintaining the strict due process requirements inherent in the criminal procedure.[54] Susan Dimock, professor of philosophy at York University and specialised in criminal law theory, argues in favour of creating a preventive detention regime by the creation of 'being a persistent violent dangerous offender' as a criminal offence. Such a solution would require anyone put in preventive detention to be tried and convicted of this offence, with the usual standard of proof applying. Dimock argues that this would be advantageous as it would enable the detention of highly dangerous individuals while still respecting core rule of law values such as the principle of legality.[55] In a US context, Jennifer Daskal, professor of law specialised in terrorism, national security and human rights, on the other hand argues that no accommodations or new frameworks of preventive detention are necessary, and that the criminal justice system in its current form is adequate to deal with the terrorism threat. This is for example shown by the number of successful prosecutions against terrorist suspects. She further points out that continued detention of alleged terrorists who have not been convicted risks being counterproductive as it gives them the opportunity to appear as martyrs.[56]

Michael Tonry, professor of criminal law and policy at the University of Minnesota, divides measures aimed at crime prevention into four different categories: deterrence, incapacitation, rehabilitation and moral education. Deterrence refers to the concept that fear of punishment makes potential criminals abstain from committing offences. Incapacitation means that while incarcerated a potential criminal cannot commit offences. Rehabilitation refers to individualised measures and programs, often in the form of drug treatment, anger management, or various therapeutic treatments, taken to ensure that past offenders do not reoffend. Finally, moral education refers to the general existence and reinforcement of basic societal norms that make most members of society refrain from committing crimes because they feel that it is morally wrong.[57] Tonry claims that incapacitation as a preventive strategy can be useful if

[52] Elias (n 11), 164-165.
[53] Ibid 172.
[54] Macken, *Counter-terrorism and the Detention of Suspected Terrorists* (n 35), 136-167.
[55] Susan Dimock, 'Criminalizing Dangerousness: How to Preventively Detain Dangerous Offenders' (2015) 9 *Criminal Law and Philosophy* 537, 537-538.
[56] Jennifer Daskal, 'A New System of Preventive Detention: Let's Take a Deep Breath' (2009) 40 *Case Western Reserve Journal of International Law* 561.
[57] Michael Tonry, 'Purposes and Functions of Sentencing' (2006) 34 *Crime and Justice* 1, 27-34.

used 'discriminately for people who commit very serious crimes at high rates'.[58] He is, however, of the opinion that in a majority of cases, incapacitation is not a legitimate strategy of crime prevention, as there is a high risk that the wrong people would be targeted. One of the main reasons for this is that there is a substantial risk of false positives, as it is generally very difficult to predict which people are likely to commit crimes in the future. This is problematic for moral reasons, as innocent individuals risk being incarcerated without good cause, and also from a cost-benefit perspective as the incarceration of people who are actually not dangerous is hardly an effective use of public resources. Tonry also points out that incapacitation as a strategy is particularly ineffective when it comes to various forms of organised crime, as the incapacitated potential offender is often quickly replaced by somebody else.[59]

Deborah Pearlstein, professor of constitutional and international law, similarly argues that preventive detention is likely to be ineffective from a security perspective, questioning the idea that there is a clear-cut dichotomy between liberty and security.[60] This claim is made for example by Eric A. Posner and Adrian Vermeule, law professors at Chicago Law School and Harvard Law School respectively, who describe the *trade-off-thesis* as one of the oldest theories of emergency powers. According to the trade-off-thesis, liberty and security are two valuable goods who cannot both be maximised simultaneously. From this it follows that a decrease in liberty will result in an increase in security. Posner and Vermeule note that this dichotomy does not apply to every situation; there are instances where both goods can be increased simultaneously and that it can sometimes be possible to increase one without detrimentally affecting the other.[61] In Pearlstein's view, the matter of terrorism prevention through preventive detention is such an instance, where a decrease in liberty will not have the desired effect of increasing security.[62] Conversely, there are many measures which may increase security without decreasing liberty, for example by preventing nuclear terrorism through international cooperation to prevent nuclear-proliferation by inventorying, securing and tracking nuclear materials. Pearlstein makes the point that for a system of detention to be justified as a counter-terrorism tool, it is not enough that it makes it easier to detain people, it must also actually have the effect of preventing terrorism. In her view, this has not been proven when it comes to preventive detention not accompanied by an intention to prosecute. Such detention would, to be effective on an individual level, often need be indefinite, which in the absence of a criminal conviction is hardly reconcilable with human rights law. The state would then instead have to release the detainee, in which case the preventive effect would cease. Pearlstein therefore argues that any effective measure of detention aimed at incapacitation of dangerous individuals must strive for prosecution and criminal conviction. In addition to this, incapacitation of individuals belonging to terrorist associations is unlikely to be effective as the individual member is easily replaced. Additionally, the practice of detaining suspected terrorists in a way which appears illegitimate – a highly relevant risk if due process rights are wavered – tends to be beneficial for the recruitment efforts of terrorist associations. Thus, the risk is that while decreasing liberty through disregarding procedural rights, the

[58] Tonry (n 57), 30.
[59] Ibid 31–32 .
[60] Deborah Pearlstein, 'We're All Experts Now: A Security Case Against Security Detention' (2009) 40 *Case Western Reserve Journal of International Law* 577, 577.
[61] Posner and Vermeule (n 10), 21–26.
[62] Pearlstein (n 60), 591–592.

state fails to prevent any terrorist attacks while simultaneously creating a breeding ground for new terrorist recruits.[63]

Webber on the other hand argues that trade-offs between human rights and security are inevitable, and that employing preventive detention may be necessary from a counter-terrorism point of view. However, she also concludes that most preventive detention frameworks fail to adequately ensure detainee rights, and recommends the international adoption of a set of principles guiding preventive detention in order to protect human rights.[64]

Tim Stahlberg and Henning Lahmann, lawyer and professor of law respectively, write that in response to the threat posed by international terrorism, many governments have embraced the view that security cannot be ensured using the traditional means of criminal law. One reason for this is that with its potential for enormous levels of casualties and damage to lives and property, terrorism poses a greater threat than traditional crime. Another reason is that the typical terrorist, the suicide bomber, is undeterred by the rules of criminal law. A person willing to die does not care that his actions would ordinarily result in a prison sentence. Based on this perspective, what Stahlberg and Lahmann call a new paradigm of prevention has emerged since September 11th 2001. One effect of this paradigm is the emergence of new rules enabling preventive detention of potential terrorists. These rules look different in different states, but have enough similarities to be considered parts of the same trend.[65]

In certain situations, it has been argued that constitutional and international safeguards should be eliminated when this is necessary to protect the public against the terrorist threat. For example, John C. Yoo, an American legal scholar and former Department of Justice official, has argued that the executive branch must not be too restrained by the judicial in the global war against terror.[66] Clarence Thomas, a U.S. Supreme Court Justice, has said that since the dangers to the nation's safety are unforeseeable and infinite, the government must have unlimited power, free from constitutional restraints, to defend itself against them.[67] Stahlberg and Lahmann say such views have gained momentum in the post 9/11 world. According to them, jurisprudence from courts such as the ECtHR and the Supreme Court of Israel implies that generally courts disagree with these views, at least on a theoretical level. The aforementioned courts do not accept that the terrorism threat justifies disregard for human rights. However, in their interpretations they tend to accept arguments offered by the states as to why counter-terrorism measures such as preventive detention of terrorist suspects is compatible with human rights, and they appear reluctant to impose any substantial limitations on such detention. There are several examples of these courts accepting new, controversial re-interpretations of concepts in order to allow for increasingly extensive frameworks of preventive security detention of alleged terrorists. This implies

[63] Pearlstein (n 60) 578–591.
[64] Webber (n 37), 208–234.
[65] Stahlberg and Lahmann (n 4), 1053.
[66] John C. Yoo, 'Courts at War' (2006) 91 *Cornell Law Review* 573, 573.
[67] *Hamdi v. Rumsfeld*, 542 U.S 507 (Supreme Court of the United States, 2004) Dissenting Opinion of Clarence J. Thomas.

that in practice, the courts accept the notion that counter-terrorism can justify if not a complete disregard for human rights, then at least a more restrictive interpretation.[68]

Elias makes the same observation as Stahlberg and Lahmann, noting that several American legal scholars support the view that the unprecedented danger of the terrorist threat and sensitive nature of counter-terrorism intelligence operations justify some diversion from ordinary fair trial guarantees, such as the right to information about the evidence invoked, in terrorist cases.[69]

Stahlberg and Lahmann point out that the assertion that international terrorism constitutes a new kind of threat to peace and security, warranting human rights limitations, can be questioned in several respects. One is that terrorism is not as new a threat as the post 9/11 discourse might imply.[70] This shows that pre 9/11 interpretations of human rights law were developed in a reality where the terrorism threat existed and needed to be taken into account, which undermines the idea that the emergence of terrorism calls for re-interpretation.

Preventive security detention is based on an assessment that a person is dangerous. This assessment is often, but not necessarily, based on the suspicion that a person previously committed certain acts. The purpose of the detention is not to punish the individual for these acts, but to prevent future dangerous conduct. There is generally no requirement that the person is proven to be guilty of the past acts, nor that he is accused of acts which are in fact prohibited by law. Macken characterizes the assessment of a person's dangerousness in this context as a type of 'educated guess'.[71] It is not clear under which, if any, circumstances it is even possible to make a reliable prediction of a person's future conduct.[72] Law professor Anthony Gray similarly calls predictions of future dangerousness informed guesses at best, citing one study according to which predictions of future dangerousness were found to be on average 58 % correct and another one according to which such predictions were between 33 and 50 % accurate.[73] In a study of psychiatric assessments of future dangerousness, Alan Dershowitz, distinguished criminal lawyer and professor emeritus at Harvard Law School, found an 'overprediction' of dangerousness and concluded that less than half of the assessments that a person would engage in violent behaviour were correct.[74] It should be noted, however, that predictions are also used within the criminal law framework. For example, predictions of future conduct can influence the choice of punishment or the issuing of a restraining order. Whether a suspect is considered likely to engage in further criminal acts is also often a factor determining whether he is detained pending trial.[75]

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[68] Stahlberg and Lahmann (n 4), 1084.
[69] Elias (n 11), 102–103.
[70] Stahlberg and Lahmann (n 4), 1086.
[71] Macken, *Counter-terrorism and the Detention of Suspected Terrorists* (n 35), 8.
[72] Ibid 14.
[73] Anthony Gray, 'Standard of Proof, Unpredictable Behaviour and the High Court of Australia's Verdict on Preventive Detention Laws' (2005) 10 *Deakin Law Review* 177, 194.
[74] Alan Dershowitz, 'The Law of Dangerousness: Some Fictions About Prediction' (1970) 23 *Journal of Legal Education 4*4, 46.
[75] Macken, *Counter-terrorism and the Detention of Suspected Terrorists* (n 35), 15.

3 The Special Controls of Aliens Act

3.1 Introduction

This chapter presents the legislation at the centre of the thesis, the SCAA. The chapter first describes the Act's purpose and background and introduces relevant Swedish counter-terrorism legislation, and then moves to an overview of the SCAA's central rules. The chapter also covers grounds for deportation since a deportation order is a necessary precondition for detention. Thereafter rules concerning detention and impediments to enforcement of a deportation order are described. Following this, procedural rules are presented. Such rules are relevant since the level of procedural protection significantly impacts an individual's chances of protecting his rights and interests. Towards the end of the chapter, examples of practical application of the SCAA are given. The purpose of this is to illustrate the real-life consequences of the legislation. Thereafter, concerns about potential problems with the Act raised during the drafting process and in public debate are presented. Finally, the chapter describes the changes to the SCAA proposed in a 2020 Government Inquiry report, to enable an assessment of the extent to which the conclusions of this thesis will remain relevant in the event that the proposed changes are enacted.

3.2 Purpose and background of the Act

3.2.1 Introduction and history

The SCAA regulates so called *qualified security matters.* The Act primarily concerns deportation, and it is characterized by special procedural rules which award the Government significant power. Instead of functioning as an instance of appeal, the Migration Court of Appeal has an advisory function.[76] The law is subsidiary to the Aliens Act (SFS 2005:716).[77] Statistically, most matters with security aspects are dealt with through application of the Aliens Act.[78] Whether a matter is a security matter is determined by SÄPO, who by intervening in a case and recommending deportation or a similar measure of an alien for reasons related to national or public security turns the case into a security matter.[79] Any type of case can turn into a security matter, regardless of whether it concerns an alien present in Sweden or not.[80] A *qualified* security matter is a security matter dealt with through application of the SCAA.[81]

Rules aimed at preventing terrorist offences with international links were first enacted in Sweden through the Act on Special Measures to Prevent Certain Violent Acts with an International Background

[76] Ingela Fridström, Ulrika Sandell and Ingrid Utne, *Migrationsprocessen: en hjälpreda för offentliga biträden och andra yrkesverksamma jurister på utlänningsrättens område* (Thomson Fakta 2007), 231.
[77] Special Controls of Aliens Act, § 1.
[78] Fridström, Sandell and Utne (n 76), 232.
[79] Aliens Act (2005:716), Chapter 1 § 7.
[80] Fridström, Sandell and Utne (n 76), 232.
[81] SOU 2020:16 *Ett effektivare regelverk för utlänningsärenden med säkerhetsaspekter,* 135.

(SFS 1973:162).[82] The preparatory works to this Act referred to a recent increase in the prevalence of political violence in the world.[83]

In 1989, these rules were moved into the new Terrorist Act (SFS 1989:530), according to which an alien could be deported due to suspected involvement in terrorist activities if there was a well-founded reason to assume that he belonged to or acted on behalf of an organisation which it could be feared would use violence, threats, or coercion for political purposes in Sweden, if additionally it was the case that the alien himself could participate in a terrorist act.[84] In 1991, that legislation was replaced by the SCAA. In the original Government bill from 1991, the existence of the law is primarily motivated by reference to the increased severity of terrorism as a serious global problem. The bill notes that the frequency of terrorist attacks in the last decades had been steadily increasing or remained at a high frequency.[85]

Through the enactment of the SCAA, the requirement that the alien had connections to a terrorist organisation was abolished. This was motivated by difficulties in application and by a wish to avoid the risk of unintentionally and unnecessarily branding certain organisations as terrorist organisations.[86] The Government bill states that it would be unfortunate if Sweden had to officially classify an organisation as terrorist in order to apply the SCAA in cases where maybe not the entire organisation but only fractions of it was actually engaged in terrorist activities. Keeping the organisation requirement was also considered unfortunate as it would exclude the application of the law to individuals who cannot clearly be tied to a specific organization but who nonetheless are likely to commit terrorist offences.[87]

Regarding the effects on the individual of removing the organisation requirement, the Government bill notes that from a legality perspective, a more clearly delineated rule is preferable to a more general one. Despite this, the bill concludes that strong arguments related to effectiveness of the legislation speak in the opposite direction, and suggests a removal of the organisation requirement in favour of the more general requirement that it can be feared that the individual will participate in some type of criminal offence which entails violence, threats or coercion and is committed for a political purpose.[88] Later, this description was changed to its current wording, referring to terrorist offences defined in the Criminal Responsibility for Terrorist Offences Act (SFS 2003:148).[89]

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[82] Skr. 2020/21/:69 *2020 års redogörelse för tillämpningen av lagen om särskild utlänningskontroll,* 3.
[83] Prop. 1973:37 *Kungl. Maj:ts proposition till riksdagen med förslag till lagstiftning om åtgärder mot visa våldsdåd med internationell bakgrund*, 10.
[84] Prop. 1990/91:118 *Regeringens proposition med förslag till lag om särskild kontroll av vissa utlänningar, m.m.*, 26.
[85] Ibid 22.
[86] Ibid 3–4 and 32.
[87] Ibid 32–34.
[88] Ibid.
[89] Act on Changes to the Special Controls of Aliens Act (1991:572) (SFS 2003:154).

3.2.2 Swedish counter-terrorism legislation

Crimes of terrorism are regulated in the Criminal Responsibility for Terrorist Offences Act, which is to a degree an implementation of The European Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA).[90]

Terrorist offences are defined in §§ 2–3 of the Act. If an act listed in § 3 is committed with the special intent described in § 2 and has the potential to seriously harm a state or an international organisation, the act constitutes a terrorist offence.

The list in § 3 contains 22 acts, all of which are defined and criminalised in other laws, such as the Penal Code (SFS 1962:700). The list includes for example murder, aggravated assault, unlawful deprivation of liberty, gross breaches of data secrecy, destruction causing public endangerment, sabotage, smuggling, illegal handling of weapons, and offences relating to the handling of materials which can potentially be used to construct biological, chemical or nuclear weapons. The list also includes unlawful threats to commit one of the listed acts.

That the act should have the potential to seriously harm a state or an international organisation has the effect that only very serious acts qualify as terrorist crimes.[91] 'Serious harm' refers to acts which severely harm the fundamental structures of the state or of democracy, for example through targeting institutions of the state. The preparatory works also make reference to the protection of an open and secure society as an essential public interest protected by the provision. An act directed solely at one person can have the potential to seriously harm a state or international organisation, if the person is targeted because of his or her position within the state or organisation.[92]

The special intent required is that the act must be intended to seriously intimidate the population or a group within the population, unduly force public institutions or an international organisation to take or refrain from taking a measure, or to seriously destabilise or destroy fundamental political, constitutional, economic, or social structures in a state or an international organisation.[93] Direct intent is required.[94]Furthermore, attempt, preparation, or incitement of a crime of terrorism is criminalised, as is failure to reveal or prevent a crime of terrorism one has knowledge about.[95]

3.3 Grounds for deportation

The SCAA states that aliens may be deported in two different situations: i) when this is especially called for based on national security reasons and ii) when it based on what is known about the alien's previous conduct and other circumstances can be feared that he will commit or participate in a crime of terrorism or in the attempt, preparation, or conspiracy to commit such a crime.[96] Deportation according to the

[90] Prop. 2002/03:38 *Straffansvar för terroristbrott*, 24–25.
[91] Ibid 34.
[92] Ibid 86–87.
[93] Criminal Responsibility for Terrorist Offences Act, § 2(1)(3).
[94] Prop. 2002/03:38 (n 90), 87.
[95] Criminal Responsibility for Terrorist Offences Act, § 4; see also Penal Code Chapter 23.
[96] Special Controls of Aliens Act § 1.

SCAA does not require a criminal conviction and is thus different from deportation as a sanction for committing a crime according to Chapter 8 a) of the Aliens Act.

