RETHINKING PREVENTATIVE DETENTION FROM AN INTERNATIONAL HUMAN RIGHTS PERSPECTIVE: A COMPARATIVE STUDY OF AUSTRALIA, MALAYSIA AND SINGAPORE

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ABSTRACT

In order to prevent terrorist attacks, in 2005 Australia introduced a new division into the *Criminal Code 1995* (Cth). This allows preventative detention of terrorism suspects who have not been charged with any offence and of even non-suspects, for up to 48 hours under federal law, with the possibility of extending the detention up to 14 days under complementary State and Territory legislation. In contrast, since September 11, both Malaysia and Singapore have adopted only minor changes to their existing anti-terrorism laws. The two states have long dealt with terrorism suspects by relying primarily on the detention without charge measures provided for under the *Internal Security Act 1960* (Malaysia) and the *Internal Security Act 1965* (Singapore). The two Acts give the executive sweeping powers, including the power to indefinitely detain persons without charge for the purpose of national security.

This thesis examines and compares the preventative detention measures adopted by these three states from an international human rights perspective. Security-based preventative detention is a permissible deprivation of liberty under the International Covenant on Civil and Political Rights as long as it is lawful and proportionate, but any detention without charge must conform to the procedural constraints. Despite the fact that Australia's detention regime includes some safeguards, its provisions are highly problematic. In Malaysia and Singapore, both schemes have been consistently used to suppress political dissidents rather than to protect the state from threats of terrorist acts. Although Australia's new detention regime has a different maximum period of detention and grounds of detention, it has in common with its Malaysian and Singaporean counterparts a lack of sufficient and effective procedural safeguards. These include the absence of a detainee's rights to a substantive merits review of the detention grounds, to have regular contact with the outside world, and to have confidential lawyer-client communications. The thesis concludes that the normalisation of extraordinary emergency rules in Malaysia and Singapore is already against international human rights law, and

there is a real danger that Australia's preventative detention regime might damage the established rule of law and the criminal justice system.

CHAPTER 1 - INTRODUCTION

> *Our response to terrorism, as well as our efforts to thwart it and prevent it, should uphold the human rights that terrorists aim to destroy. Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism – not privileges to be sacrificed at a time of tension.*[1] *– Kofi Annan (2003)*

Since 11 September 2001, combating terrorism has become one of the top priorities of all state governments' agendas. At the international level, governments have intensified and accelerated their co-operation in countering terrorism. At the domestic level, new anti-terrorism legislation has been tabled, discussed and passed by legislature at breakneck pace.

Except for the Hilton bombing in 1978, Australia has not so far been the object of a successful terrorist attack carried out on its own soil by terrorists.[2] But Australia, like much of the world, has been greatly unsettled by several terrorist events of the last decade, especially the tragedies in Bali and London. Since 2002, the Commonwealth Parliament has enacted over 40 counter-terrorism laws,[3] which have been described by scholars as

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[1] Kofi Annan, Secretary-General of the United Nations, 'Remarks at a special meeting of the Security Council's Counter-Terrorism Committee with International, Regional, and sub-Regional Organizations' (6 March 2003).

[2] Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (UNSW Press, 2004) 83-84.

[3] See detailed discussion of the government's attitude to the necessity of new anti-terrorism laws in Australia in the Hon Philip Ruddock MP, 'Australia's Legislative Response to the Ongoing Threat of Terrorism' (2004) 27 (2) *University of New South Wales Law Journal* 254; see also Anthony Reilly, 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001-2005' (2007) 10 *Flinders Journal of Law Reform* 81.

"overly broad" and highly complicated.[4] Malaysia and Singapore, on the other hand, took the slightly different approach of relying heavily on emergency laws to protect national security which have been used for many years in combating domestic terrorism.[5] Among them, Malaysia's *Internal Security Act 1960* ('MISA') and Singapore's *Internal Security Act 1965* ('SISA') have been cited by both states in their annual report to the Counter-Terrorism Committee of the United Nations Security Council as the most important weapon in countering terrorism.[6] Both the MISA and the SISA were originally drafted to protect Malaysia and Singapore from the threat of communism in times of emergency.[7] However, these became "normal" parts of the legal frameworks in both state, and have been energetically utilised in combating domestic and international terrorism since 11 September 2001.

Many of these anti-terrorism measures raise the challenging issue of the appropriate balance between preventing society from terrorism threats and the protections of individual rights and liberties in multiple contexts. This thesis explores one of the most

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[4] George Williams said in a public forum that Australia's legal response after September 11 has been reactive, and expressed his anxiety that "driven by fear and the need to act, we run the risk of an ongoing serious of over-reactions". George Williams, *Challenging Ideas: Inspiring Action, Amnesty International Australia Public Forum* (2008) <http://www.amnesty.org.au/about/comments/22339 >.

[5] Both Malaysia and Singapore had "only to perform a relatively minor tweaking of [their] laws": Michael Hor, 'Terrorism and the Criminal Law: Singapore's Solution' (2002) 1 *Singapore Journal of Legal Studies* 20, 31.

[6] *Internal Security Act 1960* (Malaysia, Act 82, 1999 reprint) ('*MISA*'); *Internal Security Act 1965* (Singapore, cap 143, 1985 rev ed) ('*SISA*'). In Malaysia's report to CTC in 2002, the state government cited the *MISA* as a key feature of its domestic counter-terrorism measures. Counter-Terrorism Committee, *Reports Submitted by Member States pursuant to Security Council Resolution 1373 (2001) and Resolution 1624 (2005) – Malaysia*, UN Doc S/2002/35. And a similar position was adopted by the Singaporean government. Counter-Terrorism Committee, *Reports Submitted by Member States pursuant to Security Council Resolution 1373 (2001) and Resolution 1624 (2005) – Singapore*, UN Doc S/2001/1234 < http://www.un.org/en/sc/ctc/resources/1373.html >.

[7] For a detailed discussion of the history of the *MISA* and the post-war history of the country, see Abu Bakar Munir, 'Chapter 8: Malaysia', in Andrew Harding and John Hatchard (eds), *Preventive Detention and Security Law: A Comparative Survey* (Martinus Nijhoff Publishers, 1993)131, 131-2. For the history and development of the *SISA* in Sinapore, see Hor, above n 5, 32-4.

controversial options currently being adopted by the three states: the use of preventative detention without charge to hold suspected terrorists and even non-suspects.[8]

Under the new Division 105 of the Commonwealth Criminal Code, terrorism suspects and non-suspects may be detained without being charged to prevent an imminent terrorist act or merely to preserve terrorism-related evidence for up to 48 hours by federal activities, with the possibility of extension to a maximum of 14 days at the state or territory level.[9] More draconian preventative detention regime in Malaysia and Singapore allow a two-year detention which can be further extended for an indefinite period, provided the Minister is satisfied that the detention is necessary to prevent the detainees from acting in "any manner prejudicial to national security".[10]

There is no doubt that governments are entitled to take pre-emptive measures to protect society from terrorist attacks. But, the "preventative detention" schemes in the three states have garnered criticism from human and civil rights organizations and the detention regimes seem to be gaining popularity among academics, politicians, and the

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[8] The first recorded use of the term "preventative detention" was by Lord Wrenbury in the World War I English case *R. v. Halliday*, [1917] AC 260 (H.L.) (appeal taken from K.B.). Today the term "preventative detention" is typically used to describe a situation where a person is detained for reasons that are either political or connected with national security, public order, or public safety. A number of synonyms for "preventative detention" are used in jurisdictions throughout the world, including "detention without charge or trial", "administrative detention", "internment", "administrative internment", "retention administrative", "mise aux arrests", "house arrest", "attachment", "ministerial detention" and "a disposicion del poder ejecutive nacional". Steven Green, 'Chapter 2: Preventive Detention and Public Security – Towards A General Model', in Anrew Harding and John Hatchard (eds.), *Preventative Detention and Security Law: A Comparative Survey* (Martinus Nijhoff Publishers,1993) 23, 23-24. See detailed discussion of defining "preventative detention" in international law and a detailed analysis of the kind of preventative detention in domestic regime *infra* Chapter 2.

[9] *Criminal Code 1995* (Cth), ss 105.4(4)-(5). For complementary State or Territory legislation, see *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT), s 21; *Terrorism (Community Protection) Act 2003* (Vic) part 2A, ss 7 and 8; *Terrorism (Police Powers) Act 2002* (NSW) Part 2A, s 26K; *Terrorism (Preventative Detention) Act 2005* (SA), s 10; *Terrorism (Preventative Detention) Act 2006* (Qld), s 12; *Terrorism (Emergency Powers) Act* (NT), s 21K; *Terrorism (Preventative Detention) Bill 2005* (Tas), s 8; *Terrorism (Preventative Detention) Act 2006* (WA), s 13.

[10] *MISA*, arts 8(1)-(2); *SISA*, arts 8(5)-(6).

mainstream media. Thus far, however, the analysis of "preventative detention" regimes has been limited in two key respects.

Firstly, much of the considerable body of research on preventative detention legislation has focused almost exclusively on the schemes themselves, without any reference to the threshold issue of any anti-terrorism research – the definition of a "terrorist act". The definition directly affects the potential scope of detention schemes, particularly the most controversial element – a political, religious or ideological motive. While potential detainees in the three states already include suspects and non-suspects alike, the broad definition of a "terrorist act" in Australia, and the even broader definitions in Singapore and Malaysia cast the net more broadly by including a wider range of acts in the definitions.

Secondly, the debate over preventative detention has been mostly focused on a comparative research between three or four common-law jurisdictions – the United Kingdom, the United States, Canada, some European countries, and increasingly, these days, Australia.[11] Rare is the study that engages Asian jurisdictions. This is unfortunate when it comes to the study of anti-terrorism measures, especially, preventative detention regimes. Although the experience of the detention powers in Asia is often tragic, it is also complex, rich and varied. In most Asian states, a prolonged and complex process of post-conflict reconstruction often involves the introduction of exceptional and temporary

[11] See, eg, Anna Todd, J. Clare Wilson and Sharon N. Casey, 'Comparing British and Australian Fear of Terrorism Pre and Post the Iraqi War' (June 2005) 12 *Psychiatry, Psychology and Law* 184; Gregory Rose and Diana Nestorovska, 'Australian Counter-Terrorism Offences: Necessity and Clarity in Federal Criminal Law Reforms' (February 2007) 31(1) *Criminal Law Journal* 120; Kent Roach, 'A Comparison of Australian and Canadian Anti-Terrorism Laws' (2007) 30(1) *University of New South Wales Law Journal* 53; Katherine Nesbitt, 'Preventative Detention of Terrorist Suspects in Australia and the United States' (Fall 2007) 17(1) *Boston University Public Interest Law Journal* 39; Saskia Hufnagel, 'German Perspectives on the Right to Life and Human Dignity in the "War on Terror"' (April 2008) 32(2) *Criminal Law Journal* 100; and Roger Douglas, 'Proscribing Terrorist Organisations: Legislation and Practice in Five English-Speaking Democracies' (April 2008) 32(2) *Criminal Law Journal* 90.

emergency rules which may gradually become a normal part of the legal framework of a nation. Moreover, the preventative detention regimes in Asian states operated in diverse politico-legal contexts, compared to their western counterparts. While there is always a deep tension between the powers of detention without charge and the protection of fundamental rights and liberties, the laws of preventative detention in Asia do not themselves appear to also impose meaningful constraints on the powers in question. In this respect, the thesis explores how detention powers in Singapore, Malaysia and Australia should be understood as legal rules. It is very clear that a range of factors from the unique history and politico-legal structures in both countries have influenced the operation and evolvement of the detention powers in Malaysia and Singapore.

This thesis seeks to advance the debate about preventative detention by moving beyond each of these limitations. First, the thesis examines the respective definition of the "terrorist act" in Chapters 5 and 6, before a detailed analysis of the preventative detention regimes. Second, the thesis seeks to broaden the ongoing debate about "preventative detention" by comparing the domestic policies in Australia, Malaysia and Singapore, namely the similarities and differences of the three detention regimes. It also aims to rethink "preventative detention" from an international human rights law perspective by comparing the domestic detention measures against the international standards distilled from international human rights conventions, customary international law and the jurisprudence of prominent international human rights bodies. The assumption underlying this discussion is that international human rights law is not an optional extra during times of emergency. Human rights protection is an issue that must be considered in the context of anti-terrorism laws. As will be discussed in later chapters, international human rights law allows for pre-emptive measures to be taken by states, but requires that any action restricting the enjoyment of rights must remain within carefully drafted limits, and any detention measures must be lawful, necessary, and proportionate, and must incorporating effective procedural constraints.

The three countries discussed in this thesis have been chosen because their legal or political systems offer relevant and legitimate points of comparison with each other, for instance, they share a common law heritage and are established democracies. That being said, the definitions of a "terrorist act" and the preventative detention for anti-terrorism measures adopted by Australia, Malaysia and Singapore diverge in a number of respects. In part, this reflects different histories. Malaysia and Singapore have longstanding experience combating terrorism by relying upon the detention regimes in the MISA and the SISA, whereas Australia has only recently developed its legislative approaches to the detention of terrorist suspects in the wake of the terrorist attacks of 11 September 2001.[12]

There are obvious limitations inherent in the selection of just three states for this survey. Although the thesis consciously focuses on three common law states in Asia, many other common law states are not represented. Although including as many states as possible would bolster the strength of a comparative research, the discussion in this thesis contributes to a broader conversation about approaches to preventative detention within a global context.

Chapter 2 first delineates the definitional question of "preventative detention" in the context of anti-terrorism laws, and discusses the rationale for and legitimacy of states' use of "preventative detention" to combat terrorism. While there seems to be no internationally agreed definition of "preventative detention", several recent surveys suggest that the currently existing preventative detention regimes in the world can be

[12] Following the passage of UN Security Council Resolution 1373, Malaysia and Singapore also adopted new anti-terrorism laws, including new definitions of a "terrorist act", measures about prohibiting financing of terrorist acts, and also a new chapter of criminalising terrorsim-related offences in Malaysia's Criminal Code. But both states still refer to the MISA and the SISA as the powerful and major weapons in combating terrorism. Counter-Terrorism Committee, *Reports Submitted by Member States pursuant to Security Council Resolution 1373 and Resolution 1566* (2005) – *Malaysia*, UN Doc S/2005/846; Counter-Terrorism Committee, *Reports Submitted by Member States pursuant to Security Council Resolution 1373 and Resolution 1566 (2006) – Singapore*, UN Doc S/2006/120 <http://www.un.org/en/sc/ctc/resources/1373.html>.

classified into three categories, namely pre-trial detention, immigration detention and national security preventative detention. Australia's new detention regimes and indefinite detention without charge in Malaysia and Singapore all fall within the third category of national security detention framework.

Chapters 3 and 4 undertake a detailed analysis of the international human rights law applicable to preventative detention without charge by looking at the provisions of the international human rights conventions, and the jurisprudence of two prominent human rights bodies, the Human Rights Committee under the International Covenant on Civil and Political Rights ('ICCPR') and the European Court of Human Rights under the European Convention on Human Rights ('ECHR'). Specifically, the analysis examines whether preventative detention of suspects and non-suspects for reasons of combating terrorism is a permissible deprivation of the right to liberty within international human rights laws. Although Australia is the only one of the three states analysed which is a party to the ICCPR, most norms of the ICCPR are part of customary international law and thus applicable to Malaysia and Singapore even if they are not states parties to the convention. Chapter 3 further discusses the procedural constraints with which any domestic detention regime must conform to if it is to be deemed consistent with the Covenant and international human rights standards.

Chapters 5 and 6 analyse in detail the detention regimes in Australia, Malaysia and Singapore. Chapter 5 starts with a discussion of the definition of "terrorist act" in the *Criminal Code 1995*, and whether the effect of two core elements, namely the motivational requirement and exemptions for protests and strikes upon the operation of preventative detention. It analyses the Preventative Detention Order ('PDO') regime in the *Criminal Code 1995*. This Chapter examines the PDO regime against international human rights standards to assess whether it is lawful, necessary, proportionate, and whether sufficient and effective procedural safeguards are included.

Using a similar approach, Chapter 6 first examines how the MISA and the SISA defines a "terrorist" and the new definitions of a "terrorism act" that the two states introduced after 11 September 2001. While the detention regimes in Malaysia and Singapore share with their Australian counterpart a lack of important procedural safeguards, they diverge over the period of detention and the detention grounds. From the discussion of Malaysian and Singaporean detention regimes, it is clear that these emergency measures and the indefinite detention regimes were both adopted as necessary emergency measures to deal with internal insurrections as early as the 1960s. Chapter 6 explores the history of the MISA and the SISA respectively, and examines how the exceptional emergency laws have been used as ordinary criminal rules for more than half a century.

This thesis provides an overall assessment of the three "preventative detention" frameworks, and an analysis of their compliance with international human rights law. Constitutional and statutory structures, legislative histories, experiences of terrorism threats, use of preventative detention in criminal law or civil law, and even social values and cultural differences could play a vital role in shaping domestic preventative detention regimes. Finally, this thesis turns to the lessons that can be drawn from this comparative analysis of "preventative detention" regimes.

CHAPTER 2 - DELINEATING THE QUESTION

2.1 INTRODUCTION

Chapter 2 addresses the question of the definition of "preventative detention without charge" in the context of anti-terrorism laws, and discusses the rationale for and legitimacy of states' use of "preventative detention" measures. At the international level, most international treaties and related studies have addressed different forms of preventative detention, but have never clearly differentiated administrative detention from pre-trial detention or from preventative detention for reasons of national security. While there seems to be no internationally agreed definition of "preventative detention" in international law, recent surveys suggest that the current preventative detention regimes in the world can be classified into three categories, namely pre-trial detention, immigration detention and national security preventative detention. The three regimes generally differ in several respects, including the legal basis for detention, notification of charges, requirement for an initial appearance before a judicial or administrative authority, the period of time in detention without charge, access to lawyers, the right to a fair and public hearing, judicial review of the detention, and rules regarding interrogation during detention. The specific form of "preventative detention" discussed in this thesis is the national security preventative detention framework, as currently featured in Australia, Malaysia and Singapore.

This chapter also examines the rationale and legitimacy of the application of pre-emptive measures by states. A starting hypothesis of the whole thesis is that international human rights law allows for preventative detention without charge. This question will be further analysed in Chapters 3 and 4.

The last part of this Chapter discusses the legislative history of anti-terrorism laws and preventative detention regimes in the three jurisdictions as the background for the following analysis. While terrorism threats have never been far from the Malaysian and Singaporean psyche and the MISA and SISA have remained powerful weapons to combat terrorist acts for half a century, Australian home soil has not encountered a significant successful terrorism attack apart from the Hilton bombing in 1978. Australia differs from Malaysia and Singapore in a number of respects, such as distinct national identity, history of countering terrorism and conceptions of legality. Thus, a comparative research must include an in-depth discussion of the background rather than a general comparison of legal provisions. Chapter 6 will further examine the history of the MISA and the SISA, in order to gain a more comprehensive picture of the detention regimes.

2.2 DEFINING "PREVENTATIVE DETENTION" IN ANTI-TERRORISM LAWS

2.2.1 THE DIFFICULTY OF OBTAINING A COMPREHENSIVE DEFINITION IN INTERNATIONAL LAW

One intriguing issue about the extensive international literature relating to preventative detention is that there seems to be no comprehensive and internationally agreed definition of the concept.

The first recorded use of the term "preventative detention" was by Lord Wrenbury in the World War I English case *R v Halliday*.[1] Today the term "preventative detention" is typically used to describe a situation where a person is detained for reasons that are either

[1] *R v Halliday* [1917] AC 260 (H.L.) (appeal taken from K.B.)

political or connected with national security, public order, or public safety. A number of synonyms for "preventative detention" are used in jurisdictions throughout the world, including "detention without charge or trial", "administrative detention", "internment", "administrative internment", "retention administrative", "mise aux arreêts", "house arrest", "attachment" and "ministerial detention."[2] According to a survey, although there are some exceptions, the term "administrative detention" is more often used in civil law countries, while the term "preventive detention" or "preventative detention" is frequently employed in common law countries.[3]

The Working Group on Arbitrary Detention of the United Nations Human Rights Council defines detention measures in the context of anti-terrorism laws as "deprivation of liberty without charges or trial or other applicable procedural guarantees against persons accused of terrorist acts in the context of the implementation of criminal policies against terrorism." [4] Apart from this definition, the terms "preventive detention", "preventative detention", "internment" and "administrative detention" appear to be used interchangeably in international instruments. The description of "persons arrested or imprisoned without charge" [5] is a commonly used definition of "preventative detention". The United Nations Centre for Human Rights and the United Nations Crime Prevention

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[2] Steven Green, 'Chapter 2: Preventive Detention and Public Security – Towards A General Model', in Andrew Harding and John Hatchard (eds), *Preventative Detention and Security Law: A Comparative Survey* (Martinus Nijhoff Publishers,1993)23, 23.

[3] Stella J. Burch, 'Rethinking "Preventive Detention" from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects' (2009) 41 *Columbia Human Rights Law Review* 99, 110.

[4] Human Rights Council, *Report of the Working Group on Arbitrary Detention: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 10th sess, UN Doc A/HRC/10/21 (16 February 2009) [52] ('*2009 Annual Report of the Human Rights Council*').

[5] *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 30 August 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. *Standard Minimum Rules for the Treatment of Prisoners* does not provide a definition of "preventative detention", but only mentions "persons arrested or imprisoned without charge shall be accorded the same protection as that accorded" under other sections.

and Criminal Justice Unit described such arrest or imprisonment without charge as applying "to a broad range of situations outside the process of police arresting suspects and bringing them into the criminal justice system".[6] The International Committee of the Red Cross favours the term "internment" which it defines as "deprivation of liberty ordered by the executive authorities when no specific criminal charge is made against the individual concerned".[7] The term "internment" can similarly be found in the *Fourth Geneva Convention*.[8] In some reports of the former United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, the term "administrative detention" was used to refer to any form of preventative detention conducted by executive authorities.[9]

Apart from these descriptions of preventative detention, internment and administrative detention, other forms of deprivation of liberty may also be described as preventative detention in international law. Indeed, any form of detention without charge may conceivably constitute "preventative detention" when used in the context of anti-terrorism laws, such as detention of an excessive length in custody pending trial or detention pending inquiries within criminal justice system. From this perspective, even the aforementioned definition given by the Working Group of the Human Rights Commission is by no means a comprehensive one. In fact, states use different forms of detention at the domestic level and sometimes even resort to more than one approach to

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[6] United Nations Centre for Human Rights and Crime Prevention and Criminal Justice Branch, *Human Rights and Pre-Trial Detention: A Handbook of International Standards Relating to Pre-Trial Detention, Professional Trianing Series No.3*, UN Doc HR/P/PT/3, UN Sales No. E94.XIV.6 (1994) s 177.

[7] Claude Pilloud et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987) 875.

[8] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, adopted in 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950). This Convention is commonly referred to as the *Fourth Geneva Convention.*

[9] United Nations Economic and Social Council Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report on the Practice of Administrative Detention*, UN Doc E/CN.4/Sub.2/1989/27 (6 July 1989) s 17.

preventatively detain terrorism suspects. This inevitably prompts the question – what exactly is the kind of preventative detention under examination?

2.2.2 CATEGORIZING PREVENTATIVE DETENTION INTO DIFFERENT FRAMEWORKS

Preventative detention provisions may be found in different types of laws in different jurisdictions, ranging from criminal codes, administrative laws, immigration ordinance and occasionally constitutional provisions. The UN Working Group on Arbitrary Detention has identified various applications of preventative detention in domestic laws, including potentially "indefinite administrative detention orders alleged to have been carried out for security reasons";[10] "detention for security reasons ordered or legalized by a court of law where, however, the persons subsequently charged with a crime were not in a position to defend themselves effectively since the incriminating evidence was kept secret by invoking the necessity to protect the State";[11] "detention of immigrants deemed to pose a terrorist threat";[12] or "detention following trials before special courts seriously lacking fair trial guarantee".[13] These forms of preventative detention recognise various applications of preventative detention regime in domestic laws as acknowledging, and the procedural rules, detainees' rights during and after the detention, period of detention and

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[10] United Nations Commission on Human Rights, *Addendum to the Report of the Working Group on Arbitrary Detention: Visit to Canada (1-15 June 2005)* UN Doc E/CN.4/2006/7/Add.2 (5 December 2005) [84]-[85].

[11] Opinion No. 43/2006, in *Opinions adopted by the Working Group on Arbitrary Detention*, A/HRC/7/4/Add.1, addendum 1 to Human Rights Council, *Report of the Working Group on Arbitrary Detention: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 7th sess, UN Doc A/HRC/7/4 (10 January 2008) ('*2008 Annual Report of the Human Rights Council*'); Opinion No. 26/2007, in *Opinions adopted by the Working Group on Arbitrary Detention*, UN Doc A/HRC/10/21/Add. 1, addendum 1 to the *2009 Annual Report of the Human Rights Council*, UN Doc A/HRC/10/21.

[12] Opinion No. 37/2007, in the *2009 Annual Report of the Human Rights Council*, UN Doc A/HRC/10/21.

[13] Opinion No. 8/2001, in the *2008 Annual Report of the Human Rights Council*, UN Doc A/HRC/7/4.

detainees' right to administrative review or judicial review differ in various ways. Thus, it seems preferable to aim for precision in the meaning of "preventative detention" rather than adopting a comprehensive definition that will bring together under one classification forms of detention serving different goals.

Several comparative studies have been undertaken to examine the similarities and differences of the various forms of preventative detention around the world.[14] A recent survey by Burch indicates that current laws of preventative detention in the context of anti-terrorism laws can be classified into a number of categories, including pre-trial detention, the immigration detention or detention on the grounds of national security.[15] In the survey, a key point of differentiation between alternative preventative detention regimes is whether the power to detain persons in question derives from the penal code, immigration law, or provisions empowering the executive to detain without charge in emergencies or for reasons of national security.[16]

This survey suggests that France, Germany, Ireland, Italy, Spain, Brazil, Denmark, Colombia, Norway and the United Kingdom can all be said to have a pre-trial detention framework.[17] In all of these states, terrorist suspects may only be detained without trial in connection with a concrete criminal charge. Such detention is usually introduced by

[14] For instance, Green, above n 2; Burch, above n 3; Stephanie Cooper Blum, 'Preventive Detention in the War on Terror: A Comparative of How the United States, Britain, and Israel Detain and Incapacitate Terrorist Suspects' (Oct. 2008) 4(3) *Homeland Security Affairs* 1; Stephen J. Schulhofer, 'Checks and Balances in Wartime: American, British and Israeli Experiences' (2003-2004) 102 *Michigan Law Review* 1906.

[15] Burch, above n 3, 128.

[16] Burch, above n 3, 115-6.

[17] Burch, above n 3, 131.

special statutory provisions that deviate from traditional criminal justice, although detainees are not treated exactly the same way as other criminal suspects.[18]

As for the immigration detention framework, Canada, New Zealand and South Africa are all states whose preventative detention falls within this category.[19] The UK initially adopted an immigration framework approach to the detention of terrorist suspects, but the House of Lords ruled against the government in *Belmarsh,* declared that the approach adopted was unlawful and the UK subsequently developed a more criminal law framework approach to "preventive" detention.[20] Unlike the pre-trial detention framework, the original authorization of immigration detention is traced back to administrative immigration law, not to the criminal or penal codes.[21] Preventative detention is usually not predicated upon a detainee's criminal activity, but rather upon his or her status as a non-citizen or immigrant.

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[18] Ireland, Norway, Germany, and Brazil apply exacly the same pre-trial detention rules to all criminal suspects, including those charged with terrorist act. While others, such as France, Spain, Italy and Greece, have enacted special provisions and exceptions within their penal codes governing the treatment, including detention of terrorist suspects. Burch, above n 3,133-4.

[19] Burch, above n 3,159-160.

[20] *A v. Secretary of State for the Home Department* [2004] UKHL 56. This case is also known as the *Belmarsh* case as the detainees were all held at Belmarsh Prinson in London. The *Belmarsh* case was brought by nine foreign nationals who has been certified as international terrorism suspects by the UK Home Secretary under section 21 of the *Anti-Terrorism, Crime and Security Act* 2001 ('*ATCSA*') and had been detained under section 23 of the *ATCSA*. The *ATCSA* allows for the detention of suspected international terrorists without charge. The claimants challenged the legality of the ATCSA and the UK government's decision to derogate from Article 5 of the ECHR in respect of the detention provision. In its decision, the Law Lords examined whether the detention regime under the *ATCSA* was a proportionate response to the emergency situation and concluded that it was not. Thus, the House of Lords granted a quashing order in respect of the derogation order, and a declaration under section 4 of the *Human Rights Act 1998* that section 23 of *ATCSA* was incompatible with the ECHR insofar as it was disproportionate and permitted discriminatory detention of suspected non-national terrorists. Although English Court do not have the power under the *Human Rights Act 1998* to strike down a domestic legislation, after the House of Lords' decision of *Belmarsh*, the Blair government abandoned Part IV of the *ATCSA* and changed course.

[21] In each states, the legal basis for detention is found in a "combination of immigraion and terrorism-specific statutes". Almost all the high profile cases have been brought to challenge the use of immigration detention to hold suspected terrorists. Burch, above n 3, 160-5.

Most states, especially those who have promulgated their preventative detention laws after 11 September 2001, have based their preventative detention regimes squarely upon the grounds of national security. Terrorist suspects are usually held pursuant to constitutional provisions, executive regulations or statutes passed in the name of protecting national security in response to the increased threat of terrorism.[22] Malaysia, Singapore, India, Pakistan, Kenya, Mozambique, Nigeria, the Russian Federation, Australia and Israel are all examples of this framework.[23]

According to Burch's detailed survey, this group is the most diverse, encompassing states with a wide variety of legal, cultural, linguistic, and social traditions.[24] In some states, the preventative detention order is issued by executive authorities, while in others the order can only be issued by a judicial officer. For example, the preventative detention order regime in Australia includes an initial order and a continued one, both of which are administrative in nature. The initial PDO is issued by senior officers of the Australian Federal Police, and the continued one is issued by a judicial officer acting in his or her personal capacity.[25] Although the PDO might be issued by different authorities at different stages, both are issued based purely on the grounds of national security concerns. Generally, the national security framework in any state is not predicated on immigration status, and orders are not issued in connection with an ongoing investigation which will lead to actual trial.

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[22] For example, terrorism suspects in Malaysia and Singapore are held pursuant to the *Internal Security Act 1960* (Malaysia, Act 82, 1999 reprint) ('*MISA*') and the *Internal Security Act 1965* (Singapore, cap143, 1985 rev ed) ('*SISA*'), which are executive regulations that could be traced back to particular special powers provisions in the Constituions. For further discussions on the constitutional validity of the *MISA* and the *SISA*, see further discussions in Chapter 6.

[23] Israel's case is complicated in that the state runs two separate schemes of detention for terrorist suspects – one in Israel, and the other in the Occupied Territories – and applies two different standards for detainees – one for Israeli citizens and the other for non-citizens. Burch, above n 3, 180-1; Blum, above n 14, 5-8.

[24] Burch, above n 3, 179-203.

[25] *Criminal Code Act 1995* (Cth), ss 100.1(1), 105.12.

Only by designating individual states according to different frameworks of preventative detention, can we possibly draw a full-scale picture. However, it is sometimes difficult to classify some states with a single criterion being regarded as a definitive category determinant. For instance, Australia's preventative detention orders regime has included a number of the same procedural safeguards for terrorist suspect and non-suspect detainees that are available in the pre-trial detention regimes, but at the same time employ a detention framework based exclusively on the reasons of national security. Thus, Australia's detention regime may share many characteristics with other pre-trial detention regimes.[26] This is perhaps inevitable, as legal perceptions tend to migrate from state to state. A state that borrows from other states usually incorporates some of the others' experience, while making changes according to its own unique background and perceptions of legality. For example, commentators have noticed that anti-terrorism laws in many common law states can be traced back to the *Terrorism Act 2000* (UK).[27] Australia, Malaysia and Singapore all borrowed significantly from the definition of "terrorist act" in the *Terrorism Act 2000* (UK), but each state added its own variations on the original model. Australia's control order scheme was modelled on laws from the United Kingdom's *Prevention of Terrorism Act 2005* (UK), but also made changes. Nonetheless, the legal basis for detention is always the cornerstone for differentiating detention frameworks.

Moreover, in many states, there is more than one form of detention regime, and terrorist suspects may thus be detained under either a pre-trial detention framework or a national security detention regime. In Burch's survey, she categorises countries to a detention framework on the basis of the most extreme form of detention used by that state

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[26] Burch, above n 3, 180.

[27] For example, Kent Roach is of the view that the *Terrorism Act 2000* (UK) played an important role during the legislative process of new anti-terrorism laws in many states. It helps explain the similarity of the definitions of terroism in various common law states as well as other anti-terrorism measures. Kent Roach, 'The Post-9/11 Migration of Britain's Terrorism Act 2000', in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 374, 375-6, 401-2.

to hold detainees. Of these three frameworks for detention, pre-trial detention is generally regarded as the least extreme and most rights-respecting system of detention, and national security detention is the most extreme and most rights-stripping system of detention.[28] Therefore, Australia, Malaysia and Singapore, although sometimes uses pre-trial detention, are all classified as a nation security detention framework country. But, as this thesis focuses only on the detention schemes in Australia, Malaysia and Singapore, rather than detention regimes in more than 30 states as analysed by Burch, it is better to distinguish pre-trial detention from national security detention without charge within domestic legislation. As will be discussed later, in addition to Australia's PDO regime, under the *Australian Security Intelligence Organisation Act 1979* (Cth), a terrorism suspect may be detained and questioned for a maximum period of 7 days,[29] if he or she is suspected of having any knowledge of an offence, or of actual engagement in a terrorism-related offence.[30] Detention pending inquiries is also found in Malaysia and Singapore. Apart from the detention orders made by the Minister for reasons of national security, the police can detain suspects or non-suspects pending inquiries with the possibilities of criminal charges being brought at a later stage.[31]

Strictly speaking, neither the detention pending trial regime in the MISA or the SISA, nor the questioning and detention regime in the *ASIO Act* are national security preventative detention regimes. If one accepts Burch's classification of detention regimes, the key difference between pre-trial detention regime and national security detention is

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[28] Burch, above n 3, 129-130.

[29] *Australian Security Intelligence Organisation Act 1979* (Cth), s 34G(4)(c): "the passage of 168 hours".

[30] All that is required is that the issuing authorities – a consenting federal magistrate or judge appointed by the Attorney General- be satisfied that "there are reasonable grounds for believing that it will substantially assist the collection of intelligence that is important in relating to a terrorism offence" and that relying on other methods of collecting intelligence would be ineffective. *Australian Security Intelligence Organisation Act 1979* (Cth), s 34G(1)(b).

[31] *MISA*, s 73(6); *SISA*, s 74(6). For a detailed discussion on the inquiries regimes in Malaysia and Singapore, see Chapter 6.

the purpose, and whether charges will be laid eventually. The national security preventative detention regime is purely for detention in order to *prevent* terrorist acts happening without regard to the possible bringing of any criminal charge, whereas the ultimate purpose of the pre-trial detention regime is prosecution, conviction and imprisonment of a terrorist. The detention pending inquiries regime is, as its name suggests, detention for the purpose of collecting evidence in relation to a terrorism-related offence. Although detentions of terrorism suspects under these detention regimes may also be justified on the basis of posing threats to national security, there is, at least, a possibility that the detainee will be prosecuted for a terrorism-related offence under a pre-trial detention or a detention pending inquiries.

Furthermore, there are other two sources of preventative detention powers currently existed in Malaysia, namely preventative detention without charge under the *Emergency (Public order and Prevention of Crime) Ordinance 1969* ('*Emergency Ordinance*') and the *Dangerous Drugs (Special Preventive Measures) Act 1985* ('*Dangerous Drugs Act*').[32] Under these two ordinances, police are capable of detaining suspected gang members and criminals who cannot be formally charged due to lack of evidence and suspected drug traffickers. The preventative detention regimes in the two Acts are similar to pre-trial detention in a number of aspects, among which, detainees are usually suspected criminals. That said, most victims under these two Acts were detained without charge, and were not charged in a court for any criminal offences for lack of evidence.

[32] *Emergency (Public Order and Prevention of Crime) Ordinance 1969* (Malaysia, Act 187); *Dangerous Drugs (Special Prevention Measures) Act 1985* (Malaysia, Act 316). The former was firstly introduced as a temporary measure to control the spread of violence after the May 13, 1969 racial riots, but has continued to be in force ever since. The latter was introduced with a sunset clause, under which the Act will be reviewed every five years. Since 1985, the Act has been successfully renewed from time to time. See further discussions of these two sources of detention powers in s 6.4.6.

Judging by the number of people detained under the *Emergency Ordinance*,[33] this Act has been considered by human rights activists as much worse than the infamous MISA.

Last but not the least, Burch's classification of preventative detention regimes seems to lead to an assimilation of national security with anti-terrorism. However, at least in some jurisdictions, there are real differences between the two. Acts that threaten national security include, apart from terrorist acts, acts of treason, secession, sedition and subversion against the government, etc. Preventative detention for the purpose of protecting national security is thus broader than preventative detention of anti-terrorism, as terrorism being just one of several potential threats to national security. In Australia, commentators and scholars tend to use national security and anti-terrorism interchangeably. In Malaysia and Singapore, while there is obvious difference of detaining for purpose of national security and detaining for reasons of countering terrorism, both the MISA and the SISA generally require the grounds of detention to be that the detainees act in any manner prejudicial to national security.[34] In this respect, the terms national security and anti-terrorism are also used interchangeably with regard to preventative detention regimes under the MISA and the SISA.

As such, in the interests of clarity, I therefore propose to differentiate between detention for reasons of national security and detention for the purpose of making inquiries, or detention for actual involvement in terrorism-related activities. This thesis thus will focus on national security detention when an individual is detained for reasons of national security, or to be specific, for reasons of countering terrorism, with no specific

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[33] According to a NGO report, there were 3,701 persons detained under the *Emergency Ordinance* from 2000 to 2009. Whereas under the MISA, in the past 50 years, 4,139 persons were issued with formal detention orders. The figure was provided by Prime Minister Abdullah Ahmad Badawi in a written statement, who is also Minister for Internal Security, to parliamentary opposition leader Lim Kit Siang, whose statement was quoted by the police department in a newsreport dated 3 Feb 2005.

[34] *MISA*, s 8(1); *SISA*, s 8(1).

criminal charge having been made against the individual concerned, and no contemplation of bringing a criminal charge.

2.3 RATIONALE AND LEGITIMACY OF "PREVENTATIVE DETENTION" IN ANTI-TERRORISM LAWS

Security of the individual is one of the fundamental human rights and the protection of individuals from the threat of terrorist activities is a fundamental obligation of Government.[35] States therefore are obliged to ensure national security by taking positive measures to protect their nationals against the threat of terrorist acts and bringing terrorists to justice. In the case of *Luis Asdrúbal Jiménez Vaca v Colombia*, the Human Rights Committee accepted that States Parties are under an obligation to take reasonable and appropriate measures to protect the life of persons under their jurisdiction.[36] The European Court of Human Rights and Inter-American Commission on Human Rights have also underlined the state's legitimate right and duty to guarantee national security by taking preventative operation measures.[37]

International human rights law allows states to restrict fundamental human rights so as to disrupt terrorist networks. UN Security Council Resolution 1373 went as far as to issue

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[35] Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-terrorism - Fact Sheet No. 32,* (accessed 12 February 2008) 1 <http://www.ohchr.org/EN/PUBLICATIONSRESOURCES/Pages/FactSheets.aspx>.

[36] Human Rights Committee, *Views: Communication No. 859/1999*, 74th sess, UN Doc CCPR/C/74/D/859/1999 (15 April 2002) 7.3 ('*Luis Asdrúbal Jiménez Vaca v Colombia*').

[37] *Kilic v Turkey* [2000] 2 Eur Court HR 75, 62: "…it also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individual whose life is at risk". *Neira Alegria et al v Peru* (1995) Inter-Am Court HR (ser C) No.20, 75: "[W]ithout question, the State has the right and duty to gurantee its security". *Asencios Lindo et al*. (1998) Case 11.182, Report No. 53/98, Inter-Am Court HR, OEA/Ser.L/V/II.95 Doc. 7 rev. at 194 [58] – "The State's national and international obligation to confront individuals or groups who use violent methods to create terror among the populace, and to investigate, try, and punish those who commit such acts means that it must punish all the guilty, but only the guilty".

the mandatory direction that "all States shall …" have a responsibility to combat terrorism.[38] As will be discussed in Chapters 3 and 4, security-based preventative detention is a permissible deprivation of the right to liberty under Article 9(1) of the International Covenant on Civil and Political Rights ('ICCPR').

Moreover, international human rights actors regularly acknowledge that preventative detention for reasons of countering terrorism may be lawful. The legitimacy of preventative detention in the context of anti-terrorism was acknowledged by the Human Rights Committee in its *General Comment 8* and by the Working Group on Arbitrary Detention in its special report, with both documents mentioning that preventative detention might be appropriate and lawful in the counter-terrorism context.[39] The former Sub-Commission on Prevention of Discrimination and Protection of Minorities of the United Nations Human Rights Commission admitted that "administrative detention is not banned on principle under international rules."[40] In *Schweizer v Uruguay*, the Human Rights Committee explained the circumstances in which preventative detention could be employed and said that preventative detention "may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner …"[41] The option of preventative

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[38] UN Security Council, *Security Council Resolution 1373*, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001) [1]-[3].

[39] Working Group on Arbitrary Detention of the Human Rights Council, *Report of the Working Group on Arbitrary Detention*, U.N.Doc.E/CN.4/2004/3 (15 December 2003) 84-5; Human Rights Committee, *General Comment 8, Right to Liberty and Security of Persons (Article 9)*, 16th sess, (30 June 1982), reprinted in Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 at 130 (29 July 1994) [4] ('*General Comment 8*').

[40] UN Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report on the Practice of Administrative Detention* (prepared by Louis Joinet), UN Doc E/CN.4/Sub/2/1990/29 (24 July 1990) [17].

[41] Human Rights Committee, *Views: Communicatoin No.66/1980*, 17th sess, UN Doc U.N.Doc.CCPR/C/17/D/66/1980 (12 October 1982) [18.1] ('*Schweizer v Uruguay*').

detention is, therefore, recognised as a legitimate means to protect society and individuals for imperative security threats.[42]

As such, when there is a perceived danger posed by terrorists, states cannot simply ignore the threats to the life of persons or the society,[43] and should take measures to protect their people and the society as a whole. Following the terrorist attacks in September 2001, the priority of governments in recent years has been for early interventions that will *prevent* terrorist acts from taking place, rather than merely *responding* after the event. Thus, the rationale of proposing preventative measures is that a person may be detained when intelligence sources or other evidence suggests that he or she pose a threat to national security, but where the existing evidence is insufficient for criminal proceedings.

That being said, it is important that States take preventative measures within the framework set out by international human rights law. The Human Rights Committee has stressed that domestic legislation enacted pursuant to Security Council Resolution 1373 must be in conformity with the ICCPR.[44] By stating that states have the right and duty to

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[42] Helena Cook, 'Preventative Detention – Internatonal Standards and the Protection of the Individual', in Stanislaw Frankowski and Dinah Shelton (eds), *Preventive Detention : A Comparative and International Law Perspective* (Martinus Nijhoff Publishers, 1992) 1; International Commission of the Red Cross, U.S. *Detention Related to the Events of 11 September 2001 and Its aftermath – the Role of the ICRC* (5 September 2006) <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/usa-detention-update-121205?opendocument> (asserting that states may detain persons outside the armed-conflict and criminal models "for imperative reasons of security").

[43] Human Rights Committee, *Views: Communication No. 195/1985*, 74th sess, UN Doc CCPR/C/39/D/195/1985 (12 July 1990) ('*Delgado Paez v Colombia*'). In this case, the Committee considerd the question of States' duty to protect persons under their jurisdiction as state's duty and ignorance of the threats would "render totally ineffective the guarantees of the International Covennant on Civil and Political Rights".

[44] Such statement could be found in various Human Rights Committee's concluding observations or comments. See, eg, Human Rights Committee, *Concluding Observations: Estonia*, 77th sess, UN Doc CCPR/CO/77/EST (15 April 2003) [8]; Human Rights Committee, 75th sess, *Concluding observations: New Zealand*, UN Doc CCPR/CO/75/NZL (7 August 2002) [11]; Human Rights Committee, *Concluding Observations: Egypt*, 76th sess, UN Doc CCPR/CO/76/EGY (28 November 2002) [16]; Human Rights Committee, *Concluding Observations: Republic of Moldova*, 75th sess, UN Doc CCPR/CO/75/MDA (26 July 2002) [8]; Human Rights Committee, *Concluding Observations: United Kingdom of Great Britain and*

protect national security, the European Court of Human Rights has emphasized that this does not mean that they "enjoy an unlimited discretion … to secret surveillance".[45] Similar statements are also found in the annual report of the Inter-American Commission on Human Rights, in which the Commission agreed that the last thing states could resort to in the struggle against terrorism was to adopt whatever measures they deem appropriate.[46] Thus, limitations on individual's liberties and rights must be provided for by domestic laws. Chapters 3 and 4 examine the permissible grounds of detention and duration of preventative detention, as well as the core procedural constraints that must be included in any detention regime. Domestic preventative measures must be in full conformity with the international human rights standard.

2.4 HISTORY OF ANTI-TERRORISM LAWS AND PREVENTATIVE DETENTION REGIMES

2.4.1 AUSTRALIA

The example of Australia neatly sums up many of the dilemmas in the contemporary fight against terrorism. The 1978 Hilton bombing is generally regarded as the only terrorist event that has occurred on Australian soil.[47] It sharply raised the awareness of the potential threat posed by terrorism and finally led to official review of national

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Northern Ireland, 73rd sess, UN Doc CCPR/CO/73/UK (6 December 2001) [6] and Human Rights Committee, *Concluding Observations: Yemen*, 75th sess, UN Doc CCPR/CO/75/YEM (26 July 2002) [18].

[45] *Klass and Others v Germany* (1978) 5029/71 Eur Court HR (ser A) [49].

[46] Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission of Human Rights 1990-91*, OEA/Ser.L/V/II.79.rev.1 (22 February 1991) Chapter V. Part II, 512 < http://www.cidh.oas.org/annualrep/90.91eng/TOC.htm>.

[47] In the early hours of 13 Februray 1978, a bomb exploded in the back of a garbage truck, killing two garbage men and a policeman. At then, the leaders of twelve Asian and Pacific member nations were staying for the Commonwealth heads of Governemnt Regional Meetings. No one claimed responsibility for the bombings at the time. Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (UNSW Press, 2004) 83-4.

security law and policing.[48] The Australian Security Intelligence Organization (ASIO) was accordingly established to produce national threat assessments in the field of terrorism and politically motivated violence.[49] In addition to a developed web of security organizations, the criminal law also provides for a number of national security offences-such as the offences of treachery, sedition and treason are dealt with under the *Crimes Act 1914* (Cth). Additionally, Australia is a party to many international conventions which target different types of terrorist activities and which have been incorporated into federal legislation, such as aircraft hijacking, murder and bombing.[50] Apart from these features, on 11 September 2001, Australia did not have any general counter-terrorism laws at the Commonwealth level, and of all the Australian state jurisdictions, only the Northern Territory had enacted any general crimes of terrorism at that time.[51]

Like much of the world, Australia was greatly unsettled by the terrorist attacks in New York and Washington in September 2001 which prompted the concern that the current

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[48] Jenny Hocking, above n 47, 84-8; Cameron Stewart, 'Hilton Bomb Induced Anti-Terror Squad', *The Australian*, 1 January 2010 <http://www.theaustralian.com.au/hilton-bomb-induced-anti-terror-squad/story-fn4p96e3-1225815100331>.

[49] The orginal purpose and structure of ASIO was first proposed by Justice Hope in 1979 in the Protective Securtiy Review Report, in which Justice Hope designated the major responsibility for ASIO. Later that year, *Australian Security Intelligence Organization Act 1979 (Cth*) was passed setting out ASIO's original functions and special powers. Stewart, above n 48.

[50] *Chemical Weapons (Prohibition) Act 1994* implements *Convention on the Prohibition of the Development, Production, Stockpilling and use of Chemical Weapons and on their Destruction*; *Crimes (Aviation) Act 1991* implements *Convention on Offences and certain other Acts Committed on Board Aircraft* (the Tokyo Convention of 1963), *Convention for the Suppression of Unlawful Seizure of aircraft* (the Hague Convention of 1970) and the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (the Montreal Convention of 1971); *Crimes (Biological Weapons) Act 1976* implements *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*; *Crimes (Hostages) Act 1989* implements *International Convention Against the Taking of Hostages*; *Crimes (Internationally Protected Persons) Act 1976* implements *Convention on the Prevention and Punishement of Crimes Against Internationally Protected Persons, including Diplomatic Agents*; *Crimes (Ships and Fixed Platforms) Bill 1992* implements *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*. Internet Resource Guide: Australian Terrorism Law, Australia Parliamentary Library <http://www.aph.gov.au/library/intguide/law/terrorism.htm#terrchron >.

[51] *Criminal Code Act (NT)*, pt III, div 2.

system was not sufficient to deal with the threat of terrorism.[52] The Commonwealth Parliament has enacted more than 40 new counter-terrorism laws since 2002, a response frequently described by commentators as "over-reactions".[53] These different anti-terrorism laws create a very complex system.

The first package of new anti-terrorism laws into the Commonwealth Parliament in March 2002 introduced a new part – entitled "Terrorism" into the *Criminal Code 1995* (Cth), creating a range of individual terrorism-related offences, ancillary offences and a regime targeting terrorist organizations. The *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth) increased the powers of ASIO to obtain intelligence about terrorist activity in Australia and to investigate possible offences. The *Suppression of the Financing of Terrorism Act 2000* (Cth) was enacted to prevent the movement of funds for terrorist purposes and to enhance the exchange of information about such financial transactions with foreign countries, while other provisions aim to enhance the investigative power of the Australian Federal Police ('AFP').[54] The amended *Criminal Code Act 1995* criminalises preparatory acts, so that terrorism suspects may be arrested and prosecuted by law enforcement authorities before a terrorist act is completed and causes harm to individuals, their property and the society generally.[55]

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[52] The necessity to introduce new anti-terrorism laws is discussed in Gregory Rose and Diana Nestorovska, *Australian Counter-Terrorism Offences: Necessity and Clarity in Federal Criminal Law Reforms* (2007) 31 Criminal Law Journal 20.

[53] George Williams, '*Challenging Ideas: Inspiring Action, Amnesty International Australia Public Forum*', Amnesty International Australia Public Forum, 2008 <http://www.amnesty.org.au/about/comments/22339 >.

[54] See detailed discussion of the major anti-terrorism laws in Australia enacted after 2002 in Philip Ruddock MP, 'Australia's Legislative Response to the Ongoing Threat of Terrorism' (2004) 27 (2) *University of New South Wales Law Journal* 254; Anthony Reilly, 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001-2005' (2007) 10 *Flinders Journal of Law Review* 81.

[55] These preparatory acts including "providing or receiving training connected with terrorist acts", "possessing things connected with terrorist acts", "collecting or making documents likely to facilitate terrorist acts" and "acts done in preparation for, or planning, a terrorist act". *Criminal Code Act 1995 (Cth)*, ss 101.2, 101.4, 101.5, 101.6.

Generally, these legislative amendments indicate the government's deliberate policy shifting from punishing criminal conduct to the prevention of that conduct. As such, Australia created a new anti-terrorism laws regime with a core theme of pre-emption.[56] In February 2004, the then Australian Attorney General, Phillip Ruddock, defended the government's legislation effort and emphasised the necessity of preventing future attacks saying, "[t]he law should operate as both a sword and a shield – the means by which offenders are punished but also the mechanism by which crime is prevented."[57]

The London underground bombings in July 2005, however, gave rise to a further rushed round of new anti-terrorism laws. Then Prime Minister John Howard argued that the AFP needed additional preventative detention measures to "better deter, prevent, detect and prosecute acts of terrorism."[58] Accordingly, new preventative detention measures were agreed on by members of the Commonwealth, State and Territory Governments ('COAG') in September 2005.[59]

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[56] Katherine Nesbitt, 'Preventative Detention of Terrorist Suspects in australia and the United States: A Comparative Constitutional Analysis' (2007-2008) 17 *Boston University Public Interest Law Journal* 1, 73; see also Nicola McGarrity, 'Testing Our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia' (2010) 24 *Criminal Law Journal* 92, 93.

[57] Phillip Ruddock, Attorney General of Australia, '*Legal Framework and Assistance to Regions, presentation before the Regional Ministerial Counter-Terrorism Conference in Bali*'. <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=;db=;group=;holdingType=;id=;orderBy=;page=0;query=REGIONAL%20MINISTERIAL%20COUNTER-TERRORISM%20CONFERENCE%20BALI;querytype=;rec=0;resCount=Default>.

[58] Susan Harris-Rimmer and Nigel Brew, '*Proposals to Further Strenthen Australia's Counter-Terrorism Laws*', quoting the Hon John Howard MP's statement <http://www.aph.gov.au/library/intguide/law/terrorismlaws.htm >.

[59] Apart from a preventative detention regime to allow detention of a person without charge, the *Anti-Terrorism Act (No.2) 2005* introduced a number of new mechanism including: New Division 104 – Control Order in the *Criminal Code Act 1995*; an extension of the definition of a terrorist organisation to enable prohibition of organisations that advocate terrorism (Division 102 of the *Criminal Code Act 1995*); revised sedition offences (Division 80 of the *Criminal Code Act 1995*); increased the search powers of the AFP to obtain information and documents related to terrorism and serious crimes (amendments to the *Crimes Act 1914*); extension of financing of terrorism offences (Division 103 of the *Criminal Code Act 1995*) and amendments to the *Financial Transaction Reports Act 1988*, *Proceeds of Crime Act 2002*, and *Surveillance Devices Act 2004*), and increased warrant periods for Australian Security Intelligence Organisation (ASIO) and non-return of seized items if in the interest of national security (amendments to the *ASIO Act 1979*,

The *Commonwealth Anti-Terrorism (No.2) Act 2005* introduced a new Division 105 - Preventative Detention Orders ('PDOs') into the *Criminal Code Act 1995*, allowing preventative detention at the federal level of up to 48 hours, with the possibility of extending this up to a maximum of 14 days under complementary State or Territory laws.[60] The preventative detention regime in the Act aims to be "purely administrative in nature."[61] An initial PDO under which an individual can be detained for up to 24 hours may be applied for by any policy officer and issued by a senior member of the AFP. A continued PDO which extends the period of detention up to a total of 48 hours requires approval from a serving or retired Federal or State Supreme Court judge, a Federal Magistrate, or a lawyer holding an appointment to the Administrative Appeals Tribunal as President or Deputy President.[62] Although judicial officers may serve as "issuing authorities", they may only do so in their *personal* capacity, not in their *official* capacity as a member of the court.[63] Both the initial and a continued PDO may be issued on the grounds that the PDO is necessary to prevent an imminent terrorist act occurring or to preserve evidence relating to a terrorist act.[64]

Customs Act 1901, *Customs Administration Act 1985*, and *Migration Act 1958)*. Hon. Phillip Ruddock MP, Attorney-General, *'Second Reading: Anti-Terrorism Bill (No.2) 2005'*, House of Representatives, *Debates* (3 November 2005) 102. See further discussions of the *Anti-Terrorism Bill (No.2) 2005* also Andrew Lynch, 'Legislating with Urgency – The Enactment of the Anti-Terrorism Act [No 1] 2005' (2006) 31 *Melbourne University Law Review* 747, 771; Jenny Hocking, 'The Anti-Terrorism Bill (No 2) 2005: When Scrutiny, Secrecy and Security Collide, Democratic Audit of Australia' (November 2005) <http://democratic.audit.anu.edu.au>.

[60] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT), s 21; *Terrorism (Community Protection) Act 2003* (Vic) part 2A, ss 7, 8; *Terrorism (Police Powers) Act 2002* (NSW) Part 2A, s 26K; *Terrorism (Preventative Detention) Act 2005* (SA), s 10; *Terrorism (Preventative Detention) Act 2006* (Qld), s 12; *Terrorism (Emergency Powers) Act* (NT), s 21K; *Terrorism (Preventative Detention) Bill 2005* (Tas), s 8; *Terrorism (Preventative Detention) Act 2006* (WA), s 13.

[61] Nesbitt, above n 56, 75.

[62] *Criminal Code Act 1995* (Cth), ss 100.1(2), 105.12.

[63] *Criminal Code Act 1995* (Cth), s 105.19(2). The reason for this is avoidance of the constitutional implications of the strict separation of judicial power unde rthe Commonwealth Consitution. *Grollo v. Palmer* (1995) 184 CLR 348, 362-363 (Brennan CJ, Deane, Dawson and Toohey JJ)

[64] *Criminal Code Act 1995* (Cth), s 105.1.

These new orders significantly extend the powers of state authorities, and frequently limit review by parliament or judicial bodies.[65] The PDO regime has been criticised for violating Article 9 of the ICCPR,[66] which guarantees the right to liberty and security of person, freedom from arbitrary arrest and detention, the right of a detained person to be promptly informed of the reasons for their detention and brought before a judicial officer without delay.[67] As at May 2010, 37 individuals had been arrested and charged with criminal offences within Australian legal system.[68] Notably, during all the investigation and intelligence collecting process, neither a PDO at federal level nor at state level has ever been applied for by the authorities.[69]

2.4.2 MALAYSIA AND SINGAPORE

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[65] Similar argument have repeatedly been stated in various United Nations' reports on arbitrary detention or secret detention. For example, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural rights, including the right to Development - Joint Study of Blobal Practices in Relation to Secret Detention in the context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; The special Rapporteur on Torture and Other cruel, Inhuman or Degrading Treatment or Punishement, Manfred Nowak; The Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; And the Working Group on Enforced or Involuntary Disappearances Represented by its Chair, Jeremy Sarkin* (19 February 2010) UN Doc A/HRC/13/42, 4.

[66] See, eg, Claire Macken, 'Preventative Detention and The right of Personal Liberty and Security under the International Covenant on Civil and Political Rights, 1966' (2005) 26(1) *Adelaide law review* 1, 1-2.

[67] *International Covenant on Civil and Political Rights*, adopted in 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9 ('*ICCPR*'). See further discussions in Chapter 3.

[68] McGarrity, above n 56, 92.

[69] Under another important pre-emption regime in Australia, to date, only two control orders have been issued. The first control order was issued against Joseph 'Jack' Thomas in August 2006 who was found guilty in the Victorian Supreme Court of receiving funds from a terrorist organisation and possessiong a falsified passport. The second control order issued in Australia was against David Hicks in December 2007 who pleaded guilty before a US Military Commission to the offence of providing material support to terrorism and was then transferred to Australia to serve the remaing sentence in Adelaide. US Department of Defense, '*Detainee Convicted of Terrorism Charge at Guantanamo Trial*', Media Release (Mar.30, 2007) < http://www.defense.gov/releases/release.aspx?releaseid=10678 > .

Since 2001 both Malaysia and Singapore have promulgated a slew of new anti-terrorism laws to prohibit financing or supporting of terrorism and criminalize terrorism-related activities. Malaysia responded quickly yet in quite a restrained way to United Nations Security Council requirements regarding terrorist financing by enacting the *Anti-Money Laundering Act 2001*, [70] and amending its *Penal Code* and *Criminal Procedure Codes* in 2003.[71] By promulgating the *Penal Code (Amendment Act) 2003*, a new Chapter VIA was introduced into the *Penal Code*.[72] These provisions were intended to deal with the suppression of terrorist acts and the financing of them. A 2003 amendment to the *Anti-Money Laundering Act 2001* enables the authorities to trace, freeze, seize and forfeit monies intended to be used for or acquired as a result of terrorist acts regardless whether the sources of those funds is legitimate or the proceeds of other predicate offences.[73]

Singapore passed the *United Nations Act 2001* in Parliament shortly after the attacks on September 11,[74] with the similar purpose of implementing the mandatory requirement of Resolution 1373. The *United Nations Act 2001*, the *United Nations (Anti-Terrorism Measures) Regulations 2001*,[75] the *Monetary Authority of Singapore (Anti-Terrorism Measures) Regulations 2002*,[76] the *Terrorism (Suppression of Financing) Act 2002* [77] and

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[70] *Anti-Money Laundering Act 2001* (Malaysia, Act 613, 2006 reprint).

[71] The amendments include to increase penalties for terrorist acts, allow for the prosecution of individuals who provide material support for terrorists, expand the use of wiretaps and other surveillance of terrorist suspects, and permit video testimony in terrorist cases. Office of the Coordinator for Counter-terrorism, '*Patterns of Global Terrorism – 2003*' (29 April 2004) < http://www.state.gov/s/ct/rls/crt/2003/ >.