The SCAA does not specify when deportation is especially called for based on national security reasons. Some guidance can be found in the preparatory works, according to which this ground will mainly be applicable in situations of espionage or other similar crimes although application in other contexts cannot be excluded.[97]

In reference to the second ground for deportation, applicable when it can be feared that an alien will commit or participate in a crime of terrorism, the preparatory works make clear that the purpose of the law is not to classify previously committed crimes, but to ensure that presumptive terrorists do not reside in Sweden. In other words: the aim of the law is to prevent future crimes, not to punish individuals for crimes already committed. In the preparatory works it is further stated that application of this ground does not require any concrete evidence that a certain crime has been or will be committed. If there is such concrete evidence, an investigation should be initiated in accordance with ordinary rules of criminal procedure.[98] The Government bill from 1991, in which this ground was somewhat differently phrased but appears to have had substantially the same meaning, states that the rule should be reserved for very serious cases, but no specific examples of which circumstances could lead to the conclusion that there is such a fear that the rule should be applied are given.[99] The Government bill proposing amendments enacted in 2010 gives one example of 'qualified security matters', namely aliens with strong connections to organisations using violent or otherwise criminal means to achieve political ends. No further examples are given and the meaning of 'strong connections' is not elaborated on.[100]

3.4 Detention pending deportation and the issue of unenforceable deportation orders

If a decision to deport a person according to the SCAA has been taken or is likely to be taken, he may be detained while awaiting deportation if there is reason to assume that he will otherwise go into hiding or that he will commit criminal acts in Sweden, or if his identity is unclear.[101] If it is sufficient to place the alien under supervision, he shall not be detained.[102] An alien detained according to the SCAA is to be placed in a penal detention centre, not in the detention facilities of the Migration Agency. If the alien is under 18 years old, he is to be placed in the detention facilities of the Migration Agency if possible.[103]

If the deportation matter has not yet been determined, SÄPO may decide that a person should be detained, even if the criteria in § 8 (that the alien's identity is unclear or that there is reason to believe

[97] Prop. 1990/91:118 (n 84), 77.
[98] Prop. 2002/03:38 (n 90), 96.
[99] Prop. 1990/91:118 (n 84), 77–79.
[100] Prop. 2009/10:31 *Genomförande av skyddsgrundsdirektivet och asylprocedurdirektivet*, 290.
[101] Special Controls of Aliens Act § 8.
[102] Ibid § 8(2).
[103] Ibid § 8 a).

that he or she will either depart or commit crimes in Sweden) are not fulfilled. In this case, the Migration Agency shall determine at the earliest possible time whether detention shall continue.[104]

A special situation occurs when a deportation decision according to the SCAA cannot be enforced. Enforcement shall be temporarily inhibited or a temporary residence permit shall be issued to the alien if any of the impediments in Chapter 12 §§ 1–3 of the Aliens Act are at hand or if the decision for some other special reason should not be enforced.[105] The referenced provisions of the Aliens Act regulate three different situations: i) the alien facing a risk of death penalty, corporal punishment, torture, or other inhumane or degrading treatment or punishment in the receiving country, ii) the alien facing a risk of persecution in the receiving country and iii) the alien falling under Chapter 4 § 2(1)(1) or Chapter 4 § 2 a)(1) of the Aliens Act.[106] Protection against deportation in situation i) is unconditional; if there are reasonable grounds to suspect that the alien will face such treatment in the receiving country, deportation may not occur.[107] If in situation ii) it is not possible to send the alien to any other state, and the alien through an exceptionally serious crime has shown that his remaining in Sweden would result in serious danger to public order and security, the deportation decision may still be enforced unless the persecution in question entails danger to the alien's life or is otherwise of an especially severe nature.[108] If in the same situation the alien has been engaging in conduct threatening national security and there are reasons to assume that he will continue this conduct and there are no alternative receiving countries, the decision may be enforced regardless of the nature of persecution the alien risks facing.[109] Situation iii) concerns aliens who have been classified persons in need of subsidiary or other protection – that is, persons who do not qualify as refugees but who are still entitled to protection.[110] Deportation orders of such persons shall be enforced unless there are extraordinary reasons to avoid enforcement.[111]

According to an examination by Swedish news programme *Ekot*[112] only three out of nineteen persons subjected to deportation orders according to the SCAA between 2005 and 2019 were deported. In the remaining sixteen cases, impediments to enforcement prevented deportation.[113] It is noted in the Government bill to the original act from 1991 that it is not uncommon that the persons to whom the act applies risk persecution in their home countries. Since the SCAA only applies to aliens who are not to

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[104] Special Controls of Aliens Act § 9 §.
[105] Ibid § 10.
[106] Aliens Act Chapter 12 § 1–3.
[107] Ibid Chapter 12 § 1.
[108] Ibid Chapter 12 § 2(2).
[109] Ibid Chapter 12 § 2(3).
[110] Ibid Chapter 12 § 2 and Chapter 4 § 2–2 a.
[111] Ibid Chapter 12 § 3.
[112] In May 2021, it was revealed that the journalist responsible for this examination had a personal relationship with one of the individuals concerned, which raises questions about the integrity of the reporting (Mattias Carlsson and Hugo Ewald, 'Ekots reporter inledde relation med dömd islamist' *Dagens Nyheter* [Stockholm 5 May 2021] <www.dn.se/sverige/ekots-reporter-inledde-relation-med-islamist/> accessed 6 May 2021). The statistical results of the examination have however not been called into question, and I therefore think it is motivated to include them. In the following, further articles by the same journalist are employed not as sources of fact, but as sources of individual claims about the SCAA the merits of which are independently assessed in the thesis. It is my opinion that the relevance of the articles in this context is unchanged by the recent controversy. It should however be noted that as the objectivity of the reporting can be disputed, the articles in question lack the source value that can ordinarily be expected of serious journalism.
[113] Sanna Drysén, 'Tre av nitton LSU-utvisningar verkställdes' *Sveriges Radio* (Stockholm, 25 October 2019) <https://sverigesradio.se/artikel/7328149> accessed 27 april 2021.

be deported according to the Aliens Act, it is to be expected that many of its subjects have been awarded residence permits either as refugees or as persons otherwise in need of protection. The Government bill further points out that in practice it can be difficult to expel these persons to other countries than their home countries, since the application of the SCAA essentially means classifying a person as a dangerous criminal, which has the effect that few states are likely to voluntarily receive him.[114]

An important question is what happens when a person is detained pending deportation but deportation cannot be enforced. Neither the SCAA nor the preparatory works expressly say whether continued detention is possible in such a situation. The issue received much media attention in 2019, when six alleged radical Islamists who were the subjects of deportation orders were released from detention because there was no realistic prospect of expelling them in the foreseeable future. According to Minister for Home Affairs Mikael Damberg the Government is of the opinion that 'international rules' prevents prolonged detention of persons in this type of situation.[115] Likely this refers to the ECtHR's interpretation of Article 5(1)(f) of the ECHR in for example *A. and Others v. the United Kingdom* (see Chapter 5).

3.5 Rules and principles of procedure

3.5.1 Procedural rules in the Special Controls of Aliens Act

A qualified security matter is initiated by SÄPO, which lodges an application for deportation with the Migration Agency. The decision to deport a person based on the SCAA is then taken by the Migration Agency.[116] The Migration Agency's deportation order may be appealed against by the concerned individual or by SÄPO. The instance of appeal is the Government.[117] That the government is the highest instance of appeal is motivated by the claim that terrorist matters often require sensitive assessments of foreign policy, and that making such decisions requires extensive knowledge of foreign policy and national security.[118] Before the Government's decision, the Migration Court of Appeal shall make a statement. This statement is not binding for the Government, unless it states that there are such impediments to enforcement as are defined in Chapter 12 § 1–3 of the Aliens Act.[119] A detention order can be appealed against, with the exception of detention awaiting the Migration Agency's decision in § 9. Appeals against detention orders are tried by the Migration Court of Appeal.[120]

Before the Migration Court of Appeal makes its advisory statement, oral proceedings shall be conducted. The alien shall be heard and be given the opportunity to express his position and views on the invoked circumstances. The Migration Court of Appeal may decide to also hear other persons.[121] SÄPO and the Migration Agency shall account for the circumstances of the case and be given opportunity to question

[114] Prop. 1990/91:118 (n 84), 34.
[115] Sanna Drysén, 'Regeringen: Det saknas lagstöd för fortsatt förvar', *Sveriges Radio* (Stockholm, 7 November 2019) <https://sverigesradio.se/artikel/7338903> accessed 27 april 2021.
[116] Special Controls of Aliens Act 2 §.
[117] Ibid 2 a) §.
[118] Prop. 1990/91:118 (n 84), 53–54.
[119] Special Controls of Aliens Act, 3 §.
[120] Ibid 9 d) §.
[121] Ibid 13 b) §.

the alien and others who are being heard. SÄPO and the Migration Agency shall also give any other information necessary for the proceedings to take part.[122]

Unless it must be assumed that there is no need thereof, counsel shall be appointed for the alien in matters of deportation, obligation to report, enforcement of a deportation order if inhibition or a temporary residence permit has been issued, enforcement of a deportation order to the degree that it concerns detention and the alien has been detained for more than three days, and the application of coercive measures according to § 11 or § 11 a).[123]

3.5.2 Procedural protection in administrative law

The SCAA is based on the idea that since it is a piece of administrative law, principles of criminal procedure do not apply. In SOU 2020:16, a government inquiry into reforms to the SCAA published in 2020, it is stated that this means that the SCAA does not require a concrete and specific criminal suspicion, and that, unlike in criminal procedure, there is no general principle of openness and transparency. According to the inquiry, rule of law concerns which are cornerstones in criminal procedure 'do not belong in migration law' [my translation].[124] This means, for example, that in the view of the inquiry there are 'no particular demands on the evidence' [my translation].[125]

The proceedings belonging to administrative law does not mean a complete absence of rules and principles designed to protect the individual. Below follows an overview of relevant such rules and principles applicable to administrative proceedings.

Administrative agencies and courts are bound by the principle of legality.[126] Exactly what this means is not entirely clear. The principle has for a long time been considered less significant in administrative law than in criminal law.[127] In the post-war period, the notion that administrative authorities were to some extent obliged to respect at least a watered-down version of the principle of legality became generally accepted.[128] At this time, scholars did not favour a strict adherence to the principle of legality within administrative law. Instead, they considered it a principle among others that should be considered in the interest of justice and legal certainty, and which needed to be balanced against interests such as the effectiveness of the administration.[129]

Through the adoption of the 1974 Constitution (SFS 1974:172), which is in force today, the role of the principle of legality increased. Its Chapter 1 § 1(3) stipulates that all public exercise of power must take place under the law. This applies to courts as well as administrative public authorities.[130] The article is phrased in relatively abstract terms, but the Government bill makes clear that the provision is intended

[122] Special Controls of Aliens Act 13 b § 3 st.
[123] Ibid 27 §.
[124] SOU 2020:16 (n 81), 169–170.
[125] Ibid 170.
[126] Håkan Strömberg, *Allmän förvaltningsrätt* (27th edition, Norstedts Juridik 2018), 69.
[127] Carl Lebeck, *Legalitetsprincipen i förvaltningsrätten* (Norstedts Juridik 2018), 93–94.
[128] Ibid 94.
[129] Ibid 96.
[130] Ibid 97.

to create a concrete obligation for courts and administrative authorities.[131] The principle of legality is further strengthened by other rules in the Constitution, as it requires that any rules constituting interventions in the personal or financial affairs of individuals be enacted through legislation.[132] This includes the rules of detention, in which case the requirement is unconditional.[133] The principle of legality is also explicitly included in the Administrative Procedure Act (SFS 2017:900).[134]

The principle of legality requires unfavourable administrative decisions to be based on and in accordance with positive law. However, the exact meaning of the principle varies between different areas of administrative law and the level of precision required of the rules in question is not always the same.[135] Generally, more precision is required of rules enabling coercive or otherwise unfavourable measures against individuals than of neutral or beneficial rules.[136] Historically, migration law has generally left a large degree of discretion to the authorities applying it. This is related to the fact that while migration law often has significant, potentially very intrusive, effects on the individual, it has traditionally been considered a cornerstone of state sovereignty. However, jurisprudence from the Parliamentary Ombudsman for Justice shows that this discretion has decreased over time. This is often motivated by reference to the intrusive nature of decisions in the migration area. Carl Lebeck, doctor of law at Stockholm University, summarises the role of the principle of legality in migration law as meaning that measures as serious as deportation of individuals must be based on precise criteria.[137] However, there is no exact definition of the term 'precise criteria'.[138] According to Fredrik Sterzel, professor of constitutional law at Uppsala University and previous Swedish Supreme Court Justice, the principle of legality is weaker in administrative law than in criminal law. For example, it is unclear whether the prohibition of application by analogy applies in administrative law. Sterzel concludes that it is often considered sufficient that an administrative authority has 'some' legal basis for its decisions, while the requirements of preciseness and clarity are not given as much weight.[139]

Administrative decisions must also adhere to the principles of objectivity and equality.[140] This follows from the Constitution, and applies both to administrative agencies and other organs fulfilling administrative tasks, such as the Government.[141] This means that assessments must be objective and impartial. The principle of equality also means that where there is room for discretion, this discretion must be exercised in a consistent manner.[142]

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[131] Prop. 1973:90 *Kungl. Maj:ts proposition med förslag till ny regeringsform och ny riksdagsordning m. m.; given Stockholms slott den 16 mars 1973*, 228; see also Lebeck (n 126), 109.
[132] Constitution of Sweden (Regeringsformen) Chapter 8 § 2.
[133] Strömberg (n 126), 70.
[134] Administrative Procedure Act, 5 §.
[135] Lebeck (n 127), 162–163.
[136] Ibid 109.
[137] Ibid 214–215.
[138] Ibid 163.
[139] Fredrik Sterzel, 'Legalitetsprincipen' in Lena Marcusson (ed.), *Offentligrättsliga principer* (4th edition, Iustus förlag 2020), 84–98.
[140] Administrative Procedure Act 5 §.
[141] Constitution of Sweden (*Regeringsformen*) Chapter 1 § 9.
[142] Strömberg (n 126), 71–73.

The Administrative Procedure Act also prescribes that decisions must follow the principles of proportionality and necessity.[143] This means that a decision should only be made if its negative effects on the individual are outweighed by a strong public interest, and that the least intrusive available means should be chosen.[144]

Rules of communication and party insight aim to ensure that the individual knows of the evidence against him and has an honest chance to defend himself.[145] The starting point is that an individual who is party to administrative proceedings has a right to see all material that has been brought into the proceedings. This right can be limited.[146] The grounds for limitation are found in the Public Access to Information and Secrecy Act (SFS 2009:400). If a file relevant to the proceedings is classified according to that Act and it is of exceptional importance that the confidential information in it is not revealed, the file is not included by the right to party insight. Instead, the party should be given information about the content of the file to the extent that is necessary for him to protect his interests and is possible without severely endangering the interest the confidentiality seeks to protect.[147] It follows from the subject matter of the SCAA that the proceedings will often concern confidential information and that it therefore is likely that the right to party insight will in practice be limited on many occasions.[148]

A person who is wrongfully detained in accordance with a decision by an administrative agency can be entitled to financial compensation if it is clear that the decision was based on incorrect grounds and therefore was wrongful.[149]

3.5.3 Standards of proof in administrative law

Different standards of proof are employed in different areas of administrative law. The standard can also vary depending on the nature of a specific matter. Generally, the required standard of proof is higher when an individual is the subject of an unfavourable decision.[150] In his doctoral thesis on procedural law, Gustav Lindkvist discusses whether there exists any general standard of proof in administrative procedure, and concludes that the legal position is unclear but that a 'relatively high' standard of proof should be applied in most cases.[151] According to Christian Diesen et al., the general standard of proof in Swedish migration law is that to be considered proven, a claim should be made *probable*. This means that its likelihood should be assessed to be around 75 %.[152]

[143] Administrative Procedure Act § 5.
[144] Strömberg (n 126), 74.
[145] Ibid 155–116.
[146] Administrative Procedure Act § 10.
[147] Public Access to Information and Secrecy Act (2009:400), Chapter 10 § 3.
[148] Prop. 1990/91:118 (n 84), 67.
[149] Financial Compensation in Cases of Detention and other Coercive Measures Act (1998:714), § 5.
[150] Gustav Lindkvist, *Utredningsskyldighet, bevisbörda och beviskrav i förvaltningsprocessen* (Norstedts Juridik 2018), 333.
[151] Ibid 339.
[152] Christian Diesen et al., *Prövning av migrationsärenden. Bevis 8* (Norstedts Juridik 2007), 215.

The wording of the SCAA does not specify what standard of proof is required for it to be applicable. Its § 1(1) regards the situation where deportation *is* especially necessary due to national security concerns, and § 1(2) speaks of when *it can be feared* that the alien will commit certain crimes.

In an earlier version of the Code of Judicial Procedure, 'reasonably can be feared' referred to the level of risk of collusion necessary warrant pre-trial detention.[153] Today, the word used is instead 'risk' which is thought to mean a likelihood of at least 33 %.[154]

3.6 Application of the Special Controls of Aliens Act

Each year, the Government addresses a communication to Parliament, in which the application of the SCAA in the last twelve months is described. The communication is based on reports by SÄPO. However, since much of the material the decisions are based on is classified intelligence material, it is difficult to see exactly how the Act is interpreted.

Between the 1st of July 2019 and the 30th of June 2020, the Government made twelve decisions in which it applied the law. Out of these, eight were denials of appeals of the Migration agency's issued deportation orders. Three were denials of requests for reconsideration of deportation orders. One was a denial of an individual's request for a temporary residence permit.[155]

The communication refers to the fact that between 2015 and 2018, there was a comparatively high number of committed or perpetrated terrorist attacks in Western countries. These attacks were in most cases either inspired or instructed by Daesh, and mostly committed by lone perpetrators. While the threat level is lower today than it was in those years, it remains serious.[156] The communication further concludes that the main source of terrorism support in Sweden is violent Islamist extremism, but that the terror threat from violent right-wing extremism has increased. The communication also refers to violent left-wing extremism but states that this does not presently constitute a terror threat in Sweden. The SCAA has historically mainly been applied to supporters of violent Islamist extremism.[157] The communication contains no further information regarding the cases in which the SCAA has been applied. For example, it does not specify which grounds for deportation were applied, whether the concerned individuals have actually been deported, or whether they have spent any time in detention.[158]

Media reporting can also give some indication of how the SCAA is applied in practice. In 2019, SÄPO intervened against a number of persons who had previously been acquitted of terrorist crimes. As a result of the intervention, the individuals were put in detention according to the SCAA immediately after their release from pre-trial detention. Representatives of SÄPO expressed that SÄPO may sometimes have access to information which has not been part of the criminal investigation but which motivates

[153] Lars Heuman, 'Vilka beviskrav gäller eller bör gälla för användningen av tvångsmedel?' (2007) 1 *Svensk Juristtidning* 141, 150.
[154] See Chapter 4.
[155] Skr. 2020/21:69 (n 82), 5.
[156] Ibid 7.
[157] Ibid 6
[158] Ibid 1–10.

deportation and detention for security purposes.[159] Allegedly, the concerned individuals were radical Islamists. Eventually they were subjected to deportation orders which, however, could not be enforced.[160] The case in question has been the subject of much public debate, see Section 3.7.2.

3.7 Reception of the Special Controls of Aliens Act

3.7.1 Discussion in the preparatory works

A part of the Swedish drafting process is that proposed legislation is sent to relevant consultation bodies, who are given the opportunity to express opinions on the proposal. These opinions are not binding, but can serve to illuminate controversial aspects of the legislation.

Two consultation bodies, the Equality Ombudsman and the Swedish Refugee Council, were concerned that the existence of special terrorist regulation only applicable to non-citizens would result in ethnic discrimination.[161] The Equality Ombudsman described the proposed act as objectionable on two main grounds: its discriminatory nature and the way in which it disabled ordinary principles of law by allowing drastic measures comparable to strong sanctions against individuals without requiring any establishment of criminal guilt. The Ombudsman noted that existing legislation of a similar nature had yielded relatively scarce results as it was rarely applied, and claimed that in many of the cases in which it had been applied it would also have been possible to press charges and deal with the matter through the ordinary criminal procedure.[162] The Minister for Immigration as well as the Committee for Terrorism Legislation found that as acts of political violence in Sweden had previously generally been a result of political conflicts abroad, it was necessary and reasonable to maintain a special regulation for non-citizen terrorist suspects. The Minister for Immigration noted that the system had also been accused of inadequacy, as it did not apply to all terrorist suspects. The Government bill also stipulates that the act is only intended to be applied to a small number of violent extremists, and that 'foreigners in general' therefore have no reason to worry about it being applied to them.[163]

In the Government bill, it is noted that the 'branding' of a person as a terrorist may not only negatively affect the chances of another state willingly receiving said person; it is also likely to detrimentally affect the individual and his chances of eventually leading a normal life in Sweden or elsewhere.[164]

Several consultation bodies, such as the Swedish National Courts Administration and the Svea Court of Appeal, thought that in the interest of justice and legal certainty the highest instance of appeal should be a court of law. The Svea Court of Appeal noted that courts generally have a higher competency in matters of evaluating evidence and interpreting legislation than the Government, and would therefore be better suited to balance the state's interest of security against the individual's interest of legal certainty. The

[159] TT, 'Terrorfriade bedöms som säkerhetshot', *Aftonbladet* (Stockholm 17 March 2019) <www.aftonbladet.se/nyheter/a/P3kXAe/terrorfriade-bedoms-som-sakerhetshot> accessed 1 May 2021.
[160] TT, 'Samtliga sex förvarstagna islamister ska utvisas', *Dagens Nyheter* (Stockholm 31 October 2019), <www.dn.se/nyheter/sverige/samtliga-sex-forvarstagna-islamister-ska-utvisas/>, accessed 16 May 2021.
[161] Prop. 1990/91:118 (n 84), 26–27.
[162] Ibid 106–107.
[163] Ibid 27.
[164] Ibid 34.

Svea Court of Appeal pointed out that one of the reasons the bill had given for the Government's role as highest instance of appeal was the fact that it would sometimes be necessary to take considerations of foreign policy into account, and pointed out that it can be questioned whether basing decisions on such considerations rather than on strict interpretation of the law would conform to the requirements of the principle of legality and the rule of law.[165] The Minister for Immigration disagreed with this interpretation.[166] The Office of the Chancellor for Justice expressed similar concerns as the Svea Court of Appeal and the National Courts Administration, emphasising that the act would mean significant intrusion in the lives of individuals and that the assessment by an experienced judge would therefore be favourable in the interest of justice. The Office pointed out that a judge could gain such specialised competence that would make him especially well-suited to make this type of assessment. The Office was of the opinion that it would be sufficient for a Court to have an advisory function.[167]

The Swedish Refugee Council was very negative to the draft law as it thought that it would worsen an already existing threat against the rule of law. Additionally, the Council found it unacceptable for this type of legislation to exclusively target non-citizens.[168] The Swedish Refugee Council further thought that the grounds for application, and thus implicitly the definition of a presumptive terrorist, were not sufficiently clear and that this aspect of the draft law was therefore unacceptable.[169] This referred to the original grounds for application such as they were phrased in 1991, but it should be noted that according to the Government bill from 2002, after which the grounds changed to their current wording their meaning is roughly the same as in the original act.[170]

The Swedish section of the International Commission of Jurists also criticised the grounds for application of the act. It noted that applying the act to an individual would severely harm his or her chances of leading a normal life in the future, and contended that the preconditions for application should therefore be more precise. The section suggested that it should be required that the alien had already committed or participated in a criminal act of the nature described in the Act, or that it at the very least should be necessary that there was probable cause to suspect that this was the case. The section motivated this by reference to the principle of legal certainty, meaning that the subjects of the legislation should be able to understand their legal status and position from the legislation.[171]

3.7.2 Public debate

The SCAA has also been the subject of debate in the media. The debate often revolves around either the fact that it, for security reasons, is problematic that persons subjected to deportation orders which cannot be enforced are released into society, or around issues of whether there are sufficient justice and human rights guarantees in place to protect the persons to whom the law is applied.

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[165] Prop. 1990/91:118 (n 84), 117.
[166] Ibid 54.
[167] Ibid 116.
[168] Ibid 108.
[169] Ibid 110.
[170] Ibid 77–78.
[171] Ibid 111–112.

In an opinion piece in *Sydsvenskan* in January 2021, two representatives of right-wing anti-immigration party Sverigedemokraterna wrote that 'foreigners who constitute a terror threat should be placed in detention until they can be deported' [my translation into English].[172] In line with this, the authors propose an expansion of the grounds for security detention.[173] In the same month, an editorial in *Göteborgs-Posten* expressed concern that the Government has not done enough to ensure the deportation of the six imams whose deportation orders from 2019 have yet to be enforced. According to the author, the failure to deport security threats is remarkable.[174] The opinion that the SCAA in its current shape fails to adequately protect against terrorism was also expressed by the legal policy spokespersons of four major political parties, Moderaterna, Centerpartiet, Kristdemokraterna and Liberalerna, in *Aftonbladet* in 2020. Referring to the fact that many deportation orders had not been possible to enforce, the authors called for revision of the legislation, with the aim of finding a way to, in conformity with Sweden's international obligations, ensure that persons who constitute security threats cannot move about freely in society.[175]

Dennis Töllborg, professor of law at Gothenburg University, has claimed that the SCAA proceedings are only held for appearances' sake and that it is uncertain whether they fulfil the requirements of Article 13 of the ECHR, regarding the right to an effective remedy. Töllborg's assessment is that the information on which the deportation decisions are made rarely proves what has actually occurred, but that it is merely an account of the position of SÄPO.[176] Anne Ramberg, lawyer and former secretary general of the Swedish Bar Association, has remarked that the SCAA has severe deficiencies from a justice perspective. Her criticism has emphasized the low standard of proof and the lack of transparency, especially the fact that the suspect and his counsel are not given access to all of the information on which the decisions are based.[177]

In June 2019, an open letter to the Minister for Home affairs and the Minister for Justice written by Hajir Alduhan, a lawyer representing the families of the six detainees mentioned above, was published in *Aftonbladet*. The letter claimed that the detentions were contrary to principles of justice, and alleged the detained men had not been given access to information about the reasons for their detention. Furthermore, it argued that the right to fair trial and the presumption of innocence demanded that the detained men either be released or brought before a court where they could view the evidence against them and where the accusations against them could be tried. The letter further claimed that the six men

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[172] Adam Marttinen and Magnus Olsson, 'Ingen våldsbejakande islamist som ska utvisas ska kunna välja att bo i Malmö', *Sydsvenskan* (Malmö 19 January 2021) <www.sydsvenskan.se/2021-01-19/ingen-valdsbejakande-islamist-som-ska-utvisas-ska-kunna-valja-att-bo-i-malmo> accessed 1 May 2021.
[173] Ibid.
[174] Bawar Ismail, 'Har regeringen glömt bort de farliga imamerna?', *Göteborgs-Posten* (Göteborg 22 January 2021) <www.gp.se/ledare/har-regeringen-gl%C3%B6mt-bort-de-farliga-imamerna-1.40256468> accessed 1 May 2021.
[175] Johan Forssell, Johan Hedin, Andreas Carlsson and Johan Pehrson, 'De som är terrorhot måste kunna utvisas', *Aftonbladet* (Stockholm 23 April 2020) <www.aftonbladet.se/debatt/a/LAE8jp/de-som-ar-terrorhot-maste-kunna-utvisas> accessed 1 May 2021.
[176] Sanna Drysén, 'Professor: LSU-process kan strida mot Europakonventionen', *Sveriges Radio* (Stockholm 22 October 2019) <https://sverigesradio.se/artikel/7326881> accessed 1 May 2021.
[177] Sara Malm, 'Anne Ramberg kritisk mot lagen efter tillslaget mot Gävleimamen', *Expressen* (Stockholm 19 May 2021) <www.expressen.se/nyheter/anne-ramberg-kritisk-mot-sapos-tillslag-mot-gavleimamen-lagen-behover-andras/> accessed 1 May 2021.

had been unfairly painted as extremists and terrorists in the media, even though the interventions were based only on rumours. In the view of the family members, detention on such loose grounds constituted an infringement of the six men's freedom of expression. Finally, the letter suggested that the men had been unfairly targeted due to their religious identity as Muslims.[178]

Already in 2001, journalist Peter Bratt criticized the SCAA in an article in *Dagens Nyheter*. Referring to criminologist Janne Flyghed, Bratt claimed that the SCAA undermines the traditional order of criminal procedure in which sanctions require a conviction after a trial in a court of law. Bratt especially pointed out that the grounds for application are vague. According to Flyghed, the act's discriminatory nature, as it is only applicable to non-citizens, is highly problematic.[179]

3.8 The future of the Special Controls of Aliens Act

In 2020, a Government inquiry proposing changes to the regulation of migration matters with security aspects was issued. Which legislation these changes may result in is still unknown. The proposed changes include a number of alterations to the SCAA, some of which would affect the detention regime. While the material content of the Act would remain largely the same, the report suggests exchanging it for a new act, in order to make the legislation clearer and more structured. The changes are also intended to facilitate expulsion of aliens who pose a security risk.[180]

The inquiry suggests introducing additional grounds for detention by expanding the scope of § 8, which in the new act would be Chapter 3 §§ 1–3, to include cases where the alien in other ways than hiding impedes the enforcement of a deportation order.[181] The new Act would also create an absolute time limit regarding the length of detention, stipulating that any time spent in detention be as short as possible, and that adults could be detained for a maximum period of one year unless there were significant reasons, related to enforcement, to maintain the detention longer, in which case the maximum period would be two years. For persons under the age of 18, detention would only be allowed for 72 hours, or in the event of there being such significant reasons, an additional 72 hours (creating a maximum period of detention for 144 hours). The report also suggests rules for review of the detention's legality and necessity.[182]

The report also suggests explicitly including the principle of proportionality in the new SCAA by legislating that detention and other coercive measures may only be employed if the reasons for doing so outweigh the infringement of the alien's rights, or other detrimental effects to him or any other interest.[183]

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[178] Hajir Alduhan, 'Var är bevisen mot de gripna imamerna?', *Aftonbladet* 3 juni 2019 <www.aftonbladet.se/debatt/a/3JVMmX/var-ar-bevisen-mot-de-gripna-imamerna> accessed 1 May 2021.
[179] Peter Bratt, 'Misstankar räcker för utvisning', *Dagens Nyheter* 2 December 2001 <www.dn.se/arkiv/inrikes/misstankar-racker-for-utvisning/> accessed 1 May 2021.
[180] SOU 2020:16 (n 81), 28–32.
[181] Ibid 48.
[182] Ibid 50–51.
[183] Ibid 43.

4 Detention in Swedish criminal law

4.1 Introduction

The previous chapter described the conditions for detention in the context of the SCAA. This chapter does the same for detention as a part of criminal proceedings, in order to enable a comparison between the two systems. The chapter starts by describing different standards of proof employed in Swedish criminal law, and then moves on to describing the conditions for the different forms of pre-trial detention. This structure is chosen because an understanding of the differences between the different standards makes it significantly easier to understand the conditions for different forms of detention. Finally, the chapter describes various rules of procedural protection enshrined in the criminal law.

4.2 Standards of proof in criminal procedure

Different standards of proof apply at different stages of the criminal procedure. The lowest standard of proof used in Swedish criminal procedure is *reason to assume* ('anledning att anta').[184] Most notably this standard creates the threshold for when a criminal investigation is to be initiated.[185] This means that there must be a suspicion that a specific criminal act has occurred. The suspicion must be based on some type of observed circumstance or other direct or indirect evidence associated with such acts. However, it is sufficient that the probability that the suspected act has occurred is around 10–12 %. It is important to note that this standard of proof does not express the probability that a specific person has committed a crime, but only that a crime has been committed.[186]

The lowest level of suspicion directed at a specific person is when that person *can be suspected* ('kan misstänkas') of a crime.[187] Someone who can be suspected of a crime can be obligated to stay to be interrogated for a longer period of time, twelve hours rather than six, than others, and may be detained during this time.[188] This is a very low standard of proof, as there must not be any significant or otherwise qualified evidence of the person's guilt. Instead, the standard is fulfilled as soon as a person becomes the subject of suspicion.[189] However, the suspicion must be based on some type of concrete circumstance. Thomas Bring et al. say that the level of probability required lies around 15–20 %. The standard can be fulfilled in respect of several alternative persons at the same time.[190]

The next level of suspicion is *reasonable suspicion* ('skälig misstanke'). When this is achieved a number of key rules relating to the suspect's rights and the use of coercive measures are activated. The standard of proof required for there to be a reasonable suspicion is much higher than to say that a person can be

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[184] Thomas Bring, Christian Diesen and Simon Andersson, *Förundersökning* (5th edition, Norstedts Juridik 2019), 158–159.
[185] Code of Judicial Procedure (1942:740) Chapter 23 § 1.
[186] Bring, Diesen and Andersson (n 184), 163–165.
[187] Ibid.
[188] Code of Judicial Procedure, Chapter 23 § 9.
[189] SOU 1926:32 *Processkommissionens betänkande angående rättegångsväsendets ombildning – Andra delen – Rättegången i brottmål*, 67.
[190] Bring, Diesen and Andersson (n 184), 166–167.

suspected. It is only achieved when the investigation has reached the point of focusing on one person, meaning that only one person at a time can be the subject of reasonable suspicion of a certain crime (unless, of course, there are several suspects who are believed to have acted together). This means that for there to be a reasonable suspicion, it must be more likely that the suspected person committed the crime than that someone else did. The suspicion in question must be based on substantial and objectively founded circumstances, and these circumstances must be of a certain magnitude. The mere intuition of a police officer can never be sufficient to establish reasonable suspicion.[191]

After reasonable suspicion comes *probable cause* ('sannolika skäl'). This requires suspicion that appears justified and convincing by an objective assessment by an experienced and discerning person.[192] The notion of probable cause in Swedish law can be said to signify the same strength of evidence as the internationally used *clear and convincing evidence*. Bring et al. interpret this as meaning the likelihood of criminal guilt ought to be around at least 75 %.[193]

When the level of suspicion reaches *sufficient cause* ('tillräckliga skäl'), the prosecutor shall press charges.[194] In terms of probability this is very close to the highest standard of proof in Swedish law, *beyond reasonable doubt* ('utom rimligt tvivel'), since a prosecutor should only press charges when assessing that the evidence is sufficient for a conviction, which is out of the question if the evidence does not prove beyond reasonable doubt that the defendant is guilty. The distinction between probable cause and sufficient cause relates not only to the level of probability required, but also to the manner of assessment. Whether there is sufficient cause to press charges depends not only on the likelihood of criminal guilt, but also on whether the evidence will hold up in court. This means that the assessment must also take into account for example that witnesses may change their statements or appear less reliable than anticipated. The assessment must also include the presence of grounds for impunity.[195]

For the defendant to be convicted by the court his guilt must be proven.[196] It is clearly established that this is to be interpreted as *proven beyond reasonable doubt*.[197] This is sometimes said to signify a probability of around 95–98 %. However, the determination of whether this standard is achieved is not based on a strict probability assessment, but rather on whether the prosecutor's statement of the criminal act as charged is the only reasonable explanation of what has occurred. If a reasonable person would find an alternative explanation plausible, guilt has not been proven beyond reasonable doubt even if that alternative explanation is statistically less probable than 2–5 %.[198]

The standard of proof can be divided into two elements: sufficient support and sufficient investigation. While the former refers to how strongly the evidence available to the decision-maker supports the

[191] Bring, Diesen and Andersson (n 184), 166–171.
[192] Ibid 181–182.
[193] Ibid 186.
[194] Code of Judicial Procedure 23 Chapter 2 §.
[195] Bring, Diesen and Andersson (n 184), 186–188.
[196] Code of Judicial Procedure Chapter 35 § 1.
[197] See inter alia NJA 1980 s. 725 (Supreme Court of Sweden), NJA 1991 s. 83 (Supreme Court of Sweden), NJA 1992 s. 446 (Supreme Court of Sweden), NJA 1993 s. 68 (Supreme Court of Sweden) and NJA 1996 s. 176 (Supreme Court of Sweden).
[198] Bring, Diesen and Andersson (n 184), 191–194.

hypothesis, the latter refers to the amount of available evidence produced by the investigation.[199] The latter requirement refers to the robustness of the evidence, that is, the probability that the conclusion would change if more information was made available to the decision-maker. Robustness can be described as *second order probability* as it refers to the probability that a probability assessment would change in a given situation (the introduction of new information).[200] If in a criminal case the court finds that there is not enough available information, the standard of proof is not fulfilled and the defendant shall be acquitted, as a result of the presumption of innocence.[201]

In addition to these different standards of proof referring to the likelihood that a specific event has occurred in the past, some rules refer to the *risk* that something may occur in the future. This is relevant when determining whether there are grounds for pre-trial detention. Bring et al. interpret this as requiring an at least 33 % likelihood of the future event occurring. Like in the other assessments described above, it is essential that the determination is based on concrete circumstances.[202]

4.3 Grounds for pre-trial detention in criminal law

Chapter 24 of the Code of Judicial Procedure (SFS 1942:740) creates a three-tier system of different forms of pre-trial detention, which are provisional in relation to each other.[203] The thesis refers to these forms as arrest (‘gripande’), prosecutorial detention (‘anhållan’) and court-ordered detention (‘häktning’).[204] A person may be put in court-ordered detention if there is probable cause for suspicion that he has committed a crime for which the punishment can exceed one year in prison, and his continued liberty would create a risk of his flight, tampering with evidence or commission of further criminal offences.[205] If the minimum sentence for the offence exceeds two years in prison, the court shall order detention unless it is obvious that none of the risks are at hand.[206] Court-ordered detention may only be employed if the reasons in favour of it outweigh its negative effects.[207] If it can be assumed that the defendant will only receive a pecuniary penalty detention may not be ordered.[208] A person may, however, be put in court-ordered detention regardless of the prescribed and predicted penalty if his identity is unknown and he refuses to identify himself, or if his residence is abroad and there is a risk that he evades legal proceedings by leaving the country.[209] Court-ordered detention is possible even if there is only reasonable suspicion, rather than probable cause, if all other requirements for detention are fulfilled *and* it is of exceptional importance that the person is detained pending further investigation.[210]

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[199] Christian Dahlman, *Beviskraft* (Norstedts Juridik 2018), 148–149.
[200] Ibid 153.
[201] Ibid 149.
[202] Bring, Diesen and Andersson (n 184) 194–195.
[203] Ibid 361.
[204] These terms lack generally accepted English translations, but it is my opinion that this terminology succinctly captures the signifying feature of each type of pre-trial detention while also distinguishing them from each other.
[205] Code of Judicial Procedure Chapter 24 § 1(1).
[206] Ibid Chapter 24 § 1(2).
[207] Ibid Chapter 24 § 1(3).
[208] Ibid Chapter 24 § 1(4).
[209] Ibid Chapter 24 § 2.
[210] Ibid Chapter 24 § 3.

Such detention must always be reviewed by the court within a week. If the level of suspicion has not then reached probable cause, the person must be released.[211]

Prosecutorial detention is allowed if there are grounds for court-ordered detention, but the court has not yet made a decision or if not all grounds for court-ordered detention are fulfilled, but there is reasonable suspicion of the person's guilt and it is especially important to detain him pending further investigation.[212] If there are grounds for prosecutorial detention and the matter is urgent, a policeman may arrest a person.[213] Following arrest, the detainee shall be interrogated as soon as possible, and immediately thereafter a prosecutor shall decide whether he shall remain in detention or not. If there are no grounds for detention, he shall be released immediately.[214]

When a person is arrested or placed in prosecutorial detention, he shall be informed of which crime he is suspected of having committed and of the grounds for the detention.[215] When placed in court-ordered or prosecutorial detention, the detainee is also entitled to be informed of the circumstances the detention order is based on.[216] This right is absolute, and cannot be limited by concerns that giving the detainee information might harm the investigation.[217]

4.4 Procedural protection in criminal law

Most rules of criminal procedure emanate from either the principle of realisation or the principle of protection. The first relates to the ultimate goal of the criminal procedure, namely to identify, prosecute and punish those guilty of criminal acts, while the second refers to the idea that the suspect shall be protected against undue interferences in his rights. Through the procedural rules of the Code of Judicial Procedure, the legislator has struck a balance between the two principles. Where rules based on the principle of realisation enable the use of coercive measures, rules based on the principle of protection restrict that use by for example requiring certain standards of proof or the setting of time limits after which the coercive measure must cease.[218]

Criminal procedure as a whole is governed by the principle of legality, meaning that any criminal conviction or measures aiming at future criminal conviction must be based in law.[219] The principle of legality in criminal procedure is comprised of the principle that criminalisation requires legislation, the prohibition of application by analogy, the prohibition of retroactive application and the principle that criminal rules must be sufficiently clear and precise.[220] The prohibition of retroactivity is enshrined in the Constitution, which in its Chapter 2 § 10 stipulates that no one may be sentenced to a punishment or other criminal sanction for an act which was not criminalized at the time of commission. This includes

[211] Code of Judicial Procedure Chapter 24 § 19.
[212] Ibid Chapter 24 § 6.
[213] Ibid Chapter 24 § 7.
[214] Ibid Chapter 24 § 8(2).
[215] Ibid Chapter 24 § 9.
[216] Ibid Chapter 24 § 9 a.
[217] Gunnel Lindberg, Rättegångsbalk (1942:740) Chapter 24 § 9 a), Section 4.2 Omfattningen av rätten till insyn, Lexino 2021-05-16 (JUNO).
[218] Karol Nowak, *Oskyldighetspresumtionen* (Norstedts Juridik 2003), 63.
[219] Bring, Diesen and Andersson (n 184), 65.
[220] Madeleine Leijonhufvud and Suzanne Wennberg, *Straffansvar* (8th edition, Norstedts Juridik 2008), 22-29.

special legal effects of crime, such as expulsion following a crime.[221] In a criminal context, the principle of legality is protected by Article 7 of the ECHR. The meaning of this is expanded on in Chapter 7.

The principle of immediacy requires a conviction to only be based on information that has been presented at the main hearing.[222] At the main hearing, evidence shall to the greatest extent possible be presented orally.[223] The pre-trial investigation is guided by a principle of objectivity, meaning that the prosecutor and the police have an obligation to search for and take into account circumstances and evidence that speak in favour of the suspect as well as against him.[224] If a person who has been placed in court-ordered pre-trial detention is acquitted, or if the prosecution is dismissed or if the investigation is terminated without the commencement of a prosecution, the detainee is entitled to financial compensation.[225]

The presumption of innocence is guaranteed in Swedish criminal law through Article 6(2) of the ECHR. The convention is part of Swedish law through the Act (SFS 1994:1219) on the European Convention for the Protection of Human Rights and Fundamental Freedoms, and enjoys a special status on par with the constitution due to the rule in Chapter 2 § 19 of the Constitution. The presumption existed in Swedish law before the accession to the ECHR, but it was not codified and its status was significantly improved by the accession to, and incorporation of, the Convention.[226] Article 6(2) states that: 'Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.'[227] Similar rules exist in Article 14 of the ICCPR, Article 11 of the UDHR and Article 48 of the EU Charter. In a European context, reference is most often made to the ECHR, but the inclusion of the presumption in other human rights instruments speaks to its status as a generally accepted principle of justice.[228] The presumption serves both to protect the defendant's human rights in an individual case and to ensure that the criminal procedure as a whole appears fair and just. Several important rules of Swedish criminal procedure exist as a result of the presumption.[229] The fair trial rules in Article 6 also include the principle of equality of arms, aimed at ensuring the defendant an effective defence.[230] From this follows a right to confront witnesses.[231]

[221] Henrik Jernsten, Regeringsformen (1974:152) Chapter 2 § 10, Section 3 Förbudet mot retroaktiv strafflag, Lexino 1 January 2021 (JUNO).
[222] Code of Judicial Procedure Chapter 30 § 2.
[223] Ibid Chapter 46 § 5.
[224] Ibid Chapter 23 § 4.
[225] Financial Compensation in Cases of Detention and other Coercive Measures Act (SFS 1998:715), § 2.
[226] Nowak (n 218), 78.
[227] ECHR Art. 6(2).
[228] Nowak (n 218) 75.
[229] Ibid 58–59.
[230] Bring, Diesen and Andersson (n 184), 66.
[231] ECHR Article 6(2)(d).