[72] *Penal Code* (Malaysia, Act 574, 2006 rev ed). See detailed introduction of all the amendments Counter-Terrorism Committee, *Reports Submitted by Member States pursuant to Security Council Resolution 1373 (2001) and resolution 1624 (2005)* – Malaysia, UN Doc S/2004/778 (2004) <http://www.un.org/sc/ctc/countryreports/Creports.shtml>.

[73] *Anti-Money Laundering (Amendment) Act 2003* (Malaysia), Part VI - Freezing, Seizure and Forfeiture.

[74] *United Nations Act* (Singapore, cap 339, 2002 rev ed).

[75] *United Nations (Anti-Terrorism Measures) Regulations 2001* (Singapore, cap561).

[76] *Monetary Authority of Singapore (Anti-Terrorism Measures) Regulations 2002* (Singapore, cap515) (As amended by S563/2002, S623/2002, S189/2003, S352/2003, S451/2003, S606/2003, S258/2004, S734/2004, S383/2005 and S666/2005).

the *Strategic Goods (Control) Act 2002* [78] were enacted to enable Singapore to give effect to United Nations Security Council Resolutions as well as to fulfill Singapore's obligations under the international conventions concerning terrorism to which it is party.[79]

Unlike Australia which has made major changes to its criminal law in response to 11 September, both Malaysia and Singapore had "only to perform a relatively minor tweaking" of their current laws about preventative detention of terrorism suspects without charge or trial. [80] Even with several newly enacted anti-terrorism laws, in practice the two states have dealt with the threat of terrorism by primarily relying on existing legislation, specifically, Malaysia's *Internal Security Act 1960* (MISA) and Singapore's *Internal Security Act 1965* (SISA).[81]

The MISA has its origins in the *Emergency Regulations Ordinance 1948* which was enacted by the then British colonial government as a response to rising communist violence in 1947.[82] In a time of real emergency, the Ordinance gave wide-ranging powers to the High Commissioner, who was empowered to make any regulations considered to

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[77] *Terrorism (Suppression of Financing) Act 2002* (Singapore, cap 325, 2003 rev ed).

[78] *Strategic Goods (Control) Act* (Singapore, cap 300, 2003 rev ed).

[79] Some of the Acts are also enacted as obligations under international conventions, for example, the *Strategic Goods (Control) Act 2002* was passed after Singapore's signed the *International Convention for the Suppression of the Financing of Terrorism*. It aims to regulate the movement of certain strategic goods (which include munitions and dual-use materials) which may be used to develop weapons of mass destruction such as biochemical and nuclear weapons.

[80] Michael Hor, 'Terrorism and the Criminal Law: Singapore's Solution' (2002) 1 *Singapore Journal of Legal Studies* 20, 31.

[81] *Internal Security Act 1960* (Malaysia, Act 82, 1999 reprint); *Internal Security Act 1965* (Singapore, cap143, 1985 rev ed) (Singapore).

[82] *Emergency Regulations Ordinance 1948* (Malaya, Ordinance No 10/1948); Therese Lee, 'Malaysia and The Internal Security Act' (July 2002) *Singapore Journal of Legal Studies* 56, 57.

be desirable for the public interest,[83] including ones that altered ordinary criminal procedure.[84] He was also empowered by the Ordinance to modify, amend, supersede or suspend any written law,[85] to impose curfews,[86] to censor media publications[87] and to detain persons without trial.[88] The High Commissioner declared a state of emergency on 12 July 1948 when the Malayan Communist Party sought to overthrow the government to establish a communist republic.[89] The ensuing 12-year struggle from 1948 to 1960 came to be known as the Malayan Emergency, during which an estimated 6,710 terrorists and 1,865 members of the security forces were killed.[90]

After the end of the Malayan Emergency was signalled by the substantive defeat of the communist insurrection, the Malaysian government proceeded to enact the MISA.[91] Rather than being merely an extension of the *Emergency Regulations Ordinance 1948*, the MISA was enacted in reliance on article 149 of the *Federal Constitution of Malaysia* and became a statute that could only be repealed by an act of Parliament.[92] Thus, the

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[83] The High Commissioner headed the British colonial administration and also served as Governor of the Straits Settlements, which comprised Singapore, Penang, and Malacca; Lee, above n 82, 57.

[84] *Emergency Regulations Ordinance 1948*, s 4(1).

[85] *Emergency Regulations Ordinance 1948*, s 4(2)(p).

[86] *Emergency Regulations Ordinance 1948*, s 4(2)(c).

[87] *Emergency Regulations Ordinance 1948*, s 4(2)(a).

[88] *Emergency Regulations Ordinance 1948*, s 20. By the end of 1948, 11,799 people were held in detention and on independence of the Federation 33,992 people had been detained. Abu Bakar Munir, 'Chapter 8: Malaysia', in Andrew Harding and John Hatchard (eds), *Preventive Detention and Security Law: A Comparative Survey* (Martinus Nijhoff Publishers, 1993) 132.

[89] Lee, above n 82, 57.

[90] RO Winstedt, *A History of Malaya, Kuala Lumpur - Singapore: Marican & Sons* (Malaysia Sdn.Bhd., 1982) 253.

[91] Munir, above n 88, 135-6

[92] *Federal Constitution* (Malaysia, 2006 reprint) art 149. Under article 149 of the *Constitution of Malaysia*, any law designed to stop or prevent the following actions is valid, notwithstanding that it is inconsistent with basic rights and liberties in any of the provisions of Article 5, 9, 10, 13 or 14 (*ie*, freedom of movement, assembly and speech):

restrictive provisions of the *Emergency Regulations Ordinance 1948*, an extraordinary law in a genuine time of emergency, were codified into Malaysia's everyday law.

A similar situation also eventuated in Singapore. The SISA had been in place before the establishment of an independent Singapore.[93] Singapore also had a bitter and long-drawn fight against the communist terrorists who resorted at various stages to organised violence against the then government.[94] A set of terrorism-related legislation was passed by the British colonial government to deal with the chaos and was carried over into independent Singapore, including the *Preservation of Public Security Ordinance* (PPSO) and the *Criminal Law (Temporary Provisions) Ordinance* (CLTPO).[95] The MISA first became Singapore's law when Singapore joined the Federation of Malaya in 1963.[96]

(a) to cause, or to cause a substantial number of citizens to fear, organized violence against person or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, or anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudical to public order in, or the security of, the Federation of any part thereof.

For further discussion of the constitutional validity of the emergency powers in Malaysia, see Chapter 6.

[93] Malaya gained its independecne in 1957 (from the United Kingdom), and Singapore gained its first independence accordingly. Singapore merged with Malaysia in 1963, and announced its second independence two years later.

[94] Singapore's birth as an independent nation was a battle between two parties – People's Action Party that eventually won and rules the country to date and the other one that lost and considered by the victors as "communist terrorists". Professor Hor is of the view that it was a mortal combat at the beginning. Although there were many accounts to explain the so-called "communist terrorists", in nature, the lost one was labelled as terrorists by the victors. Hor, above n 80, 31. See the many accounts also in Lee Kuan Yew, *The Singapore Story: Memoirs of Lee Kuan Yew* (Singapore Press Holdings Times Ed.,1998). Lee Kuan Yew was then Singapore's Senior Minister and led the ruling People's Action Party at the birth of the Republic and was the first Prime Minister of the Republic from 1959-1990.

[95] *Preservation of Public Security Ordinance 1955* (Singapore, Ordinance 25); *Criminal Law (Temporary Provisions) Ordinance 1955* (Singapore, Ordinance 26).

[96] Hor, above n 80, 42-3.

When Singapore left the Federation to be an independent state in 1965, the PPSO lapsed with the introduction of the SISA (which is modelled on the MISA), whereas the CLTOP has been renewed from time to time and is still in force.[97]. Like the MISA, the SISA was permanently enshrined by special powers provisions in the *Constitution of Singapore*[98] and has been used on many occasions since then.

With very broad and ambiguous definitions of terrorist activities, the MISA and SISA allow any police officer to detain an individual for an initial period of up to sixty days and thirty days respectively with the possibility of criminal charges being brought at a later stage,[99] if the officer has reason to believe that the individual is "acting in any manner prejudicial to the security of Malaysia/Singapore … or to the maintenance of essential services therein or to the economic life thereof".[100] The most controversial part of the MISA and the SISA is that the Minister for Home Affairs in each state may order an individual to be detained for a period of two years.[101] Using the same grounds, the Ministers can issue a further detention order to detain the individual for a period up to two years, and this may be renewed an indefinite number of times.[102]

The detention provisions in the MISA and the SISA are highly problematic, as they authorize indefinite detention without charge without providing the detainees with

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[97] *Criminal Law (Temporary Provisions) Ordinance* (Singapore, cap 67, 2000 rev ed). It has been renewed once every five years since 1955, and its future looks reasonably secure. See relevent discussion in *Parliament at the last renewal: Parliamentary Debates* (15 April 1999), vol 70, cols 1215-28.

[98] *Constitution of the Republic of Singapore* (Singapore, 1999 reprint), art 149. It has a similar impact on fundamental liberties and rights as art.149 of the Malaysia's Constitution. For detailed discussion of the constitutional validity of the emergency measures in Singapore, see *infra* Chapter 6.

[99] *MISA*, s73(3): "for a period not exceeding sixty days"; *SISA*, s 74(4): "for a period not exceeding 48 hours" plus "an additional period not exceeding 28 days" (total 30 days).

[100] *MISA*, ss 73(1)(a)-(b); *SISA*, ss (1)(a)-(b).

[101] *MISA* ,s 8; SISA, s 8.

[102] *MISA*, s 8(1); *SISA* s 8(1): "the Minister … may make an order directing that that person be detained for any period not exceeding two years".

comprehensive and effective procedural safeguards.[103] What worries most is that, in many cases, the MISA or SISA has been "used as a tool [by the Executive] to stifle … dissent",[104] while the two acts were originally designed to tackle social and economic chaos brought about by domestic guerrilla warfare in a genuine emergency. The governments have expressed their intention to continue resorting to the MISA and SISA,[105] and have claimed the measures in the MISA and SISA to be reasonable and proportionate as the normal parameters of criminal law are no longer practical for dealing with threats posed by terrorists.[106]

2.5 CONCLUSION

This Chapter has categorised preventative detention measures into three different forms, and made clear this thesis focus on national security detention regime currently available in Australia, Malaysia and Singapore. As noted above, detention without charge for reasons of national security is permissible under international law. But, the core question of the grounds upon which such a detention regime is permissible under international law awaits further discussion.

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[103] See further discusssions in Chapter 6.

[104] Human Rights Watch, '*Malaysia's Internal Security Act and Suppression of Political Dissent: A Human Rights Watch Backgrounder*', Human Rights Watch News (online), 2006 <http://www.hrw.org/backgrounder/asia/malaysia-bck-0513/htm>.

[105] Counter-Terrorism Committee, *Reports Submitted by Member States pursuant to Security Council Resolution 1373 (2001) and Resolution 1624 (2002)*, Singapore, UN DOC S/2002/690 (20 June 2002) 2(a); *Reports Submitted by Member States pursuant to Security Council Resolution 1373 (2001) and Resolution 1624 (2002)*,Malaysia, UN DOC S/2002/35 (8 January 2002).

[106] Counter-Terrorism Committee, *Reports Submitted by Member States pursuant to Security Council Resolution 1373 (2001) and Resolution 1624 (2002)*, Singapore, UN DOC S/2002/690 (20 June 2002) 2(a)-2(b).

Having over forty new pieces of anti-terrorism legislation in place, Australia has created a complex system of anti-terrorism measures, emphasising the need to introduce exceptional measures focused on prevention. This is specifically illustrated by the introduction of the new PDO regime into the *Criminal Code 1995* enabling preventative detention of terrorism suspects and non-suspects without criminal charges being laid.

In terms of the number and scope of newly enacted anti-terrorism laws, Malaysia and Singapore's responses to 11 September have been relatively restrained, mainly because these two states have relied heavily on the MISA and the SISA to investigate and detain terrorism suspects. Australia's preventative detention scheme imposes less constraint on individual rights and liberties with regard to the period of detention and grounds of detention. While the preventative detention orders of both MISA and SISA can be extended for an indefinite period of time which is exactly the two government's current strategy in detaining terrorism suspects,[107] the Australian legislation strictly limits the length of preventative detention to a maximum of 48 hours at federal level and up to 14 days under state or territory law. Furthermore, as will be discussed in detail in later chapters, Australia's preventative detention regime has a higher threshold for authorising detention than its Malaysian and Singaporean counterparts. In practice, while Malaysia and Singapore have constantly used the indefinite detention regimes to suppress political dissent rather than to prevent clear threats of terrorism, Australian authorities are yet to utilise their preventative detention measures.

[107] Since 2002, more than 60 suspects have been detained under the ISA. By July 2010, 16 people are still being detained under the MISA at the Kamunting Detention Center without prosecution. SUHARAM: Gerakan Mansuhkan ISA (Human Rights Commission of Malaysia), 'Press Statement', 26th July 2010 <http://suaram-blog.blogspot.com/2010/07/gerakan-mansuhkan-isa-press-statement.html>. For a list of known detainees in Malaysia, see Aliran's ISA Watch, 'List of known detainees as at 13 October 2010' <http://aliran.com/isa-watch>.

Preventative detention has often given rise in the past to serious human rights violations, and in the context of state actions against terrorism, it raises sharp concerns. Before examining the impact that the laws of preventative detention might have on individual rights and liberties in the national sphere, and evaluating these provisions against international human rights law, Chapters 3 and 4 set out the international human rights standards regarding national security preventative detention. Specifically, the two chapters examine whether preventative detention of terrorism suspects and even non-suspects without charge is a permissible deprivation of the right to liberty, and if international human rights law does permit such detention measures, what constitutes a reasonably necessary detention regime, what restrictions should be placed upon detention regimes and what are the necessary procedural safeguards to protect detainees from arbitrary detention.

CHAPTER 3 - TOWARDS AN INTERNATIONAL HUMAN RIGHTS STANDARD: THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

3.1 INTRODUCTION

As discussed in Chapter 2, not only are governments allowed to use pre-emptive measures to combat terrorism, they are in fact required under international law to take reasonable steps to protect the lives and health of individuals against terrorist attacks. But the question of whether a threat renders preventative detention reasonably necessary is inevitably elusive in practice.[1]

International Human Rights Law is reflected in a number of core international human rights treaties or conventions and in customary international law. The core elements of International Human Rights Law on norms governing preventative detention mainly derive from the International Covenant on Civil and Political Rights ('ICCPR'), the Universal Declaration of Human Rights ('UDHR') and several regional instruments – the European Convention on Human Rights ('ECHR'), American Convention on Human Rights ('American Convention') and African Charter on Human and People's Rights ('African Charter').[2]

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[1] See, eg, Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practic* (Cambridge University Press, 2006) 264-7. (describing the difficulties international bodies have in reviewing official justifications for resorting to emergency measures).

[2] Organization of American States, *American Convention on Human Rights*, open for signature 22 November 1969, OASTS No.36 1144 UNTS 123 (entered into force 23 March 1976) ('*American Convention*'); *International Covenant on Civil and Political Rights*, open for signuture 16 December 1966

This chapter first examines international human rights law in a general context by looking at the detention-related provisions in the ICCPR, the UDHR, the ECHR, the American Convention and the African Charter. What emerges from doing so is the noteworthy fact that norms on preventative detention at the international level differ distinctively from that at the regional level. It concludes that security-based preventative detention is a permissible deprivation of liberty under the ICCPR as long as it is lawful and proportionate under domestic laws. In stark contrast, preventative detention without charge for reasons of national security is strictly prohibited under the ECHR, and shall only be exercised by member states of the ECHR after they have formally derogated from the relevant provisions of the Convention during genuine emergency.

Apart from the provisions of international human rights conventions, in fact, much of the content of the international human rights standard on detention without charge has been developed and interpreted by a number of influential judicial or quasi-judicial organs. The Human Rights Committee's interpretations of the ICCPR and case decisions, although not binding on state parties, have great persuasive force and have been cited as an authoritative source of international law by the International Court of Justice. Similarly, judgments of regional courts such as the European Court of Human Rights carry persuasive weight as a subsidiary source of international norms on preventative detention. Chapters 3 and 4 will examine the jurisprudence of the Human Rights Committee and the European Court of Human Rights, in order to ascertain the content of

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G.A.Res. 2200A, UN GAOR, 21st sess, UN Doc A/RES/2200, 999 UNTS 172 (entered into force Mar. 23, 1976) ('*ICCPR*'); *European Convention for the Protection of Human Rights and Fundamental Freedoms,* open for signature 4 Novemrber 1950, 213 UNTS 222 (entered into force 9 March 1953) ('*ECHR*'); Organiztion of African Unity, *African Charter on Human and Peoples' Rights*, open for signature 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5 (entered into force 21 October 1986) ('*African Charter*'); *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3rd sess, 1st plen mtg, UN Doc.A/810, adopted 10 December 1948 ('*UDHR*').

the substantive standards as well as procedural safeguards accompanying the use of preventative detention on the grounds of national security.

Although this thesis will focus on the national security preventative detention frameworks which are not intended to lead to criminal prosecution, Chapters 3 and 4 will examine cases and decisions concerning other forms of detention where doing so relates to security-based detention, for example, where they deal with the duration of detention.

3.2 PREVENTATIVE DETENTION AND INTERNATIONAL HUMAN RIGHTS LAW – A GENERAL DISCUSSION

3.2.1 INTERNATIONAL STANDARDS

The ICCPR is one of the core international human rights treaties to which as to date 166 States are parties, including Australia, though neither Malaysia nor Singapore have signed or ratified it.[3] As an independent body monitoring the implementation of the

[3] Of the major international human rights instruments, Malaysia has signed/ratified/accessed only five namely, *Convention on the Elimination of All Forms of Discrimination Against Women* (accessed on 5 July 1995), *Convention on the Rights of the Child* (assessed on 17 Feb 1995), *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (ratified on 10 Nov 2000), *Convention on the Prevention and Punishment of the Crime of Genocide* (accessed on 20 Dec 1994) and *Supplementary Convention on the Abolishment of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* (accessed on 18 Nov 1957). Singapore has signed/ratified/assessed/successed seven human rights instruments, including *Convention on the Elimination of All Forms of Discrimination Against Women* (accessed on 5 Oct 1995), *Supplementary Convention on the Abolishment of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery* (successed on 28 Mar 1972), *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* (accessed on 26 oct 1966), *Convention on the Prevention and Punishment of the Crime of Genocide* (accessed on 18 Aug 1995), *Convention on the Rights of the Child* (accessed in 5 Oct 1995), *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts* (signed on 7 Sep 2000), *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (ratified on 14 Jun 2001). Malaysia and Singapore have yet to ratified the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Australia has signed/ratified/assessed to all major human rights treaties, including the ICCPR (signed on 18 Dec 1972 and ratified on 13 Aug 1980) and the ICESCR (signed on 18 Dec 1972 and ratified on 10 Dec 1975).

ICCPR, the Human Rights Committee offers its interpretation of the ICCPR and has the authority to consider individual complaints. Although the UDHR was not adopted as a legally binding instrument, it has widely been regarded as containing rights and freedoms, many of which have become part of the customary international law, and thus are required to be respected by all states. Australia voted in favour of the UDHR and Malaysia and Singapore are bound by the UDHR insofar as it represents customary international law. Lastly, the ECHR, together with two other major regional human rights conventions – the American Convention and African Charter – contribute to a growing body of international jurisprudence on the subject. While the ECHR is of course open for ratification only by the member states of the Council of Europe, the decisions of the European Court of Human Rights are influential source of guidance for ascertaining the prevailing international standards relating to preventative detention. As will be discussed in Chapter 4, the case law of the European Court of Human Rights is an essential supplemental source to the procedural constraints of preventative detention without charge.

Human rights standards require that preventative detention shall not be arbitrary. It is one of the basic guarantees under the UDHR that no one shall be subjected to arbitrary arrest or detention.[4] Article 9(1) of the ICCPR, Article 6 of the African Charter and Article 7(2) of the American Convention all provide that arrest and detention must not be arbitrary.[5] But none of the international human rights instruments is specific about the test for arbitrariness or non-arbitrariness: in what circumstances may a specific detention be rendered "arbitrary"? The current international human rights law depends on more of a case-by-case analysis than the use of a universally accepted standard to determine, namely, whether a particular detention is "reasonable" and "proportionate" to satisfy a

[4] *UDHR*, art 9.

[5] *ICCPR*, art 9(1); *African Charter*, art 6; *American Convention*, art 7(2).

standard of arbitrariness.[6] It is arguably necessary and appropriate to apply a case-by-case analysis in the context of anti-terrorism law and state of emergency, given that the current counter-terrorism activities are frequently viewed as different from all past experiences,[7] plus the fact that states have faced completely distinct levels and types of threat from terrorism. However, it is also noticeable that without a generally applicable standard setting out limits on security-based preventative detention, states might use preventative detention in an excessive way.

There are also procedural constraints that are designed as safeguards against unlawful or arbitrary detention in international human rights instruments. States must promulgate in advance the permissible grounds for detention and act in conformity with domestic laws, so that any detention will be grounded at domestic level.[8] States must inform a detainee immediately of the reasons for his or her detention,[9] and must afford him or her

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[6] See eg Human Rights Committee, *Views: Communication No. 1324/2004*, 88th sess, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006) [7.2] (‘*Shafiq v Australia’*) (detention could be arbitrary if "not necessary in all the circumstances of the case and proportionate to the ends sought"); Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) [7.2] (‘*A v Australia*’); Human Rights Committee, *Views: Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (15 August 1990) [5.8] (‘*Van Alphen v The Netherlands*’); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial* (2003) 44 Harvard International Law Journal 503, 507.

[7] Christopher Michaelson, ‘The Proportionality Principle in the Context of Anti-Terrorism Legislation: an Inquiry into the Boundaries between Human Rights Law and Public Policy’, *in* Penelope Mathew and Miriam Gani (eds), *Fresh Perspectives on the "War on Terror"* (ANU E-Press, 2008) 109, 118; Monika Hakimi, ‘International Standards for Detaining Terrorism Suspects: Moving beyond the Armed Conflict-Criminal Divide’ (2008) 33 *Yale Journal of International Law* 369, 377-8.

[8] *ICCPR*, are 9(1); *American Convention*, arts 7(2)-(3); *African Charter*, art 6; *ECHR*, art 5 (all norms prohibit detentions that are not prescribed by law).

[9] *ICCPR*, art 9(2); *African Charter*, art 7(2); *ECHR*, art 5(2) (asserting that under customary law, a detention will be arbitrary if “not accompanied by a notice of charges”); Human Rights Committee, *General Comment 8: Right to Liberty and Security of Persons (Article 9)* (30 June 1982), reprinted in Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 at 130 (29 July 1994) 1 (acknowledging that administrative detention is sometimes lawful) (‘*General Comment 8*’).

opportunity for prompt judicial review.[10] Whether the decision to detain the individual is made by executive authority or the courts, it should always be based on prior legislation and subject to the oversight of an independent and impartial judiciary.[11] The procedural constraints in international human rights instruments are critical to preventing abuses. Preventative detention will always be considered to be inconsistent with international human rights law in assessing whether detainees have been denied any of the aforementioned procedural rights.

3.2.2 REGIONAL EXPERIENCES

In Europe, the ECHR takes a slightly different approach from other human rights instruments, thus making the picture more complicated. Instead of specifically prohibiting arbitrary detention, Article 5(1) of the ECHR enumerates an exhaustive list of permissible grounds for detention. The ECHR permits detention, *inter alia*, after conviction of a person by a competent court; for noncompliance with a lawful court order; for the purpose of bringing a person before a competent legal authority on reasonable suspicion that he has committed a criminal offence; for the prevention of infectious diseases or drugs control; for immigration control; or when reasonably necessary to prevent a person from committing an offence.[12] Member states of the ECHR must fit any

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[10] *ICCPR*, art 9(4); *American Convention*, art 7(5); *African Charter*, art 7(1); *ECHR*, art 5(4). Some international actors have also suggested that human rights law requires that any detainee shall be provided with access to legal counsel. See, for example, Human Rights Commission, *Concluding Observations: Israel*, UN Doc CCPR/CO/78/ISR (21 August 2003) 13; Louise Arbour, 'In Our Name and On Our Behalf' (2006) 55 *International and Comparative Law Quarterly* 511, 519.

[11] The right to be brought promptly before a judicial authority: *ICCPR*, art 9(3); *American Convention*, art 7(5); *ECHR*, art 5(3); *African Charter* has no explict provision to this effect. The right to trial within a reasonalbe time or to release pending trial: *ICCPR*, art 9(3); *American Convention*, art 7(5); *ECHR*, art 5(3); there is also no corresponding provision in the *African Charter*.

[12] *ECHR*, art 5 – The Right to Liberty:

1. Everyone has the right to liberty and security of person.

of their detention schemes within one of these categories as well as comply with the procedural constraints in other subsections, namely bringing the detainees promptly before a court; exercising judicial control within a reasonable time; and limiting the time on detention.[13] Of particular concern is that preventative detention without charge on the grounds of national security has not been listed in Article 5 of the ECHR. As will be discussed in detail in Chapter 4, security-based preventative detention without criminal charge is clearly prohibited by Article 5 of the ECHR. However, states are permitted to detain terrorism suspects for a reasonable period of time as a necessary and proportionate measure in response to a real public emergency threatening the life of the nation.[14] Such extraordinary powers can only be used once an official derogation is made from the ECHR, complying with the textual limitations, substantive restrictions and procedural conditions as proscribed by Article 15 of the ECHR.

3.2.3 CONCLUSION

> No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

[13] *ECHR*, arts 5(2)-(5).

[14] *ECHR*, art 15. See relevant discussion of the requirements for necessicity and proportionality *infra* Chapter 4.

As was briefly discussed in Chapter 2, preventative detention on the grounds of national security may be a permissible limitation on the right to liberty in international human rights law. Both the universal and regional systems provide a structure for scrutinising preventative detention used for reasons of national security in a general sense. The lawfulness of detention measures depends upon their conformity with restrictions imposed by international human rights law.

However, most of these instruments focus on the procedural aspects of preventative detention, and identify the period of detention or grounds of detention only in a general sense, for example, "no one shall be subjected to arbitrary arrest or detention".[15] None of these conventions indicates the meaning of the term "arbitrary detention" or distinguishes between pre-trial detention and detention without charge. This is understandable given that states might not have been able to reach a consensus over the substantive standards during the drafting process, and have thus shifted their focus to the procedural constraints on administrative detention to protect against arbitrary detention.

A further conclusion is that the substantive constraints posed by international human rights instruments have proven to be insufficient in the context of anti-terrorism laws. The reasons for such a situation may be multi-faceted: first, international human rights conventions do not particularly differentiate security-based detention from other forms of executive detention, and thus do not provide any workable guidance towards a comprehensive standard in detaining terrorism suspects without criminal charge; second, the current international law is not mature enough to provide adequate guidance with regard to the national security detention regime. Major human rights conventions were drafted more than fifty years ago and times have changed dramatically in important respects, in particular as regards the international dimension of contemporary terrorism.

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[15] *ICCPR*, art 9(1).

The jurisprudence of the Strasbourg Court and decisions delivered by the Human Rights Committee, however, represent a timely interpretation and understanding of the international conventions, and contribute significantly to the formation of an international standard relating to detention without charge. The second part of this chapter examines in depth what is the standard of arbitrariness enshrined in the ICCPR, with a focus on the permissible grounds of detention, acceptable period of detention and the required procedural safeguards.

3.3 PREVENTATIVE DETENTION IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

3.3.1 GENERAL DISCUSSION – DEPRIVATION OF THE RIGHT TO LIBERTY

Article 9(1) of the ICCPR provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[16]

This provision is quite different from the ECHR which states that arrest or detention has to fall within an exhaustive list of Article 5(1) or must otherwise be referrable to a derogation based on Article 15 of the ECHR. In fact, the original 1947 draft of the ICCPR contained a list of grounds on which arrest and detention could be made.[17] But it was quickly agreed among the drafting member states that it would be impossible to formulate an exhaustive list of permissible cases of deprivation of liberty and also that

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[16] *ICCPR*, art 9(1).

[17] *Document A/2929 – Annotation on the Text of the Draft International Covenants on Human Rights*, UN GAOR, 10th sess, Agenda Item 28 (Part II) Annexes, UN Doc A/2929 (1 July 1955) Chapter VI [28]; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P.Engel Publisher, 1993) 164.

such a lengthy list would create an unfavourable impression of the convention.[18] A supplementary motion proposed by India which aimed at procedural safeguards was approved shortly after the refection of an exhaustive list by the majority.[19] Ultimately, Article 9 was drafted in terms neither expressly permitting nor prohibiting preventative detention on the grounds of national security.

In contrast to certain absolute rights such as the prohibitions against torture, slavery or retroactive criminal law, the fundamental right to liberty and security of person enshrined in Article 9 does not completely foreclose the possibility of domestic measures of deprivation of individual liberty. The second and third sentences of Article 9 provide two requirements for states' measures of deprivation of liberty to be permissible, namely that these must be non-arbitrary and "on such grounds and in accordance with such procedure as are established by law". As Nowak states in his commentary on Article 9:

> It is not the deprivation of liberty in and of itself that is disapproved of but rather that which is arbitrary and unlawful. It obligates a State's legislature to define precisely the cases in which deprivation of liberty is permissible and the procedures to be applied and to make it possible for the independent judiciary to take quick action in the event of arbitrary or unlawful deprivation of liberty by administrative authorities or executive officials.[20]

Article 9, therefore, merely represents a guarantee which summarises the procedural constraints that states must follow in their domestic laws of detention. Accepting this

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[18] *Document A/2929 – Annotation on the Text of the Draft International Covenants on Human Rights*, above n 17, Chapter VI [35].

[19] Nowak, above n 17, 164. Voting in favour of this proposal – lawfulness of deprivation of liberty on the grounds of procedural safeguards – were Chile, China, Guatemala, India, Iran, the Philippines, the Ukraine, the USSR, the USA and Yugoslavia; voring agaisnt were Australia, Belgium, Denmark, Egypt, France and the United Kingdom. UN Commission on Human Rights, 5th sess (1949) UN Doc E/CN.4/234; *Document: A/CN.4/SR.96 - Summary Record of the 96th Meeting* [1951] I Yearbook of the International Law Commission 116.

[20] Nowak, above n 17, 159-160.

presumption, security-based preventative detention would not be contrary to the ICCPR as long as laws of preventative detention strictly followed the requirements enshrined in the second and third sentences of Article 9.

This is also the view of the Human Rights Committee. In its *General Comment 8*, preventative detention was clearly contemplated by the Committee:

> Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para.1) …[21]

Accordingly, whether preventative detention, especially pure security-based detention, is a permissible deprivation of liberty depends on whether it is lawful, and whether the detention regime in question falls outside the prohibition on arbitrary arrest and detention under Article 9(1) of the ICCPR.

3.3.2 THE PRINCIPLE OF LAWFULNESS

It follows from the above discussion of Article 9 that security-based preventative detention is permissible only when the detention scheme is constructed "on such grounds and in accordance with such procedure as are established by law". The core issue is how to interpret the term "lawful".

According to Nowak, the interpretation of what elements constitute a "law" can only be answered by a systematic interpretation of all comparable provisions in the Covenant,[22] rather than merely seeing the word "law" in its broadest context. If one takes

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[21] *General Comment 8*, above n 9, [4].

[22] Nowak, above n 17, 171.

into consideration the phrases "established by law", "prescribed by law" and "provided by law" in other articles,[23] the term in Article 9 obviously requires domestic legislation to set down all permissible grounds and relevant restrictions.[24] Therefore, the word "law" refers to the domestic legal system in the first instance.[25] But what kind of domestic legislation is appropriately recognised as "law"? The Constitution of each state shall be taken into consideration in the first place, namely any detention measures must be constitutional. Nowak further indicated that the term "law" here has to be understood in the strict sense of a "general-abstract, parliamentary statue or an equivalent, unwritten norm of common law accessible to all individuals subject to the relevant jurisdiction".[26] On a strict reading of this, certain subordinate legislation and administrative act by local government will not be sufficient as the basis of preventative detention for reasons of national security.

Therefore, the minimum requirement of legality will not be satisfied if an individual is detained on the ground of national security that is not clearly established by domestic anti-terrorism legislation. But legality is obviously not the only requirement. If a detention regime is lawful within the domestic legal system - namely if it has been enacted by the legislature in accordance with constitutional procedures - the regime in question may still be contrary to the Covenant if it violates a further requirement - non-arbitrariness. Although the Human Rights Committee did not explicitly stated this, in

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[23] *ICCPR*, art 12(3): "provided by law"; art 18(3): "prescribed by law"; art 19(3): "provided by law"; art 21: "in conformity with the law" and art 22(2): "prescribed by law".

[24] Nowak, above n 17, 171.

[25] Ibid.

[26] Ibid. Nowak did not discuss in detail how subordinate legislation and administrative acts could be lawful under the principle of legality in detail. In fact, subordinate legislation may even not be counted as law. But as discussed in next chapters, in Australia, Malaysia and Singapore, laws of preventative detention are enacted as a national law and parliamentary legislation. Therefore, it is not necessary to explore this issue further in the present context.

Amuur v France, the European Court of Human Rights confirmed such argument, and concluded that:

> "… Where the 'lawfulness' of detention is in issue, including the question whether 'a procedure prescribed by law' has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness…"[27]

3.3.3 PROHIBITIONS AGAINST ARBITRARINESS

Article 9(1) could be interpreted as affirming that preventative detention is non-arbitrary and thus lawful as long as the procedures for the detention are *established by law*. But the second sentence of Article 9 adds the prohibition of arbitrariness of arrest and detention of an individual as an additional requirement.

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[27] *Amuur v France* (1996) Eur Court HR 25, [50]. In some detention pending deportation cases at the domestic level, there are further explanations of how to understand the term "lawful" in international law or the European Convention of Human Rights. For example, in the UK case of *R v Governor of Brockhill Prison Ex Parte Evans* [2001] 2 AC 19, Lord Hope of Craighead explained the criteria for ascertaining whether the domestic laws permitting detention are lawful under international law: "… They include the requirements that the domestic law must be sufficiently accessible to the individual and that it must be sufficiently precise to enable the individual to foresee the consequences of the restriction." This principle was further discussed in *Nadarajah v Secretary of State for Home Department* [2003] EWCA Civ 1768, in which the English Court of Appeal considered whether the detention of the asylum-seeker was lawful, having regard to the policy purported by the Secretary of State and to the requirements of the Human Rights Act 1998. There, Lord Phillips MR, concluded that when considering whether domestic law permits detention for reasons that are arbitrary under Article 5 of the ECHR, several questions have to be answered: "(1) What is the Secretary of State's policy? (2) Is that policy lawful? (3) Is that policy accessible? (4) Having regard to the answers to the above questions, were N and A lawfully detained? ". Thus, domestic rules relating to detention have to be lawful, and accesible. This principle was again mentioned by the Court of Appeal of Hong Kong in another detention pending deportation case: see *A v Director of Immigration* [2008] 4 HKLRD 752 [41]-[46]. It is noticeable that UK has in place the Human Rights Act 1998, which requires domestic legislation to be in conformity with the European Convention on Human Rights and makes available in UK courts a remedy for breach of a Convention right, whereas none of the three states discussed here has a similar domestic mechanism.

The requirement that laws of arrest or detention should not allow the arbitrary exercise of power was first proposed by Australia. This proposal was highly controversial during the drafting process in both the Human Rights Committee and the 3rd Committee of the General Assembly. There were some dissenting opinions that the additional requirement should not be included in Article 9 as it meant nothing more than "unlawful".[28] However, the majority stressed that the meaning of "non-arbitrary" went beyond mere meaning of "unlawful" and contained elements of justice, predictability, reasonableness, capriciousness, proportionality, as well as the Anglo-American principle of due process of law.[29] This broad appreciation of the prohibition against arbitrariness was later adopted by the Human Rights Committee in both its case law relating to Article 9 and several General Comments concerning the interpretation of "arbitrary".

In its *General Comment 8* regarding Article 9, the Human Rights Committee did not interpret the word "arbitrary". But when referring to Article 17, *General Comment 16* provides that "no one shall be subjected to *arbitrary* or *unlawful* interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".[30] Accordingly, the Human Rights Committee argued that the drafters of the ICCPR had accorded the terms "arbitrary" and "unlawful" a meaning that extended beyond mere compliance with domestic legislation:

> The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorised by States can only take place on the basis of law,

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[28] Nowak, above n 17, 172. See also UN Commision on Human Rights, 13th sess (1958) UN Doc A/C.3/SR.863 [8], [21], [29]; UN Doc. A/C.3/SR.866 [16]-[18].

[29] Nowak, above n 17, 172. See also UN Commision on Human Rights, 13th sess (1958) UN Doc A/C.3/SR.863 [15], [17]; UN Doc A/C.3/SR.866 [8], [25], [34].

[30] Human Rights Committee, *General Comment 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art.17)*, 23rd sess,(4 August 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 at 142 (2003) [1] ('*General Comment 16*').

> which itself must *comply with provisions, aims and objectives of the Covenant*.[31]

In the same comment, the Committee further argues that the word "arbitrary" should be interpreted in a wider context:

> The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and *should be, in any event, reasonable in the particular circumstances.*[32]

Therefore, that compliance with domestic law of preventative detention is necessary but not sufficient to make it lawful under the ICCPR. According to *General Comment 16*, preventative detention will be regarded as non-arbitrary and lawful only when it is in accordance with the laws that are reasonable in content and that comply with the provisions, aims and objectives of the ICCPR.

By referring to the *travaux préparatoires* of Article 9(1) of the ICCPR, Bossuyt similarly concluded that the deprivation of a person's liberty should be on such grounds and in accordance with such procedures as are established by domestic legislation, and most importantly should conform to the principle of justice.[33] In *Suarez de Guerrero*, the Committee concluded that in relation to the right to life, there was a difference between killings in accordance with the domestic law and arbitrary deprivation of life. Even though the killings were deemed "lawful" under Colombian municipal law, it was still a breach of Article 6 of the ICCPR.[34] Thus, prohibitions against arbitrary detention act as a

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[31] Ibid [1].

[32] Ibid [4].

[33] Marc J Bossuyt, *Guide to the Travaux Preparatoires of the International Covenant on Civil and Political Rights* (Kluwer Law International, 1987) 198.

[34] Human Rights Committee, *Views: Communication No. R.11/45*, 24th sess, UN Doc Supp.No.40, A/37/40 (31 March 1982) [13.3] (*Suarez de Guerrero v Colombia*). ("the action of the police resulting in the death

safeguard against the unreasonable "lawful" domestic measures, or in other words, against the injustice of States.

The Committee further defined "arbitrariness" in *Van Alphen v The Netherlands*, where it defined "arbitrariness" to include a number of core elements. In this case, Van Alphen was detained without any criminal charge for a period of over nine weeks in order to force him to waive his professional obligation to secrecy and to solicit evidence which could be used in the criminal investigations against his clients.[35] The Committee considered the meaning of "arbitrary" in Article 9 by reference to the drafting history of the ICCPR. It held that:

> "Arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of *inappropriateness*, *injustice* and lack of *predictability*. This means that remand in custody pursuant to lawful arrest must not only be lawful but *reasonable* in all the circumstances.[36]

This broad interpretation of "arbitrariness" was confirmed in *A v Australia*. In *A*, the detainee was detained because of illegal entry into Australia without a legitimate refugee status, and had been detained pending determination of his refugee status for seven months.[37] According to the Committee, a person may be detained for reasons of illegal entry into Australia or for other reasons such as lack of cooperation.[38] But without these compelling reasons, simply detention pending determination of his entitlement to refugee

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of Mrs. Maria Fanny Suarez de Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived of her life contrary to article 6(2) of the ICCPR.") See also Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 2000) 110.

[35] *Van Alphen v The Netherlands*, UN Doc CCPR/C/39/D/305/1988 [3.1].

[36] *Van Alphen v The Netherlands*, UN Doc CCPR/C/39/D/305/1988 [5.8].

[37] Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) ('*A v Australia*') [1].

[38] *A v Australia*, UN Doc CCPR/C/59/D/560/1993 [9.4] .

status without any provision for periodic review may be considered arbitrary, even if A's entry was illegal in the first place.[39] Again, the Committee stressed that "arbitrariness must not be equated with 'against the law' but interpreted more broadly to include such elements as inappropriateness and injustice."[40] In *Shafiq v Australia*, the Committee added the element of proportionality by stressing that detention could be arbitrary if "not necessary in all the circumstances of the case and proportionate to the ends sought."[41]

In its recent judgement in the *Diallo case* delivered in November 2010,[42] the International Court of Justice ('ICJ') also emphasized the elements of necessity and proportionality in determining the meaning of "arbitrariness" in Article 9 of the ICCPR. The ICJ acknowledged the arrest and detention of Diallo by the Democratic Republic of the Congo was not arbitrary *per se*, as it could be recognised as a required measure effecting a decision taken by the state authority.[43] That said, having considered that Diallo was held for a "particularly long time" and that the state authorities made no attempt to ascertain whether Diallo's detention was necessary, the Court considered such detention as arbitrary within the meaning of the ICCPR.[44]

Therefore, to avoid infringement of the Covenant's prohibition on "arbitrary" detention, any scheme of security-based preventative detention in the national sphere must be manifestly just, predictable and proportionate to the ultimate goal of the

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[39] Ibid.

[40] Ibid [9.2]. Australia has contested this as a correct interpretation of Article 9.

[41] See, eg, *Shafiq v Austrlaia*, UN Doc CCPR/C/88/D/1324/2004 [7.2]. It is noticeable that in *Shafiq*, Australian government disagreed with the Human Rights Commission on the issue of whetehr a lawful detention can be arbitrary.

[42] *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), judgemnt of 30 November 2010* (2010) ICJ.

[43] Ibid [81].

[44] Ibid [82].

detention scheme. The specific manner in which a detention is made must not be discriminatory and must be able to be deemed appropriate and proportionate in view of the circumstances of the case.[45]

3.3.4 Lack of A Substantive Standard on The Grounds of Detention and The Period of Detention

3.3.4.1 Grounds of Detentions

When dealing with the cases concerning preventative detention, although the Human Rights Committee has stressed that the meaning of "lawfulness" and "non-arbitrariness" must be interpreted broadly to include extra elements of justice, reasonableness, necessity, proportionality and predictability, it has not set out explicitly the standard as to the grounds on which a person be detained.

When the Human Rights Committee was reviewing the detentions by the United States at Guantanamo Bay, it did not consider whether preventative detention in Guantanamo Bay may be arbitrary under the Covenant. Rather, it focused squarely on the ICCPR's procedural constraints, and urged the United States to afford all Guantanamo detainees "proceedings before a court to decide, without delay, on the lawfulness of their detention or order their release."[46]

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[45] Parvez Hassan, 'The International Covenant on Civil and Political Rights: Background and Perspective on Article 9(1)' (1973) 3(2) *Denver Journal of International Law and Policy* 153, 179; See also Nowak, above n 17, 172-3.

[46] Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observation United States of America*, 87th sess, UN Doc CCPR/C/USA/CO/3 (15 September 2006) [18].

In *Schweizer v Uruguay*, the Committee found that it was not "in a position to pronounce itself on the general compatibility of the regime of 'prompt security measures' under Uruguayan law with the Covenant."[47] While the applicant was arrested on the ground of "association to break the law" and kept in incommunicado detention without charge,[48] the Committee concluded that the detention was in violation of the Covenant on the basis of non-compliance with procedural constraints - as the detainee had not been brought before a judge and could not take proceedings to challenge his arrest and detention - rather than holding that the grounds of detention were not reasonable.

Even when the Committee concludes the preventative detention regime in question is consistent with the ICCPR and does not necessarily offend the prohibition on arbitrary detention; it avoids discussing the permissible justifications for preventative detention. An example of such practice was evidenced by its reaction to India's reservation to Article 9 of the ICCPR.

Article 22 of the *Constitution of India* permits preventative detention in non-emergency situations, allowing the detention of a person without charge or trial for a period of up to three months without judicial review. Further, a subsection of Article 22 denies certain procedural safeguards to any person who is arrested or detained under any law providing for preventative detention.[49] India ratified the ICCPR with a reservation stating that it would interpret the ICCPR provisions on detentions to permit national

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[47] Human Rights Committee, *Views: Communication No. 66/1980*, 17th sess, UN Doc CCPR/C/OP/2 at 90 (12 October 1982) [18.1] ('*Schweizer v Uruguay*').

[48] *Schweizer v Uruguay*, UN Doc CCPR/C/OP/2 at 90 [2.2].

[49] According to Article 22(3) of the *Constitution of India*, a person in preventative detention is not entitled to be informed of the grounds for such arrest nor entitled to judicial review before a Magistrate. *The Constitution of India* (India, as modified up to the 1st December, 2007) art 22(3).

security detention taken consistent with the Indian Constitution.[50] In its 1996 report to the Human Rights Committee, India acknowledged that it employed preventative detention in response to a "sustained campaign of terrorism" within its territory.[51] It asserted that such detention was necessary in order to prevent a person from threatening public order or security, but did not specify the exact circumstances of this case, nor did it demonstrate that it satisfied that standard.[52] The Committee expressed its regret that "the use of special powers of detention remains widespread" in India. However, it was silent on the lawfulness of the quite broad detention grounds in India. The Committee merely stressed that it accepted that India could continue to detain persons administratively for reasons of national security as long as such detention satisfied the procedural constraints.[53]

The Committee, however, was slightly more assertive about whether the grounds of preventative detention are permissible under the ICCPR in its two concluding observations on Israel, in 1998 and 2001 respectively. Although the Committee still did not express itself with precision, it has raised some concerns with regard to the grounds of detention.

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[50] The Government of India entered a reservation to Article 9 of the ICCPR: "with reference to Article 9 [the right to personal liberty] … the Government of the Republic of India takes the position that the provisions of the Artile shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of Article 22 of the Constitution of India." Human Rights Committee, *Reservations, Declarations, Notifications and Objections Relating to the International Covenant on Civil and Political Rights and the Optional Protocols*, UN Doc CCPR/C/2/Rev.4 (24 August 1994) 25.

[51] Human Rights Committee, *Third Periodic Reports of States Parties Due in 1992: India*, UN Doc CCPR/C/76/Add.6 (17 June 2006) [50].

[52] Ibid [55].

[53] Ibid [24].

Israel ratified the ICCPR with a notification that it intended to exercise powers of arrest and detention as required by the state of exigencies.[54] Israel hedged on whether the exercise of such powers would be inconsistent with the ICCPR so as to require derogation and it, therefore, merely derogated from the detention provisions insofar as was necessary.[55] In its 1998 concluding observations on Israel, the Committee expressed its concern that "at least some of the persons kept in administrative detention for reasons of State security … do not personally threaten State security but are kept as 'bargaining chips' in order to promote negotiations with other parties."[56] Given that Israel's practice of detaining persons as "bargaining chips" is not prohibited by any of the procedural constraints on detention in the ICCPR, this concern presumably went to the substantive requirement of non-arbitrariness. The Committee's statement implied that if a particular detention is based not on an assessment of the need to detain the particular individual but on a broader consideration of state interest which is unrelated to the individual case, the detention is arbitrary and thus unlawful.[57] In Israel's second periodic report to the Human Rights Committee, the country seemed to accept the Committee's argument and acknowledge that the detention of persons who do not themselves constitute a threat to national security but who may be useful as "bargaining chips" in future negotiations is indeed arbitrary detention.[58]

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[54] The government of Israel entered a reservation to article 9 of the ICCPR on 3 October 1991: "In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision." United Nations Treaty Collection, *Declarations and Reservations (International Covenant on Civil and Political Rights)* <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec> .

[55] Ibid.

[56] Human Rights Committee, *Concluding Observations: Israel*, 63rd sess, UN Doc CCPR/C/79/Add.93 (18 August 1998) [21].

[57] For a more thorough discussion of this decision, see Gerald Heckman, 'International Decisions: *Ahani v Canada*' (2006) 99 *American Journal of International Law* 699, 700-1.

[58] Human Rights Committee, *Second Periodic Report Addendum: Israel*, 30th sess, UN Doc CCPR/C/ISR/2001/2 (4 December 2001) [125]-[128].

Overall, the Human Rights Committee's jurisprudence on national security preventative detention has failed to provide a comprehensive explanation of the permissible justifications for detention, namely under what circumstance a person may be detained for national security reasons. The Committee recognized in its observations on Israel that preventative detention may be non-arbitrary and thus lawful if it is based on individualised assessments of necessity. The requirement of necessity was confirmed by the Committee in *A v Australia*. However, apart from this requirement, it is difficult to find other substantive guidance with regard to preventative detention. As will be discussed in Chapter 4, the Strasbourg Court provides a more detailed and workable standard in examining whether the detention measures are acceptable in the context of international human rights law.

3.3.4.2 Period of Detention

Another major issue of concern on part of the ICCPR in relation to preventative detention without charge is the duration of detention. Unlike preventative detention in the pre-trial detention framework or immigration framework, which is normally brought to an end by a criminal charge being made, deportation, or the granting of a visa or residency, preventative detention based on security grounds can easily be prolonged and might eventually turn into indefinite detention. International law actors and commentators have consistently suggested that security-based detention must in some way be temporally constrained,[59] for example, international law may explicitly indicate

[59] International Commission of Jurists, '*ICJ Memorandum on International Legal Framework on Administrative Detention and Counter-Terrorism*' (December 2005) 12; Drew R. Atkins, 'Customary International Humanitarian Law and Multinational Military Operations in Malaysia' (2007) 16 *Pacific Rim Law and Policy Journal* 79, 97 n. 124 (noting that two-year limit on pure secutiy-based detention in Malaysia is too long to amout to arbitrary detention. This will be discussed in detail *infra* next chapter); Jelena Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 *International Review of Red Cross* 375, 382 (noting that human rights jurisprudence rejects the notion of indefinite detention); Sangeeta Shah, 'The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish' (2005) 5 *Human Rights Law Review* 403,

that an initially lawful detention will become unlawful or arbitrary if it is exceptionally lengthy. The Human Rights Committee has expressed concerns over the duration of detention and that administrative detention may possibly be indefinite.[60] However, there is still no shared understanding as to how long a person may be detained before it is viewed as arbitrary.

Article 9(4) of the ICCPR places a time constraint on the review process of the detention and requires that a "court may decide *without delay*" on the lawfulness of the detention in question.[61] In *Hammel v. Madagascar*, incommunicado detention for three days, during which the detainee was unable to gain access to a court or to challenge his detention, was held by the Committee to breach the ICCPR.[62] In *Portorreal v. Dominican Republic*, the Committee concluded that a shorter period of 50 hours of detention without charge was an arbitrary arrest and detention, as the detainee was not informed of the reasons of detention, the conditions of the cell was unbearable and he received no food or water until the second day.[63] While the Human Rights Committee did not hold that three days or 50 hours was the threshold, it has failed to provide a clear standard with regard to duration of detention in the decisions of individual cases under the First Optional

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404-5 (decribing the United Kingdom's derogation from the ECHR and the ICCPR to accommodate post-9/11 legislation eventually permitting indefinite detention unde the immigration framework in UK).

[60] Human Rights Committee, *Concluding Observations: Cameroon*, adopted at 1807th and 1808th mtgs U.N.Doc. CCPR/C/79/Add.116 (3 Novermber 1999) [19] (expressiong concern that "a person held in adminitrative detention … may have his detention extended indefinitely"); Human Rights Committee, *Concluding Observations: Israel*, UN Doc CCPR/C/ISR/2001/2 [13]; Human Rights Committee, *Concluding Observations: Israel*, UN Doc CCPR/C/79/Add.93 [21].

[61] *ICCPR*, art 9(4).

[62] Human Rights Committee, *Views: Communication No.155/1983*, 29th sess, UN Doc CCPR/C/OP/2 at 179 (3 April 1987) [18.2] ('*Hammel v Madagascar*').

[63] Human Rights Committee, *Views: Communication No.188/1984*, 31st sess, UN Doc CCPR/C/31/D/188/1984 (5 November 1987) [9.2] ('*Portorreal v Dominican Republic*').

Protocol.[64] One could arguably conclude that a duration as short as 50 hours may still be arbitrary if states have failed to provide procedural safeguards.

Instead, the Committee found it more appropriate that any detention should be assessed on a case-by-case basis rather than providing any detailed guidance as to what is the substantive standard of a time constraint so that the detainee can be reviewed "without delay". In *Torres v Finland*, almost three months had passed between the filing of the author's appeal against the decision of the Ministry of the Interior and the delivering of the final decision by the Supreme Administrative Court. The delay was found by the Committee to be "in principle too extended",[65] and thus was regarded as an obvious violation of Article 9(4) for a failure of the judicial review of executive detention "without delay":

> as a matter of principle, the adjudication of a case by any court of law should take place *as expeditiously as possible*. This does not mean, however, that precise deadlines for the handing down of judgments may be set which, if not observed would necessarily justify the conclusion that a decision was not reached "without delay".[66]

In most other cases that reaching the Human Rights Committee, a much longer period of detentions without charge or detention pending trial has been applied by either the executive or the police. For example, in *Medjnoune v Algeria*, the Committee concluded that a period of detention without charge of six years was contrary to the ICCPR, as the state failed to provide an effective remedy which included bringing the applicant before a judge and initiating a criminal proceeding against the persons involved in ill-treatment

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[64] The First Optional Protocol to the International Covenant on Civil and Political Rights is an international treaty establishing to enable individual complaint for the ICCPR.Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[65] *Torres v Finland*, UN Doc CCPR/C/38/D/291/1988 [7.2]-[7.3].

[66] Ibid [7.3].

towards the applicant.[67] Thus, it seems impossible to simply draw a conclusion as to how long a period is permissible under the ICCPR, as in all these above cases, the issue of duration is directly and closely related to the availability of procedural rights, especially the right to a review of the detention grounds to decide whether the detention in question is lawful or not.

Noticeably, in *A v Australia*, the Committee seemed to indicate that a higher standard should be applied in assessing whether the period of detention is acceptable, namely a prolonged period of detention is not acceptable under the Covenant if there is no "sufficiently frequent judicial review" of the grounds of detention within domestic legal system.[68] In this case, shortly after A's arrival in Australia, he applied for refugee status but was rejected and was detained from December 1989 onwards.[69] During his detention, A applied for reassessment of his refugee status several times, but all applications were rejected.[70] He also tried to challenge the constitutional validity of the *Migration Amendment Act 1992* (Cth), which defined the detainee as a "designated person".[71] According to the Act, the court's power to order the release of the detainee was limited to an assessment of whether the person in question was a "designated person". If the criteria for such determination were met, the court would have no power to review the grounds of detention and to order the release of the detainee if his or her detention was not lawful.[72] By a judgement delivered by a domestic court of Australia in 1992, the validity of major portions of the *Migration Amendment Act* was upheld, with the result that A could be

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[67] Human Rights Committee, *Views: Communication No.1297/2004*, 87th sess, UN Doc CCPR/C/87/D/1297/2004 (9 August 2006) [8.5], [9], [10] ('*Medjnoune v Algeria'*).

[68] *A v Australia* , UN Doc CCPR/C/59/D/560/1993 [9.4].

[69] Ibid [2.1].

[70] Ibid [2.2]-[2.7].

[71] Ibid [2.10].

[72] Ibid [2.10], [9.5].

continued to be lawfully detained under that legislation.[73] By then, A had been detained pending determination of his entitlement to refugee status for four years.[74]

The Human Rights Committee considered whether the prolonged detention pending deportation was arbitrary and whether the alleged impossibility of challenging the lawfulness of the detention was in violation of Article 9(4). It is noteworthy that while the Committee stressed that the conception of "arbitrariness" must be interpreted more broadly to include elements such as inappropriateness and injustice, the prolonged four-year detention was not *per se* arbitrary.[75] Nor could the Committee find any argument for the contention that there is a rule of customary international that would simply render such lengthy detention of individuals requesting asylum arbitrary.[76] It seems quite odd for the Committee to have reached the conclusion that a lengthy preventative detention without charge is not against international law and the Covenant. If a broad interpretation of the word "arbitrariness" was adopted in order to carry out the object and purpose of the Covenant, as suggested by the Committee,[77] then any detention that is particularly lengthy should be considered as incompatible with Article 9 and other provisions of the Covenant, even if such detention was "lawful" within domestic legislation. It would be inappropriate and unreasonable to adopt a narrow interpretation of Article 9 which will eventually attenuate a human right. Therefore, such a provision must be interpreted more broadly and even expansively in the case of preventative detention without charge so as to better protect detainees' fundamental rights and liberties.

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[73] Ibid [2.12].

[74] Ibid [2.1] (A's initial application for refugee status was filed on 9 December 1989), [2.12] (The High Court of Australia delivered the final decision with regard to the constitutional validity of the provisions in question in 8 December 1992).

[75] Ibid [9.2]. Apart from *A v Australia*, see also Human Rights Committee, *Concluding Observations: Japan*, para 19, 64th sess, adopted at 1726th and 1727th mtgs, UN Doc CCPR/C/79/Add.102 (19 November 1998) (noting that persons were detained for up to two years pending immigration proceedings but expressing concern only about the conditions of detention).

[76] Ibid [9.3].

[77] See above n 75.

The Committee, however, concluded that "every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed". In so doing, "detention should not continue beyond the period for which the State can provide appropriate justification".[78] In this case, the Australian government failed to justify A's continued detention for a period of four years because there was no periodical review of the grounds of detention. Therefore, A's lengthy detention was declared to be arbitrary by the Committee.[79]

A more compelling example in requiring a review of the grounds for detention is the 2002 case of *Ahani v Canada*,[80] in which the person in question was detained pending deportation for national security reasons. In June 1993, Ahani was first recognised by the Canadian authorities as the assassin of the Iranian Ministry of Intelligence and Security. He was certified as inadmissible to Canada under section 19(1) of that country's *Immigration Act* on the grounds that he was a member of an organization that would engage in terrorism and that he had engaged in terrorism-related activities.[81] After going through a lengthy and complicated review process, Ahani was finally deported to Iran in 2002. By then, he had been detained pending deportation for nine years.[82] In this case, domestic review of the reasonableness of the detention lasted four years and ten months. A substantial part of the delay can be attributed to the applicant who chose to contest the constitutionality of the security certification procedure, instead of proceeding directly to the "reasonableness" hearing before Canadian Federal Court. Ahani's claims against the

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[78] *A v Australia* , UN Doc CCPR/C/59/D/560/1993 [9.4].

[79] Ibid [9.2].

[80] Human Rights Committee, Views: Communication No.1051/2002, 18th sess, UN Doc CCPR/C/80/D/1051/2002 (10 January 2002) [10.2] ('*Ahani v Canada*').

[81] *Ahani v Canada*, UN Doc CCPR/C/80/D/1051/2002 [2.2].

[82] Ibid [2.1], [2.10].

executive detention focused on the prolonged domestic process of review of his detention certificate.[83]

While a four-year and ten-month detention pending issuing of the deportation order was obviously quite a lengthy period and seemed contrary to the requirement of access to a judicial review without delay, as in the earlier case of *A v Australia*, the Human Rights Committee did not regard a relatively lengthy detention without charge on national security grounds as constituting *ipso facto* arbitrary detention.[84] What the Committee stressed in *Ahani* was also the requirement of "sufficiently frequent judicial review" of the grounds of detention. The Committee stressed the need to conduct a separate interim review during the prolonged domestic judicial proceedings, under which the detention grounds would be thoroughly reviewed.[85] The review is mainly for the purpose of authorization the continuation of the detention. In so doing, even though the overall prolonged period of detention was caused by the detainee's own choice to challenge the constitutional validity of relevant domestic laws, and the domestic courts had to deal with that claim, the Committee considered it was the state's responsibility under the ICCPR to conduct necessary interim review to avoid a lengthy and arbitrary detention. The Committee thus required a strict interpretation of the word "without delay" in *Ahani* by placing obligations upon state authorities, just as in its earlier conclusion in *A v Australia*.

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[83] Ibid [3.3]. The Committee considered three periods of detention separately. While the detainee was mandatorily taken into detention under the security certificate, the Federal Court of Canada examined the certificate and its evidentiary foundation within a week, which was considered acceptable by the Committee. The detainee waited another four years and ten moths for the resolution of the hearing challenging the "reasonableness" of his mandatory detention before the Federal Court. As will be discussed in the next paragraph, this delay itself was too long with respect to the requirements enshrined in the ICCPR. After the issuance of a deportation order, the detainee was detained for another 120 days before he became eligible to apply for release. In the Committee's view, such a period of detention was acceptable, as it was an appropriate period of time for the Federal Court to consider a judicial decision.