5 The prohibition of arbitrary detention in the European Convention on Human Rights

5.1 Introduction

Preventive security detention is sometimes accused of lacking sufficient safeguards against arbitrariness. Arbitrary detention is prohibited by Article 5 of the ECHR, which protects the right to personal liberty and security. In the analysis, the SCAA's relationship to this right will be examined. This chapter provides description of the relevant Convention articles and their interpretation, which the analysis will be based on. The chapter starts by introducing Article 5 and then moves on to focus on two of the grounds for lawful detention. The two grounds have been chosen because of their apparent potential to justify the detention regime of the SCAA.

5.2 The right to personal liberty and security

Article 5 of the ECHR states that everyone has the right to liberty and security of person, and that a person may be deprived of his liberty only in the specific circumstances listed in the Article 5(1) and in accordance with a procedure prescribed by law.[232] Furthermore, the article creates a set of procedural rights for persons who have been deprived of their liberty.[233]

'Right to liberty' in Article 5 refers to physical liberty and does not apply to restrictions of a person's freedom of movement.[234] The Court's determination of whether a deprivation of liberty has occurred is autonomous, in that it does not rely on the conclusions of domestic authorities.[235] The purpose of the deprivation of liberty is not relevant for its classification, but is considered in the determination of whether the deprivation is compatible with the convention.[236] A deprivation of liberty is made up of two elements: an objective element constituted by the physical confinement of a person in a particular restricted space and a subjective element constituted by the fact that the person has not consented to this.[237] That a detention is only in effect for a short duration of time does not mean it is not deprivation of liberty under Article 5.[238]

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[232] ECHR Article 5(1).
[233] ECHR Article 5(2)–(5).
[234] European Court of Human Rights, 'Guide on Article 5 of the European Convention on Human Rights – The Right to Liberty and Security' (Council of Europe 2021), § 1.
[235] *Khlaifia and Others v. Italy* [GC] App no. 16483/12 (ECtHR 15 December 2016), § 71; *H.L. v. The United Kingdom* App no. 45508/99 (ECtHR 5 October 2010), § 90.
[236] *Rozhkov v. Russia (No. 2)* App no. 38898/04 (ECtHR 31 January 2017), § 74.
[237] *Storck v. Germany* App no. 61603/00 (ECtHR 16 June 2005), § 74; *Stanev v. Bulgaria* [GC] App no. 36760/06 (ECtHR 17 January 2012), § 117.
[238] *Rantsev v. Cyprus and Russia* App no. 25965/04 (ECtHR 7 January 2010), § 317; *Iskandarov v. Russia* App no. 17185/05 (ECtHR 23 September 2010), § 140.

The main purpose of Article 5 is to prevent arbitrary and unjustified deprivations of liberty.[239] The Court has on several occasions held that this is an essential feature in a democratic society.[240] Furthermore, the Court has consistently emphasised the exhaustive nature of the grounds for lawful deprivations of liberty and the importance of prompt judicial controls.[241] The effect of the exhaustive nature of the list in Article 5 is that if a deprivation of liberty does not fit within one of the listed grounds, it is a violation of the convention regardless of which arguments the state uses to justify it and any balancing between the detainee's and the state's interests is irrelevant.[242]

In addition to falling under one of the sub-paragraphs in Article 5(1), any deprivation of liberty must be in accordance with a procedure prescribed by law in order to be allowed by the convention be. This refers both to national law and to other international legal standards applicable in the state.[243] Continued detention after a national Supreme Court has found the detention unlawful does not fulfil this criterion.[244]

To be considered lawful, it is not enough that the detention adheres to applicable domestic law. Additionally, that domestic law must comply with the Convention and with the general principles the Convention expresses or implies.[245] Such principles include the rule of law, the principle of legal certainty, the principle of proportionality and the principle of protection against arbitrariness.[246]

The principle of legal certainty requires the domestic law to be foreseeable. This means that it must be so clear and precise that it is possible to foresee that certain actions will result in a deprivation of liberty.[247] The law must clearly define under which circumstances detention can be ordered and extended. It should also include clear provisions on time-limits of the detention, and provide for an effective remedy in the case that the applicant wishes to contest the detention's lawfulness.[248] The matter of time limits was dealt with in *Garayev v. Azerbaijan*, where domestic law did not contain a time-limit for detention pending extradition. The Court found that this together with the lack of clear legal provisions establishing the procedure for ordering and extending the detention meant that the detention was not sufficiently circumscribed by adequate safeguards against arbitrariness. The Court's reasoning does not make clear whether the lack of pre-established time-limits or a procedure for setting such time limits alone could lead to the same conclusion.[249] In *Baranowski v. Poland* and more recently *Gal v. Ukraine*, the Court held that detaining a person for an unlimited and unpredictable time without basis in

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[239] *Selahattin Demirtas v. Turkey (No. 2)* [GC] App no. 14305/17 (ECtHR 22 December 2020), § 311.
[240] *Medvedyev and Others v. France* [GC] App no. 3394/03 (ECtHR 9 March 2010), § 76; *Ladent v. Poland* App no. 11036/03 (ECtHR 18 March 2008), § 45.
[241] *Khlaifia and Others v. Italy* [GC] (ECtHR 2016 [n 235]), § 88; *Selahattin Demirtas v. Turkey (No. 2) [GC]* (ECtHR 2020 [n 239]), § 312.
[242] *Merabishvili v. Georgia* [GC] App no. 72508/13 (ECtHR 28 November 2017), § 298.
[243] *Medvedyev and Others v. France* [GC] (ECtHR 2010 [n 240]) § 79; *Toniolo v. San Marino and Italy* App no. 44853/10 (ECtHR 26 June 2012), § 46.
[244] *Sahin Alpay v. Turkey* App no. 16538/17 (ECtHR 20 March 2018), § 118; *Mehmet Hasan Altan v. Turkey* App no. 13237/17 (ECtHR 20 March 2018), § 139.
[245] *Plesó v. Hungary*, App. No 41242/08 (ECtHR 2 October 2012), § 59.
[246] *Simons v. Belgium (dec.)* App no. 71507/10, (ECthR 28 August 2012), § 32.
[247] *Khlaifia and Others v. Italy* [GC] (ECtHR 2016 [n 235]), § 92; *Del Río Prada v. Spain* [GC] App no. 42750/09 (ECtHR 21 October 2013), § 125*; Medvedyev and Others v. France* [GC] (ECtHR 2010 [n 240]), § 80.
[248] *J.N. v. the United Kingdom* App no. 37289/12 (ECtHR 19 May 2016), § 77.
[249] *Garayev v. Azerbaijan* App no. 53688/08 (ECtHR 10 June 2010), § 99.

a specific legal provision or a judicial decision is contrary to the principle of legal certainty, but in both cases it failed to clarify the independent effect of a lack of time limits.[250]

If a detention is actually enforced for a different purpose than the invoked sub-paragraph of Article 5, the detainee is not sufficiently protected against arbitrariness. The same is the case if there is no actual connection between the ground for detention and the conditions of the detention, or if the detention is disproportionate in relation to its purpose.[251]

When the lawfulness criterion has been fulfilled, the next step is to determine whether a deprivation of liberty falls under one of the permitted grounds in Article 5(1)(a)-(f). Out of these, sub-paragraphs (c) and (f) warrant special attention in this context as they govern preventive detention and the detention of non-citizens respectively.

5.2.1 5(1)(c)

Sub-paragraph 5(1)(c) provides what may be interpreted as a justification of preventive security detention, by allowing detention in the following situation:

> (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 […].[252]

Article 5(1)(c) can be divided into three different situations: i) arrest or detention when there is reasonable suspicion a person has committed an offence, ii) arrest or detention when it is reasonably considered necessary to prevent a person committing an offence, and iii) arrest or detention when it is reasonably considered necessary to prevent a person fleeing after having committed an offence. The second category appears to refer to purely preventive detention.[253]

That this is the case was confirmed by the ECtHR in 2018, in *S., V. and A. v. Denmark*. Here the Court explicitly stated that the second limb should be regarded as a distinct and separate ground for detention and that detention for the purpose of preventing the commission of an offence thus does not require any suspicion that the detainee has previously committed a crime.[254] Nor is it necessary that the detention takes place in the context of criminal proceedings.[255]

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[250] *Baranowski v. Poland*, App no. 28358/95 (ECtHR 28 March 2000), § 56; *Gal v. Ukraine* App no. 6759/11 (ECtHR 16 April 2015), § 36.
[251] *James, Wells and Lee v. the United Kingdom*, App nos. 25119/09, 57715/09 and 57877/09 (ECtHR 18 September 2009), §§ 191–195; *Saadi v. the United Kingdom* [GC] App no. 13229/03 (ECtHR 29 January 2008), §§ 68–74.
[252] ECHR Article 5(1)(c).
[253] Macken, 'Preventive Detention and the Right to Personal Liberty and Security under Article 5 ECHR' (n 33), 196–197; 'Guide on Article 5 of the European Convention on Human Rights – The Right to Liberty and Security' (n 234), § 78.
[254] *S., V. and A. v. Denmark* [GC], App. Nos. 35553/12 36678/12 and 36711/12 (ECtHR 22 October 2018), §§ 114–115.
[255] Ibid §116.

The ECtHR has found the condition 'for the purpose of bringing him before a competent legal authority' to apply to all three situations.[256] In subsequent case law it has, however, said that the application of this requirement should be quite flexible. In *Brogan and others v. the United Kingdom*, it held that the fact that the applicants were never charged or brought before a court does not mean that the purpose of their detention was illegitimate, and that Article 5(1)(c) does not presuppose that the police at the time of arrest has sufficient evidence for charges to be brought.[257] *In S., V. and A. v. Denmark* it elaborated on what this means in the specific context of preventive detention, listing a number of arguments against a strict interpretation of the purpose requirement in such cases. Instead, it found that short-term preventive detention can be allowed even if there is no intention to bring the person before a judicial authority at all, given that the purpose is instead to release the person after a short period. It motivated this conclusion in two ways. The first was by reference to practical necessity, saying that Article 5 must not be interpreted in a way that makes it impossible for the police to effectively fulfil their task of maintaining order and protecting the public. The second argument was that in cases of preventive detention, the individual should be released as soon as the risk of the crime being committed has passed. In the event of a person being placed in preventive detention to prevent an imminent offence, the point in time where the risk has passed and release is called for may often come before the earliest point where it would be possible to bring the person before a judicial authority. Thus, requiring that the person be brought before a judicial authority in such cases would result in the detention being longer than it would have otherwise been, which would contradict the purpose of the Article.[258]

In *Guzzardi v. Italy*, the ECtHR held that Article 5(1)(c) does not aim to enable a 'policy of general prevention directed against an individual or a category of individuals who […] present a danger on account of their continuing propensity to crime; it does no more than afford the Contracting states a means of preventing a concrete and specific offence'.[259] It recapitulated this conclusion in *S., V. and A. and Others*, and specified that it applies also when the conclusion that the person is dangerous is correct. The Court elaborated on the meaning of the term 'offence', saying that it should be interpreted strictly in order to safeguard against arbitrariness. The purpose of Article of 5(1)(c) is only to enable states to prevent a *concrete* and *specific* offence. This concreteness and specificity can for example refer to the time and place of the offence and to its victims.[260] For preventive detention to be justified, the authorities need to 'show convincingly that the person in all likelihood would have been involved in the concrete and specific offence, had its commission not been prevented by the detention'.[261] The protection against arbitrariness also requires that any decision authorizing detention for a prolonged period of time must include the grounds for the decision.[262]

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[256] *Lawless v. Ireland (no. 3)* App no. 332/57 (ECtHR 1 July 1961), §§ 13–14; *Ireland v. The United Kingdom* App no. 5310/71 (ECtHR 18 January 1978), § 196.
[257] *Brogan and Others v. The United Kingdom*, App. Nos. 11209/84 11234/84 11266/84 and 11386/85 (ECtHR 29 November 1988), § 53.
[258] *S., V. and A. v. Denmark* [GC] (ECtHR 2018 [n 254]), §§ 118–123.
[259] *Guzzardi v. Italy* App no. 7367/76 (ECtHR 6 November 1980), § 37.
[260] *S., V, and A. v. Denmark* [GC] (ECtHR 2018 [n 254]), § 89.
[261] Ibid § 91.
[262] Ibid § 92.

Detention under the second limb of Article 5(1)(c) must be both necessary and proportionate.[263] The necessity criterion follows directly from the wording of the article, as it refers to the situation where detention is 'reasonably considered necessary' to prevent an offence from being committed. This means that less severe measures must have been considered and found insufficient. The ECtHR has also interpreted the necessity requirement as including a qualification of the offence in question; it must be of a serious nature and include danger to life and limb or significant material damage.[264]

5.2.2 5(1)(f)

Sub-article 5(1)(f) allows detention in the following situation:

> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.[265]

This ground permits states a larger discretion than for example Article 5(1)(c), as it stems from the sovereign right to control aliens entry into and residence in the country.[266] That states have this right has been confirmed by the ECtHR on several occasions.[267] Article 5(1)(f) does not require the detention to be necessary, and the underlying reason for deportation is irrelevant for the legality of the detention.[268] Deportation proceedings must, however, be done with due diligence.[269] Still, any detention based on this ground must be compatible with the overall purpose of Article 5, meaning that it must be ensured that no one is arbitrarily deprived of his liberty.[270] This means for example that the detention must be carried out in good faith, the place and conditions of it should be appropriate and the detention should not be longer than reasonably necessary for the purpose pursued.[271]

In its assessment of whether the detention is arbitrary the ECtHR looks at domestic procedural safeguards. It may, but will not necessarily, take into account whether there are time-limits for the duration of the detention and the availability of judicial remedies. It is not necessary that states create a maximum limit for the time of detention; however, the absence of time limits serve as an indication that the procedural safeguards are not satisfactory.[272]

Detention under Article 5(1)(f) may not be punitive in nature.[273] The length of the detention should not exceed what is reasonably required for the purpose pursued.[274] Both of these issues were relevant in *Azimov v. Russia*. In this case, the applicant had resided illegally in Russia for some time, which

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[263] *Ladent v. Poland* (ECtHR 2008 [n 240]), § 55.
[264] *S., V. and A. v. Denmark* (ECtHR 2018 [n 254]), § 161.
[265] ECHR Article 5(1)(f).
[266] *Saadi v. The United Kingdom* (ECtHR 2008 [n 251]), § 64.
[267] See i. a. *Amuur v. France* App no. 19776/92 (ECtHR 25 June 1996), § 41; *Chahal v. The United Kingdom* App no. 22414/93 (ECtHR 5 November 1996), § 73; *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, App nos. 9214/80 9473/81 and 9474/81 (ECtHR 28 May 1985), §§ 67–68.
[268] *Chahal v. The United Kingdom* (ECtHR 1996 [n 267]), § 112; *Conka v. Belgium App no.* 51564/99 (ECtHR 5 February 2002), § 38.
[269] *Chahal v. the United Kingdom* (ECtHR 1996 [n 267]), § 113.
[270] *Saadi v. the United Kingdom* (ECtHR 2008 [n 251]), § 64.
[271] Ibid § 74.
[272] *J. N. v. The United Kingdom* (ECtHR 2016 [n 248]), § 83–96,
[273] *Azimov v. Russia* App no. 67474/11 (ECtHR 9 September 2013), § 172.
[274] *Shakurov v. Russia* App no. 55822/10 (ECtHR 5 June 2012), § 162.

constituted an administrative offence that was punishable by expulsion.[275] The applicant was also the subject of an extradition request from Tajikistan, and when his detention pending expulsion was ordered he had already been in detention with a view to extradition for one year. In total, his detention amounted to two years and five months.[276] The court found this unreasonable, mainly due to the fact that during a significant part of this time, no actual proceedings aiming at expelling or extraditing the applicant had taken place. It also took into account that the offence for which the applicant was being extradited was an administrative one and that the maximum punishment for such offences in Russian law is 30 days in detention. This meant that the administrative detention pending expulsion in which the applicant had been placed was significantly longer than a punitive detention for an offence of the same degree. The court noted that this was not normal and took this into consideration when finding that the detention had violated Article 5(1)(f) of the Convention.[277]

In *A. and Others v. the United Kingdom*, the United Kingdom had detained the applicants with a view to deporting them.[278] The applicants were all foreign nationals who would have been deported were it not that deportation would have constituted a violation of the non-refoulement rule in Article 3 of the Convention. However, their presence in the United Kingdom was considered a threat to national security as they were suspected of various types of involvement in terrorist activities. Therefore, the authorities considered continued detention necessary for security reasons.[279] There was at the time nothing indicating that the risk of ill-treatment contrary to Article 3 in potential receiving countries would cease, meaning that there were no real prospects of actually deporting the applicants in the foreseeable future. Under such circumstances, the Court found that action with a view to deportation was not being taken, which meant that the detention could not be justified under Article 5(1)(f).[280] The Court stated that it was clear that instead, the applicants were held because they were suspected of being terrorists and because their liberty therefore was considered a threat to national security. Furthermore, the Court rejected the Government's argument that Article 5 permits a balance to be struck between the individual's right to liberty and the state's interest in terrorism-prevention.[281]

5.3 The proportionality assessment

5.3.1 Who is responsible for assessing proportionality?

The proportionality requirement inherent in Article 5(1) means that while a balancing between the intrusion and the aim pursued is irrelevant in cases where a deprivation of liberty does not fall under any of the grounds in Article 5(1), such a balancing is a necessary step once a deprivation has been found to fit within one of the sup-paragraphs of the article. In cases of preventive security detention of terrorist suspects, this means that an adequate balance must be struck between the individual interest of personal

[275] *Azimov v. Russia* (ECtHR 2013 [n 272]), § 162.
[276] Ibid § 166.
[277] Ibid §§ 166–174.
[278] *A. and Others v. The United Kingdom* App no. 3455/05 (ECtHR 19 February 2009), § 163.
[279] Ibid § 166.
[280] Ibid § 167.
[281] Ibid § 171.

liberty and the aim of preventing terrorism.[282] This is a matter of legal interpretation to be done by the ECtHR, but can also be seen as a matter of counter-terrorism policy. This section presents different potential considerations, relevant both to interpreting the proportionality requirement in Article 5 and to on a more general level assess whether a counter-terrorism measure is normatively suitable.

It is common for states to increase the power of the executive when it comes to national security matters. This is generally motivated by the idea that the executive branch has the best access to terrorism related intelligence, and is therefore best suited to assess the nature and severity of a terrorism threat.[283] Macken points out that it may still be legitimate to question the executive's assessments.[284]

According to Fiona De Londras and Fergal F. Davis, professor of global legal studies and law respectively, there are three ways to respond to decisions by the executive branch which limit individual liberties due to alleged necessity in the face of a violent terrorist threat: i) trusting the executive to behave responsibly and lawfully, ii) relying on the legislature and the popular democratic processes to force the executive to behave lawfully and responsibly, or iii) calling on the judiciary to intervene and restrict unlawful behaviour by the executive or the parliament.[285] While disagreeing on how to best solve the issue, De Londras and Davis agree that option i) is undesirable. They base this on research showing that the executive tends to have a so called 'security bias', making it overestimate threat levels and the necessity of rights limitations as a response to said threats. Thus, relying on the executive to make a correct proportionality assessment may lead to disproportionate human rights limitations.[286]

5.3.2 Relevant factors in the proportionality assessment

Macken suggests a number of parameters to take into account when assessing the proportionality of a measure of preventive detention. Her analysis is to a degree based on jurisprudence from the ECtHR, but also includes other considerations. The purpose of including it in this context is to exemplify which parameters *could* and maybe *should* be taken into account, not to explain what the ECHR currently stipulates.