[84] Ibid [10.2].

[85] Ibid [10.2].

The Committee did not offer clear guidance as to the permissible duration of detention; rather it stressed the need to conduct a periodic review of the detention grounds. But one can conclude that a detention without charge as short as 50 hours may be regarded as arbitrary if required procedural rights are not provided. As could be concluded from *A v Australia* and *Ahani v Canada*, although a prolonged detention without charge does not result *ipso facto* in arbitrary detention,[86] lengthy detention will be arbitrary if there is no "sufficiently frequent judicial review" of the detention, under which the justification of detention will be substantively reviewed.[87]

3.4 PROCEDURAL SAFEGUARDS

As discussed above, preventative detention without charge is not prohibited, *per se*, by international human rights law. However, such detention will be "arbitrary" when a person is not detained in accordance with procedural constraints or the detainee has been denied any procedural rights enshrined in Articles 9(2) to (5), namely the right to a judicial review, the right to be informed of the reasons for detention and the right to be brought promptly before a competent authority without delay.[88] The Human Rights Committee has mentioned repeatedly in various cases that when preventative detention abrogates the safeguards in Article 9 of the ICCPR, there will be a breach of the prohibitions on arbitrary preventative detention and accordingly a violation of the right to liberty under the ICCPR.

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[86] *A v Australia*, UN Doc CCPR/C/59/D/560/1993 [9.3]; *Ahani v Canada*, UN Doc CCPR/C/80/D/1051/2002 [10.2].

[87] *A v Australia*, UN Doc CCPR/C/59/D/560/1993 [9.4]; *Ahani v Canada*, UN Doc CCPR/C/80/D/1051/2002 [10.2].

[88] *ICCPR*, arts 9(2) – (5).

3.4.1 ARTICLE 9(2) – RIGHT TO BE INFORMED OF THE REASONS OF THE DETENTION

This article reads as follows:

> Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

There are basically two rights embodied in this article, the first is that anyone who is arrested has the right to be informed of the reasons for his or her detention at the time of the arrest. The second is usually applicable in the context of a pre-trial detention framework requiring a person charged with an offence to be promptly notified of the charge or charges against him. The Human Rights Committee stressed the first right in the context of preventative detention without charge in *General Comment 8* and indicated that "if so-called preventive detention is used, for reasons of public security, … information of the reasons must be given."[89] However, this comment does not indicate the exact content of the information to be conveyed to the individual. Apart from the fact of being detained, should the detainee be provided with the grounds of detention and also the factual allegations on which the detention is based?

In *Caldas v Uruguay*, the Human Rights Committee clearly expressed that:

> Article 9(2) of the Covenant requires that anyone who is arrested shall be informed *sufficiently* of the reasons for his arrest *to enable him to take immediate steps to secure*

[89] *General Comment 8*, above n 9, [4]; See, eg, Scott N Carlson and Gregory Gisvold, *Practical Guide to the International Covenant on Civil and Political Rights* (Hotel Publishing, 2003) 84. In the judgement of *Diallo*, the International Court of Justice also mentioned that the right to be ""informed, at the time of arrest, of the reasons for his arrest" is a right guaranteed in all cases, irrespective of the grounds of the arrest. *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), judgemnt of 30 November 2010* [2010] ICJ, [84].

his release if he believes that the reasons given are invalid or unfounded. [90]

The Committee, therefore, stressed that simply informing the detainee that he was arrested without providing any indication of the substance of the complaint against him was clearly a breach of Article 9(2) of the ICCPR,[91] as it was obviously not enough for the detainee to "take immediate steps" to challenge his detention. [92]

Moreover, it is noteworthy that, apart from information relating to the justification of the detention, the Committee requires other related information be provided to the detainee's family. In *Davlatbibi Shukurova v Tajikistan,* [93] taking into account the fact that the state authorities did not inform the detainees' family members about the date or the location of the detainees' execution immediately after the judgment, the Committee regarded such detention as inhuman treatment of the applicant, and concluded that it was contrary to the ICCPR.[94]

Therefore, with regard to security-based preventative detention where there is no criminal charge laid or contemplated, if a person is to be informed of the reasons for his arrest by state authorities, the description must go beyond a mere reference to the legal basis for detention and enable the detainee to discern the substance of the complaint against him.

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[90] Human Rights Committee, *Views: Communication No. 43/1979*, 19th sess, UN Doc CCPR/C/19/D/43/1979 (21 July 1983) [13.2] ('*Drescher Caldas v Uruguay'*).

[90] From the individual opinion submitted by Mr Bertil Wennerg with regard to rule 94, [3] (emphasis added).

[91] *Drescher Caldas v Uruguay,* UN Doc CCPR/C/19/D/43/1979 [13.2].

[92] Ibid.

[93] Human Rights Committee, *Views: Communication No.1044/2002*, 86th sess, UN Doc CCPR/C/86/D/1044/2002 (26 December 2002) ('*Davlatbibi Shukurova v Tajikistan*').

[94] *Davlatbibi Shukurova v Tajikistan,* UN Doc CCPR/C/86/D/1044/2002 [8.7].

The national security detention framework discussed in this thesis will not normally lead to any criminal prosecution of the detainee, and thus relate to the second requirement that the detainee be informed of the specific "accusations" against him or her may not seem apt. However, in most security-based detention cases, individuals are detained for reasons of involvement in terrorist activities or because they are believed to be able to provide the state authorities with terrorism-related intelligence information. If the detainee is not provided with the specific "accusations" with regard to which terrorist activity he or she was suspected of being involved in, the detainee cannot make use of his or her right to submit an application for judicial review or habeas corpus.

3.4.2 ARTICLE 9(4) – RIGHT TO JUDICIAL SUPERVISION

This provision provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

As discussed above in relation to the permissible length of periods of detention, any detention must be subjected to a judicial supervision, through which the justification for the detention can be fully assessed. The right of access to proceedings before a court ensures that detainees be provided with the right to judicial review of the lawfulness of the detention measure to which they are subjected,[95] regardless of whether such arrest or detention is in fact lawful or unlawful. Thus, Article 9(4) may be violated when an individual is lawfully detained under domestic legislation but has not been offered the opportunity to apply to a court to have the legality of the detention judicially examined.

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[95] *De Wilde, Ooms and Versyp ('Vagrancy') v Belgium* (No.1) (1970) 2832/66 Eur Court HR [76].

The principle of judicial control over detention stems from the common law remedy of *habeas corpus*, enabling a person arrested or detained to challenge the validity of his detention before a court, and obtain release if detention is unlawful.[96] In fact, the first draft of Article 9(4) expressly provided the right to an effective remedy in the nature of *habeas corpus*.[97] This term was ultimately omitted and replaced with a neutral expression "proceedings before a court" to allow states to establish effective remedies according to their own legal traditions and within their domestic legal systems.[98]

The Human Rights Committee has confirmed that the right to a review of the legality of the detention "applies to all persons deprived of their liberty by arrest or detention."[99] In *Vuolanne v Finland*, the Committee clearly stated that Article 9(4) also applied to administrative detention without charge:

> whenever a decision depriving a person of his liberty is taken by an administrative body or authority, there is no doubt that Article 9, paragraph 4, obliges the State Party concerned to make available to the person detained the right of recourse to a court of law.[100]

Thus, anyone detained must be provided with the right to an effective recourse regardless whether they are being detained under a pre-trial detention regime or under a national security detention regime. In so doing, a merits review of the detention grounds

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[96] Manfred Nowak, above n 17, 166.

[97] Ibid. See also UN Drafting Committee on An International Bill of Rights, Report of the Drafting Committee to the Commission on Human Rights, 1st sess, UN Doc E/CN.4/21 (1 July 1947) Annex B (Article 9(4)).

[98] Manfred Nowak, above n 17, 166.

[99] *General Comment 8*, above n 9, [1].

[100] Human Rights Committee, *Views: Communication No. 265/1987*, 35th sess, UN Doc CCPR/C/35/D/265/1987 (7 April 1989) [9.6] ('*Vuolanne v Finland*').

conducted by an administrative tribunal, or a judicial review of the validity of the detention measures will both satisfy the requirement of access to judicial supervision, provided the competent body has the authority to review the justifications for the detention, and has the power to order release of the persons in question if the detention is not lawful.

This provision does not provide the detainee with the right of actual appearance before a competent judicial authority, which was only explicitly granted by Article 9(3) to persons detained under a pre-trial detention regime, and thus does not extend to security-based detention.[101] However, as discussed above, when a person has been detained without criminal charge for a lengthy period of time without any periodic review, the detention in question will become "arbitrary" and thus offend the core prohibition in the ICCPR. Such lengthy or even indefinite detention also confronts the rule of law and the principle of natural justice. From this perspective, one can conclude that the right of actual appearance before a competent judicial authority is implicit in Article 9(4).

Another issue arising out of Article 9(4) is the meaning of "court". Similar to Article 9(3), as will be discussed in next section, a court shall have the power to examine the lawfulness of the arrest or detention and must have the power to order release once the detention is considered to be unlawful. In Article 14(1),[102] the term "court" extends to cover not only ordinary courts but also special courts, such as administrative,

[101] See relevant discussions below in this and next sections.

[102] *ICCPR*, art 14(1): "All persons shall be equal before the *courts and tribunals*. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by *a competent, independent and impartial tribunal established by law*. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.[emphasis added]"

constitutional and military courts.[103] In *Vuolanne v Finland*, the Committee considered whether a 10-day "close arrest" of a military solider for having left his garrison without permission was in violation of Article 9.[104] The Human Rights Committee held that the right to an effective remedy could be satisfied by a military court,[105] but that the mere right to have the arrest reviewed by a supervisory military officer or a Parliamentary Ombudsman rather than a civil or administrative court was a violation of Article 9(4). This was because none of the above-mentioned authorities had the power to order the release of the detainee even if a complaint reached them in time and if they considered the detention in question to be unlawful.[106] Therefore, even if a broad interpretation of the term "court" were adopted, a mere "supervisory" body not empowered to order release of a detainee cannot be accepted as a competent "court" by the Committee.

In *Torres v Finland* and *A v Australia*, the Committee further indicated that even if a competent court was empowered to review the detention and order release of the individual if the detention was ruled unlawful, it would be a violation of the Covenant if such judicial power is limited to an earlier review of an order by domestic administrative authorities, or is limited merely to assessing compliance with domestic law. In *Torres v Finland*, while the justifications of the detention were finally reviewed by the Supreme Administrative Court of Finland, this was possible only when the detention was confirmed by order of the Minister of the Interior.[107] According to the Committee, "the legality of detention will be determined by a court so as to ensure a *higher degree of objectivity and independence* in such control (emphasis added)."[108] Therefore, Finland's

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[103] Nowak, above n 17, 179.

[104] *Vuolanne v Finland*, UN Doc CCPR/C/35/D/265/1987 [2.2].

[105] Ibid [9.3]-[10].

[106] Ibid [9.6].

[107] *Torres v Finland*, UN Doc CCPR/C/38/D/291/1988 [5.4].

[108] Ibid [7.2]; See also Nowak, above n 17, 180.

practice was found to be contrary to the procedural safeguards enshrined in Article 9(4).[109] A similar conclusion can be found in *A v Australia*, in which the competent court's power to review and order the release of an individual was limited to an assessment of whether the individual in question was a "designated person" in the context of the *Migration Amendment Act*.[110] If the criteria for such an assessment were met, the courts would have no power to review the detention and to order release of the individual. The Committee stated that the court's power to review the lawfulness of detention under the Covenant should not "be limited to mere compliance of the detention with domestic law".[111] Therefore, as concluded by the Committee in *Torres*, it held in *A v Australia* that a competent court should have the authority to order release if the detention is not lawful pursuant to article 9, without being limited to compliance with any domestic law.[112]

3.4.3 Article 9(3) – Right to be Brought before a Judge and Entitled to Trial within a Reasonable Time

Article 9(3) provides:

> Anyone arrested or detained on a *criminal charge* shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantee to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

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[109] *Torres v Finland*, UN Doc CCPR/C/38/D/291/1988 [7.2].

[110] *A v Australia*, UN Doc CCPR/C/59/D/560/1993 [9.5].

[111] *Torres v Finland*, UN Doc CCPR/C/38/D/291/1988 [7.2].

[112] Ibid.

From the wording of Article 9(3), it only applies to those "arrested or detained on a criminal charge". It should be recalled that as national security preventative detention is a pre-emptive measure based on preventing future terrorist activities, no charge is contemplated. Thus, Article 9(3) does not regulate such detention. Arrest or detention without charge is accordingly protected against by Article 9(4), in which an effective remedy such as *habeas corpus* is guaranteed.

During the drafting of Article 9, the appropriate scope of application of Article 9(3) was the focus of discussion. France proposed to extend its scope to all forms of arrest by striking out the words "on a criminal charge", but this proposal was subsequently withdrawn.[113] A similar proposal made by Israel in the 3rd Committee of the General Assembly which sought to remove the reference to connection with criminal prosecutions, was also defeated by a large majority later in 1958.[114] The reason for a discussion of the scope of Article 9(3) may not be immediately obvious, as Article 9(4) seems to already incorporate a sufficient judicial control to protect detainees against arbitrary detention. However, a closer analysis would suggest that there are clear differences as to the level of protections in the two provisions.

Compared to Article 9(4), Article 9(3) requires the detainee to be brought *promptly* before a judge or other judicial body and shall be entitled to trial *within a reasonable time*. In contrast, Article 9(4) does not contain the term "promptly" or the requirement of access to a judicial review "within a reasonable time", and thus only requires the detainee to "*take proceedings* before a court, in order that the court may decide *without delay* on the lawfulness of his detention and order his release if the detention is not lawful". Thus, the two articles obviously afford the detainee procedural safeguards at different stages of

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[113] Carlson and Gisvold, above n 89, 84.

[114] *Drescher Caldas v Uruguay*, UN Doc CCPR/C/19/D/43/1979 [13.2].

his or her arrest or detention. Article 9(3) regulates the overall length of pre-trial detention requiring that the detainee be brought to trial within a reasonable time, whereas Article 9(4) does not explicitly prohibit prolonged detention before judicial control but merely stipulates that a court must decide without delay during the legal proceedings on the lawfulness of his detention. Accordingly, Article 9(4) could be interpreted in a narrow sense as only applying to the actual process of the review, and the period of detention before being brought before the judicial body is to be excluded from this procedural safeguard. Such an interpretation would result in an inadequate protection of persons detained without charge.

Furthermore, while the requirement that the detainee shall "be brought promptly before" a competent judicial authority means that even if the detainee did not file an application for *habeas corpus*, under Article 9(3) he or she has a right to be brought by state authorities "promptly" before a judge or other competent officers. Under that article, state authorities have a responsibility to have the arrest or detention reviewed and the detainee enjoys an active right. In contrast, under Article 9(4), the detainee only enjoys a passive right, as the detainee needs to "take proceedings before a court" himself or herself, while the judicial body is not required to review the arrest or detention within a reasonable time.

The fact that persons detained under a pre-trial detention framework are in fact provided with more procedural protections than detainees who may never be charged with any criminal offence appears unreasonable. That said, however unjust it might sound, this interpretation of these two articles is supported by *General Comment 8*, in which the Human Rights Committee confirmed that in cases of preventative detention for security reasons, the provisions of Articles 9(1), 9(2), 9(4) and 9(5) are applicable. [115] The

[115] *General Comment 8*, above n 9, [2].

Committee has emphasised that only if criminal charges are brought in cases of preventative detention, is the full protection of, *inter alia*, Article 9(3) to be granted.[116]

Other conclusions of the Human Rights Committee also suggest that the important guarantees contained in Article 9(3) only apply to persons who have been arrested or detained for the ultimate purpose of criminal justice, whereas the other safeguards are applicable to all forms of deprivation of liberty, whether in criminal or other cases such as, for example, security-based detention without charge, mental illness, drug addiction, educational purposes, or immigration control. For example, in *Kulomin v Hungary*, the Human Rights Committee confirmed that the first sentence of Article 9(3) is intended to bring the detention of a person charged with a concrete criminal offence under judicial control.[117] In so doing, in contrast to the ECHR which provides that the procedural safeguards enshrined in Article 5 of the ECHR extend to all forms of detentions or arrests, Article 9(3) of the ICCPR only provides persons who have been arrested or detained in connection with a concrete criminal charge.

There have been views expressed challenging the Human Rights Committee's restrictive interpretation of Article 9(3). In an individual opinion in *Kelly v Jamaica*, Mr Bertil Wennerg reasserted:

> It is, however, abundantly clear from the *travaux préparatoires* that the formula "on a criminal charge" was meant to cover as broad a scope of application as the corresponding provision in the European Convention. All types of arrest and detention in the course of crime prevention are therefore covered by the provision, whether it is preventive

[116] Ibid.

[117] Human Rights Committee, Views: Communication No. 521/1992, 56th sess, UN Doc CCPR/C/50/D/521/1992 (22 March 1996) [11.3] ('*Kulomin v Hungary*').

detention pending investigation or detention pending trial.[118]

In its comments on Peru with regard to preventative detention of suspects of terrorism, espionage and illicit drug trafficking, the Human Rights Committee expressed its concern over the preventative detention for up to 15 days within the domestic legal system.[119] In making recommendations to the government, the Committee suggested that "the duration of preventive detention should be reasonable and any arrested person should be brought promptly before a judge."[120] There, the Committee clearly expressed the opinion that the state government was obliged to bring the detainee before a competent judicial authority within a reasonable time. Having said that, its comments on Peru is the only example in which the Committee explicitly extended such a right from pre-trial detentions to detentions without charge.

As examined in this Chapter, the definition of 'arbitrariness' has incorporated the principles of natural justice, the dignity of the human person, the concept of legality and the rule of law. These basic principles have either been stated in the express terms or already incorporated in the aims and purposes of the ICCPR. Although Article 9(3) applies only to arrest or detention on a criminal charge, the right to be brought before a court and the restriction on the overall duration of detention, shall be interpreted in a broad sense, and thus extends to protect against all types of arbitrary arrest and detention.

3.5 CONCLUSION

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[118] From the individual opinion submitted by Mr Bertil Wennergren with regard to rule 94, paragraph 3 of the Committee's rules of procedure, in Human Rights Committee, Views: Communication No.253/1987, 41st sess, UN Doc CCPR/C/41/D/253/1987 (8 April 1991) Appendix I ('*Kelly v Jamaica*').

[119] Human Rights Committee, *Concluding Observations: Peru*, 44th sess, UN Doc CCPR/C/79/Add.67 (25 September 1996) [18].

[120] Ibid [24].

Security-based preventative detention without charge is not in itself "arbitrary arrest and detention", and therefore, may be a permissible deprivation of liberty under Article 9(1) of the ICCPR. Detention without charge measures must be non-arbitrary, in other word the detention regime must conform to the principles of natural justice, be proportionate, appropriate and predicable, and must incorporate comprehensive and effective procedural safeguards.

The jurisprudence of the Human Rights Committee does not offer a very clear guidance on how long a period of detention may be regarded as "arbitrary".[121] This is understandable, due to a lack of clear classification of detention regimes and the distinctiveness of every detention regime in individual state. Accordingly, an assessment of the arbitrariness of preventative detention for reasons of national security in any state can only be based on a case-by-case analysis. As concluded by the Committee, any detention without charge scheme for reasons of national security must be necessary. Given that the duration of detention as short as 50 hours and 3 days were concluded by the Committee as arbitrary primarily because detainees did not have access to some core procedural rights, it seems that the Committee has placed more weight on the procedural constraints rather than the duration of detention *per se*. Apart from those two relatively short detentions, most cases reached before the committee include prolonged detentions without charge, ranging from three months to nine years. They were all regarded as arbitrary detentions.

Although the Committee has emphasized the importance of the principle of legality and prohibition against arbitrary arrest or detention in practice, due to lack of clear

[121] See discussions above about *Ahani v Canada*, UN Doc CCPR/C/80/D/1051/2002; *Schweizer v Uruguay*, UN Doc CCPR/C/17/D/66/1980; *Medjnoune v Algeria*, UN Doc CCPR/C/87/D/1297/2004; *Davlatbibi Shukurova v Tajikista*, UN Doc. CCPR/C/86/D/1044/2002; and the Human Rights Committee's Concluding Observations on India, Isreal and the USA respectively, UN Doc CCPR/C/USA/CO/3/Rev.1; UN Doc CCPR/C/79/Add.81; UN Doc CCPR/C/79/Add.93; UN Doc CCPR/CO/78/ISR.

jurisprudence, in practice the Committee usually relies heavily on the procedural constraints on detention to determine whether it is contrary to the ICCPR. In so doing, any detention without charge measures must incorporate the procedural constraints enshrined in Article 9 of the ICCPR. Articles 9(2) and 9(4) of the ICCPR do not draw a distinction among criminal investigative pre-trial detention, immigration detention pending deportation or national security detention without charge or trial. Therefore, the procedural safeguards in the two provisions apply to all forms of detention. At the time of detention, a detainee must be sufficiently informed of the reasons for their preventative detention, so as to enable a challenge where possible; and that every person in security-based detention has the right to take proceedings before a court to decide without delay on the lawfulness of the arrest or detention, where the court has the power to order release if the detention is not lawful.

Article 9(3) regulates the length of pre-trial detention and clearly indicates that the detainee shall be brought to trial within a reasonable time. As noted above, this procedural safeguard does not extend to protect persons detained without charge. Although the detainee is provided with the right to judicial recourse under article 9(4), he does not have the right to be brought before a competent judicial body by state authorities. Moreover, there is no clear procedural safeguard to protect the detainee from lengthy detention, as article 9(4) only requires the court to decide within a reasonable time, without any explicit requirement to the overall period covering the person first being detained to the detainee actually being brought before a judicial officer. Although by reviewing the Human Rights Committee's conclusions and comments, the Committee has implicitly mentioned that the right may be extended to security-based detention, this appears to be more an *ad hoc* response than its general practice.

In stark contrast, as will be discussed in the next chapter, the procedural safeguards enshrined in Article 5 of the ECHR have been explicitly interpreted by the European Court of Human Rights to apply to all types of preventative detention even though Article

5(1)(c) explicitly only refers to detention pending trial. This ensures that persons preventatively detained without charge will be provided with at least the same procedural protections as those detained under a pre-trial detention regime. If the same reasoning also applied in the context of the ICCPR, then Article 9(3) would similarly extend to cover detention without charge or trial in addition to pre-trial detention. The result for a person detained for reasons of national security would be to oblige the state to bring the detainee promptly before a judicial body within a reasonable time.

CHAPTER 4 - TOWARDS AN INTERNATIONAL HUMAN RIGHTS STANDARD: COMPLEMENTARY RULES IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

4.1 INTRODUCTION

The discussions in Chapter 3 indicated that preventative detention without charge is a permissible deprivation of fundamental rights and liberties under the ICCPR, provided that certain substantive restrictions and procedural constraints are complied with. Accordingly, states can detain terrorism suspects or even non-suspects under the ICCPR without invoking the derogation provision of the treaty, namely Article 4. However, in most cases or situations considered by the Human Rights Committee, states were held to have failed to fulfil their international human rights commitments because of the absence of sufficient procedural safeguards, as there was little by way of substantive explanation of the concept of arbitrariness. Certainly, such non-compliance with the ICCPR may be attributed to states' own failure to incorporate an appropriate and proportionate detention regime at the domestic level. But from another perspective, neither the provisions of the ICCPR nor the jurisprudence of the Human Rights Committee provides comprehensive and clear guidance to states on the standards of arbitrariness, particularly on the permissible grounds of detention. The absence of the core procedural safeguard, namely that the detainees shall be provided with an active right to be brought before a judicial body within reasonable time, increases the likelihood of incommunicado detention or inhuman treatments.

In contrast, under Article 5 of the ECHR,[1] detention without charge for reasons of national security are allowed provided they be imposed in accordance with procedure established by law. In so doing, detention without charge can be incorporated in domestic legislation, but states must fit their pre-trial detention regimes within the exhaustive list of permissible grounds of detention in Article 5. However, if governments conclude that it is imperative to go beyond these reasonable limits on rights, the ECHR provides a

[1] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, open for signature 4 Novemrber 1950, 213 UNTS 222 (entered into force 9 March 1953) ('*ECHR*'), art 5 – The Right to Liberty:

1. Everyone has the right to liberty and security of person.

   No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

   a) the lawful detention of a person after conviction by a competent court;
   b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
   c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
   d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
   e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
   f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

vehicle for doing so,[2] namely to invoke provisions that allow for temporary derogations of fundamental rights and liberties. In order to do so, states have to prove that there is a real state of emergency that threatens the life of the whole nation, and most important of all, that the derogation measures are necessary and proportionate to the achievement of a legitimate purpose. The latter issue requires consideration of two further questions: first, whether currently existing laws are adequate to protect security and prevent suspects from committing terrorist acts, and secondly, if a new detention regime is necessary, whether there are sufficient procedural safeguards or forms of external supervisions provided by the national authorities to prevent arbitrary detentions or abuses in the operation of the detention scheme. Thus, the well-established jurisprudence of the Strasbourg authorities provide clear criteria as to the scope of permissible derogations from the rights guaranteed by the ECHR, in other words, on what grounds states may detain terrorism suspects or non-suspects without criminal charge.

The European Convention approach is a better way to protect fundamental rights. A derogation model is established on the assumption that there are certain rights and liberties that shall be protected even in real times of emergency. Even if some rights need to be compromised during emergencies, the model has the virtue of recognising them in the first place, and placing strict procedural constraints upon the derogations from such rights. Furthermore, derogation measures are subject to *ex post* legislative and judicial review. A good example is the 2004 case of *Belmarsh*, in which both the House of Lords and the European Court of Human Rights considered the UK government's indefinite detention of non-UK citizens - which purported to have been covered by a formal derogation from the provisions of the ECHR - to be disproportionate and unlawful. The decision delivered by the House of Lords led to the repeal of the detention regime. To

[2] The ICCPR also allows states to temporarily derogate from the Covenant. However, states do not have to make formal derogations to preventatively detain an individual for reasons of national security, as Article 9 explicitly permit security-based detention without charge.

some extent, derogation issues obviously prompt stricter public scrutiny than non-derogation measures.[3]

Although extensive and repeated use of derogations has been said to lead to tyranny,[4] this has not been the post-9/11 experience in Europe. Rather, governments have acted with restraint.[5] The only government that has explicitly derogated from the ECHR in responding to 9/11 is the United Kingdom which in 2001 authorised indefinite detention of non-citizens suspected for involvement in terrorist acts. Apart from the UK, most democratic governments have not been eager to derogate from the human rights conventions so they can detain terrorism suspects without charge for pure security reasons. Instead, they have tried to introduce anti-terrorism measures that act as reasonable and permanent limits on rights.

This chapter looks at the European Convention approach to national security preventative detention without charge, specifically the exact circumstances under which state can resort to such a rights-violative measure. Although the ECHR does not apply to any of the three jurisdictions under examination, Europe's experience in the application of preventative detention measures may shed light on the permissible grounds of detention in international human rights law, particularly when the relevant standard under the ICCPR has not been clearly explicated. This chapter is not simply equivalent to the discussion of the ICCPR, but intends to assist the understanding and implementation of Article 9 of the ICCPR. As already noted, the ICCPR has not provided adequate procedural protections to persons detained without charge. In contrast, the procedural

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[3] See, eg, Kent Roach, 'Ordinary Laws for Emergencies', in Victor V. Ramraj (ed), *Emergencies and the Limits of Legality* (Cambridge University Press, 2008) 229, 244-5.

[4] Conor Gearty, 'Reflections on Civil Liberties in an Age of Counterterrorism' (2003) 41 *Osgoode Hall Law Journal* 185, 203.

[5] Roach, above n 3, 251.

safeguards enshrined in Article 5 of the ECHR have been interpreted by the European Court of Human Rights to apply to all types of preventative detention even though Article 5(1)(c) explicitly only refers to detention pending trial. Such an interpretation ensures that persons preventatively detained without charge will be provided with at least the same procedural protections as those detained under a pre-trial detention regime, particularly the right to be brought before a court without delay and the protection against an unreasonably lengthy period of detention.

4.2 THE PROHIBITION AGASINT ARBITRARY DETENTION

4.2.1 THE RIGHT TO LIBERTY – ARTICLE 5 OF THE ECHR

Article 5(1)(c) of the ECHR provides that:

> The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of 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.[6]

The European Court of Human Rights has interpreted Article 5(1)(c) in a number of decisions to permit detention only in the enforcement of the criminal law and has explicitly rejected its application to permit the detention of a person who merely poses a threat or has a general propensity to crime.[7] Thus, preventative detention without charge

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[6] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, open for signature 4 Noverber 1950, 213 UNTS 222 (entered into force 9 March 1953) art 5(1)(c) ('*ECHR*').

[7] See, eg, *Lawless v Ireland* (No.3) (1961) 332/57 Eur Court HR [13]-[15], [48]; *Ciulla v Italy* (1989) 11152/84 Eur Court HR [38]; *Guzzardi v Italy* (1980) 7367/76 Eur Court HR [102]. But cf. *Eriksen v Norway* [1997] 3 Eur Court HR 26 [85]-[86] (finding detention after conviction and sentence justified, in light of the detainee's "impaired mental state and ... foreseeable propensity for violence," because the detention was "closely linked to the original criminal proceedings").

is not a permitted form of deprivation of liberty under Article 5 of the ECHR. That said, such detention may nonetheless be justified if enacted as temporary derogations in a real state of emergency.

In *Lawless v Ireland*, the Strasbourg Court's very first judgment concerning the applicability of Article 5(1)(c) to security-based preventative detention, the Court concluded that national security detention measures may only implemented as a derogation measure in times of emergency. In *Lawless*, laws of preventative detention were enacted in response to terrorist activities in Northern Ireland, and were intended to be activated only in declared emergencies. Under the legislation in question, the UK's Minister of Justice could issue an executive order to arrest or detain a person whenever the Minister "is of opinion that any particular person is engaged in activities which, in his opinion, are prejudicial to the preservation of public peace and order or to the security of the State."[8] Lawless was detained under the legislation without charge for approximately five months in 1957 based on the suspicion of the Minister of Justice that he had been involved in activities prejudicial to the security of the State. [9]

In its judgment, the Court concluded:

> If the construction placed by the Court on the aforementioned provisions were not correct, anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision without its being possible to regard his arrest or detention as breach of the Convention.[10]

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[8] *Lawless* (No.3) (1961) 332/57 Eur Court HR [9]. The legislation permitted preventative detention under Section 4 of the *Offences Against the State (Amendment) Act 1940*. Following increased terrorist activites by the IRA in 1956, the preventative detention powers were brought into force on 8 July 1957 by a Proclamation of the Irish Government published in the Official Gazette.

[9] *Lawless* (No.3) (1961) 332/57 Eur Court HR [5].

[10] Ibid [14]

According to the Strasbourg Court, even though the detention of the person was authorised by a domestic statute which permitted his detention for engaging in activities prejudicial to the security of the state, it could not be justified under the ECHR. This was because interpreting Article 5 as authorizing a general power of detention without charge would lead to results repugnant to the fundamental principles of the ECHR.[11] Thus, the ECHR permits preventative detention only when it is for the purpose of bringing the person before competent judicial authority to examine the question of deprivation of liberty or to decide on the merits.[12] The Court further explained in a later case involving a suspected *Mafioso* that Article 5(1)(c) clearly does not authorize a "policy of general prevention directed against an individual or a category of individual who, like *mafioso*, 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."[13] Thus, domestic legislation that generally authorizes preventive detention of persons who are considered merely dangerous to national security without any actual involvement in criminal acts will be considered as contrary to the ECHR. [14]

4.2.2 DEROGATION FROM THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Although the national security preventative detention regime was rejected in *Lawless*, the Strasbourg Court considered whether these detention measures were justified by

[11] Ibid. See also David Harris, Michael O'Boyle and Chris Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1st ed, 1995) 117.

[12] *Lawless* (No.3) (1961) 332/57 Eur Court HR [10].

[13] *Guzzardi* (1989) 11152/84 Eur Court HR [38].

[14] Ibid. See also Harris, O'Boyle and Warbrick, above n 11, 117; Torkel Opsahl and Thomas Ouchterlony (eds), *Frede Castberg: The European Convention on Human Rights* (A.W.Sijthoff, 1995) 109.

virtue of the Irish government's derogation from the right to liberty under the ECHR, and concluded that it was.[15]

The conditions for derogation from the ECHR appear in Article 15 (1):

> [i]n time of war or other *public emergency* threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent *strictly required by the exigencies of the situation*, provided that such measures are not inconsistent with its other obligations under international law.[16]

Article 15(1) thus restricts the power to derogate to a "public emergency threatening the life of the nation" and allows states to take derogation measures only "to the extent strictly required by the exigencies of the situation". Article 15(2) further refers to certain rights from which no derogation is permitted and provides that a state must not contravene its other international law obligations by any measures of derogation.[17] The list of non-derogable rights includes an absolute prohibition against torture, slavery, servitude and retroactive criminal laws, as well as to certain aspects of the right to life. Finally, Article 15(3) contains procedural conditions under which derogating states bear the responsibility of notifying the Secretary General of the Council of Europe the reasons for derogation, derogation measures taken and the end of derogation.[18]

Three conditions must be satisfied for a permissible derogation under the ECHR:

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[15] *Lawless* (No.3) (1961) 332/57 Eur Court HR, [30], [38], [47].

[16] *ECHR*, art 15(1).

[17] *ECHR*, art 15(2): "No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4(paragraph 1) and 7 shall be made under this provision."

[18] *ECHR*, art 15(3): "Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

(1) there must be a public emergency threatening the life of the whole nation;
(2) the derogation measures must be strictly required by the exigencies of the situation; and
(3) the measures taken must also be in compliance with the State's other obligations under international law.

4.2.3 PUBLIC EMERGENCY THREATENING THE LIFE OF THE NATION

The circumstances that can provoke the proclamation of derogation from the ECHR were originally considered to include war, internal unrest, natural disasters or economic crises.[19] Terrorism was not endemic and was not contemplated by the drafters of the ECHR.[20] However, all the cases involving derogation and Article 15 of the ECHR that have reached the European Court of Human Rights arose out of measures prompted by terrorism threats. In *Lawless v Ireland*, *Ireland v United Kingdom*, *Brannigan and McBride v United Kingdom*, the states' declarations of a "public emergency" were triggered by terrorist acts committed by the Irish Republican Army and their Unionist counterparts.[21] In *Aksoy v Turkey*, Turkey's declaration of a "public emergency" was triggered by the extent and impact of PKK (Workers' Party of Kurdistan) terrorist activities in southeast Turkey.[22]

In determining whether a "public emergency" exists, the Court has stated that situation of public emergency will be "exceptional" and must "affect the whole population". In

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[19] See, eg, Jaime Oraa, *Human Rights in States of Emergency in International Law* (Oxford: Clarendon Press, 1992) 30-1.

[20] Christopher Michaelsen, 'The Proportionality Principle in the Context of Anti-Terrorism Law: An Inquiry into the Boundaries between Human Rights Law and Public Policy', in Miriam Gani and Penelope Mathew (eds), *Fresh Perspective on the "War on Terror"* (ANU E-Press, 2008)109, 111.

[21] See below notes 23, 24.

[22] *Aksoy v Turkey* [1996] 6 Eur Court HR 2260 [8], [9], [69], [70].

Lawless, the Court held that the threat of terrorism in Northern Ireland during the 1970s did constitute an actual or imminent threat to the community, mainly due to the steady and alarming increase in terrorist activities which represented an imminent danger to the nation.[23] However, in *Aksoy* the Strasbourg Court has adopted a broader interpretation of a "public emergency" insofar as it accepted that terrorist activities in only part of a state may still affect the nation as a whole.[24] Thus, the Court's interpretation of Article 15 basically allows a state to derogate from its human rights obligations in the face of low-intensity, irregular violence.[25]

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[23] In *Lawless*, the United Kingdom's declaration of a state of emergency was in response to the impending release of almost 100 IRA prisoners and general fears of the Irish Government as to the intensification of IRA terrorist activities in the coming 12th of July – a date which for "historical reasons is particularly critical for the preservation of public peace and order." The Court noted that the existence of a secret army within the territory of Ireland and also operating outside the territory of the State, plus the steady and alarming increase in terrorist activities during the past year. In addition, on the night 3rd to 4th July – just eight days before 12th of July – a homicidal ambush had brought to light in the territory of Northern Ireland near the border which has caused one policeman dead and another injured. Judging from the above facts, the Court considered the imminent danger to the nation caused by "the continuance of unlawful activities in Northern Ireland by the IRA and various associated groups" and recognised the existence of a "public emergency threatening the life of the nation." *Lawless* (No.3) (1961) 332/57 Eur Court HR [28], [29]; In *Brannigan and McBride*, the then emergency situation in Northern Ireland escalated with attendant level of terrorist activities after 1970. While the then emergency situation in Northern Ireland and elsewhere in the United Kingdom had lasted for more than twenty years, within which the extent and impact of terrorist violence varied as had been noted by the Court, the Court considered "there can be no doubt that such a public emergency existed at the relevant time". *Brannigan and McBride v The United Kingdom* (1993) 14553/89; 14554/89 A258-B Eur Court HR [12], [45].

[24] In *Aksoy*, the Court had the chance to consider whether the particular extent and impact of PKK terrorist activities in only part of the state, namely South-East Turkey has created a public emergency threatening the life of the nation. As the Court have found, since approximately 1985, serious disturbances have raged in the South-East of Turkey between the state's security forces and the members of the PKK. Particularly, the Court noticed that at the time of the Court's consideration of the case – between 1995 and 1996, ten of the eleven provinces of south-eastern Turkey had been subjected to emergency rule since 1987. In light of the materials before it, the Court thus considered the particular extent and impact of PKK terrorist activities in South-East Turkey had "undoubtedly created, in the region concerned, a public emergency threatening the life of the nation". *Aksoy* [1996] 6 Eur Court HR 2260 [8], [71].

[25] Harris, O'Boyle and Warbrick, above n 11, 492.

Terrorism today is extremely complex and unprecedented, and is thus not comparable to past experience when traditional emergencies were largely localised and domestic.[26] Therefore, whenever the existence of a "public emergency" is to be claimed or declared by a state in the context of terrorism, there has to be an assessment of the particular threat. While the Strasbourg authorities have been demanding in their scrutiny of the derogation measures adopted by the national governments, they are deferential to the judgment of national authorities on the question of whether there is in fact a public emergency threatening the life of the nation.[27] As could be concluded from *Belmarsh*, even though different courts disagreed as to the necessity and proportionality of the detention measures, all of them, including the lower courts, the House of Lords, and the Strasbourg authorities, were prepared to accept the UK government's declaration of a state of emergency on the ground that the threat from al-Qaeda had indeed created a public emergency threatening the life of the nation.[28] On the basis of this case law, current threats from terrorism would also be recognised as a public emergency threatening the whole nation.

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[26] Michaelson, above n 20, 118; Monika Hakimi, 'International Standards for Detaining Terrorism Suspects: Moving beyond the Armed Conflict-Criminal Divide' (2008) 33 *Yale Journal of International Law* 369, 377-8.

[27] The only exception was the *Greek Case*, in which the Commission did not endorsed the government's claim that there was an emergency. The only case in which one of the Strasbourg authorities has not endorsed the state government's claim that there was an emergency, the Commission declared in the *Greek Case* that its task was "to examine on the evidence before it" and make an independent assessment of the facts to determine whether a "public emergency" exists. *Greek Case* (1969) 12 Yearbook of the European Convention on Human Rights 1, 157.

[28] The case was first heard by the Special Immigration Appeals Commission (SIAC) which has the power to cancel the certification of suspected international terrorists. SIAC's decision was appealed to the Court of Appeal. The case reached before the House of Lords, and the Law Lords delivered judgment on 16 December 2004. The eleven non-UK nationals finally appealed to the Strasbourg Court on 2005, and the Court delivered its final decision on 4 February 2009, in which it shared the view of the majority of the House of Lords that there was a public emergency threatening the life of the nation. *A and Others v Secretary of State for the Home Department* [2002] EWCA Civ 1502; *A v Secretary of State for the Home Department* [2004] UKHL 56; *A and Others v the United Kingdom* (European Court of Human Rights, Grand Chamber, Application No. 3455/05, 19 February 2009).

Nonetheless, the core question is whether the derogation measures are arbitrary, that is whether the preventative detention regime is a necessary and proportionate response to the situation. While the jurisprudence of the Human Rights Committee offers little valuable guidance with regard to the permissible justifications for detention, the Strasbourg Court listed several requirements in assessing the detention regime.

4.2.4 STRICTLY REQUIRED BY THE EXIGENCIES OF THE SITUATION

As has been concluded by the Human Rights Committee in relation to the similar language in Article 4 of the ICCPR,[29] the phrase "strictly required by the exigencies of the situation" in Article 15(1) of the ECHR suggests a test more demanding than merely "necessary" which only requires the state to show a "pressing social need" for its measures of limitation. [30] The Court has on some occasions inquired into the proportionality between the need and the response.[31] The greater the need, namely the more exceptional the situation within a state, the greater the permissible derogation measures may be, including detention without charge merely for interrogation or detention for reasons of national security. In any case, these measures must be necessary, proportionate, and most importantly, include sufficient procedural protections.

In *Lawless*, the applicants claimed that the security detention was not necessary as the Irish government had alternatives, namely ordinary criminal prosecution and; prosecution before special criminal courts or before military courts.[32] The Court, however, noted that

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[29] Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Israel*, 63rd sess, UN Doc CCPR/C/79/Add.93 (18 August 1998) [21]; Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) [9.4] ('*A v Australia*').

[30] *ECHR*, art 10(2); Harris, O'Boyle and Warbrick, above n 9, 498.

[31] *De Becker v Belgium* (1962) 214/56 Eur Court HR [271].

[32] *Lawless* (No.3) (1961) 332/57 Eur Court HR [15]-[18], [35].

none of the currently existing measures were adequate to deal with the situation Ireland had encountered in 1957.[33] The "military, secret and terrorist" nature of the IRA, the fear the IRA had inspired among witnesses, together with the evidentiary difficulties - most of their activities were cross-border raids into Northern Ireland all made criminal prosecution particularly difficult. While neither ordinary nor special courts in Ireland were able to deal with the dangers occasioned by the IRA, the Strasbourg Court considered the administrative detention of terrorism suspects could be justified as a measure required by the circumstances.[34]

The Court also considered whether other alternatives - less draconian or less rights-violative – might have been contemplated. After examining whether sealing the border between Ireland and Northern Ireland would be an alternative means of combating cross-border raids, the Court concluded that this measure would have gone beyond the exigencies of the emergency in Ireland and would have had "extremely serious repercussions on the population as a whole"; [35] it thus would not have been proportionate to the threat. Therefore, despite its gravity, detention without criminal trial of individuals suspected of intending to take part in terrorist activities appeared to be a measure required by the circumstances".[36]

In *Ireland v UK*, the Strasbourg Court considered whether normal criminal law was sufficient to combat terrorism, and concluded that it was not. After recalling its standard of assessment in *Lawless* and reviewing the recent history of Ireland and the acute danger

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[33] Ibid [36].

[34] Ibid.

[35] Ibid.

[36] Ibid.

for the national security of the United Kingdom and the lives of its inhabitants,[37] the Court concluded that the United Kingdom was confronted with a massive wave of terrorist violence and intimidation. The British government thus was "reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism" and that recourse to measures outside the scope of ordinary criminal law, including extrajudicial deprivation of liberty, even for the purposes of merely interrogation of witnesses and procedural guarantees to regulate deprivation of liberty, were thus necessary to meet the emergency situation. [38]

Thus, in a number of important decisions involving the preventative detention regimes, the Strasbourg Court has established criteria for examining whether preventative detention measures are necessary, and thus permissible under the ECHR: first, whether ordinary criminal law or other currently available measures compatible with the ECHR are adequate to deal with the emergency situation; second, whether other less draconian or less rights-violative alternatives might have been likely to be effective. For both questions, a negative answer is required.

However, even if it is established that the condition of necessity is satisfied and no other alternatives would be sufficient, it must next be asked whether the detention measures in question were appropriate and proportionate – are they no greater than those required to deal with the emergency? It may be difficult to reach consensus as to the application of that substantive standard to the facts of a particular case in examining the question of proportionality. Nevertheless, many of the contested derogation measures involved insufficient procedural safeguards and even the removal of elements of judicial oversight. It is possible to detect in several cases a willingness by the Court to question

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[37] *Ireland v The United Kingdom* (1978) 5310/71 Eur Court HR [16],[17], [20], [28]-[32], [35]-[42], [44], [47]-[48], [54]-[55], [58], [61], [63], [67].

[38] *Ireland v The United Kingdom* (1978) 5310/71 Eur Court HR [212].

the sufficiency and effectiveness of the procedural safeguards or external supervisions accompanying the detention measures.

4.3 PROCEDURAL SAFEGUARDS

4.3.1 PROCEDURAL SAFEGUARDS EXTEND TO ALL FORMS OF DETENTION

There is an argument that *Lawless* does not prohibit preventative detention without charge *per se*. According to Macken, the Strasbourg Court supported the argument that the Convention explicitly provides for grounds of preventative detention in Article 5(1)(c).[39] The interpretation of *Lawless* views the case as merely confirming that preventative detention must follow the stipulated procedural constraints rather than being impermissible *per se*.[40] It was preventive detention "without appearance before judicial authority that was observed to be contrary to the 'spirit' of the Convention."[41]

It is true that Ireland's regime of preventative detention without charge regime was declared by the Court to be an arbitrary exercise of the detention power without sufficient supervisory oversight, as the detainee had not been brought before the Court. That said, there is an evident confusion of different forms of detention measures in Macken's argument, namely pre-trial detention and security-based preventative detention without

[39] Claire Macken, 'Preventive Detention and the Right to Personal Liberty and Security under Article 5 ECHR' (September 2006) 10 (3) *Internaitonal Journal of Human Rights* 195, 208.

[40] Macken argued in her article that there were several decision of the European Court of Human Rights supporting her conclusion. For exmaple, in *Duinhof and Diuif*, the Court held that Article 5(3) is "aimed at ensuring prompt and automatic judicial control of police or administrative detention ordered in accordance with the provisinos of Article 5(1)(c)." *Duinhof and Duijf v The Netherlands* (1984) 9626/81, 9736/82 /Eur Court HR [36]. In *Brogan v The United Kingdom*, the Court expressed that the purpose of Article 5(3) is to minimise the risk of arbitrariness by providing judicial control or the executive's interference with the right to liberty. Further, she took the *Igdeli v Turkey* and *Sakik and Schiesser v Switzerland* as examples to support her argument, in which the Court similarly held that the pupose of Article 5(3) was to prevent arbitrary detention. Macken, above n 39, 208-9.

[41] Macken, above n 39, 208.

charge. The only forms of preventative detention of terrorism suspects permissible under the ECHR are pre-trial detention, and other forms of detentions listed in Article 5 such as detentions for educational purpose or for the prevention of the spreading of infectious diseases. Security-based preventative detention without charge is only permitted as a derogation measure during genuine times of emergency.

Nevertheless, Macken's analysis does underline the importance of the procedural constraints. Any preventative detention regime must include the required procedural safeguards. This thesis suggests that even though Article 5 requires that pre-trial detention must be in accordance with the procedural safeguards enshrined in Article 5 of the ECHR, which extend to *all* forms of detention, including security-based preventative detention without criminal charges being made.

In *Lawless*, the government argued that Article 5(1)(c) did not require a person detained under a national security detention framework to be brought before a judicial authority.[42] While Article 5(3) requires a person having been arrested or detained shall be brought before a competent legal authority, it only affords those detained in accordance with Article 5(1)(c) such right, for example, individuals detained pending trial, or for educational purpose, or for prevention of spreading of infectious diseases.[43]

The Court rejected this interpretation and required Lawless to be brought promptly before a judge.[44] By drawing a distinction between two types of judicial control over two forms of detention in *Lawless*: (1) bringing a detainee before a judge "for the purpose of

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[42] *Lawless* (No.3) (1961) 332/57 Eur Court HR [9].

[43] *ECHR*, art5(3): "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power. … Release may be conditioned by guarantees to appear for trial."

[44] *Lawless* (No.3) (1961) 332/57 Eur Court HR [9].

examining the deprivation of liberty"[45]; and (2) bringing a detainee before a judge "for the purpose of deciding on the merits",[46] the Court basically required any persons being preventatively detained for security reasons to be brought before a judge or a judicial officer, either to review the legality of detention, or to decide on the merits of the charge, if there is any.[47]

The Court further held that the phrase "effected for the purpose of bringing him before the competent legal authority" in Article 5(1)(c) must always be read in conjunction with procedural safeguards enshrined in other subsections of Article 5.[48] Therefore, even though pure security-based preventative detention is not enumerated in Article 5(1)(c), such detention can still be controlled by a competent judicial authority, and the detainee should be provided with the right to be brought before a judicial body.

That Article 5 affords minimum procedural safeguards to all forms of preventative detention was also clearly stated by the Court in *Schiesser v Switzerland*. The Court commented that the overall purpose of Article 5 was to ensure no one is arbitrarily dispossessed of his liberty, and that this purpose gives rise to "guarantees appropriate to the kind of deprivation of liberty in question."[49] In *Brogan*, the Court did not consider there is a violation of Article 5(3) as having occurred if the arrested or detained person is released "promptly" before "any judicial control of his detention would have been

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[45] Ibid [14].

[46] Ibid.

[47] In *Lawless*, the judgment only mentioned the requirment to be brought before a judge to review either the legality of detention or the merits of the charge, in relation to the types of detention enumerated in article 5(1)(c). Pure security-based detention was not permitted under article 5(1)(c), but I would argue that the procedural safeguards enshrined in Article 5 are also applicable to such detention, as mentioned earlier in this section.

[48] *Lawless* (No.3) (1961) 332/57 Eur Court HR [10].

[49] *Schiesser v Switzerland* (1979) 7710/76 Eur Court HR [30].

feasible".[50] However, considering the rarity of such release, the Court indicated that if the arrested person is not released promptly, "he is entitled to a prompt appearance before a judge or judicial officer".[51] Therefore, if the individual has been preventatively detained for security reasons, he must also be brought before a competent authority. Arrest or detention of a terrorism suspect or non-suspects need not necessarily be related to a concrete criminal prosecution, but states are obliged to bring the detainee before a competent judicial authority for substantive review of the grounds of detention. The Court thus clearly indicated that the procedural safeguards in Article 5 generally apply to all forms of detention, not merely pre-trial detention as prescribed by Article 5(1).

This European Convention approach is significant towards the establishment of an international standard of protecting fundamental rights and liberties of those detained under preventative detention without charge regimes. Under Article 9 of the ICCPR, persons detained simply for national security reasons are provided with fewer protections than those detained under a pre-trial detention framework, as the ICCPR does not explicitly guarantee the former group the right to be brought before a judicial body within a reasonable time for the purpose of reviewing the grounds for detention. In contrast, although preventative detention without charge is not permitted under Article 5 of the ECHR, persons detained under other forms of detention framework are entitled to the same comprehensive procedural protections.

4.3.2 External Supervisions/Access to the Outside World/Sunset Clause

[50] *Brogan and Others* (1988) 11209/84, 11234/84, 11266/84 Eur Court HR [58].

[51] Ibid.

The European Convention approach shares with the ICCPR some common procedural protections, such as the right to the remedy of habeas corpus in which the lawfulness of the detention shall be comprehensively examined and access given to the outside world including family members and lawyers. Apart from these generally accepted procedural rights, the Strasbourg Court has emphasized the importance of external supervision and periodical parliamentary review of the detention regime, usually in the form of including a sunset clause in anti-terrorism laws. These procedural safeguards are considered by the Court as core safeguards against arbitrary detention and abuse, and should be strictly followed by the governments in any time.

In *Lawless*, the existence of continuous oversight by the Parliament and detailed safeguards designed to prevent abuses in the operation of the system of administrative detention were regarded by the Court as sufficient and effective in preventing arbitrary detention.[52] The form the supervision took was (1) supervision by Parliament of the ordinance in question was subject to supervision by Parliament, which not only received detailed reports but also have the authority to annul the government's power of security detention in times of emergency; (2) the existence of a Detention Commission consisting of a military officer and two judges set up to hear complaints from detainees which had the power to an order binding on the government to release detainees; and which was subject to direction by the ordinary courts to carry out its functions; and (3) release of a detainees by the government if he or she gave an undertaking to respect the law which was considered by the Court to be a legally binding commitment.[53]

In *Brannigan and McBride* the Court examined whether there were adequate safeguards protecting against arbitrary behaviour and incommunicado detention. The

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[52] *Lawless* (No.3) (1961) 332/57 Eur Court HR [37].

[53] Lawless was later released after he gave such an undertaking. Ibid [38].

Court emphasized that the state must ensure the detainee's right to have contact with the outside world while detained, in particular ensuring that the detainee was able to consult a solicitor within a reasonable time;[54] that any interference with access to the outside world must be capable of being contested by judicial review, that in such proceedings the burden of establishing reasonable grounds for limiting the detainee's access to the outside world rested on the authorities;[55] and that the detainee was entitled to have other persons informed about his detention and to have access to a doctor.[56]

The emergency situations which have reached the Court have involved continuing internal disturbances caused by terrorist violence, such as those in *Lawless, Ireland,* and *Aksoy*.[57] The question arises as to whether a state can justify derogation measures enacted as a necessary response to the most intense periods of violence and disorder, during periods of low-intensity violence, in other words, whether detention without charge is a required response at all relevant times. In some cases, the inclusion of a sunset clause in legislation has provided some reassurance that the continuing necessity for the extraordinary measures would be periodically reviewed. Unfortunately, there have been notable instances in which such a clause has been extended simply as a matter of course.[58]

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[54] *Brannigan and McBride* (1988) 14553/89, 14554/89 Eur Court HR [64].

[55] Ibid.

[56] Ibid.

[57] *Lawless* (No.3) (1961) 332/57 Eur Court HR, "AS TO THE FACTS" [14]; *Ireland* (1978) 5310/71 Eur Court HR [11]-[14]; *Aksoy* [1996] 6 Eur Court HR 2260 [9]-[10].

[58] For example, in Singapore, the *Criminal Law (Temporary Provisions) Ordinance* (CLTPO) has been renewed once every five years under a sunset clause since 1955, and its future looks reasonably secure. The last renewal was in 2009, and this Act shall continue in force for a period of 5 years from 21st October 2009. See further discussions in Chapter 6.

4.3.3 ARTICLE 5(3) – TIME CONSTRAINTS ON DETENTION

The second part of Article 5(3) of the ECHR provides:

> Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article … shall be entitled to trial within a reasonable time or to release pending trial.

The first part of the provision requires that the detainee be brought before a competent judicial authority as discussed earlier; its second part further suggests that the detainee has the right to a trial within a reasonable time, or to release pending trial. That a detainee must be brought before a judicial officer "promptly" and must be afforded a trial within a reasonable time effectively protects the detainees against lengthy periods of detention. While the Human Rights Committee concluded in *A v Australia* and *Ahani v Canada* that a prolonged period of detention without periodical review were arbitrary, the Committee did not consider a relatively long period of detention for national security reasons to be arbitrary, *per se*.[59] The Strasbourg Court, on the other hand, provides a more clear guidance regard the duration of detention.

In *Brogan*, the four applicants were detained for an initial period of 48 hours as permitted by the *Prevention of Terrorism (Temporary Provisions) Act 1984 UK*. By a decision of the Secretary of State for Northern Ireland, detention was extended for each applicant.[60] The maximum detention was six days and eleven hours, followed by five

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[59] Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) [9.3] ('*A v Australia*'); Human Rights Committee, *Views: Communication No.1051/2002*, 18th sess, UN Doc CCPR/C/80/D/1051/2002 (10 January 2002) [10.2] ('*Ahani v Canada*').

[60] *Brogan and Others v The United Kingdom* (1988) 11209/84, 11234/84, 11266/84 Eur Court HR [30].

days and eleven hours, four days and eleven hours and four days and six hours.[61] None of the applicants were charged or brought before a judicial authority before their release.

When considering for how long a period of time a person may be detained, the Strasbourg Court and the European Commission of Human Rights have both taken the view that the time constraint in Article 5(3) does not mean that the detainee must be brought before a judicial body immediately and instantaneously, but that "it must be done as soon as possible having regard to place, time and the circumstances of each case".[62] The core issue was how much latitude was allowable. In the view of the European Commission, given the context in which the applicants were arrested and the special problems associated with the investigation of terrorist offences, a somewhat longer period of detention than in normal cases was justified.[63] The Commission concluded that the periods of four days and six hours (Mr McFadden) and four days and eleven hours (Mr Tracey) did satisfy the requirement of Article 5(3), whereas the periods of five days and eleven hours (Mr Brogan) and six days and sixteen and a half hours (Mr Coyle) did not.[64]

The Strasbourg Court examined the permissible duration of detention without charge by interpreting the word "prompt" both in its use in the English text and in the French text.[65] It considered that the use in the French text of the word "aussitôt" confirmed that the degree of flexibility attaching to the notion of "promptness" is limited, and took into account that the case was exclusively concerned with extraordinary detention power granted by special legislation, and the Court applied a quite broad interpretation of the

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[61] Ibid [12], [15], [18], [21].

[62] *Brogan* (1988) 11209/84, 11234/84, 11266/84 Eur Court HR, '*Jointing Dissenting Opinion of Judges Thor Vilhjalmsson, Bindschedler-Robert, Golcuklu, Matscher and Valticos*' (Translation) [2].

[63] *Brogan* (1988) 11209/84, 11234/84, 11266/84 Eur Court HR [57].

[64] Ibid.

[65] Ibid [58]-[59].

term “promptness”. The Court considered the importance of Article 5 in the Convention system concluding that “it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty.”[66] Thus, the right to be brought before a judicial body and have the detention reviewed as soon as possible is an essential feature of the guarantee embodied in Article 5(3), which provides a safeguard intended to minimise the risk of arbitrariness and to secure the rule of law.[67]

In contrast to the conclusions of the Commission, the Court concluded that even the shortest detention time – four days and six hours (Mr McFadden) fell outside the strict constraints as to time permitted by the second part of Article 5(3).[68] The Court was of the view that all of the periods of detention were beyond the permissible length of detention in violation of Article 5(3), and none of the detainees was brought “promptly” before a judicial authority. As the Court concluded: “to attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation” of the meaning of Article 5(3). Such an interpretation would import a serious weakening of a procedural guarantee of Article 5(3) and “would entail consequences impairing the very essence of the right protected by this provision”.[69] As a conclusion, a period of four days in cases concerning ordinary criminal offences and of five days in exceptional cases could be considered compatible with the requirement of promptness in Article 5(3).[70]

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[66] Ibid [58].

[67] Ibid.

[68] Ibid [62].

[69] Ibid.

[70] See especially the admissibility decision of *X v the Netherlands* (1966) 9 Eur Comm HR [568]; *X v Belgium* (1973) 42 Eur Comm HR [54]-[55]. See also *Brogan* (1988) 11209/84, 11234/84, 11266/84 Eur Court HR [57].

Later cases before the Court have involved varying lengths of detention without charge or trial, including periods of seven days (*Igdeli v Turkey*),[71] and " at least fourteen days" (*Aksoy v Turkey*),[72] all being held to be a lengthy of detention in breach of Article 5(3) for failing to satisfy the requirement of promptness. In so doing, the Strasbourg Court seems to take the length of detention in police custody of four day in case of pre-trial detention and five days in other exceptional circumstances as the *de facto* standard to apply when assessing whether detention without charge or trial is a breach of Article 5(3).[73]

The Court further stated in *Dikme* that: "the mere fact that a period of detention in police custody complies with domestic law cannot exempt the authorities from the requirement to bring the accused 'promptly' before a judge, in accordance with Article 5(3)."[74] The Court also refused to accept the argument that prolonged detention was justified based on the fact that a police or judicial investigation had yet to be completed because of the evidentiary difficulties associated with terrorism, or the number of suspects involved, or because the authorities had to gather evidence from the suspects themselves or witnesses in order to complete their investigations.[75] The Court stressed the fact that the detention period should be assessed in a strict sense to in compliance with the purpose of the ECHR, and thus excuses such as evidentiary difficulties cannot justify the lengthy period of detention.

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[71] *Igeli v Turkey* (2002) 29296/95 Eur Court HR [3].

[72] *Aksoy* [1996] 6 Eur Court HR 2260 [75].

[73] Strictly speaking, four days in a pre-trial detention and five days in exceptional cases is not the standard of the period of detention, as the Court never explicitly qote this standard in later cases. The Court simply recognised any period of time longer than this unnecessary and not propotioinal, given that of all the cases reached the Court, states had detained the applicant longer than five days under a detention without charge regime.