Macken discusses whether the basis of a prediction that a person is dangerous can in itself render the detention disproportionate, as a result of the basis being either illegitimate for policy reasons or not sufficiently accurate. She claims this would be the case in instances of group profiling, and that membership in a group which is statistically overrepresented as perpetrators of terrorist crimes cannot be legitimate reason for preventive detention. Such profiling tends to be discriminatory or racist, and is also often very overinclusive.[287] Furthermore, Macken rejects the legitimacy of basing a prediction of future criminal propensity on the fact that a person is generally a 'dangerous person', due to for example past criminal activity or on the person's appearance or behaviour. Macken finds such determinations

[282] Macken, *Counter-terrorism and the Detention of Suspected Terrorists* (n 35), 56.
[283] Fiona De Londras and Fergal F. Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30 *Oxford Journal of Legal Studies* 19, 21; Macken, *Counter-terrorism and the Detention of Suspected Terrorists* (n 35), 102–103.
[284] Macken, *Counter-terrorism and the Detention of Suspected Terrorists* (n 35), 103.
[285] De Londras and Davis (n 282), 19.
[286] Ibid 21.
[287] Macken, *Counter-terrorism and the Detention of Suspected Terrorists* (n 35), 110–113.

illegitimate because they are statistically often inaccurate, and, therefore, will lead to detention of many innocent persons contrary to the presumption of innocence. Additionally, there is a justice problem of principle as it is theoretically impossible for a person accused of dangerousness to disprove a speculative allegation which relates only to future conduct rather than to specific events in the past. Arguments in favour of such determinations could be, for example, that since the purpose of preventive detention is to incapacitate dangerous persons, and not to establish criminal guilt, these assessments are necessary and relevant. Another would be that assessments of risk of future dangerous behaviour are generally used in other areas of law, such as, for example, criminal law when determining whether there is a need for pre-trial detention. [288] Finally, Macken claims that any preventive detention not accompanied by sufficient procedural human rights safeguards would be disproportionate as there would be no real protection of the right to freedom from arbitrary detention.[289]

There are several arguments as to why preventive detention, in spite of the potential pitfalls identified, is particularly likely to be proportionate in a counter-terrorism context. The main such argument is that preventive detention fulfils a purpose that cannot be achieved by criminal law, but that is nevertheless necessary to protect society. This argument is based on the idea that traditional criminal law is ill-accommodated to deal with terrorism, and that incorporating preventive detention into criminal law would either make the detention ineffective as it would be constrained, or that it would risk broadening the general scope of criminal law in dangerous ways by undermining existing constraints.[290] Macken concludes that preventive detention existing entirely outside of the criminal law framework tis generally disproportionate, since the legitimate purpose of terrorism-prevention could be achieved to the same degree, but with a lower cost to procedural human rights protection, by implementing a form of pre-charge detention within the criminal law system.[291]

[288] Macken, *Counter-terrorism and the Detention of Suspected Terrorists* (n 35), 113.
[289] Ibid 117–119.
[290] Ibid 122–123.
[291] Ibid 136–137.

6 The presumption of innocence in the European Convention on Human Rights

6.1 Introduction

In Chapter 4, the presumption of innocence was mentioned in the context of criminal proceedings. That it applies in such a context is undisputed. As this thesis aims to analyse the relationship between the SCAA and the presumption it is also necessary to assess whether the presumption might also be applicable in an administrative law context. This chapter deals with this matter by first describing ECtHR jurisprudence on the applicability of Article 6(2) and then the meaning of the article being found applicable. In the analysis, the principles covered by this chapter are applied to the SCAA in order to see whether the presumption of innocence can apply to that Act and what that could potentially mean.

6.2 Applicability of Article 6(2)

The presumption of innocence is protected by Article 6(2) of the ECHR. Formally, it appears to apply only to criminal cases as the article refers to persons charged with a criminal offence. However, the ECtHR tends to reject formal interpretations in favour of extensive interpretations, in order to ensure practical and effective protection of human rights.[292] Article 6(2) is no exception. The court has in several cases stated that the classification of a procedure in domestic law does not necessarily determine whether the presumption applies and that the presumption can be violated by measures less flagrant than explicit expressions of a non-convicted person's guilt.

In *Adolf v. Austria,* the applicant had been accused of throwing a set of keys at a woman and striking her.[293] Proceedings against him were terminated when a District found that since the injury caused by the alleged crime and the fault of the accused were both 'insignificant', there was no reason for continued proceedings.[294] The applicant submitted that this violated Article 6(2) as the District Court had based its decision on the assumption that he had committed the act.[295] The ECtHR held that the expression 'charged with a criminal offence' has an autonomous meaning in the context of the Convention. Referring to the prominent place of the right to a fair trial in a democratic society, the Court expressed that Article 6 should primarily be given a substantive rather than formal interpretation. In the light of this, the Court found that the applicant had been charged with a criminal offence within the meaning of the convention. That he was not actually prosecuted or that domestic law classified the criminal offence as too insignificant to be punished did not affect the applicability of Article 6(2).[296]

In *Deweer v. Belgium*, the question before the Court was whether the closing of the applicant's establishment together with the imposition of a fine could constitute a criminal offence. The Court again

[292] *Airey v. Ireland* App no. 6289/73 (ECtHR 9 October 1979); Nowak (n 218), 89.
[293] *Adolf v. Austria* App no. 8269/78 (ECtHR 26 March 1982), §§ 10–11.
[294] Ibid § 12.
[295] Ibid § 25.
[296] Ibid §§ 30–34.

expressed that the term is autonomous and that the prominent place the right to a fair trial holds in a democratic society prompted a substantive rather than formal conception of the word 'charge'.[297] The word *charge* was defined as 'the official notification given to an individual by the competent authority of the allegation that he has committed a criminal offence'.[298] This has been reiterated in for example *Eckle v. Germany*and more recently *Simeonovi v. Bulgaria*.[299]

While the *Deweer* case focused on the existence of a 'charge', the matter of when a charge is of a criminal nature was dealt with in the *Engel and others v. The Netherlands.*[300] The five applicants served in the Dutch armed forces, and had all been subjected to penalties for offences against military disciplinary law, which was separate from both military criminal law and ordinary criminal law.[301] The Court noted that states generally distinguish between disciplinary proceedings and criminal proceedings; while the former are usually more advantageous for the individual, for example with regard to the harshness of sentences passed, it can also be the other way around as disciplinary proceedings may lack the procedural guarantees of criminal procedure. The Court reiterated its previous finding that the word 'charge' must be understood autonomously, 'within the meaning of the convention'.[302] It found that of the word 'criminal' there is a 'one-way' autonomy, meaning that states are free to classify an act as 'criminal', but that the Court may scrutinize the converse choice of classifying an act otherwise.[303]

In *Engel*, the Court established the following matters as relevant when determining whether charge is 'criminal': i) whether the offence is defined in the criminal law of the respondent state, ii) the nature of the offence, and iii) the degree of severity of the penalty prescribed.[304] These criteria have subsequently become known as the 'Engel criteria', and are frequently employed by the ECtHR when determining whether there exists a criminal charge within the meaning of Article 6.[305] The Court's application of the criteria has led to a gradual widening of the scope of the criminal limb of Article 6.[306] The criteria are alternative, meaning that one of the them implying that there is a criminal charge is enough for the criminal limb of Article 6 to apply.[307] While the first of the criteria is relatively straight-forward, the second and third require more interpretation. Regarding the second criterion, the nature of the offence, the Court has established the following parameters to take into account: i) whether the legal rule is generally binding and not directed at a specific group, ii) whether the proceedings are instituted by a public body with statutory enforcement powers, iii) whether the prohibition has a deterrent and punitive purpose, iv) whether the imposition of a penalty depends on a finding of guilt and v) the classification

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[297] *Deweer v. Belgium* App no. 6903/75 (ECtHR 27 February 1980), § 41–44.
[298] Ibid § 46.
[299] *Eckle v. Germany*, App No. 8130/78 (ECtHR 15 July 1982), § 73; *Simeonovi v. Bulgaria* [GC] App no. 21980/04 (ECtHR 12 May 2017), § 110.
[300] *Engel and others v. The Netherlands*, App nos. 5100/71, 5101/71, 51/02/71, 5354/72, 5370/72 (ECtHR 8 June 1976), § 1.
[301] Ibid § 12–14.
[302] Ibid § 80- 81.
[303] Ibid.
[304] Ibid § 82.
[305] William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015), 277.
[306] Ibid 277.
[307] Christoph Grabenwarter, *European Convention on Human Rights: A Commentary*, (Bloomsbury Academic 2013), 108.

of the offence in other Council of Europe member states. If the punishment is a deprivation of liberty, there is a strong presumption that the offence should be classified as criminal.[308]

There are several situations in which the Court has found that the criminal limb of Article 6 is applicable to administrative proceedings. There are several cases in which the Court has tried whether it applies to proceedings about the placement of mentally ill offenders in psychiatric hospitals.[309] The reasoning in these cases is relevant to this thesis since such placements tend to entail a preventive element.

In *Antoine v. The United Kingdom*, the applicant had been arrested on the suspicion of participation in murder. Psychiatric evidence indicated that he was suffering from paranoid schizophrenia and the judge found that the applicant's mental disability made him unfit to plead or stand trial and ordinary criminal proceedings were terminated. Instead, proceedings according to an act governing criminal procedure in cases of insanity were initiated. A new jury was empanelled, and instructed to determine whether the applicant 'did the act or made the omission charged against him'.[310] This determination was to concern only whether the *actus reus* of the act was fulfilled; the *mens rea* was irrelevant. The purpose of the proceedings was no longer to determine if the applicant was liable to be convicted of murder, as his mental disability made such criminal liability impossible. The applicant argued that since the proceedings included a determination of whether he had committed the criminal act of which he had been accused, the criminal limb of Article 6 applied. The Government argued that the proceedings only aimed at determining whether the applicant should be detained as a person of unsound mind, and not at issuing a criminal penalty, and that therefore, Article 6 was inapplicable. The Court agreed with the Government's position that since the proceedings did not entail a determination of criminal guilt, but only of whether the applicant had committed such acts that he could be considered such a dangerous person that he should be hospitalized for the protection of the public, there was no criminal charge. The Court emphasized that the assessment made in the proceedings would not include any determination as to the applicant's *mens rea*. Consequently, the Court found the applicant's complaint that his detention violated the presumption of innocence inadmissible, as there was no indication his detention as a person of unsound mind was the result of his being held guilty of a criminal offence.[311] The Court reached an identical conclusion in *Kerr v. The United Kingdom*, which concerned the same legislation.[312]

The opposite conclusion was reached in *Valeriy Lopata v. Russia* and *Vasenin v. Russia*. In these cases, the Court emphasised the fact that after the determination had been made that the respective applicant was mentally ill, he remained in criminal custody, and the purpose of the proceedings remained to establish criminal guilt. Not until after it had been determined that the criminal act had been committed did the Russian courts pronounce that the mental illness of the respective defendant excluded criminal liability. Therefore, the Court found that the criminal limb of Article 6 was applicable.[313]

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[308] Schabas (n 305), 277–278.
[309] European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights – Right to a Fair Trial (Criminal Limb)' (Council of Europe 2021), § 33–39.
[310] *Antoine v. The United Kingdom (dec.)* App no 62960/00, (ECtHR 13 May 2003).
[311] Ibid.
[312] *Kerr v. The United Kingdom (dec.)* App. No. 63356/00, (ECtHR 23 September 2003).
[313] *Valeriy Lopata v. Russia* App no. 19936/04 (ECtHR 30 October 2012), § 120; *Vasenin v. Russia* App no. 48023/06 (ECtHR 21 June 2016), § 130.

Individualised measures aimed at preventing criminal acts do not necessarily activate the criminal limb of Article 6. In *Raimondo v. Italy*, the Court stated that 'special supervision is not comparable to a criminal sanction because it is designed to prevent the commission of offences'.[314] This was reiterated in *De Tommaso v. Italy*.[315]

6.3 Meaning of the presumption of innocence being applicable

If there is a criminal charge, the criminal limb of Article 6 applies. This refers to Article 6(2) and (3). Article 6(2) contains the presumption of innocence. The main effects of the presumption are that the members of the court shall not have a preconceived idea that the accused is guilty, that the burden of proof is on the prosecution and that any doubt should benefit the accused.[316] The third principle is sometimes referred to as *in dubio pro reo*. This principle is tightly connected to the high standard of proof in criminal law, as this means that if there is reasonable doubt as to the defendant's guilt he shall be acquitted.[317] With the presumption follow also other procedural guarantees, such as the privilege against self-incrimination.[318] The presumption is infringed if members of a court or other representatives of public authorities make official statements suggesting criminal guilt prior to conviction.[319]

The presumption covers the entirety of the criminal proceedings, and continues to apply if the defendant is acquitted. This means that the presumption is violated if the reasoning of an acquitting judgment implies the Court's opinion that the defendant is guilty.[320] This was the case in for example *Adolf v. Austria*, in which the Court held that the reasoning of the District Court was capable of suggesting that the applicant had committed the act in question. Such reasoning could in itself constitute a violation of Article 6(2), even if paired with a decision to terminate proceedings.[321]

Article 6(3) awards the accused certain rights, namely: to be informed promptly of the nature and cause of the accusation against him; to have adequate time and facilities for the preparation of his defence to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

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[314] *Raimondo v. Italy* App no. 12954/87 (ECtHR 22 February 1994), § 43.
[315] *De Tommaso v. Italy* App no. 43395/09 (ECtHR 23 February 2017), § 143.
[316] *Barberà, Messegué and Jabardo v. Spain* App no. 10590/83 (ECtHR 6 December 1988), § 77.
[317] Nowak (n 218), 32–33.
[318] *Saunders v. the United Kingdom* App no. 19187/91 (ECtHR 17 December 1996), § 68.
[319] *Allenet de Ribemont v. France* App no. 16175/89 (ECtHR 10 February 1995), § 35–36; *Nešťák v. Slovakia App no.* 65559/01 (ECtHR 27 February 2007), § 88.
[320] *Adolf v. Austria* (ECtHR 1982 [n 293]), §§ 35–51; *Cleve v. Germany* App no. 48144/09 (ECtHR 15 January 2015), § 41.
[321] *Adolf v. Austria* (ECtHR 1982 [n 293]), §§ 35–41.

7 The principle of legality in the European Convention on Human Rights

7.1 Introduction

In Chapters 3 and 4, the principle of legality was mentioned in the contexts of Swedish administrative and criminal proceedings respectively. The meaning of the principle is, however, not the same in the two systems. As the SCAA is a part of administrative law, it would seem reasonable to assume that Swedish law requires its application to adhere to the principle as it is understood in administrative law, but not to any additional requirements it creates in a criminal law context. The principle is also protected by Article 7 of the ECHR. Thus, a relevant question is whether the SCAA must adhere to this version of the principle, and if so, whether it does. This chapter follows a similar structure to Chapter 6, and describes the conditions of applicability of Article 7 and then moves on to the consequences of the Article being applicable. In the analysis, these principles are applied to the SCAA in order to see how the Act relates to the principle as it is phrased in the Convention.

7.2 Applicability of Article 7

Article 7 applies only to criminal sanctions. This follows directly from its wording, which prescribes that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed, and that a heavier penalty than that applicable at the time of the offence may not be imposed.[322] However, the concepts of 'criminal offence' and 'penalty' are autonomous.[323] A 'criminal offence' is defined by the Engel criteria, which were developed to define 'criminal charge' within the meaning of Article 6.[324] Thus, one relevant factor in ascertaining whether a measure is a 'penalty' is whether the measure was ordered following a conviction for a criminal offence. The absence of such a conviction does not mean that a measure cannot constitute a penalty.[325] The Court also looks at the nature and aim of the measure, particularly whether it has a punitive aim, and the severity of the measure.[326] The Court has expressed that the severity of the measure alone will not lead to it being considered a penalty, because there are many preventive measures unrelated to criminal law which substantially impact the person concerned. It appears that in the Court's view, it is self-evident that such measures, whose purpose can be for example therapeutic, are not penalties.[327] It dealt with this matter in *Berland v. France*, where it found that mandatory hospitalisation for reasons of mental illness and in the absence of a criminal conviction

[322] ECHR Article 7(1).
[323] See i. a. *G.I.E.M. S.R.L. and Others v. Italy* App nos. 1828/06 34163/07 19029/11 (ECtHR 28 June 2018), § 210.
[324] See *Engel and others v. The Netherlands* (ECtHR 1976 [n 300]), § 82; regarding application to Article 7 *Societe Oxygène Plus v. France (dec.)* App no. 76959/11 (ECtHR 17 May 2016), § 43.
[325] *G.I.E.M. S.R.L. and Others v. Italy* (ECtHR 2018 [n 323]), § 215–219.
[326] Ibid § 211.
[327] *Welch v. the United Kingdom* App no. 17440/90 (ECtHR 26 February 1996), § 32; *Del Río Prada v. Spain* (ECtHR 2013 [n 247]), § 82.

could not constitute a penalty, even though the mental illness was though to create a risk of future criminal behaviour.[328]

There are several cases where the Court has examined whether preventive detention can constitute a penalty within the meaning of Article 7. Depending on the circumstances of the case, the Court has come to both negative and affirmative conclusions. In *M. v. Germany*, *Jendrowiak v. Germany* and *Glien v. Germany,* the Court found that preventive detention constituted a penalty.[329] Conversely, in *Lawless v. Ireland* the Court found that preventive detention aimed at ensuring that the applicant did not engage in criminal activities did not constitute a penalty.[330] In *M.*, preventive detention was imposed after the applicant had committed an attempted murder and robbery, which was a criminal offence both according to national law and within the meaning of the Convention.[331] According to domestic law, the preventive detention was not a penalty. Its purpose was not to punish criminal guilt, but purely to protect the public by preventing the commission of further crimes.[332] As the ECtHR has found several times, a preventive aim does not exclude the existence of a punitive aim, especially since some degree of prevention is generally considered part of the justification for imprisonment as punishment.[333] The Court noted that a similar system of preventive detention of previous offenders in Belgium was classified as a penalty under Belgian law, and then went on to consider the nature of the detention. It started out by noting that preventive detention is similar to a prison sentence in that it entails a deprivation of liberty, and that persons subject to preventive detention under the law were regularly interned in ordinary prisons. Substantially, the Court said, there was very little difference between the execution of a prison sentence and of a preventive detention order.[334] According to the Court, the 'realities of the situation of persons in preventive detention' together with the fact that preventive detention orders required a previous finding of similar guilt meant that the detention constituted a penalty in spite of the government's claim that the detention lacked a punitive aim.[335] The Court also took into account that the procedure for imposing preventive detention took place within the criminal court system.[336] It emphasised the experience of detainees and of potential future offenders by pointing out that '[preventive detention] may well be understood as an additional punishment for an offence by the persons concerned and entails a clear deterrent element.'[337] It further noted that psychologically, indefinite preventive detention is very difficult for the detainee and that any preventive detention should be coupled with real efforts to rehabilitate the detainee with a view to his eventual release.[338]

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[328] *Berland v. France* App no. 42875/10 (ECtHR 3 September 2015), §§ 39–47.
[329] *M. v. Germany* App no. 19359/04 (ECtHR 17 December 2009), §§ 123–133; *Jendrowiak v. Germany* App no. 30060/04 (ECtHR 14 April 2011), § 47; *Glien v. Germany* App no. 7345/12 (ECtHR 28 November 2013), §§ 120–130.
[330] *Lawless v. Ireland (no. 3)* (ECtHR 1961 [n 256]), § 19.
[331] *M. v. Germany* (ECtHR 2009 [n 329]), § 124.
[332] Ibid § 125.
[333] Ibid § 130; *Welch v. The United Kingdom* (ECtHR 1996 [n 332]), § 30.
[334] *M. v. Germany* (ECtHR 2009 [n 329]), § 126–127.
[335] Ibid § 128.
[336] Ibid § 131.
[337] *M. v. Germany* (ECtHR 2009 [n 329]), § 130.
[338] Ibid § 129.

In *Jendrowiak*, the relevant factual circumstances were identical to those in *M.*, and the Court thus referred back to its previous case law and found that the preventive detention in this case constituted a penalty.[339] In *Glien*, preventive detention had been ordered as a result of a criminal conviction under the same legal regime as in *M.* and *Jendrowiak*. The details of this regime had been somewhat altered in that the role of therapy and rehabilitation had been emphasised so as to more clearly distinguish the detention from punitive detention. However, the Court did not find that these changes were sufficient for the preventive detention to not constitute a penalty.[340]

In *Bergmann v. Germany*, further alterations had been made to the German preventive detention regime.[341] As the original detention order, which was eventually extended, was issued in the same judgment as the applicant's criminal conviction, the Court found that the detention should still be considered as imposed 'following his conviction for a criminal offence'.[342] The conditions of the detention were different from those in *M.* and *Glien* as it was not executed in an ordinary prison, but in a specific prevention detention centre. The material conditions in this centre, regarding for example individual freedom of movement and room size, were notably better than in prison. The level of medical and therapeutic care offered was higher than in the previous cases.[343] The care was partially aimed at ensuring that persons in preventive detention would cease to be dangerous so that they could eventually be safely released. This in the Court's view strengthened the preventive purpose of the detention, although it was again noted that preventive and punitive aims are not mutually exclusive.[344] The court concluded that due to special circumstances related to the applicant's mental illness and treatment thereof he received in detention, the detention was not a penalty. However, it also expressed that preventive detention in accordance with the new German framework would as a rule still be considered a penalty for the purpose of Article 7.[345]

In *Ilnseher v. Germany*, the applicant had, as in *Bergmann,* been detained in a special preventive detention centre.[346] The case was different from the previous cases in the sense that the preventive detention order had not been made together with the applicant's criminal conviction but in a separate judgment 13 years later. The preventive detention was, however, still linked to the criminal conviction, as the conviction was a necessary precondition for the preventive detention Therefore, the Court considered the preventive detention to have been imposed following conviction for a criminal offence.[347] The motivations for the detention were, as in *Bergmann*, not exclusively based on the applicant's criminal history but also on his mental illness, for which he was awarded treatment.[348] Since *Bergmann*, the legal framework had improved so that in general, detainees in preventive detention received even more therapeutic care aimed at reducing their dangerousness with a view to eventually releasing them.[349]

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[339] *Jendrowiak v. Germany* (ECtHR 2011 [n 329]), §§ 46–47.
[340] *Glien v. Germany* (ECtHR 2013 [n 329]), § 120–130.
[341] *Bergmann v. Germany* App no. 23279/14 (ECtHR 7 January 2016), §§ 153–154.
[342] Ibid §§ 155–159.
[343] Ibid §§164–169.
[344] Ibid §§ 170–177.
[345] Ibid §§ 181–183.
[346] *Ilnseher v. Germany* [GC], App. Nos. 10211/12 and 27505/14 (ECtHR 4 December 2018), §§ 210–214.
[347] Ibid§ 215.
[348] Ibid § 219.
[349] *Ilnseher v. Germany* [GC] (ECtHR 2018 [n 248]), §§ 220–228.

In the Court's view, this meant that in cases of preventive detention based not only on a criminal conviction but also on mental illness, the preventive nature of the measure exceeded the punitive element and thus the detention was no longer to be considered a penalty.[350]

In *Lawless*, the applicant, a member of the Irish Republican Army (IRA), was detained in a military detention camp because he was considered a danger to the public. He had previously been charged but acquitted of criminal offences.[351] The Court found that it was established that the sole purpose of the detention was prevention of future offences, and that the detention therefore was not a penalty.[352]

In *G.I.E.M. S.R.L. and Others v. Italy*, the Court expressed that Article 7 not only requires that criminal sanctions be based in law, but also that criminal sanctions be not imposed unless personal criminal liability has been established. However, this finding must not formally take place in a criminal court.[353]

7.3 Meaning of Article 7 being applicable

The first step of an analysis of the meaning of Article 7 in a specific context is determining whether it is applicable. The second step is to ascertain what effects it would have *if* the first question was answered in the affirmative. The article prohibits the imposition of penalties in several different situations, and defines different criteria for when a penalty is to be considered lawful. Firstly, no one may be held guilty of any criminal offence on account of an act or omission which was not criminalised under national or international law at the time of its commission.[354] Secondly, the penalty imposed must not be heavier than the one that was applicable when the crime was committed.[355]

The Convention also imposes requirements on the preciseness of the legal rules defining a criminal offence. This is intended to ensure that the legal consequences of certain actions are foreseeable. The requirement of preciseness refers not only to the definition of the offence, but also to the penalty.[356] The Court generally accepts some degree of vagueness stemming from the fact that legal rules are by definition generalisations. However, for the requirement of foreseeability to be fulfilled, it should in principle be possible for an individual assisted by counsel to understand which acts may give rise to criminal liability.[357]

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[350] Ibid § 236.
[351] *Lawless v. Ireland (no. 3)* (ECtHR 1961 [n 256]), §§ 1–20.
[352] Ibid § 19.
[353] *G.I.E.M. S.R.L. and Others v. Italy* [GC] (ECtHR 2018 [n 323]), § 252.
[354] ECHR Article 7(1).
[355] Ibid.
[356] *G.I.E.M. S.R.L. and Others v. Italy* [GC] (ECtHR 2018) [n 323], §242; *Jorgic v. Germany* (ECtHR 2007 [n 8]), §§ 103–104; *Kafkaris v. Cyprus* [GC] App no. 21906/04 (ECtHR 12 February 2008), § 150.
[357] *Kafkaris v. Cyprus* (ECtHR 2008 [n 356], § 140; *Cantoni v. France* App no. 17862/91 (ECtHR 11 November 1996), 29.

8 Analysis and conclusions

8.1 Introduction

In this chapter, I draw conclusions based on the previous chapters, by applying the presented principles and arguments to the SCAA in order to respond to the research questions and fulfil the thesis' purpose.

The purpose of this thesis is to examine whether the detention enabled by the SCAA is a suitable tool of counter-terrorism. As the thesis is based on the notion that respect for individual human rights is essential, including in a counter-terrorism context, the answer depends on the detention regime's compatibility with human rights.

The analysis starts out by placing the SCAA in an international context, by applying Elias' framework and the definitions presented in chapter 2 to the Act. If the Act creates a system of preventive security detention, as this is understood in international scholarly writings on counter-terrorism, the potential benefits and concerns highlighted in these writings may be relevant in assessing the suitability of the SCAA. Classifying the Act according to those writings is therefore highly relevant to the thesis

Since part of the thesis' purpose was to examine the effects of placing the rules in question in an administrative law framework rather than a criminal one, the analysis will then move on to compare the conditions for detention according to the SCAA to the conditions for detention in a criminal law context. Thereafter, the matter of how the differences between the two systems affect the practical enjoyment of detainee rights is discussed. Thereafter, the analysis moves on to the relationship between the SCAA and the three chosen principles in the ECHR. Finally, the analysis turns to the main research question and purpose of the thesis, that is, the suitability of the detention system of the SCAA as counter-terrorism tool. In this part the previous sections of the analysis are tied together, and I discuss whether the system can, regardless of its eventual compliance with the letter of the law of international human rights, be criticized for undermining various principles of human rights, such as justice and the rule of law.

8.2 The Special Controls of Aliens Act as a framework of preventive security detention

This section aims to answer the first of the thesis' sub-questions, namely whether the detention regime of the SCAA constitutes preventive security detention. Definitions of preventive security detention differ, and authors disagree on whether pre-trial detention is to be considered as preventive detention or not, as well as on whether it is necessary for the detention to be ordered by the executive. The three reoccurring elements in the definitions provided by different scholars are i) detention ii) for security purposes iii) without prior conviction for a crime or criminal charges. The Swedish system is clearly one of preventive security detention, whichever exact definition of this one chooses. The SCAA enables detention of persons in certain situations. There are two stages in this assessment. Firstly, the person must be determined to be either a threat to national security or a potential perpetrator of a crime of terrorism. This creates grounds for deportation. Secondly, for it to be possible to also detain the person,

one of the alternative criteria in § 8 must also be fulfilled. One of these is that there is a risk that the person may commit further crimes. Under no circumstances does application of either of the articles in the SCAA require a prior criminal conviction or even a suspicion of a past criminal act or that there be an intention to press charges. Thus, when someone is detained based on § 8(2), it is without a doubt a case of preventive security detention. Arguably, the same conclusion can be drawn even when detention is based on the risk that the person will go into hiding or on the fact that his identity is unclear, as it is a precondition for any application of the SCAA that the person is a security threat and the ultimate purpose of that application is to prevent criminal offences.

The Swedish system falls within the immigration detention framework described by Elias, and shares several features with the systems employed in Canada, New Zealand and South Africa. As in these states, the basis for detention is found in administrative migration law that references a terrorism specific statute, and detention does not require conviction or suspicion of a criminal offence. Sweden also deals with terrorism through criminal law. Similar to the states in Elias' study, the separate system based in administrative law applies only to non-citizens and is less protective of detainee rights. There are, however, some procedural rules protecting potential detainees, such as right to counsel and an albeit limited right to information. The SCAA also fits into an international trend of increasing executive power when it comes to matters of terrorism. As the Svea Court of Appeal and the National Courts Administration pointed out, this is not ideal from a rule of law point of view. The view of these consulting bodies is supported by writers such as Macken, De Londras, and Davis, who question the notion that the executive is best suited to decide on terrorist matters.

The general trend of increasing executive power in response to a perceived terrorist threat can be seen in the SCAA, in mainly two ways. One is that the highest instance of appeal of the decision to deport a person according to the act is the Government. Another is that the application of the law, both in theory and perhaps even more in practice, relies on the assessments made by the National Security Police. Both of these things are motivated by intelligence availability arguments.

Much of the debate around preventive detention described in chapter 2 is applicable to the SCAA. While there has not been much academic debate on the SCAA, the debate about it in the general media and the criticisms by consultation bodies bring up the same concerns as raised by international debate on preventive detention regimes. On the one hand, there are those who call for harsher legislation so as to ensure that terrorist suspects, even in the absence of sufficient evidence to press charges, can under no circumstances be released into society. On the other hand, there are those who claim that the current legislation fails to respect human rights of the detainees, that they are unfairly targeted due to their status as non-citizens and that the procedure is incompatible with due process.

The relevance of the international debate to the Swedish case shows that the assumption of the legislator that the procedural guarantees of criminal law 'do not belong' in the SCAA as it is a piece of immigration legislation can be questioned. Much of the international debate around preventive detention is focused on the way in which placing it into other areas of law than the criminal law results in a lowered standard of human rights protection. Based on this, several scholars such as Macken, Dimock and Pearlstein argue that such matters should instead be handled within the criminal law.

Additionally, there is plenty of discussion internationally as to whether the criminal law would be up to such a task. While the aforementioned authors as well as Elias think this is the case, others find it unlikely. In my view, it is difficult to motivate a differential treatment of terrorism and consider it as a *sui generis* discernible from other instances of crime. Proponents of specific procedural rules in terrorist cases identify a number of 'flaws' in the criminal procedure, such as the fact that high standards of evidence can make convictions of guilty persons impossible, that the criminal procedure is retrospective in the sense that it only takes aim at past conduct, that skilful cooperation between terrorists might make intelligence gathering difficult and that witnesses might be unwilling to testify due to intimidation. It is of course always unfortunate when these things lead to the acquittal of persons who are actually guilty, but this unfortunate effect is not isolated to terrorist cases. The difficulty of fulfilling the high standard of proof and an unwillingness of witnesses and victims to testify due to fear is often invoked to explain, for example, why it is hard to convict perpetrators of domestic violence. Witness intimidation and refined strategies to avoid detection are also key features of organized crime. The matter of prevention versus retrospection can be said to apply to all crimes; the criminal procedure is indeed retrospective, but it also has a preventive aim. In criminal trials in general it would be preferable had the crime never occurred in the first place – this is not a unique feature of terrorist cases.

The arguments above demonstrate that the necessity of a separate terrorist legislation can be called into question, as can the premise that this legislation does not belong in the criminal law. Thus, contrary to what is said in SOU 2020:16, a comparison of the SCAA with the criminal law is highly relevant.

8.3 Comparing detention in the Special Controls of Aliens Act to detention based in criminal law

8.3.1 Differences between the two systems

A comparison of the detention regime of the SCAA and the conditions for detention within a criminal law context shows that while the former is only intended to be used in extraordinary situations, the threshold it sets for detention is significantly lower. This lowered threshold can be seen in three distinct ways. Firstly, the grounds for detention are less clearly specified. Secondly, the standard of proof is less clear. Thirdly, the procedural protection of the 'suspect' is lower within the administrative law than in a criminal law context.

Detention in a criminal law context unconditionally requires that there is at least a suspicion that a person has committed a criminal act. As a result of the principle of legality, all criminal acts must be clearly defined by the law, analogies are not allowed and new offences may not be invented by anyone else than the legislator. This means that the set of circumstances which can warrant detention in a criminal law context, both pre- and post-conviction, are clearly defined and delineated by the law. When it comes to preventive detention in the SCAA, the situation is different, as it is quite unclear which circumstances can form the basis for a deportation and subsequent detention order. It should be noted here that, in criminal law the law does not define which circumstances are allowed to be used as basis for the conclusion that a person has committed a specific act. This is instead determined by the evaluation of

evidence made by the courts, or in some cases the prosecutor. Nevertheless, an important limitation is created by the fact that it is clearly defined which acts this evidence should serve to establish. As Swedish procedural law is based on the free proof theory and lacks a formal relevance criterion, the law does not create any formal limits as to which evidence may be considered relevant. However, the fact that it is clear that the prosecution's evidence serves to establish that the defendant has committed a specific act on a specific occasion in a way that corresponds to a specific crime defined by law means that in practice, the sphere of relevant evidence is limited to evidence that somehow indicates that this occurred. This limitation does not exist in the case of the SCAA, where it is unclear which type of past conduct can lead to deportation and detention. This allows for a greater level of discretion, or arbitrariness, on the part of the decision maker.

Regarding the standard of proof, the first step is defining the standards required for detention within the two different systems. Within the criminal law framework, detention requires at least reasonable suspicion that a person has committed a specific criminal act. For the detention to be prolonged, which in this context means longer than one week, this is not sufficient, there must also be probable cause. In addition to this, any detention requires that there is a risk that the person will either escape, hinder the investigation or commit further crimes. Applying the probabilities connected to different standards of evidence described, this can be expressed in mathematical terms as follows: For prolonged pre-trial detention to be allowed, a court needs to think that there is a 75 % probability that the detainee is guilty and a 33 % probability that if not detained, he will attempt to escape, hinder the investigation or commit further crimes. In addition to this, detention must always be proportional. For a criminal conviction, the defendant's guilt must be proven beyond reasonable doubt. Additionally, there are a number of factors which the court is to take into account when deciding whether a deprivation of liberty is a suitable punishment or not.

In the SCAA on the other hand, the evidentiary standard is another. According to Diesen et al., the general standard of proof is that something should be made probable, that is, reach a likelihood of around 75 %. This can be assumed to apply for the first ground for deportation. When it comes to the second ground, it is enough that 'it can be feared' that a person will in the future commit certain acts. Contrary to what is generally the case in migration law according to Lindkvist, 'it can be feared' semantically seems to be a relatively low standard. In the view of the Government Inquiry from 2020 there are no particular demands on the evidence invoked. Based on the fact that 'it can be feared' was previously used in the criminal law in situations where today *risk* is used, the following analysis will be based on the presumption that 'it can be feared' refers to the existence of a 33 % risk. Whether this is actually how the law is applied is, however, impossible to discern. The lack of clarity regarding standards of evidence in administrative law together with the lack of transparent jurisprudence related to the SCAA means that it is very difficult to establish in mathematical terms what level of probability is required for a person to be detained according to the SCAA. It can, in any case, be concluded that the level is significantly lower than for pre-trial or post-conviction detention in a criminal law context.

The matter is further complicated by the fact that the SCAA exclusively deals with predictions. The circumstance to be proven is that it 'can be feared' that a person will do a certain thing in the future. Such circumstance can be supported by reference to acts in the past, and which standard of proof that is

required for those acts to be regarded as actually having occurred is also unclear. There are two different interpretations of the evidentiary standard in such cases of prediction. One would be to say that the theme of proof, that is, the hypothesis which is to be proven, is that the person will in the future commit or participate in a certain crime. In this case, the term 'can be feared' defines the evidentiary standard, saying that the Act applies if there is at least a 33 % probability that such a crime will be committed. Another interpretation would be to say that the theme of proof is the existence of a risk that such a crime will be committed. In that case, presumably, the ordinary standard that claims should be made *probable* applies. This means the standard of proof in § 2(2) of the SCAA could be phrased as follows: for a person to be deported according to this ground, the deciding authority shall be satisfied that there is at least a 33 % probability that the person will in the future commit or participate in a crime of terrorism, and this assessment must have at least a 75 % probability of being correct. This might make it seem as though the standard of proof is the same as in the case of pre-trial detention – namely a probability of 75 %. This conclusion would be false. In the case of *probable cause*, there must be a 75 % probability that the accused *did in fact commit the crime* – in other words, there needs to be a 75 % probability that a specific thing happened with a 100 % certainty. In the case of the SCAA, this 100 % certainty is swapped for a 33 % risk. Whichever of these two interpretations one favours, the result is that the standard of proof is significantly lower than in a criminal law context.

In addition to these circumstances, detention requires a risk that the person escapes, commits further crimes or that his identity is unclear. The phrasing of this is very similar to the rules on pre-trial detention within the criminal law, and is identical to the previous phrasing of these rules. Therefore I find it reasonable to conclude that risk in this context has the same meaning, namely a 33 % probability. Out of the different probabilities operating within the criminal law system this one is the lower. This means that in any case, in addition to what has been said above detention requires a 33 % risk of flight, collusion or other such circumstances.

In this context, it is also relevant to differentiate between different types of probability. As predictions of future conduct are inherently more speculative than estimations of probability of an event having occurred in the past, it is likely that the robustness of the evidence will be lower in such cases. This means that not only will the standard of proof be lower in the sense that the decision-maker will find a lower degree of probability sufficient, but also that the decision-maker will probably be less sure that the established degree of probability is actually correct. A low robustness can for example stem from the fact that an important piece of evidence is missing, or that a significant question was never asked of a witness. The speculative nature of predictions means that they can never achieve the same level of robustness as inquiries into the past potentially could; there will always be significant and relevant information missing, information relating to everything that happens between the moment of the decision and the moment in the future when the crime would supposedly occur. It will never be possible for the fact-finder to gain access to all relevant information since much of that information does not yet exist. This means that even when the available evidence leads to the conclusion that there is a very high probability that a person will do something in the future, the robustness of this conclusion risks being significantly lower than the robustness of the conclusion that a person has done something in the past. This is another way in which the application of the SCAA leaves room for a higher degree of uncertainty

than the criminal procedure does. However, since the rule that a low robustness in a criminal case shall speak in favour of the defendant is a result of the presumption of innocence, it does not apply in relation to the alien in immigration matters.

According to Macken, Gray and Dershowitz, predictions of future dangerousness tend to have a relatively low level of accuracy. For example, Gray refers to studies showing the average success rate to be between 33 and 58 %, while Dershowitz places the accuracy of psychiatric dangerousness assessments at less than 50 %. If these claims were to be applied to the SCAA[358], the conclusion remains that the probabilities required for application of the SCAA will be lower than those required for detention in a criminal law context. In relation to the uncertainties linked to predictions of future conduct, I would like to bring attention to the argument presented in chapter 2 that such predictions are uncontroversial because they also take place within the criminal law system. The premise of this argument is naturally correct; as we have seen above, risk assessments are for example an integral part of the decision to detain a person pending trial. The conclusion can, however, be questioned, because there is a key difference between such assessments in the pre-trial detention context and the preventive detention context: namely that in the former, the prediction is only one out of several relevant elements (most importantly, it is also required that there is a certain probability that a specific event in the past has occurred) whereas in the latter, the decision to detain is based *exclusively* on predictions. This means that from a legal certainty point of view, the unreliability of predictions is more controversial in the latter case.

While it is difficult to with certainty define the standard of proof required for application of the SCAA, it is possible to conclude that when compared to a criminal law context, in addition to the set of circumstances warranting detention being wider, the required level of certainty that these circumstances actually are at hand is lower.

The third and final main difference is that there are number of rules of criminal procedure which exist to protect the suspect which do not exist in the application of the SCAA. The presumption of innocence is not considered applicable in administrative procedure, and neither are other fair trial guarantees of Article 6 ECHR. The individual in the case of the SCAA does not have a right to confront witnesses and, unlike the defendant in a criminal case, he has no unconditional right to take part of the evidence invoked against him. The SCAA does provide for an oral hearing, but unlike in the criminal procedure, there is no requirement that the final decision be based only on what happens at this oral hearing. In addition to this, the principle of objectivity obligating the prosecution to search for and investigate

[358] Naturally, it cannot be taken for granted that this is the case as, to my knowledge, there is no empirical research on the accuracy of the assessments made by SÄPO and the Government in this context. It is also important to note that any such research would be accompanied by great methodological difficulties, as it would by definition be contrafactual and in itself speculative in trying to determine whether a person would have committed certain acts were it not for him being put in detention. However, this uncertainty in itself illustrates the difficulties related to dangerousness predictions. While it is not possible to simply apply the statistics provided by Gray and Dershowitz to the Swedish case, noting for example that they are based on studies conducted in completely different contexts than contemporary Swedish counter-terrorism, these statistics can function to support the claim that dangerousness predictions in general run the risk of being inaccurate and would therefore be unlikely to alone fulfill the standards of evidence employed in criminal law.

circumstances and evidence in favour of the defendant does not apply to SÄPO's investigations prior to proceedings according to the SCAA.

Pre-trial detention is also, as the term suggests, designed to be provisory, and the idea is that eventually the matter of the detainee's guilt will be tried in a court of law. If the investigation is closed, or if the person is acquitted following trial, the detainee shall be released immediately and he is entitled to compensation. While the financial compensation might not necessarily always appear as adequate compensation to a person who considers himself to have been wrongfully detained, it has a strong symbolic value in showing that the state acknowledges that the person should be considered innocent and that the detention was not justified.[359] In the case of administrative detention, the absence of a criminal conviction is not sufficient for such compensation to be given. Instead, compensation requires that it is clear that the detention was based on incorrect grounds.

There is also no requirement that preventive security detention shall ultimately lead to a trial where the individual has the opportunity to be acquitted, nor are there any rules stipulating compensation in the event that the person later is found to never have committed any crimes. The latter of course follows from the fact that no suspicion of a specific criminal act which could be adjudicated is necessary in the first place.

8.3.2 The effects of the differences between the systems on detainee rights

In this section, I will look at how the differences identified above affect the practical enjoyment of detainee rights. The discussion will be centred on the three principles the thesis focuses on, namely the prohibition of arbitrary detention, the presumption of innocence and the principle of legality.