[74] *Dikme v Turkey* [2000] 8 Eur Court HR 101 [61].

[75] *Dikme* [2000] 8 Eur Court HR 101 [65].

However, in *Brannigan and McBride*, the Court seems to depart from its understanding of the standard period of detention by upholding British detention of terrorism suspects from Northern Ireland for a period of up to seven days without any judicial supervision.[76] The British statute discussed in this case did not purport to authorize security-based preventative detention without charge for as long as seven days. Rather, the statute extended the time during which the police could detain a suspect while gathering evidence for criminal prosecution.[77] The Strasbourg Court oddly concluded that it was "not the Court's role to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other."[78] By concluding that it was legitimate for the police to detain the person in question for such a relatively long time, the Court avoided discussing whether the seven-day detention period was acceptable under the ECHR. Instead, the Court stressed that the focus should be whether the State party had provided sufficient procedural safeguards in relation to the particular detention.[79] The Court stressed the necessity for such safeguards, including the detainee's access to *habeas corpus*, his absolute and legally enforceable right of access to a lawyer within 48 hours, the right to inform a friend or relative of his detention and the right to have access to a doctor if necessary.[80] In addition, the operation of the legislation in question had been kept under regular independent review and it was subject to regular renewal until 1989.[81] The Court seems to imply that a longer period of time of detention could be justified

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[76] *Brannigan and McBride* (1993) 14553/89, 14554/89 Eur Court HR [38].

[77] Ibid [38]-[40].

[78] Ibid [59].

[79] Ibid [55].

[80] Ibid [61]-[64].

[81] Ibid [65].

provided basic safeguards are sufficiently enshrined in the operation of the detention scheme.

Obviously, the acceptable period of time will not be the same in every case, and it would be unworkable to lay down a strict limit valid under all circumstances. The Strasbourg Court has on more than one occasion held that, it is impossible to translate the concept of "reasonable time" into a fixed number of hours, days, weeks, etc.[82] Therefore, there arises a need for a case-by-case assessment, the result of which will depend on various factors, especially the inclusion of core procedural protections, such as the right to have contact with the outside world and the subjection of the detention measures to periodical review.

4.4 CONCLUSION

The jurisprudence of the Human Rights Committee clearly indicates that the ICCPR does not prohibit a State from responding to terrorism by detaining a person without criminal charge if such a measure is appropriate and proportionate and certain procedural safeguards are strictly followed. While preventative detention will always be considered "arbitrary" if procedural safeguards for those arrested and detained are not complied with, the ICCPR does not provide a detailed substantive standard of arbitrariness, in the form of specific criteria to assess whether particular detention measures are inconsistent with the treaty. Moreover, the Human Rights Committee has taken a quite narrow interpretation with regard to the duration of detention.

[82] *Stogmuller v Austria* (1969) 1602/62 Eur Court HR [9].

In contrast, the Strasbourg Court has developed a workable standard for examining whether the detention measures are permissible, namely whether the detention regime is necessary and proportionate to its purpose. The issue of necessity is further divided into two aspects, namely whether the currently existing criminal laws or other measures are adequate for achieving the same purpose, and whether other less rights-violative alternatives exist. While it is difficult to reach a consensus as to the application of the substantive standard in examining the question of proportionality, the Strasbourg Court considers the sufficiency and effectiveness of the procedural safeguards or external supervisions provided by national authorities to prevent arbitrary detentions or abuses in the operation of the detention regime. With regard to the duration of detention, the Court considered that Article 5(3) must be interpreted broadly, and thus set out a clear time limit - namely four days in ordinary situations and five days in exceptional cases - in order to prohibit prolonged preventative detention

While the exhaustive list of forms of detention enshrined in Article 5 of the ECHR does not include pure security-based detention, the European Court of Human Rights has underlined the suspensions of procedural rights in considering the arbitrariness of national security preventative detention scheme. It has stressed the importance of Article 5 as it enshrines the fundamental procedural rights that protect an individual against arbitrary interference by the State with his or her right to liberty. As noted above, even though Article 5 prohibits security-based preventative detention without criminal prosecution, procedural safeguards enshrined in Articles 5(2), 5(3), 5(4) and 5(5) apply to all categories of preventative detention, whether such detention framework is national security detention, immigration detention or pre-trial detention. Therefore, a person detained without charge must be brought before a competent legal authority to decide the lawfulness of the detention, and shall be ordered to be released once the detention is found to be arbitrary or unlawful. Although the ECHR is not applicable in any of the three jurisdictions under examination, its procedural safeguards nevertheless complement

the international human rights standard of preventative detention without charge, especially with regard to the procedural safeguards.

The next two chapters examine the domestic practice of preventative detention in Australia, Malaysia and Singapore. These states have been willing to resort to a variety of pre-emptive measures either based on other states' experiences or the use of old measures they have already exercised for half a century. The comparison of these three states' practices will take place against the international human rights standard as summarised in Chapters 3 and 4.

CHAPTER 5 - AUSTRALIA'S NEW DETENTION REGIME

5.1 INTRODUCTION

As a general rule in Australia, individuals may not be preventatively detained beyond an initial short period of time except after being convicted by a judge.[1] In other words, for citizens, detention is only justifiable as part of a judicial process. As Brennan, Deane and Dawson JJ of the High Court stated in *Lim v Minister for Immigration, Local Government and Ethnic Affairs*:

> The involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[2]

However, in the same case, the Court identified a number of exceptions to the general rule where the detention is non-punitive in character and thus is permitted under the Australian legal system, [3] such as for reasons of mental illness, infectious disease or for immigration-related purposes in the case of non-citizens.[4] In the 2004 case of *Fardon v. Attorney-General* (Qld), the High Court acknowledged that the list of exceptions stated

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[1] Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's Criminal Code since September 11, 2001' (2007)16 (1) *Griffith Law Review* 27, 45.

[2] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 [27].

[3] These exceptions included the arrest and detention in custody of a person accused of crime, and detention in cases of mental illness or infectious disease. The judgement also acknowledged that aliens enjoyed less protection under the Constitution than citizens, and that the administrative detention of aliens would be valid if it was "reasonably capable of being seen as necessary for the purposes of deportation of necessary to enable an application for an entry permit to be made and considered". *Lim* (1992) 176 CLR 1 [33].

[4] Ibid; *Al Kateb v Godwin* (2004) 219 CLR 562; *Re Wooley, Ex parte Applicants M276/2003* (2004) 225 CLR 1.

in *Lim* "is not closed",[5] and therefore left the possibility that detention on security grounds might be permissible within Australian legal system.

Since the 1990s, laws of preventative detention have been passed at the state level to provide extended detention for dangerous prisoners, especially sexual offenders, who have a high risk of reoffending.[6] However, these laws apply to offenders who have already been convicted.[7]

The addition by the *Anti-Terrorism Act (No 2) 2005* (Cth) of Division 105 to the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') represented a shift from the general principle in Australia that arrest and detention should be based on reasonable suspicion of the commission of a criminal offence, to principles of general pre-emption. By inserting the new "preventative detention" scheme in the context of anti-terrorism laws, terrorism suspects might now be detained for a (longer) period of time without any criminal charges.[8]

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[5] *Fardon v Attorney General (Old)* (2004) 223 CLR 575, [83].

[6] The Australian High Court in *Fardon* upheld the constitutionality of Queensland's *Dangerous Prisoners (Sexual Offenders) Act* (2003), which allows for the post-sentence preventive detention of sex offenders deemed to be at high risk of serious sexual recidivism. *Fardon v Attorney-General for the State of Queensland* (2004) HCA 46 [44]. See, eg, Cynthia Calkins Mercado and James R.P. Ogloff, 'Risk and the Preventive Detention of Sex Offenders in Australia and the United States' (2007) 20 (1) *International Journal of Law and Psychiatry* 49, 51-2.

[7] See relevant discussion in MacDonald and Williams, above n 1, 45-6. In the 2004 case of *Fardon*, the High Court of Australia considered the validity of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), which granted the Supreme Court of Queensland the power to make interim and continuing detention orders against a prisoner currently serving time for a serious sexual offence. A 6:1 majority of the Court found the law to be constitutionally valid. *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), ss 8(2)(b)(ii), 13(5)(a); *Fardon v Attorney General (Old)* (2004) 223 CLR 575, [80]. But it is noteworthy that *Fardon* dealt with involuntary detention at the state level, not at the commonwealth level. In Australia, some constitutional principles, such as the separation of powers doctrine, do not need to be strictly followed and operated at state level, and thus the cross-over of judicial and non-judicial power is much more blurred at state level. For a detailed discussion of the constitutional validity of the Control Orders and the Preventative Detention Orders, see, eg, Andrew Lynch and Alexander Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventative Detention' (2007) 10 *Flinders Journal of Law Reform* 105.

[8] For a discussion of the pre-trial detention in Australia under which terrorism suspects might be detained up to 7 days, see below s 5.1.5.

The executive PDO regime enables detention without charge for a maximum of 48 hours at the Commonwealth level, and allows for restrictions of fundamental rights and liberties on both terrorism suspects and non-suspects.[9] The object of the PDO regime is to prevent an imminent terrorist act occurring or to preserve evidence relating to a terrorist act.[10] An initial preventative detention order may be applied for by any police officer and made by a senior police officer for the detention of suspects and non-suspects alike up to 24 hours.[11] Issuing authorities, acting in their personal capacity may extend the initial order by making a continued preventative detention order for a further 24 hours. [12] The Commonwealth has limited power to enact "non-punitive" administrative detention specifically in terms of the detention period, as suggested by *Lim*.[13] Thus, the *Criminal Code* only provides for a maximum 48 days detention at the

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[9] *Criminal Code Act 1995* (Cth), s 105.8(5): "[t]he period of time specified in the [initial preventative detention] order…must not exceed 24 hours." and s 105.12(5): "[t]he period of time specified under [the continued preventative detention order]… must not exceed 48 hours." For State or Territory legislation, eg, under sections 26D-26L of the *Terrorism (Police Powers) Amended (Preventative Detention) Act 2005* (NSW), the Supreme Court of NSW may make a state PDO after hearing. When the Court cannot proceed immediately to the hearing and determination of the application, but the application satisfies the requirement of issuing a detention order, the Court may first issue an interim PDO, in order to prevent an imminent terrorist act or preserve related evidence. The interim PDO ceases to have effect if the Supreme Court has not heard and determined the application within 48 hours. The overall duration of a state PDO cannot exceed 14 days. There is no classification of an initial state PDO and a continued one. At state level, it simply provides that the court may make a state PDO and the maximum detention period, other than an interim order, is 14 days. Of the eight states and territory, the only exception is the PDO regime in Queensland, where a PDO is divided into the making of an initial order and a final order. The initial order is applied by a police officer and issued by a senior police officer, with a maximum period of 24 hours. The final order may also applied by a police officer, but can only be issued by a judge or retired judge as appointed by the Minister, with a maximum period of 14 days. *Terrorism (Preventative Detention) Act 2005* (Qld), s 4(issuing authority), s 17 (issuing authority may make initial order) and s 25 (issuing authority may make final order).

[10] *Criminal Code Act 1995* (Cth), s 105.1.

[11] *Criminal Code Act 1995* (Cth), ss 105.7, 105.8, 105.9, 105.10.

[12] *Criminal Code Act 1995* (Cth), ss 105.11, 105.13, 105.14(1). Persons who may be an issuing authority are Federal Court judges or Federal magistrates, retired judges from the States or the President or Deputy President of the Administrative Appeal Tribunal. *Criminal Code Act 1995* (Cth), s 105.12(1).

[13] See above notes 1 and 2.

Commonwealth level, but the period of detention can be extended to 14 days through complementary State or Territory legislation.[14]

Article 9 of the ICCPR allows preventative detention of terrorism suspects and non-suspects without charge for security purposes, but the same provision also sets out restrictions upon preventative detention, namely whether the regime in question is necessary and proportionate. That test, as outlined in Chapters 3 and 4, is whether ordinary criminal law or other currently available measures are adequate to deal with the emergency situation; and whether other less draconian or less rights-violated alternatively might have been contemplated. A negative answer is required to each question. A further and essential requirement is that the detention regime must include sufficient and effective procedural safeguards or external supervisions.

This Chapter will address each of the questions above in detail in relation to the PDO regime, with a focus on the existence of effective procedural safeguards and whether the detention regime is legal under international human rights law. This Chapter first explores how the term "terrorist act" has been defined in Australia's *Criminal Code.* As the threshold issue in the discussion of the PDO regime, the definition of a "terrorist act", particularly the motivational requirement, directly relates to the grounds of detention. While potential detainees include non-suspects who merely possess terrorism-related evidence, a broad definition of a "terrorist act" further lowers the threshold of detention without charge. The second part of this chapter examines Australia's preventative detention policies and compares the regime with international human rights laws, with a focus on the procedural safeguards, particularly the availability of substantive review of

[14] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT), s 21; *Terrorism (Community Protection) Act 2003* (Vic) part 2A, ss 7 and 8; *Terrorism (Police Powers) Act 2002* (NSW) Part 2A, s 26K; *Terrorism (Preventative Detention) Act 2005* (SA), s 10; *Terrorism (Preventative Detention) Act 2006* (Qld), s 12; *Terrorism (Emergency Powers) Act* (NT), s 21K; *Terrorism (Preventative Detention) Bill 2005* (Tas), s 8; *Terrorism (Preventative Detention) Act 2006* (WA), s 13.

the grounds of detention, access to information pertaining to the detention, contact with family members and other persons, and lawyer-client communication.

5.2 DEFINING TERRORIST ACT IN THE CRIMINAL CODE

5.2.1 OUTLINE OF THE DEFINITION OF A TERRORIST ACT

Central to Australia's anti-terrorism framework is the definition of a "terrorist act". Upon this definition hang the individual terrorism offences in Division 101 of the *Criminal Code*, the group terrorism offences in Division 102 of the *Criminal Code*, financing offences in Division 103, the provisions for control orders in Divisions 104, and the PDO regime in Division 105 of the *Criminal Code*, which authorize the police to detain a terrorism suspect or non-suspect without charge or trial.

Section 100.1 of the *Criminal Code* defines a "terrorist act" to be an action or threat of action with the intention of:

- advancing a political, religious or ideological cause; and
- coercing, or influencing by intimidation, the government of the Commonwealth, a State, Territory or foreign country (or part of any of the aforementioned) or intimidating the public (or a section of the public).[15]

An act is only defined as a "terrorist act" if it causes a certain level of harm, for example, serious physical harm or death to a person, or poses a serious risk to public

[15] *Criminal Code Act 1995* (Cth), s 100.1(1).

health or safety.[16] In contrast to the equivalent definition in many other states, Australia's definition includes serious damage to property and serious interference with, serious disruption to or destruction of an electronic system.[17] Unlike its UK and the US antecedents, the Australian definition is also careful to establish what does not constitute a "terrorist act", recognising exceptions for any "advocacy, protest, dissent or industrial action", so long as it is not carried out with the intention to cause serious harm or death to a person or the public.[18]

The Australian definition is not free of problems. For instance, there is no exception made for those who cause harm and damage as part of a domestic struggle for liberation. Consequently, what some see as terrorism, others may regard as self-defence or a struggle for liberation. Nelson Mandela, Nobel Peace Prize winner who was called a terrorist by many people during his fight against apartheid in South Africa, would also be classified as a terrorist under Australian definition.[19]

On 12 August 2009, Attorney-General Robert McClelland released a 452-page discussion paper on proposed reforms to national security legislation, including several changes to the definition of "terrorist act".[20] It was, by far, the most comprehensive reform to national security legislation introduced by Australian Government since initial introduction of the laws. Almost every proposed change to the definition of "terrorist act" aimed to broaden the definition. One of the most far-reaching proposals was to extend the definition of terrorism beyond an act or plan that causes "serious harm that is

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[16] *Criminal Code Act 1995* (Cth), s 100.1(2).

[17] *Criminal Code Act 1995*(Cth), s 100.1(2).

[18] *Criminal Code Act 1995*(Cth), s 100.1(3).

[19] Andrew Lynch and George Williams, *What Price Security? - Taking Stock of Australia's Anti-Terror Laws* (UNSW Press, 2006) 17.

[20] Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 44-5 <http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Nationalsecuritylegislation-Publicconsultation_Nationalsecuritylegislation-Publicconsultation>.

physical harm" to a person, to include psychological harm, by omitting the word "physical".[21] The definition was to be further widened by including "threats to action" that are "likely to cause" serious harm, even if no such action occurs or is planned.[22] The proposed amendments had not passed when parliament was prorogued for the August 2010 federal election, and the definition of "terrorist act" in Australia remains the same.[23] Instead, the *National Security Legislation Amendment Act 2010* passed in November 2010 which introduced some expansions of police power and conditions that limit free speech, but no changes were made with regard to the detention regime or the definition of a "terrorist act".[24]

The following sections discuss the key elements of the definition of a "terrorist act" in the *Criminal Code* - the political, religious or ideological motive and exemptions for protests and strikes. Apart from these two elements, there are other controversial issues in defining terrorism, such as whether to extend the scope of harm caused by terrorist acts so that it includes psychological in additional to physical harm, the distinction between terrorist act and legitimate acts of violence committee in armed conflict, and whether states can also commit terrorist acts. Nonetheless, the purpose of this section is to generally discuss the definition and focus on the most controversial elements that are relevant to the preventative detention regime in Australia, particularly the motivational requirement.

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[21] *National Security Legislation Discussion Paper* (August 2009), Amendments to the definition of a terrorist act, 45.

[22] Ibid 47.

[23] But these amendments were reintroduced by Prime Minister Julia Gillard's government as soon as parliament resumed in 30th September, 2010. The Hon. Robert McClelland MP, *Reintroduction of National Security Legislation*, Media Release (30 September 2010) <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_ThirdQuarter_30September2010-ReintroductionofnationalsecuritylegislationS>.

[24] No relevant changes to the definition of a "terrorist act" in Schedule 2 - Terrorism, *National Security Legislation Amendment Act 2010* (Cth).

5.2.2 MOTIVE ELEMENT – A POLITICAL, RELIGIOUS OR IDEOLOGICAL CAUSE

People have been debating whether advancing a political, religious or ideological cause should be an element of the definition of "terrorist act" for a long time. This issue is one of the most important reasons why states have failed consistently to arrive upon a universally accepted definition and to finally conclude an International Counter-Terrorism Convention.[25]

There appears to be little international consensus on whether "terrorism" should be defined by its purposes as well as by the nature of its acts.[26] None of the thirteen international terrorism-related conventions mention the element of political, religious or

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[25] The recent decision of the Appeals Chamber of the Special Tribunal on Lebanon discusses at some length the meaning of the term "terrorism" under customary international law. Based on its review of a number of treaties, UN resolutions, and the legislative and judicial practice of States, the Tribuinal concluded that a customary rule of international law regarding the international crime of terrorism has emerged. This customary definition of terrorism requires three key elements: (1) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson), or threatening such an act; (2) the intent to spread fear among the ppulation (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (3) a transnational element. Appeals Chamber of the Special Tribunal on Lebanon, Case No.STL-11-01/1 (16 February 2011) [85]

<http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216_STL-11-01_R176bis_F0010_AC_Interlocutory_Decision_Filed_EN.pdf>.

[26] The Appeals Chamber of the Speical Tribunal on Lebanon further notes that, as this customary norm continues to evolve, the "terrorist's intent to coerce an authority or to terrorise a population will often derive from or be grounded in an underlying *political or ideological purpose*", which differentiates terrorism from other criminal acts. See, eg, the Report of the Policy Working Group on the United Nations and Terrorism summarised in 2002: "[W]ithout attempting a comprehensive definition of terrorism, it would be useful to delineate some broad characteristics of the phenomenon. Terrorism is, in most cases, essentially *a political act.* It is meant to inflict dramatic and deadly injury on civilians and to create an atmosphere of fear, *generally for a political or ideological (whether secular or religious purpose).* Terrorism is a criminal act, but it is more than mere criminality." *Report of the Policy Working Group on the United Nations and Terrorism*, UN Doc A/57/273 (2002), Annex [13]. That said, the Tribunal also acknowledged that this element in defining terrorism has not yet been so broadly and consistently spelled out and accepted so as to rise to the level of customary international law. Appeals Chamber of the Special Tribunal on Lebanon, Case No.STL-11-01/1 (16 February 2011) [106].

ideological cause,[27] nor does the current draft definition of "terrorism" in the *UN Draft Comprehensive Convention on International Terrorism* require an intention to advance a political cause.[28] This mirrors the position under the *Patriot Act (USA)*,[29] but it is not the position under the *Terrorism Act 2000 (UK)* which heavily influenced Australia's legislation.[30] In fact, the inclusion of a motive element in the definition of terrorism has

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[27] The thirteen conventions do not explicitly define the acts prohibited as terrorist acts; nonetheless, they concern "terrorism-related" activities and were regarded as customary international law and applicable to states whether or not they are parties to the convention. These conventions include (1) *International Convention for the Suppression of the Financing of the Terrorism*; (2) *International Convention for the Suppression of Terrorist Bombing*; (3) *Convention on the Making of Plastic Explosives for the Purpose of Detection*; (4) *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*; (5) *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*; (6) *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*; (7) *Convention on the Physical Protection of Nuclear Material; (8) International Convention Against the Taking of Hostages*; (9) *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents*; (10) *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*; (11) *Convention for the Suppression of Unlawful Seizure of Aircraft*; (12) *Convention on Offences and Certain Other Acts Committed on Board Aircraft*; and (13) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the 1971 Convention for the Suppression of Unlawful Acts Against Civil Aviation. For a discussion of how these international conventions define terrorism-related activities, see, eg, Reuven Young, 'Defining Terrorism: The Evolution of Terrorism as A Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation' (2006) 29 *Boston College International and Comparative Law Review* 23; Alex Schmid, 'Terrorism – The Definitional Problem' (2004) 36 (2-3) *Case Western Reserve Journal of International Law* 375.

[28] The committee meet each year. In its most recent annual reports, it has stressed the need to distinguish between acts of terrorism and the legitimate struggle of peoples in the exercise of their right to self-determination under foreign occupation and colonial or alien domination, without mentioning the political, religious cause of a terrorist act in defining terrorism. See, eg, *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996*, 14th sess (12 - 16 April 2010), UN GAOR, 65th, sess, Supplement No. 37, UN Doc A/65/37 [11]; *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996*, 13th sess (29 June - 2 July 2009), UN GAOR, 64th sess, Supplement No.37, UN Doc A/64/37 [6]; *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996*, 12th sess (25 and 26 February and 6 March 2008), UN GAOR, 63rd sess, Supplement No.37, UN DOC A/63/37 [5].

[29] *USA Patriot Act* (H. R. 3162), s 411 (F) amending clause (iv) to define "engage in terrorist activity".

[30] Kent Roach is of the view that terrorism is the use of violence for political, religious and ideological ends originates from UK, namely the *Terrorism Act 2000* (UK). Kent Roach, 'The post-9/11 migration of Britain's Terrorism Act 2000', in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2007) 374, 389.

a long history in the UK, and its experience has been influential in international law and comparable jurisdictions, especially Commonwealth countries.[31]

In 1996, Lord Lloyd Berwick observed that terrorism offences had been adopted in the UK because terrorism is generally regarded as an attack on society itself and its democratic institutions, and thus a terrorism offence has an added element of seeking to promote a politically motivated objective.[32] Accordingly, his inquiry recommended that terrorism be defined to mean the use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government or the public in order to promote political, social, or ideological objectives.[33] Following Lord Berwick's suggestion and other special reports on anti-terrorism laws,[34] the *Terrorism Act 2000* incorporates the motive element in UK's definition of terrorism. In addition to the *Terrorism Act 2000*, the motive element is also part of the definition of a "terrorist act" in New Zealand's *Terrorism Suppression Act 2002*, the Canadian *Criminal Code 1985* and the South African *Protection of Democracy against Terrorist and Related Activities Act 2003*.[35]

In determining whether to include the motive element when defining terrorism, the key issue is what sets a "terrorist act" apart from other crimes. The distinction between

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[31] Section 20 of *Prevention of Terrorism Act (Temporary Provision) Act* 1974 (UK) defined terrorism as "the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear." *Prevention of Terrorism Act (Temporary Provision) Act* 1974 (UK), s 20.

[32] Rt Hon Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism* (The Stationery Office, 2006)Volume 1, CMD3420, pxi.

[33] Ibid 28.

[34] See, eg, Lord Carlile of Berriew Q.C., *The Definition of Terrorism, A Report by Lord Carlile of Berriew Q.C. Independent Reviewer of Terrorism Legislation* (The Stationery Office, 2007). In his independent review, Lord Carlile of Berriew Q.C. quoted many submissions and reports prior to the enactment of the *Terrorism Act 2000* (UK).

[35] *Terrorism Suppression Act 2002* (New Zealand), s 5; *Criminal Code 1985* (Canada, Chapter 46), s 83.01; *Protection of Constitutional Democracy Against Terrorist and Related Activities Bill 2003* (South Africa), clause 1(1)(xxiv).

terrorist acts and other violent criminal offences may sometimes be blurred, but arguably the key distinction, nevertheless, lies in the motivation. The absence of including motive may lead to an undesirable situation of confusion of "terrorist acts" with other privately motivated acts of violence that attract a less severe punishment. While the motive may be too subjective or difficult to prove, simply to dispense with the criterion would have the effect of considerably broadening the range of circumstances that would fall within the concept of a "terrorist act". The result would be entirely at odds with the intent to ensure that the definition is a relatively narrow one – a definition designed to deal specifically with "terrorism" of the kind seen in New York, London, Madrid and Bali. The High Court of Australia also addressed the essential function of motive in *Thomas v Mowbray*, noting that "[i]t is sufficient to note here that it is the political, religious or ideological motivation and the intention to intimidate governments or the public which distinguishes the acts in question from acts in pursuit of private ends, which come within established offences against the person or property, or those relating to firearms or explosives."[36] Therefore, it was important that the definition be specific and accurate; so as to only capture those violent acts carried out with political, religious or ideological motivation.

Commentators have raised concerns about the motive requirement being inconsistent with the tenets of traditional criminal law theory.[37] In traditional criminal law, motivation is not typically a required element of an offence, especially for violent crimes. Instead, it is normally an offender's intention to commit a prohibited act that is essential for conviction. Thus, requiring proof of an intention to advance a political, religious or ideological cause is said to confuse the intention to commit an offence, and thus does not

[36] *Thomas v Mowbray* [2007] HCA 33, [45] (Gummow and Crennan JJ).

[37] MacDonald and Williams, above n 1, 45; Kent Roach, 'The Case for Defining Terrorism with Restraint and Without Reference to Political or Religious Motive', in Andrew Lynch, Edwina Macdonald and George Williams (eds), *Law and Liberty in the War on Terror* (The Federation Press, 2007) 39, 39-40

sit well within classic criminal law.[38] The Commonwealth Director of Public Prosecutions and the Attorney-General's Department of Australia, which is responsible for the administration of the anti-terrorism legislation, have similarly argued that the requirement of motive in the prosecution seems to be "at odds with common law principles that motive is a distinct and largely irrelevant consideration to the criminality of an act".[39] However, as Saul has pointed out, that the motive element is comparatively rare in criminal law is no reason not to include such an element where there is a compelling public interest in doing so.[40] If society decides that certain social, ethical or political values are worth protecting in the context of anti-terrorism legislation, a motive requirement can more accurately target reprehensible infringements of those values.[41] In accepting this argument, ignoring motive may well be a departure from the central purpose of anti-terrorism laws.

Another objection to including motive as a part of the definition is a potential for discrimination against minority groups and breach of fundamental liberties and rights. In the Canadian case of *R v Khawaja*, Rutherford J held that the requirement for proof of political or religious motive with respect to crimes of terrorism constituted an unjustified violation of freedom of expression, religion and association.[42] In Australia, the former Chief Justice Sir Gerard Brennan warned that the focus on motive "may easily be misunderstood as targeting the entire group who wish to advance the religious cause of

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[38] Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006) 31-2.

[39] Attorney-General's Department, 'Submission to the Security Legislation Review Committee' (2006) 12.

[40] Ben Saul, above n 38, 32.

[41] Ibid.

[42] *R v Khawaja* (Ontario Superior Court, No. 04-G3028224 October 2006) [58], [73]. Rutherford J then identified a series of human rights concerns, including that investigative and prosecutorial scrutiny would inevitably focus on political, religious and ideological beliefs, opinions and expressions; freedoms and consequently democratic life would be chilled; and suspicion and anger would fall on anyone belonging to a religious, political or ideological group that is connected with terrorist acts. For a detailed discussion of *Khawaja*, see, eg, Roach, above n 37, 46-7.

Islam".[43] The British Parliamentary Joint Committee on Human Rights similarly found that the motive element in the British definition gave rise to a "high risk" of incompatibility with freedom of expression and related rights under the European Convention on Human Rights.[44]

The motive requirement does pose these risks to individual rights, especially in a state like Australia which does not have a comprehensive system of legislative or constitutional protection of fundamental human rights. Nevertheless, the inclusion of a motive requirement ultimately appears to serve as a protection, rather than diminishing basic human rights.[45] Australia's independent Security Legislation Review Committee pointed out that the motive requirement is a "narrowing provision" that tightens the ambit of terrorist offences, particularly at the Commonwealth level where the States only agreed to refer the necessary constitutional power to the federal parliament on the understanding that terrorism would be tightly defined and capture only acts that the States would readily agree constitute terrorism, such as the political or religious motivated terrorist bombings in Bali in 2002.[46] Therefore, including such an element will in fact substantially limit the number of potential terrorism suspects by excluding privately motivated actors, and thus the definition will not be so broad as to overlap with other offences such as regular murders and property damage.

The last objection is a practical one, in that a motivational requirement may hinder effective prosecution because of the difficulty of proving a subjective political, religious or ideological motive. To prove a person guilty of the offence, the prosecutor will need

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[43] Gerard Brennan, *Liberty's threat from executive power,* Sydney Morning Herald, 6 July 2007, 11.

[44] Parliamentary Joint Committee on Human Rights, UK Parliament, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters* (2005).

[45] Ben Saul, above n 38, 35-6.

[46] Security Legislation Review Committee (Sheller Committee), *Review of Security and Counter-Terrorism Legislation* (2006) [6.23]. Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (2006) [5.25].

to establish that the person intentionally carried out an act because of a specific political, religious or ideological reason, rather than because of some other motive, such as revenge or anger. In practice, it is difficult for a court to give the jury clear and accurate instructions with regard to the understanding of the motive element and how to apply such criterion in determining whether the person in question has committed a terrorism crime.[47] In fact, although no individual has been prosecuted or even charged in Australia for the offence of directly engaging in a "terrorist act" under the *Criminal Code*, the complexities of the definition of a "terrorist act" have still plagued *every* terrorist prosecution.[48]

In their 2006 submission to a review body, the Australia's Attorney-General's Department and the Director of Public Prosecutions supported removing the motive requirement, partly in response to the *Mallah* case, which involved a reckless threat to bomb a government building where it was unclear if the motive was personal frustration or political grievance.[49] In *Mallah*, the prosecution needed to demonstrate that Zeky Mallah meant to advance a political, religious or ideological cause in pursing it as "distinct from some purely personal cause".[50] But the evidence before the jury was that Mallah was motivated merely by a personal vendetta against ASIO, and thus he was acquitted of the offence.

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[47] Security Legislation Review Committee noted in its 2006 review report that "problems in the interpretation of the definition of 'terrorist act' should be avoided [because] … [t]hey are likely to make prosecutions more prolonged and more difficult and increase the difficulties members of the public have in understanding the legislation". Security Legislation Review Committee, *Review of Security and Counter-Terrorism Legislation* [6.12]. The particular focus of the Committee was to remove the reference to a "threat of action" from the definition of a "terrorist act" in section 100.1(1) of the *Criminal Code Act 1995*, and make this a separate offence under the *Criminal Code*.

[48] See related discussion of the definition of a "terrorist act" in the application and clarification of the terrorism offences in Nicola McGarrity, '"Testing" Our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia' (2010) 34 *Criminal Law Journal* 92, 113-4.

[49] Attorney-General's Department, 'Submission to the Security Legislation Review Committee' (February 2006), 12; Commonwealth Director of Public Prosecutions, 'Submission to the Security Legislation Review Committee' (February 2006) 9; *R v Mallah* [2005] NSWSC 317 (Unreported, Wood CJ at CL, 21 April 2005) [41].

[50] *R v Mallah* [2005] NSWSC 317 (Unreported, Wood CJ at CL, 21 April 2005) [22].

Recently some scholars and politicians have also pointed out that, though terrorism used to be a weapon of "coercive and political diplomacy", they suggest that terrorism is now a meaningless and aimless form of violent crime, and thus with no particular intention to advance a political, religious or ideological cause. It is argued that we are now facing a new form of violence: "hyper-terrorism"[51] or "mega-terrorism"[52] and these new forms of terrorism are not intended to pursue a political, religious or ideological cause but aim at mass murder, or are merely intended to provoke anger or revenge. While this argument is understandable, occasional examples cannot deny the fact that a majority of terrorist activities are still carried out with the requisite motive, however loosely that may exist in the mind of the actors. In most cases, terrorists accept responsibility for terrorist acts and explain their motives for initiating the terrorist acts, and thus would be clear enough for prosecution. As summarised by Jenkins, "terrorists want a lot of people watching and a lot of people listening, not a lot of people dead".[53] Terrorists want publicity, and even want to create a symbiotic relationship with the modern media.[54] It is uncertain whether this is the unavoidable trend of future terrorist acts. But there are good reasons for retaining motive as an element of the definition of a "terrorist act".

Though a reference to a political, religious or ideological purpose does not appear in UN Resolutions or international conventions, the link between terrorist violence and these triggering motives permeates the international law on this subject. After the UK

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[51] Cyrille Begorre-Bret, 'The Definition of Terrorism and The Challenge of Relativism' (2005-2006) 27 *Cardozo Law Review* 1987, 1990, quoting Francois Heisbourg, *De l'apres guerre-froide a l'hyerterrorisme*, Le Monde (September 2001) 17.

[52] Fernando Reinares, 'Terrorism', in Wilhelm Heitmeyer and John Hagan (eds), *International Handbook of Violence Research* (Kluwer Academic Publishers, 2003) 309, 315.

[53] Brian Jenkins, *International Terrorism: A New Mode Conflict* (Crescent Publications, 1975) 3.

[54] Michael Kirby, 'Terrorism: the International Response of the Courts' (Winter 2005) 12 (1) *Indiana Journal of Global Legal Studies* 313, 317.

first included this element in its domestic definitions; most common law states followed without contemplating whether it fits within their unique domestic legal system. The motive requirement creates a special regime alongside traditional criminal law to better meet the need to criminalise terrorist acts. While it is inevitable that the motive element may target certain groups by including a political, religious or ideological cause which is not part of standard criminal offences, it is not the motive itself that threatens individual rights or marginalises the community, but rather the possibility of arbitrary exercise of the discretionary power, such as the power to preventatively detain a individual, by law enforcement agencies. There is no suggestion that the inclusion of the purposive element places Australia in breach of any international legal obligation. It is not unworkable, and has highlighted the core issue in defining terrorism. Overall, the motive element separates terrorism from other types of serious criminal offences, and forms the basis for a special regime.

5.2.3 Exemption for Protests and Strikes

The definition of a "terrorist act" in Australia specifically creates an exception for lawful or unlawful "advocacy", "protest", "dissent" and "industrial action", provided the activity is not intended to cause serious physical harm or death, endanger someone's life, or create a serious risk to health and safety of the public or a section of the public.[55] The exemption for protests and strikes is a good example of how a carefully drafted definition will effectively play a part in preventing and criminalising terrorist acts, as it excludes protests and strikes which may cause serious harm to people or property but with no political, religious or ideological intent.

[55] *Criminal Code Act 1995*, s 100.1(3),

The object of that exception is to "provide clarity for intelligence and police authorities that these [counter-terrorism] powers are not intended to hinder freedom of assembly, association and expression".[56] In *Lodhi*, Wood J stated that the proper construction of the definition of a "terrorist act" should "exclude advocacy, protest, dissent or industrial action that is not intended to cause the consequences detailed in the subsection".[57] McClellan J has also commented that "it is apparent that the definition of a 'terrorist act' is capable of catching conduct that does not fall within popular notions of a terrorist act. In particular, the definition only protects advocacy, protest, dissent and industrial action that are not intended to have certain results. Given that much protest and industrial action involves mass gathering, it may be hard to know what the relevant intention of an individual may be…".[58] It is likely under some circumstances that such protest may result in personal injury or property damage, but they should not be included in the definition of a "terrorist act", and should not be regulated by ordinary criminal laws or civil ordinances. Therefore, if a definition begins with a list of broad actions that may constitute terrorism, then acknowledgement and exclusion of legitimate civil disobedience or protest better ensures compliance with human rights guarantees.

The ultimate inclusion of an exemption to exclude protests and strikes may have been a matter of political willingness to send a message to both the domestic and international community that the government does not intend anti-terrorism laws to be used to stifle legitimate political activism or democratic dialogue between political communities. An exclusion for civil disobedience or protest also gives domestic law enforcement officials

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[56] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (2006) [5.31].

[57] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (2006) [5.28] quoting the unreported case of *R v Lodhi* (New South Wales Supreme Court, Whealy J,14 February 2006) [98].

[58] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation* (2006) [5.29] quoting Justice McClellan, *Terrorism and the Law* (2006) 9; "A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events." *Criminal Code Act 1995,* s 5.2(3).

a clear indication that they should exercise extra caution when seeking to apply anti-terrorism powers to situations of peacefully intended civil protest or demonstration. The explicit exclusion of protests and strikes ensures a limited scope for the application of anti-terrorism provisions, including the PDO regime.

Overall, after amendment of the original bill and the extension of the exemption to both "lawful" and "unlawful" protest and strikes, the definition in the *Criminal Code* provides better safeguards for civil liberties, than other definitions without such exemptions, for instance, the United Kingdom and the United States. Considering Australia is the only common law jurisdiction without a comprehensive system of legislative or constitutional protection of human rights, such an exemption is especially necessary. It also effectively helps to maintain the appropriate threshold for preventative detention without charge. Given that lawful and unlawful protests and strikes do not constitute terrorist acts, the AFP cannot use the broad power to preventatively detain the people involved in protests or strikes. Having said that, the exemption places a burden of proof upon the AFP, so they have to prove the protests and strikes that accidentally cause harm to people or property damage are not carried out with the specific motive. That this may make it harder to convict terrorism suspects partly explains why the government has previously expressed dissatisfaction with this exception.[59]

5.2.4 CONCLUSION

The definition included in the *Criminal Code* is complex, unwieldy and without clarity on some important concepts; only "intention", "physical harm" and "electronic system" have been defined. There is still controversy over most of the key elements of

[59] The Attorney-General's Department proposed dropping the part of exemption, after Security Legislation Review Committee's thorough review of terrorism offences. Although the committee rejected that suggestion, the government may well propose the change again in the future. See relevant discussion in Lynch and Williams, above n 19, 16.

the definition of a "terrorist act", particularly the motivational requirement. However, although the motivational requirement may conceivably have perverse effects for the operation of the preventative detention regime, it is submitted that the exemption for protests and strikes has been carefully drafted to limit the definition of a "terrorist act." While the inclusion of the motive element may cause evidentiary difficulties, it effectively distinguishes terrorist acts from other violent criminal offences. The possibility that the definition may enable the police to wrongfully detain non-suspects using powers under Division 105 by targeting a religious group or political dissidents does exist. Nevertheless, it is not the motive element itself that causes the problem, but rather the possibility of the arbitrary exercise of the discretionary detention power. A good example of how the definition helps to narrow down the group of persons that may be preventatively detained is the exemptions for protests and strikes. By moving the unnecessary restriction of "lawfulness" from the original draft, Australia's definition provides better safeguards for basic rights of protest and assembly, and thus effectively helps to maintain an appropriate threshold for preventative detention without charge.

5.3 PREVENTATIVE DETENTION ORDERS

5.3.1 DETENTION GROUNDS

The object of the PDO regime is to prevent an imminent terrorist act occurring or to preserve evidence relating to a terrorist act.[60] The same two grounds apply to both an initial PDO and a continued one, namely if the issuing authority is satisfied that:

> (4) (a) there are reasonable grounds to suspect that the subject
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> (i) will engage in a terrorist act, or

[60] *Criminal Code Act 1995* (Cth), s 105.1.

(ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or

(iii) has done an act in preparation for, or planning, a terrorist act; and

(b) making the order would substantially assist in preventing a terrorist act occurring; and

(c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

(5) A terrorist act referred to in subsection (4):

(a) must be one that is imminent; and

(b) must be one that is expected to occur, in any event, at some time in the next 14 days.[61]

The major operational restriction here is the time limit – the potential act must be "one that is expected to occur, in any event, at some time in the next 14 days".[62]Although the term "imminent" has not been strictly defined, it can be clearly concluded that a PDO only operates in a limited timeframe. Thus, if the terrorist act was not imminent, but was expected to occur in three or four weeks' time, the criterion will not be met and it will not be possible to obtain a preventative detention order.[63]

The *Explanatory Memorandum* describes the requirement of imminence as a "high threshold … because it is necessary to show not only that the subject had, for example, done something in preparation for a terrorist act, but also that the terrorist act is imminent, and that making the order would assist in preventing a terrorist act".[64] But the

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[61] *Criminal Code Act 1995* (Cth), s 105.4.

[62] *Criminal Code Act 1995* (Cth), s 105.4(5).

[63] *Explanatory Memorandum to the Anti-Terrorism Bill (No 2) 2005* (Cth) 40 <http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/bills/bytitle/238FAE457261DA2DCA256F72002451E6?OpenDocument&VIEWCAT=attachment&COUNT=999&START=1>. I cannot find any information or discussions regarding this time limit, as to why 14-day period of time is reasonable, or why 7-day or 10-day period of time is not appropriate.

[64] *Explanatory Memorandum to the Anti-Terrorism Bill (No.2) 2005* (Cth) 40.

problem is that of all the key words in the legislation establishing the conditions for issuing PDOs, only the "terrorist act" has been expressly defined in the *Criminal Code*.[65] Other terms, such as "reasonable grounds to suspect",[66] "substantially assist"[67] and "reasonably necessary",[68] which describe the grounds to issue a PDO, lack clear definitions in the *Criminal Code*. As no PDO has been issued using these provisions, there is still no established jurisprudence to look at. It is highly likely that interpretation of these undefined terms might cause controversy in practice. Although these terms are commonly used in other provisions of the *Criminal Code*, the nature of the PDO regime suggest that any key terms in the provisions should be carefully defined, given it is a special regime providing the police with extraordinary detention power.

Moreover, there are particular reasons to worry about the orders being used to cover those circumstances where the authorities do not possess sufficient evidence to lay a charge.[69] It is also worth noting that the grounds set out in the provisions, namely engagement in a terrorist act, possessing something connected to a terrorist act or doing an act in preparation for a terrorist act, are also covered by existing offences in the *Criminal Code*.[70] If a police officer has a reasonable suspicion that those factual circumstances have arisen, then the person could be arrested and charged with the offence and then taken before a judicial officer.[71] However, with the power of preventative detention not requiring the detainee to be taken before a judicial officer, it is conceivably that the police officer will prefer the lesser requirement of these

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[65] *Criminal Code Act 1995* (Cth), s 100.1(1)

[66] *Criminal Code Act 1995* (Cth), s 105.4(4)(a).

[67] *Criminal Code Act 1995* (Cth), s 105.4(4)(b).

[68] *Criminal Code Act 1995* (Cth), s 105.4(4)(c).

[69] Lynch and Williams, above n 19, 56.

[70] For examples, Division 102 of the *Criminal Code Act 1995* criminalises a range of conducts preparatory to the commission of a "terrorist act"; subdivision A of Division 102 creates a range of status offences of membership and association with a terrorist organisation.

[71] See, eg, *Crimes Act 1900* (NSW) s 352(2).

preventative detention provisions, notwithstanding that the detainee may be suspected of committing a serious indictable offence. Such a situation may cause abuse of the regime by being used to detain a suspect or non-suspect when there is no adequate evidence for prosecution.

The second type of PDO operates after a terrorist act has occurred. The purpose of this type of PDO is to preserve evidence relating to a recent terrorist act.[72] A person can be subject to a PDO if the issuing authority is satisfied that "a terrorist act has taken place within the last 28 days"[73], and "it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act".[74] Further, detaining the subject for the period of time must be necessary for the purpose of the order.[75]

In this second situation, the requirement for obtaining a PDO is quite low. The AFP does not need to establish any direct connection between the subject of the detention order and any terrorist-related activity.[76] It is possible simply the AFP could issue a PDO to detain witnesses and any other people who may be of some assistance to a terrorist investigation.[77]

5.3.2 ISSUING PROCESS

5.3.2.1 Issuing Authorities

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[72] *Criminal Code Act 1995* (Cth), s 105.1.

[73] *Criminal Code Act 1995* (Cth), s 105.4(6).

[74] Ibid.

[75] Ibid.

[76] Katherine Nesbitt, 'Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis' (2007) 17 *Public Interest Law Journal* 39, 76-7.

[77] Ibid 77.

The PDO regime provides that any AFP member may apply for an initial PDO and a continued PDO.[78] Following the application, members of the AFP of the rank of superintendent or above may grant and extend an initial PDO for a period of up to 24 hours.[79] There is no judicial involvement required for issuing an initial PDO. In the first 24 hours the detention order is completely in the hands of the federal police – applied for by any AFP member and granted by a senior AFP officer.

Continued PDOs may be made in respect of a person who is the subject of an initial PDO and may also be granted, extended and further extended to bring the total period of detention to a maximum of 48 hours.[80] Although the provision sets a maximum period of 48 hours for a continued PDO, States and Territories have enacted complementary legislation to allow for a longer period of 14 days for the detention.[81]

A continued PDO and extensions of a continued PDO may only be granted by an issuing authority, namely by a *persona designata* who is a serving Federal Judge or Magistrate or a retired judge of a superior court, or by the President or Deputy President of the Administrative Appeals Tribunal in respect of a person already detained under an

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[78] *Criminal Code Act 1995* (Cth), s 105.4

[79] *Criminal Code Act 1995* (Cth), ss 100.1(1)(a), 105.8, 105.10.

[80] *Criminal Code Act 1995* (Cth), ss 105.10, 105.14.

[81] See, eg, under sections 26D-26L of the *Terrorism (Police Powers) Amended (Preventative Detention) Act 2005* (NSW), the Supreme Court of NSW may make a state PDO. When the Court cannot proceed immediately to the hearing and determination of the application, but the application satisfies the requirement of issuing a detention order, the Court may first issue an interim PDO, in order to prevent an imminent terrorist act or preserve related evidence. The interim PDO ceases to have effect if the Supreme Court has not heard and determined the application within 48 hours. The overall duration of a state PDO cannot exceed 14 days. There is no classification of an initial state PDO and a continued one. At state level, it simply provides that the court may make a state PDO and the maximum detention period, other than an interim order, is 14 days. Of the six states and two territories, the only exception is the PDO regime in Queensland, where a PDO is divided into the making of an initial order and a final order. The initial order is applied by a police officer and issued by a senior police officer, with a maximum period of 24 hours. The final order may also applied by a police officer, but can only be issued by a judge or retired judge as appointed by the Minister, with a maximum period of 14 days. *Terrorism (Preventative Detention) Act 2005* (Qld), s 4(issuing authority), s 17 (issuing authority may make initial order), s 25 (issuing authority may make final order).

initial PDO.[82] In this role, such persons are not regarded as judicial officers and do not exercise judicial power. The effect of this provision was specifically designed to get "judicial" type review without falling foul of the Constitution, namely the constitutional separation of powers doctrine.[83]

5.3.2.2 Ex-Parte Nature of the Issuing Process

In the application and issuing procedures of an initial PDO and a continued one at the federal level,[84] and the interim and continuing detention orders at the state level,[85] the detention orders are made *ex parte* by either a senior AFP member or an issuing

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[82] *Criminal Code Act 1995* (Cth), ss 100.1(1)(b), 105.12.

[83] It is settled that Chapter III of the *Constitution of Australia*, particularly section 71, operates to prevent judicial power from being vested in any body other than a court created under section 72, and to prevent non-judicial power from being offered on the same court. *R v. Kirby Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 256, 296; *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 264-5 (Knox CJ, Gavan Duffy, Powers, Rich and Stark JJ); *Polyukhovich v. The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501, 606-7 (Deane J), 703 (Gaudron J); *Leeth v. The Commonwealth* (1992) 172 CLR 455, 469 (Mason CJ, Dawson and McHugh JJ), 487 (Dawson and Toohey JJ); *Nicholas v. R* (1998) 193 CLR 173, 206-7 (Gaudron J). Generally, there is no valid combination of judicial powers and non-judicial powers within Australia federal legal system.

[84] As has been discussed in the section of an outline of the PDO regime, the initial PDO is applied by any AFP member and shall authorised by a senior AFP, and the continued PDO or any extension is also applied by any AFP member and is to be made by an issuing authority. There is no requirement in the *Criminal Code* that the detainee will be involved in the application and issuing process. *Criminal Code Act 1995*, ss 105.7, 105.8 (application and issuing of an initial PDO); ss 105.10, 105.11, 105.12 (application and issuing of a continued PDO and further extensions).

[85] The Supreme Court of state or territory may issue a PDO on the application of a police officer. When pending the hearing and final determination of an application for a PDO, the Supreme Court may also make an interim preventative detention order if the detention fits relevant requirement and the Court cannot proceed immediately to the hearing and determination of the application of the PDO. There is no requirement for the involvement of the detainee in the procedures of a PDO and an interim one. *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* (NSW), ss 26F, 26G, 26H; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT), ss 16,18, 24, 26; *Australia Terrorism (Emergency Powers) Act 2003* (NT), ss 21E, 21G; *Terrorism (Preventative Detention) Act 2005* (Qld), ss 15,17, 19, 21, 22, 25; *Terrorism (Preventative Detention) Act 2006* (WA), ss 11, 12; *Terrorism (Preventative Detention) Act 2005* (SA), ss 9, 10, 12; *Terrorism (Preventative Detention) Bill 2005* (Tas), ss 5, 7, 11; *Terrorism (Community Protection) (Amendment) Act 2006* (Vic), ss 13C, 13E, 13I.

authority. At no time during the initial or a continued PDO, is the detained person required to be taken before a competent court for a full *inter partes* hearing.

The *ex-parte* nature of the issuing, revocation and extension applications of PDOs is problematic in a number of significant aspects. It does not allow detainees to directly contest the grounds of their detentions until the relevant orders have expired. This obviously places the detainee in an unequal position, and thus is contrary to the right to a fair and public hearing. This right is provided for in Articles 9(4) and 14 (1) of the ICCPR which states a right to be present before a competent, independent and impartial judicial body.[86] Although Article 14 does not explicitly confer a right to be present at a civil hearing, such as the hearing of a detention without charge order, the Human Rights Committee stressed a fundamental duty of the courts to "ensure equality between the parties, including the ability to contexts all the argument and evidence adduced by the other party".[87] In terms of the unequal position of the detainee, the PDO regime has thus failed to ensure equality between both parties.

This is not to say that the application for PDOs must be made in the presence of the detainee. The purpose of the PDO provisions is to introduce a special regime which is necessary to prevent imminent terrorist attacks and preserve evidence of a recent terrorist attack. Thus, making of the PDOs *ex parte* can be justified and accepted in the context of anti-terrorism legislation, where there is a legitimate fear of disappearance of terrorism suspects or other exigencies. However, this should only happen in the issuing

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[86] *International Covenant on Civil and Political Rights*, open for signuture 16 December 1966 G.A.Res. 2200A, UN GAOR, 21st sess, UN Doc A/RES/2200, 999 UNTS 172 (entered into force Mar. 23, 1976) ('*ICCPR*') *ICCPR*, art 9(4): "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."; art 14(1): "All persons shall be equal before the courts and tribunals. … [E]veryone shall be entitled to a fair and public hearing by a competent, independent and impoartial tribunal established by law." For a detailed discussion of the rights to a substantive review of the detention grounds by a competent judicial authority, see below s 5.4.1.

[87] Human Rights Committee, Views: Communication No. 779/1997, 73th sess, UN Doc CCPR/C/73/D/779/1997 (4 November 1997) [7.4] ('*Äärelä v Finland*').

of an *initial* PDO. Once a person is detained, he or she will then have very limited access to information about the grounds for the detention and other related information, and may be restricted from contacting with the outside world.[88] Under such circumstance, it would be unfair and unreasonable to allow the issuing authority to make a continued PDO or a PDO at the state level *ex parte*, as the detainees are barely provided with a real chance to challenge their detentions. Thus, the detainees should be provided with the right to a full *inter partes* hearing in the issuing of a continued PDO.

5.3.3 PERIOD OF DETENTION

A PDO enables a person to be taken into custody and detained by the AFP in a state or territory prison or remand centre for an initial period of up to 24 hours, with an option to have the order continued for a total period not exceeding 48 hours.[89] But, as noted, the maximum period of detention at the federal level can be augmented under corresponding state law.

At the Commonwealth, State and Territory Governments (COAG) meeting in September 2005, the premiers and chief ministers agreed to enact state or territorial legislation enabling longer periods of detention.[90] Under the amended *Terrorism (Police Powers) Act 2002* (NSW), *Terrorism (Community Protection) Act 2003* (Vic), the *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT), *Terrorism (Preventative Detention) Act 2005* (SA), *Terrorism (Preventative Detention) Act 2006* (Qld), *Terrorism (Emergency Powers) Act* (NT), *Terrorism (Preventative Detention) Bill 2005* (Tas) and the *Terrorism (Preventative Detention) Act 2006* (WA), the Supreme Court of

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[88] *Criminal Code Act 1995*, ss 105.15 (Prohibited Contact Orders), 105.34 (Restriction on contact with other people), 105.38 (monitoring contact with family members and lawyers).

[89] *Criminal Code Act 1995*, ss 105.8(5), 105.12(5).

[90] Council of Australian Governments, *Special Meeting on Counter-Terrorism*, Press Release (27 September 2005).

the States,[91] an eligible judge or retired judge appointed by the Minister,[92] or a senior police officer,[93] may issue orders to extend the period of detention to a maximum of 14 days after hearing from the applicants and the person to be detained.[94]

Even though judicial supervision will only be available after the expiration of the PDO, the maximum period of detention of up to 48 hours at the federal level is a relatively short period and is acceptable under the international human rights standard. However, if the detention period was extended by 14 days at the state or territory level, still without any judicial involvement while the order is in force, such scheme is clearly against the international human rights standard of around four days.

Furthermore, it is debatable whether it is justifiable to extend the detention period of time to a maximum of 14 days. Under the pre-trial detention regime in the *Crimes Act 1914* (Cth), upon arrest for a terrorism offence, a person may be detained by the police for the purpose of investigating whether he or she committed the offence.[95] The period

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[91] *Terrorism (Police Powers) Act 2002* (NSW) Part 2A, ss 26H, 26I; *Terrorism (Community Protection) Act 2003* (Vic), s 13E; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT), s 18; *Terrorism (Preventative Detention) Bill 2005* (Tas), s 7.

[92] *Terrorism (Preventative Detention) Act 2006* (WA), s 7; *Terrorism (Emergency Powers) Act* (NT), s 21C; *Terrorism (Preventative Detention) Act 2006* (Qld), s 7 (for a final order); *Terrorism (Preventative Detention) Act 2005* (SA), s 4.

[93] *Terrorism (Preventative Detention) Act 2006* (Qld), s 7 (for an initial order); *Terrorism (Preventative Detention) Act 2005* (SA), s 4 (as mentioned in note 108, the issuing authority is for the most circumstances a Judge. A senior officer is an issuing authority for a PDO only if "there is an urgent need for the order; and it is not reasonably practicable in the circumstances to have the application for a preventative detention order dealt with by a Judge").

[94] *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT), s 21; *Terrorism (Community Protection) Act 2003* (Vic) part 2A, ss 7, 8; *Terrorism (Police Powers) Act 2002* (NSW) Part 2A, s 26K; *Terrorism (Preventative Detention) Act 2005* (SA), s 10; *Terrorism (Preventative Detention) Act 2006* (Qld), s 12; *Terrorism (Emergency Powers) Act* (NT), s 21K; *Terrorism (Preventative Detention) Bill 2005* (Tas), s 8; *Terrorism (Preventative Detention) Act 2006* (WA), s 13.

[95] *Crimes Act 1914* (Cth), ss 23CA (1)-(2).

of detention pending trial is limited to no more than four hours,[96] but may be extended: (1) to no more than 24 hours through the investigation mechanism for terrorism cases;[97] and (2) a maximum of 7 days through the disregarded or dead time mechanism.[98] Thus, a person may be detained for up to 24 hours until the "investigation period" expires, or up to 7 days including any time designated as "dead time".[99] Under the "dead time" provision,[100] Dr Mohamed Haneef was held for 12 days. Charges against him were later withdrawn completely.

The key difference between the two kinds of detention is that the *Crimes Act 1914* (Cth) establishes a pre-trial detention regime, where a detainee is suspected of involvement in terrorism-related offences and the detention is to facilitate the police investigation so that the detainee may be charged with criminal offences. The 14-day preventative detention, however, is not designed to investigate but to prevent a terrorist act from happening in the first place or to preserve evidence, and thus no criminal charges will be made against the detainee. How can a detainee suspected of a concrete terrorism-related offence be detained for only 24 hours or 7 days, while a suspect who is

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[96] If the person is or appears to be under 18, an Aboriginal person or a Torres Strait Islander, the investigation period does not extend beyond two hours. *Crimes Act 1914* (Cth), s 23DB(5)(a), introduced by the *National Security Legislation Amendment Act 2010* (Cth).

[97] A magistrate or justice of the peace can grant an application under s 23DA for the period of detention to be extended up to 24 hours. *Crimes Act 1914* (Cth), s 23DA(7).

[98] *Crimes Act 1914* (Cth), s 23DB(9)(m). The new time limit was also introduced by the *National Security Legislation Amendment Act 2010*, under which further time authorised by a judicial officer to the investigation period may be extended under the dead mechanism, but is limited to seven days under s 23DB(11).

[99] *Crimes Act 1914* (Cth), s 23CA. The original detention can only last for 4 hours, but can be extended by two separate mechanisms: the extension of investigation mechanism (up to 20 hours, overall the maximum detention time is 24 hours); and the disregarded or dead time mechanism (which can be certain time relating to the calculation of the investigation period or further time authorised by a judicial officer also in relation to the investigation period).

[100] *Crimes Act 1914* (Cth), s 23WCA. There is a special provision for terrorism offences relating to "dead time" in Crimes Act, which allows a magistrate or justice "stop the clock" where questioning is "reasonably suspended or delayed." Although the "dead time" provision is subjected to some limitations, the time limit of 24 hours ceases to be an effective safeguard, and the detainee is subjected to the possibility of indefinite detention.

only related or indirectly connected to a terrorist act or even a non-suspect may be detained for up to 14 days under the PDO regime?

Commentators and civil libertarian organisations have consistently criticized the 14-day period of detention, and suggested that a 48-hour time limit should be placed on detaining a suspect without charge.[101] Considering the complexity and difficulty of preventing an imminent terrorist act or preserving terrorism-related evidence, perhaps 48 hours is too short for a preventative detention regime. While the European Court of Human Rights has indicated a standard of around four days in precedents,[102] current terrorism threats are much more diffused and abstract. Therefore, a longer period of time of detention, for example, the same 7 days as the pre-trial detention under the *Crimes Act*, could be justified for the PDO scheme, provided basic safeguards are secured in the operation of the detention scheme, particularly the right to have access to judicial supervision while the order is in operation.

5.3.4 OTHER RESTRICTIONS

Under the *Criminal Code*, the person detained under a PDO is to be detained at a prison or remand centre of a State or Territory under the arrangement of a senior AFP member.[103] Except for detainees under 18 years, there are no requirements that detainees under PDOs be housed separately from those charged with or convicted of a crime.[104]

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[101] For examples, Nicola McGarrity, 'Freedoms are Losing out to Fear', *The Age (Sydney)*, 14 August 2009; Andrew Lynch, 'The Devil in the Detail', *Politics and Policy*, 19 August 2009; Jonathan Pearlman, 'Terrorism Law Revamp Dumps Haneef Charge', *The Daily Australian*, 14 August 2009, quoting Philip Lynch's comments; Mike Head, 'Australia: Rudd Government Toughens Anti-terror Laws', *World Socialist Web Site*, 19 August 2009, quoting Katie Wood's comments, who is the spokesman from Amnesty International Australia.

[102] *Brogan and Others v The United Kingdom* (1988) 11209/84, 11234/84, 11266/84 Eur Court HR [57]; *Igeli v Turkey* (2002) 29296/95 Eur Court HR [3]; *Aksoy v Turkey* [1996] 6 Eur Court HR 2260 [75].

[103] *Criminal Code Act 1995* (Cth), s 105.27.

[104] See discussions about the special rules applicable to persons under 18 in s 5.3.5.

Once a PDO is issued, the police are required to inform the detainee of a summary of the grounds of the order and must provide him or her with a copy of the order.[105] Both the initial PDO and a continued one must set out the name of the detainee, the date of the PDO and duration of custody.[106] But if disclosure of the grounds would prejudice national security, this information may be omitted from the order.[107] Detainees are not entitled to see the application nor are they entitled to any of the underlying evidence or materials supporting the application.[108]

Another potential problem that arises from the issuing process of a PDO concerns the rules of evidence. As the PDO regime is a system of executive warrants for both an initial and continued order, with no court involvement while the detention order is in force, therefore the ordinary rules of evidence do not apply. Thus, all related material can be placed before and considered by the issuing authority, not just the material that is admissible under the *Evidence Act 1995* (Cth).[109] Thus, the issuing of a PDO need not be based on admissible evidence, and can use unreliable evidence, including hearsay or false accusations.[110] The issuing authority can even consider the possible use of information obtained through torture, as there is no clear prohibition against that.[111] The sidelining of the rules of evidence has been criticized by commentators,[112] whereas the

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[105] *Criminal Code Act 1995* (Cth), ss 105.28, 105.31, 105.32

[106] *Criminal Code Act 1995* (Cth), ss 105.8(6), 105.12(6).

[107] *Criminal Code Act 1995* (Cth), ss 105.8(6)-(6A).

[108] Nesbitt, above n 76, 78.

[109] *Evidence Act 1995* (Cth), ch 3 – Admissibility of evidence.

[110] Matthew Zagor, 'Submission to the Senate Legal and Constitutional Committee - *the Senate Inquiry into the provisions of the Anti-Terrorism Bill (No.2) 2005*', Submission 260, 10.

[111] Human Rights Office, 'Submission to the Senate Legal and Constitutional Committee - *the Senate Inquiry into the provisions of the Anti-Terrorism Bill (No.2) 2005*', Submission 145, 5.

[112] Andrew Lynch and Alexander Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventative Detention' (2007) 10 *Flinders Journal of Law Reform* 105, 132 ("Clearly the apparent intention behind the PDO scheme is to detain a person in circumstances where there is insufficient evidence

AFP considers the lower evidentiary threshold crucial to the existing value of counter-terrorism measures, saying that it enables them to better protect the community and that terrorism is different from other offences in that its outcome are "much more unpredictable and potentially catastrophic".[113]

5.3.5 SPECIAL RULES APPLICABLE TO CHILDREN

A PDO cannot be applied for or made for a person under the age of 16 years.[114] However, children between 16 and 18 years of age can be the subject of a PDO. Unlike the detention pending inquiries provisions in the *Australian Security Intelligence Organisation Act 1979* (Cth), which provides that children aged between 16 and 18 years may be detained, but can only be subject to such a warrant provided they are suspected of involvement in a terrorism offence;[115] there is no higher threshold under the PDO regime for the detention of a child compared to an adult.[116]

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to support a charge for a terrorist offence"). See also Security Legislation Review Committee - *the Senate Inquiry into the provisions of the Anti-Terrorism Bill (No.2) 2005*, [2.48];Simon Bronitt, Miriam Gani, Mark Nolan and John Williams, 'Submission to the Security Legislation Review Committee - *the Senate Inquiry into the provisions of the Anti-Terrorism Bill (No.2) 2005*', Submission 210, 3.

[113] Committee Hansard, '*Inquiry into the Provisions of the Anti-Terrorism Bill (No 2) 2005*' (17 November 2005), 77.

[114] *Criminal Code Act 1995* (Cth), s 105.5.

[115] Under a "questioning and detention warrant" issued pursuant to the *Australian Security Intelligence Organisation Act 1979* (Cth), a terrorism suspect or a non-suspect can be detained for up to seven days and asked to produce records or other things. *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34F-34H. Apart from the "questioning and detention warrant", there is another warrant for the purpose of collecting intelligence in relation to a terrorism-related offence under the "Special Powers" provisions of the *Australian Security Intelligence Organisation Act 1979* (Cth). Namely, the "questioning warrant" allows ASIO to question adult non-suspects for up to a total of 24 hours and require them to produce records or other thing. Children aged between 16 and 18 years may also be subject to a questioning warrant provided they are suspected of involvement in a terrorism offence. *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34D-34E. See a detailed discussion of the ASIO warrant and a comparison with the detention pending inquiries regime in the MISA and the SISA in next Chapter.

[116] Section 34NA(4)(a) of the *Australian Security Intelligence Organisation Act 1979* requires, *inter alia*, the Attorney to be satisfied on reasonable grounds that it is likely that the child will commit, is committing or has committed a terrorism offence.

Apart from the most important requirement that "no child shall be deprived of his or her liberty unlawfully or arbitrarily", the *Convention on the Rights of the Child* includes two additional obligations: detention of children should be a "measure of last resort" and should only be for the "shortest appropriate period of time".[117] Furthermore, the Convention requires that the best interests of the child shall be a primary consideration in any sanctions concerning children, regardless of the form of the actions.[118] These additional obligations are arguably similar in substance to the proportionality test applied under Article 9(1) of the ICCPR, but appear to require a stricter approach by requiring the duration of detentions to be as short as possible.

The provisions in the PDO regime do not expressly specify whether or not the detention of a child is a "measure of last resort", nor do they require the AFP or the issuing authority to consider whether subjection a particular child will be in their best interests.

In terms of the procedural concerns, there is no obligation upon police to make inquiries about the age of a child to ensure that a child is 16 years old. The *Criminal Code* is silent on whether there is such an obligation on the police to question the detainee.[119] Given that both the initial and continued PDOs are *ex parte* in nature and no remedy is available from a State or Territory court until the detention is over, if a detainee under 16 is mistakenly detained, he or she does not have the opportunity to argue before an eligible authority and be released immediately.

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[117] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37(b) (ratified by Australia 17 December 1990).

[118] *Convention on the Rights of the Child*, art 3(1).

[119] The onus of proof is likely to be placed upon the detainee to satisfy the police on reasonable grounds that they are under 16. But, as there is no available jurisprudence in this area, it is hard to say whether that will become the practice in the future.

The PDO regime does make some special provision for children, by providing that they may receive visits from their parents or guardians and may also communicate by telephone, fax or email.[120] However, the period of contact is limited to 2 hours per day, unless the AFP officer exercises their discretion to permit additional contact.[121] The reasons for imposing limitations on children's contact with the outside world are unclear. Unlike the provisions in the ASIO Act, a PDO is not sought for the purposes of obtaining information from the detainee, so contact with a child's parents is not going to pose operational difficulties. Moreover, if the detainee is under 18 years of age, he or she cannot be detained with people over that age.[122] However, if there are exceptional circumstances, a senior AFP member can approve the person being detained together with persons who are 18 years of age or older.[123]

5.4 INSUFFICIENT PROCEDURAL SAFEGUARDS

5.4.1 NO EFFECTIVE RIGHT TO MERITS REVIEW / LIMITED RIGHT TO JUDICIAL REVIEW

The procedural guarantees contained in both Article 9(3) of the ICCPR and Article 5 of the ECHR requires that detainees must be able to challenge the grounds for their detention before a judicial officer. Like the remedy of *habeas corpus* in common law, the right to review the detention is not merely a safeguard against extreme cases involving abuse of power. It also recognises the very real possibility that the issuing authorities will make mistakes. Therefore, in the context of the PDO regime, a remedy

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[120] *Criminal Code Act 1995* (Cth), s 105.35(1).

[121] *Criminal Code Act 1995* (Cth), s 105.8(7).

[122] *Criminal Code Act 1995* (Cth), s 105. 33A(1).

[123] *Criminal Code Act 1995* (Cth), s 105. 33A(3).

which is adequate and effective must be one that provides an avenue for a person who is wrongfully detained or is being treated inhumanely to obtain redress before the wrongful detention or ill-treatment is over. However, Australia's PDO regime fails to provide such a review mechanism.

While the Security Appeals Division of the Administrative Appeals Tribunal (AAT) does have jurisdiction to undertake merits review of detention pursuant to a PDO, a review application cannot be made to the AAT while a federal PDO is in force.[124] AAT review is essentially limited to correcting the errors and awarding compensation afterwards. By contrast, both the ICCPR and the ECHR require that a person who is wrongfully detained be able to obtain redress before the detention comes to an end. In Australia's detention regime, the detainee cannot have a chance to challenge the detention until the federal PDO has expired. Neither the ICCPR nor the ECHR illustrate which right should override the other, nor do they give states the option of prioritising one over the other. Nevertheless, Australia's preventative detention regime obviously prioritises a right to financial compensation over the right to be released from detention which is unlawful or disproportionate, and the latter is so limited that a substantive review of the grounds of detention almost seems to be impossible.

Under the current scheme, the provisions create different avenues for judicial review depending upon the type of the order. If detained under a PDO made under the *Criminal Code*, detainees can apply to the federal courts for a remedy at any time. However, the grounds of such review are severely restricted in a number of respects. For example, judicial review is only allowed in the original jurisdiction of the Federal Court under the *Judiciary Act 1903* (Cth), and the High Court of Australia under the *Commonwealth Constitution*.[125]Thus, a detainee can apply to the Federal Court or the High Court for a

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[124] *Criminal Code Act 1995* (Cth), s 105.51(5)

[125] *Judiciary Act 1903* (Cth), s 39(B); *Australian Constitution*, s 75(v).

writ of *habeas corpus* to challenge the legality of detention or on narrow procedural grounds.[126] In either case, the available review is only a technical process of checking for procedural errors during the making process of the PDO, rather than one that allows a comprehensive assessment of the allegations of facts on which a PDO has been made or of the reasonableness and proportionality of the detention.

The only opportunity a detainee may have to access a substantive review of the detention is when he or she, having been firstly detained under a federal PDO, is subsequently brought under a state PDO which extends the detention period to up to 14 days.[127] The Supreme Court of State or Territory may have jurisdiction over a state or territory PDO.[128] At the state level, the Supreme Court may decide an application initiated by a detainee by way of re-examining the merits of a case. After the hearing of the case, during which the detainee does not need to be actually brought before the Court, the Supreme Court may quash the order and release the detainee immediately, confirm the detention order or give directions about the making of further PDOs.[129] In cases of an application made by a police officer detaining the persons, the Supreme Court may order to revoke the PDO if the police officer is satisfied that the grounds on which the order was initially made have ceased to exist.[130]

Indeed, there is substantive review of the justifications of a PDO at the state level, and the decision will not be affected by the original decision of the same Supreme Court that has made the order. Nevertheless, by differentiating between the available remedies in

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[126] *Judiciary Act 1903* (Cth), s 33(f).

[127] *Criminal Code Act 1995* (Cth), s 105.52.

[128] *Criminal Code Act 1995* (Cth), s 105.51(2).

[129] See, eg, *Australia Terrorism (Emergency Powers) Act 2003* (NT), s 21P; *Terrorism (Preventative Detention) Act 2005* (Qld), ss 71-4; *Terrorism (Preventative Detention) Act 2006* (WA), s 22; *Terrorism (Preventative Detention) Act 2005* (SA), s 17.

[130] See, eg, *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* (NSW), s 26M; *Terrorism (Preventative Detention) Bill 2005* (Tas), s 17; *Terrorism (Community Protection) (Amendment) Act 2006* (Vic), s 13O; *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT), s 31.

relation to a federal PDO and a state PDO, it creates unnecessary burdens upon the detainees. Although the Supreme Court of a State or Territory can quash a state PDO and order the immediate release of the detainee, the state or territory PDO will continue to be in force during the course of the proceedings.[131] Most importantly, detainees are not required to be brought before the courts, and the Supreme Court of State or Territory may deliver a decision without the actual appearance of the detainees.[132] International human rights law considers that authorities have the responsibility to bring a detainee to before the competent court as soon as possible and require the court to make a decision without delay, so as to protect detainees against prolonged detention. In most cases discussed in Chapters 3 and 4 dealing with prolonged detentions, states have failed to bring the detainees before a competent judicial body within a reasonable time. Although there is no direct cause and effect relationship between the two, actual appearance before the court can effectively reduce the possibility of prolonged detention, as well as protect detainees against inhuman treatment or possible abuses during the detention.

The preventative detention regime provides the detainee with a right to complain to the Commonwealth Ombudsman; the Ombudsman, however, is not empowered to make binding recommendations such as to release a detainee from unlawful detention. According to the conclusions delivered by the Human Rights Committee and the Strasbourg Court precedents, such a non-binding complaint mechanism is not an effective remedy for the purpose of the ICCPR.[133]

Overall, on the one hand the AFP has broad power to detain suspects and non-suspects through an extremely low threshold and without the involvement of effective

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[131] See, eg, *Terrorism (Preventative Detention) Act 2006* (WA), s 23(a); *Terrorism (Preventative Detention) Act 2005* (SA), s 18(1).

[132] See, eg, *Terrorism (Police Powers) Act 2002* (NSW) Part 2A, s 26I(5).

[133] Human Rights Committee, *Views: Communication No. 1014/2001,* 78th sess, UN Doc CCPR/C/78/D/1014/2001 (18 September 2003) [4.3] (‘*Baban v Australia*’).

judicial control; the detainees, on the other hand, have limited rights to challenge a federal and a state PDO, as the avenues for applications of review are limited. This kind of restriction on the review process is inconsistent with the international human rights standards, under which states are obliged to conduct a substantive review of the grounds of detention within a reasonable time.

5.4.2 LIMITED ACCESS TO INFORMATION

The Human Rights Committee stated in *General Comment 8* that information about the reasons for detention must be given if such detention is used for security reasons.[134] In *Drescher Caldas v Uruguay*, the Committee held that anyone who is arrested "shall be informed sufficiently of the reasons for his arrest to enable him to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded".[135] Therefore, simply informing the detainee that he is being arrested without providing any indication of the substance of the complaint against him is a breach of the ICCPR.

Although the issuing of a PDO must be explained to the detainee, the legislation only requires that the detainee be given a copy of the initial PDO, the continuing PDO or any extensions, and a "summary" of the grounds on which the order is based, as soon as practicable after the person is first taken into custody.[136] While these measures provide some access to relevant information, the material may be entirely general in nature and lack the detailed information needed to ensure the detainee knows the allegations of

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[134] Human Rights Committee, *General Comment 8, Right to Liberty and Security of Persons (Article 9)*, 16th sess, (30 June 1982), reprinted in Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 at 130 (29 July 1994).

[135] Human Rights Committee, *Views: Communication No. 43/1979*, 19th sess, UN Doc CCPR/C/19/D/43/1979 (21 July 1983) [13.2] ('*Drescher Caldas v Uruguay*').

[136] *Criminal Code Act 1995* (Cth), s 105.8(6).

facts upon which the PDO is based that would enable the detainees to contest the PDO properly. Therefore, unless the detainee is provided with a full statement of reasons that enable him or her to challenge a PDO in a federal court or in the AAT, the current scheme might be a violation of international human rights law.

Moreover, it is specifically provided by the provisions that the summary of grounds need not include any information which is "likely to prejudice national security" within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). The term "national security" has a very broad definition under that Act, which includes matters such as "political, military and economic relations between Australia, and foreign governments and international organisations".[137] Under this Act, the admissibility of sensitive evidence in civil or criminal litigation is determined by the Attorney General on the question of whether that information is "likely to prejudice national security".[138] In practice, even if the detainee may be able to obtain access to a wider range of information pertaining to his or her detention through the court's compulsory processes after commencing a judicial review application in a court, the Attorney-General could invoke the *National Security Information Act* and ask the Court to make non-disclosure orders or orders allowing the use of redacted evidence on security grounds.[139]

It is also worth noting that the *Criminal Code* provides that an application cannot be made under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[140] A significant feature of that Act is the entitlement to request written reasons for a decision.[141] The High Court has held that this is not a requirement at common law,[142]

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[137] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), ss 8, 10.

[138] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), s 17.

[139] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), ss 2, 3.

[140] *Criminal Code Act 1995* (Cth), s 105.51(4).

[141] *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 13.

meaning that there is no entitlement to written reasons in any type of PDO. While the detainee may request that copies of the summary and the orders be forwarded to his or her lawyers, the PDO provisions make it clear that this does entitle the lawyer to see any other document.[143]

In conclusion, the current PDO regime fails to meet the obligations set out in international human rights law, at least if applied as suggested above. Such limited access to judicial oversight not only contravenes the procedural requirement in international human rights law, but also has serious practical consequences. It might generally restrict a detained person's opportunity to challenge the legitimacy of the detention order, as the lack of information might make it impossible to present an innocent explanation for a matter central to the issuing of an initial or continuing federal PDO. At the very least, the *Criminal Code* should set out the minimum requirements for the content of a "summary" of the grounds on which an initial or continuing PDO is made. The summary of grounds should also notify the detainees of the factual basis upon which the detention decision is made. However, it is also true that this may involve some a sacrifice of security position. If the detainee is being notified that the exact ground of detention is that he has been detained to prevent a terrorist act occurring, this may risk alerting other conspirators that may exist. On one hand, the information should be sufficient to enable him or her to take immediate steps to challenge the detention; on the other, it should not affect the proposed aim of the detention regime. Without judicially tested jurisprudence, the question remains open of the extent to which the detainee should be provided with relevant information.

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[142] *Public Service Board of New South Wales v. Osmond* (1986) 159 CLR 656, 662 (Gibbs CJ). Relevantly, Gibbs CJ held that there "is no general rule of the common law, or principles of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expections, of other persons".

[143] *Criminal Code Act 1995* (Cth), ss 105.32(6), (9).

5.4.3 Restricted Contact with Family Members and Other Persons

Part IC of the *Crimes Act* provides persons under pre-charge detention with an express right to communicate with a friend, relative and legal practitioner before being questioned by the police.[144] In stark contrast, the preventative detention regime takes as its starting point that a detainee has no right of contact with the outside world, and is thus basically prevented from contacting anyone except where permitted by the *Criminal Code*.[145]

Under a limited list of exceptions, a detained person may contact the following people, but solely for the purpose of "letting the person know that the person being detained is safe but is not able to be contacted": one of the detained person's family members; if the person lives with people other than their family, one of those people; if the detained person is an employer, one their employees; if the detained person is an employee, their employer; with the permission of the detaining AFP officer, any other person.[146] A practical consequence of some concern appears to be that detainees in a state or territory prison will need to be held in solitary confinement to prevent contact with other people in the prison population; otherwise the contact restriction would seem to be practically meaningless. However, there is no such requirement of solitary

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[144] *Crimes Act 1914* (Cth), Part IC.

[145] *Criminal Code Act 1995*(Cth), s 105.34. This provision states that except as provided by other provisions, while a person is being detained under a PDO, the person is basically "not entitled to contact another person"; and may be prevented from contacting a particular person (for example, through a Prohibited Contact Order).

[146] *Criminal Code Act 1995*(Cth), s 105.37. An exception to the general rule applies when a Detainee is under 18-year-old. Under this circumstance, he or she may contact parents or guardians at the same time and may receive visits of two hours or more duration. See *Criminal Code Act 1995* (Cth), ss 105.8(7), 105.12(7).

confinement in the *Criminal Code.* [147] The detainee may contact a lawyer and the Commonwealth Ombudsman for the purpose of making a complaint under the *Complaints (Australian Federal Police) Act 1981* or an equivalent State or Territory authority with regard to the treatment during detention.[148] However, there is no explicit provision in the *Criminal Code* which allows the Ombudsman to visit a detainee in a police cell or State or Territory detention facility.

These restrictions raise issues in terms of humane treatment of detainees included in Article 10(1) of the ICCPR, which provides:

> Any persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

This broad general standard of humaneness in arrest or detention is further developed by similar provisions in the *Standard Minimum Rules for the Treatment of Prisoners* ("*Standard Minimum Rules*") and the *Body of Principles for the Protection of all Persons under any form of Detention* ("*Body of Principles*").[149] Rule 37 of the *Standard Minimum Rules* provides guidance as to the contact with outside world:

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[147] The provision only generally states that detainees should be held in a state or territory prison. *Criminal Code Act 1995*(Cth), s 105.27.

[148] *Criminal Code Act 1995*(Cth), s 105.36(1)-(2). See a more detailed discussion of the lawyer-client communication in the following section.

[149] *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 30 August 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 ('*Standard Minimum Rules*'); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, UN GAOR, 43rd sess, 76th plen mtg, UN Doc A/RES/43/173 (9 December 1988) ('*The Body of Principles*'). The Third Committee of the General Assembly in its 1958 Report on the drafting of the ICCPR stated that the *Standard Minimum Rules* should be taken into account when interpreting and applying Article 10(1) of the ICCPR, UN GAOR, 13th sess, 3rd comm mtg (8 December 1958) 160-173, 227-241. The Human Rights Committee has also indicated that compliance with the *Standard Minimum Rules and the Body of Principles* is the minimum requirement for compliance with the ICCPR obligation that people in detention are to be treated humanely. Human Rights Committee, *General Comment 21: The Right to Humane Treatment in Detention (Article 10)*, 44th sess (1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 at 153 (2003) [5]. See also Human Rights Committee, *Views:*

> Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.

Principle 16 of the *Body of Principles* states:

> Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment of the transfer and of the place where he is kept in custody.

These provisions are designed to avoid "incommunicado detention", which has been found to breach the right to be treated with humanity and dignity.[150] Under these rules, a detainee should be able to contact his or her family and other persons at *regular* intervals, and is entitled to notify them of his or her detention and the place where he or she is kept in custody. However, none of these rights have been granted to detainees under the current detention regime in Australia, which does not provide a right to receive regular visits from family members. Such contact is only guaranteed in the case of people aged between 16 and 18 years of age.[151] The strict limits on what may be disclosed to family and other persons also fail to meet the above requirements. Even if the PDO regime is established to prevent an imminent terrorist threat eventuating, it can hardly justify the exceptional approach taken here, as these strict limits placed on the detainees about the contents of communications with family and other persons are obviously disproportionate to the purpose.

Communication No. 458/1991, 51st sess, UN Doc CCPR/C/51/458/1991 (26 February 1991) [9.3] ('*Mukong v Cameroon*').

[150] This is guaranteed by article 10(1) of the ICCPR, see, eg, Human Rights Committee, *Views: Communication No.147/1983*, 26th sess, U.N.CCPR/C/OP/2 at 176 (1 November 1985) ('*Lucia Arzuaga Gilboa v Uruguay*').

[151] *Criminal Code Act 1995*(Cth), s 105.8(7).

Some departure from the minimum standards is permissible in exceptional circumstances. For example, the notification required under Rule 37 may be delayed for a "reasonable period" where the "exceptional needs of the investigation so require".[152] But, the Australian detention regime explicitly does not link to an investigation and places strict prohibition on questioning detainees.[153] As such, the exception does not apply to the PDO regime. Therefore, the very making of such orders as well as the process under which this occurs may affect rights protected under international human rights law, including the right of a detained person to be treated humanely and with dignity and the right not to be subjected to arbitrary interference with family life.[154]

Presumably the provision is designed to ensure that any other person who is involved in a terrorist conspiracy is not alerted to the person's detention. If this is so, the provision can hardly achieve its objective. If, for example, the detainee's family member is involved in the preparation of terrorist act, a mere notification of the detainee being detained without any further information will be just determined as greater disclosure.[155] On the other hand, if there is no conspiracy to commit a terrorist act at all, this scheme not only risks the danger of being actual incommunicado detention, but will limit the detainee's opportunity to challenge the unlawful detention as he or she cannot even notify the outside world of their detentions under PDOs.

Apart from limited contact with family members and other persons, the detainees are not entitled to disclose the fact that a PDO has been made, they are being detained for

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[152] *Standard Minimum Rules*, rule 37.

[153] *Criminal Code Act 1995*(Cth), s 105.42.

[154] See, eg, *ICCPR*, art 17(1).

[155] See also Lynch and Williams, above n 19, 53. They also argued that the unexpected disappearance of a real person itself is enough to their family and friends that there is something happened to him or her. The permitted message – "safe but is not able to be contacted for the time being" clearly implies that the person is being detained.

how long or any other information given during the contact.[156] It is a criminal offence with a penalty of up to 5 years' imprisonment to breach the rules of disclosure. The offence provisions further extend the non-disclosure obligation to those whom the detainee has contacted, his or her lawyer and family member or guardian. The regime is intended to strictly prohibit all secondary disclosures. If any person ever receives improperly disclosed information, it is an offence to intentionally pass that information on to another person.[157] The offences also apply to the interpreter and police officers monitoring the communication with a maximum penalty of 2 years as opposed to 5 years in their case.[158] Where the detainee is under 18 years, it is not an offence for the family member or guardian to let another know the detainee is safe but is not able to be contacted for the time being.[159] Nevertheless, it is an offence for the parent or guardian to disclose to the other person or guardian the fact the order has been made, that the person is being detained and the period of detention if the detainee has not contacted with that other parent.

The 5-year penalties that attach to such unauthorized communications are harsh. The information in question is not national security intelligence, but is merely basic information of the detention. Further, to provide that an intra-familial communication, such as a father's communication to a mother that their son has been placed on a PDO, should attract a jail term goes far beyond what is proportionate in the circumstance.[160] It

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[156] *Criminal Code Act 1995* (Cth), s 105.41.

[157] *Criminal Code Act 1995* (Cth), s 105.41

[158] *Criminal Code Act 1995* (Cth), ss 105.41(4)-(5).

[159] *Criminal Code Act 1995* (Cth), s 105.41(3).

[160] The Australian Council for Civil Liberties, 'Submission to the Security Legislation Review Committee - *the Senate Inquiries of the Anti-Terrorism Bill (No.2) 2005*', Submission 17, 23.

is a violation of the right to respect for family life enshrined in the preamble of the ICCPR.[161]

Given that the limited contact regime for family members is arguably of little practical utility for security reasons, more expansive contact rights should be included in the *Criminal Code.* For example, the contact rights available to people aged under 18 could be applied more generally, while the detainees would still be subject to the right of the AFP to prevent contact with particular persons through the use of prohibited contact orders. Greater scope should also be given for detainees to address pressing personal or business affairs instead of the permitted message of "safe but is not able to be contacted for the time being".[162] This could be facilitated, for instance, by making written communications which could be checked by the AFP.

5.4.4 PROHIBITED CONTACT ORDERS

A Prohibited Contact Order may be granted if the issuing authority for initial PDO or a continued one[163] is satisfied that the order is "reasonably necessary":

(a) to avoid a risk to action being taken to prevent a terrorist act occurring; or

(b) to prevent serious harm to a person; or

(c) to preserve evidence of, or relating to, a terrorist act; or

(d) to prevent interference with the gathering of information about:

  (i) a terrorist act; or

  (ii) the preparation for, or the planning of, a terrorist act; or

(e) to avoid a risk to:

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[161] Preamble of the *ICCPR*: "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

[162] Lynch and Williams, above n 19, 53.

[163] *Criminal Code Act 1995* (Cth), s 105.14A(2).

(i) the arrest of a person who is suspected of having committed an offence against this Part; or

(ii) *the taking into custody of a person in relation to whom a preventative detention order is in force; or in relation to whom a preventative detention order is likely to be made*; or

(iii) the service on a person of a control order.[164]

The *Criminal Code* sets out a wide range of grounds on which a Prohibited Contact Order is made. However, of particular concern is that the detainees' already limited communications with the outside world under a PDO may be further restricted by the operation of a subsidiary Prohibited Contact Order.[165] This regime confers a wide discretion on the AFP and other issuing authorities to issue an order to prevent communication by the detainee with a particular person. The threshold for making such an order is quite low, as the issuing authority's mere satisfaction that the exclusion "would assist in achieving the objectives of the preventative detention order" could justify the order.[166] In so doing, the order may be issued by a senior AFP member on the unsworn information of a more junior officer, or by another issuing authority when the continued PDO is made or at another time while the continued detention order is still in force.

The purpose of prohibited contact order was explained in the *Explanatory Memorandum* as:

> This is designed to ensure the "preventative" purpose of the [preventative detention] order is not defeated by the person in detention being able to contact other persons, including co-conspirators or those who might be in custody of evidence relating to a terrorist act, and, for example, instructing such a person to further the terrorist act in the

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[164] *Criminal Code Act 1995* (Cth), s 105.14A(4) (emphasis added).

[165] *Criminal Code Act 1995* (Cth), s 105.14(4)(e)(ii).

[166] Ibid.

person's absence, or destroy evidence of a terrorist act.[167]

This scheme has been criticised by commentators and human rights groups as disproportionate to its objective, and as embodying a discretion that is too broad and cannot be justified as a necessary measure.[168] If the purpose of the prohibited contact order is to prohibit the detainee from communicating with particular people who may be involved in the same terrorist act or conspiracy, the limited contact with family members and other people could well serve the purpose. As noted earlier, the range of persons who can be contacted under a PDO is already very limited, as well as the content of the communication, and thus there is no necessity to introduce a subsidiary and more severe prohibited contact order. Only when there is a greater scope for detainees to communicate with family members and other persons in the first place, can the executive be granted broader power to prohibit particular communication.

The operation of the prohibited contact order is also confusing in other respects. The AFP is not required to inform the detainee that a prohibited contact order has been made relating to the person's detention or the name of a person specified in the prohibited contact order.[169] Making a restriction order but keeping it from the detained person is itself questionable, and may potentially violate the right of obtaining an effective remedy for breach of individual rights. This basically means that the detainee may know nothing about the content of the prohibited contact order, and they will not even be able to suggest to the AFP that the order has been made on a mistaken basis. Furthermore, ignorance of the prohibited contact order makes it difficult for the detainees to comply

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[167] *Explanatory Memorandum* to the *Anti-Terrorism Bill (No.2) 2005*, 47.

[168] See, eg, Submissions to the Senate Legal and Constitutional Legislation Committee Inquiry into *Anti-Terrorism Bill (No.2) 2005* (November 2005), including Australia Council for Civil Liberties, Submission 17, 18; the Human Rights and Equal Opportunity Commission, Submission 158, [75], [76]; Public Interest Advocacy Centre, Submission 142, [4.7].

[169] *Criminal Code Act 1995* (Cth), s 105.28(3).

with it. As a practical matter, how can a person avoid contact if he does not know that he is meant to be avoiding particular people?

5.4.5 MONITORED COMMUNICATIONS WITH LAWYERS

Under the *Criminal Code*, if any contact takes place in a language other than English, an interpreter is needed during the contact so it "can be effectively monitored".[170] It is obvious that the police not only need to see the progress of the contact, but also will hear all conversations, including the ones between detainees and their counsel.

The monitoring of communications between the lawyer and his or her client is a breach of fundamental human rights norms at the international level. Under the *Body of Principles for the Protections of All Persons under Any Form of Detention* and the *Basic Principles of the Role of Lawyers*, a detainee's right to confidential communication with his or her lawyer is protected.[171] The monitoring of communication between clients and lawyers fails to respect the rules of confidentiality and is "an anathema to a system of justice which depends in significant part on the sacrosanct nature of client/lawyer communications".[172] As argued by the Australian Council for Civil Liberties,

> It has been a central tenet of the law and practice relating to lawyer talking to their clients in police custody for hundreds of years that communication cannot be listed to or eavesdropped on. The rationale for his longstanding provision is obvious and that is that

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[170] *Criminal Code Act 1995* (Cth), s 105.38(2).

[171] *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, UN GAOR, 43rd sess, 76th plen mtg, UN Doc A/RES/43/173 (9 December 1988) Principles 18(3), 29(2); *Basic Principles on the Role of Lawyers*, adopted by the Eighty United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 (7 September 1990) Principles 8, 22.

[172] See, eg, Submissions to the Senate Legal and Constitutional Legislation Committee Inquiry into *Anti-Terrorism Bill (No.2) 2005* (November 2005): Australian Council for Civil Liberties, Submission 17, 10-1; Women Lawyers Association of New South Wales, Submission 137; The Law Council, Submission 140, 16; and Victorian Council for Civil Liberties, Submission 221.

> if a preventatively detained person knows that his conversion with his lawyer is being monitored and tape recorded he simply will not be prepared to talk to his lawyer for fear that what he says will then be used to carry out further investigations and so result in the detained person being charged with a criminal offence and being further detained.[173]

Although the *Criminal Code* provides that any lawyer-client communication is inadmissible against the person in any proceedings in a court, it also confirmed that this lawyer-client immunity only extends to communications which fall within the strict limits for which access to legal advice is allowed under the *Criminal Code*.[174]

It is also an offence for a lawyer to disclose, during the period of the PDO, the fact that a PDO has been made in relation to the person; the fact that the person has been detained; the period for which the person has been detained; or any information which the person gives to the lawyer in the course of contact.[175] There are some exceptions that apply in relation to disclosure for a number of purposes, including the taking of proceedings in a federal court.[176] However, as the *Explanatory Memorandum* illustrates, those exceptions do not apply to a situation where the lawyer wishes to seek advice from a barrister. This is said to be because "it should not be necessary to disclose the fact of the particular person's detention to that barrister".[177] This restriction is quite odd and imposes unrealistic constraints upon the role of professional legal advisers. While the disclosure offence covers "*any* information which the person gives to the lawyer in the course of contact", it is difficult to envisage a situation that a lawyer can seek the barrister's advice, for example on a matter relating to conditions of detention, without

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[173] Australian Council for Civil Liberties, 'Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into *Anti-Terrorism Bill (No.2) 2005* (November 2005)', Submission 17, 11.

[174] *Criminal Code Act 1995* (Cth), s 105.38(5) : "for a purpose referred to in paragraph 105.37(1)(a), (b), (c), (d) or (e) is not admissible in evidence against the person in any proceedings in a court."

[175] *Criminal Code Act 1995* (Cth), s 105.41(2)(a)-(c).

[176] *Criminal Code Act 1995* (Cth), s 105.41(2)(d).

[177] *Explanatory Memorandum* to the *Anti-Terrorism Bill (No.2) 2005*, 64.

mentioning *any* information aforementioned. It would be better not to introduce the exception in the first place, rather than include a limited but unworkable exception.

Generally, these measures hinder the administration of justice. They also seriously impede a detained person in giving instructions to his or her lawyer, which unacceptably obstructs the latter in performing his or her duty to the client by challenging the lawfulness of the detention order in court. At the very least, the disclosure offences and restrictions which apply to contact with lawyers need to be amended so as to avoid imposing any unnecessary and unworkable constraints upon the legitimate lawyer-client communication. More specifically, the PDO regime should allow a lawyer to provide his or her legal advice to the detainees in connection with any matters without monitoring by the AFP.

5.5 CONCLUSION

Ever since the Australian government released an early draft version of the proposed *Anti-Terrorism Bill 2005* (Cth), it has been criticised by commentators and human rights groups, and sparked a response from several prominent Australian academics, who considered the preventative detention scheme as a major departure from accepted notions of how Australian law works.[178] Laws permitting detention of terrorist suspects without criminal charge mark a fundamental shift from the established criminal jurisprudence of criminalising persons for what they have done to preventatively detaining terrorist suspects, using an extremely low threshold, based upon what they

[178] See, eg, Hilary Charlesworth, Andrew Byrnes and Gabrielle McKinnon, 'Human Rights Implications of the Anti-Terrorism Bill 2005: Letter to the ACT Chief Minister' (18 October 2005); George Williams, 'Jumping the Gun on Terror', *The Age* (Sydney), 27 October 2005; Christopher Michaelson, 'Democracy Wilts Easily when Conducted Behind Closed Doors', *Canberra Times*, 18 October 2005; Michael Kirby, 'Liberty, Terrorism and the Courts' (2005) 9 *University of Western Sydney Law Review* 11, 26; Lynch and Williams, above n 19, 58.

might do. The PDO regime has even been criticised as more than a breach of the old "innocent until proven guilty" maxim, rather "it positively ignores the notion of guilt altogether".[179]

The rationale for the introduction of the new preventative detention scheme can be summarised as the need to respond to the terrorist threat that Australia currently faces. However, if the detention regime is drafted to prevent terrorist acts happening in the first place or to preserve related evidence, other alternatives which do not involve depriving suspects and non-suspects of their liberty for up to 14 days may better achieve these aims. Australia already has a range of laws which provide the Australian Federal Police with pre-trial detention powers and the powers of detention pending inquiries, to address the threat of a terrorist act occurring in Australia. Under the pre-trial detention regime in the *Crimes Act 1914* (Cth), the AFP has the power to detain a person whom they suspect of committing a terrorism offence for up to 48 hours or 7 days including the designated "dead time".[180]

That said, the government can always argue that the AFP needs to be empowered with additional pre-emptive measures to deal with the threat of terrorism. The government, which has the access to all relevant information, will make the judgment as to whether there is an emergency and the necessary measures to respond to the emergency. The preventative detention regime indeed looks an effective one considering the powers it confers on the police and the limitations it places upon individuals. However, without judicially tested justifications, it is difficult to reach a conclusion with regard to the necessity of the PDO regime. In fact, in considering the validity of control orders in *Thomas v Mowbray*,[181] the High Court deferred to the executive's assessment

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[179] MacDonald and Williams, above n 1, 48.

[180] *Crimes Act 1914* (Cth), ss 23DA(7), 23DB(9).

[181] *Thomas v Mowbray* [2007] HCA 33.

of the level of the threat posed by terrorism and the action necessary to prevent terrorism. But to what extent are we forced to defer to the executive's judgment, especially from a human rights standpoint? According to international human rights law as discussed in Chapters 3 and 4, even if these measures are necessary, they must still meet the requirement of proportionality, namely the limitations they put upon individual rights need to be strictly required by the current situation. Only by satisfying this criterion, can the detention regime be said to be non-arbitrary as required by international human rights standard.

Although statutory bills of rights like the *Human Rights Act* have been passed in one Australian State - Victoria - and one Territory - the Australian Capital Territory, the absence of a constitutional or statutory bill of rights in Australia means that Australian judges do not have a basic statement of the minimum human rights standards against which to assess the possible infringement of civil rights and fundamental freedoms by the PDO regime. As a state without constitutional or statutory protections of individual rights, the preventative detention scheme should be drafted to impose greater restrictions upon the broad executive powers. However, as discussed in this Chapter, this has not been the case here.

The fact that a person may be subject to a preventative detention order even though he or she may not have committed any offence necessitates particularly careful drafting of the whole scheme. Unfortunately, as noted above, the provisions are poorly drafted, and are problematic when measured against international human rights law. For example, several key terms, such as "imminent", "reasonable grounds to suspect", "substantially assist" and "reasonably necessary" are left undefined in the *Criminal Code*; the *ex-parte* nature of the issuing process of a PDO is arguably unfair for detainees and is in violation of the ICCPR; the 14-day period of detention is too lengthy compared to Australia's traditional 48-hour and 7-day pre-trial detention; the lack of court supervision during the operation of the federal PDO is inconsistent with international human rights law; though the Supreme Court of State or Territory indeed has jurisdiction over a State PDO, the

court involvement at the state level is problematic in a number of aspects; and the PDO regime does not provide with children between 16 and 18 years of age sufficient protections with their detention not being a "measure of last resort". Moreover, this regime lacks adequate and efficient procedural restraints which should be comprehensively incorporated in the regime and strictly followed by the executive, including guarantees of sufficient contact with family members and other persons, confidential communication with lawyers, access to information about detention grounds and the allegations of facts on which the PDO is based, and most important of all, effective judicial oversight of the detention. Without these basic procedural rights, the detention regime may be regarded as arbitrary.

It is questionable whether the preventative detention system is necessary at all. No PDO has been issued in the five years of the legislation, and the PDO regime has yet to be judicially considered. Apart from seeking a PDO under the *Criminal Code*, there are other more convenient options for the police to detain person without charge for seven days, especially considering that the AFP cannot question the detainee under a PDO.

That said, the fact that the PDO regime has never been utilised cannot of itself prove the system is not efficient or necessary. Without any established jurisprudence under the PDO regime, it is difficult to reach a conclusion assessing whether the regime is efficient in preventing terrorist acts happening in the first place. Nonetheless, the available evidence from Northern Ireland, where a similar preventative detention without charge regime was introduced in early 1970s,[182] suggests that the widespread

[182] The preventative detention without charge in Northern Ireland was introduced by the *Civil Authorities (Special Powers) Acts 1922* (Northern Ireland), in which the Minister of Home Affairs for Northern Ireland could order the internment without trial. Under Regulation 11, the Minister for Home Affairs of Northern Ireland or any member of the United Kingdom forces could order the detention of a person for an indefinite period based completely on their own subjective suspicion. The *Civil Authorities (Special Powers) Acts* were replaced by the *Northern Ireland (Temporary Provisions) Act 1972.* The Detention of Terrorists Orders regime was made under the Act. The powers of detention were not much changed except that anyone suspected of terrorism could be detained without trial only for a period of twenty-eight days. This emergency act was later replaced by other acts, but the detention without charge regime has been kept.

use of preventative detention had no beneficial effects. More than 2000 young people were held in internment camps on preventative grounds during the 1970s. By examining the past experience in Northern Ireland, commentators have warned that the denial of due process, derogation from the ordinary process of criminal justice, and limiting access to the courts severely damage the legitimacy of the states authorities using these powers,[183] and in fact cause the general application of preventative detention policy to be counterproductive.[184]

[183] For a detailed discussion of the detention measures in Northern Ireland, see, eg, John Hatchard, 'Chapter 17: The United Kingdom', in Andrew Harding and John Hatchard, *Preventive Detention and Security Law: A Comparative Survey* (Martinus Nijhoff Publishers, 1993) 265; Clive Walker, *The Prevention of Terrorism in British Law* (Manchester University Press ND, 1992); Paddy Hillyard, 'The War on Terror: Lessons from Ireland' (2005), 4 < http://www.ecln.org/essays/essay-1.pdf> .

[184] One of the leading experts in this area is Kieran McEvoy, who has argued that, according to the statistics regarding the degree and intensity of the violence in the aftermath of preventative detention, the intended objectives of preventative detention had clearly not been achieved. Kieran McEvoy, *Paramilitary Imprisonment in Northern Ireland – Resistance, Management, and Release* (Oxford University Press, 2001) 214-5.

CHAPTER 6 - SINGAPORE AND MALAYSIAN DILEMMAS

6.1 INTRODUCTION

Malaysia's *Internal Security Act 1960 (Act 82)* ("MISA") and Singapore's *Internal Security Act (Chapter 143)* ("SISA")[1] provided the basic frameworks for executive detention without charge in the context of the post-WWII armed communist, internal insurrections, and continue in application to the recent efforts of combating terrorist acts.[2] There are two detention regimes in the MISA and the SISA, namely the detention of an individual pending inquiries authorized by any police officer,[3] and the two-year period of preventative detention without charge authorized by the Minister with a possibility of extension for an indefinite period.[4]

Before independence, Malaysia and Singapore had both experienced prolonged authoritarianism,[5] which reached its height at the end of the colonial period. The confrontation with communist insurgents triggered the colonial government to officially declare a state of emergency that lasted from 1948 to 1964. Both the MISA and the SISA

[1] *Internal Security Act 1960* (Malaysia, Act 82, 1999 reprint) ('*MISA*'); *Internal Security Act 1965* (Singapore, cap 143, 1985 rev ed) ('*SISA*').

[2] Michael Hor, 'Law and Terror: Singapore Stories and Malaysian Dilemmas', in Victor V. Ramraj, Michael Hor and Kent Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2005) 273, 273-7.

[3] *MISA*, s 73; *SISA*, s 74.

[4] *MISA*, s 8; *SISA*, s 8.

[5] Malaya gained its independecne in 1957 (from the United Kingdom). In 1963 Singapore merged into the Federation of Malaya but in 1965 the city-state was pushed out of the federation and announced its second independence.

were originally enacted to tackle this social and economic chaos brought about by guerrilla warfare carried out by the Malayan Communist Party.[6] Due to the changing perceptions of race relations and broader social trends, the continuing internal communist insurrections resulted in governments' heavy reliance on the MISA and the SISA to stifle political dissent and suppress human rights activists in the name of communal harmony and national security.

It may seem odd to simply describe the preventative detention measures in Singapore and Malaysia as exceptional and extraordinary. Both the MISA and the SISA were enacted by legislature as necessary tools during real times of emergency, but (indefinite) preventative detention regimes have existed in both states from as early as 1948 when British colonial government introduced the *Emergency Regulations Ordinance 1948* and have been used ever since to detain domestic terrorists.[7] Though they were firstly adopted as short-term emergency measures to deal with internal insurrections, these measures have, nevertheless, gained strength over time and have become accepted as "normal" over time.

This chapter analyses the phenomenon in Singapore and Malaysia, namely that the exceptional emergency laws have been used as ordinary laws in both states for more than half a century and compares these preventative detention measures against international human rights law. Considering that it would be inappropriate and superficial for a comparative research project to only examine and compare the provisions of law, the first part of this chapter looks at the history of the MISA and SISA over more than 50 years to shed light on the government's arguments for the necessity, proportionality and legality

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[6] Therese Lee, 'Malaysia and The Internal Security Act: The Insecurity of Human Rights After September 11' (2002) *Singapore Journal of Legal Studies* 56, 57; See discussions of the state of emergency *infra* s 6.2.1.

[7] Hor, above n 2, 273.

of the preventative detention without charge. Specifically, it examines how the security laws were used to deal with the communist insurrection, how the interim emergency ordinances and the exceptional preventative detention measures were used as ordinary criminal law to stifle political dissents and how the old emergency rules have been used to detain terrorism suspects and non-suspects, such as human rights activists.

The detention regimes in Singapore and Malaysia differ from Australia in many aspects, but most importantly, both detention schemes were first introduced as emergency rules which were necessary in real times of emergency and were immensely useful in confronting opposition. The unique background, history, state identity and communal relations evidently shape the detention regimes and their actual operation in various ways. However, it is also true that international human rights law sets out the minimum standard for protections of individual rights; compliance with these are not an optional extra in the case of anti-terrorism laws but a basic principle that must be obeyed by states even in times of emergency. The second part of this chapter compares the preventative detention regimes with international human rights law, in light particularly of the potential for indefinite detention. This part further examined the procedural safeguards in the detention regimes and compares them against the standards enshrined in international human rights conventions and also in Australia's PDO regime, namely judicial review of the detention grounds, access to information about the allegations of fact on which the detention is based, regular contact with family members and other persons, and the confidentiality of the lawyer-client communication.

6.2 HISTORY OF THE INTERNAL SECURITY ACT

6.2.1 COMMUNIST INSURRECTIONS AND THE EMERGENCY REGULATIONS ORDINANCE 1948

In the years preceding the end of colonial rule in Malaysia and the end of the Japanese occupation in the Second World War, a communist insurgency arose that aggressively agitated for independence. Much has been written about the course and causes of the disturbance.[8] The starting point of the insurrection was the assassination of two white plantation owners in 1948, but was transformed into a compound of anti-colonialism, Chinese rights activism and political ideology.[9]

The British colonial government responded with the introduction of the *Emergency Regulations Ordinance 1948* (‘*Emergency Regulations*’)[10], the MISA and the SISA’s precursor. In times of emergency, the Ordinance gave wide-ranging powers to the High Commissioner who was empowered to make any regulations considered to be desirable for the public interest, including ones that altered ordinary criminal procedure.[11] The *Emergency Regulations* also allowed the authorities to modify, amend, supersede or suspend any written law,[12] as well as to impose curfews,[13] censor media publications,[14] and detain persons without criminal charge.[15] With these exceptional emergency measures, the British conducted mass arrests, carried out deportations, expanded their

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[8] See, eg, Anthony Short, *In Pursuit of Mountain Rats* (Cultured Lotus, 2000); The leader of the communist insurrection, Chin Peng, has published his version of the Emergency, *My Side of History* (Media Masters, 2003).

[9] Hor, above n 2, 274.

[10] *Emergency Regulations Ordinance 1948* (Malaysia, Ordinance No.10), s4(1),.

[11] The High Commissioner headed the British colonial administration and also served as Governor of the Straits Settlements, which comprised Singapore, Penang, and Malacca. Lee, above n 6, 57.

[12] *Emergency Regulations Ordinance 1948*, s 4(2)(p).

[13] *Emergency Regulations Ordinance 1948*, s 4(2)(c).

[14] *Emergency Regulations Ordinance 1948*, s 4(2)(a).

[15] By the end of 1948, 11,799 people were held in detention and on independence of the Federation 33,992 people had been detained. Abu Bakar Munir, ‘Chapter 8: Malaysia’ in Andrew Hardingand John Hatchard (eds), *Preventive Detention and Security Law – A Comparative Survey* (Martinus Nijhoff Publishers, 1993) 131, 132.

security departments, and detained communists and their sympathizers.[16] The High Commissioner declared a state of emergency on 12 July 1948 when the Malayan Communist Party sought to overthrow the government to establish a communist republic.[17] The ensuing 12-year struggle from 1948 to 1960 came to be known as the "Malayan Emergency", during which an estimated 6,710 terrorists and 1,865 members of the security forces were killed.[18] Indeed, the adoption of interim draconian counter-insurgency measures, coupled with an effective propaganda campaign, resulted in a reduction of communist attacks.[19]

Some of these emergency measures came before the courts in the form of criminal prosecutions. It is quite surprising to find that the courts often ruled against the prosecution and in favour of the accused during real times of emergency.[20] In one case, the court dealt with an offence of consorting with or being found in the company of someone in illegal possession of arms or ammunition,[21] which departed significantly from the usual criminal rules on complicity and carried three of the most severe punishments possible. Although it could not undertake a review of the constitutionality of the emergency regulations or simply abolish this unreasonable offence, the Court of Appeal of the Federation of Malaya rejected the prosecutor's statement that this was a

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[16] Karl Hack, 'Iron Claws on Malaysa: The Historiography of the Malayan Emergency' (1999) 30(1) *Journal of Southeast Asian Studies* 99, 102.

[17] Lee, above n 6, 57.

[18] Richard Winstedt, *A History of Malaya* (Marican and Sons,1982) 253.

[19] Hack, above n 16, 123-5.

[20] Hor, above n 2, 275

[21] *Emergency Regulations Ordinance 1948,* s 51(1): "Any person who consorts with or is found in the company of another person who is carrying or has in his possession arms or explosives [without lawful authority or excuse] in circumstances which raise a reasonable presumption that he intends to or is about to act with, or has recently acted with, such other person in a manner prejudicial to public safety or the maintenance of public order shall be … liable to be punished with death, or with penal servitude for life and whipping."

crime of strict liability.[22] The Court declared that the prosecution must prove that the accused knew of the illegal possession of arms or ammunition, although this was not explicitly required in the *Emergency Regulations*.[23] However, there was no subsequent government response to the court's decision, and the offence remains unchanged to this day in both the MISA and the SISA.[24] That said, it is also true that these provisions may be interpreted in accordance with this precedent and therefore the offence is less extensive that it appears on the face of the legislation.

Under some circumstances, the judicial initiatives were met with swift and exceptional legislative amendments. For example, in one notable example, the courts decided that the defence of duress should be applied to criminal offences under the *Emergency Regulations*, although there was no express provision to this effect.[25] After a series of successful pleas of duress, the Malaysian government eventually tired of the regular legal process and amended the Regulations to exclude that defence.[26] Although the judiciary endeavoured to maintain the rule of law in many respects, how the government behaved during the time of emergency represented a notorious example of how Carl Schmitt described a state of crisis: "the state remains, whereas law recedes."[27] In both cases, the government either simply ignored the courts' judgment or amended the emergency measures in question to legitimize its actions retrospectively. As will be discussed in later sections concerning the judicial review of detention orders, history repeated itself and similar government responses to court decisions have been seen again.

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[22] *Si Ah Fatt v PP* [1950] MLJ 161; See also Hor, above n 2, 275.

[23] Ibid.

[24] *MISA*, s 58; *SISA*, s 59(1).

[25] *Subramaniam v PP* [1956] MLJ 220 (P.C. on appeal from Malaya); See also Hor, above n 2, 275.

[26] The suspension of the defence of duress is now included in section 70 of the *SISA* and section 69 of the *MISA*.

[27] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans, University of Chicago Press, 2005) 12 [trans of: *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (2nd ed, 1934)].

6.2.2 DETENTION WITHOUT CHARGE IN MALAYSIA

On 31 July 1960, the state of emergency was officially declared over, but the indefinite detention regime was to be kept by the government as an effective and powerful weapon against internal security threats. In Malaysia, the power was to migrate from the *Emergency Regulations* into the MISA.[28] Rather than being merely an extension of the *Emergency Regulations*, the MISA was enacted on the basis of Article 149 of the *Federal Constitution of Malaysia* and became a permanent statute that could only be repealed by an act of Parliament.[29] Thus, the restrictive provisions of the *Emergency Regulations* which was an extraordinary law in a genuine time of emergency were codified into Malaysia's everyday law. The executive thus continued to hold powers to detain persons assessed as prejudicial to the security of Malaysia, with further broad powers to restrict freedoms of speech, association, and the press.

Then Deputy Prime Minister Tun Abdul Razak justified the enactment of the MISA by emphasizing the threat posed by 583 remaining armed terrorists in northern Peninsular Malaysia.[30] But this original legislative intent was seen diminished as the executive's subsequent actions proved that their focus and objective was to stifle political dissent, not

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[28] For a detailed discussion of the early history of the preventive detention regime in Malaysia, see I.W.Athulathmudali, 'Preventive Detention in the Federation of Malaya' (1961) 3 *Journal of the International Commission of Jurists* 100, and 'Preventive Detention in Malaysia' (1965) *Journal du Droit International* 543. Later, the power to preventatively detain without charge have been further secured in another two ordinance, the *Emergency (Public order and Prevention of Crime) Ordinance 1969* and the *Dangerous Drugs (Special Preventive Measures) Act 1985*. See a detailed discussion of those two preventative detention regimes in s 6.4.6.

[29] For further discussions of the special powers provisions in the two Constitutions, and the domestic validities of the MISA and SISA, see s 6.4.5.

[30] *Parliamentary Debates: Dewan Rakyat* (House of Representatives), 21 June 1960.

to protect the state from the national security threats as narrowly defined in the first instance.

Throughout the 1960s, arrests and detention without charge under the MISA mainly targeted those involved in communist activities, most of whom were members of the then Labour Party, which formed part of the Socialist Front.[31] Internal riots happened in the late 1960s provided the government with another ostensible justification for MISA arrests and detentions. In 1969, the most explosive race riots ever to occur in Malaysia erupted against the backdrop of the ruling party Alliance's first-time loss of its two-thirds majority in Parliament.[32] In the wake of these riots, over 200 persons were killed and many sections of Kuala Lumpur were devastated, which prompted the Yang di-Pertuan Agong (the King)[33] to declare a state of emergency. Although the *Emergency (Public Order and Prevention of Crime) Ordinance 1969* was enacted shortly after the riots, the MISA was upheld and used as a powerful weapon against "renewed racial hostility".[34]

The justification for use of the detention regime to stifle political dissent did not lapse at the end of the 1960s, but continued to exist during the 1970s. Due to the loss of political support for the Alliance's dominant party, and the violence of the riots, there

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[31] Nicole Fritz and Martin Flaherty, 'Special Report – Unjust Order: Malaysia's Internal Security Act' (2002-2003) 26 *Fordham International Law Journal* 1345, 1356.

[32] Ibid 1356-7.

[33] The term *Yang di-Pertuan Agong* described the King. The King acts on advice of the Cabinet led by the Prime Minister. *Constitution of Malaysia*, art. 3, (2): '…each of the other Rulers shall in his capacity of Head of the religion of Islam authorize the Yang di-pertuan Agong to represent him'; (3). '[t]he Constitution of the States of Malacca, Penang, Sabah and Sarawak shall each make provision for conferring on the Yang di-Pertuan Agong shall be Head of the religion of Islam in that State'; (5). '[n]otwithstanding anything in this Constitution the Yang di-Pertuan Agong shall be the Head of the religion of Islam in the Federal Territories of Kuala Lumpur and Labuan.'

[34] *Emergency (Public Order and Prevention of Crime) Ordinance 1969* (Malaysia, Ordinance No.1); Fritz and Flaherty, above n 31, 1356.

was a significant change of government policy at the domestic level.[35] New economic policies were introduced in early 1970s, alongside Islamic associations promoting an Islamic resurgence and claims for an "authentic Islamic identity".[36] Activists tended to criticize the government and took to the streets in protest, eventually provoked the fury of the executive and its application of the preventative detention measures. Actions to silence activists became characteristic of MISA-authorized arrest and detentions carried out during the 1970s.

In the early 1980s, Prime Minister, Mahathir Mohammad expressed his criticism of the MISA shortly after he assumed the post. This aroused public's expectations that the government's use of preventative detention orders would diminish. Nonetheless, political turmoil in 1987 saw the renaissance of these detention measures which were widely and constantly used by the government as an effective measure to repress political dissents. In October 1987, police arrested 107 persons in "Operation Lallang", including prominent leaders and parliamentarians of opposing parties, who were detained without charge under the MISA.[37] In 1987, Malaysia faced a severe economic downturn, and several accusations of financial misdeeds against the Prime Minister almost unseated him in the April 1987 intra-party elections.[38] Again, by resorting to the use of the internal security apparatus, Mahathir was able to consolidate his political base and survive the turmoil. All detainees were released afterwards, but the judicial decisions which derived from this incident and which prompted the government's introduction of amendments to both the

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[35] Fritz and Flaherty, above n 31, 1356-7.

[36] Meredith I. Weiss, 'What Will Become of Reformasi? Ethnicity and Changing Political Norms in Malaysia' (1999) *Contemporary Southeast Asia* 424.

[37] For a detailed account of "Operation Lallang", see Lawyers Committee for Human Rights, *Malaysia: Assault on the Judiciary* (New York: Committee for Human Rights, 1989) 11-4.

[38] Mahathir Mohamad's leadership of the United Malay's National Organisation was severly challenged by a series of events. See also Fritz and Flaherty, above n 31, 1357-8.

MISA and the *Constitution of Malaysia* to completely exclude merits review of the detention orders, continue to resonate today.[39]

In the late 1980s and early 1990s, Malaysia was one of the East Asian economic miracles and was credited for its impressive economic performance. The economic prosperity, alongside Mahathir's pronouncements that "Western-orient" human rights were incompatible with an Asian emphasis on community and public order, successfully let all the internal criticisms diminish. But that domestic compliance vanished when the leadership struggle between Mahathir and then Deputy Prime Minister Anwar Ibrahim emerged in late 1990s. Anwar and a number of his followers were arrested and detained without charge under the MISA. [40] Ever since then, there have been regular demonstrations calling for the repeal of the MISA and release of Anwar.[41] In April 2001, prior to a planned demonstration marking the second anniversary of Anwar's sentencing, Malaysian police detained 10 activists for allegedly taking steps to obtain explosives.[42] No evidence was presented to support these charges. The detainees later claimed the

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[39] The developments of judicial supervision in Malaysia and Singapore will be discussed below s 6.5.1.

[40] On September 20, 1998, Anwar was detained under the ISA but a few days thereafter he was held on criminal charges. In 1998, he was tried from four counts of corruption and in 1999 for sodomy. Both trials resulted in conviction and prison sentences. These trails were widely criticised for failing to conform to fair trial standards, and subsequently, two appeals on the corruption convictions have been dismissed. In 2004, the Federal Court of Malaysia reversed the conviction of sodomy and he was released. In July 2008, he was arrested again over allegations he sodomised one of his male assistants. The trial is still in progress. See also Fritz and Flaherty, above n 31, 1358.

[41] There are also many calls from human rights groups or activists. See, eg, The National Human Rights Commission of Malaysia (SUHAKAM), 'Press Statement' (31 July 2000) <http://www.hrsolidarity.net/mainfile.php/2000vol10no10/717/>; Asian Human Rights Commission, 'Malaysia: End 'Charade of Justice' at Anwar Trial' (25 March 2010) < http://www.humanrights.asia/news/forwarded-news/AHRC-FST-024-2010>; Human Rights Watch, 'Malaysia: Drop Political Charges Agasint Opposition Leader' (7 August 2008) <http://www.hrw.org/en/news/2008/08/06/malaysia-drop-political-charges-against-opposition-leader>.