The first identified difference is that in the case of the SCAA, the circumstances which can lead to detention are different and less clearly defined than they are within the criminal law framework. This is relevant to the prohibition of arbitrary detention in the sense that the lack of clarity in the legislation increases the margin of discretion on part of SÄPO, the Migration Agency, and the Government. This does not necessarily mean that detention according to the SCAA will be arbitrary, but it does imply that the protection against arbitrariness is somewhat weaker than in a criminal law context. This issue is exacerbated by the third of the identified differences, regarding the lower standard of procedural protection. The fact that the matter of deportation is ultimately decided by the government, a political organ which according to the Government bill at least to some degree is intended to take issues of foreign policy into account, increases the risk of arbitrariness and diminishes foreseeability and reliance on pre-established law. Possibly it can also be said that the heavy reliance on assessments by SÄPO are a part of the same issue. This can, furthermore, be related to the question of how much power and discretion should be awarded to the executive. The matter of legality will be discussed more in depth below. What has been said makes it difficult to avoid the conclusion that the application of the SCAA to an individual

[359] Note that this does not mean that the police, the prosecutor or the court ordering the detention made a faulty decision. Based on the available evidence, the detention may very well have been a reasonable and legal measure at the time even if it later turns out to no longer be warranted.

detrimentally affects his practical enjoyment of the presumption of innocence. What happens when the Act is applied is that as a result of the belief on behalf of SÄPO, the Migration Agency and, if appealed, the Government that a person is 'a terrorist', he is subjected to deportation and generally also detention. As is brought up by the Government bill, as well as in academic and other debate around preventive detention, this is bound to negatively affect the individual both because of the harm resulting directly from deportation and detention and because of its effects on his chances of leading a normal life in the future. For example, as is shown in Section 3.7.2, the six alleged Islamists to whom the SCAA was applied in 2019 are nationally known as dangerous terrorists, in spite of not having been convicted of such crimes. The fact that representatives of SÄPO and of the Government publicly talk about them as if they were criminals are things which would violate the presumption of innocence, if it applied.

That preventive detention fails to respect the presumption of innocence is frequently brought up in the international debate.[360] This criticism appears very reasonable, as the negative effects for an individual of not having the presumption respected in a criminal case are very similar to the negative effects of the principle not being applied in this case. For the individual and the general public, it seems unlikely that the distinction between being accused of having committed terrorist acts in the past and being accused of intending to commit terrorist acts in the future will make such a decisive difference so as to make the application of the presumption irrelevant.

The second difference, the lower standard of proof, is relevant to the protection against arbitrary detention in the sense that it makes it less certain that the suspicion on which the detention is based is objectively and reasonably founded. This must be determined on a case-by-case basis, but the risk that the suspicion warranting the detention fails to live up to the standard of reasonableness is likely to be higher in the absence of a clearly defined, and relatively high, standard of proof. While the protection against arbitrariness is weaker in the SCAA context, it remains to be seen whether the system is compatible with Article 5 of the ECHR. This will be examined in Section 8.4.

It is mainly the lower standard of proof and the lower procedural protection which are relevant to the presumption of innocence. It is quite clear how the lower standard of proof relates to the presumption of innocence, as the high standard of proof in criminal cases is so tightly connected to the presumption. The presumption is related to the lower standard of procedural protection because many rules of procedural protection in criminal cases are related to the presumption. For example, some of these rules are included in Article 6 and only apply if there is a criminal charge. One argument in favour of procedural rules of protection is that they are necessary to protect the presumption by giving the individual an honest chance to defend himself against accusations. The fact that the presumption brings with it further protection rules means that the non-application of the presumption detrimentally affects the individual's enjoyment of fair trial rights. As the Swedish authorities are clearly of the view that neither the presumption of innocence nor the procedural guarantees that come with it apply in matters regulated by the SCAA, it is clear that the practical enjoyment of these rights is very low in this context. Whether this is in line with the ECtHR interpretation of the presumption is discussed in Section 8.5.

[360] See chapter 2.

The principle of legality mainly relates to the first identified difference, namely that the circumstances used as basis for detention are less precise in the SCAA than within the criminal law. That the circumstances are not clearly defined by law in this context makes it significantly more difficult to by reading the law find out which acts may result in detention. A precondition for preventive detention according to the SCAA to be available is that the person has been the subject of a deportation order according to § 1 of the SCAA, and, additionally, that there are grounds for detention according to §§ 8 and 9. For this reason, any assessment of the detention should include not only §§ 8 and 9 but also § 1. For the detention to not be arbitrary or violate the principle of legality it is not enough that the criteria for detention are sufficiently clear and precise; the same must also be true for the criteria for deportation. This analysis of the relationship to the principle of legality will therefore start by an examination of § 1.

§ 1 of the SCAA allows deportation in two different situations: i) when it is especially called for due to national security reasons and ii) when it can be feared that an alien will commit or abet the commission of a terrorist crime or the conspiracy, preparation, or attempt to commit such a crime. Regarding i), neither the law nor the preparatory works make clear when it can be applied. This means that it is difficult for an individual to know which acts can result in deportation. For example, the preparatory works refer to 'strong connections' to terrorist organisations, but do not further elaborate on what that means. Since persons who it can be feared will commit or in any other way further a terrorist crime are covered by ii), it is reasonable to assume that i) applies also to others; that is, to persons whose level of involvement in terrorist groups does not reach this threshold. Reasonably, ii) should apply to a person who is a member of and commits crimes on the behalf of a terrorist group. Can i) also apply to that person's family members? His friends? What about persons who were previously members of terrorist groups? Persons who are members of the same religious communities as known terrorist group members, or persons who sympathize with terrorist causes without harbouring any intention to commit violent or criminal acts? The law does not make this clear. It also does not make clear which type of conduct it is that can lead to the application of ii), that is, when the fear that an individual will commit or participate in a crime of terrorism is serious and well-founded enough to warrant deportation. It is, however, clear that neither i) nor ii) necessarily requires that the person has committed criminal acts. This means that the acts that can lead to application of the SCAA and thus deportation and potentially prolonged detention are not listed or defined in any legal instrument. It cannot be excluded that in practice the law is only applied to persons who de facto constitute a grave threat to society and whose deportation or detention is warranted. However, from a perspective of legality and legal certainty the uncertainty described above is inherently problematic. If national security concerns make it necessary to deport and detain persons whose actions are not currently covered by any provisions of criminal law, then it would arguably be preferable to expand the criminal law, as this would serve the invoked purpose while still protecting the principle of legality by making sure that it was clear which actions could result in sanctions.

In practice, the principle of legality applies, at least to some degree, as this is a general principle of administrative law in Sweden. However, the principle of legality in administrative law is somewhat more flexible than its criminal law counterpart, and thus may allow unfavourable decisions to be based on less precise provisions than would be accepted in criminal law. If assessed against the principle of

legality as it is understood within the criminal law, it is likely that the SCAA would fall short as it does not very clearly specify which acts could lead to deportation and thus also detention. This is not necessarily a problem when the rule is instead assessed against the principle of legality as it is understood within administrative law, as the principle is vaguer in this context. Historically it has been balanced against other interests, and seemingly this is still the case today (although to a lesser extent), as the prominence of the principle varies from case to case. The unclear content of the administrative principle of legality implies that the principle might be satisfied by the fact that the law explicitly gives the Migration Agency and the Government the competency to deport and detain, and that it does not demand that the law in question creates such precise and clear criteria for application as would be required in criminal proceedings. In this context, the interest of preventing terrorism appears to serve to legitimize the use of relatively vague criteria for deportation and detention. This is unfortunate, given that the effect of the detention on the individual concerned is hardly less severe because it formally takes place within an administrative law context.

Furthermore, it is difficult to explain why the interest of ensuring that no one is detained without clear and explicit basis in law would be lesser merely because we are dealing with administrative law. Accepting such a conclusion has dangerous implications for anyone suspected or accused of a crime, as it would enable the legislator to circumvent the procedural protection of criminal law by simply rebranding criminal law provisions as administrative law. It could be argued that the differential treatment of terrorist suspects is warranted by the gravity of the terrorist threat. This is, however, a different argument. In the interests of transparency and legal certainty, it would be preferable if the legislator acknowledged that this was the motivation. The point here is not that it is unsuitable that the principle of legality has different meanings within administrative and criminal law, although that could potentially be problematic in other instances as well. Rather, the issue is that the legislator has chosen to deal with a matter of crime through administrative rather than criminal law. Whether this is acceptable from a Convention point of view will be seen in Section 8.6.

8.4 The prohibition of arbitrary detention

8.4.1 Preventive security detention of terrorist suspects and immigration detention in Article 5

In this section, I look at the legality of and conditions for immigration detention and for preventive security detention of terrorist suspects under Article 5 of the ECHR. In the following section, the Article will be applied to the SCAA.

The conclusion can be drawn that preventive security detention of terrorist suspects as such is not prohibited by the ECHR. As is made clear in *S., V. and A.*, the ECtHR acknowledges that preventive detention may be necessary to protect the public from violent criminal acts. This case, together with earlier case law such as *Brogan* and *Guzzardi*, shows that Article 5(1)(c) does not require detention to take place within the context of criminal proceedings, nor that the detainee is suspected of having committed a criminal act in the past. Originally, the requirement that there be an intention to bring the detainee before a court of law applied to all instances of detention according to Article 5(1)(c). This

must, however, not entail a determination of criminal guilt; the intention can merely be to bring the detainee before a court to try the lawfulness of the detention. Additionally, the Court appears to have relaxed this criterion in *S., V. and A.* by concluding that in instances of short-term detention for the purpose of preventing an imminent criminal act, it does not necessarily apply.

While preventive detention thus is allowed by the Convention, it is subject to certain requirements. Some of these follow from the general preconditions for detention in Article 5(1), applicable to all of the grounds for detention. From the requirement that the detention be in accordance with law, it follows that the detention must be compatible with domestic law, which in turn needs to be compatible with the rule of law, the principle of legal certainty and the principle of protection against arbitrariness. This means that the domestic law must be sufficiently clear and precise for it to be possible to foresee that certain actions will result in detention, and that the detention must be ordered in good faith, that is, that it may not in reality be for another purpose than the invoked sub-paragraph of Article 5(1). In several cases, the Court has considered the absence of a legal time limit for the potential period of detention as an indication that there are not sufficient safeguards against arbitrariness. However, it does not appear as though the absence of time limits in itself means that the detention is unlawful.

In addition to this, there are certain specific criteria for when preventive detention according to Article 5(1)(c) is justified. It follows from the wording of the article that the detention must be considered necessary to prevent the offence. This means that if a less intrusive means will have the same effect, detention is not allowed. The qualification that it must be *reasonably* considered necessary implies that the suspicion that the person will commit an offence unless detained must be somewhat well-founded. This of course also follows from the above-mentioned principle of non-arbitrariness. In addition to this, ECtHR case law shows that the suspicion must refer to a concrete and specific offence. It is not sufficient that a person is generally thought to be dangerous, or to be a 'terrorist'. Finally, the detention must be proportionate. The matter of proportionality will be discussed more in depth in a later section of the analysis.

Detention according to Article 5(1)(f) is also subject to certain limitations. Firstly, the general limitations in Article 5(1) regarding lawfulness, proportionality and non-arbitrariness apply. Secondly, the ECtHR has developed certain specific principles. Most notably, the detention may not be punitive in nature and there must be a realistic prospect of deportation actually taking place in the foreseeable future. In the absence of such a prospect, the Court considers the detainees to be persons against whom action is being taken with a view to deportation or extradition.

8.4.2 Applying Article 5 to the Special Controls of Aliens Act

The next step in the analysis is to determine how the detention regime of the SCAA can be justified by Article 5(1) of the ECHR, by applying the principles described above. This assessment is complicated by the fact that as a part of migration law aimed at terrorism prevention, it could potentially be justified by either Article 5(1)(c) or Article 5(1)(f). As I have described above, the detention can be classified as an instance of preventive detention within an immigration law context. I will first look at the conditions under which Article 5(1)(f) can justify the detention, and then move on to see whether cases not justified by Article 5(1)(f) could instead be justified by Article (5)(1)(c). As the ultimate purpose of the SCAA

is to prevent terrorism offences from occurring, rather than generally controlling migration, from a policy perspective it is relevant to see whether the act would be legal under the ECHR even if it was only based on this ground. If the answer is no, that is a potential policy argument against the Act, even in parts which are justified because the detainees happen to be non-citizens.

The first question is whether the detention of the SCAA can be justified under Article 5(1)(f), as lawful detention of persons against whom action is being taken with a view to deportation. At first glance, the answer appears to be affirmative, as the detention by definition can only be applied to a person against whom there is, or is likely to soon be, a deportation order. However, as ECtHR jurisprudence shows, this is not necessarily sufficient. In situations of prolonged detention where deportation is not likely to occur in the foreseeable future, for example due to impediments to enforcement related to Sweden's obligations according to Article 3 of the Convention, the wording of the SCAA does theoretically not exclude indefinite detention. Although this has not been the case in practice, and the opinion of the current government is that this would not be allowed, the law does not set an upper time-limit for the detention and in the public debate it has been called for indefinite detention in such cases. Therefore, the conclusion that such prolonged detention could not be justified by reference to Article 5(1)(f) of the convention due to the lack of realistic prospects of deportation is highly relevant, as is the matter of whether such detention could instead be justified under Article 5(1)(c).

This leaves the question of whether detention according to the SCAA could additionally be justified by Article 5(1)(c). What has been said above shows that this might be possible in some, but not all, cases. It would depend on the nature and level of the suspicion warranting the detention. If there exists a concrete suspicion, which is reasonably well-founded, that a person is going to commit a terrorist crime and that detention is necessary to prevent this, Article 5(1)(c) would likely allow the detention given that the general criteria described above were fulfilled. However, in the absence of such a concrete suspicion this would not be possible.

Additionally, to be legal under Article 5 the detention under the SCAA must be proportionate. The ECtHR evidently disagrees with Macken's claim that preventive detention outside of a criminal law framework will inherently be disproportionate, as it has found preventive detention of terror suspects outside of a criminal law framework to be legal according to Article 5(1). The ECtHR, however, seems to agree that preventive detention based on group profiling or on a general assessment that a person is dangerous is disproportionate and arbitrary and thus violates Article 5.

There are a number of factors to take into account in a proportionality assessment. One is whether there are any less intrusive measures which would fulfil the same purpose. Such a requirement is inherent in the SCAA, and thus if the act is applied correctly there will not be any issues with this type of proportionality. There is also proportionality *in stricto senso*, that is, that the benefits achieved should outweigh the negative effects for the individual. This principle is protected in Swedish administrative law, and will likely be made explicit by the changes to the SCAA. This means again that if the Act is applied correctly, this should not be an issue.

Proportionality also requires what is sometimes referred to as suitability; that is, that the legal solution chosen should be a suitable means for achieving its purpose. There is reason to question whether this is

fulfilled in the case of the SCAA. However, this is a more general concern about the law as a whole rather than a conclusion as to how it should be applied in individual cases. Therefore it will be dealt with in Section 8.7 where a more general normative analysis is conducted.

8.5 The presumption of innocence

The first question to answer when determining the relationship between the SCAA and the presumption of innocence as it is phrased in the ECHR is whether the criminal limb of Article 6 is at all applicable to the Act. It is clear from the motives that it is the view of the legislator in Sweden that this is not the case, due to the fact that the SCAA is a matter of administrative rather than criminal law and does not aim at establishing criminal guilt. However, it is also clear that in the view of the ECtHR, the definition of legal proceedings under domestic law as non-criminal is not necessarily enough to render the criminal limb of Article 6 inapplicable.

At first glance, case law appears to support the interpretation of the Swedish legislator. The findings in *Guzzardi*, *Raimondo* and *De Tommaso* imply that purely preventive measures fall outside the scope, as they are not aimed at determining the existence of criminal guilt. The same inference can be drawn from the inadmissibility findings in *Kerr* and *Antoine*, where the fact that the proceedings did not aim at establishing liability but rather at assessing dangerousness, played a large role in the Court's finding that the criminal limb of Article 6 did not apply. There are, however, reasons to continue the analysis in spite of the pronouncements in these judgments.

The court has time and time again emphasised that a substantive approach is preferable to a formal one. Therefore, rather than saying that the procedure of the SCAA is *formally* similar to that in the cited cases above because of a similar invoked purpose, the substantive nature of SCAA proceedings should be assessed.

There are also points on which the case law above can be questioned. The distinguishing made between the British cases and the Russian ones comes across as somewhat arbitrary. In both systems, the mental illness of the defendant leads to the conclusion that he cannot be held criminally liable. Still, the defendant is subjected to proceedings aimed at determining whether the act as such has been committed. In the British cases, the *mens rea* element was excluded, but it could be argued that the remaining element, the *actus reus*, in itself constitutes an important enough aspect of a criminal charge for this to not mean that the criminal nature of the determination is entirely removed. This stark differentiation reliant on during what stage of the proceedings it is pronounced that the determination that the defendant has in fact committed the act cannot lead to criminal liability (while still entailing other legal consequences such as detention for reasons of mental illness) is somewhat at odds with the Court's claim that the definition of 'criminal charge' should be substantial rather than formal.

The same could be said about *Raimondo* and *De Tommaso*, where the Court quite quickly dismisses the idea that a preventive measure could constitute a criminal charge. This is somewhat at odds with the string of cases regarding Article 7 where the Court emphasised that a punitive and a preventive purpose can coexist. The same reasoning could be applied to Article 6, which would mean that rather than merely looking at whether the measure is domestically classified as preventive, the Court should examine

whether the measure is tied to an allegation of criminal activity. If this is the case it cannot be excluded that the measure, in addition to its preventive purpose, has a punitive purpose, or at least is related to an allegation of criminal guilt.

There is also an important difference between the SCAA and the mental health cases, namely that proceedings according to the SCAA definitely do not ignore the *mens rea* element. Rather, as terrorism is a crime that requires not only intent in the ordinary sense but an additional special intent, the inference that a person is likely to commit terrorist crimes in the future likely entails a belief that the person harbours both the intent to commit or support the commission of the relevant acts and the special intent required to turn those acts into terrorist crimes.

Turning to a substantial assessment of whether application of the SCAA entails a criminal charge, it can first be noted that there are several pronunciations in the Court's case law speaking for an affirmative answer. For example, it could be argued that application of the law entails an allegation of criminal guilt on behalf of SÄPO, the Migration Agency and the Government (depending on in which instance the case is decided). The reasoning behind this claim is provided by the government itself in the Government bill, when talking about the 'branding' effect. Additionally, there is the argument that application of the SCAA can be based on past conduct. What if this past conduct is a criminal act? What if no criminal guilt has been established for this act, but SÄPO uses claims that it has been committed as basis for its application for deportation and detention? Is this not an allegation of criminal responsibility by the authorities? Another argument is the applicability of the criminal limb of Article 6 to the reasoning in acquitting judgments, as in *Adolf*. Could not the reasoning that a judgment which suggests guilt even in the absence of a criminal conviction violates the convention be applied to an administrative decision in which the authorities express the opinion that an individual is a terrorist? A potential counter-argument to this is that it is not so controversial that different standards of proof apply in different areas of law; for example, it is well established that it can be possible to win a civil suit against a person who has been acquitted in a criminal trial, and a court that awards the plaintiff damages in such a context does violate the presumption. In such situations the original allegations come from a private party, whereas they in the SCAA context emanate from SÄPO, which is a state organ. Additionally, the verdict in question regulates the relationship between two private parties rather than the relationship between an individual and the state, making the two situations different from each other. The comparison to reasoning in acquittals is not intended on its own to give rise to the conclusion that the criminal limb of Article 6 applies, but to illustrate the ECtHR's focus on substantial rather than formal interpretations.

One method to determine the applicability of the criminal limb of Article 6 is to apply the Engel criteria. However, there are some difficulties in applying the Engel criteria to situations of preventive security detention. The criteria were originally intended to be applied in order to distinguish between disciplinary and criminal proceedings. While it may in such cases be contentious how to classify the offence, the proceedings and the penalty imposed, and thus also which procedural safeguards apply, the fundamental structure of a disciplinary case is the same as in a criminal one. In broad and somewhat simplified terms, both cases concern the situation that a person is accused of an act that is prohibited by some type of rule, and as a result he may be subjected to some sort of penalty. It is clear that the penalty is punitive in nature, and that it is related to the past offence. The structure of a case regarding preventive detention is

entirely different. The person need not be accused of any past offence at all, criminal or otherwise. If the assessment of 'dangerousness' is based on past actions, it is not necessary that these actions be prohibited by legal rules, criminal or otherwise. The aim of the detention is not punitive, but preventive.

There are several ways to approach these issues. One would be to simply say that an application of the Engel criteria leads to the conclusion that the criminal limb of Article 6 is not applicable. Firstly, when it comes to the SCAA, the first Engel criterion cannot be fulfilled because the procedure as a whole takes place within the administrative law system. Secondly, the second criterion is not fulfilled because there is not even an 'offence' the nature of which could be assessed. Attempting to apply the second criterion by for example substituting 'prohibition' and 'penalty' for 'detention' demonstrates that the detention does not have a punitive purpose and that its imposition does not depend on a finding of guilt. Thirdly, it could be argued that the third criterion cannot not be fulfilled, as the SCAA does not concern the imposition of a penalty at all.