[42] Tony Emmanuel, *Mass Violence Planned, New Straits Times* (Malaysia), 12 April 2001, A1. Seven of the 10 detained were leaders of opposition Parti Keadilan Nasional (National Justice Party), a political organization founded by Anwar's wife, Dr. Wan Azizah Wan Ismail. The remaining three were a leader of a prominent human rights NGO, a media columnist for alternative news source <www.malaysiakini.com>, and the director of the Free Anwar Campaign. Inspector-General of Police Tan Sri Norian Mai said the detainees were members of a "secret cell" that sought to violently overthrow the government.

interrogation sessions focused on their political beliefs and personal lives rather than the offences for which they had been arrested.[43] Most of the detainees have been detained under a two-year detention order.[44] It was not long thereafter that Prime Minister Mahathir Mohammad supported and rationalized the police arrest by saying "they could have been arrested under normal laws, but normal laws require certain evidence and procedures and processes which are, I suppose, from the police point of view, not effective in preventing something from happening".[45]

Before September 2001, the government had arrested suspects for alleged terrorist activity and ties to the Kumpulan Mujahidin Malaysia ('KMM') militant group.[46] For some of the arrests and detentions,[47] it seems that the government used the MISA as a weapon to stifle political dissent, given that the government was not producing decisive evidence to substantiate the arrests. These arrests and detentions prompted commentators to call for a review of the restrictive detention provisions of the MISA.[48] In 2001, a High Court judge urged the Parliament to review the MISA and minimize its abuses.[49] Shortly

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[43] Lee, above n 6, 60.

[44] Ibid.

[45] John Roberts, 'Nine opposition leaders in Malaysia arrested in government crackdown - Mahathir reacts to growing criticism', 30 April 2001, <https://wsws.org/articles/2001/apr2001/mal-a30.shtml> .

[46] Lee, above n 6, 60. KMM favours the over-throw of the Mahathir government and the creation of an Islamic state comprising Malaysia, Indonesia, and the southern Philippines. KMM is said to have close connection with Al-Qaeda.

[47] For example, nineteen were arrested in sweeps before September 11, including Nik Adli, the alleged leader of KMM and Chief minister of Kelantan Nik Aziz Nik Mat. Militants Received guerrilla training in Afghanistan. New Striats Times (Malaysia), 6 August 2001, 1. The arrests in 2001 was viewed as a heavy-handed ploy to maintain political control, instead of really focusing on protecing security. Lee, above n 6, 60; see also Barry Desker and Kumar Ramakrishna, 'Forging an Indirect Strategy in Southeast Asia' (Spring 2002) 25:2 *The Washington Quarterly* 161, 167-8.

[48] For example, High Court Solicitor Sivarasa Rasiah said: "One can see a momentum building in the public's sphere of society, saying that this law is archaic, anachronistic, and is being abused obviously .. and I think that call will grow". Karuna Shinsho (CNN Anchor), 'Malaysia's Human Rights Commission will Investigate Government's Detention of Seven People without Trial', *CNN International, Asia Tonight,* Transcript No. 072605cb.k16 (26 July 2001); see also in Brendan Pereira, 'Pulling the Reins on ISA', *The Straits Times (Singapore),* 22 July 2001, 34.

after the judgment, in May 2001, local human rights groups launched the "Abolish ISA Movement" which comprises 82 non-governmental organizations, and have campaigned for the abolition of the MISA ever since.[50] None of these anti-MISA campaigns has yet achieved its goal.

The terrorist attacks of 11 September further stifled this "Abolish ISA Movement" and provided a good opportunity for the government to significantly extend the detention without charge to terrorism suspects and non-suspects based on an extremely broad definition of terrorist in MISA. In three separate sweeps shortly after September 11, the government detained 43 militants with alleged connections to the KMM.[51] Twenty-three suspects were also alleged to be connected to the Jemaah Islamiah ('JI'), an extremist group that seeks to establish an Islamic union of Malaysia, Mindanao and Indonesia.[52] These arrests coincided with the detention of 13 JI militants in Singapore.[53] Fearful of the threats from Islamic extremists, citizens seem to be more willing to give the government the power to arrest and detain whoever it considered was related to the KMM, JI or even merely opposition parties.[54] While it is questionable whether some of these detainees

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[49] *Abdul Ghani Haroon v Ketua Polis Negara* [2001] 2 MLJ 689.

[50] See relevant in the official blog of the AIM (Abolish ISA Movement) <http://abolishisa.wordpress.com/about/> .

[51] Lee, above n 6, 61.

[52] Eileen Ng, 'Alleged Terror Network in Southeast Asia Widens', *Agence France Press*, 24 January 2002.

[53] For more on the region's experience with terrorism post-9/11, see Davinia Filza Binte Abdul Aziz, Gerardine Goh Meishan and Ernest Lim Wee Kuan, 'South East Asia and International Law' (2001) 5:2 *Singapore Journal of International and Comparative Law* 814.

[54] Such as the opposition party - Parti Islam Semalaysia (PAS). Several members of the PAS had been arrested and detained. In order to paint PAS as a party of extremist fanatics, government-owned television stations aired videos that interspersed scenes of the annual Pas party congress with footage of the Taliban. The 90-second clip was played nightly leading up to a by-election in Indera Kayangan, where the leading party – United Malay National Organization (UMNO) achieved a robust victory. In fact, indications of ties between PAS and KMM are weak. But any possible links were maganified by the UMNO in every way. For further discussion on this complicated political struggle, see Fritz and Flaherty, above n 31, 1357-9.

actually sought to commit terrorist acts, September 11 certainly gave Mahathir more political space to exercise this power.

Despite the Prime Minister Najib Razak announcing in April 2009 that a number of MISA detainees would be released and the MISA itself was under review, by July 2010, 16 people were still being detained under the MISA.[55] The longest-standing detainee was Shamsuddin Sulaiman, alleged to be a member of the JI, who has been detained for more than 8 years. The proposed review of the MISA has been limited to only five aspects, including detention without trial; the broad powers of the minister; the period of detention allowed; the rights and treatment of detainees; and the public perception that the MISA is used as a tool of political oppression.[56] The review was completed in late 2009, and it was widely reported that the amendment suggested by the review would be tabled in Parliament in July 2010.[57] But the proposed amendments, promised for over a year, have yet to be tabled in Parliament by early 2011.[58]

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[55] The National Human Rights Commission of Malaysia (SUHAKAM), 'Press Statement' (26 July 2010) < http://suaram-blog.blogspot.com/2010/07/gerakan-mansuhkan-isa-press-statement.html> .

[56] Ibid.

[57] 'ISA Amendments to be Tabled at Next Sitting, Malaysiakini', 24 December 2009 <http://www.malaysiakini.com/news/120554>; NNN-Bernama, 'Malaysia: Amendments to ISA will be Tabled at Coming Dewan Rakyat Sitting', *Brunei fm (Komuniti Online)*, 9 February 2010 <http://news.brunei.fm/2010/02/09/malaysiaamendments-to-isa-will-be-tabled-at-coming-dewan-rakyat-sitting/>; 'ISA Amendments Expected to be Tabled Next Month', *The Star (online)*, 29 June 2010 <http://thestar.com.my/news/story.asp?file=/2010/6/8/nation/20100608154112&sec=nation>. Similar reports could be found as early as the late 2009, but the amendment is yet to be tabled in the Parliament.

[58] According to the latest news report, the de facto law minister Nazri Aziz said the most significant part of the planned amendments were the detention pending inquiries period of 60 days will be merely reduced to 30 days. As such, the MISA still allows for the two-year detention with the possibility of extending to an indefinite period of time. Aliran, 'ISA Review Fails to Tackle Basic Rights Concerns', 5 January 2011 <http://aliran.com/3768.html>. (Aliran is Malaysia's oldest human rights group. Since 1977, Aliran has lobbied hard for wide-range reforms in all aspects of public life in Malaysia, and has been constantly called for the abolition of the MISA.)

The MISA was enacted for the purpose of fighting against the Communist insurgency which did threaten national security and social order more than five decades ago, and thus could be regarded as a genuine state of emergency. But the MISA was firstly introduced as a temporary measure, rather to be part of Malaysia's everyday law. As might be gathered from the above discussion, the Malaysian government has failed to convince that the MISA has been tailored to the just requirements of public order and security. Since its inception, the MISA has been called upon repeatedly to provide an expedient and effective method to suppress political dissents or human rights activists. As summarized by Malaysia's law minister Rais Yatim in 1995:

> The ISA's role in suppressing political, academic and social activities and above all constructive social pressure groups is admittedly successful when judged by reference to the 231 leaders in these fields who have been arrested and detained in the past two decades.[59]

While the Malaysian government insisted that there was a real and imminent threat to public order and national security after the terrorist attacks in September 11, most of the arrests and detentions under the MISA have been directed at persons allegedly responsible for minor offences or merely political dissent.[60] There may be circumstances of exceptional security threat that require pre-emptive measures, but in such circumstances the burden falls on the Malaysian government to prove the necessity and proportionality of the detention regime and its use. In the case of the MISA, not only has the government failed to justify their exceptional measures in the name of security, but the government's consistent use of the MISA to suppress political dissents incurs constant criticism that these arrests are motivated by impermissible purposes.

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[59] Rais Yatim, *Freedom under Executive Power in Malaysia* (Endowment, 1995) 299. These observations were made before Dr. Rais Yatim joined the Prime Minister's Department as the *de facto* law minister. In his book, he called for the repeal of the ISA. But after he became the *de facto* law minister, he has since recanted and says he believes in its deterrent value.

[60] 'Interview with Tan Sri Dato'Harun Mahum Hashim, Deputy Chairman of the SUHAKAM' (10 June 2002), *Aliran Press Statement*, 21 December 2002.

6.2.3 DETENTION WITHOUT CHARGE IN SINGAPORE

In Singapore, the power to detain without charge found its way into two separate pieces of legislation: the *Preservation of Public Security Ordinance* (PPSO) and the *Criminal Law (Temporary Provisions) Ordinance* (CLTPO).[61] Both Acts were enacted as temporary measures; the PPSO lapsed with the introduction of the permanent SISA which is modelled on the MISA, whereas the CLTOP has been amended from time to time and is still in force.[62]

When the PPSO was enacted, the Labour Front under the leadership of David Marshall achieved an impressive victory in the 1955 elections, and became the first local government in the post-colonial era. The People's Action Party (PAP), which was formed in 1954, was elected into opposition. Although Marshall acknowledged that the PPSO would be instrumental in curbing the activities of the internal communist disturbances, he

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[61] *Preservation of Public Security Ordinance 1955* (Singapore, Ordinance 25); *Criminal Law (Temporary Provisions) Ordinance 1955* (Singapore, cap 67, 1999 rev ed). The CL(TP)O, among other things, empowered the Government of Singapore to detain suspected criminals without trial. Part V of the Act provides that if the Minister is satisfied that a person has been associated with any activities of a criminal nature, the Minister may, with the consent of the Public Prosecutor, order the detention of the person for up to 12 months. According to Brown, the power to detain under s.3 of the PPSO in order to prevent conduct "prejudicial to the security of Malaya" and the power to detain people engaging in activites of criminal nature under s.30 of the CL(TP)O were deliberately kept in Singapore. Bernard Brown, "Administrative Internment in Singapore" (1961) 13 *Journal of the International Commission of Jurists* 126.

[62] When Singapore merged with Malaysia to constitute the Federation of Malaya in 1963, the federal Internal Security Act was extended to Singapore under s.74(1) of the Malaysia Act 1963. The PPSO was in force from 1955 to 1969. Between 1963 and 1965, when Singapore was part of the Federation, both the PPSO and the CL(TP)O were in force, the detention power under the federal ISA was held by the federal government, and the detention power under the PPSO were held by the state government of Singapore. The CL(TP)O was introduced firstly as a temporary measure, but has been renewed once every five years under a sun-set clause since 1955, and its future looks reasonably secure. The last renewal was in 2009, providing that the Act would continue in force for a period of 5 years from 21st October 2009 till 20 October 2014. See discussions of the PPSO and the CLTPO in Hor, above n 2, 277-9.

demonstrated a reluctance to apply the PPSO to quell the unrests.[63] This irritated the British, who had grown increasingly impatient with Marshall's inability to restore domestic order.[64] Marshall resigned in 1956 and was succeeded by Lim Yew Hock, who showed a particular willingness to utilize the draconian powers granted by the PPSO.[65] For example, when a student sit-in protest eventually escalated into widespread rioting across the island in October 1956, Lim Yew Hock's government carried out raids on union and opposition party headquarters, and detained many people under the PPSO, including the communist leaders of the PAP.[66] The government conducted a similar purge of communist activists again in the following year, which resulted in the arrest and detention of 11 members of the opposition party.[67]

The Singapore government's use of the emergency regulations as a weapon in the context of political struggle only grew stronger later after the replacement of the PPSO by the SISA in the 1960s. Following the end of the Malayan Emergency in July 1960, the PAP leadership began to lobby for Singapore to enter into a federation with Malaysia. This was mainly because Malaysia could provide the much-needed security, economic and political opportunities that would ensure Singapore's survival.[68] When Singapore joined the Federation of Malaysia in 1963, the MISA accordingly became Singapore's law. In 1963, the government's special security branch conducted raids on opposition

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[63] John Drysdale, *Singapore: Struggle for Success* (Times Books International, 1984) 115; Yee Chee-Wai, Monica Tze-Wei Ho and Daniel Kiat-Boon Seng, 'Judicial Review or Preventive Detention under the Internal Security Act – A Summary of Developments' (1989) 10 *Singapore Law Review* 66, 71.

[64] Damien Cheong, 'Selling Security: The War on Terrorism and the Internal Security Act of Singapore' (2006) 23 (1) *The Copenhagen Journal of Asian Studies* 28, 38.

[65] Ibid.

[66] Drysdale, above n 63, 157; Fong Sip-Chee, *The PAP Story: The Pioneering Years (November 1954 – April 1968)* (Times Periodicals,1979) 50.

[67] Fong, above n 66, 60-1.

[68]Hussin Mutalib, *Parties and Politics: A Study of Opposition Parties and the PAP in Singapore* (Times Media, 2003) 59.

party and communist groups, in which approximately 107 politicians and trade unionists were detained under the MISA, in order to prevent the subversion of Singapore.[69]

When Singapore left the Federation in 1965, the state of emergency had already been officially declared by Malaysian authorities to have ended five years earlier. Nonetheless, the Singaporean legal system took along with it the accompanying emergency legislation, presumably by virtue of section 13 of the *Republic of Singapore Independence Act* – a continuation of "existing law" provision.[70] The successive governments of Singapore have never made any attempt to abolish the SISA. Instead, they have sought to effectively incorporate the SISA into the legislative framework, thereby to ensuring the retention of exceptional executive power.

Like Malaysia, following the end of the state of emergency, the Singaporean government has used the SISA and detention measures in its campaign to eliminate alleged communist subversives, most of whom were merely human rights activists or political dissidents rather than potential threats to national security. In October 1966, 30 members of the Barisan Sosialis Party, established in 1961 by communists dismissed from the PAP, were arrested and detained under the SISA.[71] The government regarded it as "necessary to arrest and detain the principal culprits involved in the planning and execution of these illegal activities to impress upon Barisan Sosialis leaders and other Communist United front operators that resort to violence will not advance their cause".[72]

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[69] Felix Abisheganaden, '107 Held in Singapore Dawn Drive', *The Sunday Times*, 3 February 1963.

[70] *Republic of Singapore Independence Act 1965* (Singgapore, Act 9 of 1965, 1985 rev ed), s 13: "Subject to the provisions of this section, all existing laws shall continue in force on and after Singapore Day, but all such laws shall be construed as from Singapore Day with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act and with the independent status of Singapore upon separation from Malaysia."

[71] Jackie Sam, '30 Held in Singapore Swoop', *The Straits Times*, 28 October 1966.

[72] Jackie Sam, 'More Barisan Union Leaders in the Bag', *Sunday Times*, 19 October 1966.

Chia Thye Poh, the party leader of the Barisan Sosialis, was detained under the SISA for twenty-three years from 1966 onwards, in addition to eight years spent under house arrest. [73] During the 1970s, the Singaporean government believed that preventive detention was a necessity to respond to insidious communist threats.[74] The government constantly used the SISA to detain journalists, lawyers, university lecturers and students whom it suspected of having communist inclinations.[75]

In the 1980s, the Singaporean government claimed that a more insidious form of communist subversion had been detected, and the threats involved were regarded as serious enough for the government to once more employ the detention regime.[76] These official statements were questionable, as the evidence presented by the government did not clearly prove the detainees posed a potential threat to national security. For example, four Malays were detained in April 1987 for spreading false rumours of an impending race riot;[77] 16 people were arrested and detained for acts prejudicial to national security, most of whom were students, volunteer workers and social service participants;[78] and

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[73] Amenesty International, 'Restrictions on Political Prisoner Chia Lifted', 27 November 1998; 'Chia Thye Poh a Free Man', *The Straits Times*, 27 November 1998.

[74] Goh Keng Swee, 'The Nature and Appeals of Communism in Non-Communist Asian Countries', in Australian Institute of Political Science, *Communism in Asia: A Threat to Australia?* (Angus & Robertson, 1967) 53-4.

[75] Lee Boon Hiok, 'Singapore: Reconciling the Survival Ideology with the Achievement Concept', in Leo Suryadinata (ed), *Southeast Asian Affaire 1978* (ISEAS Publishing, 2003) 231-4.

[76] Cheong, above n 64, 41

[77] 'Four Detained for Race-Rumours', *The Straits Times*, 4 June 1987.

[78] Of those detained, four were full-time social workers of the Catholic Church, six were volunteer workers wit hthe Geylang Catholic Centre for Foreign Workers, four were part of the Third Stage drama group, two were members of the Workers' Party Editorial Committee and the alleged leader was a former student union activist who was then pursuing a law degree in the UK. 'Marxist Plot Uncovered', *The Straits Times*, 27 May 1987. Another six were arrested in subsequent raids.

some were detained merely because they were labelled as Marxist conspirators by the government.[79]

Despite the government's claims of a "Marxist conspiracy", and the detainees' public confessions possibly made as the result of coercion, many Singaporeans were in fact unconvinced that the detainees posed a real security risk. Furthermore, proof of the ill-treatment of the detainees during interrogation and detention provoked international outrage, which significantly tarnished Singapore's global image.[80] It is not difficult to come to the conclusion that the arrests and detentions were politically motivated. Francis Seow, a former Singapore Solicitor-General, wrote when he recalled the above mentioned arrests and detentions that:

> The plain unvarnished truth was that the prime minister had marked this group of sixteen young professionals, augmented by the later arrests of another six persons, for retributive action because of their effective assistance to opposition MP J.B.Jeyaretnam and the Workers' Party in snatching victory in the 1981 by-election and the 1984 general election.[81]

During the 1990s, the government's increasing use of the SISA to stifle political dissidents in the name of national security profoundly affected upon Singaporean society, particularly political and civil society groups,[82] as the government's level of tolerance of

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[79] The Ministry of Home Affairs claimed that Singapore had "to contend with new hybrid pro-communist gypes who draw their ideological inspiration from Maoism and Marxism-Leninism …". 'Marxist Plot Uncovered', *The Straits Times*, 27 May 1987.

[80] Roger Mitton, 'The Long Story: Keeping the Streets Safe', *Asiaweek*, 28 July 1993, 46.

[81] Francis Seow, *To Catch A Tartar: A Dissident in Lee Kuan Yew's Prison* (Yale University Southeast Asia Studies, 1994) 79. In 1988, Francis Seow was himself detained for 72 days, under the alleged collusion with an American diplomat to contest the forthcoming elections which was regarded as interference in the domestic affairs of Singapore. There was a rumour that Seow was deliberately incarcerated to prevent him from participating in the 1988 general election. Cheong, above n 64, 42.

[82] Christopher Tremewan, *The Political Economy of Social Control in Singapore* (Oxford University Press, 1994) 209.

political dissent was usually quite low. Moreover, the practice of "self-censorship" became common because the electorate grew more sophisticated. Political and civil society groups increasingly found it difficult to criticize the government.[83] But just like the situation in Malaysia, the events of September 11 and subsequent terrorist attacks have precipitated a reappraisal of the SISA as a law that defends the state against internal security threats.

In December 2001 and August 2002, the Internal Security Department (ISD) arrested and detained 37 people in connection with the terrorist activities.[84] Most of the detainees belonged to the Singapore branch of the JI network. According to the Ministry for Home Affairs, the JI's prime objective was to create a Pan-Islamic state in the region through the use of armed struggle. The JI was particularly dangerous as it set up its Singapore cell as an operational unit that was tasked with planning and coordinating attacks against Western, and in particular American, targets in Singapore.[85] The following investigation revealed that the cell was planning to attack the US embassy, naval vessels, schools, commercial buildings and the Yishun substation which is frequently used by many US armed forces personnel.[86] It was further discovered that the cell was planning to attack local targets, such as the Singapore-Malaysia water pipeline, the Changi International Airport, the Ministry of Defence and other civilian facilities.[87]

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[83] Some dissenters chose to launch their protests from overseas, while others chose to stay in Singapore and operated within the "Out-of-Bound" marders that delineated the level of political participation accepted by the Singapore government. Terence Lee, 'The Politics of Civil Society in Singapore' (2002) 26(1) *Asian Studies Review* 97, 108-10; Marc Rerceretnam, 'The 1987 ISA Arrests and International Civil society Responses to Political Repression in Singapore' (2006) 23 *The Copenhagen Journal of Asian Studies* 8, 16-7.

[84] Ministry of Home Affairs (Singapore), 'White Paper: The Jemaah Islamiyah Arrests and the Threat of Terrosim', cmd. No.2 of 2003 (7 January 2003); M. Nirmala, 'Restrictions on 12 with Terror Links', *The Straits Times*, 15 January 2004.

[85] Zachary Abuza, 'Tentacles of Terror: Al Qaeda's Southeast Asian Network' (2002) 24(3) *Contemporary Southeast Asia* 427, 456-7.

[86] Ministry of Home Affairs (Singapore), *What is the ISA?* (Times Books International, 2002) 11-4.

[87] Ministry of Home Affiars (Singapore), *White Paper 2003*, above n 84, 30-1.

Following the JI arrests, local politicians and commentators predicted that the terrorist threat to Singapore would continue unabated for many years.[88] Not only were the terrorist organizations in the region highly resilient, but Singapore was also closely aligned with the United States. In view of this, Singaporean government advocated a policy of constant vigilance against potential security threats.[89] The JI attacks on two Bali nightclubs in 2002, the Marriott hotel in Jakarta in 2003, the Australian Embassy in Jakarta in 2004, and a Bali shopping strip in 2005, prompted an expansion of security measures, and increased government spending on defence.[90] All of these have collectively contributed to the "climate of fear" in the city-state.[91] It is in this context that the justification for retaining the SISA, as an integral part of Singapore's defence strategy against terrorism, was widely accepted by the public.

In both Singapore and Malaysia, indefinite detention, maltreatment, physical and mental abuse, and public humiliation of detainees were common images associated with the security Acts. While the Malaysian government has been constantly criticized for abusing the security ordinance to restrict fundamental rights and liberties, the Ministry for Home Affairs of Singapore launched a series of public awareness promotions which were designed to recast the SISA as a vital tool to protect the city-state from terrorism threats and to dispel such negative perceptions of the SISA. The promotions began with the publication of a fifty-page white paper in January 2003, which provided a detailed report on the JI arrests, the mechanism of the SISA, and how the ISD's work effectively

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[88] Asad Latif, 'Terror Targe Singapore', *The Straits Times*, 15 December 2002; Daljit Singh, *The Post-September 11 Geostrategic Landscape and Southeast Asian Response to the Threat of Terrorism – Trends in Southeast Asia* (Institute of Southeast Asian Studies, 2002) 6.

[89] Reme Ahmad, 'Threat of Attack to Remain for Many Years', *The Straits Times*, 29 July 2004.

[90] Cheong, above n 64, 43.

[91] Lee Tee Jong, 'Singapore to Spend More on Defence to Fight Terrorism', *The Straits Times*, 15 June 2004.

protected the city-state from terrorism threats.[92] ISD officers were even present at the campaigns to respond to public inquiries. From 2002 onwards, the department has held its annual ceremony in public venues, which had in the past been conducted internally.[93] As observed by Roach, although a carefully worded government document is no substitute for public trials covered by a free press, "it is significant and may even be a sign of some movement towards liberalism that the government felt it necessary to prepare such an unprecedented document".[94] The publications of official documents were also complemented by the initiative to raise the profile of the ISD, which is particularly helpful in removing the "veil of secrecy" surrounding the internal operation of the department since its establishment.[95]

These promotional campaigns certainly lend credence to the government's argument that the SISA was still relevant and should not be abolished. However, it should also be noted that apart from the successful promotions, compared with Malaysia, Singapore government has been relatively restrained in its recent use of the security act.[96] As noted

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[92] Internal Security Department, 'White Paper - The Jemaah Islamiyah Arrests and the Threat of Terrorism', Coomd. 2 of 2003.

[93] 'Book on ISA To Be Released this Year', *The Straits Times*, 4 August 2002.

[94] Kent Roach, 'National Security, Multiculturalism and Muslim Minorities' (2006) *Singapore Journal of Legal Studies* 405, 418. See also Victor V. Ramraj, 'The Post-September 11 Fallout in Singapore and Malaysia: Prospects for an Accomodative Liberalism' (2003) *Singapore Journal of Legal Studies* 459. Ramraj escribed the government's publication of the fifty-page whit paper as some indications towards liberalism. This White Paper also received compliments from opposition politicians. For example, Chiam See Tong of the Singapore Democratic Alliance noted: "My party, the Singapore Democratic Alliance (SDA), welcome the Government's decision to introduce the White Paper on the JI detentions. The White Paper provides the factual background to the detentions and show how appropriate the Internal Security Act is in dealing with threats to national security". Chiam See Tong, 'Parliamentary Speech on JI White Paper', 15 August 2005.

[95] 'ISD's Role Not Over with End of Cold War', *The Straits Times*, 27 June 2000.

[96] After announced independence, Singapore government has been extremely sparing with the use of emergency powers in fifty years of existence. The reported decisions show examples of the use of emergency legislation in *Osman v PP* [1965-68] SLR 19 (concerning events in the context fo the Indonesian Confrontation, that started when Singapore was part of Malaysia but continued after the indepence of Singapore), and *PP v Goh Seow Poh* [1972-74] SLR 461 (emergency offences concerning the verification of sources of publications).

above, the arrests and detentions under the SISA have been far fewer than has been the case in Malaysia.

The city-state's small territory, strategic geographical location and lack of natural resources have made it heavily reliant on international trade including for obtaining the most basic necessities, such as food and water. The public is extremely sensitive to internal and external conditions that might adversely affect its trade and economy. Thus, the government's connection of national security to Singapore's economic growth and development has always proved to be a strong justification. Moreover, the Singaporeans have considerable faith in their government, and they trust the powerful PAP government. This further explains the public's tolerance for the SISA. As argued by home affairs minister Wong Kan Sen, without the SISA and the ISD, the public "would not have enjoyed the sense of safety and security today … It is because of the Home Team that Singaporeans can sleep well at night, in the comfort that there are thousands of Home Team officers keeping watch for them".[97]

6.3 DEFINING A TERRORIST ACT/TERRORIST

6.3.1 THE DEFINITIONS OF A TERRORIST IN THE MISA AND THE SISA

The new security environment has enabled the Singaporean and Malaysian governments to recast the SISA and the MISA as integral tools for defending the state against terrorism and other national security threats. However, there is a fundamental flaw in the SISA and the MISA – the definition of terrorism does not correspond to international understandings.

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[97] Mr Wong Kan Seng, 'Speech by Minister for Home Affairs at the ISD Intelligence Service Promotion Ceremony', 3 April 2003, < http://www.mha.gov.sg/news_details.aspx?nid=OTA5-AJbbOx6zQXU%3D>.

A "terrorist" has been defined in the SISA or the MISA as any person who:

(a) by the use of any fire-arm, explosive or ammunition acts in a manner prejudicial to the public safety or to the maintenance of public order or incites to violence or counsels disobedience to the law or to any lawful order;

(b) carries or has in his possession or under his control any fire-arm, ammunition or explosive without lawful authority thereof; or

(c) demands, collects or receives any supplies for the use of any person who intends or is about to act, or has recently acted, in a manner prejudicial to public safety or the maintenance of public order. [98]

This definition principally addresses those who use any fire-arm, explosive or ammunition in a manner "prejudicial to the public safety or to the maintenance of public order or incites to violence or counsels disobedience to the law or to any lawful order".[99] Merely carrying or having in one's possession or control any fire-arm, ammunition or explosive without lawful authority would fall within the definition of "terrorist". The definition even includes any person who "demands, collects or receives any supplies" for the use of another person who "intends or is about to act, or has recently acted, in a manner prejudicial to public safety or the maintenance of public order" to be terrorists.[100]

The definition of terrorist is so broad that can be used to cover a wide range of suspects who would not be labelled as terrorists in other jurisdictions, and who may then be subject to more severe punishment under the MISA or the SISA than under the ordinary criminal law. In essence, the ISA definition reduces 'terrorism' to the level of a

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[98] *MISA*, s 2; *SISA*, s 2.

[99] *MISA*, s 2(a); *SISA*, s 2(a).

[100] *MISA*, s 2(c); *SISA*, s 2(c).

general public safety offence involving firearms or explosives. Such a broad definition of terrorism is obviously one of the reasons why the governments in both states could use the security ordinance generally to stifle political dissent or human rights activists in the name of national security.

6.3.2 NEW DEFINITION OF A TERRORIST ACT IN MALAYSIA

In addition to the definition of "terrorist" in the MISA, there are other definitions of a "terrorist act" coexisting in Malaysian legislation, which have never been used since their introduction.[101] In 2003, an extremely confused definition of a "terrorist act" was introduced by the *Penal Code Amendment Act 2003* so as to better comply with Malaysia's obligations under Resolution 1373.[102] This definition was rectified by the *Penal Code (Amendment) (Amendment) Act 2007*, which replaced the 2003 version with a new section 130B of the *Penal Cod*e. The new definition resembles the Australian definition of a terrorist act in several ways, partly because both borrow their key elements from the UK's definition enshrined in the *Terrorism Act 2000*.

Malaysia's new definition requires the act to be carried out or the threat of the act to be made with the intention of advancing "a political, religious or ideological cause" and of intimidating the public or a section of the public, the government of Malaysia, any other foreign government, or any international organizations.[103] In addition to the harms

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[101] Although this section embarks on a brief description of the definition of a terrorist act in other terrorism-related legislation in Malaysia, and in the more recent terrorism financing legislation in Singapore, none of these definitions have ever been used in the preventative detention regime. This section was included primarily for the reason of comparing the definition of terrorism with Australia's domestic definition of a terrorist act.

[102] *Penal Code Amendment Act 2003* (Malaysia, Act A1210), s 130B.

[103] *Penal Code (Amendment) (Amendment) Act 2007* (Malaysia) (An Act to amend the *Penal Code (Amendment) Act 2006*), s 130B(2)(a)-(c),

of causing a person's death or serious injury to a person; or serious risk to the health or the safety of the public; or serious damage to property; or interfering with electronic systems, the new definition extends the definition by including the act or threat of using firearms, explosives; or releasing into the environment any dangerous, toxic substances.[104]

These changes have resulted in a much more restrictive definition and should be welcomed by the international human rights community.[105] The only question is when the Malaysian government will eventually decide to use the new definition of terrorist act, although the chances are quite low, as long as the government continues using the MISA.

6.3.3 NEW DEFINITION OF A TERRORIST ACT IN SINGAPORE

When the *United Nations Act 2001* was passed to facilitate the drafting of new anti-terrorism laws after 11 September 2001, Singapore's then Prime Minister Goh Chok Tong admitted that the definition of terrorism was "one of the most difficult issues", but said that the lack of agreement on the definition of terrorism itself should not prevent pre-emptive activities against terrorism threats.[106]

Unlike Australia and Malaysia, Singapore did not make the commission of terrorist acts an offence under its new anti-terrorism legislation.[107] The new definition of a

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[104] *Penal Code (Amendment) (Amendment) Act 2007* (Malaysia), s 130B(3)(a)-(k),

[105] See, eg, T.M.A.Luey, 'Defining "Terrorism" in South and East Asia' (2008) 38 *Hong Kong Law Journal* 129, 136.

[106] Singaporean Prime Minister Goh Chok Tong, 'Keynote Address at the Third International Institute of Strategic Studies Asia Security Conference', 4 June 2004.

[107] The "false threats of terrorist acts" is a specific offence in section 8 - Prohibition againt false threats of terrorist acts. *Untied Nations (Anti-Terrorism Measures) Regulations 2001* (Singapore, Act 44).

"terrorist act" can be found in the *Terrorism (Suppression of Financing) Act 2002* and the *United Nations (Anti-Terrorism Measures) Regulations 2002*.[108] Though the government did not explain the original legislative intent explicitly, the purpose of defining terrorism was to facilitate the criminalization of financing-related crimes, as a series of new anti-terrorism laws were introduced to prohibit the financing and supporting of terrorism, and there are no specific offences of committing "terrorist act" in any of the new laws.

The definition of a "terrorist act" in the *United Nations (Anti-Terrorism Measures) Regulations 2002* does not include the requirement of a political, religious or ideological motive, but only requires an intention to "influence" (as opposed to "compel" in the Malaysian definition of terrorism and "coerce" in Australian definition) the Government or "intimidate the public".[109] By not including the motive element in the definition of a terrorist act, Singapore chose a looser standard by targeting a broader group of "terrorists". More substantially, this definition excludes from its definition of "terrorism" the actions of state military forces governed by international law.[110] The definition contained in the *Terrorism (Suppression of Financing) Act 2002* made few changes to the previous definition such as adding international organizations as potential targets of terrorist act,[111] but the major elements were kept exactly the same as the previous one.

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[108] *Terrorism (Suppression of Financing) Act 2002* (Singapore, cap 325), Interpretion (1); *United Nations (Anti-Terrorism Measures) Regulations* (Singapore, Act 44), s 4.

[109] *Untied Nations (Anti-Terrorism Measures) Regulations 2001* (Singapore, Act 44), s 4(1)(b).

[110] The definition explicitly states that notwithstanding anything in previous sections, "a terrorist act does not include the activities undertaken by military forces of a State in the exercise of their offcial duties, to the extent that those activities are governed by other rules of international law." *Terrorism (Suppression of Financing) Act 2002* (Singapore, cap 325, 2003 rev ed), Interpretation (3).

[111] The additional part is to "influence or compel the government, any other government, or any international organization". *Terrorism (Suppression of Financing) Act 2002* (Singapore, cap 325, 2003 rev ed), Interpretation (1)(b)(i).

Although Singapore and Malaysia each has an updated definition of a "terrorist act" which resembles Australia's in several aspects, in practice they still resort to the old and extremely broad definition of terrorism enshrined in the MISA and the SISA. As was discussed in the earlier section about defining terrorism in Australia, this is the threshold issue in any discussion of anti-terrorism legislation. The definition of terrorism plays a crucial role in the actual operation of anti-terrorism offences and the preventative detention regime. Even a slight change to the definition may have significant consequences for the scope of any preventative detention regime based on it. With such a broad definition of terrorism in the MISA and the SISA, the respective governments are arguably able to preventatively detain people who commit only minor offences or who are not criminal suspects at all.

6.4 PREVENTATIVE DETENTION WITHOUT CHARGE

6.4.1 (INDEFINITE) PREVENTATIVE DETENTION ORDERS MADE BY THE MINISTER

Under the MISA, a person may be detained without trial for a period not exceeding 2 years if the Minister is satisfied that the detention "is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or to the maintenance of essential services or the economic life."[112] Under the direction of the President, the Minister for Home Affairs of Singapore can authorize the detention of a person for a period not exceeding 2 years on the similar suspicion or belief that the detention or that person is necessary in the interest of public order or security of Singapore.[113]

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[112] *MISA*, s 8(1).

[113] *SISA*, s 8(1): "If the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore or any part thereor or to the

Although the preamble to the MISA is clear as to the precise circumstances in which its provisions may be invoked,[114] the grounds under which persons may be detained without charge are very vague. Questions abound as to the exact meaning of the phrases "prejudicial to the security of Malaysia (or Singapore)", "prejudicial to the maintenance of essential services of Malaysia (or Singapore)" or "prejudicial to the economic life of Malaysia (or Singapore)".

The lack of clear criteria in both laws as to the grounds on which a person may be detained without trial gives rise to the possibility of persons being detained beyond the legitimate purposes of the MISA and the SISA. The Malaysian High Court has noted the broad scope and vague context under which a person may be detained under the MISA. In the case of *Abdul Ghani Haroon v Ketua Polis Negara and another application*, the High Court opined that the phrase "prejudicial to the security of Malaysia" is too general and vague in nature, as well as the phrase "prejudicial to the maintenance of essential services of Malaysia" and "prejudicial to the economic life of Malaysia".[115]

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maintenance of public order or essential services therein, it is necessary to do so, the Minister shall make an order…"

[114] The Preamble of the *MISA* provides the grounds for the adoption of the *MISA*: "Whereas action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia;

(1) to cause, and to cause a substantial number of citizens to fear, organized violence against persons and property; and

(2) to procure the alteration, otherwise than by lawful means, of the lawful Government of Malaysia by law established;

And whereas the action taken and threatened is prejudicial to the security of Malaysia; And whereas Parliament considers it necessary to stop or prevent the action; …"

[115] *Abdul Ghani Haroon v Ketua Polics Negara and another application* [2001] 2 MLJ 689. It should be noted that apparently vague statutory provisions may be given a more restricted scope of operation as a result of judicial interpretation in the common law tradition. Consequently, even the broad language of the grounds of detention under the MISA and the SISA may, as a matter of application, be read more narrowly.

An issue of greater concern is that the period of detention is not static. On the one hand, the period of detention may be reduced to less than two years, depending on the exercise by the Minister/President of his power to suspend the detention.[116] On the other hand, the period of detention may also be renewed by the Minister/President for a further two-year period at one time on the same grounds or on grounds different from those on which the order was originally made, or partly on the same grounds and partly on different grounds.[117] The most controversial part of the extension of detention orders in both states is that there is no limit on the number of times an order may be extended. Thus, a detention order under the MISA or SISA can be extended for an unlimited numbers of two-year periods, as long as the Minister or the President decides to do so.[118]

The power to impose or renew the detention of a person without limit is tantamount to an indeterminate term of imprisonment of a person without his being convicted of any offence, major or minor.[119] Moreover, the extension of the detention period for another two-year period or indefinitely could be based on the same grounds. It is unlikely that the police or national security department needs an indefinite amount of time to eliminate threats to national security posed by an individual. Although under certain circumstances, it is possible that detention beyond a particular fixed period is indeed necessary. Such open-ended detention must be extremely rare, for example, far rarer than the persons who have in actual fact been so detained. As will be discussed in later sections, neither

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[116] *MISA*, s 10; *SISA*, s 10. The Minister/President may also order to release the detainees on the recommendations made by the "Advisory Board". MISA, section 12; SISA, section 13. See relevant discussions about the "Advisory Board" operating as the internal review mechanism below.

[117] *MISA*, s 8(7); *SISA*, s 8(2).

[118] The indefinite nature of the period of detention will be discussed below s 6.4.4.

[119] The National Human Rights Commission of Malaysia (SUHAKAM: SURUHANJAYA HAK ASASI MANUSIA MALAYSIA), *Review of the Internal Security Act 1960* (Cetakan Pertama, 2003) 39 ('*SUHAKAM Report*'). The Human Rights Commission of Malaysia (SUHAKAM) was established by Parliament under the *Human Rights Commission of Malaysia Act 1999* (Malaysia, Act 597). Section 4(2) of the Act provides SUHAKAM with power to to undertake research by conducting programs, seminars and workshops and to "advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken".

government can justify the extension of detention for an indefinite time. Many suspects have been detained ever since 11 September, 2001 and have never been charged by law enforcement agencies.[120] As of July 2010, 16 people were still being detained under the MISA, some of whom have been detained for more than eight years.[121] It is hardly justifiable for such a lengthy period of detention based on the government's evidence.

Both The MISA and the SISA provide an internal review mechanism - the Advisory Board. While detention orders made by the Minister are in force, detainees can make representations to the Advisory Board against the detention order.[122] The members of the Advisory Boards are public servants.[123] Pursuant to the review mechanism, the Advisory Board makes its recommendations to the King of Malaysia who will presumably act on the advice of the Minister of Home Security or it makes corresponding recommendation to the President of Singapore, who may act on the advice but who also has a personal discretion to veto or uphold a detention.[124] During the two-year period of detention or any extensions, the Advisory Board must conduct a review of the detention at least once every 6 months under the MISA or every 12 months under the SISA.[125] Having said that, the Advisory Board does not have the power to order the release of a detainee even if it

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[120] Aliran's ISA Watch, 'List of known detainees as at 13 October 2010' <http://aliran.com/isa-watch>; Amnesty Internal, Singapore – Amnesty Internal Reports, 2007, 2008, 2009 and 2010 < http://www.amnesty.org/en/region/singapore>; *SUHAKAM Report*, above n 119, 38.

[121] The National Human Rights Commission of Malaysia (SUHARAM), 'Press Statement' (26th July 2010) <http://suaram-blog.blogspot.com/2010/07/gerakan-mansuhkan-isa-press-statement.html>.

[122] *MISA*, s 13(1); *SISA*, s 12(1).

[123] *MISA*, s 15; *SISA*, s 15. Although Advisory Board members are "public servants", this does not mean that they must follow the orders of the Executive, namely the Minister or the President. The purpose of the Act is to confer on the members the benefit of enjoying certain protections under domestic legislation, for example, the Singapore Penal Code makes it an offence for anyone to try to interfere with a public servant doing his or her duty. Penal Code (Singapore, cap 224), s 186: Obstructing public servant in discharge of his public functions.

[124] *MISA*, s 12(2); *SISA*, s 12(2). The President of Singapore normally acts on advice of the Advisory Board. The President would not uphold a detention where Advisory Board has not recommend it, and he has a personal discretion to reject the Advisory Board's's advice.

[125] *MISA*, s 13(1); *SISA*, s 13(1).

finds the detention is unlawful, but can only make recommendations for release or extensions.[126]

6.4.2 DETENTION PENDING INQUIRIES ORDERS MADE BY THE POLICE

Apart from the detention without charge regimes in the MISA and the SISA, the police in both states are also empowered to detain terrorism suspects for the purpose of inquiries for a period of up to 60 days in Malaysia and 30 days in Singapore.[127] Such detentions orders may be made on the grounds that the person "has acted or is about to act or is likely to act in any manner prejudicial to the security of Singapore/Malaysia or any part thereof",[128] or where the detention pending trial could be justified under the indefinite detention order made by the Minister/President.[129] The detention order can be authorized by any member of the security forces, any person performing the duties of a guard or watchman in a protected place, and any person generally authorized by a Chief Police Officer.[130]

The relationship between detention pending police inquiries and indefinite detention authorized by the minister is of concern. Technically, it is correct to conclude that the power of investigative detention lies with the police and that of preventative detention with the Minister. Therefore, the detention orders made by the police and the Minister are independent of one another. However, there is a general perception that in practice the Minister relies on the findings of the police during the investigations made under the

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[126] *MISA*, s 13(2); *SISA*, s 12(2).

[127] *MISA*, s 73; *SISA*, s 74. *MISA*, s 73(3): "for a period not exceeding sixty days"; *SISA*, s 74(4): "for a period not exceeding 48 hours" plus "an additional period not exceeding 28 days" (30 days in total).

[128] *MISA*, s 73(1)(b); *SISA*, s 74(1)(b).

[129] *MISA*, s 73(1)(a); *SISA*, s 74(1)(a).

[130] *MISA*, s 73(6); *SISA*, s 74(6).

detention pending inquiries regime, when deciding whether a person ought to be preventatively detained. More importantly, as the police in Malaysia and Singapore are under the direct command of the Minister, it is fair to assume that almost always that the police and the Minister will act in concert. Thus, some suspects may be initially arrested under an order made by the police, and may be re-arrested and detained subsequently under a detention order made by the Minister.[131] In a typical case, Nasharuddin Nasir was detained under the MISA for alleged involvement with KMM.[132] On November 2002, the High Court of Malaysia ordered the detainee's release after having found that the detention order made against him under section 73 of the MISA was tainted.[133] However, as soon as Nasir was released by the court, he was promptly rearrested, served with a two-year detention order issued by the Minister and immediately sent back to the detention centre.[134]

The detention pending inquiries scheme resembles the "questioning and detention warrant" in the *Australian Security Intelligence Organization Act 1979* (Cth) (*ASIO Act*).[135] These "Special Powers" provisions in the *ASIO Act* enable ASIO to seek a special warrant to compulsorily question and detain persons aged 16 years and above who are suspected of having information relating to terrorism offences.[136] The person needs to be

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[131] *SUHAKAM Report*, above n 119, 34-5.

[132] Amnesty International Malaysia, 'Nasharuddin Nasir: Detained Without Trial in the "War on Terror"', AI Index: ASA 28/010/2004 (August 2004) <http://www.amnesty.org/en/library/info/ASA28/010/2004/en>.

[133] *Nasharuddin bin Nasir v Kerajaan Malaysia and Others* (No.2) [2002] 4 MLJ 617, 623-8. Justice Suriyade upheld the habeas corpus application and held that the section 73 detention order was illegal for three main reasons. Firstly, the initial detention period was automatically extended. Secondly, the officer did not specifically identify the purpose of the extension. Thirdly, the respondents failed to satisfy the objective test. Each of the three grounds on its own would have been sufficient to tarnish the legal status of the detention.

[134] Amnesty International Malaysia, 'Nasharuddin Nasir: Detained Without Trial in the "War on Terror"', AI Index: ASA 28/010/2004 (August 2004) <http://www.amnesty.org/en/library/info/ASA28/010/2004/en>.

[135] *Australian Security Intelligence Organisation Act 1979* (Cth), Division 3, Part III.

[136] In addition to the "questioning and detention warrant", there is another warrant in the *Australian Security Intelligence Organisation Act* for the purpose of collecting intelligence in relation to a terrorism

suspected of having any knowledge of an offence, or of actual engagement in a terrorism-related offence. All that is required is that the issuing authorities, a consenting federal magistrate or judge appointed by the Attorney General, be satisfied that "there are reasonable grounds for believing that it will substantially assist the collection of intelligence that is important in relating to a terrorism offence" and that relying on other methods of collecting intelligence would be ineffective.[137] Under this warrant, a person could be detained for a maximum period of 7 days.[138] During questioning the person has no right to silence, no privilege against self-incrimination and may be subjected to body and strip searches.[139] The person's rights to contact third parties, including legal representatives, are severely circumscribed.[140]

Strictly speaking, neither the detention pending trial regime in the MISA or the SISA, nor the questioning and detention regime in the *ASIO Act* are schemes of preventative

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offence. The "questioning warrant" allows ASIO to question adult non-suspects for up to a total of 24 hours over the courseo of 28 days, and require them to produce records or other things. Children aged between 16 and 18 years may also be subject to a questioning warrant provided they are suspectd of involvment in a terrorism offence, which is a relatively higher threshold compared to the former one. *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34D, 34E.

[137] *Australian Security Intelligence Organisation Act 1979* (Cth), s 34G(1)(b). "Judge" is defined as a judge of a court created by parliament: *Australian Security Intelligence Organisation Act 1979* (Cth), s 4.

[138] *Australian Security Intelligence Organisation Act 1979* (Cth), s 34G(4)(c).

[139] Jude McCulloch and Joo Cheong Tham, 'Secret State, Transparent Subject: The Australian Security Intelligence Organisation in the Age of Terror' (2005) 38 *Australian and New Zealand Journal of Criminology* 400, 402. The PDO regime, nevertheless, explicitly prohibits questioning of the detainees during the periods of detention, and thus indirectly protects the detainees' privilege against self-incrimination. That said, even if the detainee can refuse to answer a question or to give information or evidence on the ground that the answer, information or evidence might incriminate the person, the authorities may easily resort to other different measures, such as the questioning and detention warrant under the *ASIO Act*. Under a questioning and detention warrant, the person must provide the information or records sought during questioning, regardless of whether such information or records are self-incriminating. Thus, there is no privilege against self-incrimination *per se*. However, information or documents provided by the person under questioning cannot be used against that person in subsequent criminal proceedings. *Australian Security Intelligence Organisation Act 1979* (Cth), s 34L(9).

[140] *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34J(1)(e), 34K(1), (9)-(11), 34G(5)-(6), 34E(3), 34ZO, 34C(3B),34D(4A), 34TA, 34U, 34CU. See also, McCulloch and Tham, above n 139; Andrew Palmer, 'Investigating and Prosecuting Terrorism: The Counter-Terrorism Legislation and the Law of Evidence' (2004) 27 *University of New South Wales Law Journal* 373, 381.

detention without charge simply for security reasons, as defined in Chapter 2. Although a person detained under these regimes may end up being released without any charges having been laid, there is at least a possibility that the person will be prosecuted for a terrorism-related offence. The key difference between these two types of regime is the purpose of detention. The preventative detention without charge regime is purely for detention in order to *prevent* terrorist acts happening, as demonstrated by the PDO regime in the *Criminal Code* and the indefinite detention without charge in the MISA and the SISA. All three detention regimes place broad restrictions on the detainees' right to have access to judicial supervision and to contact their family, friends and lawyers. The detention pending inquiries regime is, as its name suggests, a detention for the purpose of collecting evidence in relation to a terrorism-related offence. However, the police may make detention orders if they think such detentions could be justified under the indefinite detention order made by the Minister/President.[141]. As such, the detention pending inquiries regimes have exactly the same detention grounds as the indefinite detention regimes. That said, the detention pending inquiries regimes is different from the indefinite detention regime, particularly as regard application and issuing procedures, the period of detention and treatment of detainees.

6.4.3 RESTRICTION ORDER

In both Malaysia and Singapore, under certain circumstances where the executive is of the view that it is unnecessary to detain a person but still essential to prevent him or her from acting in any manner prejudicial to national security, the Minister may impose a Restriction Order on that person in respect of his activities, freedom of movement, or places of residence or employment.[142] A Restriction Order may prohibit a person from

[141] *MISA*, s 73(1)(a); *SISA*, s 74(1)(a).

[142] *MISA*, s 8(5); *SISA*, s 8(1)(b).

being out of doors between the hours specified in the order; require him or her to notify the police of his movements at specified times; or prohibit the person from addressing public meetings or from holding office, taking part in the activities of any organization or association, participating in any political activities; or travelling abroad or within Malaysia or Singapore as specified by the order.[143] Similar to the making and extension of the detention order, a Restriction Order can be extended for further two-year periods based on the same or different grounds, and there is also no limitation on the maximum period of a Restriction Order.[144] As an internal review mechanism, the Minister may "from time to time" re-examine the restriction order and decide whether to vary, cancel or add to any restrictions or conditions imposed upon that person by that order.[145] However, there is no clear requirement as to how often the Minister is required to review a Restriction Order.

In Australia's PDO regime, the corresponding restriction that may be imposed upon a person's activities is the Prohibited Contact Order, under which the detainee is prevented from communicating with a particular person.[146] Despite their different operational contexts, the Restriction Order shares with the Prohibited Contact Order a low threshold and both orders can be made by issuing authorities in a number of circumstances.[147] The major difference between the two orders is that the Prohibited Contact Order is to be issued as a subsidiary measure to the PDO, with the purpose of further restricting the detainee's communication with the outside world. Thus, the Prohibited Contact Order is

[143] *MISA*, s 8(5)(a)-(e); *SISA*, s 8(1)(b)(i)-(v).

[144] *MISA*, s 8(7); *SISA*, s 8(2).

[145] *MISA*, s 8(8); *SISA*, s 8(1)(b).

[146] *Criminal Code Act 1995* (Cth), s 105.15(4).

[147] The threshold for making a Prohobited Contact Order is quite low, being the issuing authority's mere satisfaction of the exclusion "would assist in achieving the objectives of the preventative detention order" could justify the order; or the making of the order is reasonably necessary to prevent a terrorist act occurring, avoid serious harm to a person, to preserve evidence relating to a terrorist act or to prevent interference with the gathering of terrorism-related information. *Criminal Code Act 1995* (Cth), ss 105.15(4)(e), 105.14A(4)(a)-(d).

only valid when an initial PDO or a continued one is in force, and can only last for a maximum of 48 hours at federal level. The Restriction Order is more like an in-house detention to be applied when the police regard it as unnecessary to detain a person in a detention centre, while a Restriction Order is independent of a detention order and can be extended for an indefinite period by the executive whenever it is necessary.

6.4.4 THE LENGTHY/INDEFINITE PERIOD OF DETENTION

Obviously, the major concern rising from the detention regime, both the inquiries and indefinite detention, is the lengthy period of detention of individuals under anti-terrorism schemes. The prolonged period of detention in both schemes obviously exceeds the permissible period of detention as proscribed by the Human Rights Committee and the European Court of Human Rights. That that, the Human Rights Committee also accepts a relatively longer period of detention provided it is necessary and include periodic review during the detention. Accordingly, at least the following aspects shall be considered in the context of Malaysia and Singapore's emergency ordinance: whether the executive need two years to prevent an individual constituting a terrorism threat, whether the police need 60 days or 30 days to detain suspects pending inquiries, and even if the period of time could be justified fifty years ago during real times of emergency, whether it is still appropriate nowadays.

6.4.4.1 Detention Pending Inquiries Regime

The 60-day and 30-day periods of detention pending inquiries have been controversial and attracted criticism for being too long and disproportionate to the purpose of the power. At the Open Inquiry conducted by the Human Rights Commission of Malaysia – (SUHAKAM) in 2003, the Police informed SUHAKAM that the main purpose of the 60-day detention was to gather intelligence from a person, relating to his or her alleged

involvement in activities prejudicial to the national security of Malaysia.[148] The Police claimed that they required this period to gather *additional* information about the extent of the person's involvement in such activities, as well as the role which the person may play in an organization involved in these activities.[149] However, as claimed by the Police themselves, prior to the arrest, sufficient intelligence would already have been collected by the police to identify and target the suspect.[150] There seems no compelling cases that the police should be allowed or need *another* 60 days to detain suspects. It could be argued that the MISA was first introduced in the 1960s, an era when the police could not benefit from the modern technology and there is no efficient intra-state or intra-department cooperation, but with recent advances in practice, this cannot be used as an excuse for never planning to introduce any amendments to reduce the period of detention accordingly.

In fact, under the original provisions of the MISA, the Police could only detain a person for a maximum period of 30 days. The period was increased to the present 60 days by the *Internal Security (Amendment) Act 1971*.[151] According to the *Explanatory Statement* accompanying the Bill for the *Internal Security (Amendment) Act 1971*, the increase in the maximum period of time was made "based on difficulties which have arisen in practice".[152] According to the *Parliamentary Debates* of 30 July 1971, the practical difficulties mentioned in the above statement were the asserted insufficiency of 30 days for the files of a person detained under section 73 of the ISA to be brought from the police department at district level to the headquarters of the Police and subsequently

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[148] *SUHAKAM Report*, above n 119, 36-7.

[149] Ibid, 37-8.

[150] Ibid, 36.

[151] *Internal Security (Amendment) Act 1971* (Malaysia, Act A61).

[152] *SUHAKAM Report*, above n 119, 37, quoting Parliament Debates, 'Dewan Rakyat' (30 July 1971) [4095].

to the Ministry of Home Affairs.[153] Even if this rationale was reasonable then, it is no longer a valid justification given the advances in internet, telecommunication and transportation since that time.[154]

Consequently, the power to deprive a person of his or her liberty for up to 60 days under the MISA and 30 days under the SISA appears to be inappropriate and disproportionate to the aim of the power – to gather *further* intelligence on the detained person's alleged involvement in acts prejudicial to the security of Malaysia and Singapore. According to Nazri Aziz, the de facto law minister of Malaysia, the period of detention pending inquiries will be reduced from 60 days to 30 days in the proposed amendments to the MISA.[155] However, as noted above, as of the end of 2011 the foreshadowed amendments have yet to be tabled in the Malaysian Parliament.

6.4.4.2 Indefinite Detention without Charge

The indefinite nature of the detention regimes in Malaysia and Singapore has long been criticised as at odds with the basic principles of the rule of law, and as disregarding the fundamental human rights protections under international law. When assessing whether a prolonged detention is acceptable under the ICCPR, the Human Rights Committee stressed that the requirement of a "sufficiently frequent judicial review" of the grounds of detention within domestic legal system.[156] Thus, if there are sufficiently

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[153] *SUHAKAM Report*, above n 119, 37.

[154] Ibid.

[155] Aliran, 'ISA Review Fails to Tackle Basic Rights Concerns', 5 January 2011 < http://aliran.com/3768.html>.

[156] Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) [9.4] ('*A v Australia*'); Human Rights Committee, *Views: Communication No.1051/2002*, 18th sess, UN Doc CCPR/C/80/D/1051/2002 (10 January 2002) [10.2] ('*Ahani v Canada*')

frequent judicial reviews during the whole detention process to assess the merits of the grounds of the detention, the detention regime in question may be considered as non-arbitrary even if the detention period is relatively longer than usual. It is unlikely that an indefinite detention without charge is permissible under the international human rights law. Although the Human Rights Committee did not consider there is a rule of customary international law to prohibit a lengthy period of detention, the Strasbourg Court applied a broad interpretation of the term "promptness".[157] Thus, notions such as justice, reasonableness, appropriateness have been incorporated in the understanding of the time constraint of preventative detention without charge. In so doing, a two-year detention order with the possibility of extending it for an indefinite period of time is plainly inconsistent with international human rights standards.

Furthermore, there is no effective periodic review of the detention order during the whole detention process. Although the Advisory Board is required to conduct a review at least every 6 months under the MISA and every 12 months under the SISA,[158] the Advisory Board is just an *advisory* body that can only make recommendations to the King of Malaysia or the President of Singapore.[159] The Advisory Board is not empowered to decide on the lawfulness of the detention order and to order the release of the detainees if the detention in question is unlawful.[160] Therefore, neither regime provides detainees with sufficiently frequent judicial reviews to periodically review the continuation of detention orders.

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[157] See discussions above s 4.3.3.

[158] *MISA*, ss 12(1), 13(1); *SISA*, ss 12(1), 13(1).

[159] *MISA*, s 12(2); *SISA*, s 12(2).

[160] The courts can not decide on the lawfulness of the detention order and to order the release if the detention is unlawful. For discussion of the limited nature of the courts' jurisdiction to review detention, see below s 6.5.1.

Third, the indefinite detention regime is not proportionate to its purpose, as other less rights-violative measures can well achieve the purpose of protecting national security. The Prohibited Contact Order provides the police with a convenient approach to detain non-suspects, but in a manner that inflicts lesser harm upon individual rights – an in-house arrest without actually being detained in prison. Terrorism suspects can be preventatively detained under the detention pending inquiries regimes for a maximum of 60 days under the MISA and 30 days under the SISA. The only difference between the indefinite detention regime and the inquiries regime is that the former is based the assessment of police, while the later is based on the judgment of the Minister/President. But, under both regimes, a detention order may be issued on the ground that the detainee might act in a manner prejudicial to the national security. The inquiries regime includes a further detention ground that if any police officer believes that the detention in question would be justified under the indefinite detention regime, he may made a detention order accordingly. In so doing, the two detention regimes have the same purpose, and appear to be essentially the same schemes. When the states obviously have other less rights-restrictive measures that can achieve the same purpose of protecting national security, it is unreasonable that a terrorism suspect or non-suspect may be subject to a two-year or even an indefinite detention.

Compared to similar laws in other jurisdictions that provide for shorter periods of detention for the purposes of investigation or merely to prevent the detainees from committing terrorist acts, even the two-year period of detention without any further extensions is a very lengthy period. Australia's PDO regime empowers the AFP to detain the subject for up to 48 hours at Commonwealth level and this can be prolonged to 14 days under state and territory laws.[161] Under ASIO's questioning and detention warrant, a

[161] The new Division 105 was inserted by *Anti-Terrorism Act (No 2) 2005 (Cth)* into the *Criminal Code Act 1995* (Cth) as part of Australia's national counter-terrorism policy.

person in question can only be detained up to 7 days.[162] The *Terrorism Act 2000* (UK) provides for the detention by the police of a suspected terrorist for a period of up to seven days, which was later extended to 14 days by the *Criminal Justice Act 2003* and eventually to 28 days by the *Terrorism Act 2006*.[163] The *United States Immigration and Nationality Act* provides for the detention of a foreign national who is suspected of being a threat to the national security by the Attorney General for a maximum period of 7 days.[164] The Canadian *Criminal Code* only allows for a pre-trial detention for up to 72 hours.[165]

However, there are evident differences among these ordinances and domestic situations, and thus a superficial comparison of the provisions may not be determinative. The detention regimes in the UK, the USA, Australia and Canada are established in democratic states with a well-established rule of law and a stable and developed legal-political culture of accountability, where even a relatively long period of detention may be operated in an appropriate manner. In stark contrast, the MISA and SISA were first enacted as emergency rules to combat communist activists, most of whom were intended to overthrow the government. Thus, the detention regimes in Malaysia and Singapore could be justified as necessary measures in real times of emergency. But necessity alone cannot justify the obvious disproportionate detention measures. As discussed in Chapters 3 and 4, other than meeting the requirement of necessity, any detention measures must also be carefully construed to be proportionate to its purpose. It is unreasonable,

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[162] *Australian Security Intelligence Organisation Act 1979* (Cth), s 34G(4)(c).

[163] *Terrorism Act 2000 UK* (UK) c 11, s 25; *Criminal Justice Act 2003* (UK) c 44, s 7; *Terrorism Act 2006* (UK) c 11, s 23.

[164] *Immigration and Nationality Act of 1965*, Hart-Celler Act, INS, Act of 1965, Pub.L. 89-236, s 236A. This section was inserted by section 412 of the USA *Patriot Act.*

[165] The Canadian Parliament passed Bill C-36, namely the *Anti-Terrorism Act* (S.C. 2001, c.41), which received royal assent on 18 December 2001 inserted a new Part II. 1 – Terrorism into the *Criminal Code*.

disproportionate and unjust that terrorism suspects and non-suspects may be detained under these draconian emergency rules for an indefinite period.

6.4.5 SPECIAL POWERS PROVISIONS

Both the *Federal Constitution of Malaysia* and the *Constitution of the Republic of Singapore* have a separate chapter containing guarantees of fundamental individual liberties and rights, including the right to due process,[166] the right to property,[167] the right to profess and practice religion,[168] freedom of speech,[169] freedom of association[170] and freedom from slavery.[171] Measures set out in the MISA and the SISA to deal with offences prejudicial to national security, such as indefinite preventive detention without charge, obviously conflict with considerations of fundamental liberties guaranteed by the *Federal Constitution of Malaysia* and the *Constitution of the Republic of Singapore* as listed above. Usually, these constitutional guarantees should be effective in protecting individual rights. The detention regimes in both states pose direct challenge to constitutions and it might be expected that they would be declared unconstitutional if a challenge was made in the courts.

Ironically, the origins of the power to indefinitely detain without charge can be traced back to the *Federal Constitution of Malaysia* and the *Constitution of the Republic of Singapore*. Those fundamental protections of individual rights that one would normally

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[166] *Federal Constitution* (Malaysia, 2006 reprint), art 6; *Constitution of the Republic of Singapore* (Singapore, 1999 reprint), art 9.

[167] *Federal Constitution* (Malaysia), art 6

[168] *Federal Constitution* (Malaysia), art 10; *Constitution of the Republic of Singapore* (Singapore), art 15.

[169] *Federal Constitution* (Malaysia), art 11; *Constitution of the Republic of Singapore* (Singapore), art 14.

[170] *Federal Constitution* (Malaysia), art 10; *Constitution of the Republic of Singapore* (Singapore), art 14.

[171] *Federal Constitution* (Malaysia), art 13; *Constitution of the Republic of Singapore* (Singapore), art 9.

expect to work in a constitutional democracy came to be subject to the special powers provisions - *Special Powers against Subversion and Emergency Powers* in the constitutions of both states.[172] Article 149 provides for special powers to deal with "subversion", and is the source of constitutional legitimacy for the MISA and the SISA. Although neither the MISA nor the SISA is enacted directly under the emergency power enshrined in article 150, this provision guarantees the validity of any emergency rules enacted during a time of emergency, such as the Internal Security Act. Accordingly, however generous these constitutional rights in the two Constitutions may be, they are not guaranteed comprehensively because they are subject to the special powers provisions. Since the independence of Malaysia and Singapore, these special powers have in fact become wider in scope as the result of a series of constitutional amendments.

The powers that permit the curtailment of individual liberties are triggered by any event in the form of an action that has been taken or threatened by any persons to give rise to subversion.[173] "Subversion" has been defined in articles 149 of the *Federal Constitution of Malaysia* and the *Constitution of the Republic of Singapore* to refer to the following: causing people to fear organized violence; exciting disaffection against the

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[172] *Federal Constitution* (Malaysia), Part XI; *Constitution of the Republic of Singapore* (Singapore), Part XII. Under article 149, any law designed to stop or prevent the following actions is valid, notwithstanding that it is inconsistent with basic rights and liberties in any of the provisions of articles 5, 9, 10, 13 or 14 (*ie*, freedom of movement, assembly and speech):

(g) to cause, or to cause a substantial number of citizens to fear, organized violence against person or property; or

(h) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(i) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(j) to procure the alteration, otherwise than by lawful means, or anything by law established; or

(k) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or which is prejudical to public order in, or the security of, the Federation of any part thereof.

[173] *Federal Constitution* (Malaysia), art 149(1); *Constitution of the Republic of Singapore* (Singapore), art 149(1).

government; promoting feelings of ill-will between classes of the population in such a way as is likely to cause violence; procuring alteration, otherwise than by lawful means of anything by law established; prejudicing the maintenance of any supply or service to the public; or causing prejudice to public order or national security.[174] It is evident that this definition of subversion is of such a broad catch-all nature that even "vigorous criticism of official polices, industrial action like strikes and call to taxpayers to withhold payment could conceivably fall within the parameters of subversion."[175] The only safeguard against overzealous use of this provision is the conscientiousness of those in power.

Moreover, article 150, the special powers provision, allows the King of Malaysia to issue a Proclamation of Emergency. In a state of emergency, the Parliament is empowered to make any laws considered necessary in the emergency, notwithstanding any other provision of the Constitution.[176] It thus guarantees the validity of any act of Parliament designed to stop or prevent action or threatened action that may affect the public order or national security, regardless of whether a state of emergency has been declared.[177] A statute of this kind is valid even if it is on its face, inconsistent with articles protecting various fundamental rights in the *Constitution*. The legislature in Malaysia has taken the opportunity to promulgate a number of Acts under Article 149,[178] the most controversial of which is the Internal Security Act. The indefinite preventative

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[174] *Federal Constitution* (Malaysia), art 149(1); *Constitution of the Republic of Singapore* (Singapore), art 149(1).

[175] Shad Saleem Faruqi, 'Special Powers Legislation And the Courts', Paper Presented at the 11th Malaysian Law Conference (2001).

[176] *Federal Constitution* (Malaysia), art 150.

[177] *Federal Constitution* (Malaysia), art 149:

[178] Apart from the *MISA*, there are other laws enacted under article 149 of the *Constitution*, such as the *Dangerous Drugs (Special Preventive Measures) Act 1985* (Malaysia, Act 316), and the *Emergency (Public Order and Prevention of Crime) Ordinance 1969* (Malaysia, Ordinance No.5).

detention regime, therefore, has its source of power in the special subversion powers provisions of the *Constitution*.[179]

While the powers contained in the *Constitution of Singapore* also allow the President of Singapore to issue a Proclamation of Emergency, such powers have not been used by the Singapore authorities. The government took advantage of the exception provisions in section 13 of the *Republic of Singapore Independence Act*, in which a continuation of "existing law" provision allows the government to retain the emergency ordinance after the state of emergency was officially rescinded in 1960.[180] In so doing, the SISA has gained domestic validity. It is also worth noting that after a standard recitation of freedom of speech, assembly and association, Article 14 of the *Constitution of Singapore* similarly authorizes the Parliament to make "such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality".[181]

The special powers provisions, therefore, explicitly preserved the constitutional validity of security measures, such as the MISA and the SISA, even though they are inconsistent with fundamental rights and liberties.[182] As a result, detainees cannot directly

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[179] *Federal Constitution* (Malaysia), art 149; *Constitution of the Republic of Singapore* (Singapore), art 149(1).

[180] *Republic of Singapore Independence Act 1965* (Singapore, Act 9, 1985 rev ed), s 13: "Subject to the provisions of this section, all existing laws shall continue in force on and after Singapore Day, but all such laws shall be construed as from Singapore Day with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act and with the independent status of Singapore upon separation from Malaysia."

[181] *Constitution of the Republic of Singapore* (Singapore), art 14 (2) (a).

[182] *Federal Constitution* (Malaysia), art 149: "[A]ny provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13."; *Constitution of the Republic of Singapore* (Singapore), art 149(1): "any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 9, 13, 14."

challenge the detention regime for inconsistency with the constitutional protections of fundamental rights and liberties.

6.4.6 Other Preventative Detention Without Charge Measures in Malaysia

Apart from the power to detain a person for up to 60 days under a detaining order issued by the Minister, the police in Malaysia are capable of detaining suspected gang members and criminals who cannot be formally charged due to lack of evidence under the *Emergency (Public Order and Prevention of Crime) Ordinance 1969* (‘*Emergency Ordinance*’),[183] and suspected drug traffickers under the *Dangerous Drugs (Special Preventive Measures) Act 1985* (‘*Dangerous Drugs Act*’).[184]

The *Dangerous Drugs Act* was introduced to enhance the effectiveness of the governments’ countermeasures against those involved in drug trafficking. It empowers the government to detain a person if the Minister is satisfied that the person has been or is associated with “any activity relating to or involving in the trafficking in dangerous drugs”.[185] Similar to the MISA, although the detention order under the Act cannot exceed two years, the order may be extended to an unlimited number of times, and thus being detained indefinitely. As a “sunset legislation”, the Act was given an initial life from 1990 to 1995. But this legislation was further extended till June 15, 2015.

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[183] *Emergency (Public Order and Prevention of Crime) Ordinance 1969* (Malaysia, Act 187). The *Emergency Ordinance* was enacted as a temporary measure to control the spread of violence after the May 13, 1969 racial riots. Then, a state of emergency was declared, the Parliament and Constitution were suspended, and the Ordinance was enacted accordingly. Until now, the government of Malaysia has not yet revoked Malaysia’s emergency proclamations.

[184] *Dangerous Drugs (Special Prevention Measures) Act 1985* (Malaysia, Act 316).

[185] *Dangerous Drugs (Special Prevention Measures) Act 1985*, s 6(1).

The broadly worded provisions of the *Emergency Ordinance* allow the police to arrest and detain people up to an initial period of 60 days if a police officer suspects a person has acted or is about to act in a manner prejudicial to public order or if the police officer has reason to believe that a person should be detained if "necessary for the suppression of violence" or for "the prevention of crimes."[186] There is no need for the police to obtain any detention order, only requiring an arresting police officer of or above the rank of deputy superintendent to report the circumstances of the arrest and detention to the Inspector-General of Police or to a police officer designated by the Inspector-General.[187] After the initial 60-day period, the Minister of Home Affairs may authorise the detention of the person for a period not exceeding two years, which can then be extended to an indefinite period of time. The Minister may also issue a restriction order imposing a number of limitations upon the designated person's activities for two years.[188]

There are some similarities between the MISA and the *Emergency Ordinance,* for example, both acts provide the police with exceptional powers to arrest and detain people who are considered as threats to national security, and both empowered the Minister to issue a restriction order upon designated person. A NGO activist explained the distinction between the MISA and the *Emergency Ordinance*: "the ISA is top down-a government minister orders detention of someone seen as a threat to the government-whereas the EO is bottom up. The police, having failed to collect evidence to prosecute a criminal suspect, request an EO detention order from the minister."[189] Further, the majority of the persons

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[186] *Emergency (Public Order and Prevention of Crime) Ordinance 1969*, ss 3(2), (3).

[187] *Emergency (Public Order and Prevention of Crime) Ordinance 1969*, s 3(3)(c).

[188] *Emergency (Public Order and Prevention of Crime) Ordinance 1969*, s 4A(1). Contravention of a restriction or condition would result in a commission of an offence.According to the *Emergency Ordinance*, the detainee 'shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years and not less than two years. *Emergency (Public Order and Prevention of Crime) Ordinance 1969*, s 4A(4).

[189] Human Rights Watch interview with S. Arutchelvan, Suaram, Kuala Lumpur, July 4, 2005.

detaining under the *Emergency Ordinance* are not political dissidents or well-known human rights activists, the public thus has been less aware of the existence of the Ordinance, compared to the MISA.

According to a NGO report, there were 3,701 persons detained under the *Emergency Ordinance* from 2000 to 2009. As at February 2010, there were 819 detainees in the Simpang Rengam detention camp.[190] Because of the target group of the *Emergency Ordinance* mainly being alleged gangsters, violent criminals or drug peddlers, the Ordinance has not been seen as notorious as the MISA, despite currently detaining more persons. However, recent experience shows that the *Emergency Ordinance* has been used to justify the continued detention of suspects originally detained under the *Criminal Procedure Code*.[191] The *Criminal Procedure Code* allows for a pre-trial detention under which a suspected may be detained up to a period of 15 days for investigation. But, in that case, the police must obtain a detention order from a magistrate judge.[192] In practice, if the police have failed to collect enough evidence to charge the suspect, the police may then seek to continue detain the person for an additional 60 days and then up to two years under the *Emergency Ordinance*.[193]

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[190] 'Emergency Ordinance Abused', < http://fabm.wordpress.com/2011/07/27/emergency-ordinance-abused/>. As this figure does not include those detained under the Ordinance in other detention centres in Malaysia, it is assumed that the overal number is at least bigger than 819.

[191] *Criminal Procedure Code* (Malaysia, Act 593).

[192] *Criminal Procedure Code* (Malaysia, Act 573) s 117(2).

[193] In practice, the police may also obtain successive remand orders for a suspect from different magistrate judges and states' jurisdictions for alleged involvement in one case or different cases to continue detaining a suspect. For cases of successive detention under the *Criminal Procedure Code* and the *Emergency Ordinance*, see Human Rights Watch, *Convicted Before Trial: Indefinite Detention Under Malaysia's Emergency Ordinance*, 24 August 2006, C1809 <http://www.unhcr.org/refworld/docid/4517cda34.html> . In a case documented in that report, a man named Samsudin was taken to nine different police stations in four states and detained, without access to lawyer, for succesive 143 days under pre-trial detention orders by the Malaysian police. He was then detained under the *Emergency Ordinance* for another sixty days and banished to a remote village for an additional two years under restricted residence.

Both detention acts, especially the *Emergency Ordinance* violates international human rights law in a number of aspects, such as the fundamental right to liberty, right to due process, right to a fair trial and right to procedural safeguards. Several human rights groups in Malaysia have constantly called for the repeal of the *Emergency Ordinance*. In May 2005, a government-appointed Royal Commission in its report to the King and the government expressed concerns about the *Emergency Ordinance*, and stated that in several cases the Ordinance has facilitated the abuse of Constitutional rights and liberties.[194] Despite of those many negative responses towards the use of *Emergency Ordinance*, its future seems to be fairly secured in Malaysia.

6.5 PROCEDURAL CONSTRAINTS

Both the ICCPR and the ECHR have strict procedural constraints applicable to persons detained without charge for security reasons, including limits on restricting contact with the outside world, guaranteeing access to detention-related information, and most important of all, the right to be brought before a judicial body that is able to review the grounds for detention and that has the authority to release the detainees immediately if the detention is found to be unlawful. Those procedural safeguards generally extend to all types of detention, and at least provide detainees under a preventative detention without charge regime with the same level of protections as one detained under a pre-trial detention framework. This is not just a conclusion that could be drawn from the case-law of the Strasbourg authorities and the decisions delivered by the Human Rights Committee. More importantly, it is because security-based detentions particularly need extra

[194] In this report, the Commission concluded that the *Emergency Ordinance* is "undesirable because they deny the individual his personal liberty without a right to trial in an open court as approved for in Article 5 of the Constitution and in the International Bill of Rights. This right is among the most precious that the individual has and it must be protected". The Report of the Royal Commission to Enhance the Operations and Management of the Royal Malaysian Police, Chapter 10 [1.4(1)].

protections, as arbitrary detention or incommunicado detention is most likely to occur under detention without charge for reasons of state emergency or national security.

In addition to the internationally accepted standards of human rights protections of, the rights of detainees are also derived from the *Constitution of Malaysia* and the *Constitution of Singapore*, which provide that no person shall be deprived of his life or personal liberty save in accordance with law.[195] This has been interpreted by the Privy Council on appeal from Singapore to mean that a law which deprives a person of life or personal liberty must conform to the fundamental principle of natural justice.[196] However, this principle has yet to be applied to the detention regime in the MISA or the SISA, which are domestically immune from constitutional challenge under the special powers provisions in the *Constitution.* The principle of natural justice could be used, for example, to ensure that a detainee should be given adequate rights under national law, for example by ensuring adequate access to the outside world and the right to take proceedings before a judicial body, both guarantees are severely restricted under the currently detention regimes.

6.5.1 COMPLETE EXCLUSION OF MERITS REVIEW/JUDICIAL REVIEW

Australia's PDO regime lacks comprehensive judicial and merits reviews of an initial order and a continued one at the Commonwealth level, as an application for the review of a federal PDO cannot be made to the Administrative Appeal Tribunal while the order is in force, and such review is limited to the procedural issues rather than permitting a substantive review of the justification for the detention. Although there are limited

[195] *Constitution of the Republic of Singapore* (Singapore), art 9(1); *Federal Constitution* (Malaysia), art 5(1).

[196] *Ong Ah Chuan v Public Prosecutr* (1981) AC 648; *Ong Ah Chuan v Public Prosecutor* (1981) 1 MLJ 64.

opportunities for merits review at the Administrative Appeals Tribunal, a challenge to the constitutional validity of the PDO regime would still be open. Moreover, states or territory Supreme Court may conduct a judicial review of the detention grounds with regard to a state or territory PDO. In contrast, even though the *Constitution of Malaysia* and the *Constitution of Singapore* have included procedural constraints upon preventative detention regimes, under which the detainee shall be given the opportunity to make presentations against the detention order "as soon as may be",[197] and the right not to be detained for a period exceeding 3 months unless the Advisory Board has considered the representations made,[198] detainees may be preventatively detained under the regimes for an indefinite period without enjoying the right to merits review of the detention orders.

Under the MISA and the SISA, all persons who have been preventatively detained are entitled to make representations against the order to an Advisory Board,[199] and their applications must accordingly be reviewed by that body.[200] However, it is clear that the Advisory Board is not a court, but only an *advisory* body. The awkward situation faced by the Advisory Board is reflected in corresponding provisions in both the MISA and the SISA. The Advisory Board will make recommendations to the King of Malaysia/President of Singapore who in turn may give the Minister such directions as he thinks fit.[201] It is the King/President himself who will decide whether to overrule or continue the order according to his own assessment of the detention order and the decision shall not be called in question in any court, regardless of the assessment and

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[197] *Federal Constitution* (Malaysia), art 151(1)(a); *Constitution of the Republic of Singapore* (Singapore), art 151(1)(a).

[198] *Federal Constitution* (Malaysia), art 151(1)(b); *Constitution of the Republic of Singapore* (Singapore), art 151(1)(b).

[199] *MISA*, s 12(1); *SISA*, s 12(1)

[200] *MISA*, s 13(1); *SISA*, s 13(1).

[201] *MISA*, s 12(2); *SISA*, s 12(2).

recommendations of the Advisory Board.[202] Generally, all the Advisory Board is empowered to do is to hear the representations and make recommendations to the King/President accordingly. As such, review by the Advisory Board does not satisfy the requirement enshrined in the ICCPR and the ECHR that a detainee be brought promptly before a competent judicial authority,[203] as the Advisory Board lacks jurisdiction to decide on the lawfulness of the detention order and is powerless to order the release of the detainees, and thus does not have any judicial character.

With this controversial review mechanism in place, it was only a matter of time before detainees challenge the lawfulness of their detentions before the courts in Malaysia and Singapore. In *Chng Suan Tze v Minister of Home Affairs* (*Chng*),[204] the Singapore Court of Appeal held for the detainees on a technical ground but in *obiter* advocated an objective standard of review,[205] which is different from the provisions of the SISA that empowered the executive to have the ultimate say. While the Malaysian courts traditionally deferred to the executive's decision on matters of security-based detention, in *Tam Sri Raja Khalid bin Raja Harun*,[206] the court delivered a decision in favour of an objective approach instead of completely relying on the Minister's subjective assessment in examining the detention order. This approach was later confirmed in the case of *Mohamad Ezam Bin Mohd Noor v Ketua Polis Negara and Others Appeal* (*Mohamad Ezam*).[207] However, a closer analysis would reveal that these high points may be in reality

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[202] Ibid.

[203] *ICCPR*, arts 9(3) and 9(4); *ECHR*, arts 5(3) and 5(4).

[204] *Chng Suan Tze v Minister for Home Affairs* [1988] 1 SLR 132 (C.A.).

[205] Under the MISA and the SISA, the detention orders are entirely based on the subjective satisfaction of the Minister or the President. An Objective test suggested by the Court is to let the Court review the grounds for detention from other respects, for example, the judges could examine whether the executive's decision was in fact based on national security considerations, as well as whether the executive's consideration in determining the necessity of the detention fell within the scope of the purposes specified in the SISA. See discussions *infra* s 6.5.1.1.

[206] *Inspector-General of Police v Tam Sri Raja Khalid bin Raja Harun* [1988] 3 MLJ 29.

[207] *Mohamad Ezam Bin Mohd Noor v Ketua Polis Negara & Others Appeal* [2002] 4 MLJ 449.

more symbolic than significant. Although these precedents are shining examples of sound and careful judicial reasoning as the courts wanted to develop the law, these decisions later were legislatively overruled.

6.5.1.1 Judicial Review of Preventative Detention Orders in Singapore

In the case of *Lee Mau Seng v Minister for Home Affairs* (*Lee*), the court set a subjective standard for reviewing the preventative detention order.[208] The court held that the executive had to consider whether sufficient grounds existed for detention,[209] but stressed in accordance with the SISA that this assessment involved a "purely subjective condition so as to exclude a judicial enquiry".[210] Accordingly, an affidavit by the Minister of Home Affairs was sufficient to prove the President's subjective satisfaction. Later, the Court of Appeal found this subjective standard insufficiently demanding and overturned it in *Chng Suan Tze v Minister for Home Affairs*.[211]

In *Chng*, nine former detainees who had been held under detention orders made by Minister issued a joint statement protesting their innocence. Shortly after releasing of the statement, they were re-arrested and detained on the grounds that they continued to pose a security risk. The detainees lodged an appeal of *habeas corpus* to challenge the validity of the detention. The Court of Appeal held for the detainees on a technical ground that the wrong person had signed the relevant documents. However, in *obiter* the Court argued that an objective standard should be adopted in reviewing the detention in

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[208] *Lee Mau Seng v Minister for Home Affairs* [1971] 2 MLJ 137 (Sing H.C.).

[209] Ibid [57].

[210] Ibid [62].

[211] *Chng Suan Tze v Minister for Home Affairs* [1988] 1 SLR 132 (C.A.).

question.[212] In so doing, the judges could examine whether the executive's decision was in fact based on national security considerations, as well as whether the executive's consideration in determining the necessity of the detention fell within the scope of the purposes specified in the SISA. Despite the narrow and technical basis of the actual decision in this case, the Court of Appeal at least expressed its willingness to challenge the executive's decisions on national security matters.

Unfortunately, the government reacted swiftly by amending both the *Constitution of Singapore* and the SISA to exclude judicial review of the executive's decisions relating to preventive detention under the SISA. Less than two weeks after the decision in *Chng*, it was announced that the SISA would be amended.[213] Approximately a month later, Parliament passed two bills – the first to amend the *Constitution*,[214] and the second, to amend the SISA.[215] The amendment to the *Constitution* was the inclusion of Article 149(3) in the special powers provisions which says that the validity of any decision made in pursuance of any power conferred upon the President or the Minister by any law shall be determined by and only by that law.[216] It basically provides that the detention order made by the Minister shall not be challenged and invalidated by any provision of the *Constitution*. Thus, appeals from the special powers provisions of the *Constitution* to the Privy Council were removed. Moreover, the notwithstanding clause in article 149(1)(e)

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[212] Ibid [86].

[213] In December 1988, the Bills to amend both the Constitution and section 8 of the SISA were introduced in parliament and were passed in January the next year. Yee Chee Wai, Monica Ho and Daniel Seng, 'Judicial Review of Preventive Detention under the Internal Security Act – A Summary of Development' (1989) 5 *Singapore Law Review* 66, 98.

[214] *Constitution of the Republic of Singapore (Amendment) Act 1989* (Singapore, No. 1 of 1989).

[215] *Internal Security (Amendment) Act 1989* (Singapore, No. 2 of 1989).

[216] *Constitution of the Republic of Singapore* (Singapore), art 149(3). Notably, when the Bill to amend the Constitution was tabled in the Parliament, there were 81 elected Members of Parliament, of whom 80 were from the People's Action Party. While a Bill amending the Constitution requires a supporting vote of not less than two-thirds of the total number of elected Members of Parliaments to be passed, the success of the influential Constitutional Amendment had been secured.

was further extended to include the right to protect against retrospective criminal laws and the right to equality as enshrined in articles 11 and 12.[217] The preventative detention regime was amended by adding four additional subsections, which completely exclude judicial review in any court challenging the detention orders, with the only exception being review of procedural matters.[218] Further, one subsection gives these amendments a retrospective application,[219] which effectively permits the executive not to follow the objective standard in *Chng.* The overall outcome of both amendments was to restore the laws on judicial review of executive discretion to the subjective test applied in *Lee* and limit the scope of judicial review to procedural matters only.[220]

In later decisions, the judiciary in Singapore deferred to the legislature's actions, rather than to substantially review of the legislative amendments according to the separation of powers doctrine and the principle of natural justice. In the case of *Teo Soh Lung v Minister of Home Affiars* (*Teo*), [221] the appellant challenged the constitutional validity of these amendments. As the legislature had carefully amended the SISA to exclude any avenues for constitutional challenge to the amendments, the appellant's only opportunity was if the court applied the rule of law, which requires the judiciary to have the ability to

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[217] According to the Minister of Law, the inclusion of article 11 was necessary to ensure that the retrospective application of the Internal Security (Amendment) Bill could not be challenged, and article 12 was necessary because the Court of Appeal had concluded that a subjective test might be inconsistent with the right to equality. *Parliamentary Debates* (Singapore), vol.52, col.463, 473 (25 January 1989) citing Prof. S. Jayakumar.

[218] *SISA*, s 8B(2) - Law applicable to judicial review: "there shall be no judicial review in any court of any act done or decision made by the President or the Minister under provisions of this Act save in regard to any question relating to compliance with any procedural requirement of this Act governing such act or decision."

[219] *SISA*, s 8D.

[220] *Parliamentary Debates*, vol. 52, col. 463, 463 (25 January 1989), citing Professor S. Jayakumar.

[221] *Teo Soh Lung v Minister of Home Affairs* [1989] 2 MLJ 449 (Sing C.A.).

substantively review executive decisions based on the doctrine of separation of powers,[222] and fundamental principles of natural justice.[223] However, the Court ruled that even if the review of the detention grounds was objective, the applicants would still have failed on the facts. Most significantly, it acknowledged the constitutionality of the controversial amendments, and further observed that the amendment to the SISA had "… effectively excluded any right of judicial review on the grounds of illegality, irrationality and unconstitutionality of any detention order".[224] It seems that Singaporean courts will not question the validity of any detention measure as long as it is procedurally sound – the Parliament had done no more than enacting an amendment to the SISA and the *Constitution* relating to judicial review, which is a significant retreat from *Chng*. Although the Court did not decide with finality to go back to the subjective test of judicial review in *Lee*, it, nevertheless, held that the subjective test cannot be said to be contrary to the rule of law. In light of Singapore's political context, an overwhelming majority of the People's Action Party in both the executive and legislature further weakens the willingness of the judiciary to check possible abuse of preventative detention under the SISA.[225]

The Court showed its reluctance to undertake any review of Executive's preventative detention decisions in a 1990 case of *Vincent Cheng v Minister of Home Affairs*:

"By the scheme of the ISA and of the Constitution from its very inception, the executive

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[222] It was recognized in *Hinds v The Queen* [1977] AC 195 (P.C. on appeal from Jamaica) that the basic principle of separation of powers were a "necessary implication" in Constitutions based on the Westminster model, of which Singapore's is an example.

[223] In *Ong Ah Chuan v Public Prosecutor* [1980] AC 64 (P.C. on appeal from Singapore) 71, the Privy Council held that the "law" means a system of law that incorporates fundamental rules of natural justice.

[224] *Teo Soh Lung v Minister of Home Affairs* [1989] 2 MLJ 449 (Sing C.A.); *Vincent Cheng v Minister for Home Affairs* [1990] 1 SLR 190.

[225] In Eunice Chua's article, she discussed how Singapore's unique political context - one party, one parliament society - might influence the application of the SISA. Eunice Chua, 'Reactions to Indefinite Preventive Detention: An Analysis of How the Singapore, United Kingdom and American Judiciary Give Voice to the Law in the Face of (Counter) Terrorism' (2007) 25 *Singapore Law Review* 3, 20-3.

> has been entrusted as the sole body to look at and weigh the evidence and case against a person and to form a view on the question whether a detention order should be issued … the least that can be asserted against the applicant is that there has been some evidence against the applicant which related to national security and that once that assertion can be properly made it would be contrary to the scheme and the law of preventative detention for any court of law to adjudicate on the sufficiency or relevancy of the evidence nor should a court, by a side wind, as it were, investigate any allegation of bad faith or the abuse of the powers of ISA."[226]

In summary, the Court of Appeal in Singapore appeared to realize that the subjective standard test set up in *Lee* was too low and had decided to move to a more reasonable objective test in *Chng*. However, the judiciary backed off to limit the scope of judicial review of preventative detention orders to procedural matters and restored to the subjective test after the government amended both the *Constitution* and the SISA. Certainly, the executive and legislative actions limited the judiciary's role to prevent it from conducting merits review of the detention orders. Nevertheless, it should also be noted that Singapore's judiciary is ultimately passive not because of any weakness in *Chng*, but because the courts later allowed *Chng* to be legislatively overruled without offering any hint of resistance.[227] Courts have typically been reluctant to challenge the executive's assessment and the obviously biased or even unreasonable emergency measures. But the British case of the *A v Secretary of State for the Home Department* represents a very inspirational example of how judiciary might act to resist the overuse of executive power.[228] In the *Belmarsh* case, the House of Lord declared the indefinite detentions of non-citizens to be incompatible with the *Human Rights Act 1998* (UK).[229]

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[226] *Vincent Cheng v Minister* for *Home Affairs* [1990] 1 SLR 190, [28], [29].

[227] For further discussion on how the court should act to respond, see the Conclusion of this Chapter about the constitutional protections of procedural rights.

[228] *A v Secretary of State for the Home Department* [2005] 2 AC 68.

[229] Surely the difference is that the possibility of review was open in the UK, which it was not under the revised Constitution in Singapore.

The provisions in question were then repealed by the UK government. In contrast, the Court of Appeal in Singapore took a very "thin" formulation of the rule of law, and asserted the constitutionality of the restrictions on judicial review in *Teo* and *Vincent Cheng*. Given the damage already done, the possibility of the judiciary to test the legality of detention under the SISA is extremely low in the foreseeable future.

6.5.1.2 Judicial Review of Preventative Detention Orders in Malaysia

Following its Singaporean counterpart, the government of Malaysia wasted no time in amending the laws regarding judicial review.[230] In March 1988, the *Constitution of Malaysia* was amended to make the jurisdiction and powers of the court subject to federal law rather than the *Constitution of Malaysia* itself, and thus make it possible for the Malaysian parliament to limit or abolish judicial review by a simple majority vote, rather than by the two-thirds majority required for a constitutional amendment.[231] This was followed by important amendments to the MISA the following year that inserted three subsections to completely eliminate judicial review on all substantive matters:

> There shall be no judicial review in any court, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong [the King] or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.[232]

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[230] As observed by Michael Hor, considering the wording of the amendment to the MISA is almost the same as the amendment to the SISA, the Singapore inspiration was evident. Hor, above n 2, 287.

[231] *Federal Constitution* (Malaysia), art 121(1)(b).

[232] *SISA*, s 8B(1), as amended by the *Internal Security (Amendment) Act 1989* (Singapore, No.2 of 1989).

These amendments leave very little space for manoeuvre. Though the courts may yet exploit the vague divide between substantive and procedural review,[233] this appears unlikely and in fact rarely happens.

The courts have been most reluctant to address the fundamental issue of whether the amendment to the *Constitution of Malaysia* should even have been allowed to have been made in the first place. Instead, they have been extremely deferential to the executive's decisions and have repeatedly followed the view taken by the Federal Court in *Negeri Sabah v Sugumar Balakrishnan* that the court must give expression to Parliament's intention and inquire no further.[234]

In *Kerajaan Malaysia and Others v Nasharuddin Nasir*,[235] the Court of Appeal was willing to shackle its own powers when it decided that although the amended MISA ousted the court's review jurisdiction, it was not unconstitutional and that "an ouster clause may be effective in ousting the court's review jurisdiction if that is the clear effect that Parliament intended; that if the intention of Parliament is expressed in words which are clear and explicit, then the court must give expression to that intention".[236] As such, the preventative detention was valid if the Minister was subjectively satisfied that the conditions and grounds for the preventative detention were met. In addition, the lower

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[233] For an examination of the state of judicial review in Malaysian ISA cases, see Gan Ching Chuan, 'The Interpretation of the Internal Security Act of Malaysia: An analysis of the Protective measures available and their effectiveness' (Feb. 1995) 1 *Current Law Journal* cxxxvii; Gan Ching Chuan, 'Judicial Review of Preventive Detention in Malaysia' (1994) 1 *Malayan Law Journal* cxiii.

[234] *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2003] 3 AMR 2817, 2843-5.

[235] *Kerajaan Malaysia, Menteri Dalam Negeri, and Ketua Polis Negara v Nasharuddin Bein Nasir* (2003) 6 AMR 497 (Malay C.A.).

[236] Ibid.

court had no jurisdiction to review the Minister's decision except on procedural grounds, given that the ouster clause in the amended MISA was constitutionally valid.[237]

The trend is clearly illustrated by the Federal Court in the 2004 case of *Abdul Razak bin Baharudin v Ketua Polis Negara and Others*, in which the Court held and confirmed that detention order by the Minister may only be challenged on the ground of procedural non-compliance.[238] This specifically rules out challenging the grounds given by the Minister for his decision to detain, as well as allegations of *mala fides*.

The 2005 Federal Court decision of *Ahmad Yani Bin Ismail and Anor v Inspector General of Police and Others* also stated the court's acceptance of the subjective test, and upheld the validity of the MISA provisions limiting judicial review to procedural aspects.[239] There, the applicants stated the ouster clause in the MISA was invalid because it removed the fundamental right to seek judicial review and was "inimical to the rule of law."[240] The court upheld the validity of the provisions excluding judicial review of substantive aspects in the MISA, and found the lower court does not have the inherent jurisdiction to declare a law made by Parliament *ultra vires*, as it would amount to "rendering an advisory opinion which is tantamount to judicial vandalism."[241] In so doing, the highest court in Malaysia has indicated its unwillingness to question the exercise of executive power in national security matters.

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[237] Ibid.

[238] *Abdul Razak bin Baharudin v Ketua Polis Negara and Others* [2004] 7 MLJ 267 (Malay H.C.).

[239] *Ahmad Yani Bin Ismail and Anor v Inspector General of Police and Others* [2004] 4 MLJ 636 (Malay H.C.).

[240] Ibid.

[241] Ibid 639.

The only exception in recent years is the 2004 case of *Mohammad Ezam,* in which the Federal Court argued that the amended section 8 does not cover an act done or decision made by a police officer under section 73 of the MISA:

> "Given the enormous powers conferred upon police officers including minor officials such as guards and watchmen and the potentially devastating effect or effects arising from any misuse thereof … it therefore makes sense that the subjective judgment accorded to the minister under section 8 cannot be extended to the police in the exercise of their discretion under section 73(1)."[242]

According to the judgment, detentions authorized by the police and detentions authorized by the Minister were connected, but "nevertheless operate quite independently".[243] Therefore, even if a detention order made by the police is consistent with the Minister's subjective assessment, such a subjective test cannot be extended to the detention pending inquiries by police, which is in exercise of investigative detention powers as discussed earlier.[244] The Court could therefore enquire into the arresting officer's "reason to believe" when "the appellants' arrests were effected.[245] In so doing, the Court can examine whether the police officers' decision was in fact based on national security considerations and is entitled to inquire into "the basis for the detaining authority's reasons to believe that the appellants had acted or were about to act or were likely to act in a manner prejudicial to the security of Malaysia."[246] Further, the detention can be challenged on the ground that it was made *mala fides*. *Mala fides* "does not mean at all a malicious intention" but normally means that a power was exercised for a collateral or ulterior purpose."[247]

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[242] *Mohamad Ezam Bin Mohd Noor v Ketua Polis Negara and Others* [2002] 4 MLJ 449, 474 (Malay. F.C.).

[243] Ibid.

[244] See s. 6.4.2.

[245] Ibid 476.

[246] Ibid.

[247] Ibid 479.

There have been cases, such as that of *Mohammad Ezam*, which have given hope that at least the courts were entitled to inquire into the grounds on which the executive made decisions of preventative detentions pending inquiries, if the court was not going to challenge the constitutionality of executive detention. However, the legislature has been active in closing the doors to effective judicial review. The courts themselves have also been helpful in the process. As noted above, in almost all Malaysian cases pertaining to reviews of detention under the MISA, the judges have been quite content to allow the executive to exercise unfettered powers of detention. In appeals before it, the Federal Court has snuffed out any hope of the judiciary adopting a different approach. Instead, they have interpreted the words of the Malaysian Constitution to readily accommodate preventative detention, rather than to refer to higher standards, such as the rule of law, s principle of natural justice, in the judgments.

6.5.2 TO BE INFORMED OF THE REASONS FOR DETENTION

Under international human rights law, a person is entitled to be informed of the reasons for their arrest. The notification given must be sufficient to enable the person to take immediate steps to challenge this detention and to secure his or her release if the detainee believes that the grounds for detention are invalid or unlawful.[248] Additionally, the *Constitution of Malaysia* together with the *Constitution of Singapore* provide that "where a person is arrested he shall be informed as soon as may be of the grounds of his arrest …"[249] It was held in *Aminah v Superintendent of Prisons, Pengkalan Chepa, Kelantan* that the provisional requirement in the *Constitution of Malaysia* is clearly meant

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[248] *ICCPR*, art 9(2); Human Rights Committee, *Views: Communication No. 43/1979*, 19th sess, UN Doc CCPR/C/19/D/43/1979 (21 July 1983) (*'Drescher Caldas v Uruguay'*).

[249] *Federal Constitution* (Malaysia), arts 5(3), 151(1)(a); *Constitution of the Republic of Singapore* (Singapore), arts 9(3), 151 (1)(a).

to apply to arrests under any law in force in Malaysia.[250] In *Mohammad Ezam*, where the Federal Court discussed the right to consult a legal practitioner, the Court clearly held that Article 5(3) applies to the MISA and the detention regime.[251] This position was confirmed by the Federal Court in *Assa Singh v Menteri Besar, Johore*,[252] and *Yit Hon, Kit v Minister for Home Affairs of Malaysia* where the court held that "complaint of failure to inform the person arrested of the grounds of his arrest, contrary to the first limb of Article 5(3), if substantiated, can render his subsequent detention unlawful".[253]

Under both the MISA and the SISA, detainees are to be informed of the grounds for their detention and their right to make representations to an Advisory Board.[254] For the purpose of facilitating the detainees' representation before the Advisory Board, they will also be furnished by the Minister with a statement in writing of the grounds on which the order is made as well as of the allegations of fact on which the order is based.[255] In contrast, under Australia's PDO regime, detainees are only provided with a "summary" of the grounds on which an initial PDO is made without any requirement for specific detailes. By stressing that the detainees shall be informed in order to make representations, at least under the MISA and the SISA, detainees are aware of the core information, including the grounds and the allegations of fact.

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[250] *Aminah v Superintendent of Prison, Pengkalan Chepa, Kelantan* [1968] 1 MLJ 92, [42].

[251] *Mohamad Ezam Bin Mohd Noor v Ketua Polis negara and Others Appeal* [2002] 4 MLJ 449 (Malay. F.C.).

[252] *Assa Singh v Menteri Besar* of *Johore* (1969) 2 MLJ 30, 30.

[253] *Yit Hon Kit v Minister of Home Affairs, Malaysia and Anor* (1988) 2 MLJ 638, 639. In this case, the detainee was detained under the *Emergency (Public Order and Prevention of Crime) Ordinance 1969.*

[254] *MISA*, s 9; *SISA*, s 9.

[255] *MISA*, ss 11(2)(a)-(b); *SISA*, ss 11(2)(a)-(b).

However, the Malaysian Federal Court case of *Gurcharan Singh a/l Bachittar Singh* brought to light a peculiarity in the law.[256] According to the decision, only detainees who are further detained on grounds different from those on which the detention order was originally made or are further detained partly on the same grounds and partly on different grounds are entitled to a statement of the grounds on which they are being further detained and the allegations of fact on which the detention order is based.[257] Consequently, it can be implied that detainees who are further detained on the same grounds as the initial detention order are not entitled to such statement. Those detainees will not be in a good position to challenge extensions of their detention, given that they may not know the real reasons why they still need to be detained on the same grounds for a longer period of time. There is a possibility that the detainee is only continuously detained because the police are inefficient in collecting related intelligence to prove the detainee pose real threat to national security. In any case, the detainees who are further detained on the same grounds are denied the right to access to related information.

Another concern is Article 11 of the MISA, which deals with the representations against a detention order that may be made to an Advisory Board. It states that the detainee may be given those reasons which are "in the opinion of the Minister" reasonably required to make his representations against the order to the Advisory Board. No such limitations are included in the SISA.[258] This limitation in the MISA may well set a potential barrier for the detainees, as the Minister can justify any non-disclosure of relevant information in the name of national security, for example, secret intelligence that cannot be gave to the detainee or his or her lawyer.

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[256] *Gurcharan Singh a/l Bachittar Singh v Penguasa, Tempat Tahanan Perlindungan Kamunting, Taiping and Others* [2002] 4 MLJ 255.

[257] Ibid.

[258] That said, according to the *Constitution* of Singapore, there is a discretion to withhold evidence, if in the authority's opinion, the disclosure of the evidence would be contrary to the national interest. *Constitution of the Republic of Singapore* (Singapore), art 151(3).

6.5.3 LIMITED ACCESS TO THE OUTSIDE WORLD

The importance of contact with family members, friends, lawyers and other persons cannot be overstated. As have been discussed in Chapter 5, Rule 37 of the *Standard Minimum Rules and Principle of the Body of Principles* are designed to avoid "incommunicado detention", which has been found to be a violation of the right to be treated humanely as well as the right not to be subjected to torture.[259] Besides the very act of cutting the detainee off from the outside world, "incommunicado detention" effectively prevents the detainee from complaining against any ill-treatment, and emboldens the authorities to do whatever they like without having to worry about the consequences. Though the MISA and the SISA do not provide detainees with the right to have regular and adequate contact with family members or friends, the *Constitution of Malaysia* and the *Constitution of Singapore* guarantee the right of a detained person to be consulted and defended by a legal practitioner of his choice.[260]

6.5.3.1 Detention Pending Inquiries

During the period of detention authorized by police, the treatment of detainees is regulated by the *Internal Security (Detained Persons) Rules 1960*.[261] Rule 94 of the *Internal Security (Detained Persons) Rules 1960* provides that the *Lockup Rules 1953* shall apply to the detention pending inquiries regime,[262] which states:

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[259] See discussions above Chapters 3 and 5; *ICCPR*, art 10(1).

[260] *Federal Constitution* (Malaysia), art 5(3); *Constitution of the Republic of Singapore* (Singapore), art 9(3).

[261] *SUHAKAM Report*, above n 119, 33.

[262] *Internal Security (Detained Persons) Rules 1960* (Malaysia), Rule 94: "[w]here the place of detention of a detained person is a lockup appointed under section 8 of the Prisons Ordinance, 1952, these rules shall

(a) A prisoner shall be entitled, subjected as hereinafter provided, to such visits from his relative, friends and advocates as are consistent with the proper discipline of the lockup.

(b) No prisoner shall receive more than one visit in each week from relatives or friends.

(c) No more than two persons shall be admitted to visit a prisoner at any one time.

(d) No visit shall last for more than fifteen minutes.

Overall, these legislative provisions allow detainees some access to the outside world, in particular regular access to family members, lawyers and a medical officer. The *Lockup Rules 1953*, however, are not entirely clear as to the exact time and conditions under which detainees may be allowed such access. For example, in relation to access to family members, rule 22(2) of the *Lockup Rules 1953* appears merely to imply that detainees should be allowed access to family members within seven days of their arrest as it provides detainees with one visit "in each week". In relation to access to medical treatment, rule 10 only provides that a detainee should have access to a medical officer "so far as possible". Furthermore, the time limit of 15 minutes imposed by rules 22(4) of the *Lockup Rules 1953* on visits to detainees is evidently too short. In addition, the detainee apparently may not see his family members if he wants to meet his lawyer in the same week, which is an odd restriction. Detainees' limited access to the outside world gives rise to concern about the possible use of torture or other cruel, inhuman or degrading treatment during interrogation by the police.

6.5.3.2 Indefinite Detention without Charge

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not apply to such detained person or to such lockup but the Lockup Rules, 1953, shall apply to such detained person in such lockup."

If a person is detained under order made by the Minister, his or her communications with family, friends and lawyers are governed primarily by rule 81 and rule 82 of the *Internal Security (Detained Persons) Rules 1960*,[263] which states:

> (1) A detained person shall, … be entitled to visits from his relatives and legal adviser; …with the express permission of the Superintendent whose decision shall, subject to an appeal to the Officer-in-Charge, be final, receive visits from persons other than his relatives and legal adviser.
> (2) No detained person shall, except with the express permission of the Superintendent, receive more than one visit a week.
> (3) Not more than two persons shall be admitted to visit a detained person at any one time.
> (4) No visit shall last more than thirty minutes.
> (5) A superintendent or an officer … shall be in sight and hearing during the whole of any visit to a detained person, unless the Superintendent by an order in writing sees fit to dispense with any of the above requirements.

Clearly, the rules allow for visits from relatives and lawyers. However, as with the *Lockup Rules 1953* discussed above, the limitations imposed upon the detainees are not reasonable. For example, no one is allowed to receive more than one visit a week. This not only means that the intervals between visits are long, but also that, once again if the detainee needs to consult his or her lawyers, he would not be able to see his family in the same week. In addition, the time limit of 30 minutes is still too short for family and counsel visits, even though it is longer than the 15-minute visiting time in the detention pending inquiries regime.

Unlike rule 22(8) of the *Lockup Rules 1953*, which allows detainees detained pending inquiries to have interviews with their counsel within sight but not hearing of the police,

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[263] *SUHAKAM Report*, above n 119, 71.

rule 81(5) of the *Internal Security (Detained Persons) Rules 1960* requires a prison officer to be both in sight and within hearing during the whole visit, unless the Superintendent by an order in writing sees fit to dispense with any of these requirement.[264] Thus, there is basically no guarantee of privacy during the detainees' visits from their counsel. As was discussed in relation to Australia's PDO regime, confidential lawyer-client communication is a fundamental human rights protection norm at the international level, and it has been a central feature of the law and practice relating to lawyer talking to their clients in police custody for hundreds of years that communication cannot be monitored.

6.5.3.3 Case Studies

Despite the fact that the provisions of the *Lockup Rules 1953* and *the Internal Security (Detained Persons) Rules 1960* already fall short of the aforementioned international human rights standards, there have been reported cases where even those provisions do not appear to be adhered to, especially the rights to meet with lawyers and family members.

In the case of *Abdul Ghani Haroon v Ketua Polis Negara and Another,*[265] the police alleged that visits by family members were not allowed because that would "… impede police investigations that were in progress". The Malaysian Federal Court ruled against the police and held that such reasoning was unacceptable. The judge asked rhetorically what harm could "brief visits by immediate family members do to the police investigations?"[266], and went on to argue that "the law, especially a law that affects

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[264] *Internal Security (Detained Persons) Rules 1960* (Malaysia), rule 81(5).

[265] *Abdul Ghani Haroon v Ketua Polis Negara and Another Application* [2001] 2 MLJ 689.

[266] Ibid 690.

fundamental rights, should not be enforced blindly. It must be interpreted and carried out as humanely as possible. … There is no provision under the MISA that confers upon the police such drastic powers".[267] As for the denial of access to lawyers in the same case, the Court held that unreasonably denying such access would result in the detention being made *mala fides* as such denial "… is not only cruel, inhuman and oppressive, it is also a blatant violation of the applicants' constitutional rights under art.5(3) of the Constitution …"[268]

The Federal Court also had the opportunity to decide on the issue of access of legal counsel during detention pending inquiries in *Mohammad Ezam*, in which access to lawyers was granted only after the detention order had expired.[269] The court held that the denial of access was unreasonable and a clear violation of Article 5(3) of the Constitution.[270] The court further argued that such conduct also lends support to an allegation of *mala fides* on the part of the police.[271] Notwithstanding the special powers provisions in the *Constitution of Malaysia*, the court held in no uncertain terms that "… the MISA is still subject to the rights entrenched in art 5(3)".[272]

The Malaysian court also emphasized the importance of meeting a lawyer in the case of *Nasharuddin Bin Nasir*, a preventative detention case decided after 11 September 2001.[273] In the High Court, the applicant claimed the right entrenched in Article 5(3) of

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[267] Ibid 690, 691.

[268] Ibid 691.

[269] *Mohamad Ezam Bin Mohd Noor v Ketua Polis Negara and Others* [2002] 4 MLJ 449 (Malay. F.C.).

[270] Ibid 470.

[271] Ibid 474.

[272] Ibid.

[273] *Nasharuddin bin Nasir v Kerajaan Malaysia and Others* [2002] 6 MLJ 65 (Malay. H.C.) 68. Nasir was arrested in April 2002 for suspected links with Kumpulan Militant Malaysia, a group which was alleged to have indirect connections with the Al-Qaeda.

the Constitution.[274] Justice Suriyade held that the police action was *mala fides* in that it unfairly denied this access during the detention.[275] He also noted that the behaviour of the police was "coldly calculative" by allowing access to the family immediately before the trial, but deliberately denying it for crucial legal advice. In a bold statement, Justice Suriyade concluded the police should be responsible for the counsel's inability to meet with the detainee.[276]

Consequently, it was clear that though the MISA was issued as a special emergency law under the special powers provisions of the *Constitution of Malaysia*, and there is no requirement in the MISA guaranteeing a detainee the right to counsel. Nevertheless, the courts are insistent that even so, the MISA is still subject to the right to counsel entrenched in Article 5(3) of the *Constitution*. According to the courts, the right to counsel is so fundamental that anyone detained under the MISA must be provided with such access. Under no circumstances would the police have any excuse to place restrictions on this right, otherwise it would be a direct violation of the constitutional right to liberty.

In the Singaporean decision of *Lee*, the Court similarly held that the constitutional right under Article 9(3) which provides that a person arrested "… shall be allowed to consult and be defended by a legal practitioner of his choice" applies even in preventative detentions under the SISA.[277] It was held that the contention of the Attorney General that the SISA was "… intended to deprive a person of a fundamental liberty which the Constitution guarantees to him, namely the right to be allowed to consult a legal

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[274] Ibid 68.

[275] Ibid 72.

[276] The Court found that the detainee was denied meeting with his lawyer right after he had to be taken to the hospital due to a "rare and strange onset of illness". Ibid 72.

[277] *Lee Mau Seng v Minister for Home Affairs* (1971) 2 MLJ 137 (Sing. H.C.) [19].

practitioner of his choice" was an "unacceptable proposition".[278] Thus, rights of access to the outside world seem to have been afforded in all cases. It has never been the practice of the Singapore authorities to hide the fact of detention, and it has not proved difficult for detainees to see their families, or consult their lawyers.[279]

Compared with their Australian counterpart, there are no restrictions as to the content of the communications between detainees and family or friends in the MISA and the SISA, and there is no criminal offence with regard to the disclosure of detention orders. Although both Singapore and Malaysia restrict detainees' contact with the outside world in time and frequency, at least the detainees can be visited on a weekly basis, even if the contact is limited to only one family member or his or her lawyer once every week. While detainees under an Australian PDO cannot even tell their family members they have been detained and are only allowed to inform the family members and others that they have being detained, the MISA and the SISA include more expansive contact rights. But one common feature of the detention regimes in Malaysia and Australia is the monitored lawyer-client communication. In both regimes, a police officer or a prison officer is required to be both in sight and within hearing during the whole visit; this is a violation of the confidential lawyer-client communication enshrined in international law.

While the courts in both states have been quite deferential to the executive's decisions about the preventative detention orders, and have even acknowledged the constitutional validity of the notorious amendments to the MISA and the SISA, in terms of the rights to counsel, the courts have usually ruled against the executive, holding that the detention regime still has to be subject to the right to counsel in the *Constitution.*

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[278] Ibid [20].

[279] In two detention cases, lawyers were detained for reasons of national security. Andrew J. Harding, 'Chapter 11: Singapore', in Andrew Harding and John Hatchard (eds.), *Preventive Detention and Security Law – A Comparative Survey* (Martinus Nijhoff Publishers, 1993) 193, 207.

6.6 CONCLUSION – THE AFTERMATH

The histories of the MISA and the SISA show that, while both Acts were originally designed to protect Malaysia and Singapore from the threat of communism in times of real emergency, after the emergency was officially declared at an end, the executive in both countries has frequently resorted to the indefinite detention regimes not to protect national security, but to stifle political dissent and human rights activities.

A distinct characteristic of the MISA and the SISA is that the two emergency ordinances have been used to address a number of broadly defined national security threats. The MISA and the SISA empower the domestic security departments and police officers to question and detain espionage suspects, political opponents alleged to be communist conspirators and in recent times, terrorism suspects. Apart from these widely accepted threats to national security, governments in both states also consider mass demonstrations and some forms of political activity as potentially damaging to national security. Hence people who would not be considered terrorists in Australia, even given the width of the definition of a "terrorist act" in Australia, have been defined as national security threats in Malaysia and Singapore, and have been preventatively detained under the MISA and the SISA.

The indefinite detention regimes in both states have been much used throughout their post-colonial history primarily for the purpose of suppressing internal rebellions, getting control of the state, restoring law and order and stifling political dissent, rather than to prevent genuine threats to national security and the social order of the nation. The new security environment, brought about by the September 11 terrorist attacks, and the so-called US-led "War on Terror" appeared as good opportunities for the indefinite detention regimes to be continually used as ordinary criminal law to combat international

and domestic terrorism. While the MISA and the SISA have been severely criticized for being abused to stifle human rights activists prior to the 9/11 attack, the international community now seems more open to acceptance of oppressive applications of preventative detention measures.[280] With the international community debating the necessity and efficacy of pre-emptive measures in countering terrorism, and more and more western states resorting to preventative detention schemes, Singapore and Malaysian authorities were finally able to boast of their schemes of indefinite detention without charge as powerful and legitimate anti-terrorism measures.[281]

By comparing Singapore and Malaysia's detention regimes against international human rights standards and Australia's PDO regime, there is no doubt that the provisions themselves are highly problematic. The two-year or even indefinite period of detention is not only disproportionate to the purpose of the regime, but also against the principles of natural justice and the rule of law. The two states' detention regimes fail to incorporate procedural constraints in a number of respects, such as contact with the outside world. That being said, the provisions in the MISA and the SISA require the issuing authorities to provide the detainee with a statement in writing of the grounds on which the order is made, as well as of the facts on which the order is based. Compared to Australian PDO regime, in which the detainees must only be furnished with a summary of such grounds, the detainee in Singapore and Malaysia at least will be provided with the allegations of facts on which the order is made, and thus is in a better position to challenge the order before an Advisory Board.

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[280] For discussion of the western democracies' inconsistent reaction to the detention regime before and after 9/11, see Michael Hor, 'Terrorism and the Criminal Law: Singapore's Solutions' (July 2002) *Singapore Journal of Legal Studies* 30, 30-1.

[281] At the 2008 Internal Security Department (ISD) 60th Anniversary Dinner, which is the enforcement agency of the SISA, Prime Minister Lee Hsien Loong appraised the effort of ISD in enforcing the SISA to detain terrorist suspects. 'Speech by Prime Minister Lee Hsien Loong at the Internal Security Department 60th Anniversary Dinner', 30 August 2008, 8.15PM at the ISTANA.

Although the MISA and the SISA each provides an internal review mechanism under which the detainees can apply for a review of the detention order to the Advisory Board, the Board does not have the ultimate power to quash the detention orders and thus to release detainees immediately. Instead, the Advisory Board can only make suggestions to the Minister or the President, who will then make a final decision which cannot be challenged in any court.

It is not surprising that in order to protect national security, governments have used legislative tools to deter and punish terrorism, including the tool of indefinite preventative detention. But one might question the legislation providing for the detention regimes in several ways, particularly the judicial responses to them. In fact, during the half-a-century history of both the MISA and the SISA, courts in both states did occasionally try to uphold the integrity of the Constitution*s* and to protect fundamental rights and liberties, particularly when asserting that the MISA and SISA are subject to the constitutional right to counsel. Their efforts nonetheless have provoked the government to respond through significant amendments to the MISA and the SISA to further limit judicial power in reviewing detentions. Judicial review in both states is strictly limited to procedural aspects of the preventative detentions without charge. Despite the fact that Australia's PDO regime only offering limited opportunity for merits review at the AAT *ex post facto*, it is still possible for a challenge to be made to the constitutional validity of the regime, and the Supreme Court of states or territory may conduct merits review of a state or territory PDO. The legislative and subsequently constitutional entrenchment of the MISA and the SISA in 1980s and early 1990s established the constitutional validity of the detention regime, and further prevented the courts from conducting merits review of the detention orders. As a result, detainees cannot make applications concerning substantive aspects of the detention orders, and the courts are unable to declare the detention regimes or the amendments unconstitutional if a challenge is made. Because of the legislature's careful efforts to immunize the amendments to the MISA and the SISA

from challenges of constitutional validity, there appears to be little the judges can do to judicially challenge the disproportionate detention regime.

However, even so, the judicial role clearly consists of upholding the constitution and the rule of law. In the face of clear constitutional amendment, the court could only recognise and uphold legislative supremacy. That said, what the court in both courts failed to do was in considering whether the Parliaments had provided with detainees sufficient protections with regard to the amendments to the MISA and the SISA. As judicial review of the grounds of detention had been removed, the courts should particularly take into account the remaining procedural safeguards to examine whether such safeguards are sufficient in protecting the detainees' rights. Specifically, whether the remaining safeguards are in concert with article 151 of the Constitutions, which provides for restrictions on preventative detention, namely the detainee must be informed of the grounds of his detention as soon as possible; be informed of the allegations of fact on which the order is based provided the disclosure would not be against the national interest; and be given the opportunity of making representations against the detention order without delay.[282] If any one of the above criteria is not met under the current provisions, then the court may be required to reconsider whether the amendments limiting judicial review to procedural grounds are constitutional.

The timely use of detention orders may prevent a catastrophic terrorist act, and governments should have the power to decide whether use of a preventative detention regime is necessary. But without proper procedural constraints, especially the effective judicial control, who guards the guardians? When the proper functioning of a system depends solely on the integrity of its operators, considering a country like Singapore

[282] *Federal Constitution* (Malaysia), art 151; *Constitution of the Republic of Singapore* (Singapore), art 151.

where the People's Action Party has been in power since late 1950s,[283] who can prevent future abuse?

New anti-terrorism laws have been promulgated in the two jurisdictions. Singapore has the *United Nations (Anti-Terrorism Measures) Regulations 2002* which only deals with the aiding and financing of foreign terrorists, and other penal laws were not amended to deal specifically with terrorism. Hence the government can only detain and charge persons suspected of domestic involvement of terrorist activities under the SISA. In contrast, Malaysia amended the *Criminal Code* in 2007 to include a new chapter of terrorism-related offences and introduced an updated version of the definition of terrorism which is appropriate and accord with international standards. The question is evident: is there still a need to continue heavily relying upon the MISA or the SISA?

[283] Singapore essentially has only one party in power and a unicameral Parliament, so that all legislative power is concentrated in one body. But an Upper House may provide added scrutiny over proposed legislation and at the very least would have a delaying, if not a vetoing power. See relevant discussion also in Giovanni Sartori, *Comparative Constitutional Engineering* (Macmillan Press, 2nd ed., 1997) 184-5.

CHAPTER 7 - CONCLUSION

It is, in practice, hard to imagine a circumstance when absolutely clear and adequate evidence of an impending terrorist attack would exist, and sufficient time is left for the legislature or the executive respond to a terrorism threat. International human rights law recognises the reality of the threat presented by terrorism, and states are entitled and even obliged to take necessary and positive pre-emptive measures to protect their nationals against the threat of terrorist acts. It has been no part of my argument that government should be denied powers they genuinely need to defend our society and our way of life. But these pre-emptive measures, particularly security-based preventative detention without charge, need to strike a proper balance between the vital needs of the state to protect national security and the fundamental liberties and rights of individuals. The protection of human rights is not antithetical to the preservation of national security. In fact, as could be concluded from the established jurisprudence of preventative detention without charge in the Human Rights Committee and the European Court of Human Rights, human rights law already strikes a balance between security interests and fundamental individual rights. Accordingly, the overall assumption is that international human rights law allows for special counter-terrorism measures to be taken by states, but demands that any measures shall remain within carefully drafted limits and shall include effective procedural safeguards.