Another approach would be to engage in a more substantial analysis of the SCAA and argue that in practice, it functions in ways which are not purely preventive. In practice, the assessment of a person's dangerousness is often based on his past conduct, and in this context, the relevant past conduct is very clearly connected to criminal acts. This differentiates the SCAA from other systems of administrative detention, such as coercive institutional care of drug abusers or severely mentally ill persons, because such detention is to a large degree aimed at preventing the person from inflicting harm upon himself, which is generally not criminal. Such detentions usually contain an element of care and rehabilitation absent from preventive security detention.[361] The SCAA, on the other hand, is directly aimed at preventing criminal acts, and it is obvious that past criminal acts are relevant in assessing an individual's potential future dangerousness. From the concerned individual's perspective, the subjective experience of being deported and/or detained because the state finds it likely that you will commit crimes of terrorism will likely be quite similar to being subjected to the same effects because of an alleged past criminal act. The difference, apart from the formal classification, is that in the case of the SCAA, the criminal act of which you are accused has not been specified. Fact remains, however, that the authorities have classified the person as a 'terrorist', who either has in the past or is likely to in the future engage in very grave criminal acts, and as a result of this the state imposes detention and deportation, which are undeniably detrimental to the individual. If the goal is ensuring practical and effective protection of human rights, it seems odd if the fact that the state imposes these measures, which are similar to criminal sanctions, without requiring that it has been proven beyond reasonable doubt that the individual is guilty of an act defined by the law as criminal functioned as an argument to render the situation outside the scope of protection. Such an argument would essentially mean that by creating a comparatively more rights-stripping system of detention, states could escape the scrutiny of the Court. This would mean that by choosing to ignore the presumption of innocence, a state could render the presumption inapplicable. This is a strong argument in favour of a less restrictive and formalistic application of the Engel criteria

[361] Naturally, such situations are also connected to criminality as the purpose can also be to protect others from violent acts which tend to be criminal, and as for example drug use is in itself criminalized. However, the strong role of the protection of the detained individual himself shows that these regimes are not as strongly or exclusively tied to crime prevention as the SCAA.

in situations of preventive security detention. One way to conduct such an application would be to say that the statement that a person needs to be detained and deported because he is likely to commit or otherwise participate in a terrorist crime practically contains the statement that the person is or has been involved in terrorist crimes or preparations thereof (which is, in itself, criminal). Therefore, there is a relevant offence to apply the second Engel-criterion to, namely the crime of terrorism as is defined in §§ 2 and 3 of the Criminal Responsibility for Terrorist Offences Act. This is obviously a criminal offence, meaning that the second of the Engel criteria would be fulfilled. A counter-argument to this would be that the premise is false, as application of the SCAA does not actually require that a person has committed a crime and since also non-criminal acts could give rise to the conclusion that the person might commit future crime and therefore needs to be deported and detained. Accepting this argument would, however, be highly undesirable from a human rights standpoint, as it would mean that a state that awarded potential detainees a higher level of procedural protection would as a result of that choice be subjected to stricter scrutiny by the ECtHR.

To conclude this section, the case law of the ECtHR provides arguments both for and against applying the criminal limb of Article 6 to the proceedings of the SCAA. In my view, applying the presumption would be desirable, especially in cases where the application of the SCAA is causally tied to the belief that a person has previously committed a criminal act. The primary argument in favour of applying the presumption of innocence to the SCAA is that, as has been shown above, the individual the Act is applied to risks suffering the same detrimental effects of the presumption not being applied as an individual would suffer from the principle being violated in a criminal law context.

8.6 The principle of legality

The case law of the ECtHR shows that preventive security detention can be considered a penalty within the meaning of Article 7 despite not being classified as such in domestic law, but that this will not necessarily be the case. The main deciding factors appear to be whether the preventive detention is closely related to the commission of a criminal offence or not, whether the detention is executed in a manner which is substantially similar to the execution of punitive prison sentences, and whether the detention can be shown to have a preventive aim by entailing measures intended to rehabilitate the detainee and enable future release. The result of applying these principles to the SCAA is not quite clear, and it is necessary to differentiate between different types of situations. On one hand, the SCAA does not require any finding of criminal guilt, and the imposition of preventive detention is dealt with in the administrative court system, which is entirely separate from the ‘ordinary’ court system which deals with criminal matters. On the other hand, past criminal offences can be relevant, and the detention is executed in ordinary prisons. In *Ilnseher*, the Court made it clear that the detention should be considered to be imposed following a criminal offence even if a long time has passed between the criminal conviction and the detention order. This ought to mean that in the event that a person is detained according to the SCAA and this causally is a clear effect of the fact that he has previously been convicted of a crime, the detention should be regarded as imposed following the criminal offence. As the detention in the SCAA is not coupled with any particular rehabilitation efforts or any other specific features practically distinguishing it from punitive detention, Article 7 ought to apply to these cases.

Another imaginable situation is that of there being no criminal conviction, but where SÄPO and the administrative authorities applying the SCAA are nevertheless convinced that the person has committed a crime and that therefore, it is necessary to place the person in preventive detention. The different standards of evidence for criminal conviction and application of the SCAA together with the difficulties related to adjudicating terrorist crimes make this situation highly plausible. In such a case, there will have been no establishment of criminal guilt. Nevertheless, the detention will be a direct effect of the authorities' suspicion that the person is guilty of a criminal offence. This makes it possible to argue that what happens here is that while the explicit aim of the measure is preventive, in practice it also functions as a punishment for a criminal act which has not been proven beyond reasonable doubt. The case law of the ECtHR is difficult to apply to situations where a suspicion of past criminal activity forms the basis for detention, but where there is no requirement that there has been a criminal conviction. On the one hand, *Lawless* as well as the string of German cases read *e contrario* imply that this means that the detention cannot constitute a penalty, and thus Article 7 is not applicable. On the other hand, *G.I.E.M. S.R.L. and Others* shows that there can theoretically exist a penalty also in the absence of an establishment of criminal guilt, and that the imposition of such a penalty in itself constitutes a violation of Article 7.

In the event that there has been no established criminal guilt of any kind the situation is different, and an application of the findings of the Court in *Lawless* leads to the conclusion that Article 7 does not apply. There are, however, some reasons to question this finding, and the way it in *Lawless* very quickly determined that since the detention was purely preventive it could not constitute a penalty. The Court reached this conclusion without engaging in any deeper discussion of the conditions of the preventive detention, or the plausibility that a punitive and a preventive aim may coexist, as it has expressed several times in more recent case law. It also did not take into account whether or not the preventive detention was coupled with any rehabilitation efforts, which it did in later cases. As has been described above, one feature of preventive security detention is that acts that are not criminalized can lead to detention, and that it is not always entirely clear which these acts are. Even though the detention is formally based on an assessment of the individual's likely future conduct, in practice this assessment is often based on his past conduct. That this is typically the case is also illustrated by § 2 of the SCAA which explicitly refers to the alien's past conduct. If we were to regard the detention as a penalty, this would evidently be highly problematic from a legality perspective, as it would mean that non-criminal acts which were not clearly defined could lead to the imposition of a penalty – the very essence of what the principle of legality aims to prevent.

The obvious argument in favour of not considering the detention a penalty is the ECtHR:s finding in *Lawless*. However, several of the arguments the Court relied on in *M.*, *Glien* and *Bergmann* could also be applied to instances of preventive detention without link to a criminal conviction. Such arguments can concern the nature of the detention, which, if executed in ordinary prisons, may from the perspective of the detainee appear very similar to a criminal sanction. In *M.*, the Court made clear that a person convicted of a criminal offence is likely to experience preventive detention as an additional punishment and that the preventive detention may function as a deterrent. What is to say that the detention does not function, and is not experienced, in this way also in the situation that it is causally the effect of an act

that is not criminalised, such as having personal relationships with persons involved in terrorist activities?

A final important point, raised by the Court in several cases, is that a preventive aim does not preclude the existence of a punitive aim. In this context, it is relevant to note that *Lawless* is a relatively early case of the Court, with the judgment being made in 1961. It is therefore not impossible that the Court would reach a different conclusion today, by taking into account some of the principles it has developed in its more recent case law. A counter-argument to such an interpretation of Article 7 would be that the Article itself refers specifically to the situation in which a person is 'held guilty' of a criminal offence without basis in law, which would seem to require that the authorities in some way establish criminal guilt. As is acknowledged in the motives to the SCAA, applying the law to a person will inevitably have the effect of 'branding' the person as a 'terrorist'. This shows that despite the absence of a formal finding of criminal guilt, the application of the SCAA to an individual clearly sends the message that the state considers this individual a criminal and that the deportation and detention is a result of this. It could be argued that expanding the notion of 'held guilty of a criminal offence' to also include the imposition of penalties in such cases would be reasonable and also in line with the Court's practice of prioritising the practical and effective protection of human rights.

In the event that the application of the SCAA is a clear effect of previous criminal conviction, Article 7 probably applies. If applicable, the article is probably satisfied in such a situation, as the crime as such is presumably clearly defined; the SCAA makes clear that previous acts can lead to application and it should be reasonable to assume that, for example, a prior conviction of a terrorist crime could have this effect. However, what about other crimes? Supposing that a prior crime unrelated to terrorism is taken into account as an indication that the person is likely to commit a terrorist crime in the future. Is this sufficiently foreseeable? Whether this will be problematic depends on the application of the SCAA, the principle of legality limits the interpretational discretion in such a way that if a previous criminal conviction is to be used as the basis for application, this must be foreseeable. A counter-argument would be that in this context the aim is not to punish, rather, the prior conviction is merely of evidential value and thus the article is not applicable. The way in which ECtHR has dismissed arguments of purely preventive aims and instead focused on the causal link between conviction and preventive detention, however, discredits this argument. In relation to the evidential value of prior criminality it can be noted that the Swedish legal framework does not include a legal theory of evidence, but in states that do, it is common to restrict the usage of prior criminality as a basis for conclusions of guilt in the present case. While not directly applicable in this situation, this illustrates that the use of prior convictions as 'merely' evidence is not in itself uncontroversial.

In cases where there is no criminal conviction, but the application is the effect of the authorities being satisfied of the commission of a past criminal event, the situation is somewhat unclear, and leaves room for argumentation. If the article is at all applicable *G.I.E.M. S. R. L. and Others* shows that it is also being violated as a penalty is imposed in the absence of established criminal liability. Additionally, the SCAA hardly fulfils the requirement of preciseness and foreseeability, as it is very difficult to establish which acts may potentially lead to its application. If there is no criminal conviction or even suspicion of

past criminal acts, it is unlikely that Article 7 would apply. However, it can still be argued that the interests protected by the article are harmed by the SCAA.

8.7 The suitability of the detention regime of the Special Controls of Aliens Act

8.7.1 Is the lower level of human rights protection justified?

The legislator justifies the lower standard of procedural protection in the SCAA by among other things referring to the fact that it is formally a piece of administrative, rather than criminal, law. Therefore, it is supposedly evident that procedural guarantees which are cornerstones of criminal procedures neither do nor should apply. However, this is hardly a valid argument as it is the legislator who has chosen to deal with this through administrative law. That the rules are currently placed in administrative law does not support the claim that the laws *should* be placed in administrative law. A convincing argument could instead be based on two alternative claims. It could explain why practically, the effects of the procedure are less intrusive for the individual whose need of protection is therefore smaller. This claim is, as is shown above, quite easy to question. The other option would be to acknowledge that the SCAA regime does limit the human rights of its subjects, but argue that this is necessary and justified for other reasons. These reasons could for example relate to the nature and gravity of the terrorism threat or the practical and evidentiary difficulties in prosecuting terrorist crimes. Such arguments have of course also been invoked by the legislator. Examining their validity makes it necessary to engage in a larger discussion on the nature of contemporary counter-terrorism than the scope of this thesis allows. However, as is made clear in Chapter 2, it cannot be taken for granted that this is the case.

As the ECtHR has pointed out again and again, such reliance on the formal classification of state measures does not guarantee effective protection of human rights. Protection is better ensured by a substantive evaluation of the measure's effect on the individual. In the case of application of the detention provisions in the SCAA, the effect is that the individual is deprived of his liberty. In this context, it is also notable that the detention is to be executed in facilities ordinarily used for detention of criminal convicts rather than in detention facilities normally used by the migration board for administrative detention. The detrimental effect on the individual is aggravated because the acts he is suspected of either having committed or being likely to commit in the future are of such a serious nature. To be accused of 'being a terrorist' is incredibly stigmatising for the individual. It seems unlikely that the general public would clearly distinguish between persons convicted of terrorist crimes and persons in administrative detention according to the SCAA. The debate surrounding the alleged Islamists subjected to deportation orders in 2019 shows this is not just hypothetical; in the public debate the six men, some of whom have been identified with names in the media, are constantly referred to as highly dangerous presumptive terrorists despite not having been convicted of any terrorist offences.

It is also relevant that the detention is not necessarily brief. The current SCAA does not set any time limit for the detention, meaning that there is no explicit guarantee against indefinite detention although in practice there appears to be such a limit as a result of ECtHR jurisprudence. The suggested changes

to the SCAA would introduce a general one-year time limit, and, in cases with special circumstances, an absolute two-year time limit. While a clarification that the detention cannot continue indefinitely is welcome, the fact remains that one or two years in detention is something that will without a doubt have a very serious effect on the detainee. Procedural rights in criminal law, such as the rule that punishment requires guilt to be proven beyond reasonable doubt, apply to all crimes – including those where the potential punishment is less harsh than a year in prison. The rules discussed apply even to crimes without prison in the range of punishment, or to cases where the defendant due to for example age or lack of a previous criminal record is unlikely to be given a prison sentence at all. The idea that the limited duration of detention in matters covered by the SCAA warrants a lowering of procedural standards is at odds with this, and is therefore hardly valid if we intend the legal system to be internally coherent.

Contrary to ordinary immigration legislation, the purpose of this regime is not to regulate immigration (for example by determining which non-citizens have grounds for asylum or assessing whether a migrant has the financial status necessary to reside in the host country without burdening the social welfare system), but to prevent crime. Based on this, it is difficult to justify a separate regime only applicable to non-nationals. As has been pointed out by critics of the immigration detention framework in relation to, for example, Canada and by several consultation bodies while drafting the SCAA, this is problematic and discriminatory as it creates a system where non-nationals are awarded significantly lower procedural protection than nationals suspected of the same type of activity.

8.7.2 Proportionality and suitability

As mentioned above, it can be questioned whether the SCAA is a suitable means of terrorism prevention.[362] The reason for this is that there are several ways in which the act fails to effectively incapacitate presumptive terrorists.

It has been claimed above that the discriminatory nature of the SCAA is problematic because it disproportionately affects non-nationals and may potentially encourage ethnic discrimination and prejudice. In addition to this, the fact that the SCAA applies only to non-nationals is problematic from a suitability point of view, because it means that as a tool of counter-terrorism system it cannot be fully effective. Until this point, my analysis has focused on the risk of over-inclusiveness of the rule – that is, the risk that it captures people who are in fact not terrorists. I will now turn to the risk that the rule is under-inclusive, that is that it fails to capture cases where it should apply were it to be effective. It is not uncommon that terrorist crimes are committed by nationals of the affected country. SÄPO has in its report on the application of the SCAA concluded that the two gravest instances of terrorist threat in Sweden today come from violent radical Islamism and violent right-wing extremism. The SCAA is mainly thought to be effective against the former, as right-wing Swedish nationalists are more commonly presumed to be Swedish citizens. However, laws aimed at Islamist terrorism who only target non-nationals are likely to be underinclusive merely based on the fact that not all Islamist terrorists are

[362] Suitable in this context has a specific, quite restricted meaning, referring to whether the act is capable of fulfilling its purposes. This is not to be confused with 'suitable' in a broader sense referring more generally to whether something is a good solution all things considered.

non-nationals.[363] Even disregarding this, a counter-terrorism rule that generally applies only to one out of the two main sources of terrorism is by definition underinclusive.

The second way in which the SCAA fails to fulfil its aim is due to the frequency of impediments to enforcement. A large percentage of those individuals who are subject to deportation orders based on this law are not actually deported. This is not incidental. As is explained in the Government bill, it is inherent in the nature of the SCAA that persons to whom it is applied will often be impossible or at least difficult to expel. As a result of the ECHR, it is not possible to keep these persons in detention if it does not seem likely that the enforcement impediments would disappear in the foreseeable future. Therefore, people are released even though SÄPO and the Government are of the opinion that national security would warrant their deportation, and in absence thereof detention. Assuming for a moment that this opinion is correct, it is evident that the SCAA does not fulfil its purpose in a satisfactory way. This claim is further supported by the arguments presented by Tonry, Pearlstein and Daskall regarding the flaws of preventive detention as a counter-terrorism strategy.

These arguments relating to the suitability of a law are also relevant when determining its proportionality *in stricto senso*. That the act in many cases fails to achieve its intended benefits makes it less likely that these benefits would outweigh its detrimental effects.

What has been said above leads to the conclusion that the system of terrorism prevention created by the SCAA is likely to be both over- and underinclusive. This is illustrated by the debate surrounding the act, which illustrates that the legislation is unsatisfactory from several points of view. Not only does the act seriously and in a discriminatory manner undermine fundamental principles of justice, it also fails to achieve its purpose. Given this, it is difficult to argue that the rights infringements in question are necessary or proportionate.

[363] According to a Europol report from 2020, around 60 percent of foiled, failed and completed jihadist attacks in the EU in 2019 were committed by citizens of the host country (Europol, 'European Union Terrorism Situation and Trend Report 2020' [European Union Agency for Law Enforcement Cooperation, 2020] <www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-te-sat-2020> accessed 5 May 2021, 15).

9 Concluding remarks

The purpose of this thesis was to examine how the detention framework in the SCAA relates to the prohibition of arbitrary detention, the presumption of innocence and the principle of legality as they are expressed in the ECHR. This was done by comparing the preconditions for detention in the SCAA to the preconditions for detention in the context of criminal proceedings, and thereafter assessing how the identified differences affected the application and practical enjoyment of the three principles. Additionally, the thesis aimed to place the SCAA in a global context by relating it to general, internationally relevant matters of counter-terrorism.

The result of this assessment was that detention in accordance with the SCAA significantly differs from detention in a criminal law context in three ways: the circumstances leading to detention are less clearly defined in the law, the standard of proof applied is significantly lower and the individual lacks a number of procedural rights which exist in criminal procedural law, such as the right to confront witnesses or to be awarded the presumption of innocence during the proceedings. The effect of this is that the practical enjoyment of the rights conferred by the three principles is detrimentally affected in a large number of ways.

As regards the international element, the analysis shows that the SCAA is part of an international trend in which the human rights of terrorist suspects are disregarded, as this is for various reasons deemed necessary to combat a sever terrorism threat. More specifically, through the SCAA Sweden has chosen to deal with preventive detention in what Elias calls an immigration detention framework, and the Swedish system shares many features with other states who have made the same choice, for example when it comes to the level of procedural rights awarded the detainees. The SCAA also adheres to the trend of placing unusual amounts of power in the hands of the executive because of the connection to terrorism. Much of the international criticism directed at such practices is applicable also to the SCAA. One potential inference to be drawn from this is the more hopeful notion that many of the internationally suggested solutions might also have potential in a Swedish context.

This thesis demonstrates that the SCAA is unsatisfactory in a number of ways. Not only because it detrimentally and discriminatorily affects the human rights of non-citizens suspected of terrorism, but also because it fails to achieve its purpose of terrorism prevention. It is underinclusive in the sense that it does not apply to potential terrorists with Swedish citizenship, and it has severe enforceability issues as many of its subjects cannot be deported. As it is also not possible to keep these persons in detention when deportation ceases to be a realistic prospect, with the effect that persons who SÄPO deems highly dangerous remain at large. The recurring references to the gravity of the terrorist threat in official documents, from 1973 to 2020, show that terrorism is not going away. Therefore, identifying strategies of terrorism prevention which are effective while also respecting fundamental human rights is essential. The modifications to the SCAA suggested in SOU 2020:16 unfortunately fail to address many of the issues of the current legislation.

One conclusion of this thesis, which confirms the empirical findings of Elias' study, is that placing terrorism detention in an administrative rather than criminal law framework affects the human rights of suspects negatively. Writers such as Elias, Macken and Dimock present arguments as to why it is not necessarily true that the criminal law system is ill-suited to deal with issues of terrorism, and why many of the difficulties associated with prosecuting terrorist crimes exist also in relation to other crimes. This makes it difficult to justify the separate and differential treatment of terrorism. Elias' study shows that dealing with these matters in an immigration law context is only one of several different approaches states take. The United Kingdom has for example abandoned the immigration detention framework due to human rights concerns, and instead adopted a pre-trial detention framework. Both Macken and Dimock argue in favour of pre-trial detention frameworks rather than systems of detention outside of the criminal law. These suggested frameworks are also not perfect, and authors such as Tonry and Pearlstein present arguments as to why preventive detention is generally unlikely to fulfil its security goals. Against this background, one potential future avenue for Sweden would be to engage in an open-minded examination of whether a preventive detention system is actually a necessary and effective tool of terrorism-prevention. If this leads to an affirmative answer, the merits of incorporating such a system into the criminal law should be examined, with a view to finding strategies of preventing terror attacks while also respecting fundamental human rights and the rule of law.

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