The application of international human rights law becomes more contentious in national security cases. Neither the provisions of international human rights conventions nor the jurisprudence of the Human Rights Committee has given comprehensive guidance as to the permissible scope of preventative detention. The Human Rights Committee has acknowledged the need for a State to demonstrate the necessity of any detention measures, but largely focuses on procedural protections. The Strasbourg Court, on the other hand, has developed a workable standard for examining whether the

detention measures are permissible under international human rights law, namely whether the detention regime in question is strictly necessary to the current exigencies and proportionate to its purpose; whether other less rights-stripping alternatives may be sufficient;[1] and whether external supervision is included to protect detainees against arbitrary detentions or abuses in the operation of the detention scheme. With regard to the duration of detention, the Strasbourg Court has contributed to the duration of an international human rights standard by requiring the term "promptly" to be interpreted in a broad context. It thus set out a clear prohibition against prolonged preventative detentions by indicating a standard of a four-day period of detention in normal cases and a five-day in exceptional situations. Nonetheless, both human rights bodies acknowledged that it is impossible to set out the time constraint into a fixed number of hours, days, weeks, and instead there arises a need for a case-by-case assessment. Last but not the least, both the Human Rights Committee and the Strasbourg Court emphasised the suspensions of procedural rights in considering the arbitrariness of the detention regime. Across a number of decisions, the Strasbourg Court insisted that procedural safeguards enshrined in Article 5 apply to all categories of preventative detention. In so doing, those detained without criminal charge will at least be provided with the same procedural safeguards as those detained under a pre-trial detention framework.

International human rights law thus identifies principles and rules that have established the permissible range of preventative detention laws. This standard requires that any domestic detention measures must be lawful, necessary, predictable and proportionate to its proposed aim of preventing terrorist acts, procedures that ensure substantive review of the justifications of detention and other essential rights that protect

[1] This is also the same standard as applied by the HRC under the derogation and permissible restrictions analysis under article 4 of the ICCPR. However, as national security preventative detention is permissible under article 9 of the ICCPR, and does not have to invoke derogation provisions, the Human Rights Committee does not explicitly apply these standards in examining the preventative detention schemes.

detainees against inhuman treatment, including the right to be informed of the reasons for detention, the right to contact with the outside world, the right to a confidential lawyer-client communication, and the right to be brought by state authorities before a competent judicial body. A preventative detention regime that suspends human rights should only be permitted when all the above notions have been incorporated in domestic detention regimes.

This thesis has compared the preventative detention regimes in Australia, Malaysia and Singapore by considering not only the provisions of laws of preventative detention, but also the influence of a distinct national identity, background, legislative history and concept of legality. Terrorism has never been far from the Malaysian and Singaporean psyche. The MISA and SISA were firstly introduced as emergency ordinances in real times of emergency, and have remained in force for half a century. By contrast, Australian home soil has not encountered a significant successful terrorism attack apart from the Hilton bombing in 1978, and only introduced its anti-terrorism laws after the terrorist attacks in 11 September 2001. The new preventative detention order in Australia's Criminal Code has not been used since its introduction five years ago. Thus, it is not surprising that domestic laws of preventative detention in Australia, Malaysia and Singapore diverge in a number of significant respects.

One of the major differences is the period of detention. In Australia terrorism suspects and non-suspects may be detained for up to 48 hours by the Commonwealth with the possibility of this being extended by a further 14 days at State or Territory level, whereas detentions in Malaysia and Singapore can be extended for an indefinite period of time. Judging by the mere length of detention, even the 14-day period in Australia is contrary to the international human rights standard. Not only because the overall duration is lengthy compared to the international standards and under current pre-trial detention scheme in Australia, but also due to the fact that there is no court involvement in the issuing process of the federal detention order, no substantive review of the justifications

of the detention at the federal level, and a comprehensive assessment of the allegations of facts on which a State or Territory PDO has made is problematic in several aspects, for example, the State PDO will continue to be in force during the course of proceedings, and the detainees are not required to be brought before the court. An issue of more concern is the two-year period of detention with the possibility of extending to an indefinite period in Malaysia and Singapore. Moreover, the threshold for detentions without charge in Malaysia and Singapore is quite low, requiring only the subjective satisfaction of the Minister or police that the detention is necessary to prevent detainees from acting in a manner prejudicial to national security. In contrast, as least under Australia's PDO regime, an initial PDO or a continued one can only be issued when it is necessary to prevent an imminent terrorist act occurring in the next 14 days or to preserve evidence relating to a terrorist act. Nevertheless, the grounds of detention are far from clear under domestic laws in all jurisdictions, as there are no clear explanation of key terms, such as "imminent" or "reasonably necessary" in the *Criminal Code* or "act in a manner prejudicial to national security" in the MISA or the SISA. The uncertainties and ambiguities surrounding the provisions of the Australian PDO regime may significantly broaden the executive's power to preventatively detain without charge. Notable examples of the potential damages are the undesirable situations in its Malaysian and Singaporean counterparts that, partly due to the low threshold of detention and unclear and undefined key terms, preventative detention schemes have constantly been used to stifle political dissent rather than to prevent real national security threats.

Australia's PDO regime shares with Malaysian and Singaporean detention measures a lack of several core procedural safeguards prescribed by international human rights law, namely the right to have regular contact with the outside world, the right to have confidential lawyer-client communication, and the most important right to have a substantive review of the detention grounds. What complicates things further is that major amendments to the MISA and the SISA completely exclude substantive review of the detention orders. As a result, detainees cannot make applications for review of the

grounds of detention nor the allegations of fact on which the order is based. The courts cannot declare any detention measures to be unconstitutional even if a challenge is made, as the special powers provisions in Constitutions explicitly preserve the constitutional validity of these measures, notwithstanding that they may be inconsistent with fundamental rights and liberties. Although under Australia's PDO regime, detainees have only a very limited right to reviews of the detention grounds (as any application to the Australian Administrative Tribunal cannot be made when the PDO is in force), at least it is still open for a challenge of the constitutional validity at Commonwealth level, and the detainees are entitled to a substantive review of the detention grounds at State or Territory level.

Both the MISA and the SISA were passed as interim emergency rules during real times of emergency, and they were indeed necessary fifty years ago. But, emergency laws often are framed in vague and undefined terms which create a potential environment for illegal or arbitrary detention in the future. As demonstrated by the examples of the detention regimes in the MISA and the SISA, to continually make use of these old emergency measures after the disappearance of the particular state of emergency, means that the indefinite detention regimes are a source of violation of international human rights law. While these measures were indeed necessary during a genuine time of emergency, when interim emergency rules are regularly renewed a matter of course, the normalisation of extraordinary rules is at odds with the underlying assumption of international human rights law – the respect for human rights, particularly the right to liberty. Even if these emergency acts has been clearly spelt out by the Parliaments in Malaysia and Singapore, the courts would still be justified in striking it down as these emergency measures violates basic principles of the rule of law that the civilized community has come to accept as entrenched rights.

The demand for Australia's PDO scheme came from a perception that preventative actions were essential for responding to the contemporary terrorism threat. The

Australian government justified their pre-emptive measures on the assumptions that when the commission of a terrorist act was imminent and could not be dealt with by existing criminal offences. Thus a preventative detention regime is necessary and efficient in preventing terrorist acts. In fact, few can dissent from the conclusion that pre-emptive measures and early intervention against terrorism is preferable, and as the state is the only authority to have access to all related material and classified intelligence information, it should be empowered to make such decisions. But the undeniable fact is that the newly created preventative detention powers conferred on the Australian Federal Police extend executive powers very considerably, and frequently restrict review by judicial bodies. In effect, the traditional criminal justice system, with its well established evidentiary and procedural requirements has been supplanted, at least in part, by the new preventative detention regime. Although there is not enough practical experience in Australia, the problems of normalisation of exceptional laws and the seepage of emergency powers into the normal legal framework have been highlighted by the Malaysian and Singaporean examples. There is a real danger that this preventative detention regime might damage the established rule of law and the criminal justice system in Australia.

Australia, Singapore and Malaysia stand as interesting yet complicated examples and there is still much to be learned about how governments should act to respond to terrorism threats. If there is anything to be gained from the tension between detention without charge and the protections of fundamental rights, and how the jurisprudence of international human rights bodies has developed with regard to preventative detentions without charge, it is that even in genuine emergencies, certain individual rights and liberties are non-derogable and should be respected by states.

In an optimal model of preventative detention regime, there should be an appropriate role for judges, bureaucrats and legislators. The powers exercised by the state authorities must be authorized by the rule of law, the concepts of legality and natural justice, and judges should be able to apply a heightened standard of judicial review and be involved

in the real examination of the process and merits of any detention order. In addition, detention measures should engage international institutions in reviewing how a state acts in times of emergency. This is the essence of human rights protection at both the international and national levels. While the executive or legislature has often failed to observe these basic principles, as the deprivation of personal liberty has been characterized as in accordance with the *Constitutions*, courts should act as the guardian of the human rights. In so doing, judges' clear resistance to the wrongful use of the preventative detention regimes will be the starting point.

BIBLIOGRAPHY

A. Books/Journal Articles/Reports

Abuza, Zachary, 'Tentacles of Terror: Al Qaeda's Southeast Asian Network' (2002) 24(3) *Contemporary Southeast Asia* 427

Ackerman, Bruce, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press, annotated ed. 2007)

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

Agamben, Giorgio, *Homo Sacer: Sovereign Power and Bare Life*, trans. by Daniel Heller-Roazen (Stanford University Press, 1998)

Arbour, Louise, 'In Our Name and On Our Behalf' (2006) 55 *International and Comparative Law Quarterly* 511

Athulathmudali, I.W., 'Preventive Detention in Malaysia' (1965) *Journal du Droit International* 543

Athulathmudali, I.W., 'Preventive Detention in the Federation of Malaya' (1961) 3 *Journal of the International Commission of Jurists* 100

Atkins, Drew R., 'Customary International Humanitarian Law and Multinational Military Operations in Malaysia' (2007) 16 *Pacific Rim Law and Policy Journal* 79

Attorney-General's Department, 'National Security Legislation Discussion Paper' (August 2009)

Attorney-General's Department, 'Submission to the Security Legislation Review Committee' (February 2006)

Bingham, Tom, *The Rule of Law* (Allen Lane, 2010)

Blum, Stephanie Cooper, 'Preventive Detention in the War on Terror: A Comparative of How the United States, Britain, and Israel Detain and Incapacitate Terrorist Suspects' (Oct. 2008) 4(3) *Homeland Security Affairs* 1

Bobbitt, Philip, *Terror and Consent: The Wars for the Twenty-First Century* (Anchor, Reprint ed. 2009)

Bossuyt, Marc J, *Guide to the Travaux Preparatoires of the International Covenant on Civil and Political Rights* (Kluwer Law International, 1987)

Brown, Bernard, 'Administrative Internment in Singapore' (1961) 3 *Journal of the International Commission of Jurists* 126

Burch, Stella J., 'Rethinking "Preventive Detention" from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects' (2009) 41 *Columbia Human Rights Law Review* 99

Carlson, Scott N and Gregory Gisvold, *Practical Guide to the International Covenant on Civil and Political Rights* (Hotel Publishing, 2003)

Cheong, Damien, 'Selling Security: The War on Terrorism and the Internal Security Act of Singapore' (2006) 23 (1) *Copenhagen Journal of Asian Studies* 28

Chua, Eunice, 'Reactions to Indefinite Preventive Detention: An Analysis of How the Singapore, United Kingdom and American Judiciary Give Voice to the Law in the Face of (Counter) Terrorism' (2007) 25 *Singapore Law Review* 3

Commonwealth Director of Public Prosecutions, 'Submission to the Security Legislation Review Committee' (February 2006)

Cook, Helena, 'Preventative Detention – International Standards and the Protection of the Individual', in Stanislaw Frankowski and Dinah Shelton (eds), *Preventive Detention: A Comparative and International Law Perspective* (Martinus Nijhoff Publishers, 1992) 1

Cotler, Irwin, 'Terrorism, Security and Rights: The Dilemmas of Democracies' (2002) 14 *National Journal of Constitutional Law* 13

Craig, Paul, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467

Davinia Filza Binte Abdul Aziz, Gerardine Goh Meishan and Ernest Lim Wee Kuan, 'South East Asia and International Law' (2001) 5:2 *Singapore Journal of International and Comparative Law* 814

Desker, Barry and Kumar Ramakrishna, 'Forging an Indirect Strategy in Southeast Asia' (Spring 2002) 25:2 *Washington Quarterly* 161

Diecy, Albert V., *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th ed, 1920)

Douglas, Roger, 'Proscribing Terrorist Organisations: Legislation and Practice in Five English-Speaking Democracies' (April 2008) 32(2) *Criminal Law Journal* 90

Drysdale, John, *Singapore: Struggle for Success* (Times Books International, 1984)

Dyzenhaus, David, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006)

Eminent Jurists Panel, *Assessing Damages, Urging Action Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (2008)

Fong, Sip-Chee, *The PAP Story: The Pioneering Years (November 1954 – April 1968)* (Times Periodicals, 1979)

Fritz, Nicole and Martin Flaherty, 'Special Report – Unjust Order: Malaysia's Internal Security Act' (2002-2003) 26 *Fordham International Law Journal* 1345

Fuller, Lon L., *The Morality of Law* (New Heaven: Yale University Press, 1969)

Gan, Ching Chuan, 'Judicial Review of Preventive Detention in Malaysia' (1994) 1 *Malayan Law Journal* cxiii

Gan, Ching Chuan, 'The Interpretation of the Internal Security Act of Malaysia: An Analysis of the Protective Measures Available and Their Effectiveness' (Feb. 1995) 1 *Current Law Journal* cxxxvii

Gearty, Conor, 'Reflections on Civil Liberties in an Age of Counterterrorism' (2003) 41 *Osgoode Hall Law Journal* 185

Goh, Keng Swee, 'The Nature and Appeals of Communism in Non-Communist Asian Countries', in Australian Institute of Political Science, *Communism in Asia: A Threat to Australia?* (Angus & Robertson, 1967)

Green, Steven, 'Chapter 2: Preventive Detention and Public Security – Towards A General Model', in Andrew Harding and John Hatchard (eds), *Preventative Detention and Security Law: A Comparative Survey* (Martinus Nijhoff Publishers, 1993) 23

Gross, Oren and Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006)

Gross, Oren, 'Chaos and Rules: Should Responses to Violent Crises always be Constitutional?' (2003) 112 *Yale Law Journal* 1011

Hack, Karl, 'Iron Claws on Malaya: The Historiography of the Malayan Emergency' (1999) 30(1) *Journal of Southeast Asian Studies* 99

Hakimi, Monika, 'International Standards for Detaining Terrorism Suspects: Moving beyond the Armed Conflict-Criminal Divide' (2008) 33 *Yale Journal of International Law* 369

Harding, Andrew J., 'Chapter 11: Singapore', in Andrew Harding and John Hatchard (eds.), *Preventive Detention and Security Law – A Comparative Survey* (Martinus Nijhoff Publishers, 1993) 193

Harris, David, Michael O'Boyle and Chris Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1st ed, 1995)

Hassan, Parvez, 'The International Covenant on Civil and Political Rights: Background and Perspective on Article 9(1)' (1973) 3(2) *Denver Journal of International Law and Policy* 153

Hatchard, John, 'Chapter 17: The United Kingdom', in Andrew Harding and John Hatchard, *Preventive Detention and Security Law: A Comparative Survey* (Martinus Nijhoff Publishers, 1993) 265

Heckman, Gerald, 'International Decisions: *Ahani v. Canada*' (2006) 99 *American Journal of International Law* 699

Hor, Michael, 'Law and Terror: Singapore Stories and Malaysian Dilemmas', in Victor V. Ramraj, Michael Hor and Kent Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2005) 273

Hor, Michael, 'Terrorism and the Criminal Law: Singapore's Solution' (2002) 1 *Singapore Journal of Legal Studies* 20

Hufnagel, Saskia, 'German perspectives on the right to life and human dignity in the "war on terror"' (April 2008) 32(2) *Criminal Law Journal* 100

Ignatieff, Michael, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton University Press, New ed, 2005)

Joseph, Sarah, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 2000)

Kirby, Michael, 'Liberty, Terrorism and the Courts' (2005) 9 *University of Western Sydney Law Review* 11

Lawyers Committee for Human Rights, *Malaysia: Assault on the Judiciary* (Committee for Human Rights, 1989)

Lee, Boon Hiok, 'Singapore: Reconciling the Survival Ideology with the Achievement Concept', in Leo Suryadinata (ed), *Southeast Asian Affaire 1978* (ISEAS Publishing, 2003)

Lee, Terence, 'The Politics of Civil Society in Singapore' (2002) 26(1) *Asian Studies Review* 97

Lee, Therese, 'Malaysia and the Internal Security Act: The Insecurity of Human Rights After September 11' (2002) *Singapore Journal of Legal Studies* 56

Locke, John, *Two Treatises of Government*, Peter Laslett (ed) (Cambridge University Press, 1988).

Luey, T.M.A., 'Defining "Terrorism" in South and East Asia' (2008) 38 *Hong Kong Law Journal* 129

Lynch, Andrew and Alexander Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventative Detention' (2007) 10 *Flinders Journal of Law Reform* 105

Lynch, Andrew and George Williams, *What Price Security? - Taking Stock of Australia's Anti-Terror Laws* (UNSW Press, 2006)

Lynch, Andrew, 'Legislating with Urgency – The Enactment of the *Anti-Terrorism Act [No 1] 2005*' (2006) 31 *Melbourne University Law Review* 747

Lynch, Andrew, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (The Federation Press 2007)

MacDonald, Edwina and George Williams, 'Combating Terrorism: Australia's Criminal Code since September 11, 2001' (2007)16 (1) *Griffith Law Review* 27

Macken, Claire, 'Preventative Detention and the Right of Personal Liberty and Security under the International Covenant on Civil and Political Rights, 1966' (2005) 26(1) *Adelaide Law Review* 1

Macken, Claire, 'Preventive Detention and the Right to Personal Liberty and Security under Article 5 ECHR' (September 2006) 10 (3) *International Journal of Human Rights* 195

McCulloch, Jude and Joo Cheong Tham, 'Secret State, Transparent Subject: The Australian Security Intelligence Organisation in the Age of Terror' (2005) 38 *Australian and New Zealand Journal of Criminology* 400

McEvoy, Kieran, *Paramilitary Imprisonment in Northern Ireland – Resistance, Management, and Release* (Oxford University Press, 2001)

McGarrity, Nicola, '"Testing" Our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia (2010) 34 *Criminal Law Journal* 92

McGarrity, Nicola, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge London and New York, 2010).

Mercado, Cynthia Calkins and James R.P. Ogloff, 'Risk and the Preventive Detention of Sex Offenders in Australia and the United States' (2007) 20 (1) *International Journal of Law and Psychiatry* 49

Michaelsen, Christopher, 'The Proportionality Principle in the Context of Anti-Terrorism Law: An Inquiry into the Boundaries between Human Rights Law and Public Policy', in Miriam Gani and Penelope Mathew (eds), *Fresh Perspective on the "War on Terror"* (ANU E-Press, 2008) 109

Ministry of Home Affairs (Singapore), *What is the ISA?* (Times Books International, 2002)

Munir, Abu Bakar, 'Chapter 8: Malaysia', in Andrew Harding and John Hatchard (eds), *Preventive Detention and Security Law – A Comparative Survey* (Martinus Nijhoff Publishers, 1993) 131

Nesbitt, Katherine, 'Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis' (2007) 17(1) *Public Interest Law Journal* 39

Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P.Engel Publisher, 1993)

Opsahl, Torkel and Thomas Ouchterlony (eds), *Frede Castberg: The European Convention on Human Rights* (A.W.Sijthoff, 1995)

Oraa, Jaime, *Human Rights in States of Emergency in International Law* (Oxford: Clarendon Press, 1992)

Palmer, Andrew, 'Investigating and Prosecuting Terrorism: The Counter-Terrorism Legislation and the Law of Evidence' (2004) 27 *University of New South Wales Law Journal* 373

Parliamentary Joint Committee on Human Rights, UK Parliament, 'Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters' (2005)

Parliamentary Joint Committee on Intelligence and Security, 'Review of Security and Counter-Terrorism Legislation' (4 December 2006)

Paust, Jordan J., 'Judicial Power to Determine the Status and Rights of Persons Detained Without Trial' (2003) 44 *Harvard International Law Journal* 503

Pejic, Jelena, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 *International Review of Red Cross* 375

Peng, Chin, *My Side of History* (Media Masters, 2003)

Pilloud, Claude, et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987)

Posner, Eric A. and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the* Courts (Oxford University Press, 2007)

Ramraj, Victor V. (ed), *Emergencies and the Limits of Legality* (Cambridge University Press, 2008)

Ramraj, Victor V. and Arun K. Thiruvengadam (eds), *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge University Press, 2010)

Ramraj, Victor V., 'The Post-September 11 Fallout in Singapore and Malaysia: Prospects for an Accomodative Liberalism' (2003) *Singapore Journal of Legal Studies* 459

Ramraj, Victor V., Michael Hor and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2006)

Reilly, Anthony, 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001-2005' (2007) 10 *Flinders Journal of Law Reform* 81

Rerceretnam, Marc, 'The 1987 ISA Arrests and International Civil society Responses to Political Repression in Singapore' (2006) 23 *Copenhagen Journal of Asian Studies* 8

Roach, Kent, 'A Comparison of Australian and Canadian Anti-Terrorism Laws' (2007) 30(1) *University of New South Wales Law Journal* 53

Roach, Kent, 'Judicial Review of the States' Anti-Terrorism Activities' (2009) 3 *Indian Journal of Constitutional Law* 138

Roach, Kent, 'National Security, Multiculturalism and Muslim Minorities' (2006) *Singapore Journal of Legal Studies* 405

Roach, Kent, 'The Case for Defining Terrorism with Restraint and Without Reference to Political or Religious Motive', in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (The Federation Press, 2007) 39

Roach, Kent, 'The Post-9/11 Migration of Britain's Terrorism Act 2000', in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006) 374

Rose, Gregory and Diana Nestorovska, 'Australian Counter-Terrorism Offences: Necessity and Clarity in Federal Criminal Law Reforms' (Feb 2007) 31(1) *Criminal Law Journal* 120

Ruddock, Philip MP, 'Australia's Legislative Response to the Ongoing Threat of Terrorism' (2004) 27 (2) *University of New South Wales Law Journal* 254

Sartori, Giovanni, *Comparative Constitutional Engineering* (Macmillan Press, 2nd ed., 1997)

Saul, Ben, *Defining Terrorism in International Law* (Oxford University Press, 2006)

Scheuerman, William E., 'Survey Article: Emergency Powers and the Rule of Law after 9/11' (2006) 14 (1) *Journal of Political Philosophy* 61

Schmid, Alex, 'Terrorism – The Definitional Problem' (2004) 36 (2-3) *Case Western Reserve Journal of International Law* 375

Schmitt, Carl, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans, University of Chicago Press, 1st ed. 2006) [trans of: *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (2nd ed, 1934)]

Schulhofer, Stephen J., 'Checks and Balances in Wartime: American, British and Israeli Experiences' (2003-2004) 102 *Michigan Law Review* 1906

Seow, Francis, 'To Catch A Tartar: A Dissident in Lee Kuan Yew's Prison', (Yale University Southeast Asia Studies, 1994)

Shah, Sangeeta, 'The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish' (2005) 5 *Human Rights Law Review* 403

Short, Anthony, *In Pursuit of Mountain Rats* (Cultured Lotus, 2000)

Singh, Daljit, *The Post-September 11 Geostrategic Landscape and Southeast Asian Response to the Threat of Terrorism – Trends in Southeast Asia* (Institute of Southeast Asian Studies, 2002)

The National Human Rights Commission of Malaysia (SUHAKAM: SURUHANJAYA HAK ASASI MANUSIA MALAYSIA), *Review of the Internal Security Act 1960* (Cetakan Pertama, 2003)

Todd, Anna, J. Clare Wilson and Sharon N. Casey, 'Comparing British and Australian Fear of Terrorism Pre and Post the Iraqi War' (June 2005) 12 *Psychiatry, Psychology and Law* 184

Tremewan, Christopher, *The Political Economy of Social Control in Singapore* (Oxford University Press, 1994)

Walker, Clive, *The Prevention of Terrorism in British Law* (Manchester University Press ND, 1992)

Weiss, Meredith I., 'What Will Become of Reformasi? Ethnicity and Changing Political Norms in Malaysia' (1999) *Contemporary Southeast Asia* 424

Winstedt, Richard O., *A History of Malaya, Kuala Lumpur* (Marican and Sons, 1982)

Yatim, Rais, *Freedom under Executive Power in Malaysia* (Endowment, 1995)

Yee, Chee Wai, Monica Ho and Daniel Seng, 'Judicial Review of Preventive Detention under the Internal Security Act – A Summary of Development' (1989) 5 *Singapore Law Review* 66

Yee, Chee-Wai, Monica Tze-Wei Ho and Daniel Kiat-Boon Seng, 'Judicial Review or Preventive Detention under the Internal Security Act – A Summary of Developments' (1989) 10 *Singapore Law Review* 66

Young, Reuven, 'Defining Terrorism: The Evolution of Terrorism as A Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation' (2006) 29 *Boston College International and Comparative Law Review* 23

B. Cases

A and Others v Secretary of State for the Home Department [2002] EWCA Civ 1502

A and Others v the United Kingdom (European Court of Human Rights, Grand Chamber, Application No. 3455/05, 19 February 2009)

A v Director of Immigration [2008] 4 HKLRD 752

A v Secretary of State for the Home Department [2004] UKHL 56

Abdul Ghani Haroon v Ketua Polics Negara and Another Application [2001] 2 MLJ 689

Abdul Razak bin Baharudin v Ketua Polis Negara and Others [2004] 7 MLJ 267 (Malay H.C.)

Ahmad Yani Bin Ismail and Anor v Inspector General of Police and Others [2004] 4 MLJ 636 (Malay H.C.)

Aksoy v Turkey [1996] 6 Eur Court HR 2260

Al Kateb v Godwin (2004) 219 CLR 562

Aminah v Superintendent of Prison, Pengkalan Chepa, Kelantan [1968] 1 MLJ 92

Amuur v France (1996) Eur Court HR 25

Appeals Chamber of the Special Tribunal on Lebanon, Case No.STL-11-01/1 (16 February 2011)

Asencios Lindo et al. (1998) Case 11.182, Report No. 53/98, Inter-Am Court HR, OEA/Ser.L/V/II.95 Doc. 7 rev. at 194

Assa Singh v Menteri Besar of Johore (1969) 2 MLJ 30

Brannigan and McBride v The United Kingdom (1988) 14553/89, 14554/89 Eur Court HR

Brogan and Others v The United Kingdom (1988) 11209/84; 11234/84; 11266/84 Eur Court HR

Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (judgment of 30 November 2010) [2010] ICJ

Chng Suan Tze v Minister for Home Affairs [1988] 1 SLR 132 (Sing C.A.)

Ciulla v Italy (1989) 11152/84 Eur Court HR

De Becker v Belgium (1962) 214/56 Eur Court HR

De Wilde, Ooms and Versyp ('Vagrancy') v Belgium (No.1) (1970) 2832/66 Eur Court HR

Dikme v Turkey [2000] 8 Eur Court HR 101

Eriksen v Norway [1997] 3 Eur Court HR 26

Fardon v Attorney-General for the State of Queensland (2004) HCA 46

Greek Case (1969) 12 Yearbook of the European Convention on Human Rights 1

Gurcharan Singh a/l Bachittar Singh v Penguasa, Tempat Tahanan Perlindungan Kamunting, Taiping and Others [2002] 4 MLJ 255

Guzzardi v Italy (1980) 7367/76 Eur Court HR

Hinds v The Queen [1977] AC 195 (P.C. on appeal from Jamaica)

Igeli v Turkey (2002) 29296/95 Eur Court HR

Inspector-General of Police v Tam Sri Raja Khalid bin Raja Harun [1988] 3 MLJ 29

Ireland v The United Kingdom (1978) 5310/71 Eur Court HR

Kerajaan Malaysia, Menteri Dalam Negeri, and Ketua Polis Negara v Nasharuddin Bein Nasir (2003) 6 AMR 497 (Malay C.A.)

Kilic v Turkey [2000] 2 Eur Court HR 75

Klass and Others v Germany (1978) 5029/71 Eur Court HR

Lawless v Ireland (No.3) (1961) 332/57 Eur Court HR

Lee Mau Seng v Minister for Home Affairs [1971] 2 MLJ 137 (Sing H.C.)

Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1

Mohamad Ezam Bin Mohd Noor v Ketua Polis negara and Others Appeal [2002] 4 MLJ 449 (Malay F.C.)

Nadarajah v Secretary of State for Home Department [2003] EWCA Civ 1768

Nasharuddin bin Nasir v Kerajaan Malaysia and Others (No.2) [2002] 4 MLJ 617

Nasharuddin bin Nasir v Kerajaan Malaysia and Others [2002] 6 MLJ 65 (Malay H.C.)

Neira Alegria et al v Peru (1995) Inter-Am Court HR (ser C) No.20

Ong Ah Chuan v Public Prosecutor (1981) 1 MLJ 64

Ong Ah Chuan v Public Prosecutor [1980] AC 64 (P.C. on appeal from Singapore)

Osman v PP [1965-68] SLR 19

Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2003] 3 AMR 2817

PP v Goh Seow Poh [1972-74] SLR 461

R v Governor of Brockhill Prison Ex Parte Evans 2 [2001] 2 AC 19

R v Halliday [1917] AC 260 (H.L.) (appeal taken from K.B.)

R v Khawaja (Ontario Superior Court, No. 04-G30282, 24 October 2006)

R v Mallah [2005] NSWSC 317 (Unreported, Wood CJ at CL, 21 April 2005)

Re Wooley, Ex parte Applicants M276/2003 (2004) 225 CLR 1

Schiesser v Switzerland (1979) 7710/76 Eur Court HR

Si Ah Fatt v PP [1950] MLJ 161

Stogmuller v Austria (1969) 1602/62 Eur Court HR

Subramaniam v PP [1956] MLJ 220 (P.C. on appeal from Malay)

Teo Soh Lung v Minister of Home Affairs [1989] 2 MLJ 449 (Sing C.A.)

Thomas v Mowbray [2007] HCA 33

Vincent Cheng v Minister for Home Affairs [1990] 1 SLR 190

X v Belgium (1973) 42 Eur Comm HR

X v the Netherlands (1966) 9 Eur Comm HR

Yit Hon Kit v Minister of Home Affairs, Malaysia and Anor (1988) 2 MLJ 638

C. Legislation/Treaties

African Charter on Human and Peoples' Rights

American Convention on Human Rights

Anti-Money Laundering (Amendment) Act 2003 (Malaysia)

Anti-Money Laundering Act 2001 (Malaysia, Act 613, 2006 reprint)

Anti-Terrorism Act (Canada, S.C. 2001, c.41)

Anti-Terrorism Act (No 2) 2005 (Cth)

Anti-Terrorism Act (No 2) 2005 (Cth)

Australian Security Intelligence Organisation Act 1979 (Cth)

Australian Security Intelligence Organisation Act 1979 (Cth)

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Civil Authorities (Special Powers) Acts 1922

Constitution of the Republic of Singapore (Amendment) Act 1989 (Singapore, No. 1 of 1989)

Constitution of the Republic of Singapore (Singapore, 1999 reprint)

Convention on the Rights of the Child

Crimes Act 1914 (Cth)

Criminal Code 1985 (Canada, Chapter 46)

Criminal Code Act (NT)

Criminal Code Act 1995 (Cth)

Criminal Justice Act 2003 (UK)

Criminal Law (Temporary Provisions) Ordinance 1955 (Singapore, cap 67, 1999 rev ed)

Criminal Procedure Code (Malaysia, Act 593)

Emergency (Public Order and Prevention of Crime) Ordinance (Malaysia, Act 187)

Emergency Regulations Ordinance 1948 (Malaya, Ordinance No 10/1948)

European Convention for the Protection of Human Rights and Fundamental Freedoms

Evidence Act 1995 (Cth)

Federal Constitution (Malaysia, 2006 reprint)

Geneva Convention Relative to the Protection of Civilian Persons in Time of War

Immigration and Nationality Act of 1965 (USA)

Internal Security (Amendment) Act 1989 (Singapore, No. 2 of 1989)

Internal Security (Detained Persons) Rules 1960 (Malaysia)

Internal Security Act 1960 (Malaysia, Act 82, 1999 reprint)

Internal Security Act 1965 (Singapore, cap 143, 1985 rev ed)

International Covenant on Civil and Political Rights

Judiciary Act 1903 (Cth)

Monetary Authority of Singapore (Anti-Terrorism Measures) Regulations 2002 (Singapore, S515/2002)

National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)

National Security Legislation Amendment Act 2010 (Cth)

Northern Ireland (Temporary Provisions) Act 1972

Penal Code (Amendment) (Amendment) Act 2007 (Malaysia)

Penal Code (Malaysia, Act 574, 2006 rev ed)

Penal Code Amendment Act 2003 (Malaysia, Act A1210)

Preservation of Public Security Ordinance 1955 (Singapore, Ordinance 25)

Prevention of Terrorism Act (Temporary Provision) Act 1974 (UK)

Protection of Constitutional Democracy Against Terrorist and Related Activities Bill 2003 (South Africa)

Republic of Singapore Independence Act 1965 (Singapore, Act 9, 1985 rev ed)

Standard Minimum Rules and the Body of Principles

Standard Minimum Rules for the Treatment of Prisoners

Strategic Goods (Control) Act (Singapore, cap 300, 2003 rev ed)

Terrorism (Community Protection) Act 2003 (Vic)

Terrorism (Emergency Powers) Act (NT)

Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)

Terrorism (Police Powers) Act 2002 (NSW)

Terrorism (Police Powers) Amended (Preventative Detention) Act 2005 (NSW)

Terrorism (Preventative Detention) Act 2005 (Qld)

Terrorism (Preventative Detention) Act 2005 (SA)

Terrorism (Preventative Detention) Act 2006 (WA)

Terrorism (Preventative Detention) Bill 2005 (Tas)

Terrorism (Suppression of Financing) Act 2002 (Singapore, cap 325, 2003 rev ed)

Terrorism Act 2000 UK (UK, c.11)

Terrorism Act 2006 (UK)

Terrorism Suppression Act 2002 (New Zealand)

The Constitution of India (India)

United Nations (Anti-Terrorism Measures) Regulations 2001 (Singapore, Act 44)

United Nations (Anti-Terrorism Measures) Regulations 2001 (Singapore, Act 44)

United Nations Act (Singapore, cap 339, 2002 rev ed)

Universal Declaration of Human Rights

USA Patriot Act (H. R. 3162)

D. International Instruments(Other than Treaties)

Annual Report of the Inter-American Court of Human Rights 1990-91

Counter-Terrorism Committee, *Reports Submitted by Member States pursuant to Security Council Resolution 1373 (2001) and Resolution 1624 (2005) – Singapore*, UN Doc S/2001/1234

Counter-Terrorism Committee, *Reports Submitted by Member States pursuant to Security Council Resolution 1373 (2001) and Resolution 1624 (2005) – Malaysia*, UN Doc S/2002/35

Counter-Terrorism Committee, *Reports Submitted by Member States pursuant to Security Council Resolution 1373 and Resolution 1566 (2005) – Malaysia*, UN Doc S/2005/846

Counter-Terrorism Committee, *Reports Submitted by Member States pursuant to Security Council Resolution 1373 and Resolution 1566 (2006) – Singapore*, UN Doc S/2006/120

Counter-Terrorism Committee, *Reports Submitted by Member States pursuant to Security Council Resolution 1373 (2001) and resolution 1624 (2005) – Malaysia*, UN Doc S/2004/778 (2004)

Counter-Terrorism Committee, *Reports Submitted by Member States pursuant to Security Council Resolution 1373 (2001) and Resolution 1624 (2002) – Singapore*, UN Doc S/2002/690 (20 June 2002) 2(a)

Document A/2929 – Annotation on the Text of the Draft International Covenants on Human Rights, UN GAOR, 10th sess, Agenda Item 28 (Part II) Annexes, UN Doc A/2929 (1 July 1955)

Document: A/CN.4/SR.96 Summary Record of the 96th Meeting [1951] I International Yearbook of the International Law Commission 116

Human Rights Committee, *Concluding Observations: Cameroon*, 1807th and 1808th mtgs, U.N.Doc. CCPR/C/79/Add.116 (3 November 1999)

Human Rights Committee, *Concluding Observations: Egypt*, 76th sess, UN Doc CCPR/CO/76/EGY (28 November 2002)

Human Rights Committee, *Concluding observations: Estonia*, 77th sess, UN Doc CCPR/CO/77/EST (15 April 2003)

Human Rights Committee, *Concluding Observations: Israel*, UN Doc CCPR/CO/78/ISR (21 August 2003)

Human Rights Committee, *Concluding Observations: Japan*, 64th sess, 1726th and 1727th mtgs, UN Doc CCPR/C/79/Add.102 (19 November 1998)

Human Rights Committee, *Concluding Observations: New Zealand*, 75th sess, UN Doc CCPR/CO/75/NZL (7 August 2002)

Human Rights Committee, *Concluding Observations: Peru*, 44th sess, UN Doc CCPR/C/79/Add.67 (25 September 1996)

Human Rights Committee, *Concluding Observations: Republic of Moldova*, 75th sess, UN Doc CCPR/CO/75/MDA (26 July 2002)

Human Rights Committee, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 73rd sess, UN Doc CCPR/CO/73/UK (6 December 2001)

Human Rights Committee, *Concluding Observations: Yemen*, 75th sess, UN Doc CCPR/CO/75/YEM (26 July 2002)

Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observation United States of America*, 87th sess, UN Doc CCPR/C/USA/CO/3 (15 September 2006)

Human Rights Committee, *General Comment 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17)*, 23rd sess (4 August 1988), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 at 142 (2003)

Human Rights Committee, *General Comment 21： The Right to Humane Treatment in Detention (*Article 10), 44th sess (23 March 1992), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 at 153 (2003)

Human Rights Committee, *General Comment 8: The Right to Liberty and Security of Persons (Article 9)*, 16th sess (30 June 1982), reprinted in Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 at 130 (29 July 1994)

Human Rights Committee, *Reservations, Declarations, Notifications and Objections Relating to the International Covenant on Civil and Political Rights and the Optional Protocols*, UN Doc CCPR/C/2/Rev.4 (24 August 1994)

Human Rights Committee, *Second Periodic Report Addendum: Israel*, 30th sess, UN Doc CCPR/C/ISR/2001/2 (4 December 2001)

Human Rights Committee, *Third Periodic Reports of States Parties Due in 1992: India*, 36th sess, UN Doc CCPR/C/76/Add.6 (17 June 2006)

Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Israel*, 63rd sess, UN Doc CCPR/C/79/Add.93 (18 August 1998)

Human Rights Committee, *Views: Communication No. 1014/2001*, 78th sess, UN Doc CCPR/C/78/D/1014/2001 (18 September 2003) (‘*Baban v Australia*’)

Human Rights Committee, *Views: Communication No. 1324/2004*, 88th sess, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006) (‘*Shafiq v Australia’*)

Human Rights Committee, *Views: Communication No. 195/1985*, 74th sess, UN Doc CCPR/C/39/D/195/1985 (12 July 1990) (‘*Delgado Paez v Colombia*’)

Human Rights Committee, *Views: Communication No. 265/1987*, 35th sess, UN Doc CCPR/C/35/D/265/1987 (7 April 1989) (‘*Vuolanne v Finland*’)

Human Rights Committee, *Views: Communication No. 305/1988*, 39th sess, UN Doc CCPR/C/39/D/305/1988 (15 August 1990) (‘*Van Alphen v The Netherlands*’)

Human Rights Committee, *Views: Communication No. 43/1979*, 19th sess, UN Doc CCPR/C/19/D/43/1979 (21 July 1983) (‘*Drescher Caldas v Uruguay’*)

Human Rights Committee, *Views: Communication No. 458/1991*, 51st sess, UN Doc CCPR/C/51/458/1991 (26 February 1991) (‘*Mukong v Cameroon*’)

Human Rights Committee, *Views: Communication No. 521/1992*, 56th sess, UN Doc CCPR/C/50/D/521/1992 (22 March 1996) (‘*Kulomin v Hungary*’)

Human Rights Committee, *Views: Communication No. 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) (‘*A v Australia’*)

Human Rights Committee, *Views: Communication No. 66/1980*, 17th sess, UN Doc CCPR/C/OP/2 at 90 (12 October 1982) (‘*Schweizer v Uruguay*’)

Human Rights Committee, *Views: Communication No. 779/1997*, 73th sess, UN Doc CCPR/C/73/D/779/1997 (4 November 1997) (‘*Äärelä v Finland’*)

Human Rights Committee, *Views: Communication No. 859/1999*, 74th sess, UN Doc CCPR/C/74/D/859/1999 (15 April 2002) (‘*Luis Asdrúbal Jiménez Vaca v Colombia*’)

Human Rights Committee, *Views: Communication No. R.11/45*, 24th sess, UN Doc Supp.No.40, A/37/40 (31 March 1982) (*Suarez de Guerrero v Colombia*)

Human Rights Committee, *Views: Communication No.1044/2002*, 86th sess, UN Doc CCPR/C/86/D/1044/2002 (26 December 2002) (‘*Davlatbibi Shukurova v Tajikistan*’)

Human Rights Committee, *Views: Communication No.1051/2002*, 18th sess, UN Doc CCPR/C/80/D/1051/2002 (10 January 2002) (‘*Ahani v Canada’*)

Human Rights Committee, *Views: Communication No.1297/2004*, 87th sess, UN Doc CCPR/C/87/D/1297/2004 (9 August 2006) (‘*Medjnoune v Algeria’*)

Human Rights Committee, *Views: Communication No.147/1983*, 26th sess, U.N.CCPR/C/OP/2 at 176 (1 November 1985) ('*Lucia Arzuaga Gilboa v Uruguay*')

Human Rights Committee, *Views: Communication No.155/1983*, 29th sess, UN Doc CCPR/C/OP/2 at 179 (3 April 1987) ('*Hammel v Madagascar*')

Human Rights Committee, *Views: Communication No.188/1984*, 31st sess, UN Doc CCPR/C/31/D/188/1984 (5 November 1987) ('*Portorreal v Dominican Republic*')

Human Rights Committee, *Views: Communication No.253/1987*, 41st sess, UN Doc CCPR/C/41/D/253/1987 (8 April 1991) ('*Kelly v Jamaica*')

Human Rights Committee, *Views: Communication No.66/1980*, 17th sess, UN Doc CCPR/C/17/D/66/1980 (12 October 1982) ('*Schweizer v Uruguay*')

Human Rights Council, *Report of the Working Group on Arbitrary Detention: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 10th sess, UN Doc A/HRC/10/21 (16 February 2009)

Human Rights Council, *Report of the Working Group on Arbitrary Detention: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 7th sess, UN Doc A/HRC/7/4 (10 January 2008)

International Commission of Jurists, *ICJ Memorandum on International Legal Framework on Administrative Detention and Counter-Terrorism* (December 2005)

Policy Working Group on the United Nations and Terrorism, *2002 Report of the Policy Working Group on the United Nations and Terrorism*, UN Doc A/57/273 (2002)

Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, 14th sess (12 - 16 April 2010), UN GAOR, 65th, sess, Supplement No. 37, UN Doc A/65/37 [11];

Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, 13th sess (29 June - 2 July 2009), UN GAOR, 64th sess, Supplement No.37, UN Doc A/64/37 [6].

Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, 12th sess (25 and 26 February and 6 March 2008), UN GAOR, 63rd sess, Supplement No.37, UN DOC A/63/37 [5]

UN Commission on Human Rights, 13th sess (1958) UN Doc A/C.3/SR.863

UN Commission on Human Rights, 13th sess (1958) UN Doc A/C.3/SR.866

UN Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report on the Practice of Administrative Detention (prepared by Louis Joinet)*, UN Doc E/CN.4/Sub/2/1990/29 (24 July 1990)

UN Security Council, *Security Council Resolution 1373*, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001)

United Nations Centre for Human Rights and Crime Prevention and Criminal Justice Branch, *Human Rights and Pre-Trial Detention: A Handbook of International Standards Relating to Pre-Trial Detention, Professional Training Series No.3* (1996) UN Doc HR/P/PT/3, UN Sales No. E94.XIV.6

United Nations Commission on Human Rights, *Addendum to the Report of the Working Group on Arbitrary Detention: Visit to Canada (1-15 June 2005)*, UN Doc E/CN.4/2006/7/Add.2) (5 December 2005)

United Nations Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report on the Practice of Administrative Detention*, UN Doc E/CN.4/Sub.2/1989/27 (6 July 1989)

United Nations Treaty Collection, *Declarations and Reservations (International Covenant on Civil and Political Rights)* <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec>

Working Group on Arbitrary Detention of the Human Rights Council, *Report of the Working Group on Arbitrary Detention*, UN Doc E/CN.4/2004/3 (15 December 2003)

E. Others

Ahmad, Reme, 'Threat of Attack to Remain for Many Years', *The Straits Times*, 29 July 2004

Aliran, 'ISA is Not Exercised Arbitrarily, Right of Reply by Malaysia Before the 69th Session of the U.N. Commission on Human Rights' (4 April 2003) 23(4) *Aliran Monthly* (2003) <http://www.aliran.com/oldsite/monthly/2003/4b.html />

Aliran, ‘ISA Watch - List of known detainees as at 13 October 2010’ <http://aliran.com/isa-watch>.

Amnesty Internal, Singapore – Amnesty Internal Report, 2007, 2008 2009 and 2010 < http://www.amnesty.org/en/region/singapore>

Amnesty International Malaysia, ‘Nasharuddin Nasir: Detained without Trial in the “War on Terror”’, *AI Index: ASA 28/010/2004*, August 2004 <http://www.amnesty.org/en/library/info/ASA28/010/2004/en>

Annan, Kofi, Secretary-General of the United Nations, ‘Remarks at a special meeting of the Security Council’s Counter-Terrorism Committee with International, Regional, and sub-Regional Organizations’ (6 March 2003)

Asian Human Rights Commission, ‘Malaysia: End ‘Charade of Justice’ at Anwar Trial’, 25 March 2010 < http://www.humanrights.asia/news/forwarded-news/AHRC-FST-024-2010>

Australian Council for Civil Liberties, ‘Submission to the Security Legislation Review Committee - the Senate Inquiry into the provisions of the *Anti-Terrorism Bill (No.2) 2005*', Submission 17

Brennan, Gerard, ‘Liberty’s Threat from Executive Power’, *Sydney Morning Herald*, 6 July 2007.

Bronitt, Simon, Miriam Gani, Mark Nolan and John Williams, ‘Submission to the Security Legislation Review Committee - the Senate Inquiry into the provisions of the *Anti-Terrorism Bill (No.2) 2005*’, Submission 210

Charlesworth, Hilary, Andrew Byrnes and Gabrielle McKinnon, ‘Human Rights Implications of the Anti-Terrorism Bill 2005: Letter to the ACT Chief Minister’ (18 October 2005)

Chiam, See Tong, ‘Parliamentary Speech on JI White Paper’, 15 August 2005

Committee Hansard, ‘Inquiry into the Provisions of the *Anti-Terrorism Bill (No 2) 2005*’ (17 November 2005)

Emmanuel, Tony, ‘Mass Violence Planned’, *New Straits Times* (Malaysia), 12 April 2001, A1

Explanatory Memorandum to the Anti-Terrorism Bill (No 2) 2005 (Cth)

Four Detained for Race-Rumours, *The Straits Times*, 4 June 1987

Goh, Chok Tong, 'Keynote Address at the Third International Institute of Strategic Studies Asia Security Conference', 4 June 2004

Harris-Rimmer, Susan and Nigel Brew, 'Proposals to Further Strengthen Australia's Counter-Terrorism Laws', quoting the Hon John Howard MP's statement <http://www.aph.gov.au/library/intguide/law/terrorismlaws.htm >

Head, Mike, 'Australia: Rudd Government Toughens Anti-terror Laws', World Socialist Web Site, 19 August 2009

Hillyard, Paddy, 'The War on Terror: Lessons from Ireland' (2005) *European Civil Liberties Network*, 4 < http://www.ecln.org/essays/essay-1.pdf>

Hocking, Jenny, 'The *Anti-Terrorism Bill (No 2) 2005*: When Scrutiny, Secrecy and Security Collide, Democratic Audit of Australia' (November 2005) <http://democratic.audit.anu.edu.au >

Hudson, Phillip, 'Hilton Bombing Sets off Battle of Tactics', *Sydney Morning Herald*, 1 January 2009 <http://www.smh.com.au/news/national/hilton-bombing-sets-off-battle-of-tactics/2008/12/31/1230681578363.html>

Human Rights and Equal Opportunity Commission, 'Submission to the Security Legislation Review Committee - the Senate Inquiry into the provisions of the *Anti-Terrorism Bill (No.2) 2005*', Submission 158

Human Rights Office, 'Submission to the Senate Legal and Constitutional Committee - the Senate Inquiry into the provisions of the *Anti-Terrorism Bill (No.2) 2005*', Submission 145

Human Rights Watch, 'Malaysia: Drop Political Charges Agasint Opposition Leader' (7 August 2008) <http://www.hrw.org/en/news/2008/08/06/malaysia-drop-political-charges-against-opposition-leader>

Human Rights Watch, 'Malaysia's Internal Security Act and Suppression of Political Dissent: A Human Rights Watch Backgrounder', *Human Rights Watch News (online)*, 2006 < http://www.hrw.org/en/reports/2002/05/13/malaysias-internal-security-act-and-suppression-political-dissent >

Human Rights Watch, 'Interview with S. Arutchelvan, Suaram, Kuala Lumpur (4 July 2005)

Internal Security Department (Singapore), 'White Paper - The Jemaah Islamiyah Arrests and the Threat of Terrorism', Cmd. 2 of 2003 (7 January 2003)

International Commission of the Red Cross, 'U.S. Detention Related to the Events of 11 September 2001 and Its aftermath – the Role of the ICRC' (5 September 2006) <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/usa-detention-update-121205?opendocument>

Internet Resource Guide: Australian Terrorism Law, *Australia Parliamentary Library* <http://www.aph.gov.au/library/intguide/law/terrorism.htm#terrchron >

Interview with Tan Sri Dato'Harun Mahum Hashim, Deputy Chairman of the SUHAKAM, *Aliran Press Statement*, 21 December 2002

ISA Amendments Expected to be Tabled Next Month, *The Star (online)*, 29 June 2010 <http://thestar.com.my/news/story.asp?file=/2010/6/8/nation/20100608154112&sec=nation>.

ISA Amendments to be Tabled at Next Sitting, *Malaysiakini*, 24 December 2009 <http://www.malaysiakini.com/news/120554>

ISD's Role Not Over with End of Cold War, *The Straits Times*, 27 June 2000

Latif, Asad, 'Terror Targe Singapore', *The Straits Times*, 15 December 2002

Law Council, 'Submission to the Security Legislation Review Committee - the Senate Inquiry into the provisions of the *Anti-Terrorism Bill (No.2) 2005*', Submission 140

Lee, Tee Jong, 'Singapore to Spend More on Defence to Fight Terrorism', *The Straits Times*, 15 June 2004

Lynch, Andrew, 'The Devil in the Detail', *Politics and Policy*, 19 August 2009

Marxist Plot Uncovered, *The Straits Times*, 27 May 1987

McClelland, Robert, 'Reintroduction of National Security Legislation', Media Release (30 September 2010) <http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_ThirdQuarter_30September2010-Reintroductionofnationalsecuritylegislation>

McGarrity, Nicola, 'Freedoms are Losing out to Fear', *The Age (Sydney)*, 14 August 2009

Michaelson, Christopher, 'Democracy Wilts Easily when Conducted Behind Closed Doors', *Canberra Times*, 18 October 2005

Ministry of Home Affairs (Singapore), 'White Paper: The Jemaah Islamiyah Arrests and the Threat of Terrorism', cmd. No.2 of 2003 (7 January 2003)

Mitton, Roger, 'The Long Story: Keeping the Streets Safe', *Asiaweek*, 28 July 1993, 46

National Human Rights Commission of Malaysia (SUHAKAM), Press Statement (31 July 2000) <http://www.hrsolidarity.net/mainfile.php/2000vol10no10/717/>

Ng, Eileen, 'Alleged Terror Network in Southeast Asia Widens', *Agence France Press*, 24 January 2002

Nirmala, M., 'Restrictions on 12 with Terror Links', *The Straits Times*, 15 January 2004

NNN-Bernama, 'Malaysia: Amendments to ISA will be Tabled at Coming Dewan Rakyat Sitting', *Brunei FM (Komuniti Online)*, 9 February 2010 <http://news.brunei.fm/2010/02/09/malaysiaamendments-to-isa-will-be-tabled-at-coming-dewan-rakyat-sitting/>

Office of the Coordinator for Counter-terrorism, 'Patterns of Global Terrorism – 2003' (29 April 2004) < http://www.state.gov/s/ct/rls/crt/2003/ >

Office of the United Nations High Commissioner for Human Rights, 'Human Rights, Terrorism and Counter-terrorism - Fact Sheet No. 32' (accessed 12 February 2008) <http://www.ohchr.org/EN/PUBLICATIONSRESOURCES/Pages/FactSheets.aspx>

Parliament at the Last Renewal: Parliamentary Debates (Singapore, 15 April 1999) vol 70

Parliamentary Debates: Dewan Rakyat (House of Representatives, 21 June 1960)

Pearlman, Jonathan, 'Terrorism Law Revamp Dumps Haneef Charge', *Daily Australian*, 14 August 2009

Pereira, Brendan, 'Pulling the Reins on ISA', *The Straits Times*, 22 July 2001, 34

Public Interest Advocacy Centre, 'Submission to the Security Legislation Review Committee - he Senate Inquiry into the provisions of the *Anti-Terrorism Bill (No.2) 2005'*, Submission 142

Ruddock, Philip, Attorney General of Australia, 'Legal Framework and Assistance to Regions, presentation before the Regional Ministerial Counter-Terrorism Conference in Bali'

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=;db=;group=;holdingType=;id=;orderBy=;page=0;query=REGIONAL%20MINISTERIAL%20COUNTER-TERRORISM%20CONFERENCE%20BALI;querytype=;rec=0;resCount=Default>

Security Legislation Review Committee (Sheller Committee), 'Report of the Security Legislation Review Committee' (15 June 2006)

Senate Legal and Constitutional Legislation Committee, 'Consideration of Legislation Referred to the Committee*: Security Legislation Amendment (Terrorism) Bill 2002 [No 2]*' (2002) <http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/report/report.pdf >

Shinsho, Karuna, 'Malaysia's Human Rights Commission will Investigate Government's Detention of Seven People without Trial', *CNN International, Asia Tonight*, Transcript No. 072605cb.k16 (26 July 2001)

Singapore's Parliamentary Debates, vol. 52, col. 463, 463 (25 January 1989)

Speech by Prime Minister Lee Hsien Loong at the Internal Security Department 60th Anniversary Dinner (30 August 2008, 8.15PM at the ISTANA)

Stewart, Cameron, 'Hilton Bomb Induced Anti-Terror Squad', *The Australian*, 1 January 2010 <http://www.theaustralian.com.au/hilton-bomb-induced-anti-terror-squad/story-fn4p96e3-1225815100331>

The National Human Rights Commission of Malaysia (SUHAKAM), Press Statement, 26 July 2010 <http://suaram-blog.blogspot.com/2010/07/gerakan-mansuhkan-isa-press-statement.html>

The National Human Rights Commission of Malaysia (SUHAKAM): Gerakan Mansuhkan ISA, Press Statement, 26 July 2010 <http://suaram-blog.blogspot.com/2010/07/gerakan-mansuhkan-isa-press-statement.html>

US Department of Defence, 'Detainee Convicted of Terrorism Charge at Guantanamo Trial', Media Release, 30 March 2007 <http://www.defense.gov/releases/release.aspx?releaseid=10678>

Victorian Council for Civil Liberties, 'Submission to the Security Legislation Review Committee - the Senate Inquiry into the provisions of the *Anti-Terrorism Bill (No.2) 2005*', Submission 221

Williams, George, ‘Challenging Ideas: Inspiring Action, Amnesty International Australia Public Forum’ (2008) <http://www.amnesty.org.au/about/comments/22339 >

Williams, George, ‘Jumping the Gun on Terror’, *The Age (Sydney)*, 27 October 2005

Women Lawyers Association of New South Wales, Submission to the Security Legislation Review Committee - *the Senate Inquiries of the Anti-Terrorism Bill (No.2)* 2005, Submission 137

Wong, Kan Seng, ‘Speech by Minister for Home Affairs at the ISD Intelligence Service Promotion Ceremony’, 3 April 2003, < http://www.mha.gov.sg/news_details.aspx?nid=OTA5-AJbbOx6zQXU%3D>

Zagor, Matthew, ‘Submission to the Senate Legal and Constitutional Committee - the Senate Inquiry into the provisions of the *Anti-Terrorism Bill (No.2) 2005*’, Submission 260

ANNEX

	Australia	Malaysia	Singapore
Legal Basis for Preventative Detention	*Criminal Code Act 1995* (Cth); *Anti-Terrorism Act (No 2) 2005* (Cth)	*Federal Constitution of Malaysia*; *Emergency Regulations Ordinance* 1948; *Internal Security Act 1960*	*Constitution of the Republic of Singapore*; *Internal Security Act*; PPSO; CL(TP)O
Grounds of Detention	reasonable grounds to suspect the person will engage in a terrorist act, or possesses a thing connected with the preparation of a terrorist act, or has done an act in preparation for or planning a terrorist act; making the order would substantially assist in preventing a terrorist act occurring; detention is reasonably necessary to prevent a terrorist act occurring	the Minister satisfied that the detention is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or to the maintenance of essential services or the economic life	iff the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore or any part thereof or to the maintenance of public order or essential services therein, it is necessary to do so, the Minister shall make an order
Issuing Process and Authorisation Authority	any AFP member may apply for an initial PDO and a continued one; Senior AFP members may issue an initial PDO; Federal Judge or Magistrate or retired judge of a superior court, in his or her *persona designata* may issue a continued PDO	Minister may issue a detention order under section 8 of the MISA, any police officer may detain pending inquiries without warrant under section 73	Minister (acting on the personal discretion of the President) may issue a detention order under section 8 of the SISA, any police officer may detain pending inquiries without warrant under section 74
Maximum Period of Detention	48 hours (Criminal Code); 14 days (Federal Criminal Code + State or Territory laws)	2 years; may be extended to an indefinite period of time	2 years; may be extended to an indefinite period of time

	Australia	Malaysia	Singapore
Other Restrictions	the whole issuing, revocation and extension process of the federal PDO is *ex parte;* not entitled to the grounds of detention if disclosure of the grounds would prejudice national security; no limits set upon the admissible evidence; children between 16 and 18 years of age can be the subject of a PDO	the Minister may impose a Restriction Order to prevent a person from acting in any manner prejudicial to national security in respect of his activities, freedom of movement, or places of residence or employment; special powers provisions in the *Constitution* provides the constitutional legality for the indefinite detention measures	the same as its Malaysian counterpart
Administrative Review	Administrative Appeals Tribunal do have jurisdiction to undertake a merits review pursuant to a PDO, a review application cannot be made to the AAT while a federal PDO is in force	the Advisory Board conducts a review of the detention at least once every 6 months; but can only make recommendations to the King who will act on the advice of the Minister	the Advisory Board conducts a review of the detention at least once every 12 months; but can only make recommendations to the President, who may act on advice or has a personal discretion to veto or uphold a detention
Judicial Review	the grounds for judicial review are severely restricted, only a technical process of checking for procedural errors during the making process of the federal PDO; the Supreme Court of State or Territory may have jurisdiction over a state or territory PDO	completely eliminate judicial review on all substantive matters	completely exclude judicial review in any court challenging the detention orders, with the only exception being review of procedural matters

	Australia	Malaysia	Singapore
Procedural Safeguards	detainees be provided with a "summary" of the grounds of detention with no specific requirements on the actual content; detainee has no right of contact with the outside world except where permitted; detainee's contact with the outside world is further restricted by the Prohibited Contact Order; monitored communications with lawyers	detainees have the right to be informed of the reasons of detention; but have very limited access to the outside world	detainees have the right to be informed of the reasons of detention; not much information about how the detainees' procedural rights have been protected in practice